GENERAL STATUTES OF MINNESOTA

SUPPLEMENT 1917

CONTAINING THE AMENDMENTS TO THE GENERAL STATUTES AND OTHER LAWS OF A GENERAL AND PERMANENT NATURE, ENACTED BY THE LEGISLATURE IN 1915, 1916, AND 1917

WITH NOTES OF ALL APPLICABLE DECISIONS

COMPILED BY

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CHAPTER 77

CIVIL ACTIONS

7673. One form of action—Parties how styled—

Contract or tort (121–296, 141+181, 45 L. R. A. [N. S.] 205, Ann. Cas. 1914C, 720). Action, ⚖27(1).

Actions for damages, whether based upon our own statutes or upon those of other states, are governed by our own Code (124–195, 144+942). Action, ⚖17.

As to effect of demurrer in legal and equitable actions, in view of the abolition of the distinction between the two kinds of actions, stated (see 129–342, 152+734).

A complaint against a physician, alleging that defendant undertook to set plaintiff's dislocated hip joint, and so negligently and unskillfully conducted the operation as to injure plaintiff, etc., states a cause of action, and is on contract, and not in tort (122–152, 142+143). Action, ⚖27(1); Physicians and Surgeons, ⚖18(4).

PARTIES

7674. Real party in interest to sue—When one may sue or defend for all—

Interest in general—An abutting owner, whose access to an alley is obstructed, has a special interest different from that of the public at large, and he may sue to protect his rights (127–440, 149+669). Municipal Corporations, ⚖671(5).

Where a husband and wife executed a second mortgage without consideration, and after death of the husband the second mortgagee wrongfully refused to execute a release, and the first mortgage was foreclosed at the request of the widow, the widow and the purchaser at the foreclosure sale were entitled to maintain an action to restrain the second mortgagee from redeeming from the foreclosure sale (124–176, 144+761). Mortgages, ⚖594(4, 6).

To restrain trespass on Indian lands, the title to which is in the United States, an action will not lie at the suit of the Indians alone, but the United States must be made a party plaintiff (130–510, 153+1088). Injunction, ⚖114(1).

The right to sue for breach of covenant which runs with the land rests exclusively in the last covenantee, and an intermediate covenantor has no right of action thereon when he has indemnified such subsequent covenantee (126–14, 147+670). Covenants, ⚖80.

A creamery company held not to have sufficient interest to maintain action to restrain enforcement of a police regulation, on the ground that it was unconstitutional, and compliance with it would interfere with plaintiff's business (124–239, 144+764, 49 L. R. A. [N. S.] 951). Injunction, ⚖105(2).

Assignments—An agreement to repurchase stock held assignable (128–341, 150+1084). Assignments, ⚖18.

An assignee of an agreement by defendant to repurchase stock held entitled to maintain an action to enforce the agreement, though the debt due from the assignor to the assignee, to secure which the assignment was made, was paid after the commencement of the action (128–341, 150+1084). Corporations, ⚖121(1).

One to whom an order on a fund is given, for the purpose of paying out of the proceeds the claims of third persons, is the real party in interest, and may maintain an action on the order (127–340, 149+545). Bills and Notes, ⚖443(3).

One suing for many—For practical reasons courts ought not to entertain suits at the instance of individual consumers to enjoin a public service corporation from placing in effect a schedule of rates which does not exceed the maximum fixed by the proper legislative body (130–71, 153+262, Ann. Cas. 1916B, 286). Injunction, ⚖114(2).

7676. Executor, trustee, etc., may sue alone—

A party to a contract, by which defendant sold his transfer business and agreed not to engage in business in a certain city, may maintain injunction to restrain a violation of the covenant, though he made the purchase for an undisclosed principal and had no interest in the transaction, except under a contract with the principal to employ him if he made the purchase (124–49, 144+415). Principal and Agent, ⚖144.

7677. Married women may sue or be sued alone—

In forcible entry and detainer, brought by a married woman to recover possession of her own property, the husband is not a necessary party (123–270, 143+785). Husband and Wife, ⚖210(3).

7681. Parent or guardian may sue for injury to child or ward—Bond—Settlement—

Under this section, prior to its amendment in 1907, a father could settle for an injury to his child without suit brought (130–3, 153+250). Parent and Child, ⚖8.

7683. Joinder of parties to instrument—

This section does not apply to actions for tort (134–461, 159+1081). Action, ⚖45(3).

7685. Action not to abate by death, etc.—Torts—

Effect of death on jurisdiction—A judgment for or against a decedent is not void when jurisdiction was acquired prior to the death; but it is otherwise where the party was dead at the commencement of the action (132–409, 157+648). Judgment, ⊜12.

Motion for substitution—An order made under this section, on motion of plaintiff, substituting appellants as parties defendant in place of the original defendant, who had died, is appealable (131–365, 155+396). Appeal and Error, ⊜95, 128.

Where an ex parte order, made under § 7690, joining appellants as additional defendants, was vacated, the only question properly before the court was whether appellants were necessary parties to a full determination of the controversy between the original parties, and the order of vacation was not necessarily a bar to an application subsequently made under this section to substitute appellants for the original defendant, who had died (131–365, 155+396). Judgment, ⊜569.

Substitution granted—An action to restrain obstruction of a roadway, the issue being whether, by virtue of an agreement relative to the opening of the way and the acts done under such agreement, the roadway became a town road, affects interests in land, and does not abate upon the death of a party (133–128, 156+7). Abatement and Revival, ⊜58(2).

A suit to cancel a beneficiary certificate does not abate by the death of insured before judgment, or by the commencement of an action by the beneficiaries to recover on the certificate before they are made parties in the equity suit (132–422, 157+646). Abatement and Revival, ⊜63.

Under this section a suit in equity, brought during the lifetime of insured, to cancel a certificate of membership in respondent association, does not abate by the death of insured, and the beneficiaries in the certificate may be substituted as defendants, whether they be regarded as "representatives" or "successors in interest"; and the suit does not abate because plaintiff has, since the death, an adequate remedy at law. It is immaterial under this section that the complaint, as originally filed, and existing at the time of the motion for substitution, does not state a cause of action against the defendants sought to be brought in as parties (131–365, 155+396). Abatement and Revival, ⊜63.

Practice in supreme court—Practice in supreme court, on suggestion of death of party before commencement of action, stated (132–409, 157+648).

7690. Bringing in additional parties—

Where a special administrator was not entitled, under § 3514, to collect the proceeds of a beneficiary certificate, the beneficial association, in an action on the certificate, could not bring in such special administrator as a party defendant under this section (122–221, 142+316). Executors and Administrators, ⊜438(1).

Where an ex parte order, made under this section, joining appellants as additional defendants, was vacated, the only question properly before the court was whether appellants were necessary parties to a full determination of the controversy between the original parties, and the order of vacation was not necessarily a bar to an application subsequently made under § 7685 to substitute appellants for the original defendant, who had died (131–365, 155+396). Judgment, ⊜569.

LIMITATION OF ACTIONS

7694. General rule—Exceptions—

A statute of limitations operates prospectively, unless a legislative intent to give it a retrospective operation is clear. The postponement of the time when a limitation statute becomes effective evidences an intent to make it of retrospective operation (134–21, 158+715). Limitation of Actions, ⊜6(1).

Contract stipulations, limiting time within which action may be brought and not unreasonable, are valid (125–512, 147+651). Limitation of Actions, ⊜14.

In determining whether a cause of action is barred, the day upon which it accrued is excluded, and the statute ceases to run when the complaint is drawn and the summons served, though the complaint be demurrable, since it is amendable (134–78, 158+908). Limitation of Actions, ⊜123; Time, ⊜9(2).

Where an insurance contract suspends the right of action thereon until the doing of certain acts by the insurance company, the limitation period commences to run from the time such suspension has terminated (125–512, 147+651). Insurance, ⊜622(3).

Where a second mortgage was executed without consideration, a cause of action to restrain the mortgagee from redeeming from a foreclosure sale under the first mortgage did not accrue until the second mortgagee refused to release his mortgage or otherwise asserted its validity (124–176, 144+761). Limitation of Actions, ⊜60(1).

7695. Bar applies to state, etc.—Exception—

A strip of land held to have become a street by virtue of a plat, and of long-continued user by the public (123–344, 144+150). Dedication, ⊜44.

Title to a strip of land claimed by a city as a part of the street held acquired by the abutting owner by adverse possession, within the rule laid down in 101–378, 112+385 (129–59, 151+532). Adverse Possession, ⊜114(2).

A person may be in the adverse possession of land, though it is traversed by public streets, and, while he cannot acquire the public easement, he may acquire title to the portions not dedicated to the public use, and he may also acquire title to the fee of the streets (132–311, 156+350). Adverse Possession, ⊜8(2).

7696. Recovery of real estate, fifteen years—

126–488, 148+296.

In general—The optionee under a 50-year option for a 30-year mining lease is not barred by this section from asserting a right under the option because he has not been in possession within 15 years, where neither party has been in actual possession during that time (134–412, 159+966). Limitation of Actions, ⟸19(1).

Adverse possession for the statutory period held not necessary in order to take an executed parol gift of land out of the statute of frauds (126–389, 148+125). Frauds, Statute of, ⟸129(7).

A perfect legal title to land is never lost by abandonment (124–393, 145+30). Abandonment, ⟸7.

Boundary lines—Evidence on the issue of determination of a boundary line by adverse possession for 15 years held insufficient to support a verdict for plaintiff (124–233, 144+758). Adverse Possession, ⟸114(2); Boundaries, ⟸37(1).

One is not to be deprived of his land because, through mistake or ignorance, he placed a fence on what he thought was the division line, when it was not such in fact, unless the evidence of practical location is clear, positive, and unequivocal (124–233, 144–758). Boundaries, ⟸48(7).

Inclosure by fence constructed by adverse party. Sufficiency of adverse user to overcome true line (121–468, 141+788). Boundaries, ⟸37(1).

Color of title—Possession may be adverse and hostile without color or claim of title, and it may originate in trespass (134–430, 159+830). Adverse Possession, ⟸68.

The possession must be on an assertion of a claim of right, and must not possess the appearance of a mere trespass. The action of a city in taking possession of land donated to it for a site for a fire house held not a mere trespass, but an assertion of title supporting a claim of adverse possession (125–484, 147+655). Adverse Possession, ⟸24, 64.

Degree of proof required—The evidence must be clear and convincing to justify a finding of title acquired by adverse possession (134–430, 159+830). Adverse Possession, ⟸85(3).

Evidence held to sustain a finding against a claim of title by adverse possession (125–484, 147+655). Adverse Possession, ⟸24, 64.

Evidence held to establish title to real estate by adverse possession (127–397, 149+647). Adverse Possession, ⟸85(3).

Possession must be visible—Possession must be shown for the full period of fifteen years. The possessory acts must appear upon the land itself, and be such as to indicate an intention to appropriate it permanently. Giving permission to a third person to cut hoop poles and receiving pay for such poles is not sufficient (124–393, 145+30). Adverse Possession, ⟸16(1), 40.

Possession must be hostile and under claim of right—The possession must be maintained under a claim of ownership, and if the person in possession recognizes title in another his holding is not adverse (125–24, 145+404). Adverse Possession, ⟸60(3).

The terms "claim of title," "claim of right," and "claim of ownership" defined (see 132–311, 156+350). Adverse Possession, ⟸12.

"Hostile" possession defined (see 132–311, 156+350). Adverse Possession, ⟸58.

Continuous possession—There is no forfeiture to the state of land not redeemed within three years after a tax sale to the state, and hence failure to redeem does not interrupt the continuity of the possession of one holding adversely (132–311, 156+350). Adverse Possession, ⟸46.

Acquisition of a tax certificate by one in adverse possession held not to break the continuity of his possession, though he made an assignment of the certificate (132–311, 156+350). Adverse Possession, ⟸52.

Payment of taxes—Rule as to payment of taxes held to apply with less force in a case where the occupant is under a legal duty to pay the taxes as assessed (123–344, 144+150). Adverse Possession, ⟸95.

Payment of taxes, though evidence of a claim of title, is not evidence of adverse possession (124–393, 145+30). Adverse Possession, ⟸88.

Questions for jury—121–468, 141+788.

7701. Various cases, six years—

Subd. 1—An action for breach of contract to convey land, commenced in 1912, the breach occurring in 1901, is barred by the six-year statute (125–88, 145+799). Limitation of Actions, ⟸46(9).

Repairs made during three successive years on separate orders for each year's work, the price of each year's work becoming due at its completion, did not constitute a running account, and the statute began to run on the work of a year as soon as it was completed (161+593). Limitation of Actions, ⟸51(1).

This subdivision, and not § 7703 subd. 1, governs an action on the bond of a saloon keeper for acts constituting an assault (131–136, 154+795, L. R. A. 1916E, 269). Limitation of Actions, ⟸21.

Cause of action on an insurance policy to recover one-half the amount of the policy for permanent disability held not barred until the lapse of six years after the exercise of his option to take under the clause of the policy giving the right to recover one-half of the face amount of the policy; the statute of limitations not having been put in operation by the mere occurrence of the disability (133–409, 158+625). Limitation of Actions, ⟸66(6).

Subd. 2—Cause of action to enforce double liability of a stockholder accrues when insolvency of the corporation is declared and a receiver is appointed, and not at the time that an assessment is declared (161+498). Limitation of Actions, ⟸58(4).

Subd. 3—Continuing injury to land; plaintiff may recover for damage suffered during six years prior to commencement of suit, though the wrongs complained of began prior to that time (129–113, 151+968). Limitation of Actions, ⟸55(6, 7), 174(1).

Subd. 5—An action for malicious prosecution of a civil suit is governed by this section and subdivision, and not by § 7703 subd. 1 (123–17, 142+930, L. R. A. 1915B, 1179, 1195). Limitation of Actions, ⟸55(4).

Subd. 6—The provision as to discovery of fraud applies to copartnership settlements. The burden is upon a plaintiff seeking a recovery for fraud, when his cause of action is apparently barred, to allege and prove that he did not discover it until within six years. Evidence held to show that an action to set aside a partnership settlement was brought within six years after discovery of the fraud relied on to avoid the settlement (134–279, 158+426). Limitation of Actions, ⟸197(2).

A party in legal contemplation knows the facts constituting the fraud, when in the exercise of reasonable diligence he should have known them by proper inquiry (134–279, 158+426). Limitation of Actions, ⟸100(13).

7703. Various actions, two years—

An action for malicious prosecution of a civil suit is governed by § 7701 subd. 5, and not by this section (123–17, 142+930, L. R. A. 1915B, 1179, 1195). Limitation of Actions, ⟸55(4).

A complaint against a physician, alleging that defendant undertook to set plaintiff's dislocated hip joint, and so negligently and unskillfully performed the operation that plaintiff became a cripple for life, states a cause of action on contract, and hence not within this section (122–152. 142+143). Limitation of Actions, ⟸55(3); Physicians and Surgeons, ⟸18(4).

Action on saloon keeper's bond for acts constituting a tort ordinarily within this subdivision is not barred until six years after the cause of action accrues (131–136, 154+795, L. R. A. 1916E, 269). Limitation of Actions, ⟸21.

[7704—]1. Judgment note, etc., authorizing confession of judgment—One year—

No action shall be maintained upon any judgment note or other instrument, heretofore or hereafter executed, containing any provision authorizing a confession of judgment thereon, unless begun within one year after the cause of action shall have accrued. ('15 c. 222 § 1)

Section 3 repeals inconsistent acts, etc.

By § 4 the act takes effect November 1, 1915.

[7704—]2. Judgment or decree, etc., by confession, etc.—One year—

No action shall be maintained upon any judgment or decree of any court of the United States, or of any state or territory thereof, heretofore or hereafter entered upon a plea of confession under any warrant of attorney or other instrument signed by the debtor authorizing such confession, unless the action upon such judgment be begun within one year after the rendition or entry thereof. ('15 c. 222 § 2)

7707. When action deemed begun—Pendency—

As to when action is deemed commenced (see 124–195, 144+942). Action, ⟸64.

Evidence held to show that a proceeding to register a land title was pending, so as to abate an action to determine adverse claims subsequently brought (127–416, 149+735). Abatement and Revival, ⟸7.

7708. Effect of absence from state—

124–195, 144+942.

7710. Periods of disability not counted—

Possibility of exceptions operating in favor of plaintiff whose complaint shows on its face that the cause of action set up was barred by limitations as precluding demurrer (see 129–342, 152+734). Limitation of Actions, ⟸177.

Under the fifth subdivision of this section the period of limitation is not extended for more than five years by an injunction staying an action, nor in any case for more than one year after disability ceases; and a cause of action to recover payments for transportation of freight in excess of the rates fixed by §§ 4298–4304, accrued when payments were made, and not upon the dissolution of an injunction then in force restraining the putting into effect of the statutory rates (135–45, 159+1082). Limitation of Actions, ⟸111.

7712. New promise must be in writing—

Notwithstanding § 8449, post, where a note shows on its face that it is more than six years past due, if the holder relies on part payment to avoid the bar of the statute, the burden is upon him to prove it, and it is error to charge the jury that the burden is on defendant to prove that the payment was not made at the date of the indorsement (133–289, 158+391). Limitation of Actions, ⟸195(6), 200(2).

VENUE

7714. General rule—Exception—

That a proceeding for the collection of an assessment against stockholders of an insolvent corporation, under § 6646, was pending in one county, while the final hearing upon the petition for the assessment was had in an adjoining county was not error, where the adjournment to the latter county was by consent of both parties (132–9, 155+754). Corporations, ⟸263(1).

7715. Actions relating to land, situs to govern—

An action for damages for fraudulent representations as to certain land sold by defendants to plaintiff is transitory (134–332, 159+788). Courts, ⟸7.

St. Cloud City Charter § 275, as to venue of actions by or against city, *held* not applicable to actions for recovery of real estate, such actions being governed by this section (129–240, 152+408). Venue, ⟸5(3).

An action for either a decree ordering a cancellation of plaintiff's deed to Nebraska land, or a judgment for damages for the alleged fraud of defendants, is a transitory action, triable where defendants reside (162+351). Venue, ⟸5(4).

An action to recover damages for breach of a contract to establish a railway station upon plaintiff's land is not within this section, and the action need not be brought in the county in which the land is located (133–442, 158+719, L. R. A. 1916F, 687). Venue, ⟸5(5).

7718. Replevin—

Before it can be held that the action was brought in replevin solely to avoid a change of venue, it must appear conclusively that damages for conversion of the property is the only remedy available (130–103, 153+266). Venue, ⟸16.

On application to change the venue on the ground that the cause of action was in fact for conversion, and that plaintiff had put it in the form of one for replevin to avoid a change of venue, the clerk cannot look beyond the complaint and transfer the cause, but the court may do so (130–103, 153+266). Venue, ⟸72.

7721. Other cases—Residence of defendant—Residence of corporations—

Actions in municipal courts are within the provision of this section that the residence of railroad companies for the purpose of actions against them shall be any county into which their lines extend; and where the venue in such an action is properly laid, defendant has no right under § 272 to change the venue to another municipal court in the same county, though the latter is nearer its principal general office in the state, and its principal place of business in the county (128–225, 150+924). Courts, ⟸189(2, 3).

Personal service of summons on defendant at his residence in one county will not support a default judgment in the district court of another county (161+1054). Judgment, ⟸16.

CHANGE OF VENUE

7722. As of right—Demand—

Change of venue in election contest—Changes of venue in election contests are controlled by § 529 (126–404, 150+625). Elections, ⟸277.

As a matter of right—The clerk cannot look beyond the complaint to ascertain whether an action in replevin was brought in that form to avoid a change of venue; the court alone possessing that power (130–103, 153+266). Venue, ⟸72.

When demand must be made—Whether the demand provided for by this section was made seasonably must be determined from the whole record, and if defendant's affidavit shows his nonresidence, that fact must be contested in the court to which the change is made; but the court in which the action is brought is not bound to surrender jurisdiction unless the record shows a right to the change (127–324, 149+536). Venue, ⟸40, 70, 72.

Demand for change of venue, made after the 20 days, is too late, though the time for answering has been extended and has not yet expired; and a stipulation extending the time for answering does not extend the time for making application for change of venue (127–324, 149+536). Venue, ⟸61.

Several defendants—An individual defendant is not entitled to a change of venue to the county of his residence, where a municipal corporation is a codefendant, which does not join in the application for the change, such municipal corporation not having been made a defendant for the purpose of preventing a change of venue. Such change of venue could not be granted because the complaint was demurrable as to the municipal corporation for failure to allege the statutory notice before the commencement of the suit; the city not raising such defense (132–219, 156+284). Venue, ⟸41.

The words "if the numbers be equal, in that whose county seat is nearest," have no application where less than a majority demand a change of venue. Where two defendants are served in the county in which one of them resides, the nonresident defendant cannot, on his sole motion and affidavit, secure a change of venue to the county of his residence (122–377, 142+817). Venue, ⟸22(1).

7723. By order of court—Grounds—

Where there was nothing in the record to show that one defendant was not made a party to prevent a change of venue under this section, the supreme court could not disturb the judg-

ment for plaintiff because of the trial court's refusal to grant a change of venue (131–489, 154+789). Appeal and Error, ⊂965.

7727. Prejudice or bias of judge—Affidavit—

This section does not permit the defendant in a divorce suit to have the application of the plaintiff for temporary alimony and custody of the minor children pending suit transferred to another judge, by filing an affidavit of prejudice against the judge before whom the application is made (135–307, 160+778). Judges, ⊂49(1).

[7727—]1. **Expenses of trial when to be paid by county in which action was commenced**—Whenever the venue hereafter shall be changed in a civil action upon the consent of parties, with or without an order of court, to a county other than the one where the same is properly triable or by an order of court under either subdivision three (3) or four (4), of section 7723, General Statutes 1913, the expenses of the trial of such action, including officers and jurors fees, and all expenses caused by the trial of such action which would not otherwise have been incurred by the county where the same is tried shall be paid by the county in which such action was commenced. ('17 c. 421 § 1)

[7727—]2. **Same—To be first paid by county in which action is tried—Statement to county in which action originated**—Such expenses shall be paid in the first instance by the county in which the action is tried, and thereupon the clerk of court of said county shall prepare, under his hand and seal, an itemized statement of such expenses, and upon approval thereof by the judge of the court in which said trial was had, and the filing of such itemized statement and approval in the office of the county auditor in which such action was commenced, such auditor shall issue his warrant for the amount of such approved statement in favor of the county in which the trial was had. ('17 c. 421 § 2)

SUMMONS—APPEARANCE—NOTICES, ETC.

7728. Actions, how begun—

An action is deemed as commenced when the summons is delivered to the proper officer for service, if such service be completed within the prescribed time. There is no other way of commencing a civil action in this state than that prescribed by this section, and the form of the summons and the manner of its service is governed by this Code (124–195, 144+942). Action, ⊂64.

The Code provisions as to commencement of actions must be construed as a whole, so as to give effect to the intention to provide a single uniform course of procedure which shall apply alike to all civil actions (124–195, 144+942). Limitation of Actions, ⊂5(2), 118(1).

7729. Requisites of summons—Notice—

A summons is not a process, within §§ 7783, 7786, relating to amendments, but is a document in the action, which may be amended by leave of court (131–173, 154+952). Process, ⊂163.

A default judgment entered in the district court is not supported by service of a summons purporting to have been issued out of the municipal court (161+1054). Judgment, ⊂17(2).

7732. Service of summons—On natural persons—

Exemption of nonresident attorney in state for taking of depositions (see 135–317, 160+795, L. R. A. 1917C, 431).

7735. Same—On private corporations—

Cited (132–389, 157+642).

Subd. 3—130–35, 152+1102.

Section 3555, and not this section, has reference to foreign beneficiary associations transacting business in this state. (131–131, 154+748). Insurance, ⊂16, 814.

Under subd. 3 of this section the salesman of a foreign corporation soliciting orders for work to be done outside the state and fully authorized to act as to a contract for work made in the state, was an agent of the corporation on whom service might be made (162+1068). Corporations, ⊂668(10).

Under the provision of subd. 3 of this section, that service may be made on any agent for the solicitation of freight or passenger traffic, jurisdiction may be acquired over a foreign corporation doing business in the state by service on such an agent in a transitory action, though the cause of action did not arise in the state (134–261, 159+272, 134–479, 159+947). Railroads, ⊂33(2).

Summons in an action against a foreign corporation held properly served on its president, who resided in this state, and who occasionally performed corporate duties therein; the action having grown out of a sale of stock made by a traveling agent in this state (129–232, 152+410, L. R. A. 1916E, 241). Corporations, ⊂642(2).

An agent maintained by several foreign railroad companies operating connecting lines for the solicitation of business in this state is the agent of each of such companies and may be served with process. The designation of the agent to be served by the statute is valid, and, being assented to by the corporation by its act in sending the agent into this state, the service is binding on it. The designation of such an agent is due process of law, and will support the service of process in a suit growing out of the business so solicited and obtained (129–204, 151+917, L. R. A. 1916E, 232, Ann. Cas. 1916E, 335). Constitutional Law, ⟸309(3); Corporations, ⟸662, 665(2), 668(4).

Where a foreign corporation, engaged in manufacturing and selling shoes, makes contracts with local retailers by which the latter agree to adopt a particular name for their stores, to sell the corporation's shoes exclusively, and keep the stock insured for the benefit of the corporation, and by which the corporation agrees to extend credit for shoes furnished and to pay the expense of advertising for the first year, service of process on a state representative of the corporation, who has charge of its business in the state, establishes stores, and sells shoes to the stores personally and through salesmen, is good as against the corporation, since the activities of the corporation constitute the doing of business within the state (134–245, 158+975). Corporations, ⟸668(1).

A foreign corporation having an agent in this state, who appointed salesmen, to whom goods were furnished from a stock of goods kept at the office of such agent within the state, was doing business within this state, and summons served on such agent conferred jurisdiction (131–335, 155+103). Corporations, ⟸642(1).

A foreign corporation, on whose agent within the state summons was served, *held* to be doing business in the state of a character and extent necessary to warrant the inference that it had subjected itself to the jurisdiction and laws of this state. The president of a foreign corporation residing within the state is an agent "of sufficient rank and character as to make it reasonably certain that the corporation will be notified of the service," within the decisions (131–162, 154+950). Corporations, ⟸668(15).

7737. Service by publication—Personal service out of state—

This and the following section are applicable to proceedings under §§ 8717–8726 (126–95, 147+953).

Personal service on defendants outside the state has the same effect as service by publication (123–431, 144+138, 52 L. R. A. [N. S.] 1061). Judgment, ⟸17(3).

While ordinary service by publication in a divorce suit will not support a personal judgment for alimony, whether the defendant is a resident or nonresident of the state, such a judgment may be based on service by publication had on an affidavit that defendant is a resident of the state, is living therein, but cannot be found, because he secretes himself so that personal service cannot well be made on him (135–397, 161+148, L. R. A. 1917C, 1140). Divorce, ⟸202.

7738. Same—In what cases—

126–95, 147+953; note under § 7737.

Subd. 3—If the conveyance of real estate made by a nonresident debtor is fraudulent as to creditors, the land remains the property of the debtor as against such creditors, and may be seized by them on a writ of attachment as the basis of an action against such nonresident. The service of a summons upon a nonresident debtor in an action to recover the debt cannot be set aside, upon affidavits that he has no interest in the property upon which attachment has been levied as the basis of the action, since the validity of the conveyance cannot be determined upon affidavits, nor in an action to which the claimant thereunder is not a party (123–364, 143+915). Fraudulent Conveyances, ⟸228.

In an action against a nonresident to recover a debt, the jurisdiction of the court is limited to the property of the debtor seized under proper process. The court may make any form of decree known to the law, which can be enforced through its control of property within the state over which it has acquired jurisdiction by publication (123–431, 144+138, 52 L. R. A. [N. S.] 1061). Judgment, ⟸17(3), 807.

