RECENT CASES

APPEARANCE—VOID SUMMONS—EFFECT.—AMES V. FREEMAN, 112 PAC., 160 (KAN.).—*Held,* where a defendant is served with a void summons issued by a justice of the peace, but at the time named in the summons appears before the justice of the peace and submits himself to be sworn as a witness by the plaintiff and testifies as to the merits of the case in response to questions propounded by the attorney for the plaintiff in the presence of the justice, such conduct amounts to a voluntary appearance to the action, and is as binding as the valid service of a legal summons would have been; and a judgment entered upon such trial will not be enjoined as void.

An appearance is the proceeding by which the defendant submits himself to the jurisdiction of the court; *Crawford v. Vinton,* 102 Mich., 83; *Flint v. Comly,* 95 Me., 251; as by demurring; *Gilbert v. Hall,* 115 Ind., 549; or by making a motion which involves the merits; *Elliott v. Lawhead,* 43 Ohio St., 171; or by taking any action, except to object to the service of the writ, which recognizes the case as in court; *Lampley v. Beavers,* 25 Ala., 534. But a mere attendance at court without a full understanding of the pending action and the proceedings does not constitute an appearance; *Merkle v. Rochester,* 13 Hun. (N. Y.)„ 157. Neither is the execution of an attachment bond by a defendant in attachment an appearance; *Hilton & Allen v. Consumers' Can Co.,* 103 Va., 255; nor the giving of bail, after arrest under bail process; *Lanneau v. Ervin,* 12 Rich. Law (S. C.), 31. As to an appearance curing a defective summons, the weight of authority seems to be in accord with the principal case, holding that an appearance by the defendant waives all defects in the process or its service. *Childs v. Limback,* 30 Ia., 398; *Pool v. Minge,* 50 Ala., 100; *Baizer v. Lasch,* 28 Wis., 268; *Baldwin v. Murphy,* 82 Ill., 485. But some courts modify this rule, holding that a void process is not cured by appearance; *Beall v. Blake,* 13 Ga., 217; *Osgood v. Thurston,* 40 Mass., 110. In New York, however, it has been held that where a defendant appears, even though he is ignorant that the process is void, there has been a waiver. *Pixley v. Winchell,* 7 Cow. (N. Y.), 366.

BROKERS—WHEN COMMISSIONS EARNED—DEFAULT OF PURCHASER.—WEEKS V. HAZARD, 127 N. W., 1099.—*Held,* that a broker, employed on agreement to procure a purchaser for property on terms satisfactory to the owner, is entitled to his commission when the purchaser procured by him contracts with the owner on terms fixed by the owner, even if the purchaser fails to fully perform the contract. Evans and Weaver, JJ., *dissenting.*

A broker employed to procure a purchaser for property is entitled to his commission if through his instrumentality a valid enforceable contract of sale is entered into between the owner and the purchaser procured by

the broker. *Lunney v. Healey,* 56 Nebr., 313; *Pinkerton v. Hudson,* 87 Ark., 506; *Friedstedt v. Dietrich,* 84 Ill. App., 610. This is true, in the absence of an express contract of warranty, even if the purchaser is financially unable or for any other reasons fails to fully perform the contract. *Moore v. Irwin,* 89 Ark., 289; *Greene v. Hollingshead,* 40 Ill. App., 195. Or if the contract is mutually abandoned. *Sullivan v. Frazier;* 57 N. Y. Supp., 1008. There are, however, well-considered cases in Maryland and Rhode Island which require the contract of sale to be merged into an actual sale in order to entitle the broker to his commission, unless it clearly appears that the owner did not rely on the broker's judgment as to the financial responsibility of the purchaser. *Riggs v. Turnbull,* 105 Md., 135; *Butler v. Baker,* 17 R. I., 582. But no question can arise as to the doctrine that a broker, upon express agreement with the principal, is entitled to his commission when a contract is made on the principal's own terms, even if the contract is never fully carried out. *Hipple v. Laird,* 189 Pa. St., 472; *Alt v. Doscher,* 92 N. Y. Supp., 439, affirmed on opinion of lower court in 186 N. Y., 566; *Hallack v. Hinckley,* 19 Colo., 38. But in no case will a broker be entitled to his commission if there has been fraud, bad faith, or fault on his part. *Moore v. Irwin, supra; Alt v. Doscher, supra; Burnham v. Upton,* 174 Mass., 408.

CONTRACTS—FRAUD—NEGLIGENCE AS DEFENSE.—COLORADO INV. LOAN CO. v. BEUCHAT, 111 PAC., 61 (COLO.).—*Held,* that where one of two contracting parties is fraudulently induced to execute a written instrument on the false representation that it expresses the agreement which the parties had previously made orally, the party defrauded may defend against the enforcement of the fraudulent instrument, though he is chargeable with negligence in relying on the false representations, and in not reading the instrument.

