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TABLE OF TITLES.

REFERENCES.

By C. R. Mahan.

I. INTRODUCTORY.

It will be observed that the statutes providing for and governing references do not always call the person to whom the cause is referred the referee; sometimes he is spoken of as commissioner, as in Michigan; sometimes he is spoken of as an auditor, as in Massachusetts and some of the other New England states, and sometimes the referee is designated as a committee, as in Connecticut. But as a matter of fact, in all cases he is the referee, and that term is used in this article, except in a few instances.

II. MODE OF SHOWING REFERABILITY.

In many of the states, especially those wherein the codes have been adopted, and the distinction between courts of law and of equity has been abolished, there are statutes governing references which apply to all classes of actions whether legal or equitable; and the requirements of these statutes in respect of establishing the referability of

the action sought to be referred must be complied with.[1] And where the fact of referability under such statutes must be established, it may be done by affidavit if the fact does not appear upon the face of the pleadings.[2] But an affidavit sought to be used for this purpose must not state merely the conclusion of the affiant; it must state the facts upon which that conclusion is based.[3] It is not necessary, however, that this proof shall be made by affidavit; it is sufficient that the fact clearly appears from the verified pleadings that the examination of a long account will be involved in the trial of the issue.[4]

III. PROCEEDINGS BEFORE THE REFEREE OR MASTER.

1. In General. — In the Case of a Reference Under the Statutes

1. In New York a compulsory reference of either legal or equitable actions cannot be ordered, either upon application of one of the parties to the action or by the court of its own motion, unless it is affirmatively shown that the examination of a long account will be necessary upon the trial. To justify it, it is not enough to show that the case may by possibility involve the examination of such an account; enough must be shown to justify the inference that such will be the course of the trial. Thayer *v.* McNaughton, 117 N. Y. 111, 22 N. E. 562; Cassidy *v.* McFarland, 139 N. Y. 201, 34 N. E. 893; Crawford *v.* Canary, 28 App. Div. 135, 50 N. Y. Supp. 874; Cornell *v.* United States Illum. Co., 61 Hun 627, 16 N. Y. Supp. 306; Averill *v.* Emerson, 74 Hun 157, 26 N. Y. Supp. 650; McAleer *v.* Sinnott, 30 App. Div. 318, 51 N. Y. Supp. 956.

A Reference To Take Testimony which is to be reported to the court is not a reference for trial, and hence does not come within the terms of a statute requiring as a prerequisite to a trial by a referee that the case shall involve the examination of a long account or the taking of an account as necessary for the information of the court, or where some question of fact other than such as arise upon the face of the pleadings becomes important. McSween *v.* McCowan, 21 S. C. 371.

2. Crawford *v.* Canary, 28 App. Div. 135, 50 N. Y. Supp. 874.

Compare Betcher *v.* Grant County, 9 S. D. 82, 68 N. W. 163, where the court seriously questioned but did not decide whether the trial judge on a motion for a compulsory reference can look to anything but the pleadings to ascertain whether or not the case is referable.

3. In Van Ingen *v.* Herold, 64 Hun 637, 19 N. Y. Supp. 456, the moving affidavit failed to show that the trial would require the examination of a long account, merely giving the deponent's opinion that it was a case necessary to be referred; and it was held to be insufficient.

An affidavit in support of a motion to refer, stating that the trial of the action will involve the examination of a long account, but not stating any fact upon which this conclusion is based, is insufficient to warrant an order of compulsory reference. Knope *v.* Nunn, 75 Hun 287, 26 N. Y. Supp. 1074.

An affidavit merely alleging that the trial of the issues will require the examination of a long account consisting of several items of charges, but how many items or how long an account not being stated, is insufficient. Keogh Mfg. Co. *v.* Molten, 61 Hun 626, 16 N. Y. Supp. 65.

An Affidavit By the Plaintiff's Attorney merely giving his opinion that the trial will require the examination of a long account, failing to give the facts upon which that opinion is based, is insufficient to warrant a compulsory reference. Cornell *v.* United States Illum. Co., 61 Hun 627, 16 N. Y. Supp. 306.

4. Spence *v.* Simis, 137 N. Y. 616, 33 N. E. 554.

for the purpose of trying the issues in the case, the same general rules govern the conduct of the proceedings before the referee as would govern if the case were on trial before the court.[5] It follows, of course, that the general rules of evidence must be observed by the referee.[6] Nor can the established rules of evidence be changed by an order of the court, unless in a case where such authority may be specially given, or the change relates to some matter which rests in the discretion of the court.[7]

Reference by Consent. — Some of the courts have held that in the case of a reference by consent, if the agreement does not impose any limitations upon the referee in regard to the manner in which he shall conduct the trial, whether according to the strict rules of law or not, he is not bound to conform to the strict rules of law in taking testimony.[8]

Reference Merely To Take Testimony. — It has been held that in the case of a reference merely for the purpose of taking testimony, the rules of evidence are not adhered to with the same strictness as upon the trial of common law actions before a jury.[9]

5. Phelps *v.* Peabody, 7 Cal. 50; Illstad *v.* Anderson, 2 N. D. 167, 49 N. W. 659.

6. Smith *v.* Minnick, 88 Me. 484, 34 Atl. 274; Mutual L. Ins. Co. *v.* Anthony, 50 Hun 101, 4 N. Y. Supp. 501.

Whatever may be the power of the court over awards of arbitrators made in cases out of court, yet when a cause is actually pending in court and referred by rule of court to referees, the referees have no authority to dispense with the rules of evidence and substitute their own capricious notions in place thereof. Eyre *v.* Fenimore, 3 N. J. L. 489. *Compare* Fennimore *v.* Childs, 6 N. J. L. 386.

In New Hampshire referees appointed under the New Hampshire statute, in an action triable by jury, take the places of both the judge and the jury for the purposes of the trial, and should proceed according to the rules of law and the practice governing in jury trials. And an error which would be cause for setting aside the verdict, if the action had been tried by jury, will have the same effect upon the referees' report. Mason *v.* Knox, 66 N. H. 545, 27 Atl. 305.

7. Mutual L. Ins. Co. *v.* Anthony, 50 Hun 101, 4 N. Y. Supp. 501 In this case the court in its order of reference provided that the testimony of a certain witness taken on a former hearing before another referee should be read in evidence; and it was held that the order was without authority, inasmuch as such testimony was not permissible, although the witness is out of the state and his present whereabouts unknown.

8. Melendy *v.* Spaulding, 54 Vt. 517.

In Sanborn *v.* Paul, 60 Me. 325, it was held that if a submission to reference contained no provision in relation to the rules of evidence that shall govern the referees, they are not restricted to the rules of the common law but may receive the statements of parties without requiring them to be sworn.

In Davis *v.* Campbell, 23 Vt. 236, an action of trespass, referred under a rule from the county court, the rule stated that the referee was to be governed by the rules of law, and that "by the rules of court all special pleas are to be filed within ninety days of the first term of court, or defendant must be confined to the general issue, without notice of special matter to be given in evidence," and there had been no plea filed in the cause. It was held that the referee might receive and consider evidence of matter in justification of the act of the defendant complained of as a trespass.

9. Stubbs *v.* Ripley, 39 Hun (N. Y.) 620.

Reference to Master in Chancery. — In most of the states by reason of the fact that the former distinction between courts of law and courts of equity has been abolished, the rules governing the conduct of the proceedings before the master or referee in a case of an equitable nature are the same as those governing the trial of a reference of an action at law.[10] In some states, however, the distinction between courts of law and of equity still exists, and in those states the hearing before the master is governed by the general equity practice.

In the Federal Courts the proceedings before the master are governed entirely by rules of practice in equity, of which the ones considered pertinent to this article are set out in the note.[11]

2. Attendance and Production of Witnesses. — In General. — A

A referee appointed in a *certiorari* proceeding for the purpose of reviewing a tax assessment, to take testimony and report, is only an aid to the court; and in the admission of testimony offered before him the rules of evidence are not adhered to with the same strictness as upon the trial of common law actions before a jury. People *ex rel.* Batt *v.* Rushford, 81 App. Div. 298, 80 N. Y. Supp. 891.

10. See Hoofstitler *v.* Hostetter, 172 Pa. St. 575, 33 Atl. 753.

Upon a reference to the master the evidence must be produced before him, and upon failure to do so cannot afterwards be offered in court upon the hearing on exceptions to the master's report, although the court will, upon proper occasion, direct the master to review his report, when the evidence may then be laid before him. White *v.* Cox, 4 Hayw. (Tenn.) 213.

By the settled rule of chancery practice the parties are required to present the clerk with their respective accounts of the matters of reference either before or after they have examined their adversary on interrogatories. It is by comparison of these statements that the clerk is enabled to see the points of real difference and to require evidence from the parties touching those points. Myers *v.* Bennett, 3 Lea (Tenn.) 184.

11. Upon every such reference it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay. Rules of Practice in Equity, No. 75.

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used. Rules of Practice in Equity, No. 76.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other docu-

referee or auditor has the power to summon witnesses and compel their attendance.[12] And in the case of a reference to a master to take the proofs and report the same together with his opinion of the law and the facts, it is the duty of the master to cause the wit-

ments applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the act of congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties. Rules of Practice in Equity, No. 77.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable. Rules of Practice in Equity, No. 78.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, in the master's office, or by deposition, as the master shall direct. Rules of Practice in Equity, No. 79.

All affidavits, depositions and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter, may be used before the master. Rules of Practice in Equity, No. 80.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary. Rules of Practice in Equity, No. 81.

In Bell *v.* United States Stamping Co., 32 Fed. 549, an infringement suit, the testimony upon which an exception in relation to profits from savings in the cost of manufacture was founded did not appear to have been brought before the master in making up the case on the accounting so that it could be answered or explained on the other side, but had been referred to in argument and requests for finding upon the case made. The testimony it appeared had been taken by the examiner for the hearing in chief, and it was held that the testimony in question did not come within the terms of equity rule 80, and that accordingly there was no ground for sustaining the exception to the failing of the master to find as requested.

12. Smith *v.* Minnick, 88 Me. 484, 34 Atl. 274.

nesses to be brought before him and examined[13] in his presence.[14]

3. Production of Evidence. — A. ADMISSIBILITY. — a. *As Affected by the Scope of the Inquiry.* — Of course the referee or master may hear any legal evidence offered by either party which is pertinent to the matters referred.[15] But he cannot go outside the order of reference; and where the reference is to take and consider proofs upon a particular question stated in the order, it is not proper for him to take and consider proofs upon any other question.[16]

13. Particularly in case of a reference to a master to take and state an account between partners, it is proper, and even necessary, that witnesses, as well as either party, at the request of the other, should be brought before him and examined on oath, touching the partnership transactions, which examination should be carefully taken down by the master. And if a witness, or either party, refuses to appear in obedience to the master's summons, for that purpose, or refuses to answer a proper question, allowed by him, it is the duty of the master to report the contempt to the circuit court, whose duty it would be to punish the contempt. The master should also require the production of all partnership books and papers, that by a full and patient examination, he may be able to state, with accuracy and precision, the true state of accounts between the parties. The report, too, should present a detailed statement of the accounts of all the transactions on either side, showing what items are allowed, striking a balance in favor of the party entitled to it. Brockman *v.* Aulger, 12 Ill. 277.

14. "The testimony of the witnesses is presented to the master orally, and is thus before him for consideration. His duty is to reduce it to writing, or have it so reduced to writing, and report it to the court." And it is not proper for him to commit the duty of hearing the witnesses testify to a stenographer, not in his presence and hearing, and requiring the parties to produce a transcript of the testimony so taken for his consideration. Schnadt *v.* Davis, 185 Ill. 476, 57 N. E. 652, *affirming* 84 Ill. App. 669. The court said: "The practice further is to impose upon suitors the burden of compensating the stenographer for doing work which it is the duty of the master to do, and for which the master also collects the full allowance authorized by the statute to be paid for such service. If such practice has obtained it should no longer be tolerated. When the order of reference requires no more than that the master shall take and report the evidence, the evil of the practice is the illegal exaction of the sum of money demanded from suitors as for the compensation of the stenographer, which, if not submitted to, shall, as counsel for appellee contends, be enforced by the denial of a hearing in the courts. But the practice is fraught with another and not less serious evil when indulged in a case where, as here, the order of reference requires the master shall also make report of his conclusions of law and fact. In order to discharge the duty of arriving at conclusions as to the facts the master should see the witnesses and hear them testify."

15. Henderson *v.* Huey, 45 Ala. 275.

16. Taylor *v.* Robertson, 27 Fed. 537; Wright *v.* Cobleigh, 21 N. H. 339; Ballard *v.* McMillan, 5 Tex. Civ. App. 679, 25 S. W. 327. See also Lull *v.* Clark, 20 Fed. 454.

The clerk and master in taking an account is bound to conform to the directions of the decree. He cannot take evidence which changes the complexion of the case as it appeared before the chancellor, and which had it been before the chancellor would probably have caused a different decree. "He was authorized to take no testimony except that which was relevant to the matter referred to him in the decree. Any other evidence is taken as much without authority and is as little to be regarded as though it were found in voluntary

Even where the master has gone outside of the matters embraced in the order of reference and introduced into his report matters wholly irrelevant thereto, exceptions do not lie to his report on that account. The proper course for the party aggrieved in such case is to apply to the court directly by motion to expunge the impertinent matter.[17]

After an order taking the bill as confessed and the entering of a decree *pro confesso* and a reference to the master to take proof and report, the defendant has a right to appear and cross-examine the witnesses for the complainants, but he has no right to offer evidence of matters of defense.[18]

b. *As Affected by the Legality of the Evidence.* — **(1.) Generally.** The general rule is that the referee or master may and should receive any legal evidence relating to the matters referred to him. This of course necessarily implies that he should not receive

affidavits sworn to before a justice of the peace." Maury *v.* Lewis, 10 Yerg. (Tenn.) 115.