Where defendant in an action to determine adverse claims is a resident of the state, and has a record title in which his surname appears somewhat different from his true name, but such that from it he could be found and served within the state, jurisdiction cannot be acquired of him by publication (129–270, 152+640). Process, ⟸87.

Subd. 4—135–397, 161+148, L. R. A. 1917C, 1140; note under § 7737, ante.

7739. When defendant may defend—Restitution—

In general—In opening an interlocutory judgment in partition, and granting leave to answer, upon the application of a nonresident, under this section, the court may impose terms, though the applicant has not been guilty of laches. The terms, however, should not be such as to deprive the applicant of any substantial right as claimed in his proposed answer, or such as are burdensome; the applicant not being guilty of laches and making his application within the year. It was therefore improper to require the applicant to stipulate to accept and abide by the judgment already entered, in so far as it had been executed by a sale, to pay into court a sum of money sufficient to pay all expenses of the sale and the costs, and to disclaim the undivided one-half interest in the property decreed to plaintiff (123–471, 144+140). Judgment, ⟸167.

Upon the application it is not proper to try the merits of the proposed answer (123–471, 144+140). Judgment, ⟸163.

Diligence in making application—The defendant, to whom a copy of the summons is delivered in person without the state, is not personally served within this section; the service

being merely an equivalent of summons by publication. From the time defendant, served by publication, has knowledge of the commencement of the suit, he must proceed with diligence to make his defense. Defendant, to whom summons was delivered in person in New York, held not guilty of inexcusable neglect in failing to answer in time (122–396, 142+714, Ann. Cas. 1916B, 563). Judgment, ⊂=142.

7741. Jurisdiction, when acquired—Appearance—

Presence at a general term call of the calendar, when the case is set for trial, without participation or objection, is not a general appearance (122–352, 142+709). Appearance, ⊂=8(1).

An order, entered upon a special appearance, to show cause why the service should not be set aside, did not convert the special appearance into a general one, though it enlarged the time for answering in the event that the service should be upheld. A special appearance to contest the service is not made general by an adjournment, granted at defendant's request, of the hearing upon the order to show cause (122–245, 142+310). Appearance, ⊂=9(3).

As to time when action is deemed commenced (see 124–195, 144+942). Action, ⊂=64.

7742. Appearance and its effect—

Appearance by appellee in district court waives defects in proceedings for appeal from judgment of justice of the peace (122–352, 142+709). Justices of the Peace, ⊂=160(7).

An unverified answer in justice court, though a nullity, is an appearance (124–147, 144+449). Justices of the Peace, ⊂=84(1).

An attempt to demur in justice court is an appearance (124–147, 144+449). Justices of the Peace, ⊂=84(1).

7745. Same—By mail—When and how made—Effect—

This section deals exclusively with the service of pleadings, notices, and the like in legal actions or proceedings, and has no reference to notices under private contracts, as to which there is no statutory requirement (129–335, 152+723, L. R. A. 1916B, 1114). Notice, ⊂=10.

7746. Defects disregarded—Amendments, extensions, etc.—

This section does not confer on the court power to enlarge the time fixed by statute for making a demand for a review by a jury of the order of the court fixing the amount of benefits or damages in a judicial ditch proceeding (131–372, 155+626). Drains, ⊂=82(1).

That plaintiff and the court, in entering a judgment of dismissal on stipulation, overlooked the fact that a new action was barred by a contract provision, was an "omission" or "mischance" for which the court could grant relief against such judgment (131–246, 154+1099). Dismissal and Nonsuit, ⊂=43(4).

Refusal to require plaintiff to elect between several causes of action which in fact were tried as one, even if error, was without prejudice (127–490, 150+218). Appeal and Error, ⊂=1039(9).

Complaint in action for breach of contracts for sale of lumber held sufficient, as against an objection to the introduction of evidence thereunder (123–122, 143+253). Pleading, ⊂=428(2).

MOTIONS AND ORDERS

7749. Defined—Service of notice—

Under this section, an order to show cause, in proper form and properly served, is as effective as a statutory notice of motion to bring into court the party to whom it is directed and to give jurisdiction (162+523). Motions, ⊂=24.

The time of notice of an application for settling a case, as prescribed by § 7832, may be shortened by an order to show cause under § 7749 (125–475, 147+654). Appeal and Error, ⊂=568.

The granting of leave to renew a motion on the same facts is within the discretion of the court (122–154, 141+1134; 122–154, 142+134). Motions, ⊂=43.

Misnomer of corporate defendant by adding to its name the words "Relief Department," may be taken advantage of by motion to dismiss, instead of by plea in abatement (133–434, 158+711). Parties, ⊂=95(5).

7750. Motions, etc., where noticed and heard—

Findings are not proper on motion for judgment on the pleadings. On motion by relator in mandamus for judgment on the pleadings, the court looks to the allegations of the writ admitted by the return and the allegations of new matter in the return (129–181, 151+970). Pleading, ⊂=350(3).

Upon motion for judgment on the pleadings, every reasonable intendment will be given the pleading attacked (125–118, 145+812). Pleading, ⊂=350(3).

Where the supplemental answer in ejectment stated that plaintiff took possession after commencement of the action, but did not allege that such possession was acquired by force or wrongfully, and apparently it could not have been acquired otherwise than by defendant's voluntary act, plaintiff was entitled to judgment on the pleadings (124–538, 144+1090). Ejectment, ⊂=79.

Judgment on the pleadings for failure to reply may be opened on motion of plaintiff, and leave given to file reply (122–154, 141+1134; 122–154, 142+134). Judgment, ⊂=145(1).

7751. Same—Ex parte motions—

In replevin to recover a piano sold to defendant on a conditional contract, an answer setting up a warranty and a breach thereof presents a proper counterclaim (126–461, 148+307). Set-Off and Counterclaim, ⊂=29(1).

PLEADINGS

7753. Contents of complaint—

In general—A complaint should allege ultimate and issuable facts, and not conclusions of law or evidentiary facts (131–122, 154+945). Pleading, ⊂⊃8(1).

Pleading conclusions (129–240, 152+408). Pleading, ⊂⊃8(1).

The complaint must present some definite theory on which recovery is sought (122–59, 141+1105). Pleading, ⊂⊃18.

Facts going to prove estoppel in pais need not be pleaded (125–54, 145+622). Estoppel, ⊂⊃110.

A complaint which discloses delay in seeking equitable relief must contain allegations excusing the delay and negativing laches; and such allegations must set forth the facts from which the court can determine whether or not the delay is excused (131–109, 154+793). Pleading, ⊂⊃67.

A complaint by a taxpayer against the county auditor and county treasurer for failure to comply with the requirements of §§ 2059 and 2067 in the writing of the words "Sold for taxes" on the tax list and tax receipts held to state a cause of action, at least against the auditor (123–159, 143+257, 51 L. R. A. [N. S.] 137). Counties, ⊂⊃91.

A complaint held to state a cause of action to restrain breach of a restrictive building covenant (126–334, 148+286). Injunction, ⊂⊃62(3), 118(1).

A naked allegation that one of the signers of a petition to vacate a street signed the same conditionally, with nothing to indicate the nature of the condition, does not show that the signature was invalid (129–259, 152+412). Municipal Corporations, ⊂⊃657(1).

Vague allegations that an expenditure of money by a village for the purchase of land to open a street is an extravagant waste of funds of the village, without stating any facts on which the court can form any judgment, are not sufficient to warrant an injunction (129–259, 152+412). Municipal Corporations, ⊂⊃995(1).

Complaint seeking to restrain gas company from enforcing alleged discriminatory rates must allege facts showing the discrimination; mere general averments of discrimination being insufficient (130–71, 153+262, Ann. Cas. 1916B, 286). Injunction, ⊂⊃118(1).

Personal injuries—A complaint in an action against a city held to state a cause of action (130–410, 153+619). Municipal Corporations, ⊂⊃816(1).

Complaint, in action by employé for injuries due to failure of employer to guard dangerous machine, held to state a cause of action (123–76, 142+1045). Master and Servant, ⊂⊃258(12).

A complaint alleging that defendants, between whom the relation of master and servant existed, negligently drove against plaintiff, held to state a cause of action against the master (124–155, 144+462). Master and Servant, ⊂⊃329.

The pleadings in a negligence case must show a causal connection between the negligence charged and the injury (123–254, 143+783). Negligence, ⊂⊃111(3).

Complaint in a personal injury action held not to show that the negligence alleged was the proximate cause of plaintiff's injury (123–254, 143+783). Master and Servant, ⊂⊃258(1).

Complaint for personal injuries received at a baseball ground, owing to the absence of a screen for protection of patrons in the grand stand, held to state a cause of action (122–327, 142+706, 46 L. R. A. [N. S.] 606, Ann. Cas. 1914D, 922). Theaters and Shows, ⊂⊃6.

A complaint construed to allege negligence, not alone as to speed, but as to the management of an automobile (125–431, 147+434). Carriers, ⊂⊃314(2).

A general allegation of permanent injury resulting from an assault and battery held sufficient to admit evidence of the nature and character of the injury (124–260, 144+950). Damages, ⊂⊃158(1).

Complaint for injuries to railroad employés need not plead federal employers' liability act (121–269, 141+175). Master and Servant, ⊂⊃256(1).

Allegations in an action for wrongful death held not to justify an inference that decedent was guilty of contributory negligence (126–133, 147+964). Master and Servant, ⊂⊃256(1).

Complaint held sufficient to show negligence on the part of a railroad company in leaving a car standing without brakes, whereby it was propelled against an employé without notice or warning (126–133, 147+964). Master and Servant, ⊂⊃258(13).

Complaint held to sufficiently plead negligence of defendants in ordering plaintiff, a servant, into a dangerous place without warning (130–28, 153+134). Master and Servant, ⊂⊃258(19).

Plaintiff may allege all the facts which give rise to his cause of action, and may recover if he prove sufficient of such facts to entitle him to relief. Thus, in an action for damages resulting from negligence, he may allege all the grounds giving rise to his cause of action, and is not required to elect at the beginning of the trial whether he will establish by his proofs one or another of such grounds (131–317, 155+200). Pleading, ⊂⊃369(3), 389.

Statement of cause of action against interstate carrier failing to comply with federal safety appliance act (121–335, 141+297). Master and Servant, ⊂⊃256(1).

Other torts—Complaint against physician for malpractice held to state a cause of action (122–152, 142+143). Physicians and Surgeons, ⊂⊃18(4).

In action in ejectment and for damages for malicious trespass, the complaint should contain a description of the premises sufficiently definite so that the land may be located (162+1050). Ejectment, ⊂⊃64.

Under allegations that defendant negligently ran his automobile at high and dangerous speed, and ran over plaintiff's cow while it was being led back of plaintiff's wagon, evidence

that defendant passed the wagon at great speed in the traveled track in close proximity to the wagon and cow was admissible (162+71). Highways, ⚖184(1).

In an action for conversion, an allegation in the alternative that one or the other of two defendants converted the goods, but which one plaintiff is unable to determine, states no cause of action against either defendant (124–117, 144+450, 51 L. R. A. [N. S.] 640). Pleading, ⚖20.

Where a complaint in an action against an officer seizing intoxicating liquors under § 3172 does not allege that the property was wrongfully taken, the question of a wrongful taking is not in issue (123–333, 143+907). Sheriffs and Constables, ⚖168(6).

A complaint against an administrator for damages for loss of lands of the estate through failure of defendant to pay the taxes thereon held demurrable, where it failed to allege negligence, and where it showed a discharge of the administrator by the probate court (128–3, 150+171). Executors and Administrators, ⚖443(1).

Money had and received—Complaint in action for breach of contracts for sale of lumber held sufficient to warrant a recovery as for money had and received (123–122, 143+253). Sales, ⚖411, 417.

A complaint held to state a cause of action for money had and received (126–229, 148+67, L. R. A. 1915F, 962). Money Received, ⚖1.

Laws of other states—Complaint against Maine corporation need not allege that laws of Maine authorized defendant to make contract sued on (122–380, 142+871). Corporations, ⚖513(2).

Contracts—That a contract was not pleaded was immaterial, where the parties voluntarily litigated the question (126–115, 148+50). Pleading, ⚖404.

Where a complaint alleges the reasonable value of services rendered, and also that defendant agreed to pay a certain sum therefor, and there is no election, plaintiff may prove either the agreed or the reasonable value (124–416, 145+124). Pleading, ⚖369(1).

When one contract is an inducement or part consideration for another, it is not objectionable, in suing on the latter, to plead the pertinent matters of the former (128–490, 151+203). Contracts, ⚖332(1).

In an action to recover a stipulated commission for the sale of land, plaintiff cannot recover for the actual value of his services, in absence of pleading and proof as to such value (128–217, 150+785). Brokers, ⚖82(4).

A complaint held sufficient to support a recovery either on an express or an implied contract (125–458, 147+444). Contracts, ⚖333(1).

Under a complaint declaring on an express contract, plaintiff cannot recover on a quantum meruit (125–179, 146+347, 51 L. R. A. [N. S.] 254, Ann. Cas. 1915C, 882). Contracts, ⚖346(12).

A complaint held to state a cause of action for specific performance of a contract for the sale of land and for the cancellation of security given by the vendee (126–52, 147+827). Cancellation of Instruments, ⚖37(1).

A trial court held to have abused its discretion in requiring plaintiff, in an action for breach of contract, to elect to proceed either for a rescission or to recover damages (126–176, 148+43). Pleading, ⚖369(2).

Complaint for rescission of contract for sale of land for fraud held sufficient (122–295, 142+710). Vendor and Purchaser, ⚖123.

Plaintiff cannot recover for services not alleged, notwithstanding recoupment sought by answer (121–280, 141+179). Contracts, ⚖346(1).

Complaint for breach of warranty held to show that plaintiff accepted the article warranted, though there was an allegation that he did not accept (122–209, 142+193). Sales, ⚖434.

Subd. 3—Where defendant appears, the relief granted is not limited by the prayer, except that greater damages cannot be recovered, without amendment, than stated (124–279, 144+952). Judgment, ⚖252(1).

Interest as an element of damages for fraud in the sale of a horse may be recovered, though not asked for in the complaint (124–265, 144+954). Damages, ⚖157(4).

7754. Demurrer to complaint—Grounds—

In general—Admissions by demurrer (122–380, 142+871). Pleading, ⚖214(1).

Construction of pleadings on demurrer (122–441, 142+822). Pleading, ⚖216.

Failure to allege incorporation and corporate powers of defendant company in a suit on contract, or that plaintiffs were partners, is not ground for demurrer (122–380, 142+871). Corporations, ⚖513(2); Partnership, ⚖213(1).

A complaint which, to any extent and on any reasonable theory, presents facts sufficient to justify a recovery, will be sustained on demurrer, however inartificially the facts may be stated (122–504, 142+899, Ann. Cas. 1914D, 945). Pleading, ⚖218(1).

A judgment for defendant on demurrer to the complaint because the plaintiff mistook his remedy does not reach the merits, and is not a bar to a new action founded upon the proper remedy (161+388). Judgment, ⚖572(2).

Subd. 1. For want of jurisdiction—Involving interstate commerce (121–488, 142+3, 45 L. R. A. [N. S.] 612).

Subd. 5—Where the fact that several causes of action are improperly united appears upon the face of the complaint, the objection must be taken by demurrer or it is waived (132–27, 155+756). Pleading, ⚖406(8).

Subd. 6—Answer in mandamus on relation of city to compel construction of street railroad extension directed by ordinance held to present issue as to reasonableness of ordinance as against general demurrer (122–163, 142+136). Mandamus, ⟸165.

Complaint against physician for malpractice held good as against a general demurrer (122–152, 142+143). Physicians and Surgeons, ⟸18(4).

Where the complaint shows on its face that plaintiff's cause of action is barred by limitations, the defect may be taken advantage of by demurrer (129–342, 152+734). Limitation of Actions, ⟸177(2).

7755. Same—Requisites—Waiver—

Cited (131–375, 155+621).

A joint demurrer will be overruled, if a cause of action is stated against either defendant (128–300, 150+912). Pleading, ⟸198.

Where, in a complaint by foreign receivers of a foreign corporation to recover a stock subscription, there was nothing to show that the appointing court acted under its general equity powers, or without statutory authority, or that it exceeded its jurisdiction, a general demurrer did not present any question of jurisdictional defects (122–250, 142+315). Abatement and Revival, ⟸83.

The petition and notice of contest of an election under §§ 529 and 599 is governed by the rules of practice applicable to an ordinary complaint, and contestee, desiring to attack the petition on the ground of legal incapacity of contestants, must demur or answer under this section, or he will be deemed to have waived the objection (161+513). Elections, ⟸286, 287.

Where improper joinder of causes of action appears on the face of the complaint, it is waived unless taken advantage of by demurrer (132–27, 155+756). Pleading, ⟸406(8).

7756. Contents of answer—

In general—Where an answer sets out in full the contract sued on, plaintiff cannot contend that the issue as to whether the contract was entire was not raised by the answer (125–179, 146+347, 51 L. R. A. [N. S.] 254, Ann. Cas. 1915C, 882). Contracts, ⟸338(1).

Where the answer admits consideration of the note sued on, an offer by defendant to prove want of consideration is properly denied (128–241, 150+870). Pleading, ⟸36(3).

Evidence of contributory negligence is admissible under an answer containing a general denial and a specific allegation "that the damage * * * was caused by the negligence of the said plaintiff and its servant and employé, and not otherwise" (161+390). Negligence, ⟸117.

Illegality of a lease as contemplating violation of the liquor laws held not available as a defense in an action thereon, where it neither appeared from the complaint nor was alleged in the answer, and was not litigated by consent (126–417, 148+566). Landlord and Tenant, ⟸230(8).

Where defendant did not plead the law of a foreign state, by which the principles of the case were governed, and tried the case on the theory that such law was applicable, he could not complain on appeal that such law was not pleaded (132–205, 156+3). Appeal and Error, ⟸171(3).

An answer, pleading that defendant's ancestor was at the time of his death lawfully seised of the premises and that he had good and sufficient title thereto, held sufficient to permit a defense of title by parol gift, accepted and executed (126–389, 148+125). Frauds, Statute of, ⟸149.

In an action to foreclose a log lien, an answer expressly denying that any demand had been made on defendant before the filing of the lien, and averring lack of information sufficient to form a belief as to any of the allegations of the complaint, raised the issue as to such demand, and whether the work was completed before the lien was filed (128–5, 150+216). Logs and Logging, ⟸33(8).

Personal property having been converted by an attempted foreclosure and sale by the former mortgagee, the amount of a new note cannot be deducted from the damages awarded without pleading and proof of the note (132–364, 157+582). Pleading, ⟸139.

Defendant need not plead facts showing that the injury complained of resulted from a cause different from that alleged by plaintiff (131–266, 154+1093). Master and Servant, ⟸262(1).

In an action on a contract, there being a denial of the making of the contract, defendant need not plead facts tending to show that the material and labor constituting the subject of the action were furnished without expectation of pay and that the minds of the parties never met in an agreement (127–449, 149+950). Contracts, ⟸346(9).

A denial of any consideration will not admit proof of an illegal consideration (135–208, 160+676). Pleading, ⟸346(3).

An admission in an answer that defendant executed a bond sued on in the form and manner set out in the complaint carries with it an admission of all that is essential to a valid execution of the bond, the terms contained therein including the full authority of the agents by whom it was executed (123–218, 143+355). Pleading, ⟸127(2).

A claim for attorney's fees for the collection of a note is not a part of the cause of action on the note, and a denial in the answer of the value thereof as alleged in the complaint does not raise an issue, preventing the testing of the answer by demurrer as not stating a defense to the note (161+398). Pleading, ⟸204(5).

Effect of general denial—Where the complaint in a suit on a note alleges that no part of the note has been paid, a general denial does not raise a material issue upon the question of payment (161+398). Bills and Notes, ⟸489(1).

Under a general denial in an action for slander, defendant may show in diminution of dam-

ages that plaintiff's reputation was bad (122–517, 142+897, Ann. Cas. 1914D, 1056). Libel and Slander, ⟸100(4).

The issue of noncompliance with § 3858, requiring notice of assignments of wages to be given to the employer, held sufficiently raised by defendant's general denial (125–211, 146+359, Ann. Cas. 1915C, 688). Assignments, ⟸132.

Matters provable under general denial in action for slander (122–177, 142+147, 47 L. R. A. [N. S.] 1098, Ann. Cas. 1914D, 894). Libel and Slander, ⟸100(1).

A general denial in an action for treble damages for cutting timber puts in issue the question whether the cutting was casual or involuntary, though the answer admitted that some timber was cut by defendant's servants without lawful right; it not appearing from the answer that such cutting was with defendant's knowledge or consent (127–360, 149+461). Treaties, ⟸40(4).

Where, in an action for assault and battery, defendant filed a general denial merely, it was not error to refuse to instruct on the subject of justification (124–260, 144+950). Trial, ⟸251(8).

Several defendants—Where several defendants answer separately, a defense interposed by one is not available to a codefendant, where his separate answer does not present it (129–324, 152+755). Pleading, ⟸84.

Admission of ultimate facts—Defendant, having admitted the ultimate facts pleaded in the complaint, cannot insist that the plaintiff must either plead or prove the subsidiary matters which go to make up such facts (132–238, 156+283). Pleading, ⟸376.

Extension of time as releasing surety—A surety on a building bond, claiming a release because of an extension of time granted the contractor, must plead such defense. Such surety, claiming a release on the ground that the owner paid the contractor a sum of money after default, must plead such defense (123–222, 143+715). Principal and Surety, ⟸156.

7757. Requisites of a counterclaim—Pleading does not admit—

In general—Pleading recoupment (121–280, 141+179).

Whether a cause of action pleaded is a proper counterclaim in the particular action can only be raised by demurrer (133–305, 158+420). Pleading, ⟸195.

Subd. 1—In a suit on a note, transferred by a trustee in bankruptcy, to plaintiff, defendant was entitled to set off damages by a breach of contract of bailment by the bankrupt, where the damage occurred while the property was in the possession of the bailee or his trustee in bankruptcy. (124–54, 144+426). Set-Off and Counterclaim, ⟸49(1).

Where the conditional vendee of an automobile was in default, the possession of the automobile by the vendor was not wrongful until he began suit on the purchase money notes, and the court properly limited recovery on the vendee's counterclaim to the time subsequent to the commencement of the action (125–317, 146+1113, L. R. A. 1916A, 912). Sales, ⟸479(15); Set-Off and Counterclaim, ⟸29(2).

Defendant must plead a set-off, and plaintiff need not prosecute an equitable accounting to ascertain whether defendant is entitled thereto (128–58, 150+227). Contracts, ⟸328(1).

Where the complaint seeks an accounting, defendant is entitled to deductions, though he does not plead the same as a set-off or counterclaim (128–307, 150+903). Pleading, ⟸139.

In replevin by a chattel mortgagee, defendant cannot set up as a counterclaim a conversion by plaintiff of the property involved in the action after the commencement of the action (133–305, 158+420). Set-Off and Counterclaim, ⟸11.

Where plaintiff, a grading contractor, sublet a part of the work to defendant partnership, advanced money to the firm, and took a mortgage on its grading outfit to secure such advances, and on default brought replevin against the firm, defendants were entitled to assert a partnership claim by way of counterclaim, though the mortgage was not given by the firm, but by a member thereof and his wife (133–305, 158+420). Set-Off and Counterclaim, ⟸29(1).

Where a landlord forcibly evicted his tenant, who had paid his rent in advance, and brought an action to restrain the tenant from interfering with the property and for damages, a counterclaim for damages for conversion of the tenant's property in the building and for the value of the term covered by his advance payment of rent arose "out of the contract or transaction pleaded in the complaint" or "connected with the subject of the action," and was permissible under this section. (123–447, 143+1128). Set-Off and Counterclaim, ⟸29(3).

The provision that a counterclaim is proper when it is "connected with the subject of the action" should receive a liberal construction (126–461, 148+307). Set-Off and Counterclaim, ⟸3.

Damages due to plaintiff's quitting defendant's service without cause, in violation of the contract of employment, could be pleaded as a set-off to plaintiff's cause of action for conversion of garden truck (130–50, 152+865). Set-Off and Counterclaim, ⟸33(1).

Subd. 2—Where defendant, a tenant whose term expired February 28th, and who had paid his rent to that date, was forcibly evicted by plaintiff, the landlord, on February 10th, and on February 11th plaintiff brought an action against defendant for damages for a forcible re-entry, and to restrain defendant from interfering with plaintiff's possession, a counterclaim interposed by defendant to recover $500, the value of goods in the building converted by plaintiff, and for $150 "for the use and occupation" of the premises, stated a cause of action existing in favor of defendant against plaintiff at the commencement of the action. While defendant had no cause of action for use and occupation, defendant being a trespasser, his designation of his claim as for "use and occupation" would be treated as surplusage, and the claim therefor treated as one for damages for the eviction, recoverable at the date of such eviction. A further allegation of defendant's answer that "by reason of the premises defendant has been

damaged in the sum of at least $650" was sufficient to present a claim for tort accruing before the commencement of the action (123–447, 143+1128). Set-Off and Counterclaim, ⟸24.

Where plaintiff, a grading contractor, sublet a part of the work to defendants, advanced money to them, and took a chattel mortgage on their grading outfit, and, on default in the payment of the mortgage, brought replevin, a counterclaim by defendants setting up an oral agreement by plaintiff to pay extra compensation for wet excavation, encountered after the work was undertaken, was permissible under the second subdivision of this section, as another cause of action arising on contract interposed in an action on contract, though such counterclaim was not maintainable under the first subdivision (133–305, 158+420). Set-Off and Counterclaim, ⟸29(1).

Where the maker of a note for the price of corporate stock sued to enforce a contract by defendant, the payee, by which the latter agreed to collect the amount of the note from a larger note assigned by plaintiff to defendant as collateral, and for that purpose to renew plaintiff's note, a counterclaim by defendant alleging that the collateral note was worthless and had been fraudulently assigned by plaintiff to defendant, and that plaintiff had wrongfully taken possession of his own note, and praying judgment for the amount thereof, was not based on a tort, but on contract growing out of the transaction, and a demurrer thereto was properly overruled (132–399, 157+640, L. R. A. 1916E, 771). Set-Off and Counterclaim, ⟸34(1).

7758. Several defences, etc., how pleaded—Answer and demurrer—

In an action on an accident policy for death resulting from accident, where defendant alleged that the death was caused by suicide, and also that it was caused by the beneficiary, it was proper to deny plaintiff's motion to require defendant to elect on which claim it would rely, since the issue was the question of accident, and the affirmative of the issue was with the plaintiff, and it would have been proper to show either one of such claims under a general denial in disproof of accident, they not being affirmative defenses and not being inconsistent (134–192, 158+967). Pleading, ⟸93(2).

7759. Judgment on defendant's default—

Where a complaint stated a cause of action against one of two defendants, a joint demurrer of both defendants was properly overruled (123–159, 143+257, 51 L. R. A. [N. S.] 137). Pleading, ⟸198.

7760. Demurrer or reply to answer—

Demurrer to answer—Whether a cause of action pleaded is a proper counterclaim can only be raised by demurrer (133–305, 158+420). Pleading, ⟸195.

A claim for attorney's fees for the collection of a note is not a part of the cause of action on the note, and a denial in the answer of the value thereof as alleged in the complaint does not raise an issue which prevents testing by demurrer the sufficiency of the answer as a defense to the note (161+398). Pleading, ⟸204(5).

A demurrer to the second defense of an answer in ejectment denying generally the complaint and attempting to plead an oral agreement for a conveyance of the land, taken out of the statute of frauds by part performance, was not bad as being to a part of a defense only (134–321, 159+752). Pleading, ⟸204(7).