As a general rule, where a contract is procured by false representation of a material fact, the fraud is a defense against the enforcement of the instrument. *Davis v. Read,* 37 Fed., 418; *McShane v. Hazelhurst,* 50 Md., 107. And non-disclosure of a material fact may be sufficient to constitute such fraud. *Stewart v. Wyoming Cattle Ranch Co.,* 128 U. S., 383. However, there is a conflict of opinion as to whether this defense may be made, when the party defrauded is chargeable with negligence in relying upon the false representations. The majority opinion seems to allow a defense under such circumstances as in the principal case. *Livingston v. Strong,* 107 Ill., 295. Contra, *May v. Johnson,* 3 Ind., 449. Thus, it has been held that a failure to examine a deed, *Albany Savings Institution v. Burdick,* 87 N. Y., 40; or a failure to make inquiries as to the truth of facts stated; is not such negligence as will bar recovery. *Mead v. Bunn,* 32 N. Y., 275. In the same manner mere praise or an expression of opinion as to value is not sufficient to warrant the setting aside of a contract. *Zemple v. Hughes,* 235 Ill., 424; *Flynn v. Finch,* 137 Iowa, 378. And invariably, in order to avoid the legal effect of a written instrument knowingly executed and intended to embody the agreement, the proof of fraud must be strong and clear. *McCall v. Bushnell,* 41 Minn., 37; *Parlin v. Small,* 68 Me., 289.

CONTRACTS—TRADE UNIONS—CONTRACTS WITH EMPLOYERS.—KISSAM v. UNITED STATES PRINTING CO. OF OHIO, 92 N. E., 214 (N. Y.).—*Held*, a contract between an employer and trades unions, prohibiting the employment of non-union workmen, is not invalid as to such workmen, where it results in great benefit to the employer, disposes of differences between him and the labor unions, is not entered into with malice against the non-union workmen, nor with intent to injure them, and where it is not sought to compel them to join the union.

Agreements which are contrary to public policy are void. *McNamara v. Gargett*, 68 Mich., 454; *Cothran v. Ellis*, 125 Ill., 496. But a contract to trade exclusively with a particular party is not void. *Long v. Towl*, 42 Mo., 545; *Ward v. Hogan*, 11 Abb. N. Cases (N. Y.), 478. And it is not illegal for workmen to form an association to protect themselves against the encroachments of their employers. *Snow v. Wheeler*, 113 Mass., 179; *Gray v. Building Trades Council*, 91 Minn., 171. However, an agreement between a labor association and an employers' association, that all employees of the members of the employers' association shall be members of the labor association, is illegal. *Curran v. Galen*, 152 N. Y., 33. The question involved in the principal case seems to have been considered but once before, both decisions being in accord. *Jacobs v. Cohen*, 183 N. Y., 207. But in contracts for public work, stipulations that none but union labor shall be employed, are invalid. *Atlanta v. Stein*, 111 Ga., 789; *Adams v. Brenan*, 177 Ill., 194; *State ex rel. Robert Mitchell Furniture Co. v. Toole*, 26 Mont., 22.

COURTS—JURISDICTIONAL AMOUNT.—BEATY V. GOGGAN & BRO., 131 S. W., 631 (TEX.).—*Held*, that a court has jurisdiction of an action for recovery of a debt and foreclosure of the lien thereof on personal property, the value of the property not exceeding its jurisdiction, though the amount of the debt does.

The amount demanded in the complaint is, in general, the criterion of jurisdiction. *Pharis v. Carver*, 52 Ky., 236; *Burr v. Bayne*, 10 Watts (Pa.), 299. But a modification of this rule is made in a suit in chancery, where, to protect land from a claim assessed against it, the value of the land, and not the amount of the claim, determines the jurisdiction of the court. *Matteson v. Matteson*, 132 Mich., 516; *Speyer v. Miller*, 108 La., 204. Again, where a court renders a judgment within its jurisdiction, the fact that the complaint prayed a recovery in excess of the jurisdiction will not affect the validity of the judgment. *Wratten v. Wilson*, 22 Cal., 466; *In re Barbour*, 52 How. Prac. (N. Y.), 94. And jurisdiction is not lost where a portion of the claim is disallowed, thus bringing the amount below the jurisdiction of the court. *Hardin v. Cass County*, 42 Fed., 652. As to whether the market or face value of a security is the test of jurisdiction, there is a conflict. Some courts hold that they cannot judicially know that the market value is different from the value on the face of the instrument. *Gentry v. Gilkey*, 24 Ky., 372. On the other hand, some courts hold that the market and not the face value of the subject of the con-

troversy determines the jurisdiction. *Wisby v. Houston Nat. Bank*, 28 Tex. Civ. App., 268. It is well settled, however, that a creditor may voluntarily remit a part of his claim so as to bring it within the jurisdiction of a particular court. *Matlock v. Lare*, 32 Mo., 262; *Carpenter v. Wells*, 65 Ill., 451; *Bowditch v. Salisbury*, 9 Johns. (N. Y.), 366.

