RECENT CASES

ANNUITIES—APPORTIONMENT.—BROWN v. BROWN, 76 ATL. 846 (MD.).—*Held*, that under the rule that annuities are not apportionable, except in specified cases, an annuity to the wife of the testator's son payable on the decease of the son and during the wife's lifetime was not apportionable, and on her decease before the payment of an installment her administrators were not entitled thereto; the provision not being for the wife's maintenance. Briscoe and Burke, J. J., *dissenting*.

It is a general rule of the common law followed in Chancery that sums of money payable periodically at fixed times are not apportionable during the intervening periods. *Dexter v. Phillips*, 121 Mass. 178. There is, however, the apparent exception of an annuity for the support of an infant or for the support of a married woman living apart from her husband. *In re Lackawanna Iron & Coal Co.*, 57 N. J. E. 26. But the common law rule has generally been modified by statute. *Nading v. Elliot*, 137 Ind. 261. And the interest on promissory notes of individuals and of incorporated companies has been held apportionable between the days on which it was stipulated to be paid. *Dexter v. Phillips, supra* Yet where the annuity is payable on a certain day some courts hold that there can be no apportionment. *Heizer v. Heizer*, 71 Ind. 526; *Henry v. Henderson*, 81 Miss. 743. And that the personal representatives cannot compel an apportionment or *pro rata* payment. *Nehls v. Sauer*, 119 Ia. 440, *Nading v. Elliot, supra. Contra, Parker v. Seeley*, 56 N. J. E. 110; *Weston v. Weston*, 125 Mass. 268.

CONSTITUTIONAL LAW—SCHOOLS AND SCHOOL DISTRICTS—RELIGIOUS EXERCISES.—PEOPLE v. BOARD OF EDUCATION, 95 N. E. 251 (ILL.).—*Held*, that the reading of the Bible in a public school is violative of the Constitutional Article prohibiting the appropriation of any public funds in aid of any sectarian purpose. Hand and Cartwright, J. J., *dissenting*.

The weight of authority is against the proposition as laid down in the above case. Most of the jurisdictions in which the question has been considered have held that such reading and repeating of the Bible or parts thereof is not a violation of the Constitutional rights of a taxpayer, whose children are not required to be present during such exercises. *Moore v. Monroe*, 64 Iowa 367; *Church v. Bullock*, ... Tex. .... (109 S. W. 115). The Massachusetts courts have held that a school committee might order the Bible read in school. No Constitutional question, however, was raised in this case. *Spiller v. Woodburn*, 12 Allen 127. In one State the use of "Readings from the Bible," consisting of general moral precepts, as a supplemental text book of reading where the teacher makes no comment thereon and where any pupil may be excused therefrom on application of parent or guardian has been held to be no violation of the Constitution. *Pfeiffer v. Board of Education*, 118 Mich. 560. On the other hand a few cases support the principal case in holding that the reading of the Bible and singing of hymns is sectarian instruction

and prohibited. *State v. District Board,* 76 Wis. 117; *State v. Scheve,* 65 Nebr. 853. But the decision in *State v. Scheve, supra,* holds that the use of the Bible is only prohibited when it is used for sectarian instruction.

CONTRACTS—OFFER AND ACCEPTANCE—ACCEPTANCE BY PERFORMANCE OF AN ACT.—SCHMITT V. WEIL, 92 N. E. 178 (IND.).—*Held,* that to make performance of a thing proposed sufficient as an acceptance of the proposal, the performance must have been induced by the proposal.