In Gilmore *v.* Gilmore, 40 Me. 50, a suit in equity where the cleaims set up by one of the parties against the other were resisted on the ground of fraud and that question was decided by the court in favor of the claim, and the case was then sent to a master to find the amount due, it was held that in his investigation he was confined solely to the matters referred to him and that he could not permit any inquiry into the question of fraud, although all the legal evidence had at the hearing and bearing upon the question referred to him might be considered by him.

An order referring a cause to a commissioner to state an account between the parties and to take proofs as to the amount received by either party from the sales of any portion of the property in controversy previous to the filing of the bill does not authorize the commissioner to take an account and receive evidence as to property sold *pendente lite.* Reed *v.* Jones, 8 Wis. 421.

17. Tyler *v.* Simmons, 6 Paige (N. Y.) 127.

In Deitch *v.* Staub, 115 Fed. 309, 53 C. C. A. 137, the defense was usury in which there was evidence both in support and in contradiction thereof. A petition to rehear the case upon that and other points had been denied; but no application was made to reopen the case for new or additional evidence. Thereupon a decree was entered against the defendant on the question of usury. The cause was then referred to a special master to ascertain and report the amount due upon each of the loans and to ascertain the present cash value of the building and loan shares upon which the loans had been made and fixing the basis upon which this accounting should be had. Upon the hearing before the master the deposition of a certain witness was again taken and additional evidence given tending to show that the loans had not been made upon open competitive biddings. This evidence was objected to as irrelevant to any issue before the master, who, while making no express ruling, ignored it altogether and confined his report to the matters referred to him. It was held that the proposals of the defendant to inject into the record additional evidence without laying any ground or obtaining any order of the court upon a matter which had been adjudged against him by the interlocutory decree was without any precedent, and that since the new evidence had been properly disregarded by the master the defendant's exception to the master's report was properly overruled.

18. Bauerle *v.* Long, 165 Ill. 340, 46 N. E. 227.

evidence objectionable for incompetency,[19] irrelevancy or immateriality.[20] Nor should he exclude evidence which is not so objectionable.[21]

(2.) Effect of Receiving Improper Evidence. — Some of the courts hold that the fact that the referee admitted improper testimony is not of itself fatal to his report;[22] while others hold that where it appears that the report is based on evidence which should have been

19. De La Riva *v.* Berreyesa, 2 Cal. 195; Lewis *v.* Godman, 129 Ind. 359, 27 N. E. 563; Harding *v.* Wallace, 8 B. Mon. (Ky.) 536; Tripp *v.* Forsaith Mach. Co., 69 N. H. 233, 45 Atl. 746; Lathrop *v.* Bramhall, 64 N. Y. 365; Gaffney *v.* Peeler, 21 S. C. 55; Duffy *v.* Hickey, 68 Wis. 380, 32 N. W. 54.

Compare Smith *v.* Gorman, 41 Me. 405, where it was held that referees may reject or receive testimony which at common law would not be admissible.

20. Groth *v.* Kersting, 4 Colo. App. 395, 36 Pac. 156; Woodruff *v.* McGrath, 32 N. Y. 255.

21. In Severance *v.* Hilton, 32 N. H. 289, the report of the referee was set aside for the rejection of depositions and testimony which should have been admitted.

In Langdon *v.* New York, 133 N. Y. 628, 31 N. E. 98, the report of the referee was set aside because of the exclusion by him of material evidence, and a further hearing before him directed for the introduction of additional testimony.

22. The fact that the referee admitted improper testimony is not a valid objection to the award, unless the action of the referee shows corruption, partiality or undue means to produce the award. Harding *v.* Wallace, 8 B. Mon. (Ky.) 536.

The Entire Report of the Referee Will Not Be Rejected because of the reception of illegal evidence on the hearing, since the report is merely advisory to the court and it is at liberty to reject the conclusions reached by the referee and from the legitimate evidence in the cause state conclusions of its own. Lewis *v.* Godman, 129 Ind. 359, 27 N. E. 563.

Where it can be seen that the reception of incompetent testimony by a referee has not seriously prejudiced the party complaining thereof, or materially affected his rights, and where the judgment should be sustained by the appellate court if such objectionable testimony were wholly eliminated, the judgment as rendered is not necessarily to be reversed by reason of the inclusion of such evidence in the record. People *ex rel.* Batt *v.* Rushford, 81 App. Div. 298, 80 N. Y. Supp. 891.

The admission of improper evidence by the referee is no ground for setting aside his report, where there is sufficient evidence properly admitted to sustain the findings. Duffy *v.* Hickey, 68 Wis. 380, 32 N. W. 54.

It is proper to overrule an exception to a referee's report based on the alleged erroneous admission of evidence where it appears that the referee found for the excepting party on every issue to which the evidence related. Jones *v.* Nolan, 120 Ga. 588, 48 S. E. 166.

Although the record may show that much of the evidence introduced before the master was irrelevant, it will be presumed in the absence of any showing to the contrary that the master acted only upon such as was properly admissible. Allison *v.* Perry, 130 Ill. 9, 22 N. E. 492.

Neither the exclusion of evidence offered by one party nor the reception of evidence offered by the other party which relates to an immaterial issue furnish any ground for setting aside the referee's report, since in such case neither party is prejudiced by the action of the referee. Tripp *v.* Forsaith Mach. Co., 69 N. H. 233, 45 Atl. 746.

In Silver *v.* Worcester, 72 Me. 322, it was held that an auditor can receive only such evidence as would be admissible were the case he is hearing on trial in court; and that

rejected, the report in so far as it is based on such evidence will not be accepted.[23] The action of the referee in admitting illegal evidence cannot be assigned as a ground for a new trial.[24]

The Reception of Immaterial or Irrelevant Evidence by a referee is not an error which is deemed adequate of itself to require a reversal.[25]

(3.) Ex Parte Evidence. — The referee or master should not receive *ex parte* evidence in the absence of some of the parties.[26] Nor

his report may be impeached and must be amended so far as it is founded upon any evidence not legally competent. See also Paine *v.* Maine Mut. M. Ins. Co., 69 Me. 568, where the court said: "He is not an independent tribunal like a referee chosen as such by the parties. He is a part of the court itself which intrusts him with its commission. Like any other tribunal of law, he must be governed by legal principles. Extreme injustice might be suffered by parties if it was otherwise. If it was as contended by the claimants, a report might be made by an auditor against a party founded entirely upon illegal evidence, and the burden created by it could be removed by such party in this court only by legal evidence; a case made out by illegal proof to stand until overcome by legal proof. Besides, if an auditor can set himself at all above the law, what limits can be prescribed to the exercise of such discretion? He must be required to act within the law, or he must have the right without limitation to act outside of it. The general proposition is nowhere denied that an auditor must decide legal questions according to law. Whether testimony is admissible or not is but a question of law."

23. In Doolittle *v.* Stone, 55 Hun 604, 8 N. Y. Supp. 605, the referee's report was set aside because it was manifest from his decision that incompetent evidence admitted by him against objection was relied upon by him to aid him in reaching his decision.

The Finding of Fact By a Referee Based Upon Illegal Evidence is an error of law requiring the reversing of the finding. Gaffney *v.* Peeler, 21 S. C. 55.

The master should not receive incompetent testimony, and a decree based on the report of a master will not be permitted to stand where it appears that the master received incompetent testimony. Crane *v.* Stafford, 217 Ill. 21, 75 N. E. 424.

24. Lewis *v.* Godman, 129 Ind. 359, 27 N. E. 563, where the court said: "The evidence in the cause was reported to the court, and it was its duty to consider the same, and either adopt such conclusions as were reached by the master, or find conclusions of its own, as the evidence required. No question as to the action of the master in the admission of evidence can be presented to this court without an opportunity afforded to the circuit court to correct the error, if any exists, in the admission of such evidence. Following the proper effort in the circuit court to correct such error, and a refusal of the court to grant the proper relief, the action of the court would be subject to review here, but the action of the master in admitting evidence on the hearing of the cause before him cannot be assigned as a reason for a new trial, because, as we have seen, where the order of reference requires him to report the evidence, the cause is ultimately tried by the court, and not by the master commissioner."

25. Groth *v.* Kersting, 4 Colo. App. 395, 36 Pac. 156.

The improper admission of immaterial or irrelevant testimony by the referee will not necessarily vitiate the finding by him. Woodruff *v.* McGrath, 32 N. Y. 255.

26. Gee *v.* Humphries, 49 S. C. 253, 27 S. E. 101.

In Hagner *v.* Musgrove, 1 Dall. (Pa.) 83, it appeared that the parties, upon the case being called for trial before the referee, became involved in an altercation whereupon the referee ordered the parties to withdraw

should he receive *ex parte* affidavits,[27] although it seems he may do so if no objection is made.[28]

c. *Determination of the Question of Admissibility.* — Where the reference to the referee or master is to take and report the proofs with his conclusions of law and fact, he has power to determine the question of the competency, relevancy and materiality of the evidence offered before him.[29] It has, however, been considered advisable for the master to receive the evidence subject to objections until

and called the witnesses one at a time and examined them separately out of the hearing of both parties and finally reported in favor of the plaintiff. These facts being established the report was set aside on a motion of the defendant.

In Chaplin *v.* Kirwan, 1 Dall. (Pa.) 187, where the referee had allowed *ex parte* evidence to be given the court said: "If referees make inquiry abroad, to ascertain for their own satisfaction, the price of work, or the truth of any other matter, which may be said, comparatively, to be of a public nature, this, so far from being irregular, would be highly commendable. But it is a very different case, when they proceed separately to examine a witness, who has been produced by one of the parties, although the evidence relates only to those general points. The adverse parties should have an opportunity of cross-examining the witness."

In Small *v.* Trickey, 41 Me. 507, 66 Am. Dec. 255, it was held that the examination of a book of accounts by one referee in company with the successful party after a full hearing of the evidence of the parties and the arguments of counsel in order to test the accuracy of an account transcribed by a witness was not in any sense an *ex parte* hearing, and in the absence of proof of misconduct, partiality or fraud was not sufficient to vacate the award.

In Weakley *v.* Cherry Twp., 62 Kan. 867, 63 Pac. 433, the referee after the hearing looked over certain bank-books and checks which had been received in evidence and talked with the banker who had the custody of the books, whose testimony beyond what was contained in the books amounted to nothing. It was held that the referee was not guilty of such misconduct as constituted fatal error.

27. Crane *v.* Stafford, 217 Ill. 21, 75 N. E. 424; Passmore *v.* Pettit, 4 Dall. (Pa.) 271.

In Rhode Island rule 72 of the equity rules allows all affidavits, depositions and documents which have been previously made, read or used in the court upon any proceeding in any cause or matter to be used before the master. And while *ex parte* affidavits taken in a case may be used before the master, the master has, under rule 69, authority to direct the mode in which the matters requiring evidence shall be proved before him, and hence he may require other testimony. Hazard *v.* Durant, 12 R. I. 99.

28. Pearson *v.* Darrington, 32 Ala. 227.

29. Ellwood *v.* Walter, 103 Ill. App. 219; McClay *v.* Norris, 9 Ill. 370; Brockman *v.* Aulger, 12 Ill. 277; Hurd *v.* Goodrich, 59 Ill. 450; Cox *v.* Pierce, 120 Ill. 556, 12 N. E. 194; Brueggestradt *v.* Ludwig, 184 Ill. 24, 56 N. E. 419, *affirming* 82 Ill. App. 435.

In Kinney *v.* Adams, 2 Har. (Del.) 357, the court said: "All the provisions of the law regard this as a trial by and before referees and not before the justice; and in the absence of any express provision giving him authority we apprehend he has no power to regulate the testimony or otherwise to interfere with such trial than to compel the attendance of witnesses or to aid and protect the referees in the execution of their duty."

In Minchrod *v.* Ullmann, 163 Ill. 25, 44 N. E. 864, speaking of the action of the master under such a reference, the court said: "Like the chancellor, he is presumed to have considered all the competent evi-

the conclusion of the proofs, so that the evidence objected to may be in the record where it can be examined by the court on the hearing of the exceptions, if the court shall be of the opinion that it is competent.[30] But the court will not suspend the examination of witnesses before the master, in order to have settled whether or

dence tending to prove or disprove the fact in question."

In Cheltenham Imp. Co. *v.* Whitehead, 128 Ill. 279, 21 N. E. 569, the court said: "If, in the opinion of the plaintiff in error, the evidence offered before the master was incompetent, or insufficient to establish the claim, he was required to file exceptions before the master, and if overruled there, renew the exceptions in the circuit court." This implies that objections to the evidence for incompetency are to be ruled upon by the master. To the same effect is Gehrke *v.* Gehrke, 190 Ill. 166, 60 N. E. 59.

In Ronan *v.* Bluhm, 173 Ill. 277, 50 N. E. 694, the master reported objections to certain oral testimony, and to certain documents offered before him, and reported his conclusions of law that the oral proof was competent and the documents incompetent, and reported that he refused to receive the documents in evidence for any purpose. The supreme court passed upon these rulings and held that the master erred in his conclusions as to the competency of the proof, but gave no intimation that the master was without power to rule, and proceeded upon the apparent assumption that the master had such authority.

In Whiteside *v.* Pulliam, 25 Ill. 257, and in Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 94, 12 N. E. 543, it is held that upon the hearing before the master "the parties have the same right to be heard by themselves or by counsel, to introduce evidence, cross-examine witnesses, and to take the various steps authorized by law, as if the hearing was before the chancellor instead of the master."

The Question of the Qualification of the Witness to testify as an expert is one wholly for the referee, and his ruling one way or the other is not subject to revision on appeal from the verdict. Stevens *v.* Chase, 61 N. H. 340; Goodwin *v.* Scott, 61 N. H. 112.

The South Carolina Code (§ 294) provides that masters and referees to whom cases have been referred, whether they hear and decide the whole issue or report upon any specific question of fact, or the facts generally, shall hear and decide any objection which may be made to the competency, relevancy or admissibility of any evidence which may be offered. Devereux *v.* McCrady, 49 S. C. 423, 27 S. E. 467, where the order was for the purpose of an accounting between the parties and it was held that the master had the right to decide objections to the legality of any evidence offered upon the accounting.