Reply to answer—A complaint construed as required by § 7769, and held that a reply was unnecessary (122–154, 141+1134; 122–154, 142+134). Pleading, ⟸165.

In an action on a benefit certificate, in which the answer set up the expulsion of assured from the order, a reply that the expulsion was arbitrary and void, and constituted a breach of the contract, was responsive to defenses set up in the answer to the effect that after the expulsion deceased failed to pay his assessments, and that proofs of his death were not furnished (127–196, 149+197). Insurance, ⟸815(3).

A reply denying that a special administrator was appointed was sufficient to raise the issue that an appointment in fact made was invalid, because no petition for such appointment was filed as required by § 7227 (128–112, 150+385). Executors and Administrators, ⟸443(7).

Admissions in reply (129–214, 152+404). Pleading, ⟸177.

A reply setting up waiver of the payment of assessments under the beneficiary certificate sued on is not a departure from the complaint (129–214, 152+404). Pleading, ⟸180(2).

7761. Failure to reply—Judgment—

An allegation of payment in the answer, to which no reply was interposed, held presumptively litigated by consent (131–249, 154+1072). Appeal and Error, ⟸907(1).

7762. Sham and frivolous pleadings—

In general—In an action on a note given in satisfaction of a judgment, and to foreclose a mortgage given to secure such note, an answer setting up newly discovered evidence, and praying that the judgment be vacated and that a new trial be granted, held properly stricken as sham and frivolous (161+257). Pleading, ⟸358.

A frivolous reply and a sham reply defined and distinguished, and held that such a reply may be stricken on motion; its falsity being established by affidavit (125–98, 145+787). Pleading, ⟸358, 359, 360(1, 3).

Sham pleadings—To warrant striking an answer as sham its falsity must be clearly and indisputably shown. That a pleading is verified does not prevent it from being attacked as sham. An answer setting up failure of plaintiff to comply with §§ 6107–6113 in respect to an interstate transaction held properly stricken as sham (133–240, 158+239). Pleading, ⟸360(3).

Frivolous pleadings—To warrant striking an answer as frivolous, the facts pleaded must not in any legal view present a defense (133–240, 158+239). Pleading, ⟸358.

Irrelevant pleadings—In action for alienation of wife's affections, allegation of the answer setting out statement of trial court contained in the decree of divorce as to the treatment of his wife by defendant therein, plaintiff here, prior to the action for divorce, was properly stricken (162+448). Pleading, ⟸364(1).

7763. Supplemental pleadings—

127–522, 149+131.

Where, after the filing of a counterclaim, plaintiff in replevin dismissed without prejudice to the prosecution of the counterclaim, that part of an amended answer, thereafter filed, setting up an additional "counterclaim" for conversion of the property after the date of the dismissal, cannot be supported as a supplemental answer (133–305, 158+420). Pleading, ⟸146.

Where it appears from the supplemental answer in ejectment that plaintiff had taken possession after commencement of the action, but the answer did not demand a dismissal and defendant did not offer to let plaintiff have judgment determining her right of possession, but demanded judgment on the merit refusal to dismiss because of plaintiff's possession was not error (124–538, 144+1090). Ejectment, ⟸100.

7764. Interpleader—

Where a party is ordered to interplead and his right to a fund in court depends on the power of the court to relieve him from an accepted bid, he is not entitled to a jury trial (135–115, 160+500). Jury, ⟸13(19).

Substitution of party defendant, on deposit in court by the retiring defendant, of the fund in controversy, held not improper (122–187, 142+144). Parties, ⟸59(1).

An order of interpleader, made under this section, making appellant a party, and requiring her to present her claim to the fund in the hands of defendant, and restraining appellant from prosecuting an action in another state, held proper (132–167, 156+271). Injunction, ⟸33; Interpleader, ⟸11.

Where a beneficiary certificate, or the constitution and by-laws of the order, did not provide that the proceeds of the certificate, on the death of the beneficiary named, should be paid to the administrator under G. S. 1913 § 3514, as trustee, a special administrator of the deceased member, the beneficiary having predeceased him, could not be impleaded by the beneficial association, under this section, when sued on the certificate by the heirs of the deceased member (122–221, 142+316). Executors and Administrators, ⟸438(1).

7766. Intervention—

The trial court's determination, made on conflicting affidavits, as to the number of folios charged for in making the transcript and two copies of the testimony, made necessary on account of the intervention, cannot be disturbed (127–212, 149+295). Appeal and Error, ⟸1024(5).

Where a bank intervened in an action on a note, claiming that it held the note as collateral security, whereupon plaintiff withdrew from the case, and thereafter the complaint in intervention was withdrawn, intervener was liable for statutory costs on dismissal of the action on defendant's motion (131–193, 154+953). Costs, ⟸98.

Where an intervener, claiming a lien on property for the negligent loss of which the action is brought, reiterates the allegations of the complaint in the action and becomes practically a coplaintiff, he is liable, under this section, jointly with the plaintiff for costs, upon the setting aside of separate verdicts in their favor, including the expense of a transcript and two copies of the testimony (127–212, 149+295). Costs, ⟸98.

7769. Pleadings liberally construed—

Under this section, a complaint construed, and held a reply was not necessary (122–154, 141+1134; 122–154, 142+134). Pleading, ⟸165.

Construction against admission of fact (122–118, 142+10). Pleading, ⟸177.

7770. Irrelevant, redundant, and indefinite pleadings—

Allegations of perjury and fraudulent practices in obtaining a judgment without statement of facts constituting the fraud are mere conclusions and irrelevant (126–414, 148+455). Pleading, ⟸8(1).

Allegations in an action to set aside a judgment held properly stricken as redundant or irrelevant (126–414, 148+455). Pleading, ⟸364(2, 3).

An order requiring a complaint to be made more definite and certain rests in the discretion of the trial court, and will not be reversed unless the discretion is abused (126–414, 148+455). Appeal and Error, ⟸960(2).

Where a general allegation of permanent injury is deemed insufficient, the proper practice is to move the court for more specific allegations (124–260, 144+950). Pleading, ⟸367(4).

7771. Averments, when deemed admitted—

An answer held not to admit a cause of action alleged in a complaint (126–494, 148+299). Insurance, ⟸815(2).

A defendant, who omits to plead and prove a partial payment of an account, is concluded by the judgment and cannot maintain an action to recover such payment (123–389, 143+916). Judgment, ⟸619.

A reply averring that insured paid all the monthly assessments which defendant permitted him to pay, and that since a date specified defendant refused to accept payments of assessments or to recognize insured as a member of defendant beneficial order, admitted the allegations of the answer that no monthly assessments were in fact paid subsequent to the time stated (134–302, 159+624). Pleading, ⟸177.

7773. Ordinances and local statutes—

In a criminal prosecution for violation of a village ordinance, the complaint is sufficient if it refers to the ordinance by number, chapter, or section, and it is not necessary to introduce the ordinance in evidence (124–498, 145+383, 51 L. R. A. [N. S.] 40, Ann. Cas. 1915B, 812). Criminal Law, ⟸304(12).

7774. Incorporation, pleading and proof—

135–126, 160+258.

Where fact of incorporation is material, denial on information and belief or general denial does not raise an issue. Allegation of incorporation, where immaterial to the issues, need not be proved (128–73, 150+226). Corporations, ⟸514(1), 518(2).

In an action against a corporation the complaint need not allege defendant's corporate existence, and a denial thereof in the answer is unavailing when it is refuted by the verification and evidence brought out by defendant itself (124–317, 145+37). Corporations, ⟸514(2), 518(2).

Failure to allege corporate character and powers of defendant company is not ground for demurrer (122–380, 142+871). Corporations, ⟸513(1).

7775. Copartnerships—Proof as to members—

Failure to allege that plaintiffs are partners is not ground of demurrer (122–380, 142+871). Partnership, ⟸213(1).

7777. Items of account, how pleaded—

Where the complaint in an action for board and lodging sets out the dates between which the same was furnished, the number of meals and the number of lodgings, and the value of each, the failure of plaintiff to furnish a bill of particulars on defendant's demand is not presumptively prejudicial, where the demand does not indicate what information is desired beyond what is contained in the complaint (132–8, 155+617). Appeal and Error, ⟸1039(10).

Under this section evidence will not be excluded because a bill of particulars is verified by counsel, instead of the party; it having been returned with only a general objection, and the defect, if any, being subject to remedy (130–196, 153+310). Pleading, ⟸422.

7778. Pleadings in slander and libel—

In general—A complaint construed to present two separate causes of action, so that plaintiff could recover on either of them, in absence of a request to compel an election (125–122, 145+808). Pleading, ⟸369.

Where a single injury is suffered in consequence of the wrongful acts of several persons, all of whom contribute directly to cause the injury, though there was no conspiracy or joint concert of action between them, are jointly and severally liable (131–375, 155+621). Torts, ⟸22.

Pleading mitigating circumstances—If defendant plead the truth of the charge, or of a part thereof, and fail in his proof, this may be considered by the jury in aggravation of damages; but, if the plea was interposed in good faith, it may be considered by the jury on the issue of malice, and in mitigation of exemplary damages (122–517, 142+897, Ann. Cas. 1914D, 1056). Libel and Slander, ⟸57.

Bad reputation of plaintiff and absence of malice are provable under a general denial, where the complaint states a case for the recovery of punitive damages (122–177, 142+147, 47 L. R. A. [N. S.] 1098, Ann. Cas. 1914D, 894). Libel and Slander, ⟸100(1).

Under a general denial in an action for slander defendant may show, in diminution of damages, that plaintiff's reputation was bad (122–517, 142+897, Ann. Cas. 1914D, 1056). Libel and Slander, ⟸100(4).

Justification—In order to justify, defendant must plead specific facts showing the truth of the charge (122–517, 142+897, Ann. Cas. 1914D, 1056). Libel and Slander, ⟸100(3).

What need not be pleaded—Plaintiff, suing for slanderous words imputing unchastity, need not allege that her character was good, that being presumed (122–517, 142+897, Ann. Cas. 1914D, 1056). Libel and Slander, ⟸100(6), 101(1).

Where spoken words are slanderous per se, the complaint need not allege special damages (126–10, 147+668). Libel and Slander, ⟸89(1).

7780. Joinder of causes of action—

In general—Different items of damages do not constitute separate causes of action (121–296, 141+181, 45 L. R. A. [N. S.] 205, Ann. Cas. 1914C, 720). Action, ⟸53(1).

Refusal to require plaintiff to elect between different causes of action which in fact were tried as one was without prejudice to defendant (127–490, 150+218). Appeal and Error, ⟸1039(9).

Where misjoinder of causes of action appears on the face of the complaint, objection thereto must be taken by demurrer, or the defect is waived (132–27, 155+756). Pleading, ⟸406(8).

Subd. 1—Cited (134–461, 159+1081).

Causes of action for concurrent negligence of two defendants may be joined, where the facts concerning each are identical as to time, place, and result (124–531, 144+474). Parties, ⟸27.

Two causes of action for malicious prosecution held to arise out of transactions connected with the subject of action, and to each affect all the parties to the action, and therefore to be properly united in one complaint (130–229, 153+532, Ann. Cas. 1916C, 267). Action, ⟸43(2), 50(6).

Subd. 2—Complaint alleging that three defendants contracted to pay a debt of plaintiff to a third party, and that one of the defendants had previously contracted to make such payment, and had failed to do so, does not improperly unite two causes of action (122–380, 142+871). Action, ⚖38.

Election between express contract and quantum meruit not required (121–352, 141+481). Pleading, ⚖369(2).

Subd. 3—Negligence at common law may be joined with charge of negligence in failing to comply with statute (121–461, 141+518). Master and Servant, ⚖313.

A complaint against two defendants, alleging that their concurrent negligence caused an injury to plaintiff, is good as against a demurrer for misjoinder, though the liability of one defendant rests on the federal employers' liability act and the other on the common law (134–461, 159+1081). Action, ⚖45(3).

7782. Amendments of course, and after demurrer—

The right to amend a pleading after a demurrer thereto has been determined is vested in the discretion of the trial court, which discretion will not be disturbed, unless abused (129–342, 152+734). Pleading, ⚖225(2).

7783. Amendment by order—

130–151, 153+316.

Cited (132–389, 157+642).

In general—Consent to amendment permitted by the court (see 130–342, 153+745).

A proposed amendment to an answer held improperly disallowed (126–494, 148+299). Pleading, ⚖256.

Application of statute—Amendment of findings (121–285, 141+186). Trial, ⚖400(1).

While a summons is not strictly process, and is not in terms specified in this section, it is one of the documents in the action, which in virtue of this section and § 7786 may be amended in the sound discretion of the court; and where a summons, intended for and actually served on a father, contained the initials of his son, instead of the given name of the father, the court had power, on proper notice, to amend the summons by striking out initials of the son, and inserting in lieu thereof the correct name of the father (131–173, 154+952). Process, ⚖163.

Amendment on the trial—Amendment of pleadings at the trial is largely within the discretion of the trial court (131–10, 154+508). Pleading, ⚖236(3).

Amendment after judgment—There was no abuse of discretion in refusing defendant leave, after the case was tried and decided, to amend his answer so as to plead mistake and ask for a reformation of the contract involved in the suit (131–159, 154+951). Pleading, ⚖236(4).

Amendment of parties—Misnomer of corporation defendant, by adding to its corporate name the words "Relief Department," held amendable as of course, and motion at trial to vacate service of summons on ground that same was not made on defendant was properly overruled (133–434, 158+711). Parties, ⚖95(5).

7784. Variance—Amendment—Exceptions—

Proof must follow pleadings—Plaintiff must proceed on a definite theory, and no change of attitude, prejudicial to defendant, can be allowed (122–59, 141+1105). Pleading, ⚖18, 387.

Immaterial variance—An objection that the complaint was not specific enough to allow proof of so-called "short rates" was properly overruled, where a bill of particulars had been furnished fully disclosing these rates, so that defendant could not have been misled (133–316, 158+424). Contracts, ⚖346(3).

Where a complaint declares on a quantum meruit for the reasonable value of services, and the evidence discloses that defendant agreed to pay a specified price, a recovery of the agreed price is proper, where it does not appear that defendant was misled to his prejudice (128–304, 150+901). Pleading, ⚖398.

A variance between the pleadings and proof held not of a nature to mislead the defendant (135–175, 160+771). Municipal Corporations, ⚖671(4).

Substantial performance provable under general allegation of performance (121–280, 141+179). Contracts, ⚖346(8).

In an action for death of a boy at a railroad crossing, held that there was not a fatal variance between the pleadings and the proof (125–137, 145+304). Railroads, ⚖345(4).

Variance as to places and dates of making fraudulent representations inducing contract for sale of land held immaterial (122–295, 142+710). Vendor and Purchaser, ⚖123.

In an action under the federal employers' liability act, held that there was no fatal variance between the allegations and proof (128–112, 150+385). Master and Servant, ⚖264(10).

That each allegation of fact in a negligence case was not proved did not show a variance (128–112, 150+385). Negligence, ⚖119(7).

7785. Failure of proof—

128–332, 150+1088.

It is not essential that every averment of negligence be proved as alleged (128–112, 150+385). Negligence, ⚖119(1).

Where the creation of a corporation is not a material issue, it need not be proven, though alleged (128–73, 150+226). Corporations, ⚖514(1), 518(2).

7786. Extensions of time—Relief against mistakes, etc.—

In general—The defendant to whom a copy of the summons is delivered in person within the state is not personally served within this section, the service being merely an equivalent of summons by publication (122–396, 142+714, Ann. Cas. 1916B, 563). Judgment, ⇐142.

A judgment entered against defendant without his knowledge, after the claim sued on was extinguished by defendant's discharge in bankruptcy, held properly set aside under this section as having been taken through mistake, inadvertence, surprise, or excusable neglect (126–184, 148+57, L. R. A. 1916F, 837). Judgment, ⇐143(3).

Default for want of a reply may be opened, though the complaint fails to allege the giving of notice to defendant city, as required by § 1786 (122–154, 141+1134; 122–154, 142+134). Judgment, ⇐145(1).

Opening a judgment and permitting defendant to interpose an amended answer presenting a defense which had been abandoned at the trial held not an abuse of discretion (134–307, 159+626). Judgment, ⇐364.

An affidavit by an attorney, based upon knowledge acquired from investigation of the affairs of a corporation, held sufficient to sustain an order opening a default judgment; an affidavit by all the officers and directors showing ignorance of the entry of the judgment not being necessary (127–435, 149+671). Judgment, ⇐159.

Overruling of objection that motion was renewal of former motion amounted to a grant of leave to present the motion (122–154, 141+1134; 122–154, 142+134). Motions, ⇐45.

An order of the trial court refusing to relieve defendant from its failure to appear at the time set for trial held not an abuse of discretion (128–311, 150+907). New Trial, ⇐85.

In making the motion for new trial after entry of judgment, it is not necessary to make a formal motion to set aside the judgment, as the order granting the new trial will in effect vacate the judgment (125–475, 147+654). New Trial, ⇐124(1).

Where a party is served with a short notice of an interlocutory motion, he should apply to the court to vacate the service or be relieved from default in order to raise the question on appeal (125–475, 147+654). Appeal and Error, ⇐189(1).

Where a motion to open a default judgment failed to urge the objection that the judgment was in excess of the relief prayed in the complaint, and that the complaint was fatally defective in its statement of one cause of action, such objections cannot be considered for the first time on appeal (123–531, 143+1123). Appeal and Error, ⇐193(9), 223.

Mandamus will not lie to require the trial court to allow and settle a case after expiration of the time allowed therefor, where the denial of the relief is not shown to be an abuse of discretion (124–537, 144+755). Appeal and Error, ⇐571.

Application—The district court has jurisdiction, upon proper notice, to vacate an order of dismissal and reinstate the case (134–261, 159+272). Dismissal and Nonsuit, ⇐81(2).

The trial court may vacate a judgment rendered for default in filing a reply, and grant leave to plaintiff to reply (122–154, 141+1134; 122–154, 142+134). Judgment, ⇐139, 143(12).

An action cannot be maintained to set aside a judgment for perjury, where the issues were so definite that each party must have known what the other intended to prove (126–154, 147+959). Judgment, ⇐444.

Judgment perpetually enjoining railroad from occupying street, because right had not been regularly acquired, should be vacated, when right is acquired by proper franchise and condemnation proceedings. Court may, in its discretion, modify perpetual injunction against railroad from occupying city street before the condemnation proceeding in which it acquires such right is complete (162+523). Injunction, ⇐210.

Where a receiver, without notice to defendant or the creditors, secured an order authorizing a settlement whereby the receiver recognized title of a third person to certain property of the estate, and thereafter the receiver, by direction of the court, brought an action to test the validity of the settlement, which action was removed by defendant to the federal court, where defendant interposed a plea of former adjudication, the state court, which made such order of authorization, had power to entertain a motion to set aside the same; such action of the state court not being an interference with the jurisdiction of the federal court (135–286, 160–781). Receivers, ⇐78.

A summons is not strictly a process, and is not in terms specified in this section and § 7783, but it is a document in the action, which may be amended in the sound discretion of the court; and where a summons, intended for and actually served upon a father, mistakenly gave the initials of a son, the court had power, on proper notice, to amend the same by inserting therein the true name of the father (131–173, 154+952). Process, ⇐163.

Amendment of judgment on appeal in condemnation proceedings (see 128–321, 150+906). Eminent Domain, ⇐241.

This section does not empower the court in a judicial ditch proceeding to enlarge the time fixed by statute for demanding a review by a jury of the order of the court fixing the benefits and damages (131–372, 155+626). Drains, ⇐82(1).

The exception in this section of final judgments in divorce actions is not an inhibition against correcting a decree as to alimony, but only against modifying or vacating the part of such decree which deals with the marriage status. A correction of a decree of divorce, so as to more accurately express the decision of the court in respect to the alimony awarded, may be made at any time, where neither party nor any third person has, between the entry of the decree and its correction, changed positions, so as to be prejudiced by the correction (133–86, 157+999). Divorce, ⇐245(1).

This section applies and permits the opening of a judgment awarding compensation under the workmen's compensation act (134–189, 158+825). Master and Servant, ⇐411.

Supplying omissions in the findings—The court may, even after judgment, supply an omission in the findings (134–468, 158+787). Trial, ⚖400(1).

Meritorious defense necessary—Affidavit of merits is essential upon application to vacate default judgment and for leave to answer (162+518). Judgment, ⚖158.

Who may apply to vacate—Though a dismissal terminates the action, if the dismissal is obtained by fraud and collusion, the court has jurisdiction to vacate the order and reinstate the cause on the motion of a party or stranger having an interest in the subject-matter (122–355, 142+818, Ann. Cas. 1914D, 830). Dismissal and Nonsuit, ⚖43(2).

Discretion—Opening a default judgment rests in the discretion of the trial court, and its action in that respect will not be reversed, except for palpable abuse of discretion (127–435, 149+671; 129–316, 152+721; 129–414, 152+772; 131–488, 154+659; 162+518). Appeal and Error, ⚖957(1); Judgment, ⚖139.

The right to be relieved from a default is not absolute, but rests largely in the discretion of the trial court, and where inexcusable neglect of counsel appears, and there is a question as to diligence and the merits of the defense, the action of the trial court in denying a motion to reopen the case will not be reversed as an abuse of discretion (134–328, 159+752). Judgment, ⚖139, 143(10).

Where the affidavits were sufficient to sustain a finding, either that an answer was served in time, or that, if not served in time, the default was due to inadvertence and excusable neglect of defendant, an order opening default judgment will not be disturbed on appeal (133–116, 157+1076). Judgment, ⚖162(4).

Power of court commissioner—A court commissioner is without power to vacate a judgment rendered by the district court (131–129, 154+748). Court Commissioners, ⚖4.

Mistake—Where plaintiff had judgment by default due to misunderstanding by defendants' attorney as to defendants' interest in the land in question, and defendants showed a meritorious defense, the order vacating the judgment was within the court's discretion (162+352). Judgment, ⚖143(4).

That defendant in a damage suit, when the papers were served on him in prison, believed they were papers concerning the criminal case, and therefore did not read them, did not make it an abuse of discretion to refuse to open a default judgment (130–45, 152+865). Judgment, ⚖143(6).

That attorney assumed, on account of similarity of heading of summons and complaint, that client's case was in same court in which he had other cases, would not excuse default; the summons and complaint being in his possession (162+518). Judgment, ⚖143(10).

Time of application—Diligence—From the time defendant, served by publication, has knowledge of the commencement of the suit, he must proceed with diligence to make his defense (122–396, 142+714, Ann. Cas. 1916B, 563). Judgment, ⚖142.

Illness which does not incapacitate defendant from understanding his rights or giving directions as to litigation is not a good excuse for long delay in moving to vacate a judgment entered by default. So held in a case where defendant waited nine months after being informed by an attorney of the steps necessary to be taken to open the default (132–354, 157+586). Judgment, ⚖153(1, 3).

Unexplained delay for nearly two years is laches, warranting denial of motion (122–43, 141+806). Judgment, ⚖386(2).

Where plaintiff's counsel, through inadvertence and mistake, failed to file a reply for about two months after it was due, the granting of leave to file same out of time was not an abuse of discretion (131–489, 154+789). Pleading, ⚖172.

After affirmance of a judgment on appeal without a motion for new trial, and after the lapse of six months from notice of the rendition of the judgment, a motion for a new trial, on the grounds of insufficiency of the evidence and errors occurring at the trial, will not be entertained (134–292, 159+623). New Trial, ⚖4.

A party may make a motion for a new trial after entry of judgment, if without fault on his part he has had no reasonable opportunity to make the motion before judgment, and if he uses reasonable diligence in doing so afterwards. The question of diligence is in the sound discretion of the trial court (125–475, 147+654). New Trial, ⚖4, 116(3), 124(1).

Where a receiver, without notice to the defendant or the creditors, obtained an order approving a settlement made by the receiver with a third person, recognizing title of the latter to certain property of the estate, the court had power, three years after the entry of such order, to vacate the same under this section, as limitation of the right of appeal did not run against defendant and the creditors, and the receiver, by reason of his consent, did not have the right to appeal, and the doctrine of estoppel or laches did not apply as against the persons directly involved (135–286, 160+781). Receivers, ⚖78.

Excusable neglect—Excuse offered by defendant for failure to appear at the trial held insufficient to justify vacating the judgment (133–63, 157+903). Judgment, ⚖138(2).

Discretion of trial court in opening a default on the ground of negligence of defendant's attorney held not so clearly abused as to warrant reversal (122–187, 142+144). Judgment, ⚖143(12).

Though complaint was defective, where affidavits offered on motion to open default and permit plaintiff to reply showed a meritorious cause of action, and that plaintiff's attorney was unfamiliar with practice and negligent, motion was properly granted in the discretion of the court (122–154, 141+1134; 122–154, 142+134). Judgment, ⚖143(12, 16).

Good cause—The court may in its discretion open a default judgment obtained against a corporation because of bad faith or intentional neglect of the officer charged with the duty of making defense (127–435, 149+671). Judgment, ⚖143(1).

Where an attorney, from ignorance of facts or from bad faith, stipulates for judgment against a client who has a good defense, the court may, in its discretion, open the judgment and permit the defense to be interposed, if no substantial prejudice will result to the opposing party from the delay (127–435, 149+671). Appeal and Error, ⟸957(1); Judgment, ⟸90, 143(10, 11, 12, 13), 158, 159.

It was not an abuse of discretion to permit defendant to answer after entry of default, where she showed a meritorious defense, and had relied on her husband to take proper steps to protect her, and he failed to do so through a mistaken belief that no judgment could be entered against her after judgment obtained against him, and no prejudice would result to plaintiff (124–535, 144+743). Judgment, ⟸143(3, 16).

Where defendant, on being served personally with summons, wrote to plaintiff's attorney, denying liability, and the attorney answered the letter, asking for certain information, which was given, a default thereafter entered would be opened, if defendant showed a meritorious defense (124–530, 144+1134). Judgment, ⟸145(2).

That plaintiff and the court overlooked the fact that a new action would be barred by a contract limitation is "good cause" for setting aside a judgment of dismissal entered upon stipulation of plaintiff's counsel (131–246, 154+1099). Dismissal and Nonsuit, ⟸43(4).

Where defendant, when the calendar was called, announced that he was bringing a witness from Canada, and would insist on a trial at the day set, reinstatement of the case after dismissal on plaintiff's failure to appear, will be made on condition that plaintiff pay the expense incurred in respect to such witness (135–471, 160+1032). Dismissal and Nonsuit, ⟸81(8).

7789. Unimportant defects disregarded—

161+515.

Admission of evidence—Harmless error—Error in ruling on testimony, which is cured by amendment of the complaint, held not reversible error (124–49, 144+415). Appeal and Error, ⟸1052(1).

Admission of expert testimony, based on incompetent testimony of plaintiff as to his physical condition, was not prejudicial, where plaintiff's wife testified to facts which would have supported the opinion of the expert (130–434, 152+262; 130–434, 153+736). Appeal and Error, ⟸1050(1).

Under this section the erroneous admission of evidence as to complaints of pain by plaintiff after her injury to her husband was not ground for reversal, the testimony being vague and of little consequence (131–448, 155+627). Appeal and Error, ⟸1050(1).

Erroneous rulings admitting incompetent or immaterial evidence constitute reversible error only where clearly prejudicial (128–277, 150+914; 124–437, 145+120; 125–317, 146+1113, L. R. A. 1916A, 912; 125–390, 147+281; 132–81, 155+1042). Appeal and Error, ⟸1050(1).

Error in admitting evidence of a fact shown by other unchallenged testimony is not ground for reversal (128–193, 150+800; 124–288, 144+965; 128–17, 150+213, L. R. A. 1916C, 1214, Ann. Cas. 1916D, 1101; 128–64, 150+223; 129–126, 151+907, Ann. Cas. 1916E, 760). Appeal and Error, ⟸1051(2).