CRIMINAL LAW—EVIDENCE AS TO ILLEGAL SALE OF LIQUOR—ACCOMPLICE.—RAY V. STATE, 131 So., 542.—*Held*, that the purchaser in an illegal sale of intoxicating liquor is not an accomplice in the violation of the law, so as to make his testimony subject to the rule governing testimony of accomplices.

The purchaser of liquor sold in violation of law is not to be regarded as an accomplice. *Wakeman v. Chambers*, 69 Iowa, 169; *State v. Rand*, 51 N. H., 361; *Commonwealth v. Willard*, 22 Pick., 476. One decision in Tennessee holds to the contrary view. *State v. Bonner*, 2 Head, 135. A later decision in that state, however, modifies the doctrine therein stated. *Harney v. State*, 8 Lea, 113. The testimony of the purchaser is not, therefore, generally to be regarded as that of an accomplice within the rule requiring corroboration of the testimony of an accomplice. *People v. Smith*, 28 Hun., 626; *Borck v. State*, 39 So., 580. No exception occurs because the purchaser may have had knowledge that the sale was illegal; *State v. Teahan*, 50 Conn., 92; or that the purchaser was employed as an informer or spy to secure conviction on illegal sales, and was the cause of the sale being made. *State v. Baden*, 37 Minn., 212; *State v. McKean*, 36 Iowa, 343. But it has been held that the testimony of the purchaser should be received with caution and distrust. *Commonwealth v. Downing*, 4 Gray, 29.

DESCENT AND DISTRIBUTION—ADVANCEMENTS.—BOLIN V. BOLIN, 92 N. E., 530 (ILL.).—*Held*, that money paid by a father on the purchase of property conveyed to a son could not be considered as an advancement, where it was not charged in writing.

An advancement is an irrevocable gift *in praesenti* of money or property, real or personal, to a child by a parent, to enable the donee to anticipate his inheritance to the extent of the gift. *Miller's Appeal*, 31 Pa. St., 337; *Waldron v. Taylor*, 52 W. Va., 284. In most jurisdictions it is provided by statute that an advancement cannot be made unless the gift or grant be expressed in writing as an advancement, or charged in writing by the intestate, or acknowledged in writng by the donee. *Bartmess v. Fuller*, 170 Ill., 193; *Lodge v. Fitch*, 172 Nebr., 652. A loan cannot be changed into an advancement, without the consent of the party to be so charged. *Melony's Appeal*, 78 Conn., 334. No particular form of words is necessary to constitute an advancement, but the words must show that it is intended as an advancement. *Bulkeley v. Noble*, 2 Pick (Mass.), 337. It has been held where a father gave his son $5,000 to enable him to purchase an interest in a patent right, and to secure the same took back a chattel mortgage upon the patent, that this was a loan and not an ad-

vancement. *Bruce v. Griscom,* 9 Hun. (N. Y.), 280. The presumption that property put by the father in the name of his son was by way of an advancement is not conclusive, and may be rebutted by proof that the father advanced the greater part of the purchase price and the son the remainder thereof, and it was agreed between them that the son should hold the title for their mutual benefit. *Taylor v. Taylor,* 136 Cal., 92.

EMINENT DOMAIN—STREETS—CONDEMNATION OF LAND REQUIRED FOR RAILROAD PURPOSES.—PORTLAND RY., LIGHT & POWER CO. V. CITY OF PORTLAND, 181 FED., 632.—*Held,* that where a city had only general charter power to open, lay out, establish, widen, alter, extend, vacate, or close streets, and to appropriate and condemn private property therefor, it had no power to condemn a part of a railroad's right of way to construct a street longitudinally along the same, especially where there was no provision for joint use of the property by the railroad company and the public.