In New Jersey under a rule of court promulgated in 1823 the master has power to determine the admissibility of testimony offered. Rice *v.* Rice, 47 N. J. Eq. 559, 21 Atl. 286, 11 L. R. A. 591.

30. Ellwood *v.* Walter, 103 Ill. App. 219.

At the hearing before the master where evidence is offered and its competency or admissibility is objected to by the adverse party, the master should receive the evidence subject to the objection thus enabling the court to pass upon the matter on review. Kansas Loan & Trust Co. *v.* Electric R. L. & P. Co., 108 Fed. 702. The court said: "One of the principal objects in referring cases like this to the master for hearing is to relieve the court from the labor and time of hearing a case either *ore tenus* or on depositions, and to have assistance of the analysis and substance of the testimony by the master with proper reference to the testimony of the witnesses and the page of the testimony where it can be found, to enable the court easier to determine whether the conclusion drawn by the master from the facts is supported by the evidence."

not portions of testimony offered are relevant.[31] Nor will the court interfere *in limine* with the acts and proceedings of the referee or master as to the competency of the evidence offered before him.[32]

But Where the Reference Is Merely To Take the Evidence and report it to the court, the competency of the evidence offered is a question not for the determination of the referee or master, but of the court.[33]

31. In Rusling *v.* Bray, 37 N. J. Eq. 174, the court said: "To establish or tolerate the practice of allowing parties to suspend the examination in order to obtain the opinion of the court as to the competency of witnesses or the relevancy of evidence would greatly impede and embarrass suitors and often prove disastrous to poor litigants. It is urged that the record should not be encumbered with useless material. The answer is that the party insisting upon the production of illegal evidence does so at his peril as to all the costs that shall follow."

32. The master is a judicial officer acting as the representative and substitute of the court which appointed him, and while there can be no doubt of the power of the court for sufficient cause to modify or vacate any order made by him it is not the general practice for the court to interfere *in limine* with his acts and proceedings, but to wait until the coming in of his report before hearing exceptions by either party to the cause to any alleged irregularity or excess of authority on his part. Bate Refrigerating Co. *v.* Gillette, 28 Fed. 673.

In Hoe *v.* Scott, 87 Fed. 220, an infringement suit, in the progress of the investigation before the master the inquiry was sought to be extended to proof of the manufacture and sale of machines claimed by the complainant to be an infringement, but claimed by the defendant not to come within the decree of the court. Thereupon the court was asked to direct the master to refuse to take evidence concerning any machines claimed by the defendant to be non-infringing machines until the court had had an opportunity to determine the question of non-infringement. It was held that the request could not be granted. The court said: "This does not seem to be in accordance with precedent or proper practice. The court appoints the master with special reference to his fitness to perform the duties imposed upon him. He is the court's representative, and it is his duty to pass upon all the questions of procedure as they come before him. His action is subject to review of the court, but it must be only when he has concluded his labors, and the court has before it all the data upon which his conclusions are founded. The duty of the master is to hear the parties fully, 'directing the mode in which the matters requiring evidence shall be proved before him,' as provided for in the seventy-seventh rule in equity. It is necessary that he should be given the power to avoid delays and confusion, and to relieve the court of the necessity of passing upon the materiality of every disputed question as it may arise in the progress of the hearing. Errors made by the master can be corrected upon the coming in of his report upon exceptions properly taken."

33. Where objections taken before a referee are not renewed and rulings had thereon upon the trial to the court, they are not available. Fox *v.* Moyer, 54 N. Y. 125.

Upon a motion for the substitution of attorneys in a pending action, a reference order to ascertain the amount of the attorney's lien, although in form it may be one to hear and determine the matters in controversy, is in fact one to take evidence and report to the court so that it may be enabled to fix the amount of the lien. The referee cannot determine the competency of evidence, but must receive what is offered and leave the question of competency to the court. Nor is the report of the referee in any way binding on the court, who can accept or reject the conclusions of the referee as it may see fit.

B. TIME. — When an examination is once begun before a master, he ought, on assigning a reasonable time to the parties, to proceed with as little delay and intermission as the nature of the case will admit of, to the conclusion of the examination.[34] But refusal of the master to adjourn an examination at the request of counsel of some of the defendants, to afford him an opportunity to produce witnesses on behalf of those whom he represents, should he so desire, is good ground for setting aside a master's report.[35]

C. MODE. — a. *In General.* — As has been previously stated, in the case of a reference to a referee or master under the modern practice as regulated by statutes or rules of court, or both, the proceedings before the referee or master are conducted in much the same manner as before courts; and of course this necessarily involves the general rules governing the mode of adducing evidence,[36] unless, as is the case in some states, the statutes contain

Frost *v.* Reinach, 40 Misc. 412, 81 N. Y. Supp. 246.

34. Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495.

35. Douglas *v.* Merceles, 24 N. J. Eq. 25.

"It is essential to the fair and satisfactory investigation of facts, that an opportunity should be afforded to obtain and produce the necessary evidence, however distant the scene of the transaction may be. A court of justice will always allow time, for the execution and return of a commission, when witnesses reside abroad. In the present case, the question turned upon the sea-worthiness of a ship; and time was asked by the defendants to produce testimony from *Halifax*, where she had undergone a survey and repairs. This was refused, without any reason to suppose that the object in asking it was mere delay and vexation. The refusal has deprived the party of the means of defense before the referees; and we cannot think it just to place him out of the reach of all remedy by confirming the report." Passmore *v.* Pettit, 4 Dall. (Pa.) 271.

It is no objection to the auditor's report that he refused to grant a continuance for the purpose of enabling a party to remove a ground of incompetency against one of his witnesses. Newton *v.* Higgins, 2 Vt. 366.

36. Phelps *v.* Peabody, 7 Cal. 50. In Frison *v.* DePeiffer, 83 Me. 71, 21 Atl. 746, some of the evidence before the referee consisted of numerous letters in the French language which the defendant requested the referee to cause to be translated into English; and in consequence of his omission to do so, the objection was made that he failed to understand, comprehend and consider their contents, which were material to the issue. The action of the referee was sustained, the court saying: "The answer is twofold: (1), It was no part of the duty of the referee to cause the letters to be translated; and (2) the referee testifies that, with the aid of his grammar and dictionary, he refreshed his collegiate knowledge of the language and understood the purport of the letters."

In Gibson *v.* Trowbridge Furniture Co., 96 Ala. 357, 11 So. 365, it was held that on an accounting before the register under a decree in favor of the complainants in a creditor's bill, the original bill, the amendments thereto, the petitions of other creditors upon which they were let in as co-complainants, the admissions contained in the answer of one of the defendants and the decrees *pro confesso* against the other defendants were admissible in evidence.

A referee appointed to take "testimony" is only appointed to take the oral proofs in the case. And written documents especially when proved by being authenticated as provided by statute may be put in evidence at the hearing before the court. Baker *v.*

express provisions which regulate the introduction of evidence.[37]

Reference in Equity. — Under the ancient practice in equity the examination of witnesses before a master was by interrogatories previously settled and exhibited before the master, or by oral examination in the presence of the master.[38] But under the modern practice the examination of witnesses by interrogatories is but rarely resorted to, the method of taking oral testimony being by oral examination before the master.[39]

In the Federal Courts the mode of producing evidence before the master to whom a cause in equity has been referred is regulated

Woodward, 12 Or. 3, 6 Pac. 173.

It is the proper practice for the master to put testimony ruled out by him on separate sheets and set out the testimony in the "case." Floyd *v.* Floyd, 46 S. C. 184, 24 S. E. 100.

37. An Alabama Statute (Code of 1896, § 743) relating to taking evidence upon reference before registers provides that the referee shall examine on oath *viva voce* all witnesses produced by the parties before him and take down such evidence in writing. And in Brady *v.* Brady, 144 Ala. 414, 39 So. 237, it appeared that when the evidence was taken before the register the defendant attempted to introduce other witnesses and was informed by the register that he could not do so because notice had not been given to the complainant at the opening of the reference. It was held that this action of the register was a practical denial to the defendant of his constitutional rights, and that the report should not have been confirmed by the chancellor.

38. Parkinson *v.* Ingram, 3 Ves. (Eng.) 603; Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495 (where this question is fully discussed and definite and certain rules enunciated); Hollister *v.* Barkley, 11 N. H. 501.

A party interrogated by his adversary before a master in chancery has the right to demand that the questions be propounded in writing. Winter *v.* Wheeler, 7 B. Mon. (Ky.) 25.

The interrogatories to a party before the master are in the nature of interrogatories in a bill or answer in chancery, and the answers are evidence to the like extent against the party making them; since the interrogatories are always propounded in writing in a bill or answer so should they be before the master if the party interrogated desires it. Winter *v.* Wheeler, 7 B. Mon. (Ky.) 25.

The regular method of taking testimony before a master is to reduce all testimony to writing. There is no rule that he shall not hear *viva voce* evidence, but only that he shall not act on any not reduced to writing in order that the ground of his decision may be brought fully before the court. If a party for his own convenience or benefit brings his witnesses before the master instead of taking their depositions under a commission he must bear the expense himself. Taylor *v.* Cawthorne, 17 N. C. 221.

39. Jackson *v.* Jackson, 3 N. J. Eq. 96.

"As to the evidence, no precise rule can be well laid down, except that the master may use any evidence used upon the hearing, and may always take additional evidence as to matters of detail, and facts affecting the application of the principles of the decree. In taking the depositions of witnesses for the first hearing (which is indeed the hearing of the cause, the subsequent hearing being only an exception), many such facts will be included; but they need not be, save for convenience, and to avoid the expense of a second examination. They might, however, save for some such reason of convenience, be deferred to be taken before the master." Franklin *v.* Meyer, 36 Ark. 96.

In stating an account before the master the answer of one defendant cannot be used as evidence against another whose interest is adverse. Pearson *v.* Darrington, 32 Ala. 227.

entirely by the "Rules of Practice," as has already been stated.[40]

b. *Necessity of Oath.* — The witnesses must be examined under oath whether the reference is under the statutes or under the equity practice.[41]

c. *Deposition Must Be Signed.* — The deposition of the witness must be signed by him, otherwise it is regarded as imperfect and cannot be read at the hearing.[42]

d. *Cross-Examination.* — Under the former practice in equity the right to cross-examine a witness upon examination before a master did not extend to a party litigant.[43] But under the modern practice in proceedings before either a referee or master, the right of cross-examination, as well in relation to parties as to witnesses generally, is universal.[44] And the loss of this right as ground for suppressing or striking out the direct examination of the witness is the same as if the examination of the witness were being taken before the court.[45] So too, the usual rules as to the scope of the

40. See "Rules of Practice in Equity," set out in note 11, *supra.*

The old method of taking questions before the master by tediously proving every item has been abrogated, and under equity rule 79, now in force, the accounting party states his account in the form of debit and credit, which being verified by his affidavit stands as a basis for the account in which the other party must show error by proof before the master. Pulliam *v.* Pulliam, 10 Fed. 23. In this case the defendant set up a settlement of his account as executor before the probate court and by his deposition proved his account as stated to be correct, and it was held that under rule 79 he could without any leave of the court offer it before the master as his account.

In Goss Print.-Press Co. *v.* Scott, 119 Fed. 941, an application for an order requiring the defendant to produce before the master for an accounting for profits and damages for infringement of letters patent, certain correspondence leading up to the sale of certain machines containing infringing devices and designated in that proceeding, it was held that under the provisions of equity rule 77 the complainant was entitled to the production of the correspondence as being applicable to the subject-matter of the reference.

41. Brockman *v.* Aulger, 12 Ill. 277.

42. Flavell *v.* Flavell, 20 N. J. Eq. 211; Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495.

43. See Jackson *v.* Jackson, 3 N. J. Eq. 96.

44. Jackson *v.* Jackson, 3 N. J. Eq. 96.

45. In Curtice *v.* West, 2 N. Y. Supp. 507, after the defendant had proceeded for some time with the cross-examination of a witness, further cross-examination was suspended by the adjournment to a later date when the hearing was resumed and counsel called for the witness for further cross-examination. The witness had in the meantime died. Thereupon defendant's counsel moved that all the testimony of that witness be stricken out, and that if not all be stricken out then that certain portions given on his direct examination should be stricken out. The referee struck out certain portions of the testimony given by the witness upon direct examination as to which he deemed no cross-examination had been had, but which did not embrace all of that specified by counsel in his motion, and allowed the residue to remain. It was held that the defendant was in no position to complain of the action of the referee because the lack of opportunity to cross-examine the witness was not due in any way to the fault of the plaintiff and nothing appeared showing that he was deprived of the opportunity of

cross-examination apply to the examination of a witness before a referee or master.[46]

D. Place of Taking Testimony. — A master to whom has been referred a cause in equity pending in a federal court may, in the exercise of his discretion, take testimony beyond the limits of the district of his appointment.[47] And it has been held proper for the master to take testimony not only in places in this country outside

completing the cross-examination if he had desired to do so.

On a reference to ascertain the state of accounts between an attorney and client, and what, if any, liens the attorney had upon funds in his hands for services rendered, it is the duty of the referee to report the proceedings before him and leave the ultimate determination of the proceedings to the court. Thus where the attorney after his partial examination as a witness moves for adjournment, which is denied, and he does not appear at the hearing, the referee has no power to strike out the testimony of the attorney theretofore given by him. Matter of Crooks, 23 Hun (N. Y.) 696.

In Shapleigh *v.* Chester Elec. Light & Power Co., 47 Fed. 848, the examiner after the direct examination of a witness had been finished, and before his cross-examination commenced, adjourned the hearing until the following day, upon which day he again adjourned it. On the day appointed, the production of the witness for cross-examination was refused and it was held that because the witness was not produced as required, his deposition in chief was to be suppressed by the court.

The mere fact that it seems as if the information sought to be elicited by a particular question which the witness refuses to answer is not material will not excuse the witness from answering, in view of the object intended by the amendment of rule 67 requiring the preservation of all the testimony offered for the benefit of the appellate tribunal. Parisian Comb Co. *v.* Eschwege, 92 Fed. 721, *following* Blease *v.* Garlington, 92 U. S. 1.