It is well established that a mere proposition or offer, on the one hand, not acted on or accepted, does not constitute a contract. *Pennsylvania Co. v. Plotz,* 125 Ind. 26. The general rule is, that when a party offers a promise for an act, and the offeree accepts and performs the act, the promise becomes binding. *Clark on Contracts,* Section 13. This has been held whether the promise was sealed, as in *Sharp v. Bates,* 102 Md. 344, or unsealed, as in *Buffington v. McAnally,* 192 Mass. 198. For example, a written offer to an officer of indemnity for a levy is validly accepted by his making the levy and his returns. *Train v. Gold,* 5 Pick. (Mass.) 380. And where defendant wrote to plaintiff's testator, offering to reimburse him, if he would pay the taxes on certain land, testator's payment of the taxes was a sufficient acceptance of the offer. *Allen v. Chouteau,* 102 Mo. 309. So a valid tender of the act named by the promisor will make the promise binding. *Cutting v. Dana,* 25 N. J. Eq. 265. But it has been held that a party cannot accept the terms of an offer before they are communicated to him, so as to bind the offerror. *James v. Marion Fruit Jar and Bottle Co.,* 69 Mo. App. 207. The leading principle is impliedly adjudged, where the court holds that performance after offer made, which is *on the faith of the offer,* constitutes a valid acceptance. *White v. Elgin Creamery Co.,* 108 Ia. 522.

COSTS—APPEAL—UNDULY VOLUMINOUS RECORD.—HAWK V. DAY, 126 N. W. 955 (IOWA).—*Held,* that where a record on appeal containing 141 printed pages could have been condensed to 50 pages, the cost of the printing will be taxed upon the latter basis.

Statutory authority express or implied is generally necessary to authorize the allowance of costs for the printing of papers to be used on appeal. *De Camp v. Crane,* 21 N. J. Eq. 544; *Gage v. Rogers,* 52 Mo. App. 331. Furthermore, a party filing an unnecessary record, transcript, abstract, bill of exceptions, or other papers on appeal will not be allowed the costs of printing the same, *Donahue v. McCosh,* 70 Iowa 733, and the cost of printing immaterial or unnecessary matter contained in such papers must be borne by the party responsible for its insertion. *Baldwin v. Foss,* 71 Iowa 389, while the ordinary practice is to tax the party responsible for so much of the matter as is unnecessary, the courts have in some cases divided the costs of the transcript or abstract equally between the parties, *Sichel v. Carrillo,* 42 Cal. 493, and in others have required the party needlessly encumbering it to pay the whole expense thereof. *Bullard v. Creditors,* 56 Cal. 600.

EVIDENCE—COMPETENCY—RATE OF WAGES.—STAGG V. BARRETT, ET AL., 76 ATL. 974 (N. J.).—*Held,* that upon a controversy concerning the rates of wages for mechanics prevailing at and before the making of a certain building contract, it was not erroneous to exclude evidence of the rates that prevailed long after the making of the contract. Swayze, Minturn and Bogert, J. J., *dissenting.*

Not all facts which are in some degree logically relevant to the issues in the case are regarded in law as having sufficient probative force to justify the expenditure of the time which would be involved in receiving and attempting to test and weigh them. *Amoskeag Mfg. Co. v. Head,* 59 N. H. 332. Hence, whenever the court feels that a fact is not of probative value commensurate with the time required for its use as evidence, either because the fact is so remote in time, *New Era Mfg. Co. v. O'Reilly,* 197 Mo. 466, or in place, *Jungclaus v. Great N. R. Co.,* 99 Minn. 515, or because it is so uncertain, *Melvin v. Bullard,* 35 Vt. 268, or so conjectural in its nature, *Muller v. Southern Pac. R. Co.,* 83 Cal. 240, that it can have little or no weight in tending to prove the disputed fact, it may be rejected. Hence, it has been held where the issue was the mental capacity of a grantor in a deed at the time of its execution, that evidence of the condition of his mind a year afterwards may be excluded in the discretion of the court as being too remote. *White v. Graves,* 107 Mass. 325. In like manner also, where the fact in issue was the amount of overflow of a watercourse that was due to rainfall, evidence of the amount of rain which fell in a valley eight miles away was held too remote to be received, though relevant. *Carhart v. State,* 100 N. Y. Supp. 499. But evidence cannot reasonably be said to be too remote in time, either prior or subsequent, if its existence at that time raises a fair inference of its continued existence at the time involved in the inquiry. See *Bank of State of N. Y. v. S. Nat. Bank,* 170 N. Y. 1, and *McColloch v. Dobson,* 133 N. Y. 114. In thus determining whether or not a fact should be excluded on account of remoteness an important consideration affecting the propriety of the court's action is whether more direct or conclusive proof is already in the case or could have been obtained by a reasonable amount of diligence. *Long v. Traveller's Ins. Co.,* 113 Iowa 259.