The right of eminent domain is not inherent in a municipality but may be conferred upon it by appropriate legislation. *Warner v. Gunnison,* 2 Colo. App., 430; *Butler v. Thomasville,* 74 Ga., 570. Where express statutory authority exists, however, authorizing this action, this will control, but the right must be strictly exercised. *Abbott on Municipal Corporations,* Sec. 1819. It is generally held that the right to appropriate a portion of a railroad company's right of way longitudinally is not conferred by general authority to condemn; that the power must be conferred expressly or by necessary implication. *Ill. Cent. R. R. Co. v. Chicago, Burlington & Northern R. R. Co.,* 122 Ill., 473. The law seems to be well settled that lands once taken for public use cannot, under general laws, without an express act of the legislature for that purpose, be appropriated by proceedings *in invitum* to a different public use. The legislature, as the supreme and sovereign power in the state, may doubtless interfere with property held by a corporation for one purpose, and apply it to another; but the legislature's intention so to do must be stated in clear and express terms, or must appear from necessary implication. *Baltimore & Ohio R. R. Co. v. North,* 103 Ind., 486. As where it appears by the statute or by the application of the statute to the subject matter that the contemplated road cannot reasonably be built without appropriating land already devoted to public use, in which case an implication arises that the legislature intended that such appropriation might be made. *Providence etc. R. R. v. Norwich etc. R. R.,* 138 Mass., 277; *Housatonic R. R. v. Lee & Hudson R. R.,* 118 Mass., 391.

EVIDENCE—PAROL EVIDENCE.—GERMER V. GAMBILL, 131 S. W., 268 (Ky.).—*Held,* that where the true intention of the parties is not expressed in written contract, they may show that the real contract was not reduced to writing through mistake as to the effect of the words or otherwise.

Parol evidence, though not admissible to add to or vary the terms of a written contract, is admissible to prove facts and circumstances for the

purpose of showing the understanding of the parties of its terms. *Drinkhouse v. Surette,* 83 Mass., 443. So where there is a mistake in a contract and the true intentions of the parties are not expressed. *Howland v. Blake,* 97 U. S., 624. And it is admissible to explain the meaning as well as their mutual acts, where there is an ambiguity. *Bates v. Dehaven,* 10 Ind., 319. As well as to show the remainder of a contract, which the writings executed by the parties on their face, show not to have been fully expressed therein. *Miller v. Goodrich,* 53 Mo. App., 430. But these contentions must be proved to the exclusion of every reasonable doubt. *Howland v. Blake, supra; Goldborough v. Ringbold,* 1 Md. Ch. D., 239.

HOMICIDE—PREVENTING ESCAPE OF PRISONER—ARREST FOR MISDEMEANOR.—LEWIS V. COMMONWEALTH, 131 SOUTHWESTERN REPORTER, 517.—*Held,* that a police officer has no right to shoot one arrested for a misdemeanor to prevent his escape.

In general a police officer has no right to do great bodily harm to or take the life of a person arrested for a misdemeanor to prevent his escape. *Head v. Martin,* 85 Ky, 480. Such is the case even if the officer has knowledge of the desperate character of the prisoner, although such circumstances may form a question of fact for the jury. *Commonwealth v. Rhoads,* 23 Pa. Super. Ct., 512. Because the officer is never required to retreat, and may meet force with force, in order to subdue the efforts of the prisoner to escape. *Smith v. State,* 59 Ark., 132; *State v. Garrett,* 60 N. C., 144. The officer may use a deadly weapon and even take the life of the prisoner, if such action is necessary in self-defense to save his own life. *Smith v. State,* 59 Ark., 132. But in any case the officer must be careful not to exceed the reasonable necessity of the case. *Dilger v. Commonwealth,* 88 Ky., 550, 560; *.Commonwealth v. Max,* 8 Phila., 422. Some few cases hold that an officer can use violence and even take the life of a prisoner arrested for a misdemeanor, if necessary not only for his own protection but to effect his purpose of preventing an escape. *State v. Dierberger,* 96 Mo., 666. And it has been held that flagrant misdemeanors, as in case of riots or dangerous wounds, may justify the killing of the prisoner to prevent his escape, for the presumption is very great that the offense will turn out to be a felony. *State v. McNally,* 87 Mo., 644.

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—CONTRACTS ENFORCEABLE—ASSENT OF HUSBAND.—BUSHNELL V. BERTOLETT, 69 S. E. 610 (N. C.). *Held,* that where a married woman signed a contract for a lot of apple trees, and after accepting and paying for a part, refuses to accept and pay for the remainder, the contract is not enforceable against her separate estate. Clark, C. J., *dissenting.*

At common law the contracts of a married woman were absolutely void. *Prentiss v. Paisley,* 25 Fla., 927; *Condon v. Barr.,* 49 N. J. L., 53. And, independant of statute, her contracts do not personally bind her, even in equity. *Butler v. Buckingham,* 5 Day (Conn.), 492; *Davis v. Smith,*