In an action to recover a commission for the sale of land, an erroneous admission of evidence as to efforts made to sell the land was not made prejudicial, where it conclusively appeared that plaintiff found a purchaser (126–115, 148+50). Appeal and Error, ⟸1052(6).

Erroneous admission of evidence not within the issues was not ground for reversal, where the court ignored the evidence in its instructions, and held that its admission was not prejudicial on the motion for new trial (122–209, 142+193). Appeal and Error, ⟸1053(5).

In a case tried to the court, the admission of immaterial evidence which furnishes no basis for any findings made is not prejudicial error (161+213). Appeal and Error, ⟸1054(3).

The reception of objectionable testimony is not ground for reversal, where the court instructs the jury to disregard such evidence (125–353, 147+244). Appeal and Error, ⟸1053(3).

In an action for deceit in the sale of an interest in a corporation, the fraud alleged consisting in representations as to the financial condition of the company, admission of evidence as to the condition of the company four months after the representations were made, and as to acts of one of the defendants not connected with the fraud alleged, was prejudicial error (123–185, 143+718). Fraud, ⟸25, 55.

Exclusion of evidence—Harmless error—Where a party is afforded an opportunity to cross-examine a witness at the trial, it is immaterial error that he was denied the right of cross-examination under § 8377 (131–152, 154+954). Appeal and Error, ⟸1048(6).

Error in excluding evidence is harmless, where the complaining party otherwise obtained the benefit of the excluded testimony (125–102, 145+791). Appeal and Error, ⟸1058(1).

It was not prejudicial error to sustain objections to questions calling for declarations of the deceased to the effect that he intended not to pay assessments in the future (124–431, 145–118). Appeal and Error, ⟸1056(1).

Erroneous exclusion of evidence which, if admitted, could not have changed the result, is not ground for reversal (128–30, 150+229, L. R. A. 1916D, 739). Appeal and Error, ⟸1056(6).

The improper rejection of evidence when first offered is not reversible, where such evidence is later received; and the reception of evidence which is a mere repetition of evidence already received without objection is not reversible error (129–417, 152+833). Appeal and Error, ⟸1050(1), 1058(1).

Error in excluding proper questions asked a witness is not ground for reversal, where the witness subsequently testified fully as to the matters excluded (131–482, 155+758). Appeal and Error, ⟸1058(2).

Error in excluding evidence as to defendant's good faith in an action for slander was harmless, where recovery was limited by the charge to compensatory damages (122–177, 142+147, 47 L. R. A. [N. S.] 1098, Ann. Cas. 1914D, 894). Appeal and Error, ⟸1059.

Where the uncontradicted evidence shows a certain fact, the exclusion of evidence to establish such fact is not ground for reversal (126–430, 148+309). Appeal and Error, ⟸1057(1).

In replevin for an adding machine, the exclusion of plaintiff's testimony amounting to nothing more than legal conclusions was not prejudicial (162+1059). Evidence, ⟸471(2, 29).

Rejection of plaintiff's proffer of conversations had with defendant and his wife after maturity of the note in suit, involving admission of liability and tending to contradict and discredit their testimony, held prejudicial error (124–386, 145+116, Ann. Cas. 1915B, 734). Evidence, ⟸200.

Exclusion of evidence, in action against carrier for injury to goods carried held prejudicial error (124–357, 145+115). Carriers, ⟸133.

Variance—Where a complaint in an action on a beneficiary certificate alleged an absolute obligation to pay a certain sum on the death of the member, the fact that the certificate offered in evidence contained some conditions was not a fatal variance, in view of this section; defendant not having been misled (130–329, 153+742). Appeal and Error, ⟸1039(13).

Instructions held not ground for reversal—Error in instructions as to matters not in issue is not ground for reversal (122–130, 141+1118; 121–388, 141+488; 123–109, 143+121; 128–129, 150+618). Appeal and Error, ⟸215(3), 1066.

Where the evidence conclusively shows that a heating plant complied with a contract of sale, error in instructions as to the proper measure of damages for nonperformance was not ground for reversal (126–338, 148+281). Appeal and Error, ⟸1068(1).

An erroneous instruction as to negligence of an engineer is not prejudicial, where the jury finds that the engineer was not negligent (127–1, 148+446). Appeal and Error, ⟸1068(1).

Erroneous instruction, not affecting the result, held not ground for reversal (161+413). Appeal and Error, ⟸1068(4).

Failure of the court to mark requested instructions as given or refused is not reversible error, where counsel does not call the court's attention thereto until after final argument has been completed (125–431, 147+434). Appeal and Error, ⟸230.

In action against town for injuries to plaintiff riding in buggy when he turned out of center track of road, as he claimed, to avoid barrier and because highway commissioner motioned to him, instruction held harmless to plaintiff (162+332). Appeal and Error, ⟸1064(1).

Where verbal inaccuracies or incompleteness of statement occur in a charge which might have been rectified by a request for a more complete charge the judgment will not be reversed, the error being without prejudice (131–482, 155+758). Appeal and Error, ⟸1064(4).

Instruction favorable to party complaining is not ground for reversal (122–209, 142+193). Appeal and Error, ⟸1033(5).

When charge, taken as a whole, is correct, there will be no reversal for isolated erroneous statements which could not mislead the jury (121–473, 141+843). Trial, ⟸295.

Error in instructions as to the measure of damages held not prejudicial (132–265, 156+121). Appeal and Error, ⟸1068(4).

Omission in instructions covered by answer to interrogatories. Error in instructions where verdict is correct (121–258, 141+164, L. R. A. 1915D, 644). Appeal and Error, ⟸1068(1).

Instructions, effect of cross-examination of adverse party (122–20, 141+810).

Technical errors in instruction held not ground for reversal (122–327, 142+706, 46 L. R. A. [N. S.] 606, Ann. Cas. 1914D, 922).

A charge upon comparative negligence under the federal act held technically erroneous, but not prejudicial (124–503, 145+381). Appeal and Error, ⟸640.

Instructions held ground for reversal—Failure of court in drainage appeal to inform the jury that they should not consider the amount awarded by the viewers held prejudicial error (122–392, 142+802). Drains, ⟸36(4).

An instruction authorizing recovery of punitive damages in an action for breach of marriage promise, in which such damages was not sought in the complaint, is not harmless error (123–498, 144+213, 49 L. R. A. [N. S.] 757, Ann. Cas. 1915A, 295). Appeal and Error, ⟸1066.

Where in an action on a note, in which the issues of fraud in procuring the note and that plaintiff was not a bona fide purchaser, were submitted to the jury, it cannot be presumed, in favor of a verdict for plaintiff, that the jury found for plaintiff on the issue of fraud, so as to render harmless error in the instructions on the issue of bona fide purchase (127–291, 149+467). Appeal and Error, ⟸1031(1).

Error in an instruction in action for obstruction of flow of water by boom company held prejudicial (127–490, 150+218). Appeal and Error, ⟸1064(1).

Reversal where damages are nominal—A verdict for $1.31, being for a nominal sum, will not be reversed under the maxim "de minimis" (133–423, 158+705). Appeal and Error, ⟸1171(2).

An order sustaining a demurrer to a complaint, where otherwise proper, will not be reversed merely because plaintiff might have recovered nominal damages (129–11, 151+407). Appeal and Error, ⊂⊃1171(6).

A judgment dismissing the action will not be reversed and a new trial granted merely to give plaintiff nominal damages (134–209, 158+979).

Misconduct, argument and remarks of counsel—Misconduct of attorney in argument held not ground for reversal, in view of court's instruction to jury (128–245, 150+804). New Trial, ⊂⊃32.

Alleged improper remarks by counsel in argument held not prejudicial error (127–15, 148+476). Trial, ⊂⊃133(6).

Remarks of counsel and certain conduct of his during the trial held not sufficient to require a reversal (126–168, 148+61). Appeal and Error, ⊂⊃1060(1).

The act of counsel in argument in reading instructions which were later given by the court, and the announcement by the court that certain instructions given were requested by one of the parties, held not prejudicial error (134–392, 159+955). Appeal and Error, ⊂⊃1060(1).

Act of attorney, while examining jurors, in calling defendant to the stand and asking him if a certain company was interested in the defense, though error, held not prejudicial (132–128, 155+1077, L. R. A. 1916D, 644). Appeal and Error, ⊂⊃1057(1).

Intimation by plaintiff's counsel, in a suit for damages resulting from negligence, that defendant carried insurance, was not prejudicial error, where defendant's attorney vigorously denied that insurance was carried, and challenged plaintiff to show it by evidence (134–378, 159+832). Trial, ⊂⊃108½.

Improper remarks by court—Remark of judge that conduct of defendant's counsel was contemptible, and not fair or right, held not so obviously prejudicial as to demand a new trial (122–343, 142+816). Appeal and Error, ⊂⊃1060(1).

Misconduct of jury—The determination of the trial court that certain misconduct of the jury was not prejudicial will not be disturbed on appeal, where the record does not contain the evidence upon which such ruling was based (126–90, 147+716). Appeal and Error, ⊂⊃716, 1015(5).

Misconduct of jury in examining place of accident without knowledge of the court and the parties held not ground for reversal (126–48, 147+716). New Trial, ⊂⊃56.

Amendment of pleadings—Error in permitting amendment of answer after the evidence was submitted was not prejudicial, where the evidence was admissible under the original answer (128–498, 151+201). Appeal and Error, ⊂⊃1041(3).

Error in refusing to permit a defendant to amend his answer is not ground for reversal, where the evidence which could have been received under the answer as amended was introduced and submitted to the jury (127–15, 148+476). Appeal and Error, ⊂⊃1041(3).

Failure to furnish bill of particulars—Failure of plaintiff to comply with defendant's demand for a bill of particulars in an action on an account was not presumptively prejudicial error, where the demand for information did not indicate what facts were desired beyond what was alleged in the complaint, which was full and specific (132–8, 155+617). Appeal and Error, ⊂⊃1039(10).

Excessive damages as showing prejudice of jury—Defendant, against whom a verdict for $5,750 for a tort was rendered, cannot complain because the court reduced the verdict to $2,500; the action of the court not necessarily showing that the jury were so prejudiced that they could not have impartially determined the question of liability (122–343, 142+816). Appeal and Error, ⊂⊃1004(3).

Ascribing wrong reason for a ruling—Where a decision is correct on the merits, it is immaterial that the court ascribes a wrong reason for its ruling (126–154, 147+959). Appeal and Error, ⊂⊃854(2).

Limitation of peremptory challenges—Limiting peremptory challenges to three for both defendants held not ground for reversal, where it did not appear that each defendant was not in fact allowed three challenges, and that jurors remained whom defendants desired to exclude (124–204, 144+938). Appeal and Error, ⊂⊃1045(1).

Omission of material findings—A judgment will be affirmed, though a material finding is wanting, when it clearly appears that its omission was an oversight, and the evidence is conclusive as to what it should be (134–468, 158+787). Appeal and Error, ⊂⊃1071(6).

Erroneous submission of case to jury—Failure to submit a case to the jury as required by this section, where it clearly appears that such submission could not have changed the result, is error without prejudice (130–111, 153+259). Appeal and Error, ⊂⊃1061(4).

Amendment of findings—Refusal to amend findings held not prejudicial error (121–395, 141+518, Ann. Cas. 1914D, 160). Appeal and Error, ⊂⊃1071(1).

Defective designation of parties in complaint—The designation of plaintiff, suing as guardian, as "R., as guardian," instead of "B., an incompetent person, by R., her guardian," though improper, is a technical error, curable by amendment, and not ground for reversal (123–360, 143+973). Appeal and Error, ⊂⊃1036(1).

Injunction—No abuse of discretion held shown in the granting of a temporary injunction against breach of a restrictive building covenant (126–334, 148+286). Injunction, ⊂⊃62(3).

ISSUES AND TRIAL

7790. Terms defined—

Meaning of word "trial" (see 135–307, 160+778).

7792. Issues, how tried—Right to jury trial—

In general—This section does not enlarge the constitutional right of trial by jury, but merely recognizes that right (130–252, 153+527). Jury, ⊂=10.

Negligence of railroad company in running train at crossing (125–137, 145+804). Railroads, ⊂=350(6).

The court may in a proper case submit a cause to the jury on narrower ground of liability than that claimed in the complaint (131–448, 155+627). Trial, ⊂=203(2).

Negligence and contributory negligence in action for injuries to servant (128–146, 150+394).

Nature of action—An action at law for money damages only for fraudulent representations inducing plaintiff to enter into a contract was triable by jury under this section (162+1049). Jury, ⊂=13(7).

Where a party is ordered to interplead and his right to a fund in court depends on the power of the court to relieve him from an accepted bid, he is not entitled to a jury trial (135–115, 160+500). Jury, ⊂=13(19).

Issues of law in mandamus are not triable by jury (132–36, 155+1048). Jury, ⊂=19(3).

Where one defendant held title to land impressed with a trust in favor of plaintiff, and conveyed to a codefendant, who had notice of plaintiff's rights, and such codefendant conveyed to a third person having like notice, held that plaintiff had no cause of action at law against the defendants for damages and was not entitled to a trial by jury (133–452, 158+707). Jury, ⊂=14(5).

The court, in an equitable action, may withdraw from the jury issues submitted to them, or may direct a verdict at the conclusion of the trial; § 7998 not applying to such actions (129–59, 151+532). Trial, ⊂=171.

An action at law is triable by a jury, though the answer pleads fraud and asks equitable relief (126–445, 148+302). Jury, ⊂=14(1).

In action at law for fraudulent representations, triable by jury under this section, plaintiff is not deprived of his right to a jury trial because defendant interposed alleged equities (162+1049). Jury, ⊂=13(18).

Time for demand—Plaintiff's demand for a jury trial, made when the case was called for trial, was seasonable (162+1049). Jury, ⊂=25(6).

The court has power to submit an issue to a jury after the commencement of the trial (131–62, 154+661). Trial, ⊂=371.

Discretion of court—Whether the issues of testamentary capacity and undue influence, on appeal to the district court from a decree of the probate court admitting a will to probate, shall be tried by a jury, is within the discretion of the district court; and issues once framed for the jury may be withdrawn before decision, and decided by the court, though the evidence is such that the court would not have been justified in directing a verdict (131–439, 155+392). Wills, ⊂=379, 380.

The court, in summary proceedings against an attorney under § 4956, may send issues to a jury (122–87, 141+1103).

Waiver of right—In action at law for fraudulent representations, triable by jury under this section, in which defendant alleged certain equities, plaintiff did not waive his right to a jury trial by demanding that all the issues be tried by a jury (162+1049). Jury, ⊂=28(1).

Questions of fact in general—A request to court to determine disputed questions of fact was properly denied (162+1068). Trial, ⊂=261.

That plaintiff's intestate moaned and breathed for ten minutes after receiving the fatal injury was sufficient to make it a question for the jury whether his cause of action survived under the federal employers' liability act (127–144, 149+14). Death, ⊂=103(1).

Whether plaintiff's intestate was rightfully in defendant's building, when a fire occurred therein which caused her death, so that she would have had the same cause of action that the tenants would have had, was a question for a jury (126–144, 148+108). Landlord and Tenant, ⊂=169(11).

Question of surrender of lease held for jury (128–144, 150+398). Landlord and Tenant, ⊂=18.

Whether there was a parol gift of land held, on the evidence, a question for the jury (126–389, 148+125). Gifts, ⊂=50.

Whether a gift was accepted and executed by performance sufficient to take it out of the statute of frauds held, on the evidence, a question for the jury (126–389, 148+125). Frauds, Statute of, ⊂=158(4).

Evidence held to raise a question of fact for the jury as to whether medicines sold by defendant to plaintiff were worthless (123–468, 143+1133). Money Received, ⊂=18(3).

The jury may determine the amount of damages accruing from defendant's acts, though such damage cannot be ascertained with mathematical certainty; slight circumstances being sufficient to afford a basis for apportionment by the jury (127–118, 149+18). Damages, ⊂=208(1).

The testimony of a witness held not so discredited by prior written statements and reports, or by his cross-examination, as to make it error to submit his testimony to the jury, as the jury had a right to consider the circumstances under which the statements were made (127–144, 149+14). Witnesses, ⊂=397.

Whether the operation of a switchyard constituted a private nuisance to adjacent property held a question for the jury (125–224, 146+353, 51 L. R. A. [N. S.] 1017). Eminent Domain, ⟸104.

Whether a sunstroke is a disease held a question for the jury, in an action on an accident policy (125–186, 145+963). Insurance, ⟸668(1).

On the evidence, held, that whether a father intentionally omitted to provide for a child in his will was a question of fact for the jury (125–40, 145+623, 51 L. R. A. [N. S.] 645). Descent and Distribution, ⟸47(2).

Whether plaintiff was employed in interstate commerce, within the meaning of the federal employers' liability act, and whether he was injured by the negligence of his fellow servants, held questions for the jury (128–360, 150+1091). Master and Servant, ⟸284(2), 287(4).

Failure of the court in a drainage appeal to inform the jury that they should not consider the amount of damages awarded by the viewers held an invasion of the province of the jury (122–392, 142+802). Trial, ⟸133(1).

When a competent witness testifies that a photograph is a correct representation, it is not for the court to decide either that the witness is unworthy of belief or that the photograph is misleading (124–65, 144+434). Evidence, ⟸380; Trial, ⟸56.

Though a party's testimony may not be contradicted by direct testimony, the circumstances may be such that the credibility of his testimony is a question for the jury (127–291, 149+467).

Negligence—As to whether a surgical operation was made at a proper time held a question for the jury (124–269, 144+958). Physicians and Surgeons, ⟸18(9).

Whether a city and a railroad company were negligent in permitting a precipitous cliff to exist at the side of a street, without sufficient guards to prevent a wagon backing against it from breaking through the railing and falling over the cliff, held for the jury (128–95, 150+379). Municipal Corporations, ⟸819(1), 821(13), 822(2).

In an action by an employé, defendant held not entitled to a directed verdict on the ground that the evidence failed to show that plaintiff was injured within the scope of his employment, or that contributory negligence conclusively appeared (126–203, 148+113). Judgment, ⟸199.

Evidence held sufficient to take the case to the jury on the issue of negligence under the federal employers' liability act (128–112, 150+385). Master and Servant, ⟸276(1).

Negligence and contributory negligence in an action for injuries to an employé held properly submitted to the jury (124–466, 145+385). Master and Servant, ⟸276(3).

That couplers had several inches play, and did not couple on a curve, because out of line, held to present a jury question as to whether they complied with the federal safety appliance act (122–513, 142+883). Master and Servant, ⟸286(13).

Whether an employer was negligent in adopting a proper method of inspecting bottles which were being filled with carbonated water, or in not providing masks or goggles as a means of protection, and whether plaintiff assumed the risk, held, on the evidence, a question for the jury (126–364, 148+278). Master and Servant, ⟸286(27), 288(3).

In an action under the federal employers' liability act, the issues of negligence, contributory negligence, assumption of risk, and proximate cause held for the jury (130–405, 153+848). Master and Servant, ⟸286(22), 288(2), 289(3).

As to an employé working in a garage, who was injured by falling into an unguarded pit, newly made, held, that negligence, contributory negligence, and assumption of risk were for the jury (129–70, 151+537). Master and Servant, ⟸286(22), 288(2), 289(20).

Negligence of master in failing to warn servant, and in failing to provide a mangle with a hand guard, held for the jury (128–245, 150+804). Master and Servant, ⟸286(40, 41).

Whether a brakeman assumed the risk of injury from a defect in a vestibule trapdoor held a question for the jury (125–7, 145+613). Master and Servant, ⟸288(2).

Contributory negligence and assumption of risk, in action by servant for injuries, held for the jury (128–245, 150+804). Master and Servant, ⟸288(11), 289(10).

Whether a railroad company was negligent in permitting a board to remain in a passageway on its right of way, with a nail protruding therefrom, on which plaintiff stepped, held a question for the jury (125–256, 146+1092). Railroads, ⟸282(7).

The court did not err in submitting to the jury the question whether plaintiff, injured when he was 5 years 3½ months old, was guilty of contributory negligence (130–3, 153+250). Railroads, ⟸400(11).

Negligence and contributory negligence, in action against railroad company for injuries at a crossing, held for the jury (129–262, 152+408). Railroads, ⟸350(30).

Negligence and contributory negligence in the case of a person alighting from a moving train, into which he had gone to assist an outgoing passenger, held for the jury (124–517, 145+746). Carriers, ⟸320(2, 29).

Contributory negligence of a passenger of the driver of a team which collided with a train at a crossing held for the jury (128–14, 150+164). Negligence, ⟸93(1), 136(30).

Whether a boy 8 years 10 months old was guilty of contributory negligence in attempting to cross between cars of a freight train blocking a street crossing held a question for a jury (126–279, 148+101). Negligence, ⟸136(29).

Questions of agency—Whether contract was made by an agent on behalf of defendant, and whether plaintiff relied on such authority of the agent, held questions for the jury (125–311, 146+1109). Contracts, ⟸323(1); Principal and Agent, ⟸124(2).

Existence of agency held a question for the jury (126–346, 148+285). Appeal and Error, ⟸1005(2).

In action against corporation for conversion of shares of stock owned by plaintiff and delivered by defendant to a bank, whether such delivery was authorized by plaintiff, or was rati-

fied by him, held a question of fact, and not of law (131–231, 154+1081). Appeal and Error, ⊂⊃999(1).

Construction of contracts—Whether subsequent acts of the parties to a contract have rendered certain ambiguous parts of the written contract is a question of fact for the jury (128–490, 151+203). Contracts, ⊂⊃176(2).

Where the intention of the parties to a written instrument is to be determined from a consideration of all the facts and circumstances surrounding the transaction, the question becomes largely one of fact for the jury (129–328, 152+732).

Construction of building contract held improperly disposed of by the trial court as a question of law; it being one of fact, or of mixed law and fact, as to which the court should have received testimony (127–129, 148+1077). Contracts, ⊂⊃176(5).

Where a written contract is ambiguous, and the parol evidence as to its meaning is not conclusive as to the intention of the parties, the construction of the contract is properly submitted to the jury (127–241, 149+285). Contracts, ⊂⊃176(2).

Insurance—Whether a fraternal insurance order waived nonpayment of assessments by refusing to receive payment thereof when tendered held a question for the jury (126–494, 148+299). Insurance, ⊂⊃825(1).

Whether an injury was a visible one, within the meaning of a by-law of a fraternal benefit association, held for the jury (123–505, 144+160, 49 L. R. A. [N. S.] 1022, Ann. Cas. 1915A, 536). Insurance, ⊂⊃668(11).

Whether a misrepresentation by an applicant for life insurance is material, whether it increases the risk of loss, and whether it was made with fraudulent intent, are usually questions of fact for the jury (123–453, 144+218, Ann. Cas. 1915A, 458). Insurance, ⊂⊃668(6).

Evidence held sufficient to take the case to the jury on the question whether the hearing before the executive committee of a fraternal benefit order, pursuant to which assured was expelled, was such as to deprive the court of jurisdiction because no appeal was taken within the order (124–437, 145+120). Insurance, ⊂⊃825(1).

Whether the warranty by the insured that the building, wherein was kept the property covered by the policy, was a private residence, was for the jury (125–54, 145+622). Insurance, ⊂⊃666.

Cause of injury—Evidence in an action under the federal employers' liability act held not so conjectural as to the cause of the death of plaintiff's intestate as to render it improper to present the question to the jury (127–498, 150+165). Master and Servant, ⊂⊃278(6).

Whether the defective floor of a bridge was the proximate cause of injury to a passenger in an automobile held a question for a jury (125–431, 147+434). Carriers, ⊂⊃320(30).

Question of proximate cause of injury on defective bridge held for the jury (128–47, 150+221). Bridges, ⊂⊃46(11).

Questions of law in general—Whether a transaction is usurious is usually a question of fact; but where the facts are undisputed, and only one inference can be drawn from them, it becomes a question of law. (132–323, 156+666). Usury, ⊂⊃119.

Where there is no evidence as to the location of government corners, monuments placed by a county surveyor, under § 773, are prima facie the government corners, and it is error to submit the question to the jury (124–233, 144+758). Boundaries, ⊂⊃40(1).

Where defendant contracted to furnish ice to plaintiff, who conducted a meat market, damage to the meat from failure to deliver the ice was necessarily within the contemplation of the parties, and it was not error for the court to so instruct the jury as a matter of law (123–401, 143+1125). Sales, ⊂⊃418(14).

Whether a buyer of ice exercised reasonable diligence, under the circumstances, to obtain a delivery of the ice, held a question for the jury (123–401, 143+1125). Sales, ⊂⊃420.

Where a physician for insurer positively testified that insured made answer to certain questions on his application for life insurance, and signed the application, the mere fact that a witness testified that he was in the physician's outer office, and that the physician and insured were in the physician's private office at the time the application was signed no more than ten minutes did not raise a question for the jury as to whether insured gave the answers shown on the application (129–340, 152+724). Insurance, ⊂⊃819(1).

A conceded fact is a matter of law for the court (123–453, 144+218, Ann. Cas. 1915A, 458). Insurance, ⊂⊃668(1).

The court cannot say as a matter of law that the rule of respondeat superior does not apply, unless the evidence shows conclusively that the alleged employer possessed no control over the negligent person (128–43, 150+211). Master and Servant, ⊂⊃284(2).

The question of loss of residence by a debtor, claiming under the exemption law, held, on the evidence, a question of law (122–228, 142+307). Trial, ⊂⊃139(1).

There being no evidence connecting defendant with alleged fraud, it was error to submit the issue to the jury (127–340, 149+545).

Evidence held insufficient to warrant submitting to the jury the question of mental incompetency to execute a release for personal injuries (128–440, 151+188). Compromise and Settlement, ⊂⊃8(2); Release, ⊂⊃57(1).

Negligence—Assumption of risk by employé held not a question of law for the court (124–257, 144+955). Master and Servant, ⊂⊃288(2).

Whether it was unreasonable for a servant to rely on assurances given him was a question for the jury, unless the court could say that reasonable minds could reach but one conclusion (127–132, 148+1078). Master and Servant, ⊂⊃288(1, 16).

Passenger on freight train held not to have assumed the risk of injury by riding in cupola in caboose of freight train, contrary to carrier's rules, nor was he guilty of contributory negligence as matter of law (123–405, 143+1131). Carriers, ⊂⊃347(6).

Probable cause—Want of probable cause for prosecuting a suit is for the court on undisputed facts, but the aid of a jury may be required where the facts are disputed, and whether advice of counsel protected defendant from liability for malicious prosecution was a question for the jury in this case (131–320, 155+205). Malicious Prosecution, ⟸24(1), 60(4), 71(2).

What facts, and whether particular facts, constitute probable cause for a prosecution, is for the court (129–97, 151+895, Ann. Cas. 1916E, 374). Malicious Prosecution, ⟸71(2).

Whether undisputed facts show probable cause for a criminal prosecution is a question for the court (126–128, 147+1093). Malicious Prosecution, ⟸71(2).