46. The errors of the master, in permitting the cross-examination of the party to be extended to improper matters, does not necessarily vitiate the whole report. If the same result is fairly attainable from a view of the evidence without the aid of the erroneous examination, the report will be confirmed. Jackson *v.* Jackson, 3 N. J. Eq. 96.

In the Federal Courts, the rule is that, although a question on cross-examination may call for irrelevant or otherwise improper matter, the question should nevertheless be answered. If improper cross-examination is indulged in it can ordinarily be dealt with satisfactorily as a question of costs. Brown *v.* Worster, 113 Fed. 20; Whitehead & Hoag Co. *v.* O'Callahan, 130 Fed. 243.

47. Consolidated Fastener Co. *v.* Columbian Button & Fastener Co., 85 Fed. 54. The court said: "The practice of permitting the master to take testimony outside the district of his appointment has grown up with the court until it is of almost universal application, and its practical operation has been found simple, convenient and effective. . . . Should a case arise where the master has abused his discretion the court will undoubtedly interfere, but until it does arise the court should hesitate long before destroying a system, the wisdom of which in its application to a vast majority of cases must be admitted by all."

In White *v.* Toledo, St. L. & K. C. R. Co., 79 Fed. 133, 24 C. C. A. 467, where the special master had been appointed by the circuit court for the northern district of Ohio to take testimony in New York, an order was granted by the circuit court for the southern district of New York which directed the clerk of that court to issue a subpoena to a witness named directing him to appear before the master at a time named in New York City, and tesify. The witness refused to obey the subpoena, and it was held that the circuit court of New York had power to compel the attendance of the witness

of the jurisdiction of the court wherein he was appointed, but even in a foreign country.[48]

E. Order of Proof. — The order of proof is a matter resting within the discretion of the referee.[49]

before the examiner to testify. In this case, after reviewing the history of the rules of practice in equity, the court said: "This historical review of the statutes shows — what is familiar — that a court of the United States for one district had long been empowered to send a commissioner into any other district to take the testimony of a person residing in such district, and that the courts of the United States for the district wherein such testimony was to be taken were directed to issue process to secure and enforce the attendance of such witness before the commissioner or examiner, and that he was authorized to administer an oath to the witness. It also shows that in pursuance of power for that purpose, the validity of which will hereafter be considered, the supreme court, by its amendment of the sixty-seventh rule, adapted or enlarged this statutory system of practice and rules in regard to taking testimony by written interrogatories to the taking of testimony in equity cases orally by specially appointed examiners or masters, and provided that the same system should exist to compel the attendance of a witness, and of punishment for disobedience to the subpoena, or for refusal to be sworn. That the intention of the sixty-seventh rule was to provide that examiners could be appointed to take testimony orally beyond the territorial limits of the district in which the suit was pending was decided by Mr. Justice Bradley in Railroad Co. *v.* Drew, 3 Woods, 691, 29 Fed. Cas. No. 17, 434."

48. Bate Refrigerating Co *v.* Gillette, 28 Fed. 673. The court said: "The master derives his powers from his appointment by the court, and from the equity rules which specially prescribe his duties and the manner of their performance. The seventy-fifth and seventy-seventh of these rules appear to give him ample authority to make the order, unless it can be shown that the exercise of his official power is restricted to the district of New Jersey, or to the territory of the United States. The rules are silent on these matters, but the universal practice under them has been to permit the master to act outside of the territorial jurisdiction of the court, and, if we are correctly informed, without any limit as to places within the boundaries of the United States. And, if this be so, what written or unwritten rule of practice is there which forbids the master to take testimony in London or in Vienna, as well as in Boston or in San Francisco. In a legal sense, the two cities last named are as foreign to the district of New Jersey as are the others. The fact that there may be and are other modes of taking testimony abroad than the one ordered by the master does not deprive him of the discretion to act as he has done, unless those modes have been made exclusive by statute or rules of court. The absence of any express or implied prohibition on this subject in the rules, and the fact that, practically, no restriction has hitherto been placed on the master in reference to the state or country in which he may take testimony, seem to warrant the conclusion that in the exercise of a sound judicial discretion he is at liberty to make such order when he thinks it proper."

49. Steen *v.* Hendy (Cal.), 38 Pac. 718. In this case the record showed that pending the reference the defendant died and his executor was substituted. At the first hearing the executor objected to further proceeding with the trial or taking any testimony on the ground that the claim upon which the action was based had not been presented to him for allowance; but the referee notwithstanding such objection proceeded with the trial and the taking of testimony. The court in sustaining the action of the referee, said: "Defendants could not dictate the order of proof, and, so far as the bill of exceptions shows, the court might well have presumed

F. Objections and Exceptions. — a. *Necessity.* — Objections and exceptions to the rulings of the referee or master on questions of evidence, in order to be available, must be taken in the progress of the trial in the same manner as they are taken before a court.[50]

that such evidence, if essential, would be yet produced by plaintiff."

Under the 77th Equity Rule the order of proof is a matter resting entirely within the discretion of the master. Wooster *v.* Gumbirmer, 20 Fed. 167.

In Michigan, however, circuit court commissioners have no power to control the order of taking of proofs before them in chancery cases. Either party during the period allowed by the rules for taking proofs may take his testimony in any order he may choose. Nor has the commissioner any right to reject testimony; it is for the court to decide upon its admissibility. Brown *v.* Brown, 22 Mich. 242.

50. Phelps *v.* Peabody, 7 Cal. 50; Mengas' Appeal, 19 Pa. St. 221; Patten *v.* Hunnewell, 8 Me. 19; Hill *v.* Bailey, 8 Mo. App. 85; Buxton *v.* Debrecht, 95 Mo. App. 590, 69 S. W. 616; Holt *v.* Howard, 77 Vt. 49, 58 Atl. 797. See also Mattocks *v.* Owen, 5 Vt. 42; Geary *v.* New Haven, 76 Conn. 84, 55 Atl. 584.

Where no objection to the ruling of the master on the admissibility of evidence is taken at the time, nor among the objections to the master's report is there any objection relating to such rulings, the correctness of the master's rulings cannot be raised on the hearing on the report; such an objection comes too late. Whalen *v.* Stephens, 193 Ill. 121, 61 N. E. 921, *affirming* 92 Ill. App. 235.

In Marra *v.* Bigelow, 180 Mass. 48, 61 N. E. 275, one of the exceptions to the report related to a question and answer in the examination of a witness. The question had been objected to at the time and exception saved. The objection made was a general one, and it was held that it was not available to the excepting party as a ground for contending that the question was leading; that the objection should have been directed to the form of the question at the time in order to raise that contention.

Where the defendant refused to attend a reference at which by the exhibition of his accounts and the production of his evidence he might have made a better case for himself, he cannot afterwards object to the irregularity of the mode in which the master obtained his testimony, or that the evidence on which he made up his accounts was inferior to that which he himself had withheld. Bank of State *v.* Rose, 2 Strobh. Eq. (S. C.) 90.

Under exceptions to the master's report on account of the allowance of an item in the statement of an account, a party cannot avail himself of the objection that secondary evidence was admitted without a proper foundation having been laid; the objection should be made to the testimony when offered before the master and exception taken to the ruling of the master thereon. Taylor *v.* Kilgore, 33 Ala. 214.

In Illstad *v.* Anderson, 2 N. D. 167, 49 N. W. 650, the defendant had not only objected to the referee making any rulings whatever but had afterward failed to take any exception to the action of the referee in receiving evidence, and it was held that he could not raise the question whether the evidence was properly received, not having renewed the objection before the court on an application for judgment on the report and no exceptions having been taken on such application.

In Wisconsin it is immaterial how the referee rules upon objections to testimony or that he fails to rule thereon at all, so long as he takes the testimony. In disposing of the case the court considers all the proper testimony and rejects that which is improper and decides the case without reference to the rulings of the referee or his omission to rule upon objections to testimony. Kinsey *v.* Archer, 80 Wis. 201, 49 N. W. 962.

And an objection raised for the first time upon exceptions to the referee's report comes too late.[51]

b. *Rulings by Referee or Master.* — **(1.) Generally.** — A referee is not bound to rule upon a mere offer of testimony; that is a matter within his discretion, and he has the right certainly when the opposite party requires it, to call for the production of the witness and that questions be asked tending to establish the matter embraced in the offer.[52]

(2.) Reserving Decision on Objections. — It is proper for the referee to reserve decision on objections to evidence until his final decision of the case.[53] And sometimes it is held that if there is any doubt as to the admissibility of the evidence, the better practice is for the referee to take the evidence subject to the objection, stating

In Nebraska in order to have a review of the decision of a referee a motion for a new trial must be filed precisely the same as in the case of a trial by the court. And if the motion be based on the improper admission or rejection of testimony it should affirmatively appear that objections and exceptions were taken at the time of the ruling by the referee. Simpson *v.* Gregg, 5 Neb. 237.

An exception that the master received and considered against objection testimony stated in his supplementary report will be overruled if any part of the testimony in question was properly received. Enright *v.* Amsden, 70 Vt. 183, 40 Atl. 37.

In Read *v.* Winston, 4 Hen. & M. (Va.) 450, it was held that objections for want of proof of any voucher on which a commissioner found an item in his account must be made before the commissioner, in which case if the proof is not supplied it may be called for at the hearing.

51. Hill *v.* Bailey, 8 Mo. App. 85. See also Holt *v.* Howard, 77 Vt. 49, 58 Atl. 797.

Under a reference to the master to take testimony and to report the law and the facts, an objection to the competency of testimony offered at the reference cannot be raised for the first time before the court. The court will not determine the competency of the testimony introduced before the referee unless the objector shows affirmatively that the evidence was objected to when offered, and a proper and timely exception saved. Cardwell *v.* Brewer, 19 S. C. 602.

52. Lehigh Stove & Mfg. Co. *v.* Colby, 120 N. Y. 640, 24 N. E. 282.

53. Bernhard *v.* Wyandotte, 33 Kan. 465, 6 Pac. 617. The court said: "It is the almost universal practice of courts and referees to try cases in this manner. The practice hastens the trial and by this means objections are more intelligibly considered and decided. Of course there might be cases where a court or referee would err materially if it did not immediately render its decision upon objections made to evidence; but this is not one of such cases. This is one of that class of cases in which justice could better be done by the referee doing as he did. The reserved questions were all decided at the time of the final decision and the evidence admitted or excluded as the referee thought right under the law, and the other evidence introduced and proper exceptions noted." See also Lathrop *v.* Bramhall, 64 N. Y. 365.

In Kerslake *v.* Schoonmaker, 1 Hun (N. Y.) 436, at the trial before the referee, evidence objected to by the defendant was received subject to the referee's retaining or rejecting it at the conclusion of the case. It was held that since the evidence so received was competent the decision could not operate injuriously or in any way affect the defendant's rights, and that it must be considered the same as if the evidence had been admitted absolutely.

The admission by a referee of evidence in rebuttal subject to objection and a failure to rule upon the objection is not objectionable where the evidence should have been admitted. Spier *v.* Priest, 15 Mo. App. 590.

his ruling upon it.[54] But where the referee, after ruling that evidence produced by a party is inadmissible, offers to take it subject to the objection, the refusal of the party offering it, to then produce it, operates as a waiver of the error, if any, in the ruling of the referee.[55]

(3.) Receiving Evidence Subject to Motion to Strike. — It is within the discretion of the referee to receive evidence objected to as illegal, subject to a motion to strike it out if found to be illegal.[56] But

54. Holendyke *v.* Newton, 50 Wis. 635, 7 N. W. 558. The court said: "This court has several times suggested that it was the better practice, in cases tried by a referee or by the court without a jury, to take the evidence offered by either party, although objected to by the adverse party, and although the referee or judge might be of the opinion that the evidence offered was inadmissible; and that such judge or referee should not refuse to take the evidence offered, except in cases clear of doubt. In cases tried by the court or by a referee, there is very little probability of injury resulting to the parties litigant from the reception of evidence which may not be admissible or relevant, subject to the objections of the opposite party. In such cases, if, upon a review of the referee's report by the circuit court, or upon a review of the judgment of the circuit court, such evidence so objected to is found to be admissible and relevant, the party offering the same will have the same benefit of it as if it had been considered by the referee or circuit court; and, if it be found inadmissible and irrelevant, the opposite party has the benefit of his objections, and the evidence is not considered in determining the rights of the parties." See also Yates *v.* Shepardson 27 Wis. 238.

Under the Michigan Practice whether the evidence is taken before a court commissioner or in open court all objections made to the admissibility of the evidence offered must be reserved until the final hearing. This avoids sending the case back because of the rejection of evidence which the court might consider proper and material. Of course the practice permits counsel to offer and introduce evidence clearly incompetent, but as the evidence must be passed upon ultimately by the court no error is done except in the matter of costs which the court can generally regulate so as to prevent any very great abuse of the practice. Collins *v.* Jackson, 43 Mich. 558, 5 N. W. 1052.

55. We do not wish to be understood as holding that it would be error for a referee or trial judge to refuse to hear evidence which, in his opinion, is clearly objectionable, unless, upon review, it should appear that the same was in fact admissible; but we do hold that when the referee or trial judge offers to receive evidence which, in his opinion, is inadmissible, the party refusing to give the evidence waives any right to insist upon the erroneous opinion of the referee or judge as a ground for reversal of a judgment against him. We desire again to make the suggestion which this court made in the case of Yates *v.* Shepardson, 27 Wis. 238, and in other cases in this court, that referees and judges, trying causes without a jury, should be very careful in rejecting evidence offered upon the trial, and that they should, in every case where there is any reasonable doubt upon the question of the admissibility of the evidence, receive the same subject to the objections of the opposite party, although the referee or judge may entertain the opinion that the evidence is not admissible. Such course can do the parties litigant no harm, and will tend very greatly to lessen the delays and expense of litigation. Holendyke *v.* Newton, 50 Wis. 635, 7 N. W. 558.