75 Mo., 219. A married woman has no power to contract unless in direct reference to her separate property. *Stillwell v. Adams,* 29 Ark., 346. Whether the contract of a married woman is in relation to her separate estate is a question of fact. *Stenger Benev. Ass'n v. Stenger,* 54 Neb., 427. To bind the separate property of the wife there must be an express agreement to bind it. It is not enough that she asked credit, and that she had a separate estate, and on this account credit was extended to her. *Dismukes v. Shaffer,* 54 S. W., 671 (Tenn. Ch. App. 1899). Nevertheless, it was held in this case that the separate estate of a married woman is liable for all debts charged thereon either expressly or by fair implication, and is bound by all her contracts on her own behalf which are made upon the credit of such estate, and whether that be so or not must be judged by the circumstances of each particular estate. *Crockett v. Doriot,* 85 Va., 240. It has been expressly decided, limiting this right, that the contract of a married woman can be made good only out of the separate estate which is hers at the time of the contract. *Filler v. Tyler,* 91 Va., 458. In some states a married woman can charge her real estate by such contracts only as are reasonably calculated to make the estate profitable to her, or to preserve it, or to protect her title thereto. *Smith v. Howe,* 31 Ind., 233. The statutes in some states require the husband's consent to the wife's contract before she shall be liable thereon. *Wood v. Potts,* 140 Ala., 425; *Brinkley v. Ballance,* 126 N. C., 393. While in others, a wife's property is her separate estate, in respect to which she may make binding contracts without the assent of the husband. *Grapengether v. Fejervary,* 9 Ia., 163.

JUDGES—QUALIFICATION—RELATION TO PARTIES.—EX PARTE WEST, 132 S. W., 339 (TEX.).—*Held,* a district judge who was a second cousin of plaintiff's wife was disqualified to try the case, so that orders made therein were *coram non judice.*

Under the common law a judge was not disqualified by relationship to a party to a cause. *Brooke and the Earl of Rivers,* Hardres Rep., 503. But it is now generally provided by statute that relationship between the judge and a party litigant disqualifies the judge. *State v. Wail,* 41 Fla., 463; *Horton v. Howard,* 79 Mich., 642; *State v. Foster,* 112 La., 533; *Chase v. Weston,* 75 Ia., 159. And such a provision applies equally to civil and criminal trials. *People v. Connor,* 142 N. Y., 130. Although mere formal and ministerial acts are not void by reason of the disqualification of the judge. *McFarlane v. Clark,* 39 Mich., 44; *State v. Gurney,* 17 Nebr., 523. The relationship, however, to afford ground for disqualification, must exist at the time of the trial. *Patterson v. Collier,* 57 Ga., 419; *Winchester v. Hinsdale,* 12 Conn., 88. Futhermore, a judge can legally recuse himself only where a party to the case has a right to recuse him. *State v. Judges' Tenth Judicial District,* 41 La. Ann., 319. And it has been held that the disqualification of a judge may be waived by consent of the parties. *Buena Vista Bank v. Grier,* 114 Ga., 398. Most courts hold that the fact that a stockholder in a corporation, which is a party litigant, is a relative of a judge, does not disqualify the judge from sitting. *Matter of Dodge and Stevenson Man'f Co.,* 77 N. Y., 101; *Robinson v. Southern*

Pacific Co., 105 Cal., 426. *Contra*: *First National Bank v. McGuire*, 12 S. D., 226.

LIBEL AND SLANDER—WORDS ACTIONABLE—IMPUTING DISQUALIFICATION OF AN ATTORNEY.—MONTGOMERY V. NEW ERA PRINTING CO., 78 ALT., 85.—*Held*, that any oral or written words which impute to an attorney-at-law the want of the requisite qualifications to practice, or with having been guilty of corrupt, dishonest, or improper practice in the performance of his duties as a lawyer, are actionable *per se*.