EVIDENCE—JUDICIAL NOTICE—FACTS CONCERNING CENSUS.—WILLIAMS V. BROOKS, 109 PAC. 211 (WASH).—*Held,* that judicial notice will be taken of the population of a city as shown by the United States census of 1900, and that here has been no Federal census completed since that time.

Proof is never required of a fact of which the Court is bound to take judicial notice. *Secrist v. Perry,* 109 Ill. 188; *State v. Scott,* 59 Nebr. 499; *Hart v. Baltimore & O. R. R. Co.,* 6 W. Va. 336. And in general the courts will take judicial notice of matters relating to government and its administration. *United States v. Jackson,* 104 U. S. 41; *Perkins v. Perkins,* 7 Conn. 558; *Prince v. Skillin,* 71 Me. 361; *Ogden v. Lund,* 11 Tex. 688. So judicial notice will be taken of the government surveys and the legal sub-divisions of the public lands. *Rogers v. Cady,* 104 Cal. 288; *Gardner v. Eberhart,* 82 Ill. 316; *Quinn v. Champagne,* 38 Minn. 322; *At-*

water v. Schenk, 9 Wis. 160. And it is well established that judicial notice will be taken of the population of a town as shown by the United States census. *Chicago & A. R. R. Co. v. Baldridge*, 177 Ill. 229; *Page v. McLure*, 79 Vt. 83. In the same manner the results of a State census, *Denny v. State*, 144 Ind. 503; *State v. Dolan*, 93 Me. 467; or even a school census, *Kokes v. State*, 55 Nebr. 691; *Stratton v. Oregon City*, 35 Ore. 409, will be recognized.

HOMICIDE—MURDER—INTENT.—PEOPLE V. LOOSE, 92 N. E. 100 (N. Y.). —*Held*, that if a defendant, in an attempt to shoot his son, unintentionally killed his daughter, he was guilty of murder in the first degree.

The general rule is that one who kills another, mistaking him for a third person, whom he intended to kill, is guilty or innocent of the offense charged, the same as if the fatal act had killed the person intended. *Brown v. State*, 147 Ind. 28; *State v. Renfrow*, 111 Mo. 589; *McGee v. State*, 62 Miss. 172. It has been held that a shot fired at one person with the intent to wound or kill, carries with it the ingredient of malice no matter who may be the victim. *Wareham v. State*, 25 Ohio St. 601. And the claim of the defendant that he mistook the person shot for another with whom he had been on unfriendly terms, cannot lessen his guilt or change the degree of his crime. *Com. v. Eisenhower*, 181 Pa. St. 470. In a case where a person while engaged in a personal difficulty with another fires upon him and as the latter runs away, again fires, misses him, and kills a third person who is near by, he is guilty of murder and not involuntary manslaughter. *Durham v. State*, 70 Ga. 264. And in *State v. Levelle*, 34 S. C. 120, it was held that a person who in the attempt to take his own life with a deadly weapon, unintentionally takes the life of an innocent bystander, was guilty of murder. The English rule is that where one person kills another intending to kill a third person, it is necessary, in order to constitute the crime of murder in the first degree, to show that the accused intended to kill such third person and that such person was or might be supposed to be near the spot at about the time of the fatal deed. *Reg. v. Cleary*, 2 Fost. & F. 850. And it is the rule that where a person tries in a sudden heat and passion to kill one party, and accidentally kills another, he cannot be guilty of less than manslaughter. *Sims v. Com.*, 12 Ky. L. 215. However, where a party attempts to shoot another in self-defense and accidently kills a third party, such killing would be excusable and justifiable if the killing of the party intended would have been excusable and justifiable. *Pinder v. State*, 27 Fla. 370; *Butler v. State*, 92 Ga. 601. But self-defense is not available to relieve one from responsibility, who shoots and kills one person when he intends to kill another, unless the circumstances are such as to justify an ordinary reasonable and prudent man in believing himself in danger. *State v. Brown*, 4 Pen. (Del.) 120.