56. Case *v.* Phoenix Bridge Co., 11 N. Y. Supp. 724, 34 N. Y. St. 581, judgment reversed on other points, 134 N. Y. 78, 31 N. E. 254.

In Gottlieb *v.* Dole, 109 App. Div. 583, 96 N. Y. Supp. 329, where the referee overruled an objection to evi-

whatever may be the power of the referee during the progress of the trial as to striking out evidence which has been improperly admitted, no such right can exist after a case has been submitted to him for decision unless that right is specially reserved.[57]

4. Preservation of Evidence. — Unless it is expressly required by rule of court or statute,[58] or by order of the court[59] the referee or master to whom the cause is referred for trial need not preserve as

dence subject to a motion to strike out, and after the case had been submitted to him for decision concluded of his own motion to strike out the evidence, and did so, by quoting the question and objection and saying that the objection was sustained and answer stricken out, it was held that the action of the referee in this respect was error, that where an objection to the admission of evidence is overruled and the evidence is received subject to a motion to strike out, the evidence remains in the case, unless the motion to strike is made.

57. Blashfield *v.* Empire State Tel. & Tele. Co., 71 Hun 532, 24 N. Y. Supp. 1006. See also Bloss *v.* Morrison, 47 Hun (N. Y.) 218; Allen *v.* Way, 7 Barb. (N. Y.) 585; Meyers *v.* Betts, 5 Denio (N. Y.) 81.

In Bloss *v.* Morrison, 47 Hun (N. Y.) 218, before the reference was closed a motion was made to strike out certain evidence, which motion was denied and exception taken. The evidence in question was clearly incompetent, and indeed the referee so concluded because in his report he expressly stated that he disregarded the evidence, apparently thinking that he had the right to do this because the evidence was taken in his absence on stipulations between the parties, and the objections of counsel and the rulings of the referee thereon were regarded *pro forma*. It was held that the referee erred.

While under ordinary circumstances, a referee who has erroneously admitted incompetent evidence, cannot, after the submission of the case to him for decision, cure the error by simply reporting that he has disregarded the evidence erroneously admitted, and formed his judgment without reference thereto; yet, when it appears that the error of the referee in admitting the incompetent evidence has been substantially cured by the peculiar and exceptional circumstances of the particular case—as, *e. g.*, that the referee, by the consent of the parties, had been aided by his own observation in arriving at his conclusion on the question as to which he reported that he had disregarded the incompetent evidence; that there was other evidence in the case upon which his determination on that question could be satisfactorily founded, and that an opportunity had in fact been given the parties to re-open the case and give further evidence if they desired—the judgment will not be reversed by reason of such error. Blashfield *v.* Empire State Tel. & Tele. Co., 147 N. Y. 520, 42 N. E. 2.

58. Johnson *v.* Meyer, 54 Ark. 437, 16 S. W. 121; Bash *v.* Culver Gold Min. Co., 7 Wash. 122, 34 Pac. 462.

In North Carolina the testimony of all the witnesses is required by statute to be reduced to writing by the referee and signed by them and filed as a part of the record. The purpose of this is to enable the judge to consider the evidence in passing upon the findings of the referee. And in Holt *v.* Johnson, 128 N. C. 67, 38 S. E. 250, it was held incumbent upon the judge to review the findings of the referee; that while in reviewing the report made under a consent order, as was that case, the court has no power to change or modify the facts as found, yet it is his duty to consider the evidence upon which they were found, to the end that he may act intelligently in confirming, modifying or setting aside the report.

59. Freeland *v.* Wright, 154 Mass. 492, 28 N. E. 678.

In Maryland the equity rules do not prevent the examiner before whom testimony is being taken from having a clerk write it down. Indeed

part of and incorporate in his report the testimony taken by him.[60] Of course this rule does not apply where the reference is merely for the purpose of taking and reporting testimony. The practice, however, of reducing all testimony to writing is very general, regardless of the purpose of the reference.

Documentary Evidence. — A referee is an officer appointed by the court, and by his appointment is qualified with very important powers, and some discretion must be allowed him in the manner of taking and returning testimony and exhibits. Thus where an original instrument is offered in evidence before him a certified copy thereof made by him and filed and returned as an exhibit will not be disregarded except in certain cases.[61]

5. Reopening Case for Further Evidence. — It is within the discretion of the referee to open the case after it has been closed, but before his report is filed, for the purpose of receiving further evidence;[62] and the exercise of that discretion will not be disturbed except in case of gross abuse.[63]

this right is expressly recognized in equity cases by statute, and the *per diem* of the clerk fixed therein. But of course the examiner must be present when the testimony is being taken. Canton *v.* McGraw, 67 Md. 583, 11 Atl. 287.

60. Goodman *v.* Jones, 26 Conn. 264; Nims *v.* Nims, 20 Fla. 204; Beard *v.* Hand, 88 Ind. 183; Simmons *v.* Jacobs, 52 Me. 147; Bowers *v.* Cutler, 165 Mass. 441, 43 N. E. 188; Enright *v.* Amsden, 70 Vt. 183, 40 Atl. 37.

61. Bohlman *v.* Coffin, 4 Or. 313. The court said: "He acts under oath, and is presumed to be qualified to discharge his office conscientiously, and it cannot be presumed that the copy he has returned is not a true copy. Indeed, counsel practically admitted it to be a true copy, but urged as this is a trial *de novo* the original ought to be here. It is true that it would be better in all cases coming here to be tried *de novo* for the original papers offered as exhibits to be sent up with the deposition, and in some cases it would be absolutely necessary, as where a question arises as to an erasure or an interlineation, in which case an inspection of the original might be necessary to properly pass upon the rights of the parties. But nothing of this kind is urged here, and this fact, taken in connection with the deposition of Chapman and the certificate of the referee, as well as the practical admission of its correctness by counsel in the argument, leads us to the conclusion that it would be improper to reject it."

62. Marziou *v.* Pioche, 10 Cal. 546; Welles *v.* Harris, 31 Conn. 365; Heavner *v.* Saeger, 79 Ga. 471, 4 S. E. 767; New Mercer Ditch Co. *v.* Armstrong, 21 Colo. 357, 40 Pac. 989; Williams *v.* Hayes, 20 N. Y. 58; Ocorr & Rugg Co. *v.* Little Falls, 77 App. Div. 592, 79 N. Y. Supp. 251, *affirmed*, 178 N. Y. 622, 70 N. E. 1104; Decker *v.* O'Brien, 13 Misc. 94, 34 N. Y. Supp. 81.

Where counsel for the different parties agree that the testimony shall be closed upon a day fixed by them, it is proper for the master to refuse to take testimony after that day; the matter of opening the case for further evidence under such circumstances is wholly within the discretion of the master. Messinger's Appeal (Pa.), 1 Atl. 260.

In Rhode Island the rule is that where the testimony before the master has been closed and the proof of his report submitted to the parties he has no power to reopen the case to take further testimony without a special order from the court; and this will be granted only upon the ground of surprise and under circumstances that would induce the court to make such order after publication has passed and before hearing. Burgess *v.* Wilkinson, 7 R. I. 31.

63. Marziou *v.* Pioche, 10 Cal.

Some of the courts, however, hold that the referee may in his discretion require a showing of diligence upon the part of the applicant before reopening.[64]

When Both Parties on a Trial Before a Referee Announce That the Proofs Are All In, and the referee acting upon this, adjourns the hearing to some future day for argument, neither party has any legal right to recall his action or to have the case opened for the purpose of giving other or additional proofs.[65]

After the report of the master has been filed it is proper for the court when considering the report to refuse to open the testimony and consider in connection with the report certain depositions which had not been used before the master.[66]

Refusal to Reopen. — On the other hand it is proper for the referee to refuse to reopen the case for further evidence where the evidence sought to be introduced is immaterial.[67]

546; Oliver *v.* Wilhite, 201 Ill. 552, 66 N. E. 837.

The master may in his discretion reopen a case for the reception of further evidence, and having exercised his discretion by granting such further hearing his action in the premises is not reversible. Richardson *v.* Wright, 58 Vt. 367, 5 Atl. 287.

In Gottlieb *v.* Dole, 109 App. Div. 583, 96 N. Y. Supp. 329, where the former decision by the referee had not been filed or even signed, it was held error on his part to refuse to reopen the case and permit additional proof to be taken on a material issue.

64. New Mercer Ditch Co. *v.* Armstrong, 21 Colo. 357, 40 Pac. 989.

Where a proper foundation is laid therefor, a referee may in his discretion reopen the case and hear further proofs at any time before his report is filed or delivered. Cooper *v.* Stinson, 5 Minn. 201, where it was held, however, that if the proper foundation is not laid it is proper for the referee to refuse an application to reopen the case for further proofs; the showing on which the application was based not being sufficiently strong to justify the referee in exercising his discretion.

A master may, after a hearing before him is closed but before he has settled the draft of his report, reopen the case and receive further evidence, provided he is satisfied that the evidence was discovered after the first hearing. Pattison *v.* Hull, 9 Cow. (N. Y.) 747.

The master may reopen a case for the introduction of further testimony where it is shown that through inadvertence and oversight counsel failed to put in certain material evidence, but this rule does not extend so far as to warrant the master, after he has made up his report and submitted it to counsel, in reopening a case to set up and prove matter not alleged in the pleadings nor relied upon by the party upon the hearing before the master. Central Trust Co. *v.* Marietta & N. G. R. Co., 75 Fed. 41.

65. The case has, then, in the regular and orderly course of procedure, passed the stage when the examination of witnesses and the presentation of evidence is in order, and while the referee may and often does permit the parties to return to him and give further evidence it is not error on his part to refuse. Domschke *v.* Metropolitan El. R. Co., 148 N. Y. 337, 42 N. E. 804.

66. Third Nat. Bank *v.* National Bank of Chester Valley, 86 Fed. 852, 30 C. C. A. 436.

Where the master has filed his report, to which exceptions have been duly taken, the court will not reopen the case for the purpose of permitting the taking of additional evidence on which to base a recovery in accordance with the views expressed by the special master in his report. Central Trust Co. *v.* Georgia Pac. R. Co., 83 Fed. 386.

67. Reynolds *v.* Reynolds, 33 App. Div. 625, 53 N. Y. Supp. 135.

6. Hearing on Re-Reference or Re-Committal. — Where the chancellor rules that certain evidence excluded by the master should have been received, the proper practice is to re-refer the cause to the master with directions to receive the evidence in question.[68] And where a reference is made to a master to hear evidence and state conclusions, and in the judgment of the chancellor it is necessary that further evidence be taken and considered, the proper practice is to again refer the cause to the master with directions to take further testimony on the particular points on which the chancellor desires to have further evidence.[69] But where a case previously submitted to a referee for a trial of all the issues is referred back to him to take additional testimony upon a particular issue, the referee should not hear evidence on other points.[70]

Where a New Trial Is Ordered in an Equity Case it is not proper

It is proper for the master to refuse to reopen a case for the purpose of receiving alleged newly discovered evidence where it appears that the evidence sought to be introduced is merely collateral and in no sense conclusive, and in addition is merely cumulative. Oliver *v.* Wilhite, 201 Ill. 552, 66 N. E. 837.

Where an auditor has refused to open a case and hear further testimony upon the sole ground that he had no further power over the case, and the defendant remonstrated against the acceptance of the report on that ground, setting forth the newly discovered evidence and stating the circumstances, and it does not appear upon the facts so stated that the evidence could have materially affected the result, the acceptance of the report by the court is proper. Welles *v.* Harris, 31 Conn. 365.

68. Brueggestradt *v.* Ludwig, 184 Ill. 24, 56 N. E. 419.

In Sowles *v.* Sartwell, 76 Vt. 70, 56 Atl. 282, after the report was drawn and exhibited but before it was filed the master was requested to open the case and receive further testimony, which request instead of granting he referred to the chancellor. In that court the motion was made to recommit the report for the same purpose and the motion denied. It was held that whether the report should have been recommitted was, under the circumstances, a question of discretion and no abuse thereof appearing was not revisable.

69. Wall *v.* Stapleton, 177 Ill. 357, 52 N. E. 477, *affirming* 72 Ill. App. 614.

70. O'Neill *v.* Capelle, 62 Mo. 202.

Where an order of re-reference of an account stated and filed by the master is made "for the purposes and with the powers mentioned in the original order of reference to state an account between the parties with regularity and that the master have power to take further evidence," the master should give the parties an opportunity to introduce further evidence as they respectively deem requisite. Van Ness *v.* Van Ness, 32 N. J. Eq. 729.

Swift *v.* Swift, 88 Hun 551, 34 N. Y. Supp. 852, was an action to recover dower; after the usual reference commissioners were appointed who made a report admeasuring plaintiff's dower but did not report on the question of damages for withholding same. Subsequently a reference was ordered for the purpose of determining whether the damages, if any, were taken into consideration by the commissioners in their admeasurement of the dower, and whether they made plaintiff due and full compensation therefor. It was held that the referee was authorized to receive evidence as to the action and finding of the commissioners on the question of damages, although they had made no formal report on that question.

Auditors may hear new matter on recommitment of their report and should do so where justice plainly requires it, as for example, where ev-

for the judge in making a second order of reference to direct the referee to take and report the testimony *de novo*.[71]

7. Contempt. — The conduct of witnesses before a referee in the use of profanity may be punished as a contempt of court.[72]

IV. THE REFEREE'S REPORT AS EVIDENCE.

1. Evidence to Contradict or Vary Report. — It would seem to follow from the fact that a report of the referee or auditor is conclusive of the matters of fact properly embraced in it, evidence to contradict or vary it, is not admissible.[73] Although there are cases

idence is adduced not before within the power of the party to produce. Leach *v.* Shepard, 5 Vt. 363.

71. The testimony taken on the first reference was taken for the case and not merely for the purposes of a specified trial and is entitled to stand as part of the case in all subsequent proceedings whether before the court or the referee. Cooke *v.* Pennington, 9 Rich. (S. C.) 83.