7793. **Of fact, how brought to trial**—Issues of facts may be brought to trial by either party, upon notice served eight or more days before the beginning of a general term. At least seven days before the term one of the parties shall file a note of issue, containing the title of the action and the names of the respective attorneys, and stating the time when the last pleading was served and whether the issue is triable by the court or a jury. The clerk shall thereupon enter the cause on the calendar according to the date of issue, and it shall remain thereon, from term to term, until tried or stricken off by the court. Provided, that in all districts now or hereafter consisting of one county only, wherein but one term of court is or hereafter shall be held annually, no notice of trial need be served, but the party desiring to place a cause upon the calendar thereof for trial, shall, after issue is joined therein, prepare a note of issue containing the title of the cause, a statement as to whether the issue is an issue of law or an issue of fact, and if an issue of fact, whether triable by court or jury, and the names and addresses of the respective counsel, and shall serve the same on opposing counsel, and file such note of issue, with proof of service, with the clerk of court within ten days after such service; and, thereupon, the clerk shall set such cause for trial, in accordance with such rules as the judges of said court may make, but in no event earlier than thirty days after the filing of such note of issue, and shall notify all counsel in said cause by mail of the date of such setting. The judges of said court may, by order or rule of court, provide for the assigning and setting of cases for trial upon such calendar, and the order in which they shall be heard, and the re-setting thereof. All appeals from inferior tribunals, including probate court, justice court, county commissioners, and all boards from the decision of which an appeal lies to such court, shall in like manner be placed upon the calendar for trial. For all purposes, other than those specifically herein provided for, the first Monday in each month of the year, except in the months of July, August and September, shall be deemed the first day of a regular or general term of such district court, held in such county, and all persons committed for trial, or held to appear before such court, shall, unless otherwise provided, appear on such dates. Provided, that when the first Monday of any such month shall be a legal holiday the following day shall be deemed to be the first day of such general term of such district court. (Amended '17 c. 6 § 1)

That a motion for new trial was heard seven, instead of eight, days from the day of service of the notice, was an irregularity, not ground for reversal, in absence of a request for relief on account of the insufficiency of the notice (129–528, 152+270). New Trial, ⟸165.

JURY TRIALS

7797. **Jury, how impaneled—Ballots—Rules of court—Examination—Challenges—**

In examining jurors, a party may elicit such information as is necessary to enable him to discover interest or bias; but he will not be permitted to excite prejudice against the adverse party. The nature and extent of the examination rests largely in the discretion of the court (134–378, 159+832). Jury, ⟸131(5).

In a suit for damages from negligence, plaintiff may show by evidence that defendant is insured, as a basis of questioning the jurors as to any interest they may have in the insurance company, but mere intimations that defendant carries insurance is improper (134–378, 159+832). Trial, ⟸108½.

7798. **Challenges—**

124–204, 144+938.

7799. **Order of trial—**

Not ground for reversal where no prejudice results (121–170, 141+1). Appeal and Error, ⟸1046(4).

It is not error to refuse to reopen the case and permit plaintiff to introduce evidence under its reply to defendant's amended answer filed after the submission of the evidence, where the amended answer and reply presented no new issues (128–498, 151+201). Trial, ⊂=66.

Refusal to direct a verdict at the close of plaintiff's case is not available error, though plaintiff had failed to prove notice of her injuries to defendant city, where such evidence was in fact received before the case was submitted to the jury (126–491, 148+304). Appeal and Error, ⊂=1061(4).

A concession as to the facts made in the opening statement may be made the basis of a motion to dismiss, where, with such facts, there can be no recovery under the complaint (127–443, 149+667). Trial, ⊂=109.

Instruction which in effect directs the jury to disregard argument of counsel is fatally erroneous (124–386, 145+116, Ann. Cas. 1915B, 734). Trial, ⊂=218.

7800. View of premises—Procedure—

Sufficiency of request for review by jury (see 126–203, 148+113).

7802. Requested instructions—

In general—The trial court did not err in answering a question asked by a juror (124–431, 145+118). Insurance, ⊂=825(1).

Request for instructions, contributory negligence affecting amount of damages under federal employers' liability act (121+269, 141+175).

The court may decline to give requested instructions which are either inaccurate or do not conform to the evidence (128–193, 150+800).

Ambiguity or uncertainty in the court's charge must be called to the attention of the trial court before the jury retires (126–203, 148+113).

An instruction fundamentally wrong, or which has the effect of preventing a verdict for a substantial amount on a cause of action well pleaded, may be assigned as error on motion for new trial, though no exception is taken at the trial; but it is otherwise with respect to inaccuracies of expression and inadequate treatment of the controversy (125–441, 147+445, 52 L. R. A. [N. S.] 1176). New Trial, ⊂=40(4).

Requests covered by the general charge—Requested instructions, covered in substance by the charge as given, are properly refused (124–222, 144+774, 50 L. R. A. [N. S.] 170; 121–160, 141+104; 121–258, 141+164, L. R. A. 1915D, 644; 122–20, 141+810; 124–155, 144+462; 125–150, 145+806). Trial, ⊂=260(1).

Requested instructions covered by charge as given are properly refused (127–515, 150+176).

Failure to request instructions—Where an instruction contains misstatements or omissions due to inadvertence, it is the duty of the party complaining to request a correct instruction, and this rule is not affected by 1901 c. 113 (125–466, 147+441). Trial, ⊂=287.

Where no request is made by counsel, it is not error if the trial court merely fails to give an instruction on an issue presented by the pleadings (132–147, 153+513; 132–147, 155+1040). Trial, ⊂=255(1).

Duty to request more definite and specific instructions (121–439, 141+523). Trial, ⊂=273.

Verbal inaccuracies or incompleteness in a charge is not ground for reversal, where the error could have been corrected by a requested charge, but no request was made (131–482, 155+758). Appeal and Error, ⊂=1064(4).

Failure of the court to instruct on a particular phase of the case is not error, in absence of a request for such instruction (131–274, 154+1070). Trial, ⊂=256.

If an instruction is desired upon a point omitted in the general charge, a request embodying such point should be presented (122–517, 142+897, Ann. Cas. 1914D, 1056). Trial, ⊂=255(9).

Omission in charge is not ground for reversal in absence of request (122–343, 142+816). Torts, ⊂=28.

Where the court, through inadvertence, omits an exception in stating the purport of a statute, it is the duty of the party complaining thereof to call the court's attention thereto (125–431, 147+434). Appeal and Error, ⊂=215(4).

A misstatement in an instruction due to inadvertence is not ground for reversal, where appellant failed to call the trial court's attention thereto (129–70, 151+537).

Failure to instruct as to the character of the evidence required to prove an issue is not error, in the absence of a request therefor (125–353, 147+244).

Defendant, not having requested an instruction on assumption of risk, cannot complain on appeal of the court's failure to present that issue (124–245, 144+772). Trial, ⊂=255(11).

An incomplete definition of assumption of risk in an instruction is not ground for reversal, in absence of a request for a correct charge (123–109, 143+121). Appeal and Error, ⊂=215(1).

Defendant, having failed to call the court's attention to the fact that its instructions upon assumption of risks was included in its charge upon negligence, and having requested no further direction, was not in a position to complain (123–173, 143+322). Appeal and Error, ⊂=216(1).

Failure of court to instruct as to distinction between knowledge and notice, as imposing duty to warn servant, was not reversible error, in absence of request (124–1, 144+466). Trial, ⊂=256(9).

Where a railroad company, sued for damages to live stock, did not request an instruction as to a limitation of the amount of recovery, it could not complain on appeal of the court's failure to instruct as to such limitation (123–495, 144+220). Appeal and Error, ⊂=215(1).

Failure of the court to instruct on the issue of the contributing negligence of a fellow servant is not available error, where no instruction was requested thereon (124–141, 144+751). Trial, ⊂=255(10).

Modification of request—Where the court fairly informs the jury as to the weight of the evidence necessary to impeach a release, the refusal to state the rule in the language of the proffered request is not error (123–516, 144+407). Trial, ⊂=266.

If the substance of a requested instruction is given, it is not error to refuse to repeat the same thought in the language of the requested instruction (125–431, 147+434). Trial, ⊂=260(1).

The court need not give a requested charge in the same words in which it is asked (128–490, 151+203).

Failure of judge to mark instructions as given or refused—Failure of the court to mark requested instructions as given or refused is not reversible error, where counsel does not call the court's attention thereto until after final argument has been completed (125–431, 147+434). Appeal and Error, ⊂=230.

Mode of presenting instructions to jury—It is bad practice to announce to the jury that certain instructions given were requested by one of the parties, but it is not reversible error if the court makes it clear that the instruction is given as the law of the case (134–392, 159+955). Trial, ⊂=296(1).

That defendant's counsel read to the jury in argument some instructions which the court later gave in accordance with this section was not prejudicial error (134–392, 159+955). Appeal and Error, ⊂=1060(1).

7803. What papers jurors may take—

That an improper paper was taken by the jury to the jury room along with other papers held not to require a new trial, in absence of a showing of prejudice (125–291, 146+1104, Ann. Cas. 1915C, 922). New Trial, ⊂=56.

It was not error to decline to permit the jury, on its request, to have a transcript of the testimony of a witness given on a former trial (124–431, 145+118). Trial, ⊂=307(1).

It was not error to refuse to permit a letter in evidence to be taken into the jury room; the letter being read to the jury instead (124–431, 145+118). Trial, ⊂=307(2).

A party, desiring to have the jury take the pleadings with them to the jury room for the purpose of obtaining the benefit of admissions in the pleadings, should offer the pleadings in evidence for the express purpose of introducing the admissions, and a mere general offer of the pleadings as evidence is insufficient (133–156, 157+1073). Trial, ⊂=48.

7804. Verdict, when received—Correcting same—Polling jury—

The court may correct formal or clerical errors in a directed verdict after the verdict is recorded and after the time for appeal has expired (123–420, 144+148). Trial, ⊂=340(1).

When the jury returns a verdict which is not justified in any view of the evidence and law of the case as embodied in the instructions, the court may refuse to accept it and require the jury to return and report a proper verdict (129–372, 152+765). Trial, ⊂=339(3).

7805. Five-sixths of jury may render verdict, etc.—

This section is applicable to bastardy proceedings (135–65, 160+189). Jury, ⊂=32(4).

This section is applicable to an action in a state court based upon the federal employers' liability act (126–251, 148+104; 134–61, 158+796; 128–112, 150+385). Trial, ⊂=321½.

It is the province of a trial court to determine whether a jury has given sufficient consideration to a case to justify a reception of a verdict not unanimous, and such determination will not be reversed, unless the discretion is abused or the law has not been complied with (126–180, 148+51). Appeal and Error, ⊂=975.

Where the verdict is concurred in by twelve jurors, the defeated party cannot raise the question of the constitutionality of this act (132–391, 157+650).

What constitutes twelve hours' deliberation—A recital in the verdict that it was rendered after twelve hours' deliberation makes a prima facie showing that it was properly rendered by five-sixths of the jury, which is not overcome by a notation of the hour and minute at which the agreement is reached or the verdict signed (131–236, 154+1075). Trial, ⊂=321½.

A statement by a juror that ten of the jurors agreed on the verdict finally rendered by them shortly after the jury retired, but did not sign it until after the 12 hours' deliberation, did not show that there was not 12 hours' deliberation and effort to agree, as contemplated by the statute (131–231, 154+1081). Trial, ⊂=321½.

The length of time devoted to meals and sleep while a jury are deliberating cannot be shown, for the purpose of proving that they did not deliberate for the prescribed length of time (126–180, 148+51). Trial, ⊂=321½.

7807. Verdict, general and special—

A general verdict for plaintiff for the exact amount of his claim necessarily determines the defendant's counterclaim contrary to his contention (127–449, 149+950).

7808. Same—Interrogatories—Special findings—

It is within the discretion of the trial court to grant or refuse a request to submit special interrogatories to the jury (127–468, 149+947). Trial, ⊂=349(2).

The matter of submitting special issues, as well as their form and substance, rests in the sound discretion of the trial court (132–181, 156+251, L. R. A. 1916D, 144). Trial, ⊂=352(1).

When a special finding submitted to the jury is material, it cannot be withdrawn by the

court or ignored by the jury, without the consent of both parties (123–353, 143+975). Trial, ⇐356(1).

Court may correct formal or clerical errors in a directed verdict, after the verdict is recorded and the time for appeal has expired (123–420, 144+148). Judgment, ⇐299(1); Trial, ⇐340(1).

A special verdict, which does not negative any essential element of the cause of action, neither controls, nor is inconsistent with, the general verdict (122–171, 142+145). Trial, ⇐359(1).

7812. Receiving verdict—

It is not reversible error, if the court in a civil action fails to notify absent counsel when the jury returns into the courtroom, either for additional instructions or to return the verdict (129–372, 152+765). Trial, ⇐21.

7813. Entries on receiving verdict—Reserving case—Stay—

Suspension of sentence for a definite period held proper, and within the discretion of the court (125–529, 147+273). Criminal Law, ⇐1001.

A stay does not prohibit the prevailing party from resorting to such ancillary remedies as garnishment or attachment (123–353, 143+975). New Trial, ⇐12.

TRIAL BY THE COURT

7815. Decision, how and when made—

Amendment of findings—Denial of motion to make new and amended findings after remand of cause from supreme court held proper (130–530, 152+866). Appeal and Error, ⇐1213; Trial, ⇐400(2).

Plaintiff's application to amend the findings of the trial court held properly refused (125–322, 147+107). Trial, ⇐400(1).

Court need not amend findings as to contentions not within the pleadings or made until the motion to amend (122–59, 141+1105). Trial, ⇐400.

Necessity of motion for amendment of findings, and construction of findings in absence of motion to amend same or for new trial (see 127–530, 149+1070). Trial, ⇐400(1).

The court has power to supply an omission in the findings, even after judgment (134–468, 158+787). Trial, ⇐400(1).

What findings not necessary—Formal findings of fact are not required on an interlocutory motion for allowance of attorney's fees for trustee (125–322, 147+107). Trial, ⇐388(2).

Findings are not proper on motion for judgment on the pleadings (129–181, 151+970). Pleading, ⇐350(3).

Where the complaint sets up an action at law, the fact that the answer pleads fraud and asks equitable relief does not require that the court should make findings instead of directing a verdict (126–445, 148+302). Trial, ⇐388(1).

It is not necessary, in a will contest, to make a specific finding of the facts upon which the right of the objector to contest the will depends (129–460, 152+872). Wills, ⇐334.

Court need not make findings on immaterial matters (122–295, 142+710). Trial, ⇐1; Vendor and Purchaser, ⇐33.

Refusal of findings of evidentiary facts held proper (122–510, 142+885). Trial, ⇐401.

Nature of facts to be found—A judgment will be affirmed, though a material finding is lacking, when it clearly appears that its omission was an oversight, and the evidence is conclusive as to what it should be (134–468, 158+787). Appeal and Error, ⇐1071(6).

The court should make findings upon every material issue of fact, the determination of which is necessary to sustain its judgment (132–160, 156+268). Trial, ⇐388(1).

Where title to real estate is in controversy, a finding that one party is the owner thereof is a finding of the ultimate issuable fact, and a finding of the evidentiary facts which result in such conclusion is unnecessary (132–144, 155+1038). Trial, ⇐395(5).

That parts of a finding of fact may be immaterial does not require a new trial, or a change in the conclusions of law (132–321, 156+348). New Trial, ⇐61.

Findings held to negative payment set up as a defense in the answer (131–249, 154+1072). Trial, ⇐404(1).

Conclusions held justified by the findings of fact (122–17, 141+789; 131–249, 154+1072). Trial, ⇐395(7).

Court, having determined total amount due, need not make specific findings as to each item (121–285, 141+186). Trial, ⇐395(1).

In an action for money had and received, a finding that the relation of principal and agent existed between plaintiff and defendant held not improper, though such agency was not pleaded (127–502, 150+167). Money Received, ⇐18(3).

Findings that one quarterly installment of rents were paid to a mortgagor during the period of redemption held not sufficient to authorize the trial court to determine the amount due to the mortgagor (135–443, 161+165). Mortgages, ⇐491.

Findings which do not cover material issues will not support conclusions of law embracing those issues (128–5, 150+216).

Review—Where the findings are insufficient to support the conclusions of law, the defeated party is not required to move to amend the findings in order to raise the question for the first time on appeal (128–5, 150+216). Appeal and Error, ⇐237(6).

When an action is tried by court, its findings of fact are entitled to the same weight as

a verdict, and will not be reversed unless manifestly contrary to the evidence (162+679). Appeal and Error, ⊂⊃1008(1).

The supreme court cannot make findings of fact (129–380, 152+774; 134–276, 159+566). Appeal and Error, ⊂⊃1122(2).

A positive and unambiguous order of the trial court cannot be modified or limited by inferences drawn from a memorandum of the judge not made a part thereof (123–231, 143+728). Motions, ⊂⊃62.

A contention not sustained by findings will not be considered, in the absence of a request in the trial court for findings (122–448, 142+876). Appeal and Error, ⊂⊃219(2).

The refusal of the trial court to make additional findings will not be reversed, unless the evidence is conclusive in favor of such proposed findings, nor where the proposed findings are in conflict with those already made (130–450, 153+874). Appeal and Error, ⊂⊃1023.

Findings control memorandum—The findings of fact control the memorandum of the trial judge (131–16, 154+512).

Findings without judgment as a bar—If a finding without a judgment is ever a bar, it must be upon an issue in the case where it is made, and there must be something equivalent to an estoppel against parties to assert the contrary. In state's action of trespass for taking of timber, finding on issue in a former case offered in bar held not an estoppel operating against the defendant (162+1054). Judgment, ⊂⊃658.

7816. Proceedings on decision of issue of law—

Where a demurrer was overruled, and judgment was entered for plaintiff without notice, but no application was made to the trial court for leave to answer or vacate the judgment, the question whether defendant was entitled to answer or to have the judgment vacated cannot be considered upon appeal (126–367, 148+306). Appeal and Error, ⊂⊃224.

7817. Court always open—Decisions out of term—

Powers of court commissioner (see 131–129, 154+748). Court Commissioners, ⊂⊃4.

GENERAL PROVISIONS

7825. Dismissal of action—

Cited (127–416, 149+735).

In general—A judgment of dismissal is not evidence in a subsequent suit between the same parties for the same cause (123–17, 142+930, L. R. A. 1915B, 1179, 1195). Judgment, ⊂⊃570(3, 4).

Where one who has contracted with an agent of an undisclosed principal sues both principal and agent, the remedy of the defendants is a motion to compel plaintiff to elect as to which defendant he will proceed against (124–421, 145+173). Principal and Agent, ⊂⊃184(2).

Vacation or setting aside of dismissals—Rights of stockholders as to dismissal of action in which the corporation is interested (122–355, 142+818, Ann. Cas. 1914D, 830). Corporations, ⊂⊃204.

The court has jurisdiction to vacate a judgment of dismissal, though it terminates the action, on the ground of fraud and collusion, at the motion of a party or strangers having an interest in the subject-matter (122–355, 142+818, Ann. Cas. 1914D, 830). Dismissal and Nonsuit, ⊂⊃43(2).

A plaintiff who acts in a fiduciary capacity has no absolute right to dismiss the action, and if he does not act in good faith in doing so the order of dismissal may be set aside (122–355, 142+818, Ann. Cas. 1914D, 830). Dismissal and Nonsuit, ⊂⊃43(4).

On reinstatement of case after dismissal on application of defendant, on plaintiff's failure to appear at the time set for trial, held, that the court properly required plaintiff to pay the expense incurred by defendant in bringing a witness from Canada for the trial (135–471, 160+1032). Dismissal and Nonsuit, ⊂⊃81(8).

Subd. 1—A dismissal in a court of another state is not to be counted in determining the number of successive dismissals (128–49, 150+397). Dismissal and Nonsuit, ⊂⊃42.

Consent to a dismissal precludes a subsequent motion to strike the consent and grant a new trial (123–532, 144+137). Appeal and Error, ⊂⊃883.

An appeal, taken under §§ 5407–5409, on the question of damages, may be dismissed by the appellant under this section (128–66, 150+222). Eminent Domain, ⊂⊃238(1, 7).

Subd. 2—Appellants cannot dismiss the appeal by merely serving a notice of dismissal upon appellee (134–464, 157+327). Appeal and Error, ⊂⊃776.

Subd. 3—Where subsequent grantees of a mortgagor and an assignee of the purchaser at a foreclosure sale were plaintiffs in an action against the original covenantor for breach of covenant of warranty, it was not error to dismiss as to all the plaintiffs except such assignee (126–14, 147+670). Covenants, ⊂⊃80.

A judgment entered upon a dismissal of an action on motion of the defendant at the close of plaintiff's testimony for insufficiency of evidence is not res judicata (124–495, 145+380). Judgment, ⊂⊃570(5).

A case may be dismissed, where plaintiff, in his opening statement, concedes facts which prevents his recovery under the complaint (127–443, 149+667). Trial, ⊂⊃109.

A misnomer of defendant railroad company, by adding to its corporate name the words "Relief Department," was not a ground for dismissal, jurisdiction having been acquired; the defect being amendable as of course (133–434, 158+711). Parties, ⊂⊃95(5).

Subd. 4—A case held properly on the calendar, and properly dismissed for want of prosecution (126–108, 147+822). Venue, ⟸72.

Where a supersedeas bond is not approved, and does not stay proceedings, the action may be dismissed by the trial court for want of prosecution (135–474, 159+1067). Appeal and Error, ⟸452, 470.

7826. Offer of judgment—Costs—

Tender as waiver of defense that debt is not due (121–285, 141+186). Tender, ⟸26.

The offer contemplated by this section may be made in defendant's answer (135–343, 160+864). Costs, ⟸42(2).

NEW TRIALS

7828. Grounds—Presumption on appeal—

THE STATUTE GENERALLY

Other remedy—The proper remedy for the omission to find on an issue is not by motion for new trial, but by application to the court for a finding (134–468, 158+787). New Trial, ⟸61; Trial, ⟸399.

Of less than all the issues—Where two issues are submitted to the jury, and one is found in favor of one party, and the other in favor of the other, and a motion for new trial on, but one of the issues is filed, the court may grant a new trial as to that issue alone (122–463, 142+729). Wills, ⟸337.

A new trial may be granted as to a part of the issues less than an entire cause of action. A new trial may be granted as to certain distinct claims, where the court erred in excluding evidence as to such claims (131–389, 155+391). Appeal and Error, ⟸1172(3).

IRREGULARITY OR ABUSE OF DISCRETION

Misconduct in general—A new trial will seldom be granted on the ground of abuse of discretion of the trial court in rebuking counsel (122–301, 142+812, 48 L. R. A. [N. S.] 842, Ann. Cas. 1914D, 804). Appeal and Error, ⟸972.

Remark of trial judge that conduct of defendant's counsel was contemptible, and not fair and right, held not ground for new trial (122–343, 142+816). Appeal and Error, ⟸1060(1).

The fact that an improper paper was taken, with other papers, to the jury room, held not ground for new trial (125–291, 146+1104, Ann. Cas. 1915C, 922). New Trial, ⟸56.

Quotient verdict (129–14, 151+408). Trial, ⟸315.

MISCONDUCT OF THE JURY

In general—A mere showing that after the trial a juror associated with the successful party on terms of intimacy was not such misconduct as to require a new trial (124–260, 144+950). New Trial, ⟸47.

When a mistake of the jury in writing up the verdict unanimously agreed upon is clearly shown, the question of discretion of the trial court in the grant of a new trial is not involved (135–13, 159+1070). New Trial, ⟸58.

Misconduct of the jury, such as drinking intoxicants, not prejudicial, and not brought about by the prevailing party, is not ground for new trial; but, where an interested person associates with the jurors and drinks with them, there is such misconduct as will vitiate a verdict favorable to the interest of such meddler (130–206, 153+526). Bastards, ⟸69; New Trial, ⟸56; Trial, ⟸304.

Affidavits on motion and testimony of jurors—Affidavits of all the jurors that by a clerical error of the jury the verdict returned was the opposite of that unanimously agreed upon may be considered on a motion for new trial (135–13, 159+1070, distinguishing 27–108, 6+456). New Trial, ⟸143(4).

The testimony of a juror held improperly received to impeach a verdict, unless the testimony relates to matters which occurred outside of court (126–180, 148+51). Trial, ⟸306, 344.

Unauthorized view—The decision of the trial court that an unauthorized view by a juror of the locus in quo did not influence the verdict is sustained (126–168, 148+61). New Trial, ⟸56.

The action of jurors in examining a vehicle, or the place where the collision with such vehicle occurred, held ground for new trial (126–90, 147+716). Appeal and Error, ⟸1015(5).

Examination of articles not in evidence (121–326, 141+300). New Trial, ⟸44(4).

MISCONDUCT OF COUNSEL

In general—An application for a new trial on the ground of misconduct of counsel is largely addressed to the sound discretion of the trial court, and such discretion will not be disturbed, unless clearly abused (130–80, 153+269). New Trial, ⟸29.

Though the granting of a new trial for misconduct of counsel in his argument to the jury is within the sound discretion of the trial court, it is prejudicial error to fail to instruct, on request, that the jury should disregard improper remarks of counsel (133–192, 158+46). New Trial, ⟸29.

Remarks by attorney of prevailing party in argument held not ground for new trial (123–245, 150+804). New Trial, ⊂=32.

Alleged improper remarks by counsel in his argument to the jury held not ground for a new trial (127–15, 148+476). Trial, ⊂=133(6).

ACCIDENT OR SURPRISE

134–481, 159+1095; 134–292, 157+499; 134–292, 159+623.

Where one moving for a new trial on the ground of accident and surprise, based on the affidavit of a witness that he was mistaken in his testimony as to dates, had given such witness a searching cross-examination on the trial, denial of the motion for new trial was not a breach of discretion (134–468, 158+787). New Trial, ⊂=90.

Trial court held not to have abused discretion in denying new trial (121–455, 141+803). New Trial, ⊂=82.

NEWLY DISCOVERED EVIDENCE

161+515; 132–114, 155+1074; 135–9, 159+1075.

In general—Denial of new trial held proper (121–445, 141+795).

A motion for a new trial, based on newly discovered evidence, held properly denied (125–343, 147+111).

Denial of a new trial for newly discovered evidence held not an abuse of discretion (135–292, 160+793). New Trial, ⊂=106.

An order denying a new trial on the ground of newly discovered evidence will be reversed only where it violates a clear legal right of appellant or involves an abuse of discretion (131–3, 154+441). Appeal and Error, ⊂=981; New Trial, ⊂=99.

The grant of a new trial for newly discovered evidence is within the discretion of the trial court, and its ruling will not be disturbed, except in a case of clear abuse of discretion (130–469, 153+867). Appeal and Error, ⊂=981.

A motion for new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court (130–304, 153+613). New Trial, ⊂=99.

Award of a new trial for newly discovered evidence rests largely in the discretion of the trial court, whose action will not be disturbed, where abuse of discretion is not shown (133–156, 157+1073).

Showing on motion—Where no diligence is shown a new trial on the ground of newly discovered evidence is properly denied (129–460, 152+872). New Trial, ⊂=102(1).

Where the party moving for a new trial on the ground of newly discovered evidence, consisting of the affidavit of a witness that he was mistaken in his testimony as to dates, had given such witness a searching cross-examination on the trial, denial of a new trial was not an abuse of discretion (134–468, 158+787). New Trial, ⊂=90.

Cumulative evidence—Newly discovered evidence, cumulative in character, is not ground for a new trial (125–401, 147+279). New Trial, ⊂=99.

Newly discovered evidence, cumulative and directed to collateral matters, is not ground for new trial; the excuse for not producing it at trial being weak (123–319, 143+793, Ann. Cas. 1915A, 257). New Trial, ⊂=99.

Newly discovered evidence, cumulative in character, is not ground for new trial (122–510, 142+885). New Trial, ⊂=104(2).

EXCESSIVE OR INADEQUATE DAMAGES

134–477, 159+1095.

Inadequate damages—Actions open to losing party—A motion by plaintiff for a new trial on the ground of inadequate damages may be resisted by defendant on the ground that defendant should have prevailed on the merits (122–444, 142+705). New Trial, ⊂=75(1).

General principles—In determining whether passion or prejudice influenced the jury to give excessive damages, the whole record may be examined, and not alone the erroneous rulings whereby evidence tending to create passion and prejudice was received (131–320, 155+205). Appeal and Error, ⊂=839(2).