HOMICIDE—SELF-DEFENCE—RETREAT.—STATE V. BISSONETTE, 76 ATL. 288 (CONN.).—*Held*, that where one without fault is assaulted in his dwelling house, he need not retreat from his assailant, but he may resist the assault even to the extent of taking the life of the assailant when necessary.

The old rule was that a homicide was excusable when committed in self-defence only when the party killing had retreated as far as practicable or "to the wall." *Wharton, Crim. Law,* Sect. 486a; *Allen v. U. S.,* 164 U. S. 492; *People v. Constantino,* 153 N. Y. 24. This rule has, in modern times, however, been modified in many particulars. *Beard v. U. S.,* 158 U. S. 550; and now the general rule is that one, attacked while in the lawful pursuit of his business and in a place where he has a perfect right to be, may resist without retreat. *Erwin v. State,* 29 Ohio St. 186; *State v. Bartlett,* 170 Mo. 658. Accordingly, it is well established that the rule requiring retreat does not apply when a man is attacked in his own house. *State v. Bennett,* 128 Iowa 713; *Sloan v. Commonwealth,* 15 Ky. Law Rep. 437; *Kirk v. Ter.,* 10 Okla. 46. This is true whether or not the assailant is a trespasser. *People v. Newcomer,* 118 Cal. 263. It is true when the accused has been attacked in the office where he transacts his business; *Cary v. State,* 76 Ala. 8; and when the altercation has been between partners in their place of business. *Jones v. State,* 76 Ala. 78. Moreover, this rule making it unnecessary for a man to retreat when attacked in his own house is usually extended to include the curtilage within which his house is situated. *People v. Kuehn,* 93 Mich. 619; *Beard v. U. S.,* 158 U. S. 550; *Contra; Brinkley v. State,* 89 Ala. 34. The reasons for establishing the rule that a man need not retreat when on his own premises are variously stated. Some cases say that it is because a man's house is his castle and he has the right to protect it from intrusion as well as his body from harm. *People v. Coughlin,* 67 Mich. 466. Others say that when a man is in his own house he must be presumed to be "at the wall." *Palmer v. State,* 9 Wyo. 40.

LIMITATION OF ACTIONS—PAYMENT ON BARRED NOTE—REVIVAL OF MORTGAGE.—CLARK V. GRANT, 109 PAC. 234 (OKLA.).—*Held,* that where a note and a mortgage given to secure it are once barred, payment of interest on the note revives not only the note, but the mortgage, so far as affects the interest of the payers.

It is a general rule that where a debt is secured by a lien or other security and, having been barred by the Statute of Limitations, is revived in any way, the benefit of the security is revived also. *McElwee v. McElwee,* 97 Tenn. 649. And, as a special application of this rule, it is almost universally held that, where the security is a mortgage, that too is revived when the bar of the statute on the debt is removed. *Hough v. Bailey,* 32 Conn. 288; *Kraft v. Holzman,* 206 Ill. 548; *MacMillan v. Clements,* 33 Ind. App. 120; *contra; Wells v. Harter,* 56 Cal. 342. This is said to be because such a mortgage is merely an incident of the debt. *Allen v. O'Donald,* 28 Fed. 346; *Perkins v. Stone,* 23 Tex. 561. It is to be noted, however, that a mortgage differs from other forms of security in that actions for the foreclosure of mortgages have their own statutes of limitation, differing from the statutes by which actions on debt are barred. Accordingly, the date on which the debt is revived fixes the new period from which not only the limitation applicable to the debt, but also that applicable to the mortgage is to be computed. *Hughes v. Thomas,* 131 Wis. 315. When the land mortgaged has been transferred to a third