In Betts *v.* Letcher, 1 S. D. 182, 46 N. W. 193, the first reference in the case was merely to take testimony. Afterwards another reference was ordered with extended power in the referee, that is, to hear and determine all issues of fact, and it was held proper that the testimony taken in the same case before the former referee should be submitted to the second referee for his final determination and report.

72. *In re* Haldorn, 10 Mont. 222, 25 Pac. 101.

In United States *v.* Church, 6 Utah 9, 21 Pac. 503, 524, it is held that where a witness before a referee refuses to answer questions which are ruled by the referee to be proper, but in doing so acts upon the advice of counsel, he will not be punished for contempt.

73. Harper *v.* Marion County, 33 Tex. Civ. App. 653, 77 S. W. 1044; Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 49.

Statements of the Referee are not admissible to impeach his report. Daggy *v.* Cronnelly, 20 Ind. 474, where the court said: "The report stands upon the footing of the verdict and the admission of the referee can no more be given in evidence to impeach it than can the admissions of a juror to impeach his verdict."

No affidavits or statements of auditors not incorporated in their report can be heard in objection to its acceptance, unless it be to show misconduct upon the part of the auditors, or that they refused to state the facts so as to present the questions of law or for the purpose of showing newly discovered evidence. Thompson *v.* Arms, 5 Vt. 546.

In Wade *v.* Gallagher, 1 Yeates (Pa.) 77, the court refused, after a report of the referees in favor of the defendant, to permit the plaintiff's counsel to examine the referees as to what evidence was laid before them to prove a tender, how and when it was made and in what kind of money.

It is error for the trial judge whilst hearing exceptions to the report of the referee appointed to hear and determine the issues to call for the production of documents which had not been in evidence before the referee and base his judgment in the case upon those documents. The judge should either decide the case upon the report and exceptions or recommit it for further evidence. Griffin *v.* Griffin, 20 S. C. 486. The court said: "While, as a general rule, the sound theory of judicial action, based upon experience and reason, requires that the judge shall remain passive until moved in the right of those interested, we may say that we agree with the circuit judge 'that a chancellor trying a case may, during the trial, call for and put in evidence any paper pertaining to the matter.' But it is not so certain that in the instance before us the chan-

which might possibly appear to intimate a relaxation of this rule.[74]

2. Statutes Making Report Prima Facie Evidence on Trial of Exceptions or Issues Referred. — A. In General. — Sometimes in the case of a compulsory reference under the statute ordered against the objection of one of the parties regularly preserved, the party so objecting may demand a trial by jury, and upon such trial the report of the referee is *prima facie* evidence of all matters therein found and reported.[75] In other jurisdictions provision is made by statute for trial of the action by jury, and making the report of the referee or auditor *prima facie* evidence of the facts and findings stated therein.[76]

cellor was, in the full sense of the words, 'trying a case' upon the proofs offered before him, but rather hearing exceptions to the decision of a referee already made. We do not think the cases are precisely the same."

In Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 49, where the referee had made his report to the court in favor of the plaintiff, the defendant more than two months later filed a package of papers in the court as containing the evidence which was given before the referee. The affidavits of the persons who took down the evidence were also produced, alleging that it contained substantially all that was given. It was held that the package was no part of the report and was not admissible to impeach it.

In Hill *v.* Hogaboom, 13 Vt. 141, it was held proper for the court to receive *ex parte* affidavits to show that an account was or was not presented before the auditor to aid in determining whether the report should be accepted or recommitted.

74. Where the objection to the auditor's report relates to its form or validity, the proper practice requires the objection to be presented to the court for its action before going into the trial; but objections to the report which relate to the correctness of the matters contained in it serve the purpose of admitting evidence as to such items to contradict the report in those particulars. Kendall *v.* Hackworth, 66 Tex. 499, 18 S. W. 104.

Where an auditor refuses, when requested, to report the grounds of his decision upon every question of law raised, that fact may be shown by affidavit, whereupon the report will be rejected and the cause sent back for a full report. McConnell *v.* Pike, 3 Vt. 595.

In Mississippi the correctness of the decision of an auditor may be tested by the evidence taken before him and reported with the account stated; or it is competent for the judge upon the hearing of the exceptions to receive additional testimony. But the authority of the judge in this respect must be limited by the principles of a sound discretion. Benoit *v.* Brill, 2 Cushm. (Miss.) 83.

Where the acceptance of the report of experts is opposed, the trial of the opposition involves the hearing of evidence on such questions of fact as are distinctly put in issue by the opposition. Thompson *v.* Parrent, 12 La. Ann. 183.

Where an objection to the report of the referee is based on alleged facts outside the record, the facts so alleged must be established by competent evidence in order to support the objection. Nutter *v.* Taylor, 78 Me. 424. 6 Atl. 835.

75. As in Mississippi. — Code § 1723; Anding *v.* Levy, 60 Miss. 487.

76. Ford *v.* Burchard, 130 Mass. 424; Barnard *v.* Stevens, 11 Met. (Mass.) 297; Jones *v.* Stevens, 5 Met. (Mass.) 373.

The statute makes the auditor's report competent evidence of the facts found by the auditor, but subject to be impeached, controlled and counteracted by any other competent evidence. In other words it is *prima facie* evidence upon which a jury will be warranted to give a verdict and bound to do so unless overcome by other evidence. The cause goes to trial in the usual form, upon the issues joined, and it is open to each

In Georgia the statute provides that in all law cases where an auditor is appointed, exceptions of fact to his report shall be passed upon by the jury as in other issues of fact, and in equity cases by the jury when approved by the judge. The report shall be taken as *prima facie* correct, and the burden be upon the party making the exceptions, who shall have the right to open and conclude the argument. In equitable proceedings where an auditor has been appointed by the superior court, if the judge approve any exception of fact, the same shall be submitted to the jury as in other cases, with the same presumptions, burdens, and right to open and conclude.[77] Where an auditor reports the evidence before him and his

party to produce to any and all, competent evidence, tending to prove the affirmative or negative of the fact in issue. The effect of the statute, the reference and report is, to introduce a new species of competent evidence, often a very useful one. The witnesses may be re-examined, as offered by either party, not to impeach or support the report directly, though that may be incidentally the effect; but because such testimony, like the report itself, is competent evidence on the issue which the jury is to try. Allen *v.* Hawks, 11 Pick. (Mass.) 359.

The report of an auditor made pursuant to the Massachusetts statute is *prima facie* evidence for the party in whose favor it is made in regard to any item, subject to the reconsideration of the jury either upon the evidence contained in the report or upon any other counteracting evidence; and this rule is not changed by the fact that the auditor at the request of either party or otherwise reports the evidence from which he draws his conclusions. Taunton Iron Co. *v.* Richmond, 8 Met. (Mass.) 434.

In Holmes *v.* Hunt, 122 Mass. 505, 23 Am. Rep. 381, it was held that under the Massachusetts statute there in force (ch. 121, § 46) the report of an auditor was *prima facie* evidence not only of the result of the accounts, but of the facts or inferences stated in his report as derived from the evidence before him and involved in the determination of the issues submitted to him, even though they include a finding on the general question whether the defendant is or is not liable to the plaintiff.

In Clement *v.* British American Assur. Co., 141 Mass. 298, 5 N. E. 847, an action on contract upon a policy of insurance in the form prescribed by the Massachusetts Pub. Stat. ch. 119, § 139, against loss by fire, the policy provided that if any difference of opinion arose as to the amount of loss, the loss by mutual agreement was to be referred to arbitrators to be chosen whose decision was final; but it was held that the suit was nevertheless governed by the usual rules of procedure and that the court had power to refer it to an auditor whose report was admissible and had the same effect as in other cases.

Where a case had been referred to an auditor and reported back by him in favor of the plaintiff, the defendant cannot deprive the plaintiff of the benefit of the report as evidence by confessing a portion of his claim. Pickering *v.* Frink, 62 N. H. 342.

In Maine the rule is that the results reached by the auditor are not conclusive upon the parties, but his report when offered in evidence is subject to be impeached, rebutted, controlled or disproved by competent evidence. But it amounts to *prima facie* evidence sufficient to warrant a verdict unless thus impeached or disproved. Howard *v.* Kimball, 65 Me. 308. In this case it was held proper for the judge to charge the jury that "the auditor's report was *prima facie* evidence of the amount which the plaintiff was entitled to recover, that it was competent for the defendant to disprove it, but it must stand unless he had impeached it."

77. Georgia Code, §§ 4595, 4596; Cutliff *v.* Boyd, 72 Ga. 302; Arthur

conclusions thereon, such conclusions are *prima facie* correct. But this presumption of correctness may be rebutted.[78] Where, however, the report on the facts of a case is made without hearing both sides thereon, then the report is not *prima facie* evidence of truth on the issue excluded.[79]

B. Constitutionality of Statute Making Report Prima Facie Evidence. — As to whether or not a statute making the report of an auditor *prima facie* evidence is in violation of the constitutional provision preserving the right of trial by jury, the cases are not in accord.[80]

v. Gordon County, 67 Ga. 220; Brinson *v.* Wesselowsky, 57 Ga. 142; White *v.* Reviere, 57 Ga. 386.

While there is a *prima facie* presumption in favor of the correctness of an auditor's report as to facts on the trial before the jury of exceptions to such report, it is not error to charge the jury in effect that if there was not sufficient evidence to support a particular finding their verdict should be in favor of the exception thereto. Dickenson *v.* Moore, 117 Ga. 887, 45 S. E. 240.

Where an exception to an auditor's report directly contradicts the report, the exception must be supported by affirmative proof. Camp *v.* Mayer, 47 Ga. 414.

On the trial before a jury of exceptions to an auditor's report the report is *prima facie* true as to the facts and results reported. The fact that the rule of references provides that any exceptions filed are to be tried *de novo* as in cases of appeal does not vary this rule. Roberts *v.* Summers, 47 Ga. 434.

The presumption of the correctness of an auditor's report on the evidence before him may be rebutted by the evidence reported as well as by evidence *aliunde*. And if no facts are reported but only results, then evidence outside the record is essential to sustain the exceptions or overthrow the *prima facie* result. Keaton *v.* Mayo, 71 Ga. 649.

78. Keaton *v.* Mayo, 71 Ga. 649.

79. Cutliff *v.* Boyd, 72 Ga. 302, where the court sustained an exception to an auditor's report on the ground that one of the parties was not permitted to testify before the auditor as to a particular issue, while the other party was permitted so to testify, and it was held that as to the issue excluded the report was not *prima facie* true.

80. **The New Hampshire Statute** is not in violation of the constitutional provision preserving the right of trial by jury. Perkins *v.* Scott, 57 N. H. 55. See also Doyle *v.* Doyle, 56 N. H. 567.

The Massachusetts Statute (Mass. Gen. Stat., ch. 121, § 46) making the report of an auditor *prima facie* evidence upon such matters as are embraced in the order of reference to him is constitutional. Holmes *v.* Hunt, 122 Mass. 505, 23 Am. Rep. 381.

In Rhode Island it has been held that such a statute is unconstitutional. Francis *v.* Baker, 11 R. I. 103, 23 Am. Rep. 424. The court said: "The report of an auditor is, properly speaking, not evidence, but a decision. The act declaring it *prima facie* evidence declares its effect as a decision, and, in so far as it gives it effect, substitutes the judgment of the auditor for that of the jury. If the report were made conclusive evidence the substitution would be complete, and would without doubt be unconstitutional. See Rhines *v.* Clark, 51 Pa. St. 96. Is the substitution, because incomplete, constitutional? Is it not still an encroachment upon the province of the jury? Cases may easily be supposed in which the report might almost or quite as well be conclusive as *prima facie* evidence. Suppose the testimony all came from the plaintiff's witnesses, and the defendant relied on his cross-examination to discredit them. If the report were in favor of the plaintiff how could the defendant disprove it? He would certainly be at great if not fatal disadvantage.

"But again, if the legislature can

C. Report as Affecting Burden of Proof. — While under these statutes the report of the auditor is *prima facie* evidence, this does not mean that upon the trial of the action the burden of proof is changed.[81] The report merely puts on the other party the bur-

make the report of an auditor *prima facie* evidence, why not the judgment of any other tribunal? Why, for instance, can it not make the decision of a trial justice *prima facie* evidence in the trial, on appeal, before a jury, and at the same time extend the justice's jurisdiction to cases involving large amounts? It will hardly be contended that the legislature has the power to do this. But if not, how has it the power to pass the act under consideration? The exercise of the power may be unwise in the one case and wise in the other. But the question is not a question of wisdom but of constitutionality. The question is, whether the right of trial by jury under the act is the same as it was prior to the act, whether it remains inviolate. The right of trial by jury is the right to have a jury hear and decide upon evidence the issues of fact which they are empanelled to try. Is not this right impaired if the jury is required to decide, without hearing the evidence, it may be, according to the report of an auditor; or, in case the evidence is submitted, is still required to decide according to such report, unless the evidence against it is clear enough to convince them that it is probably erroneous, and even though, independently of such report, it might decide the case another way? We are constrained to the conclusion that the right is impaired or violated when the minds of the jury are or may be so trammeled and controlled."

In Vermont an act was passed in 1856 authorizing any county court to refer any civil action pending therein to a commissioner or commissioners, and providing that the commissioner's report should be *prima facie* evidence upon a trial of the action before a jury. In Plimpton *v.* Somerset, 33 Vt. 283, an action to recover damages resulting from the insufficiency of a highway was referred under this act. The commissioner reported in favor of the plaintiff, and his report was allowed to go to the jury as *prima facie* evidence, an exception to the ruling being reserved by the defendant. The defendant contended in support of his exception that the act of 1856 was unconstitutional, being in violation of the declaration in the bill of rights, which reads as follows: "Where any issue in fact proper for the cognizance of a jury is joined in a court, the parties have a right of trial by jury, which ought to be held sacred." The supreme court of Vermont, in a carefully considered opinion, the case having been twice argued, declared the act to be unconstitutional. The ground of the decision was, that under the act a case would go to the jury prejudged in favor of the party for whom the report was rendered, the jury being bound by the report in the absence of testimony to impeach its correctness. There is no trial by jury, the court argues, if the decision of the jury is to be controlled by the judgment of some other body; and if it be only partially so controlled, yet, so far as it is controlled, the right is impaired.