Any oral or written words, imputing to an attorney-at-law the want of requisite qualifications to practice law, or with having been guilty of corrupt, dishonest, or improper practice as lawyer are actionable *per se*. *Turner v. Hearst*, 115 Cal., 394; *State v. Cooper*, 138 Iowa,, 516. As in imputations affecting professional capacities generally it is essential that the charge should actually touch the attorney in his profession. *Stewart v. Minnesota Tribune Co.*, 40 Minn., 101; *Kirby v. Martindale*, 19 S. D., 394. To thus affect his profession it has been held that the charge need only be *direct* rather than *express*, although a *general* imputation, equally injurious to any one against whom it might be made, may not be actionable *per se*, unless *direct* application be made. *Sanderson v. Cadewell*, 45 N. Y. 398. Words charging an attorney with want of integrity, whether used generally of his profession or particularly as to some one transaction are actionable *per se*. *Garr v. Selden*, 6 Barb., 416. But a charge of ignorance or want of skill in a particular transaction is not usually actionable *per se*. *Garr v. Selden*, supra; *Foot v. Brown*, 8 Johns., 50. Among the more important imputations against a lawyer actionable *per se* are those charging him with dishonesty or breach of trust in regard to property of clients under his control, *Mains v. Whiting*, 87 Mich., 172; unfaithfulness generally to clients, *Hetherington v. Sterry*, 28 Kan., 426; *Chipman v. Cook*, 2 Tyler (Vt.) 456; cheating or swindling, *Rush v. Cavenaugh*, 2 Pa. St., 187; ignorance of the law, *Goodenow v. Tappan*, 1 Ohio, 60; falsely personating a constable, *McDermott v. Evening Journal Assoc.* 43 N. J. L., 488; giving erroneous and dishonest advice, *Ludwig v. Cramer*, 53 Wis., 193; offering to divulge client's secrets, *Riggs v. Denniston*, 3 Johns. Cas., 198; making extortionate charges for services, *Atkinson v. Detroit Free Press Co.*, 46 Mich., 341; charging two fees for same service, *Mosnat v. Snyder*, 105 Iowa, 500; being a "shyster," *Gribble v. Pioneer Press Co.*, 34 Minn., 342.

MUNICIPAL CORPORATIONS—INDEPENDENT CONTRACTORS—LIABILITY. FROELICH V. CITY OF NEW YORK, 93 N. E., 79 (N. Y.).—*Held*, that an independent contractor for the whole of an improvement for a city and a sub-contractor doing a part of the work are not servants or agents of the city reserving the right to supervise and inspect the work, and the city is not liable for the negligence where the plan for the work is reasonably safe, and there is no interference therewith by the city which results in injury.

Where a municipal corporation has the power to let a contract for the construction of a sewer, and it enters into such a contract with competent contractors, doing an independent business, they are not the servants or agents of the city, and the city is not liable for their negligence even when it reserves the right to change, inspect, and supervise to the extent necessary to procure the result intended by the contract, provided the plan is reasonably safe, the work is lawful, is not a nuisance when completed, and there is no interference therewith by municipal officers which results in injury. *Uppington v. City of New York,* 165 N. Y., 222, The case of *Engler v. City of Seattle,* 40 Wash., 72, holds that a contractor with a city for the construction of a street improvement is an independent contractor, though the city engineer has the right to superintend the work; and an employee of the contractor is not a servant of the city, and it is not liable for an injury received by him while at work in a dangerous place. The power of superintendence does not affect the relation of an independent contractor. But *Schumacher v. City of New York,* 57 N. Y. Supp., 968, holds that a city is liable for injuries caused by the negligent performance of work by one acting under a contract with it, where it reserves to itself the right to direct the manner of performance. And in *City of Chicago v. Murdoch,* 72 N. E., 46, it is held that where a city's contract for the construction of a tunnel provided that all labor performed should be subject to the inspection of the commissioner of public works, the city was liable for negligence of an independent contractor in doing the work. And *Dunstan v. City of New York,* 86 N. Y. Supp., 562, says, a city is liable for damages caused by the escape of water from pipes negligently permitted to remain in a leaky condition after reasonable notice to the city of the condition, although it was caused primarily by the negligence of an independent contractor, for whose acts the city was not responsible. However *Ege v. Phoenix Brick and Construction Co.,* 94 S. W., 999, holds that the fact that a contract for a street improvement gave the city engineer authority to direct at what point the work should commence, to see that it was done properly, and provided that if anyone employed on the work should refuse to obey the engineer he should be discharged, did not render the contractor the servant or agent of the city, hence the city was not liable for negligence of the contractor. And *Ginther v. Yorkville Borough,* 3 Pa. Super. Ct., 503, holds, that a municipality is not liable for the negligent performance of a contract by an independent contractor resulting in injury to the property of a citizen even if the work is done under the direction of an official authorized to inspect it who is vested with all powers necessary to secure compliance with the contract, payment even being conditional on his approval of the work. See *Cary v. City of Chicago,* 60 Ill. App., 341, and *Hookey v. Oakdale Borough,* 5 Pa. Super. Ct., 404.

MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTIONS—LIMITATIONS. SMITH V. ADAMS, 92 N. E., 760 (MASS.). *Held,* that steps maintained within the limits of a street for over forty years may not be removed by the public authorities.