party after the bar of the statute has arisen, an interesting question arises. It is held that if the land was acquired after the bar had arisen and before the debt had been revived the third pary takes free of the mortgage. *Schmucker v. Sibert,* 18 Kan. 104; *Plant v. Shyrock,* 62 Miss. 821; *Cason v. Chambers,* 62 Tex. 305. But if the purchase were not made till after the revival of the debt, the purchaser takes subject to the mortgage. *Carson v. Cochran,* 52 Minn. 57. It is also held that the mortgage will not revive with the debt when the debtor denies at the time of making the new promise or payment that it is his intention that the mortgage shall revive. *Perkins v. Sterne,* 23 Tex. 561.

SUNDAY—JUDICIAL PROCEEDINGS—RECEIVING AND RECORDING VERDICT—IN RE PLEASANT HILL LUMBER COMPANY, 52 So. 1010 (LA.).—*Held,* that a verdict may be lawfully received and recorded on a Sunday or other legal holiday.

At common law, *Dies dominicus non est dies juridicus,* and therefore a judgment rendered on Sunday was void. *Allen v. Godfrey,* 44 N. Y. 433; *Blood v. Bates,* 31 Vt. 147; *Pearce v. Atwood,* 13 Mass. 324. And as a general rule judicial acts done on Sunday are void, writs issued or service rendered on that day being invalid. *Peck v. Cavell,* 16 Mich. 9; *Hanswirth v. Sullivan,* 6 Mont. 203. But upon the ground that it is a work of necessity, it is generally held that the verdict of a jury may be entered and received on Sunday. *Webber v. Merrill,* 34 N. H. 202; *Stone v. Bird,* 16 Kan. 494; *State v. Engle,* 13 Ohio 490. A few states, however, hold to the contrary and a verdict received on the Sabbath day is void. *Bass v. Irvin,* 49 Ga. 436; *Davis v. Fish,* 19 Greene (Iowa) 406. A later case in Georgia modifies this rule greatly, holding that if the deliberations of the jury were commenced before midnight of Saturday a verdict may lawfully be received on Sunday. *Henderson v. Reynolds,* 84 Ga. 159.

TOWNS—LIABILITY—TORT OF OFFICER.—HOEK V. ALLENDALE TP., 126 N. W. 987 (MICH.).—*Held,* that a township is not liable for any tort of its highway commissioner in directing plaintiff to work as a highway land planted by a third person; so that there can be implied no obligation of the township to reimburse plaintiff for the consequence of any unwitting trespass so committed by him at the commissioner's command.

Towns as distinguished from municipal corporations are subject to such duties and liabilities as are expressly, or by necessary implication, imposed upon them by the legislature, to effect the purpose of their creation. *Lovejoy v. Foxcroft,* 91 Me. 367. Hence, when a public officer, in the line of his duty, does public work within a town for the public benefit or use, the town is not liable for his misconduct, notwithstanding he is appointed and supplied with funds by such town. *Goddard v. Harpswell,* 84 Me. 499. The rule is also well settled that local health officers acting under general statutes of the State conferring their powers, are not performing corporate functions, but are representatives of the State and that the municipality is not liable for the acts of such boards

either misfeasance or nonfeasance. *Bryant v. City of St. Paul,* 33 Minn. 289; 2 Dill. Mun. Corp. (4th Ed.), Sec. 977. So also towns cannot be held liable when supervisors act merely as governmental officers charged with the execution of a police power. *State v. McNay,* 90 Wis. 104. However, the town has been held liable where it has interfered by giving directions and taking charge of the public work by its own men. *Waldron v. City of Haverhill,* 143 Mass. 582.