81. Phillips *v.* Cornell, 133 Mass. 546; Morgan *v.* Morse, 13 Gray (Mass.) 150; Blodgett *v.* Cummings, 60 N. H. 115; Shepardson *v.* Perkins, 60 N. H. 76.

In Wyman *v.* Whicher, 179 Mass. 276, 60 N. E. 612, the judge charged the jury that the rule is that "the auditor's report does not change the burden of proof, technically speaking, which is on a party to establish by evidence essential to the maintenance of his case; but while the burden of proof is not shifted by the auditor's report, yet, as it makes out a *prima facie* case, it is incumbent on the other party to meet and control it, or it will be conclusive against him." The court in sustaining this charge said: "This was sufficiently clear with regard to the burden of proof, and we are of opinion that the jury were instructed rightly upon that point. With more hesitation we have come to the conclusion that the

den of introducing sufficient evidence to rebut and control it.[82]

D. Report Need Not Be Introduced as a Whole. — It is competent for the judge presiding at the trial when an auditor's report is offered in evidence to reject such portions of it as are not proper to go to the jury and receive the remainder, ruling upon the intro-

charge may be sustained upon the other point also, as signifying not that there was a presumption of fact in favor of the auditor's report when the whole case had been set at large by evidence, but only that it was for the jury to consider whether the whole matter had been set at large, so that the plaintiff no longer could rest upon his *prima facie* case. No doubt there was some emphasizing and holding up of the auditor's report to the jury in a conspicuous light, perhaps because the judge thought that it came to a right conclusion, but we are not prepared to say that the charge laid down or implied a wrong rule of law so distinctly that an exception should be sustained."

In Lonergan *v.* Peck, 136 Mass. 361, the issues were such that the burden of proof was upon the defendant. The auditor's report was favorable to the defendant, and it was held that the report was *prima facie* evidence for the defendant but that it did not change the burden of proof from him to establish his case, nor was the rule changed by reason of the fact that the plaintiff called the defendant as a witness but by his testimony failed to change the effect of the auditor's report.

It is a common and convenient practice to permit the plaintiff to rest his case in the first instance after putting in the auditor's report, and then to introduce additional testimony in support of it at the close of the defendant's evidence. The order of proof is discretionary with the trial judge. Lowe *v.* Pimental, 115 Mass. 44.

An auditor's report does not change the issue tried by the auditor. When the case comes before the jury the questions to be tried are still the same, the only change being that the party in whose favor the report is has obtained an additional piece of evidence which proves his case in the absence of other evidence. If it is in favor of the party upon whom by the pleadings the burden of proof rests it does not change the burden but it is merely evidence on all the points in the case like other evidence; and when the opposite party gives evidence of just equal weight so that the scales balance he is obliged to go no further. Shepardson *v.* Perkins, 60 N. H. 76.

Under the Texas Statute (Art. 1473) the auditor's report is admissible in evidence although exceptions to the report are presented. This statute has been held to mean that the report shall be admitted in evidence subject to be contradicted only as to matters embraced within the exceptions to the report or any items thereof specially objected to; and as to matters not embraced within the exceptions, or if no exceptions are made to the report it shall be taken as conclusive of the matters. Moore *v.* Waco Bldg. Assn., 9 Tex. Civ. App. 404, 28 S. W. 1033.

82. Wyman *v.* Whicher, 179 Mass. 276, 60 N. E. 612. In this case "after stating that in the absence of other evidence the auditor's report would determine the rights of the parties, the judge went on that therefore the plaintiff put in the auditor's report and rested, 'and the defendants undertook the burden of showing you that the auditor's report is wrong.' And later, again: 'The defendants have to satisfy you that the auditor's report is wrong. Starting with the position that the auditor's report is the guide in coming to a conclusion upon that matter, is your opinion changed by the fact that testimony has been introduced by the defendants and the plaintiff?' Taken by themselves the first passage suggests that the auditor's report shifts the burden of proof, and the second that the auditor's finding for one party raises a presumption of fact in favor of that side even when the only evidence is that of the

duction of those parts which are objected to as he would in the case of a deposition.[83]

A Separate and Dissenting Report made by one of the auditors is not admissible in evidence.[84]

E. Necessity of Introduction. — The report of the referee need not, however, necessarily be introduced by either of the parties.[85]

plaintiff and the defendant, and when their testimony has been heard afresh by the jury." It was held that although the judge had used language which might possibly mislead he stated the correct rule in such terms that the natural supposition was that the jury understood it.

83. Howard *v.* Kimball, 65 Me. 308.

The presiding judge may, as in the case of a deposition, reject parts of the auditor's report which he deems improper to go to the jury and receive the remainder. Jones *v.* Stevens, 5 Met. (Mass.) 373.

84. "There can be but one legitimate report on a reference of a case to auditors and that is the report of the majority upon a hearing by all the members. The fact will always appear from the report itself that it had not the concurrence of all the auditors, but it is nevertheless the report that is to be *prima facie* evidence upon the matters committed to them." Lincoln *v.* Taunton Copper Mfg. Co., 9 Allen (Mass.) 181.

85. In New Hampshire the report of trial commissioners need not be put in evidence by either party, nor submitted to the jury by the court. Chesley *v.* Chesley, 37 N. H. 229. The court said: "Where, as in the case before us, neither party was satisfied with the finding of the commissioners, we can perceive no good reason why either should be compelled to offer it in evidence, or why the court should be bound to have it read to the jury. In the absence of any statute provision on the subject, we do not see why the commissioners' report, so far as relates to the use of it by the parties, does not stand like any other independent piece of evidence, to be used by either party that may desire to lay it before the jury, or not to be used by either, at their election. Being made by the statute *prima facie* evidence of the facts stated in it, if either party chooses to offer it, it stands until impeached and overthrown by one side or the other. If both parties are dissatisfied with its findings, as the statute does not expressly require it, we can discover no good reason why either must necessarily use it, or the court cause it to be read in evidence to the jury, thereby subjecting both parties to the task of impeaching its conclusions before them. In the case of auditors, the legislature has provided that their report shall be given in evidence to the jury, while it is only provided that the reports of commissioners shall be *prima facie* evidence of the facts found by them. Unless controverted by the statements of the parties, and overthrown by the verdict of the jury specifically upon those statements, the commissioners' report is to guide the court in the rendition of judgment, equally whether put in evidence before the jury or not."

It makes no difference which party introduces the report of the auditor, either party may do so without being estopped to deny its correctness in any particular or precluded from impeaching it. Either party may use the report, or the judge may require it to be read, and its findings are made *prima facie* evidence by statute but they are nothing more than that. The party reading it may, as well as his adversary, produce evidence in addition to it, prove items not allowed by the auditor or introduce evidence in addition to it, or introduce evidence to contradict any part if it. It is received as competent evidence merely but does not supersede or exclude any other competent evidence. Lull *v.* Cass, 43 N. H. 62, *following* Conner *v.* Gas Pipe Co., 40 N. H. 537.

In Massachusetts the court has

F. Report Not Responsive to Issues.— Where the report of the auditor is not responsive to the pleadings it should to that extent be excluded from the jury.[86] And while any statements of fact or conclusions remain in the report which are not properly within the province of the auditor the report is not legally an instrument of evidence, particularly where those statements may have an unfavorable bearing upon the case of either party.[87]

G. Evidence to Rebut or Control Report. — The auditor's report is the only form in which he can be permitted to state what took place before him, and he cannot be called as a witness for the purpose of adding to or controlling it.[88] But he may be permitted

the power to require an auditor's report to be read at the trial although neither party relies upon it or desires it as evidence. Clark *v.* Fletcher, 1 Allen (Mass.) 53. The court said: "As the court has power to send a case to an auditor without and even against the consent of the parties, so in like manner it has authority to require that his report should be read in the progress of the trial although neither of them propose to offer it as proof. It is made evidence in the case by the provisions of the statutes and it cannot be set aside at the pleasure of the parties. Indeed it would be worse than an idle ceremony to incur the delay and expense of a hearing before the auditor if his report is to be excluded on the sole ground that it does not support the case which either party desires to establish before the jury." See also Fogg *v.* Farr, 16 Gray (Mass.) 396.

An auditor's report is not governed by all the rules regulating the admission of ordinary evidence offered by either party. It is the report of an officer appointed by the court under authority of statute. By the statute it is made *prima facie* evidence and *prima facie* only upon such matters as are referred to the auditor. It does not, technically speaking, change the burden of proof. The object of the statute is to simplify and elucidate the trial of those matters, and is not to be defeated or evaded at the election of either or both parties. If the plaintiff relies on the auditor's report at all he may be required to read the whole of it; but the part which is unfavorable as well as that which is favorable to him, is only *prima facie* evidence. And since the court may refer a case to an auditor without, or even against, the consent of the parties, it may cause his report to be read at the trial although neither party desires it. Fair *v.* Manhattan Ins. Co., 112 Mass. 320.

86. Barkley *v.* Tarrent County, 53 Tex. 251.

The auditor's report with reference to matters not properly arising under the pleadings should, on exception, be excluded from the jury. Kendall *v.* Hackworth, 66 Tex. 499, 18 S. W. 104.

87. Bartlett *v.* Trefethen, 14 N. H. 427.

88. Fair *v.* Manhattan Ins. Co., 112 Mass. 320; Packard *v.* Reynolds, 100 Mass. 153.

The testimony of an auditor is not admissible for the purpose of supplying certain alleged omissions in his report. His report is the only competent evidence of what was proved before him. Monk *v.* Beal, 2 Allen (Mass.) 585.

The award of a referee is to be considered like all other written documents according to the meaning and effect of the words used, and the referee cannot be called as a witness to state what his meaning and intent was in the language which he employed. If such testimony would vary the construction it is inadmissible, being in effect to alter his award after his powers were at an end; if otherwise it would be immaterial. Fuller *v.* Wheelock, 10 Pick. (Mass.) 135.

In Bellows *v.* Woods, 18 N. H. 305, the defendant offered to prove by the auditor that he allowed the claim in controversy upon the testimony of a single witness, and also

to testify that from the course of the trial before him, it did not become necessary to consider and he did not therefore decide the question raised before the jury.[89] And it is held competent for various purposes to prove whether a certain witness was called, and to what he testified before the auditor, or whether particular facts occurred at the hearing.[90]

H. Evidence Other Than Report. — In those jurisdictions where the report is considered as *prima facie* evidence, a party has the right to retry before the jury the whole case and to introduce any competent evidence which is material to the issues on trial,[91]

that the testimony of the witness was false and his character for truth was bad. The court in holding the exclusion of this evidence to be proper, said: "It would wholly frustrate the aim and policy of this statute if the court were to allow evidence to be given for the purpose of weakening the effect which the statute thus assigns to the report. The party in whose favor it is made is entitled to the benefit of what he has gained to the extent to which the law gives it to him. This has always been considered, in the construction of the statute cited, and of others *in pari materia*, to be a *prima facie* case. The evidence by which it is to be met must be other than that, the direct and sole tendency of which is to show that, owing to the manner in which it has been obtained, it ought to have less effect than that which the law assigns to it. The plaintiff has obtained a report in his favor. The defendant wishes to deprive him of its benefit by showing that the auditor did not correctly weigh the testimony, or that he himself suffered the report to be obtained, when he might have caused a different one to have been made, by appearing with his witnesses and being fully heard. In either view he is clearly wrong. He is bound by the report to the extent to which the law gives it effect."

89. Stone *v.* Aldrich, 43 N. H. 52.

90. Monk *v.* Beal, 2 Allen (Mass.) 585.

A witness called by a party who seeks to impeach an auditor's report may be asked if he testified before the auditor. Kendall *v.* Weaver, 1 Allen (Mass.) 277.

A party dissatisfied with the auditor's report may, in order to affect its weight, prove by a witness whom he calls at the trial that he did not testify before the auditor. Fair *v.* Manhattan Ins. Co., 112 Mass. 320.

Compare Shepardson *v.* Perkins, 60 N. H. 76, holding that it cannot be shown that the evidence offered to the jury is different from the testimony introduced before the referee.

91. Fletcher *v.* Powers, 131 Mass. 333.

The fact that a party has been required to read the whole of the auditor's report does not preclude him from showing by competent evidence that the portion of the report adverse to him is erroneous. Fogg *v.* Farr, 16 Gray (Mass.) 396. The court said: "By so doing he was not precluded from showing that in certain particulars in regard to which the finding was adverse to him the report was erroneous. As to those particulars, it was only *prima facie* evidence against him, and not conclusive. Such is the rule as established by St. 1856, c. 202, and reenacted in the Gen. Sts. c. 121, § 46. So far therefore as the report was in favor of the plaintiff, it made out a *prima facie* case in his behalf; and so far as it was adverse, it established a *prima facie* case for the defendant, and made it incumbent on the plaintiff to overcome it by other proof. This is a convenient and reasonable rule, and one of which the defendant in the present case had no reason to complain. The effect of the ruling at the trial was to deprive the plaintiff of his right to go to the jury on that part of his case as to which the auditor had found against him."

Upon the question of passion, prejudice, partiality or corruption, evi-

even though such evidence may have been excluded by the auditor.[92]

dence *dehors* the auditor's report is admissible. Free *v.* Buckingham, 59 N. H. 219.

In Georgia on the trial by a jury of exceptions to an auditor's report, evidence other than that introduced before the auditor is admissible. Roberts *v.* Summers, 47 Ga. 434, where the court said: "Our juries in chancery are *quasi* appellate auditors or masters upon the exceptions taken; and hence the propriety of laying before them all attainable evidence, instead of going through the delay of referring back to the master, again, excepting to his ruling, and then, at last, coming back to the jury."

92. Somers *v.* Wright, 114 Mass. 171.

REFORMATION OF INSTRUMENTS.

By Charles S. Burnell.