The municipality has no power to authorize a stairway or other projection into the street, to the detriment of the travelling public. *Pettis v. Johnson,* 56 Ind., 139. Temporary or small encroachments are held to be properly permitted under certain restrictions, where authorized by and not in conflict with statutory or charter provisions. *Wyman v. Village of St. Johns,* 100 Mich., 571. Where a fence was erected within a street and was so maintained for thirty years, the city is estopped to deny that such fence is not the true boundary line. *City of Joliet v. Werner,* 166 Ill., 34. Yet where an obstruction was originally built under a claim of right, and had existed for ten years, the city is not estopped in an action to remove it. *City of Waterloo v. Union Mill Co.,* 72 Iowa, 437. And neither a city's acquiescence in an obstruction, or laches in resorting to legal remedies, to remove it, not the doctrine of equitable estoppel, nor prescription, can defeat the right of the city to maintain a suit in equity to remove the obstruction. *Webb v. City of Demopolis,* 95 Ala., 116.

NUISANCE—NATURE OF INJURY FROM.—ROBINSON V. DALE, 131 S. W., 308 (TEX.).—*Held,* that because the value of a person's property may be decreased, or because the risk to the property from fire is increased, by the structures necessary for the operation of a business, this does not render the business a nuisance.

The law is settled, on sound reasons, that the mere fact of the diminution of the value of complainant's property, or the increased risks from the hazards of fire, occasioned by a structure erected by a defendant near the complainant's premises, without mere, is unavailing as a ground of equitable relief. 2 Story's Eq. Jur., 925; *Rhodes v. Dunbar,* 57 Pa., 274; *Gallagher v. Flury,* 99 *Md.,* 181. For this is one of many risks and discomforts naturally incident to city life, which persons of prudence can not fail to reasonably anticipate. *Ray v. Lyons,* 10 Ala., 63. And it is a general rule that when the thing complained of is not a nuisance *per se,* but may become so, according to circumstances, and the injury apprehended is eventful or contingent, equity will not interfere; the presumption being that a person entering upon a legitimate business will conduct it in a proper way so that it will not constitute a nuisance. *Chambers v. Cramer,* 49 W. Va., 395. Anticipation of injuries is not sufficient grounds to justify an injunction, unless it appears that the party threatens or intends to conduct the business so as to constitute a nuisance *per se. Bowen v. Mauzy,* 117 Ind., 258. But this intention must be proved beyond a doubt. *Bell v. Riggs,* 38 La. Ann., 555. For it is a just sequence of the maxim, *Sic utere tuo ut alienum non laedas. Campbell v. Seaman,* 63 N. Y., 568.

PARTNERSHIP—ACCOUNTING—RIGHT TO.—WESTWOOD V. CRISSEY, 124 N. Y. SUPP., 97.—*Held,* that plaintiff having formulated an enterprise to be conducted under a partnership agreement, whereby one of his associates with the other's knowledge undertook to indorse plaintiff's notes to enable him to furnish his share of the advances necessary to be made by the firm, is entitled to a fair proportion of the profits, though his associates purported to expel him from the firm for non payment of his

share of such advances; the promise to indorse his notes being broken. McLennan, P. J., and Robson, J., *dissenting.*

The law does not favor forfeitures and it does not treat the mere failure of one partner to pay his share of the capital, expenses or debts, as a cause for forfeiting his interest in the firm property. *Kimball v. Gearhart,* 12 Cal., 27. Such a failure will not justify his co-partners in exercising the powers of a court of equity and ejecting him from the partnership. *Campbell v. Sherman,* 55 Hun., 609; *Patterson v. Silliman,* 28 Pa., 304. It is the duty of the partners to conform in all respects to the partnership agreement. *Murrell v. Murrell,* 3 La. Ann., 1233. And no majority of the partners can expel any partner in the absence of an express agreement between the partners; however, where there is such power it can only be exercised in good faith and not for private benefit of any of the parties. *Blisset v. Daniel,* 10 Hare, 493. A partner will not be deprived of his just profits when he was unable to fulfill part of his agreement for reasons beyond his control. *Stuart v. Harmon,* 24 Ky. L. R., 1829. For the obligation of good faith rests upon the partners not only during partnership, but extends to statements and dealings made while negotiating for its formation. *Williamson v. Monroe,* 101 Fed., 322.

TIME—CONSTRUCTION OF STATUTE—SUNDAYS.—GULF, C. & S. F. RY. CO. v. LOUIS WERNER STAVE CO., 131 S. W., 658 (TEX.).—*Held,* that where a statute requires an act to be performed within a certain number of days or hours, and does not expressly exclude Sunday in computing such time, the court cannot construe it so as to exclude Sunday, so that a statute, imposing a penalty on shippers for failure to load within 48 hours after the delivery of cars, should under such rule be construed to include Sunday within the time provided.