Where damages are not ascertainable by any fixed standard, the trial court may order a new trial conditioned on a reduction of the verdict, though the amount is so excessive as to evince passion and prejudice, where it cannot with reason be said that such passion and prejudice affected the other issues in the case (131–261, 154+1100). New Trial, ⊂=162(3).

The award of a new trial for excessive damages, or the reduction of the verdict on account of such excessiveness, rests in the sound discretion of the trial court, and the supreme court will not interfere unless the discretion is abused (127–373, 149+544). Appeal and Error, ⊂=979(5); New Trial, ⊂=76(4).

The supreme court should not grant a new trial for excessive damages, unless the evidence is so manifestly and palpably against the verdict that the trial court violated a clear right of defendant, and abused its discretion, in refusing a new trial (123–480, 144+149, 49 L. R. A. [N. S.] 756). Appeal and Error, ⊂=1005(2).

Where interest, properly claimed in the complaint, may account for an alleged excessiveness of a verdict, a new trial will not be granted (122–39, 141+847). Damages, ⊂=140.

A verdict in excess of the amount demanded in the complaint held not to indicate passion and prejudice on the part of the jury (135–248, 160+665). Appeal and Error, ⊂=1004(1).

The record on appeal held not to indicate that a verdict was given under the influence of passion and prejudice (129–372, 152+765).

Necessity of passion or prejudice—A new trial will not be granted on the ground of excessive damages, nor will the verdict be reduced, unless the award was made under the influence of passion and prejudice (127–373, 149+544). Appeal and Error, ⟸979(5); New Trial, ⟸76(4).

Remittitur—Where a verdict in excess of the amount claimed in the complaint is supported by the evidence, a new trial may be denied on entry of a remittitur (123–222, 143+715). New Trial, ⟸162(2).

Where the only error alleged is the amount of the damages, a new trial may be granted on that issue alone; and where defendant's testimony admits a certain amount, plaintiff may be given the option of accepting that amount in lieu of a new trial. (124–421, 145+173). Appeal and Error, ⟸1140(1), 1178(3).

Contracts and bonds—A verdict for $3,331.71 for breach of contract held excessive in the amount of $200 (127–15, 148+476).

A verdict for $5,898.55 held not excessive, in an action on a common-law bond given by an appellant (123–218, 143+355). Damages, ⟸137; Judgment, ⟸874(1).

For personal services—Verdict for $309, for wages of a patrolman from August 10 to December 7, 1914, held not excessive (132–238, 156+283).

A verdict for $750, for personal services, held not excessive (130–296, 153+616).

A verdict for $5,000 for services of attorneys in procuring the cancellation of an antenuptial settlement by which the client received about $500,000, held not excessive (130–196, 153+310). Attorney and Client, ⟸148(3).

Breach of promise to marry—$800 held not excessive for breach of a promise to marry (123–498, 144+213, 49 L. R. A. [N. S.] 757, Ann. Cas. 1915A, 295). Breach of Marriage Promise, ⟸31.

A verdict for $17,425 held not excessive for breach of a promise to marry (126–350, 148+500, Ann. Cas. 1915D, 491). Breach of Marriage Promise, ⟸31.

Injuries to personal property—A verdict for $350 for injury to goods carried held not excessive (124–357, 145+115). Carriers, ⟸135.

Verdict for $750 held not excessive for injuries to live stock while being unloaded by a carrier in the course of transportation (123–495, 144+220). Carriers, ⟸229(2).

Verdicts for $220, $160, and $620, for loss of goods by fire, held not excessive (124–219, 144+937, Ann. Cas. 1915B, 705). Damages, ⟸139.

$1,300, for destruction of timber by fire set out by locomotive, held not excessive (121–357, 141+491, 45 L. R. A. [N. S.] 215).

A verdict for $550, reduced by the trial court to $375, for destroying a crop of hay and killing the roots of the grass by flowage from defendant's dam, held not excessive (130–531, 153+271). Waters and Water Courses, ⟸114.

Injuries to lands and waters—A verdict for $300, reduced by the trial court to $225, held not excessive for injury to land and structures thereon by flowage from defendant's dam (130–80, 153+269). Waters and Water Courses, ⟸114.

$3,500 held excessive for a trespass on land, and reduced to $3,300 (126–470, 148+311, L. R. A. 1916E, 977). Damages, ⟸108.

$300 held not excessive damages for a trespass on land (126–488, 148+296).

$31,339.50 held not excessive for pollution of a spring (122–510, 142+885). Waters and Water Courses, ⟸107(1).

$875 held not excessive for injury to abutting property by lowering the grade of a street (129–59, 151+532).

$900 held not excessive for wrongful diversion of water from plaintiff's mill (123–523, 143+111). Appeal and Error, ⟸1005(2).

Misrepresentation on sale of property—A verdict of $1,200 for false representation on sale of a horse held excessive, and reduced to $600 (124–374, 145+32). Fraud, ⟸59(3), 60.

A verdict for $3,616 for deceit in the sale of land held not excessive (134–91, 158+824, L. R. A. 1916F, 780). Appeal and Error, ⟸1004(1).

Damages on condemnation of land—Damages awarded in condemnation proceedings held not so inadequate as to indicate passion and prejudice (128–415, 151+198). Eminent Domain, ⟸150.

Verdict of $5,040, for land appropriated by railroad company, held excessive, and reduced to $3,500 (124–413, 145+161). Eminent Domain, ⟸263.

Insult—$300 for refusal of street car conductor to accept transfer, accompanied by rough language, held excessive (121–530, 141+304). Carriers, ⟸277(6).

Procurement of discharge—That the trial court reduced a verdict of $5,750, for malicious procurement of discharge of plaintiff as school superintendent, to $2,500, held not to require a new trial on defendant's motion, on the ground that the action of the court indicated that the jury were so prejudiced that they could not have properly considered the merits of the case (122–343, 142+816). Appeal and Error, ⟸1004(3).

False imprisonment—A verdict for $4,250 for false imprisonment held not excessive (134–58, 158+721). False Imprisonment, ⟸36.

Libel—A verdict of $3,000 for libel held excessive (132–399, 157+640, L. R. A. 1916E, 771).

A verdict for $500 held not excessive for a libel affecting plaintiff's financial credit and standing (131–435, 155+619).

Malicious prosecution—Verdicts for $3,250 held not excessive for a malicious prosecution (130–229, 153+532, Ann. Cas. 1916C, 267). Malicious Prosecution, ⟸69.

In an action by a tenant against his landlord for malicious prosecution of suits against the tenant growing out of a dispute as to the duty of making repairs, the admission in evidence of

a letter written by an insurance agent to the tenant, in which such agent expressed the opinion that it was the landlord's duty to make repairs, was erroneous, as tending to inflame the minds of the jury in the assessment of damages (131–320, 155+205). Malicious Prosecution, ⟸55, 58(1), 60(1).

A verdict for $3,750 for malicious prosecution of civil suits held excessive (131–320, 155+205).

A verdict of $57,500 held excessive for unfair competition and malicious prosecution of civil suits (123–17, 142+930, L. R. A. 1915B, 1179, 1195). Damages, ⟸137.

For death—A verdict for $4,585 for death of a farmer 61 years of age, who left a daughter of 13 and a son of 20, and four married sons and daughters, is not excessive (135–37, 159+1087). Death, ⟸99(4).

A verdict for $5,000, reduced by the trial court to $3,500, for death of a boy 14 years of age, held not excessive (134–451, 159+1076, L. R. A. 1917B, 548). Death, ⟸99(3).

A verdict of $5,000 held not excessive for death of a workman 49 years of age and earning 25 cents per hour, and leaving a widow and posthumous child (129–206, 152+137). Death, ⟸99(4).

A verdict of $7,500 for death of a farmer 51 years old, whose farm was incumbered, and who left a wife, a son 22 years old, and a married daughter, held not excessive (129–506, 152+882). Death, ⟸99(4).

A verdict for $4,500 for death of a janitor and fireman, 38 years old, earning $11 per week, and leaving a widow and children, held not excessive (130–186, 153+323, 593). Death, ⟸99(4).

$3,000 for death of boy 16 years old, who was a high school student, intelligent, active, and obedient (121–388, 141+488). Death, ⟸99.

A verdict for $18,000, for wrongful death under the federal employers' liability act, held excessive, and reduced to $12,000 (131–166, 154+957). Death, ⟸99(1).

A verdict of $700 held not excessive for death of a husband, who had abandoned his wife and beneficiary, and had not furnished her support for seven years prior to death (133–41, 157+904). Death, ⟸99(4).

Where the liability of defendant for death of an employé of a third person was fixed on the trial, and the only error consisted in awarding compensation under § 8175, instead of under the workmen's compensation act, a new trial should not have been granted, but the recovery should be reduced to the amount recoverable under the compensation act (134–113, 158+913). Master and Servant, ⟸411.

Personal injuries in general—A verdict for $2,500 for injuries resulting from the negligence of a physician in leaving a gauze pack or sponge in the abdominal cavity of a woman after an operation, from which she suffered for several months, and which left her in impaired health and in a nervous and enfeebled condition, held not excessive (135–453, 151+144). Physicians and Surgeons, ⟸18(11).

Verdict of $16,500, reduced to $12,000 by the trial court, held not excessive, where plaintiff was incapacitated from serving as a railroad engineer; but leave granted to apply to the trial court, on evidence discovered since the trial, for reconsideration thereof only (124–245, 144+772). Appeal and Error, ⟸1121.

A judgment in a personal injury action will not be reversed merely because the supreme court would have been better satisfied with a smaller recovery (125–528, 147+273). Appeal and Error, ⟸1004(4).

An award of $1,875 for personal injuries held not so inadequate as to show passion and prejudice (131–209, 154+960). Appeal and Error, ⟸930(1).

A verdict for $9,015, reduced by the trial court to $7,000, for injuries to a boilermaker 31 years of age, held not excessive (130–134, 153+267). Appeal and Error, ⟸1004(3).

A verdict for $1,750 for injuries to a passenger held not excessive (130–36, 153+117). Damages, ⟸132(1).

A verdict of $4,966, reduced by the trial court to $4,000, held not excessive for injuries to a bricklayer, which rendered him unable to work for a year, and from which he suffered a loss in wages of $2,000 (131–475, 155+767). Damages, ⟸131(1).

Where plaintiff's injuries caused her to be confined at a hospital for a time, a verdict for $3,000 was excessive, no bones being broken, and the evidence as to any injuries that may have resulted from the accident being uncertain and speculative (132–54, 155+1058). Damages, ⟸131(1).

Verdict for $5,835 held not excessive for injuries received in a collision between a street car and an automobile (121–445, 141+795).

Verdict for $1,750 to a husband for injuries to the wife, who was awarded but $500, held excessive, and reduced to $1,000 (133–370, 158+623). Damages, ⟸186.

A verdict for $5,500 held not excessive for injuries to a woman, consisting of permanent impairment of eyesight, fractured ribs, and injured spine (133–368, 158+611). Damages, ⟸132(3, 14).

$750 held not excessive for injuries, consisting of three fractured ribs, incapacitating plaintiff, who earned $35 a month, from work for over seven months (122–49, 141+849). Damages, ⟸131(1).

A verdict for $5,000, reduced by the trial court to $3,500, held not excessive for injuries to a section hand (128–505, 151+177). Damages, ⟸132(1).

$1,970 held not excessive for injuries to an employé from falling into a pit in a garage (129–70, 151+537).

$6,000 for injuries to electrician 36 years of age, earning from $110 to $130 per month; his leg having been fractured, and he having suffered permanent injuries, rendering him practically unable to work, held not excessive (128–449, 151+274). Damages, ⟸132(1).

For injuries consisting of a permanent dislocation of the clavicle or collar bone, preventing plaintiff from doing heavy manual labor with his left arm, a verdict for $17,000, reduced by the trial court to $10,000, is excessive, and reduced to $7,500 (161+400). Damages, ⟸132(1).

A verdict for injuries to health from exposure in an unheated passenger depot held not excessive (130–300, 153+600).

A verdict for $750 for injuries to a man of 39, who was earning good wages and lost five months' time, was not excessive (134–382, 159+828). Damages, ⟸131(1).

$16,000 held not excessive damages for injuries to a passenger which rendered him a physical wreck and resulted in his death (123–173, 143+322). Damages, ⟸132(1).

A verdict for $2,500 for injuries from negligence of a physician in taking an X-ray, leaving a sore which remained open and unhealed a year after the application of the X-ray, and which prevented plaintiff a woman, from working, held not excessive (134–458, 159+1073). Damages, ⟸132(2).

$2,050 held not excessive for injuries to a switchman, 29 years old, earning $105 per month; he having suffered a loss of two teeth, a serious ankle sprain, aggravation of appendical troubles, and injury to the back (127–87, 148+893). Damages, ⟸132(1).

Possibility of permanency of personal injuries—Where the evidence as to permanency of an injury was unsatisfactory to the trial court, and the verdict reduced one-half, a new trial should have been granted, instead of requiring a reduction (126–430, 148+309). New Trial, ⟸162(2).

$1,900 held not excessive for internal injury, though defendant's evidence tended to show that the injury might be entirely removed by an operation costing $200 (123–480, 144+149, 49 L. R. A. [N. S.] 756). Damages, ⟸168(2).

Paralysis and injuries to spine or nervous system—For injuries to a leg $11,337 held excessive and reduced to $8,500; plaintiff having been confined to a hospital on account of the injury for five months, and partial paralysis resulting, but it not appearing that plaintiff will not be able to earn a living in spite of the injury (127–475, 149+938). Damages, ⟸132(3).

$35,000 held excessive for injuries to an express messenger, whose spinal cord was affected, and his earning capacity virtually destroyed, and reduced to $30,000 (128–228, 150+807, L. R. A. 1915F, 1). Damages, ⟸132(3).

A verdict for $10,000, for serious injuries to the spine and back of a switchman 27 years of age, held not excessive (134–61, 158+796). Damages, ⟸132(3).

A verdict for $3,000 held not excessive for injury to the nervous system causing permanent disability (133–367, 158+611). Damages, ⟸132(3).

A verdict for $12,000, reduced by the trial court to $9,000, held not excessive for injuries to a man of 38, earning $125 to $130 per month, whose injuries were permanent, consisting of curvature of the spine and stiffening of the shoulder joint (128–119, 150+382). Damages, ⟸132(3).

Rupture and internal injuries—A verdict for $3,750, reduced by the trial court to $2,750, for injuries to a female employé, consisting of the dislocation of a kidney, held not excessive, though the evidence as to whether the dislocation resulted from the accident on which the action was based was inferential (131–261, 154+1100). Damages, ⟸132(4).

A verdict of $7,500, for death of a yard employé, 32 years old, strong and healthy, earning from $90 to $100 per month, and married, but leaving no children, held excessive, and reduced to $5,000 (127–381, 149+660). Death, ⟸99(4).

A verdict for $6,080, reduced by the trial court to $4,500, for injuries consisting of a rupture, injury of the sacroiliac joint, and hemorrhoids, held not excessive (131–493, 154+943). Damages, ⟸132(4).

$1,750 for injuries to a brakeman, 37 years old, resulting in a partial or complete hernia, curable only by an operation, and causing a lame back, which continued to the time of the trial, five months after the accident, all of which, complicated with a nervous disorder, prevented him from doing work (127–518, 148+617). Damages, ⟸131(4).

A verdict for $5,000 for an assault, resulting in a rupture, impairing plaintiff's earning capacity and causing him pain and loss of time, held excessive, and reduced to $3,000 (125–401, 147+279). Damages, ⟸132(4).

Injuries to women—A verdict for $8,871 for injury to a woman engaged in the grocery business, the injury causing neurasthenia or psychasthenia, and consequent physical ailments of a permanent nature, held excessive, and reduced to $5,000 (131–327, 155+104). Damages, ⟸132(5).

A verdict for $6,750 for injuries to a young woman stenographer, earning $50 per month, held excessive, and reduced to $5,000, though she suffers from a severe nervous disorder as a result of the accident, which prevents her from working; it not appearing that any organic disorder resulted from the injury, or that the nervous trouble is permanent (130–263, 153+525). Damages, ⟸132(5).

$7,000 to a woman 20 years of age, a servant employed at a boarding house, for injuries which disfigured her face permanently, held not excessive (123–131, 143+117). Damages, ⟸132(5); Explosives, ⟸12.

$3,000 held not excessive for injuries to a married woman 22 years old, by which she suffered a nervous shock which rendered her unable to work, and such condition continued five months after the accident, and she was suffering from a functional nervous disease (126–491, 148+304). Damages, ⟸131(5).

Injury to hip leg or foot—$4,225, reduced by trial court to $3,500, held not excessive for injuries to a teamster, consisting of permanent stiffening of the knee, accompanied by much pain, and injuries to the back (129–14, 151+408). Damages, ⟸132(6).

Where plaintiff, capable of earning $40 to $50 per month, including his board, was beaten by defendant, his right leg broken, and confined to hospital fourteen weeks, a verdict for $1,200 was not excessive, and was not the result of passion and prejudice (129–517, 152–880). Assault and Battery, ⇐40.

A verdict of $6,225, awarded to a six year old boy for injuries, consisting of the breaking of both legs, leaving a permanent deformity of the limbs, but which will not prevent him from getting about, held excessive, and reduced to $5,000 (130–314, 153+611, L. R. A. 1915F, 11). Damages, ⇐132(6).

For injuries to a laborer, 49 years old, earning 25 cents an hour, whose leg and shoulder were permanently injured, $9,850 held excessive, and reduced to $7,000 (128–270, 150+919). Damages, ⇐132(6).

A verdict of $2,000, awarded a minor whose foot was crushed, necessitating an operation and leaving a permanent impairment of the foot, causing total loss of earnings for a year, diminution of earnings, and $300 expenses, was not excessive (162+520). Damages, ⇐132(6).

A verdict for $750, reduced by the trial court to $500, held not excessive for injuries to a child 9 years old, such injuries consisting of a broken leg (131–112, 154+790). Damages, ⇐131(2).

$11,000 held not excessive for injuries to a workman on a coal dock, earning from $60 to $90 per month, whose right thigh was fractured, and his leg shortened and rendered practically useless (128–178, 150+810). Damages, ⇐132(6).

A verdict for injuries to a young woman 26 years of age, as a result of which she contracted a disease which compelled the use of a crutch, held not excessive (126–509, 148+568). Damages, ⇐132(6).

$5,000 held not excessive for injuries to a laborer 29 years old, whose leg was shortened and permanently weakened (124–466, 145+385). Damages, ⇐132(6).

$5,960 held not excessive for injuries to a salesman earning $40 per week, who was an educated musician; his leg being permanently impaired, resulting in hernia and neurasthenic condition (125–102, 145+791). Damages, ⇐132(6).

A verdict of $2,500 for injuries to a man of 72, consisting of a fracture of the hip and two ribs, which compelled the use of crutches to the time of the trial, two years after the accident, held not excessive (124–155, 144+462). Appeal and Error, ⇐1001(1); Damages, ⇐132(6).

A verdict for $4,000 held not excessive for injuries consisting of a compound dislocation of the left ankle joint with a fracture of the tibia, resulting in a permanent injury of a workman earning 45 cents an hour (124–19, 144+431). Damages, ⇐132(6).

$5,000 held excessive for injuries to a farmer's wife, she having suffered a broken ankle, which has healed, but left the ankle weak and freedom of motion impaired; reduced to $3,000 (124–169, 144+745). Damages, ⇐132(6).

$7,000, reduced by trial court to $6,000, held not excessive for injuries to a laboring man 24 years old, whose knee was permanently stiffened, and who suffered great pain and incurred expenses for medical services and nursing in the sum of over $1,300 (128–329, 151+124). Damages, ⇐132(6).

A verdict for $20,000, reduced to $15,000 by the trial court, for injuries to a fireman 40 years of age, consisting of a T fracture of the leg, and other injuries making him a permanent cripple and unable to work, he having earned $110 per month before his injuries, held not excessive (135–229, 160+787). Damages, ⇐132(6).

Injury to legs and arms in connection with other injuries—For injuries consisting of a paralyzed and atrophied arm, which will probably require amputation, a compound fracture of the left leg causing a shortening of six inches, which, with other injuries to the leg renders it useless, and also injury to the head impairing hearing and sight, a verdict of $50,000, reduced by the trial court to $35,000, was not excessive; plaintiff being 28 years of age and earning $28 a week before his injury (135–372, 160+1020). Damages, ⇐132(7).

Injuries to arm hand or fingers—Verdict for $1,250 for an assault and battery, resulting in a permanent shortening and stiffening of the thumb, held not excessive; loss of time and expense incurred amounting to $350 (133–23, 157+717, L. R. A. 1916E, 896). Assault and Battery, ⇐40.

A verdict for $4,250 for permanent injury to a brakeman's left arm and shoulder, preventing him from again following his occupation, held not excessive (131–236, 154+1075). Damages, ⇐132(8).

$12,000 held not excessive for injuries to girl of 17, where her right hand and forearm were disfigured and rendered useless (128–245, 150+804). Damages, ⇐132(8).

Loss of leg or foot—$30,000 held not excessive for loss of a leg by a switch foreman, 26 years old, earning from $105 to $115 per month; the injury causing amputation so close to the hip that an artificial limb could not be used, and the healing of the stump was difficult and exceedingly painful (128–283, 150+922). Damages, ⇐132(9).

$24,750, for loss of leg by brakeman, held not excessive (121–326, 141+300). Damages, ⇐132(9).

$15,000 held excessive for loss of a foot by a farmer 48 years old, and reduced to $12,000 (125–33, 145+626, 51 L. R. A. [N. S.] 650). Damages, ⇐132(9).

A verdict for $30,136.67, reduced by the trial court to $25,000, held not excessive for injuries received by a person at a highway crossing; the injuries consisting of loss of the right arm and leg, with several teeth, and being accompanied with other minor hurts (124–368, 145+40). Damages, ⇐132(9, 12).

Loss of both legs—$22,500 held not excessive for loss of both legs halfway between ankle and knee by a boy 12 years old (129–101, 151+894). Damages, ⇐132(11).

Loss of arms—A verdict of $39,000 held not excessive for the loss of both arms and a leg by a railroad brakeman (127–1, 148+446). Damages, ⇐132(11, 12).

A verdict, reduced by the trial court to $10,000, for loss of the right arm at the elbow, by a man nearly 60 years old, earning $120 per month, held not excessive (130–405, 153+848). Damages, ⟸132(12).

Loss of fingers—$2,000 held not excessive for loss of the little finger of the left hand at the knuckle joint and the next finger at the second joint, by a left-handed workman 35 years old (127–507, 150+175). Damages, ⟸132(13).

$1,500 held not excessive for permanent injury to a brakeman's thumb, rendering it practically useless (125–7, 145+613). Damages, ⟸132(13).

Loss or impairment of sight—A verdict for $11,375, reduced by trial court to $9,000, held not excessive for injuries to a railroad employé, consisting of loss of one eye, fracture of jawbone, and permanent disfigurement of face (124–1, 144+466). Damages, ⟸132(14).

ERRORS OF LAW ON THE TRIAL

What are errors on the trial—Submission of issue not supported by evidence is ground for new trial (128–460, 151+275). Appeal and Error, ⟸1066.

Where the charge, in a complicated case, fails to define or outline the issues of fact, a new trial will be granted (123–17, 142+930, L. R. A. 1915B, 1179, 1195). Trial, ⟸203(2).

Instruction, in action on fire policy held to be without error justifying a new trial (123–325, 143+787). Insurance, ⟸669(9); Trial, ⟸296(1).

In an action for malicious prosecution of an attachment suit, error in admitting in evidence a part of the record in a subsequent suit between plaintiff and one of the defendants, in which plaintiff recovered damages for breach of a contract, which breach existed at the time of the suing out of the attachment, and might have been used as a counterclaim, justified the awarding of a new trial (123–435, 143+1124). Malicious Prosecution, ⟸60(1).

The discretion of the trial court in granting a new trial for prejudicial error in instructions will not be disturbed, unless the order was clearly without substantial foundation for the conclusion of prejudice (130–285, 153+596). Appeal and Error, ⟸977(3).

Exclusion of evidence, not shown to be material when offered, is not ground for new trial (122–39, 141+847). Appeal and Error, ⟸205.

The giving of a "supplemental charge," after the jury had retired, of such a persuasive nature as to indicate the court's opinion as to what the verdict should be, was ground for new trial (129–531, 152+269). New Trial, ⟸39.

Where assumption of risk was neither pleaded nor litigated with the consent of the parties, error in submitting that issue to the jury was ground for new trial (129–324, 152+755). New Trial, ⟸38.

Reception of incompetent evidence bearing on one issue of the case held not ground for new trial, where a special finding of the jury on other issues in the case shows that a recovery could not be had, no matter how the issue concerning which the evidence was offered was decided (127–425, 149+672). Appeal and Error, ⟸1052(8), 1053(5).

Where two causes of action are tried as one, and the verdict rendered may include damages for both causes, error in an instruction relating to one of the causes requires a new trial (127–490, 150+218). New Trial, ⟸39.

An instruction as to contributory negligence, not warranted by the evidence, held ground for new trial (129–8, 151+423). Trial, ⟸253(9).

Error in instructions, where verdict is correct (121–258, 141+164, L. R. A. 1915D, 644).

Time for making motion for new trial—After affirmance of a judgment on appeal without motion for new trial, and after the lapse of six months, a motion for new trial on the ground of errors occurring at the trial will not lie (134–292, 159+623). New Trial, ⟸4.

Necessity of exceptions—Verbal inaccuracies in the recital of certain evidence in the charge, to which the trial court's attention was not called before the jury retired, do not ordinarily furnish ground for a new trial (130–434, 152+262; 130–434, 153+736). New Trial, ⟸40(3).

INSUFFICIENCY OF EVIDENCE

Under either subd. 5 or subd. 7—Right of appeal dependent on grounds alleged (see 128–488, 151+139). Appeal and Error, ⟸110.

In an action to recover the reasonable value of legal services, the point that the damages awarded by the jury were inadequate was properly raised on a motion for new trial made on the ground that the verdict was not sustained by the evidence (133–320, 158+419). New Trial, ⟸130.

In general—Where the pleadings and evidence make a case not submitted by the instructions, a new trial and not judgment notwithstanding the verdict is the proper remedy (129–432, 152+840). Judgment, ⟸199(1).

Where the trial court makes a general order granting a new trial on the ground that the verdict is not justified by the evidence, such order will not be reversed, unless the evidence is manifestly and palpably in favor of the verdict (124–84, 144+450). Appeal and Error, ⟸1015(3).

The Supreme Court should not grant a new trial unless the evidence is so manifestly and palpably against the verdict that the trial court violated a clear right of defendant and abused its discretion in refusing a new trial (123–480, 144+149, 49 L. R. A. [N. S.] 756). Appeal and Error, ⟸1005(2).

A new trial should be granted, where the verdict is based on uncertain evidence and the prevailing party changed his theory of his case during an intermission in the trial (123–492, 144+137). New Trial, ⟸66, 68.

The trial court's discretion in awarding a new trial will not be disturbed on appeal, where the evidence is not manifestly and palpably in favor of the verdict (123–530, 143+1123). Appeal and Error, ⟸979(2).

After the affirmance of a judgment on appeal without motion for new trial, and after the lapse of six months from notice of the entry of judgment, a motion for new trial on the ground of insufficiency of the evidence will not lie (134–292, 159+623). New Trial, ⟸4.

A verdict on conflicting evidence is binding upon the supreme court, if reasonably supported by the evidence (125–534, 147+426). Appeal and Error, ⟸1002.

The award of a new trial on the ground of the insufficiency of the evidence to support the verdict will not be disturbed on appeal, unless the discretion is abused (122–530, 142+1134). Appeal and Error, ⟸979(2).

The supreme court should not interfere with the trial court's findings, except where they are manifestly without support in the evidence, though the case was submitted on written evidence alone (126–52, 147+827). Appeal and Error, ⟸1005(2).

Finding of trial court will not be disturbed, unless palpably against the weight of the evidence (122–295, 142+710). Appeal and Error, ⟸1012(1).

Where the motion is made on the ground that the verdict is contrary to law, it should be granted if the verdict is not supported by the evidence (122–463, 142+729). New Trial, ⟸70.

The findings of the trial court must be clearly against the evidence to justify the supreme court in interfering therewith, whether the fact found be required to be established by a preponderance of the evidence, or by clear, convincing, and satisfactory proof (128–106, 150+387). Appeal and Error, ⟸1011(1).

Memorandum—Where the trial court, on granting a new trial, fails to state that the order was made on the ground of the insufficiency of the evidence, this ground of motion cannot be considered (122–463, 142+729). Appeal and Error, ⟸933.

After successive verdicts—After two verdicts for plaintiff, the discretion of the court in granting a new trial for insufficiency of evidence should be exercised with caution (125–72, 145+798). New Trial, ⟸78(1).

Of less than all the issues—In a will contest, the fact that the issues of mental capacity and undue influence were intimately connected, and the evidence upon one would have more or less bearing upon the other, held not to render erroneous an order granting a new trial as to one of the issues alone (126–275, 148+117). Wills, ⟸337.

Actions relating to contracts—Evidence held to sustain decision that defendant did not purchase goods from plaintiff (122–17, 141+789).

Evidence held not clearly against the findings of the trial court that a deed was executed and accepted in full performance of an executory contract, and that conditions imposed by such contract on the vendor were waived or abandoned by mutual consent (126–359, 148+121). Vendor and Purchaser, ⟸350.

In an action for breach of promise to marry, evidence held to sustain the finding that such promise was made (126–350, 148+500, Ann. Cas. 1915D, 491). Breach of Marriage Promise, ⟸23.

Finding of the trial court that corporate stock was of such uncertain value as to warrant specific performance of a contract to purchase same, instead of an award of damages for breach of the contract (128–341, 150+1084). Specific Performance, ⟸121(3).

Evidence held to support verdict to the effect that plaintiff's disability resulted from an accident within an accident policy, and that notice and proof of injury were waived by defendant (124–478, 145+395). Insurance, ⟸665(5, 8).

Findings of the trial court as to the extent of partial failure of consideration for the agreement sued on held sustained by the evidence (125–343, 147+111). Appeal and Error, ⟸1011(1).

Evidence held to sustain a judgment for plaintiff against a fire department relief association for benefits to which plaintiff was entitled under the by-laws of the association (124–381, 145+35, 50 L. R. A. [N. S.] 1018). Appeal and Error, ⟸1005(2).

Evidence held to support finding of jury that the guarantor of a note knew that one of the makers was to be released from liability on the note (124–411, 145+124). Guaranty, ⟸16(1).

Evidence held to support verdict finding agreement to sell interest in partnership at a price to be ascertained by inventory (125–122, 145+808).

Evidence held to sustain findings of the trial court that defendants were chargeable on a contract of promoters of a projected corporation (125–59, 145+617). Corporations, ⟸269(3).

Evidence held insufficient to support findings of court in action for breach of agency contract (122–66, 141+1097). Brokers, ⟸39.

In action on notes, in which defendant counterclaimed for services as broker, evidence held to support findings of the trial court for defendant (124–140, 144+452). Brokers, ⟸86(1).

Evidence held to support verdict to the effect that note had been paid (121–458, 141+525). Bills and Notes, ⟸527(1).

Evidence in action for specific performance of oral contract to convey property held insufficient to sustain findings of trial court (124–114, 144+744). Specific Performance, ⟸121(3).

Evidence held insufficient to sustain finding of trial court that an oral agreement to convey land was entered into (125–49, 145+615). Specific Performance, ⟸121(3, 4).

Evidence as to mental capacity of testator—Evidence as to the mental capacity of a testator held not so clearly and palpably against a verdict as to justify the supreme court in not reversing an order denying a new trial (126–275, 148+117). Wills, ⟸400.

Evidence of death—Evidence of disappearance of insured, and of his absence for more than seven years, and of search made for him, held to sustain a finding of the jury that he was dead (125–150, 145+806). Death, ⟸4.

Boundary disputes—Evidence in a boundary dispute held insufficient to support verdict for plaintiff (124–233, 144+758). Adverse Possession, ⟸114(2); Boundaries, ⟸37(3).

Evidence held to sustain finding of a trial court that there was a practical location of a boundary line (125–365, 147+241). Boundaries, ⟸37(3).

Findings of court as to practical location of boundary line held supported by the evidence (129–522, 151+273). Boundaries, ⟸37(3).

Adverse possession—Evidence held to sustain a finding against a claim of title by adverse possession (125–484, 147+655). Adverse Possession, ⟸24, 64.

Evidence held to sustain a finding that defendant's possession was not adverse (125–24, 145+404). Adverse Possession, ⟸85(3).

Criminal acts—Evidence held to support a verdict under § 3200 for illegal sale of intoxicating liquors to plaintiff's minor son (121–455, 141+803).

Torts in general—Evidence in action against physician for malpractice held to support a verdict for plaintiff (123–319, 143+793, Ann. Cas. 1915A, 257). Physicians and Surgeons, ⟸18(8).

Evidence held insufficient to support verdict for plaintiff in action for malicious prosecution (129–97, 151+895, Ann. Cas. 1916E, 374). Malicious Prosecution, ⟸64(2).

Finding that no probable cause existed for a prosecution, alleged to have been malicious, held against the weight of the evidence (122–241, 142+196). Malicious Prosecution, ⟸18(2).

Evidence held to support finding for plaintiff in action for pollution of spring (122–510, 142+885). Waters and Water Courses, ⟸107(1).

Findings held to sustain conclusions of law that defendant converted moneys of plaintiff, that a contract between such parties should be canceled, and that plaintiff was not guilty of breach of the contract entitling defendant to damages (126–340, 148+123). Vendor and Purchaser, ⟸93.

Fraud and undue influence—A finding of the district court that a will was procured by undue influence will not be disturbed by the supreme court, unless it is manifestly contrary to the evidence (129–523, 151+529). Wills, ⟸386.

Evidence held to support finding that deed was procured by undue influence (128–251, 150+809). Deeds, ⟸211(4).

Evidence held to support finding of fraud inducing contract for sale of land, warranting rescission (122–295, 142+710). Vendor and Purchaser, ⟸123.

Evidence held to justify a finding that the release of plaintiff's cause of action was procured by defendant's fraud (126–350, 148+500, Ann. Cas. 1915D, 491). Release, ⟸57(2).

Evidence held to sustain finding of a trial court that a deed from father to daughter was in fraud of creditors (126–141, 147+958). Fraudulent Conveyances, ⟸295(1).

Evidence held to sustain a verdict for damages for false representations in the sale of a stallion (124–265, 144+954). Fraud, ⟸58(2).

Evidence held to justify a finding that all the defendants were liable for fraudulent representations inducing a purchase of land (126–119, 147+1097). Vendor and Purchaser, ⟸44.

In action on note, evidence held to support finding of jury that plaintiff made false representations as to soundness of oranges for which note was given (125–134, 145+803). Sales, ⟸181(12).

Negligence—Evidence held to sustain verdict against railroad company for injury to brakeman under federal safety appliance act (121–413, 141+798, Ann. Cas. 1914D, 383). Master and Servant, ⟸243, 278, 289.

Evidence held insufficient to support a verdict for injuries to a farm laborer, resulting from the alleged negligence of his employer in furnishing him with an unruly and unsafe team (128–213, 150+786). Master and Servant, ⟸278(1).

Evidence held to support a verdict against defendant for negligence in operating a taxicab (122–363, 142+716). Master and Servant, ⟸278(3), 280, 281(5).

Evidence held to sustain verdict against master for injuries to servant (122–415, 142+804). Master and Servant, ⟸288(2), 289(4).

A verdict finding that a structure built to prevent the walls of an excavation from falling in upon the workmen was improperly and negligently constructed and braced held sustained by the evidence (126–355, 148+119). Master and Servant, ⟸278(3).

Evidence held insufficient to sustain a finding that a driver of a team was negligent in causing a collision with plaintiff (125–469, 147+427). Master and Servant, ⟸330(3).

Verdict for employé of garage, injured by falling into a newly dug pit, held supported by the evidence (129–70, 151+537).

Evidence as to negligence of employer in failing to keep automatic elevator gates in proper order held to support verdict for plaintiff in action for wrongful death of employé (129–77, 151+541). Master and Servant, ⟸286(18).

A finding of negligence resting wholly on speculation and conjecture cannot be sustained (125–78, 145+786). Master and Servant, ⟸265(9).

Evidence, in action for wrongful death of an employé, held to support findings of jury as to cause of death, negligence, contributory negligence, and assumption of risk (129–81, 151+539). Master and Servant, ⟸276(2), 280.

In an action for injuries to a brakeman, caught between the engine tender and poles projecting from a car, evidence held insufficient to show that the injury resulted from movement of the engine, for which alone defendant would be liable (124–487, 145+393). Master and Servant, ⟸276(2).

Evidence held to sustain a verdict for injuries to an employé on an issue of negligence and contributory negligence (124–466, 145+385). Master and Servant, ⊂=276(3).

Evidence held to support a finding of the jury that an employer was negligent in failing to warn an inexperienced employé as to the dangers incident to the use of machinery (124–141, 144+751). Master and Servant, ⊂=153(1).

Evidence held to sustain a verdict for injuries to an employé of a railroad company while engaged in sweeping out a box car, resulting from negligence in switching operations (123–178, 143+324). Master and Servant, ⊂=278(18).

Evidence held to show that plaintiff's daughter was lawfully in a building as a subtenant at the time the building was destroyed by fire resulting from the negligence of the landlord (126–149, 148+110). Landlord and Tenant, ⊂=169(7).

Evidence held to sustain a verdict against a landlord for death of a subtenant, resulting from the destruction of the building by fire (126–144, 148+108). Landlord and Tenant, ⊂=169(7).

Evidence held insufficient to support a finding that a landlord was negligent, rendering him liable for injury to the tenant's goods from water leaking from the ceiling (121–505, 141+835). Landlord and Tenant, ⊂=169(7).

Evidence held insufficient to sustain a finding of the jury that an engineer of a train standing at a crossing willfully and wantonly backed the train with knowledge that plaintiff was attempting to climb through the train (125–155, 145+799). Railroads, ⊂=348(11).

Evidence held to support verdict against railroad company for injuries to person on track (129–101, 151+894). Railroads, ⊂=398(3).

Evidence held to support verdict against railroad company for destruction of property by fire set out by locomotive (121–439, 141+523). Railroads, ⊂=482(1).

Evidence held to sustain verdict against railroad for injuries at crossing (122–102, 141+855). Railroads, ⊂=350(1).

Evidence held to support a verdict against a railroad company for injuries resulting from negligence in running a train at a crossing (122–44, 141+854). Railroads, ⊂=348(3).

Evidence held to support verdict against railroad company for death of trespasser on track under last clear chance rule (129–142, 151+896). Railroads, ⊂=398(3, 4).

Evidence held to support a verdict for death of plaintiff's intestate at a railroad crossing, and finding against defendant's contention that the facts shown overcame the presumption of due care on the part of deceased (123–279, 143+722). Railroads, ⊂=348(6).

Evidence held to sustain verdict that defendant's negligence in running an automobile caused injuries to plaintiff, a passenger therein (125–431, 147+434). Carriers, ⊂=318(5).

Evidence held to sustain a verdict against a railroad company for injuries to a shipment of live stock (126–259, 148+112). Carriers, ⊂=228(5).

Evidence held to justify finding that defendant railroad company was negligent in the care of live stock unloaded in the course of transportation (123–495, 144+220). Carriers, ⊂=230(4).

Evidence in action for injuries to passenger held to support verdict for plaintiff (128–193, 150+800).

Evidence as to contributory negligence of driver of automobile truck, with which a street car collided, held to support findings of the trial court (125–399, 147+430). Appeal and Error, ⊂=1010(1).

Evidence held to sustain a verdict for defendant in an action against a street railway company for injuries resulting from a collision with an automobile (126–168, 148+61). Appeal and Error, ⊂=1002.

In an action for personal injuries inflicted by a vicious cow, evidence held to support a verdict for plaintiff on the issues of negligence and contributory negligence (128–232, 150+897). Animals, ⊂=74(5).

Evidence held insufficient to justify recovery for negligence of a logging corporation in conducting a drive of logs, in consequence of which the logs were permitted to come in contact with the river bank, thus injuring plaintiff's riparian rights (127–8, 148+517). Navigable Waters, ⊂=39(6).

In an action for personal injuries, held, that there was no abuse of discretion in denying a new trial on the ground of the insufficiency of the evidence to sustain a verdict for plaintiff (161+400). New Trial, ⊂=70.

Evidence held to sustain a finding of the jury of negligence of a master causing injury to a servant and that a release executed by the servant was obtained by fraud (123–516, 144+407). Release, ⊂=57(2).

Evidence held to sustain a finding of the jury as to the cause and extent of injuries received by a shipper of live poultry owing to mismanagement of the train (123–173, 143+322). Evidence, ⊂=589.

In case of a collision of an automobile with a street car, held, that contributory negligence of the driver of the automobile was not shown by the evidence (125–308, 146+1107). Street Railroads, ⊂=114(15).

Other actions—Evidence, in action for accounting between persons engaged in a joint adventure for the purchase of a mine, held to support the findings of the court (122–448, 142+876). Joint Adventures, ⊂=5(2).

In an action by the state to recover from a purchaser of pine timber for a deficiency in the scaling of the timber as shown by a rescale, held, that findings of trial court are sustained by the evidence (122–400, 142+717). Public Lands, ⊂=16.

Evidence held to support a finding by the jury that a scale made by a purchaser of timber was incorrect, and that a subsequent scale made by a deputy surveyor general was correct (125–15, 145+402). Logs and Logging, ⊂=8(5).

Evidence held to support findings of court that delay in furnishing last items was not for the wrongful purpose of extending the time for perfecting mechanic's lien (124–132, 144+472). Appeal and Error, ⊂⊃1009(2).

Evidence held to sustain findings that defendants were innocent purchasers for value of land which the mortgage sought to be foreclosed purported to cover (123–367, 143+917). Vendor and Purchaser, ⊂⊃244.

VERDICT CONTRARY TO LAW

In an action to recover for services, in which the court charged as to agreed price, and not as to reasonable value, as to which there was evidence, a verdict based on an agreed price, but without evidence to support it, is contrary to law and is not supported by the evidence (131–13, 154+514). Master and Servant, ⊂⊃80(15).

That parts of a finding of fact may be immaterial does not require a new trial (132–321, 156+348). New Trial, ⊂⊃61.

Where the verdict is not justified by the evidence, the awarding of a new trial is discretionary; but it is otherwise where the ground is that the verdict is contrary to law (122–463, 142+729). New Trial, ⊂⊃66, 70.

7829. Basis of motion—

Effect on appeal of failure to file bill of exceptions—In the absence of a settled case or bill of exceptions, all questions covered by the findings will be presumed to have been litigated by consent (131–249, 154+1072). Appeal and Error, ⊂⊃907(3).

Failure to serve notice in time—Waiver—Failure to serve a notice of motion within time is deemed waived, where the notice is served personally, but is not returned for being too late (129–528, 152+270). New Trial, ⊂⊃121.

When motion may be made—A party may make a motion for a new trial, after entry of judgment, if without fault on his part he has had no reasonable opportunity to make the motion before judgment, and if he uses reasonable diligence in doing so afterwards. The question of diligence is in the sound discretion of the trial court (125–475, 147+654). New Trial, ⊂⊃116(3), 124(1).

When settled case or bill of exceptions is necessary—Where a new trial is granted upon a motion based upon the minutes and upon affidavits, the appellate court will not reverse, unless a settled case or bill of exceptions is contained in the record (126–90, 147+716). Appeal and Error, ⊂⊃544(1).

A settled case or bill of exceptions is not necessary to review an order disposing of a motion for a new trial on the ground that by a clerical error of the jury a verdict the very opposite of the one agreed on was returned; affidavits of all the jurors supporting the ground alleged being returned (135–13, 159+1070). Appeal and Error, ⊂⊃544(1).

Time for motion on the minutes—A motion for new trial on the court's minutes is in time when made and heard the day after the rendition of the verdict (134–266, 159+564). New Trial, ⊂⊃117(1).

Several defendants—Parties necessary in motion—To entitle a defendant to urge as error the direction of a verdict in favor of a codefendant, the latter must be made a party to the motion for a new trial, when the motion is based in part upon the claim that the court erred in so directing a verdict (132–195, 156+272). Appeal and Error, ⊂⊃327(5).

7830. Exceptions—Notice of motion for new trial—

131–13, 154+514.

In general—Where a party is served with a short notice of an interlocutory motion, he should apply to the court to vacate the service or be relieved from default in order to raise the question on appeal (125–475, 147+654). Appeal and Error, ⊂⊃189(1).

Where a judgment for plaintiff in an equity suit fails to contain a provision favorable to defendant and authorized by the findings, the remedy of defendant is by motion and not by appeal (134–39, 158+810). Appeal and Error, ⊂⊃9.

Where a demurrer was overruled, and judgment was entered for plaintiff without notice, but no application was made to the trial court for leave to answer or vacate the judgment, the question whether defendant was entitled to answer or to have the judgment vacated cannot be considered upon appeal (126–367, 148+306). Appeal and Error, ⊂⊃224.

Construction of findings, in absence of motion for new trial or to amend findings (see 127–530, 149+1070).

Where proof is sought to be elicited on cross-examination, and is excluded, it is not necessary to make an offer of proof to present the question for review (126–239, 148+102, Ann. Cas. 1915D, 888). Appeal and Error, ⊂⊃205.

Necessity for exception to or specification of errors in motion—Necessity of exception or presentation of question in motion for new trial (121–243, 141+120). Appeal and Error, ⊂⊃263(1).

Failure in the trial court to raise the question of the applicability of the fellow servant rule precludes consideration of that question on appeal (133–73, 157+993). Appeal and Error, ⊂⊃173(13).

Errors assigned upon rulings at the trial cannot be considered on appeal, unless excepted to at the time or specified in the motion for new trial; and this rule applies to instructions (131–320, 155+205). Appeal and Error, ⊂⊃301, 727.

Objections to improper remarks or conduct of counsel, not assigned as a ground of new

trial, cannot be considered for the first time on appeal (130–80, 153+269). Appeal and Error, ⊂⊃207.

Alleged misconduct of counsel, not urged in the motion for new trial, cannot be considered on appeal (130–229, 153+532, Ann. Cas. 1916C, 267).

Where no objection was made at the time to alleged misconduct of plaintiff, made a ground of the motion for new trial, complaint of such misconduct could not be made on appeal (162+464). Appeal and Error, ⊂⊃201(1).

Where errors were assigned to rulings on evidence, but no exceptions were taken thereto, and such errors were not specified in motion for new trial, they were not reviewable (162+464). Appeal and Error, ⊂⊃260(1).

Rulings to which no exception was taken at the trial nor by motion for a new trial cannot be reviewed on appeal (162+353). Appeal and Error, ⊂⊃248.

Evidence received without objection will be considered as before the court on appeal (128–307, 150+903).

Allowance of fee paid expert witness on taxation of costs in lower court cannot be objected to for first time on appeal (128–449, 151+274). Appeal and Error, ⊂⊃226(2).

Question of excessive damages, not made a ground for new trial, will not be considered on appeal (129–70, 151+537).

Assignments of error in rulings on evidence and in instructions cannot be considered, where they are not founded on exceptions taken at the trial or in the motion for a new trial (129–529, 152+270). Appeal and Error, ⊂⊃305.

Grounds for new trial, not assigned in the trial court, will not be considered on appeal (129–353, 152+725). Appeal and Error, ⊂⊃301.

Where no exception was taken to the refusal to give requested instructions, and no error in this regard was assigned in the motion for new trial, the action of the court will not be reviewed on appeal (123–325, 143+787). Appeal and Error, ⊂⊃263(3).

Assignment of error in admission of testimony will not be considered, where such objection is not contained in the motion for new trial (122–533, 142+1134). Appeal and Error, ⊂⊃289.

Where plaintiff's attorney called defendant's counsel and interrogated him as a witness as to the whereabouts of defendants and why they were not in court, so that they could be called for cross-examination, and defendants' counsel objected, but did not reserve exceptions to the rulings, either at the trial or on motion for new trial, there is nothing for review on appeal (161+167). Appeal and Error, ⊂⊃301.

Objection to admission of communications with person since deceased held sufficient to present the question for review (128–17, 150+213, L. R. A. 1916C, 1214, Ann. Cas. 1916D, 1101). Wills, ⊂⊃297(1).

Necessity for motion for a new trial—Where there is no motion for new trial, the only matter for review on appeal is the sufficiency of the evidence to support the verdict (132–307, 156+346). Appeal and Error, ⊂⊃281(1).

A motion for judgment notwithstanding the verdict is not appealable, unless the denial thereof is followed by a motion for new trial (132–467, 155+1039). Appeal and Error, ⊂⊃109.

Motion for judgment notwithstanding verdict is a waiver of all errors which would have been ground for new trial, unless the motion is in the alternative for judgment or for new trial (128–514, 151+419, L. R. A. 1915D, 1077; 129–25, 151+421). Appeal and Error, ⊂⊃289, 292; New Trial, ⊂⊃10.

Where the motion for new trial is limited to the grounds of insufficiency of evidence and excessiveness of the verdict, alleged errors in admission of evidence and instructions cannot be considered on appeal (135–476, 160+79). Appeal and Error, ⊂⊃302(1).

Where no exception to the charge is taken in the motion for new trial, the instructions must be taken on appeal as the law of the case (128–270, 150+919). Appeal and Error, ⊂⊃215(1).

What the record should contain on appeal—An order denying a motion made upon all the files and records in the action will be affirmed, unless the record contains a settled case or bill of exceptions, or a certificate of the trial judge that the record contains all that was presented or considered on the motion, or a certificate of the clerk that the record contains all the files and records in the case (123–299, 143+741). Appeal and Error, ⊂⊃671(1).

Necessity of discussing errors in the brief—Assigned errors, not discussed in the brief, will not be reviewed (122–419, 142+721). Appeal and Error, ⊂⊃366.

What matters may be raised for the first time on appeal—Where the findings of fact are insufficient to support the conclusions of law the defeated party may raise the question for the first time on appeal, and need not move in the trial court for an amendment of the findings (128–5, 150+216).

What matters may appellee raise on appeal—On appeal by defendant from an order granting a new trial plaintiff may point out other errors occurring at the trial, and properly raised, than those for which the new trial was awarded (134–192, 158+967). Appeal and Error, ⊂⊃854(6).

Necessity of stating ground of exception or objection—Where the record does not show on what grounds appellant opposed the confirmation of a receiver's sale, and the impropriety of the order is not apparent there is nothing to review (134–422, 159+948). Appeal and Error, ⊂⊃684(3).

A party will not be permitted to review rulings in admitting evidence, unless he has advised the trial court of his ground of objection (127–84, 148+891).

Instructions not objected to—An instruction fundamentally wrong, or which has the effect of preventing a verdict for a substantial amount on a cause of action well pleaded, may be assigned as error on motion for new trial, though no exception is taken at the trial; but

it is otherwise with respect to inaccuracies of expression and inadequate treatment of the controversy (125–441, 147+445, 52 L. R. A. [N. S.] 1176). New Trial, ⇐⇒40(4).

Where an erroneous instruction relates to a controlling proposition of law in the case, it is not cured by other portions of the charge, and the injured party, in view of this section, is not bound to call it to the attention of the court at the trial, in order to obtain a review on appeal (135–1, 159+1069). Appeal and Error, ⇐⇒263(2).

Instructions to the jury, not excepted to, while for some purposes the law of the case, do not furnish the test by which the admissibility of evidence is to be determined (162+520). Appeal and Error, ⇐⇒853.

Unchallenged instructions held the law of the case on appeal (121–455, 141+803). Appeal and Error, ⇐⇒853.

Verbal inaccuracies in instructions, to which the court's attention is not called before retirement of the jury, are not ordinarily ground for new trial (130–434, 152+262; 130–434, 153+736). New Trial, ⇐⇒40(3).

Defendant in a criminal case cannot permit the court in its charge to misstate his position, and, without calling the court's attention thereto, found error thereon (123–276, 143+782). Criminal Law, ⇐⇒847.

Where an instruction contains misstatements or omissions due to inadvertence, it is the duty of the party complaining to request a correct instruction, and this rule is not affected by 1901 c. 113 (125–466, 147+441). Trial, ⇐⇒287.

Where one contesting a will did not object in the trial court to an instruction, but on the contrary stated that the instructions were entirely satisfactory, he could not complain on appeal (126–275, 148+117). Wills, ⇐⇒336.

The failure of the trial court to expressly call the attention of the jury to the degree of care imposed upon defendant in respect to the maintenance of the right of way fence was an inadvertence, and since no exception was taken at the trial, is not reversible error (162+469, following and applying 101–12, 111+651, 11 L. R. A. [N. S.] 228, 11 Ann. Cas. 429). Appeal and Error, ⇐⇒263(3).

Objections to evidence when necessary—Where no objection was made to the questions asked a witness, objection cannot be made on appeal to the answers given in response to such questions (126–203, 148+113).

7831. "Bill of exceptions" and "case" defined—

A verdict is one of the "papers properly filed by the clerk," and is part of the record proper, and should be excluded from the settled case (127–15, 148+476). Trial, ⇐⇒342.

7832. Bill of exceptions or case, how and when settled—

In general—The prevailing party in the trial court held not entitled to propose and have settled a record containing the evidence and proceedings on the trial, where the court on appeal could not consider the same (134–276, 159+566). Appeal and Error, ⇐⇒516.

Suspension of sentence for a definite period held proper, and within the discretion of the court (125–529, 147+273). Criminal Law, ⇐⇒1001.

When case may be settled and allowed—Discretionary—The granting or refusing of a motion for leave to settle a case after the time limited by this section will not be disturbed on appeal, in the absence of a clear abuse of discretion (128–537, 150+924). Appeal and Error, ⇐⇒956(2).

The trial court may settle and allow a case after an appeal has been taken from an order denying a new trial (127–533, 149+550). Appeal and Error, ⇐⇒567(1).

Where the statutory time for settling a case has expired, the appellant must excuse the default and appeal to the discretion of the trial court (161+782). Appeal and Error, ⇐⇒567(2).

That a cause has been removed to the supreme court by appeal, and that by such removal some of the exhibits could not be made a part of the case, did not deprive the trial court of jurisdiction to settle a case (161+782). Appeal and Error, ⇐⇒571.

The court may extend the time for settlement of a case after the time has expired, whether the case is to be settled by the trial judge or, in the event of his disability, by another judge (125–475, 147+654). Appeal and Error, ⇐⇒567(2).

Time of notice—The time of notice of an application for settling a case, as prescribed by § 7832, may be shortened by an order to show cause under § 7749 (125–475, 147+654). Appeal and Error, ⇐⇒568.

Waiver of late service—Retention of a proposed case is not a waiver of the objection that it was not served in time (128–537, 150+924). Appeal and Error, ⇐⇒644(2).

Amendment—Objection to amendment of a settled case held insufficient to present the question, where an amendment was precluded by the perfection of the appeal (124–317, 145+37). Appeal and Error, ⇐⇒232(1).

After settlement of a case, denial of a motion made on affidavits to add certain testimony not appearing in the minutes of the official stenographer held not error (135–477, 160+247). Appeal and Error, ⇐⇒648.