At common law Sunday was *dies non juridicus. Allen v. Godfrey,* 44 N. Y., 433; *Blood v. Bates,* 31 Vt., 147. And in general, in computing time for the performance of a contract, etc., the last day for performance falling on Sunday, an extension until Monday is allowed. *Avery v. Stewart,* 2 Conn., 69; *Salter v. Burt,* 20 Wend. (N. Y.), 205. *Contra: Pearpoint v. Graham,* 4 Wash. C. C., 241. But where the length of time for performing an act is expressly provided by statute, the weight of authority is in accord with the principal case, holding that no extension is allowed. *Bissell v. Bissell,* 11 Barb. (N. Y.), 96; *Alderman v. Phelps,* 15 Mass., 225; *Patrick v. Faulke,* 45 Mo., 312. Some states, however, hold the contrary. *Edmunson v. Wragg,* 104 Pa., 500. And this contrary doctrine has been modified somewhat, it being held that if an act may be lawfully done on Sunday, the last day falling on Sunday, it is not excluded. *Swift v. Wood,* 103 Va., 494. But it is well settled that in any case intermediate Sundays are included in the computation of such time. *Martin v. Sunset Telp. & Telg. Co.,* 18 Wash., 260.

USURY—PAROL EVIDENCE—WRITTEN CONTRACT—VALIDITY.—IN RE STRASCHNOW, 181 FED., 337.—*Held,* that where a contract evidencing a

loan of money and the employment of the lender was attacked for usury, parol testimony of the conversations of the parties prior to the execution of the contract was not objectionable on the ground that all prior negotiations must be deemed merged in the written contract.

In the Federal courts and in many of the state courts it is held, in usurious contracts, that the intention of the parties is the controlling factor. *Miller v. Tiffany,* 1 Wall., 298; *Dickenson v. Edwards,* 77 N. Y., 573; *Pancoast v. Travelers' Ins. Co.,* 97 Ind., 172. It is quite immaterial in what manner or form, or under what pretence it is cloaked, if the intention was to receive a greater rate of interest than the law allows for the use of money, it will vitiate the contract with the taint of usury. Whether the transaction was so intended, where, upon its face, it does not appear to be usurious, is a question of intention for the decision of the jury. *Mitchell v. Napier,* 22 Tex., 120. Payroll evidence is admissible to explain, but not to vary or contradict writings. *Cooper v. Berry,* 21 Ga., 526. Any evidence surrounding and so connected with a transaction as to throw light upon it and disclose, or tend reasonably to show, its true character, is admissible upon the issue of usury, although the contract is in writing and appears upon its face fair and legal. *Peightal v. Building Co.,* 25 Tex. Civ. App., 390. While a valid written contract can not be varied or contradicted by parol, it is competent by such evidence to show that the writing is but a cover for usury, penalty, or forfeiture. *Lytle v. Scottish American Mortgage Co.,* 122 Ga., 458; *Campbell v. Corinable,* 98 N. Y. Supp., 231. Parol testimony is admitted to enable one to show that a written instrument is not valid, but void. *Lytle v. Scottish American Mortgage Co.,* 122 Ga., 458.

WITNESSES—PRIVILEGED COMMUNICATIONS—HUSBAND AND WIFE.—PEOPLE V. DUNNIGAN, 128 N. W., 180 (MICH.).—*Held,* that a self-incriminating letter written by accused to his wife, but not received by her, being intercepted by the sheriff, is not privileged within the statute which prohibits examination of spouses respecting communications between them.

It is a well established rule, both at common law and by statute, that confidential communications between the husband and wife are privileged, in both civil and criminal proceedings, except where they themselves are parties to the action. *Hopkins v. Grimshaw,* 163 U. S., 342; *People v. Warner,* 117 Cal., 637. And, as a general rule, letters passing between husband and wife are protected. *State v. Ulrich,* 110 Mo., 350. However, it has been held generally, as in the principal case, that where a self-incriminating letter falls into the hands of third parties it may be offered in evidence, not being privileged. *State v. Hoyt,* 47 Conn., 518; *State of Kansas v. Buffington,* 20 Kans., 599. *Contra*: *Wilkerson v. State,* 91 Ga., 729. And the mere fact that it was procured by the falsehood of a public officer will not exclude it. *Com. v. Goodwin,* 186 Pa. St., 218. Furthermore, a confidential, oral communication between a husband and wife may be testified to by a concealed witness. *Gannon v. State of Ill.,* 127 Ill., 507; *Com. v. Griffin,* 110 Mass., 181. However, if the confession, written or oral, was obtained in an attempt to produce a false statement, it is not admissible in evidence. *People v. McCullough,* 81 Mich., 25.