Effect where there is no bill of exceptions or case—On an appeal from a judgment where there is neither a bill of exceptions nor a settled case, the only matter that will be considered is whether the findings sustain the judgment (162+1073). Appeal and Error, ⇐⇒544(2).

In absence of settled case, the findings of the trial court are presumed to be within the issues litigated, whether such findings are within the pleadings or not (129–156, 151+910). Appeal and Error, ⇐⇒931(1).

An appeal will be dismissed, where appellant's grievances relate solely to alleged defects in the evidence and instructions, and there is no settled case or bill of exceptions (127–520, 148+1081). Appeal and Error, ⊂=554(2).

Mandamus to require settlement—Where the trial judge considers, and denies on its merits, an application to settle a case after the statutory period, the supreme court cannot afford relief by mandamus, especially where there is no abuse of judicial discretion on the part of the district judge (132–146, 155+905). Appeal and Error, ⊂=571.

Mandamus will not lie to require the trial court to allow and settle a case after expiration of the time fixed therefor, where the denial is not shown to be an abuse of discretion (124–537, 144+755). Appeal and Error, ⊂=571.

Cross-assignments of error—Cross-assignments of error are not permitted by the practice of this state (134–276, 159+566).

7833. Same—When judge incapacitated, etc.—

See note under § 7832.

Where the trial judge has vacated his office, another judge in the same district may hear a motion for a new trial (125–475, 147+654). New Trial, ⊂=114.

REPLEVIN

7834. Possession of personal property, how claimed—

Replevin does not lie against a joint owner or tenant in common (128–349, 150+1098). Replevin, ⊂=16.

Action between partners (see 129–525, 152+1101).

Return of partial payments, and demand, as condition precedent to replevin by conditional vendor (see 124–426, 145+164, 51 L. R. A. [N. S.] 251). Replevin, ⊂=11(1); Sales, ⊂=479(5).

7835. Affidavit—

Replevin will lie to recover property in the constructive possession of defendant, if the property is under defendant's control in the hands of another, so that defendant may deliver possession if he so desires (133–200, 158+41). Replevin, ⊂=10.

In replevin for an adding machine, finding of defendant's ownership of the machine held sustained by the evidence (162+1059). Replevin, ⊂=72.

In replevin for cordwood taken by defendant from several piles of wood on a tract of land, some of which piles belonged to plaintiff and others not, plaintiff had the burden of proving the identity of the wood claimed by him (123–525, 143+268). Replevin, ⊂=70.

Mere severance of trees standing on land in possession of plaintiff will not support replevin, but it is otherwise where defendant removes the logs from the land. Plaintiff, in possession of public land under the homestead laws, held entitled to maintain replevin for logs unlawfully cut and removed from the land by defendant (207 Fed. 40, 124 C. C. A. 600). Replevin, ⊂=9.

7838. Exception to sureties—Rebonding—

In an action for conversion, where plaintiff proves title, it is no defense that the property was taken under a writ of replevin from plaintiff's husband, and was returned to the husband on his rebonding it (127–177, 149+2). Trover and Conversion, ⊂=22.

ATTACHMENT

7845. When and in what cases allowed—

This section compared with § 7859 as to the necessity of a formal commencement of the action before the issuance of the writ (123–330, 143–792). Attachment, ⊂=71; Garnishment, ⊂=64.

7846. Contents of affidavit—

Subd. 4—A preferential transfer or payment without actual fraud does not constitute a disposition of property with intent to delay and defraud creditors, so as to authorize attachment under this section (124–112, 144+433). Attachment, ⊂=44.

Mere constructive fraud in a chattel mortgage from son to father covering a growing crop is not sufficient to support an attachment under this subdivision, an actual personal intent to defraud being necessary (130–141, 153+125). Attachment, ⊂=44.

The transfer contemplated by this subdivision is a transfer fraudulent as to creditors at common law or under the English statute (124–112, 144+433). Attachment, ⊂=44.

7847. Conditions of required bond—

A judgment of dismissal, entered under a stipulation of the parties settling and adjusting all matters in dispute between them, will not support an action on the bond given under this section, since such stipulation releases the surety, and since the statute, which is part of the contract, contemplates a judgment determining that plaintiff had no cause of action at the time of the levy. The rule as to collateral attack on a judgment is not involved (132–201, 156+5). Attachment, ⊂=331; Judgment, ⊂=516.

7849. Execution of writ—

A written contract held to constitute a sale of timber, and not a mere license, so that the estate and rights of the vendee, its contract being of record, were not effected by subsequent attachment and lis pendens against the interest of the timber vendor, nor by the latter's subsequent assignment of its land contract (126–176, 148+43). Vendor and Purchaser, ⊂=79.

7853. Motion to vacate—

Upon motion to vacate an attachment, based on affidavits putting in issue the facts on which the writ was issued, the burden is upon plaintiff to sustain the allegations of the original affidavit, by competent evidence (135–469, 160+1024). Attachment, ⊂=47(2).

GARNISHMENT

7859. Affidavit—Garnishee summons—Title of action—

There is a judgment on which garnishment may be based, though an appeal, without supersedeas, has been taken, and the affirmance of the judgment is based on the condition of the entry of a remittitur as to a part of the recovery, and the remittitur has not been filed (132–336, 156+668). Garnishment, ⊂=7.

This section contemplates and requires, as essential to the right to proceed thereunder, that either the main action be pending or that it be commenced by issuing a valid summons at the time of the issuance of the garnishee summons (123–330, 143+792). Garnishment, ⊂=64.

A guaranty insurance company held not liable as garnishee under a judgment against an assessor on an indemnity risk, when at the time of service of garnishee summons and when disclosure was made it held a valid claim for policy premiums against assured in excess of such judgment, though it defended the main action (124–339, 145+26). Garnishment, ⊂=130.

7861. In district court—

Service by publication on defendant, and notice under § 7870 of motion for leave to file supplemental complaint against garnishee (see 133–326, 158+606; notes under §§ 7865, 7870).

7862. Effect of service on garnishee—Fees—

The interest of a creditor in an estate assigned for the benefit of creditors is subject to garnishment, and the garnishee summons impounds the interest of such creditor in the trust estate (130–392, 153+740). Assignments for Benefit of Creditors, ⊂=184; Garnishment, ⊂=31.

Though the right to money is complete, plaintiff cannot recover same, where it is subject to an undetermined garnishment (125–262, 146+1093). Abatement and Revival, ⊂=8(1).

A garnishment creditor gets nothing more than an inchoate lien, and this lien can be perfected only by proceeding to judgment against the garnishee in the manner provided by statute (124–254, 144+959). Garnishment, ⊂=106.

An inchoate lien by garnishment cannot be tacked to a lien of an execution on the judgment against the defendant, and levied upon the indebtedness of the garnishee, so as to make up the period of four months specified by the bankruptcy act (124–254, 144+959). Bankruptcy, ⊂=161(1).

7863. Property subject to garnishment—

A surety company, participating in the defense of an action for personal injuries, may be made a garnishee as to the amount of the judgment under its bond of indemnity to the defendant (132–336, 156+668). Garnishment, ⊂=42.

Where an assignee for the benefit of creditors is garnished by a creditor of a creditor entitled to participate in the assigned estate, the garnishee proceedings should be continued until the amount applicable to plaintiff's claim can be determined (130–392, 153+740). Action, ⊂=68; Garnishment, ⊂=31.

Bill of sale held not to vest title of personal property in claimant, so as to free the property from garnishment as the property of defendant (123–444, 143+1130). Garnishment, ⊂=49.

An order for compensation for an attorney under § 8513, is neither a judgment, nor the amount thereof in custodia legis, but merely creates a county debt which is garnishable as such (126–264, 148+66). Garnishment, ⊂=44, 58.

Compensation ordered under § 8513 in favor of an attorney for defending an indigent accused of crime is not exempt from garnishment as being fees of a public officer (126–264, 148+66). Garnishment, ⊂=63.

7864. In what cases garnishment not allowed—

A beneficiary in an assignment for the benefit of creditors takes a vested and not a contingent interest in the estate of his debtor, and hence such creditor's interest is subject to garnishment, and the garnishment proceedings should be continued until the amount of such interest is determined (130–392, 153+740). Action, ⊂=68; Garnishment, ⊂=31.

An order for compensation for an attorney under § 8513 is neither a judgment, nor the amount thereof in custodia legis, but merely creates a county debt, which is garnishable as such (126–264, 148+66). Garnishment, ⊂=44, 58.

7865. Examination of garnishee—

The filing of the affidavit of nonresidence of defendant, as provided for in this section, has the same effect that it had prior to the revision of 1905, notwithstanding § 7870, and such affidavit relieves plaintiff from the necessity of serving notice upon the defendant of an application for leave to file a supplemental complaint against the garnishee under § 7870 (133–326, 158+606). Garnishment, ⚖99.

Service of summons by publication on a nonresident defendant gives jurisdiction to render a judgment binding upon him to the extent of the property impounded (133–326, 158+606). Judgment, ⚖17(11).

7869. Claimant of property to be joined—

Evidence held insufficient to support a finding that a fund in bank standing in the name of the defendant in garnishment was in fact the property of a third person, so as to render the bank liable to such person on its deposit of the fund in court (128–455, 151+178). Garnishment, ⚖218.

7870. Proceedings when debt or title is disputed—

Where a garnishee made disclosure that his liability to the defendant was on a contract of indemnity made in Nebraska, under the laws of which state no liability would accrue until the indemnitee had in fact suffered loss or damage by the payment of the claim from which he was protected, an issue of fact as to the law of Nebraska was presented, to be tried upon supplemental complaint under this section and plaintiff was not entitled to judgment on the disclosure (131–75, 154+739). Garnishment, ⚖144.

The testimony of other witnesses may be received to supplement or explain the garnishee's disclosure. Evidence held sufficient to sustain finding discharging garnishee (129–188, 152+136). Garnishment, ⚖163, 164.

A judgment cannot be rendered against a garnishee upon an unevasive disclosure, which does not affirmatively and clearly show liability on his part (129–188, 152+136). Garnishment, ⚖180.

Bill of sale from defendant to claimant held not to transfer title from defendant, so as to discharge the property from liability for defendant's debts (123–444, 143+1130). Garnishment, ⚖49.

The filing of the affidavit of nonresidence under § 7865 has the same effect as it had prior to the revision of 1905, and, notwithstanding the provision of this section as to service of notice on the garnishee and defendant, it relieves plaintiff of the necessity of serving notice upon defendant of an application for leave to file a supplemental complaint against the garnishee. Service of notice to appear and take part in the examination of the garnishee, and of an application to file a supplemental complaint against the garnishee, is not necessary to bring defendant into court, as he is already in court so far as the property seized by the garnishment is concerned (133–326, 158+606). Garnishment, ⚖99.

7872. Same, when rendered—Discharge—Transfer of action—

Where garnishee makes full disclosure and thereafter venue in main action is changed to another county, a dismissal there discharges garnishment, as under this section no judgment can be rendered against garnishee until after judgment is rendered against defendant (162+468). Garnishment, ⚖196.

7876. Amount of judgment—Effect—

Cited (124–254, 144+959).

Garnishee cannot set off against its liability to defendants, arising after their adjudication as bankrupts, claims arising before bankruptcy; the bankrupts having been discharged (132–336, 156+668). Garnishment, ⚖130.

INJUNCTION

7888. How issued—Effect on running of time—

This section has no application to the question as to the time of accrual of a cause of action to recover excessive freight rates paid while an injunction was in effect prohibiting enforcement of the statutory rates, of which injunction plaintiff had notice, where sufficient time existed for commencement of the action after dissolution of the injunction before the statutory limitation period had run (135–45, 159+1082). Limitation of Actions, ⚖111.

7889. Temporary injunction when authorized—

161+520; 161+524.

In general—Whether the injury to plaintiff from the denial of a temporary injunction is so much greater than the injury to defendant from an award of the order that a temporary restraining order should issue is peculiarly for the trial court, and its action on evenly balanced testimony will not be disturbed on appeal (123–231, 143+728). Appeal and Error, ⚖954(1).

An order granting or refusing a temporary injunction will not be disturbed on appeal, unless the discretion of the trial court has been abused (130–510, 153+1088). Appeal and Error, ⚖954(1).

A citizen and taxpayer may not enjoin municipal officers from leasing a building not needed for public use, unless the municipality and its officers are acting ultra vires and such acts may injuriously affect his rights (162+1073). Municipal Corporations, ⚖993(2).

Review of order dissolving temporary injunction where evidence is conflicting (128–391, 151+139). Appeal and Error ⊜954(3).

Injunction granted—A temporary injunction may be granted, though the equities of the complaint are fully denied by the answer under oath, where it appears probable that the material allegations of the complaint will on final hearing be found to be true. A temporary restraining order held properly granted in this case under the rule stated (131–337, 155+99). Injunction, ⊜146.

An order granting a temporary injunction restraining the city of St. Paul from executing an order for the removal of an alleged obstruction to the use of a public alley declared by the city a public nuisance held not an abuse of discretion (162+1062). Injunction, ⊜38.

Where county officials took possession of a building erected by the county for a sheriff's residence and jail, and used it as a courthouse owing to the fact that the county had no other building at the time for the transaction of the county business, and the sheriff locked up the building and excluded the other county officials from access to records which they had placed in the building, a temporary restraining order procured by the county against the sheriff to prevent him from the doing of such acts pending determination of the suit for injunction will not be reversed on appeal, since the public interests are of greater importance than any right the sheriff is shown to possess in and to the building (134–473, 159+129). Injunction, ⊜38.

Facts held sufficient to justify the issuance of a temporary injunction to restrain interference with plaintiff's employés (131–458, 155+638). Injunction, ⊜101(2).

Showing of probable irreparable injury from cancellation of contract for sale of land under § 8081, to warrant temporary restraining order against service of notice during pendency of action for rescission of contract for fraud of grantor (132–384, 157+587). Injunction. ⊜38.

Injunctions denied—Where, under a complaint, the court was justified in refusing to entertain an action at all, there was no abuse of discretion in denying an application for a temporary injunction (124–10, 144+423, L. R. A. 1915F, 1012, Ann. Cas. 1915B, 448). Injunction, ⊜137(1).

Where, after judgment for separate maintenance rendered in this state, the defendant brought an action for divorce in Illinois, a temporary injunction to restrain the prosecution of such action held properly denied (127–21, 148+478). Injunction, ⊜136(1).

7891. Bond required—Damages, how ascertained—

Where the expense of removing an embankment constituting a nuisance was less than the diminution in the value of the land owing to the fact that the embankment caused the ponding of water during rain falls, the damages will be restricted to the lesser amount (126–470, 148+311, L. R. A. 1916E, 977). Damages, ⊜108.

RECEIVERS

7892. When authorized—

In general—A receivership being merely ancillary to the main action, the validity of the appointment of a receiver depends upon the jurisdiction of the court of the action (126–440, 148+449). Receivers, ⊜5.

Subdivisions 3 and 4 of this section do not limit the authority of the court in the appointment of receivers for corporations to the instances provided by § 6634, but recognize the general equity powers of the court to appoint receivers for corporations when proper grounds are made to appear (134–422, 159+948). Corporations, ⊜553(1).

Receiver appointed—A receiver may be appointed in an action to foreclose a mechanic's lien on a sufficient showing that it is necessary to protect or preserve the property (161+407). Mechanics' Liens, ⊜283.

In foreclosure, where, in addition to mortgagor's insolvency and insufficiency of the security, the rents had been appropriated by mortgagor to his own use and he had not paid taxes or overdue interest, so as to depreciate security, appointment of a receiver to collect and apply rents was justified (162+674). Mortgages, ⊜468(3).

Appointment denied—Appointment of receiver to take possession of property pendente lite is within discretion of court. The appointment will not be made unless there is imminent danger of loss and where there is not adequate remedy at law. Appointment will not ordinarily be made when title is in dispute, unless there is a reasonable probability that applicant will prevail on the issue of title. A receiver held properly denied in a suit for a partnership accounting (129–229, 152+264; 129–229, 152+537). Partnership, ⊜325(2); Receivers, ⊜8, 16.

Where a corporation repudiates an act of one who acquired property as its agent, it has no standing to demand an appointment of a receiver to hold the property pending an action concerning it (126–440, 148+449). Receivers, ⊜9.

A receiver held improperly appointed in an action for a partnership accounting (125–283, 146+1101). Partnership, ⊜325(2).

JUDGMENT

7896. Measure of relief granted—

In a suit for divorce, in which personal service is had on defendant, the court has power to allow alimony, notwithstanding this section, though the complaint contains no specific demand therefor and the defendant does not answer (130–472, 153+864). Divorce, ⟸203.

Plaintiff may recover interest as an element of damages for false representations in the sale of a horse, though he does not pray therefor in his complaint (124–265, 144+954). Damages, ⟸157(4).

Where defendant appears plaintiff is not limited, as to his relief, to the prayer of his complaint, but he cannot recover a greater amount than that stated therein (124–279, 144+952). Judgment, ⟸252(1).

7897. Judgment between parties and against several defendants—

It is error to instruct that the verdict must be for or against both defendants, and that the only question for determination was whether or not there was a conspiracy between defendants to injure plaintiff (123–17, 142+930, L. R. A. 1915B, 1179, 1195). Torts, ⟸28.

That two defendants are sued as copartners does not make a recovery depend on proof of partnership (127–163, 149+20). Partnership, ⟸219(1).

7898. Same, how signed and entered—Contents—

In view of this section a judgment, in an equitable action to determine title, held not to grant relief ordinarily incident to an action of ejectment (122–158, 142+150). New Trial, ⟸178(1).

A decision of the district court that "it is ordered and adjudged" that the judgment of the probate court, reciting its terms, is affirmed, signed by the judge, and not by the clerk, as required by this section, is an appealable judgment, not a mere order for judgment, so that it should be affirmed, not dismissed, on default of appellant (135–235, 159+565; 135–235, 160+765). Appeal and Error, ⟸133.

Evidence, in an action by an employé for injuries from the explosion of a bottle that he was filling on an unguarded machine, held to warrant denial of a motion for judgment notwithstanding the verdict for plaintiff (123–76, 142+1045). Master and Servant, ⟸258(12).

7901. Damages for libel—

The notice of retraction need not specify each particular part of a published article which contains defamatory matter, it being sufficient if the publisher can determine, without difficulty, the words that contain a libelous imputation (126–239, 148+102, Ann. Cas. 1915D, 888). Libel and Slander, ⟸70.

Persons who are neither owners nor publishers of a newspaper, who cause a circular letter to be published therein of a libelous nature, are not within the provision of this section as to demand for retraction before suit will lie (131–355, 155+212). Libel and Slander, ⟸70.

7904. Docketing judgments—Transcripts—Lien on land—

A judgment debtor, acting as a mere conduit for transfer of title to land from one person to another, acquires no title or interest on which the judgment lien attaches (130–365, 153+861). Judgment, ⟸780(5).

Where a deed to a wife was adjudged to be an equitable mortgage, an amount deposited to redeem therefrom could not be subjected to a judgment against the husband (128–126, 150+396). Mortgages, ⟸608½.

7905. Same—To take effect January 1, 1914—

A subsequently docketed judgment against the grantor in an absolute deed given to secure a debt is not notice to a subsequent purchaser from the grantee (123–293, 143+720). Judgment, ⟸787.

7908. Lien discharged by deposit of money, when—

This section held not applicable to redemption from a mortgage foreclosure sale, so as to require commencement of suit, and deposit of amount of tender in court in order to extinguish the right of a judgment creditor to redeem (127–37, 148+1066, Ann. Cas. 1916C, 527). Mortgages, ⟸596.

7909. Assignment of judgment—Mode and effect—

This section affects the validity of assignments only as to subsequent purchasers and attaching creditors; between the parties the assignment is valid without compliance with the formalities stated in the statute (127–203, 149+199). Judgment, ⟸840.

A finding that a judgment was "sold, assigned, and transferred" to defendant implies the payment of a consideration (127–203, 149+199). Trial, ⟸404(1).

7910. Judgments, procured by fraud, set aside by action—

In general—In an action to set aside a judgment for fraud and perjury, evidence that the judgment defendant was not indebted to plaintiff on the note sued on, and that her signature to the note was a forgery was not admissible (133–463, 157+1069). Judgment, ⟸444.

Failure to disclose on the trial of a divorce action an agreement of separation, entered into after the desertion charged in the complaint, though intentional, is not fraud or perjury for which the judgment can be set aside under this section. A finding of the trial court that there

was no fraud in obtaining service of the summons in a divorce case held sustained by the evidence (127–406, 149+666). Divorce, ⟸167.

To authorize a court of equity to relieve against a judgment on the ground of newly discovered evidence after the time for filing motion for new trial has elapsed, the showing must be clear and specific, free from hearsay, doubt, or conjecture, and justify the conclusion that manifest injustice will result if the relief be not granted (161+257). New Trial, ⟸167(2).

This section applies to divorce cases (133–148, 157+1086). Divorce, ⟸167.

The fact that defendant's husband failed to call her attention to the action in which summons was served by delivery to him, or a copy thereof, cannot be charged to the plaintiff, so as to form the basis of an action to set aside the judgment (133–463, 157+1069). Judgment, ⟸419.

Complaint—A complaint to set aside a judgment for fraud of the prevailing party must, by clear, direct, and positive averments, show that the action is brought within the time stated in this section (135–432, 161+143). Judgment, ⟸460(1).

For perjury—An action cannot be maintained under this section to set aside a judgment on the ground of perjury by the successful party or his witnesses, where the issue of fact is squarely made by the pleadings, so that each party knows what the other may be expected to prove (126–414, 148+455). Judgment, ⟸443(1), 444.

Where, in an action on a benefit certificate, defendant prevailed on the ground that insured had been tried and expelled as a member, the answer setting up such expulsion, and the reply denying it, plaintiff cannot maintain an action under this section to set aside the judgment on the ground that the same was supported by false and perjured testimony offered in proof of such expulsion, since the evidence related to an issue squarely made by the pleadings, and though the facts as to the expulsion were peculiarly within the knowledge of defendant, plaintiff cannot prevail in his subsequent action, where he could readily have obtained evidence to counteract the alleged false testimony (134–338, 159+835). Judgment, ⟸444, 460(4).

Laches—On the facts, held, that a husband was precluded by laches from maintaining an action under this section to set aside a decree of divorce obtained by the wife, though he alleged that he was led to believe that the suit for divorce had been abandoned, and that the parties, though maintaining separate homes, cohabitated together occasionally after the divorce was granted, and until the wife remarried (133–148, 157+1086). Divorce, ⟸167.

The right to have a decree vacated for fraud is not absolute and may be barred by laches (133–148, 157+1086). Judgment, ⟸456(1).

7914. Discharge of judgments against bankrupts—

Where a judgment debtor sues to cancel the judgment on the ground that since its rendition he had been discharged in bankruptcy, it was error to determine an issue as to whether the judgment was a lien on property owned by one not a party, and to decree satisfaction of the judgment, whether the action be considered as one to cancel or as a motion under this section (125–286, 146+1097). Bankruptcy, ⟸433(2), 433½.

7915. Joint debtors—Contribution and subrogation—

Lessor of dam, compelled to pay damages to third persons on account of the flooding of their land, owing to the use of same for floating logs, held not entitled to recover from the lessee under this section (124–475, 145+163). Waters and Water Courses, ⟸171(3).

7916. Several judgments against joint debtors—

One of two makers of a note, who gives his personal note to the payee upon the maturity of the note, and the same is accepted as payment of it, may maintain an action for contribution against his comaker (125–266, 146+1094). Contribution, ⟸6.

In an action by two makers of a note, who paid it, to recover of a comaker his proportionate share, the evidence justifies the findings of the court (125–266, 146+1094). Contribution, ⟸9(6).

7918. By confession—On statement—

135–432, 161+143.

7920. Submission without action—

135–314, 160+792.

EXECUTIONS

7922. Judgments, how enforced—

A judgment held, in view of this section, not to require delivery of possession of land to defendant. (122–158, 142+150). Judgment, ⟸533.

Where, prior to the passage of 1913 c. 318, the defendant denied liability to plaintiff, but upon action brought such liability was found by the court and judgment directed accordingly prior to such passage, and was entered afterwards, such judgment will not be enforced in proceedings by contempt, where the widow was the pensioner's common-law wife (126–332, 148+279). Contempt, ⟸21.

7924. Execution, how issued—Contents—

No order of court is necessary for the issuance of an alias execution. Alias execution cannot issue until the return of the original writ; but where the evidence shows that the original writ was returned, and the alias writ issued on the same day, it will be presumed that the rule stated was complied with (127–203, 149+199). Evidence, ⟸83(6); Execution, ⟸99.

That the copy of the execution served on the judgment debtor does not bear the signature or seal of the clerk does not invalidate a sale of real estate made under the execution (127–203, 149+199). Execution, ⊂⊃94.

7925. When returnable—Inventory—

No formal levy is necessary to be made on real estate in order to sell the same on execution. Failure of the sheriff to make return after the execution sale does not invalidate a sale of real estate (127–203, 149+199). Execution, ⊂⊃275, 330.

7930. What may be levied on, etc.—

An estate dependent on a conversion from realty to personalty in the future is not subject to execution (126–21, 147+812, Ann. Cas. 1915D, 430). Wills, ⊂⊃869.

A garnishment lien and an execution lien on the judgment against defendant cannot be tacked, so as to make up the four months period specified by the bankruptcy act (124–254, 144+959). Bankruptcy, ⊂⊃161(1).

7935. Certificate to be furnished officer—

Where a levy is made under execution on personal property in hands of third party and receipt is taken by officer pursuant to this section, and no further steps are taken for seven months, the levy becomes ineffectual as lien against property (162+468). Execution, ⊂⊃146(1).

7939. Service on judgment debtor—

That copy of execution served on the judgment debtor does not bear the signature or seal of the clerk does not invalidate a sale of real estate under the execution (127–203, 149+199). Execution, ⊂⊃93.

7947. Certificate of redemption—Effect of redemption—

Cited (129–356, 152+727).

7949. Redemption pending action to set aside execution sale—

Cited (123–293, 143+720).

7950. Stay of execution on money judgment—

Cited (133–63, 157+903).

7951. Property exempt— * * *

16. The wages of any person, not exceeding thirty-five dollars, due for any services rendered by him for another during thirty days preceding any attachment, garnishment or the levy of any execution against him, provided, that all wages paid to such person, and earned within said thirty day period, shall be deemed and considered a part of, or all, as the case may be, of said exemption of thirty-five dollars. (Subd. 16, amended '15 c. 202 § 1)

In general—It is immaterial to creditors what agreement is made by the debtor with respect to exempt property (133–375, 158+612). Chattel Mortgages, ⊂⊃191.

A debtor, by a temporary absence from the state on a visit, held not to have lost his residence (122–228, 142+307). Exemptions, ⊂⊃29.

The revision of 1905 introduced no change in this section on the question of selection of exempt property by the debtor, and hence a construction of such provision prior to the revision is still controlling (122–228, 142+307). Exemptions, ⊂⊃116.

Where all the property taken on execution is exempt, no selection or claim is necessary to entitle the debtor to assert the right of exemption (122–228, 142+307). Exemptions, ⊂⊃116.

Subd. 2—A piano, together with a plush cover and stool, are exempt (122–228, 142+307). Exemptions, ⊂⊃47.

Subd. 13—Proceeds of insurance on a building on a homestead, after destruction of the building by fire, is exempt from garnishment under this subdivision (132–372, 157+504). Homestead, ⊂⊃79.

Subd. 16—The proviso to G. S. 1913 § 7951 subd. 16, was violative of Const. art. 1 § 12, but the remainder of the subdivision was valid (129–184, 152+135). Exemptions, ⊂⊃63; Statutes, ⊂⊃64(2).

7952. Levy on property in excess of exemption—

Selection not necessary, where all the property levied on is exempt (122–228, 142+307). Exemptions, ⊂⊃116.