CROSS-REFERENCES:

Parol Evidence;
Statute of Frauds.

I. BURDEN OF PROOF.

1. In General. — A party seeking a decree reforming a written instrument not only has the burden of proof as does a plaintiff in an action generally,[1] but must produce sufficient evidence to rebut the strong presumption created by the existence of the written instrument itself.[2] This rule is equally applicable in the case of a defendant, sued upon an obligation arising from an instrument, who pleads a mistake therein by way of defense,[3] or who, while admitting an error in the instrument sought to be reformed, claims the mistake to be a different one from that alleged by the plaintiff who

1. *Alabama.* — Tyson *v.* Chestnut, 100 Ala. 571, 13 So. 763; Smith *v.* Allen, 102 Ala. 406, 14 So. 760; Moore *v.* Tate, 114 Ala. 582, 21 So. 820; Paterson *v.* Hannan, 43 So. 192.
Colorado. — Connecticut F. Ins. Co. *v.* Smith, 51 Pac. 170.
Iowa. — Longhurst *v.* Star Ins. Co., 19 Iowa 364; Tufts *v.* Larned, 27 Iowa 330.
Missouri. — Tesson *v.* Atlantic Mut. Ins. Co., 40 Mo. 33, 93 Am. Dec. 293; Sweet *v.* Owens, 109 Mo. 1, 18 S. W. 928; Parker *v.* Vanhoozer, 142 Mo. 621, 44 S. W. 728; Griffin *v.* Miller, 188 Mo. 327, 87 S. W. 455.
New Jersey. — Vreeland *v.* Bramhall, 28 N. J. Eq. 85; Flaacke *v.* Mayor, etc., 28 N. J. Eq. 110.
New York. — Coles *v.* Bowne, 10 Paige Ch. 526, 535 ("the party alleging the mistake . . . holds the affirmative"); Berringer *v.* Schaefer, 52 How. Pr. 69; Simpkins *v.* Taylor, 81 Hun 467, 31 N. Y. Supp. 169.
Ohio. — Young *v.* Miller, 10 Ohio 85.
Oregon. — Mitchell *v.* Holman, 30 Or. 280, 47 Pac. 616; Stein *v.* Phillips, 47 Or. 445, 84 Pac. 793.

2. *United States.* — Harrison *v.* Hartford F. Ins. Co., 30 Fed. 862 ("besides the ordinary burden of proof which rests on every litigant who holds the affirmative of an issue, there is in this class of cases the additional burden of overcoming the strong presumption created by the contract itself which the proceeding seeks to reform").
Alabama. — Clopton *v.* Martin, 11 Ala. 187; Campbell *v.* Hatchett, 55 Ala. 548; Smith *v.* Allen, 102 Ala. 406, 14 So. 760.
Connecticut. — Palmer *v.* Hartford Ins. Co., 54 Conn. 488, 9 Atl. 248 ("such prayer must be supported by overwhelming evidence or be denied").
Illinois. — Shay *v.* Pettes, 35 Ill. 360.
Iowa. — Tufts *v.* Larned, 27 Iowa 330; Bowman *v.* Besley, 122 Iowa 42, 97 N. W. 60.
Massachusetts. — Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45, *s. c.* 107 Mass. 290, 317 (approving instructions to jury that "proof that both parties intended to have the precise agreement between them inserted in the deed and omitted to do so by mistake, must be made beyond a reasonable doubt, and so as to overcome the strong presumption arising from their signatures and seals that the contrary was the fact").
New York. — Souverbye *v.* Arden, 1 Johns. Ch. 240, 252 ("the presumption is against him and the task is upon him to destroy that presumption by clear and positive proof"); Duke *v.* Stuart, 45 Misc. 120, 91 N. Y. Supp. 885.
North Carolina. — Southern Finishing & W. Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681.
Utah. — Ewing *v.* Keith, 16 Utah 312, 52 Pac. 4; Deseret Nat. Bank *v.* Dinwoodey, 17 Utah 43, 53 Pac. 215.
Virginia. — Donaldson *v.* Levine, 93 Va. 472, 25 S. E. 541 ("the burden of proof is throughout upon the complainant, who must rebut the presumption that the writing speaks the final agreement by the clearest and most satisfactory evidence").

3. In McTucker *v.* Taggart, 29 Iowa 478, defendant in an action for damages for breach of covenants in a deed pleaded as a defense that there was a mistake therein as to the

seeks reformation. In the latter case each party has the burden of establishing the mistake, the existence of which he contends for.[4]

Where the instrument is shown to have been executed by the plaintiff under strong pressure of the other party, who occupied a relation of trust and confidence toward him, and its terms show it to be prejudicial to the interests of the plaintiff, the burden of proving that plaintiff fully understood and freely executed it is upon the defendant.[5]

2. Original Agreement. — It is generally held that a party seeking a decree of reformation has the burden of showing clearly that the parties to the instrument had, prior to its execution, entered into an oral agreement which expressed their real intentions,[6] and

quantity of land to be conveyed and asked for a reformation accordingly.

4. In Busby *v.* Littlefield, 33 N. H. 76, the plaintiff claimed that whereas the deed sought to be reformed conveyed one hundred feet, it should have in fact conveyed only thirty feet, and the defendant admitted the mistake but alleged that thirty-two feet should have been conveyed.

5. In Sanderlin *v.* Robinson, 59 N. C. 155, an elderly woman was induced by her brothers to execute a conveyance in trust whereby she was deprived of the rents and profits of her property.

6. *United States.* — Fulton *v.* Colwell, 112 Fed. 831, 50 C. C. A. 537 ("before such relief can be granted, however, the party invoking the interference of the court must show with entire clearness . . . that the minds of the parties had met as to certain matters, and that the paper as written failed to express that agreement"); Tilghman *v.* Tilghman, 23 Fed. Cas. No. 14,045 ("the contract sought to be enforced ought to be clearly proved").

Alabama. — Keith *v.* Woodruff, 136 Ala. 443, 34 So. 911 ("to warrant a court in decreeing reformation of a conveyance arising from contract, it is not enough that a mistake has been made, or that the minds of the parties never met upon the subject of the conveyance, but it must appear from definite allegations and corresponding proof that there was an agreement between the parties").

Illinois. — Shay *v.* Pettes, 35 Ill. 360.

Indiana. — Hileman *v* Wright, 9 Ind. 126; Jones *v.* Sweet, 77 Ind. 187 ("without knowing what the preliminary agreement was, it would seem to be impossible to determine whether anything had been inserted or omitted contrary to its terms in the writing intended to be made in performance of it").

Iowa. — Conner *v.* Baxter, 124 Iowa 219, 99 N. W. 726.

Massachusetts. — Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290, 317; German-American Ins. Co. *v.* Davis, 131 Mass. 316 ("it must appear beyond reasonable doubt that the precise terms of a contract had been orally agreed upon between the parties, and that the written instrument afterwards signed fails to be, as it was intended, an execution of the previous agreement, but expresses a different contract; and that this is the result of a mutual mistake").

Minnesota. — Fritz *v.* Fritz, 94 Minn. 264, 102 N. W. 705.

New York. — Coles *v.* Bowne, 10 Paige Ch. 526, 535; Mead *v.* Westchester F. Ins. Co., 64 N. Y. 453; Simpkins *v.* Taylor, 81 Hun 467, 31 N. Y. Supp. 169 (the plaintiff is bound to establish "the mutual agreement of all parties to the instrument to the precise contract alleged to have been in fact the original agreement").

Ohio. — Jung *v.* Weyand, 14 Wkly. L. Bul. 143.

Wisconsin. — James *v.* Cutler, 54 Wis. 172, 10 N. W. 147 ("in the absence of fraud a deed will not be reformed as to its description unless the evidence shows that previous to the execution thereof there was a mutual agreement to sell on the one

the terms of which were so precise that neither party could reasonably misunderstand them,[7] and just what those terms were,[8] although it has been held that it is not necessary to show the existence of a prior oral contract.[9] He also has the burden of proving that the original intention of the parties as to their agreement continued concurrently in the minds of all the parties down to the time of the execution of the instrument in question,[10] and that the party against whom reformation is sought had full knowledge of all the material facts from which it is claimed the alleged real agreement arose,[11] and that it was the intention of both parties to enter into the agreement in the form which he seeks to establish.[12]

3. Written Instruments. — He must show also that there was a written instrument based upon, and which the parties intended to express, their original agreement;[13] and that it was signed by the

part, and purchase on the other, a parcel of land different from that inserted in the deed, and that such misdescription was inserted by mistake").

7. Tilghman *v.* Tilghman, 23 Fed. Cas. No. 14,045; Kent *v.* Manchester, 29 Barb. (N. Y.) 595.

8. *Alabama.* — Alexander *v.* Caldwell, 55 Ala. 517; Turner *v.* Kelly, 70 Ala. 85; Smith *v.* Allen, 102 Ala. 406, 14 So. 760; Guilmartin *v.* Urquhart, 82 Ala. 570, 1 So. 897; Tyson *v.* Chestnut, 100 Ala. 571, 13 So. 763; Keith *v.* Woodruff, 136 Ala. 443, 34 So. 911 ("the terms of the real agreement must be shown with such certainty as that the proven averments will form a basis for the decree in substantial conformity with the theory of the bill").

Nebraska. — Slobodisky *v.* Phenix Ins. Co., 52 Neb. 395, 72 N. W. 483 (suit to reform fire insurance policy by inserting a clause allowing additional insurance).

New York. — Roussel *v.* Lux, 39 Misc. 508, 80 N. Y. Supp. 341.

Texas. — Waco Tap. R. Co. *v.* Shirley, 45 Tex. 355.

9. Conaway *v.* Gore, 24 Kan. 389.

10. Nebraska Loan & T. Co. *v.* Ignowski, 54 Neb. 398, 74 N. W. 852; Ramsey *v.* Smith, 32 N. J. Eq. 28; Roberts *v.* Derby, 68 Hun 299, 23 N. Y. Supp. 34; Sternback *v.* Friedman, 23 Misc. 173, 50 N. Y. Supp. 1025; Southern Finishing & W. Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681.

11. Northwestern Ohio Nat. Gas Co. *v.* Tiffin, 59 Ohio St. 420, 54 N. E. 77.

12. *United States.* — Fulton *v.* Colwell, 112 Fed. 831, 50 C. C. A. 537.

Iowa. — Holmes *v.* Rogers, 80 N. W. 522.

Missouri. — Parker *v.* Vanhoozer, 142 Mo. 621, 44 S. W. 728.

New York. — Jackson *v.* Andrews, 59 N. Y. 244 ("to entitle the plaintiff to a reformation of the contract he must prove that it was the intention of both parties to make a contract such as he seeks to have established"); Mead *v.* Westchester F. Ins. Co., 64 N. Y. 453; Kilmer *v.* Smith, 77 N. Y. 226, 33 Am. Rep. 613.

Ohio. — Jung *v.* Weyand, 14 Wkly. L. Bul. 143; Rothchild *v.* Bell, 10 Ohio Dec. 176.

Virginia. — Donaldson *v.* Levine, 93 Va. 472, 25 S. E. 541.

13. *Arkansas.* — Cunningham *v.* Edsall, 98 S. W. 545 (refusing to reform an administrator's deed where the only proof of its execution was in an entry in an abstract of the county).

Connecticut. — Osborn *v.* Phelps, 19 Conn. 63, 48 Am. Dec. 133.

Florida. — Jackson *v.* Magbee, 21 Fla. 622 ("it should be made to appear satisfactorily that the parties in their final instrument intended only to carry out their preliminary verbal agreement").

Georgia. — Reese *v.* Wyman, 9 Ga. 430, 438.

Illinois. — Shay *v.* Pettes, 35 Ill. 360.

Iowa. — Fritzler *v.* Robinson, 70 Iowa 500, 31 N. W. 61.

Kansas. — Fry *v.* Platt, 32 Kan.

party to be charged, or by his agent;[14] and that it failed to express their real agreement and intention.[15]

4. Mistake or Fraud. — He has the burden of proving that this failure of the instrument to express the intention of the parties is due to a mistake therein;[16] for instance that words or stipulations

62, 3 Pac. 781; Brundige *v.* Blair, 43 Kan. 364, 23 Pac. 482 (the whole contract with all its terms and conditions must be shown to be in writing).

Massachusetts. — Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45; German-American Ins. Co. *v.* Davis, 131 Mass. 316.

Minnesota. — Fritz *v.* Fritz, 94 Minn. 264, 102 N. W. 705.

North Dakota. — Kaster *v.* Mason, 13 N. D. 107, 99 N. W. 1083.

New York. — Coles *v.* Bowne, 10 Paige Ch. 526, 535 ("if the agreement, as stated in the bill, is denied by the answer of the defendant, the complainant must produce legal evidence of the existence of such an agreement upon the hearing"); Simpkins *v.* Taylor, 81 Hun 467, 31 N. Y. Supp. 169.

14. Osborn *v.* Phelps, 19 Conn 63, 48 Am. Dec. 133.

15. *United States.* — Fulton *v* Colwell, 112 Fed. 831, 50 C. C. A 537.

Alabama. — Trapp *v.* Moore, 21 Ala. 693; Guilmartin *v.* Urquhart, 82 Ala. 570, 1 So. 897; Ohlander *v.* Dexter, 97 Ala. 476, 12 So. 51; Hertzler *v.* Stevens, 119 Ala. 333, 24 So. 521; Hough *v.* Smith, 132 Ala. 204, 31 So. 500; Moore *v.* Tate, 114 Ala. 582, 21 So. 820 ("the burden in such cases always rests upon the complainant to show by evidence that is clear, exact, convincing, satisfactory, that the written instrument does not truly contain or express the real agreement of the parties").

Nebraska. — Slobodisky *v.* Phenix Ins. Co., 52 Neb. 395, 72 N. W. 483.

Ohio. — Jung *v.* Weyand, 14 Wkly. L. Bul. 143.

New York. — Boardman *v.* Davidson, 7 Abb. Pr. (N. S.) 439.

Pennsylvania. — Graham *v.* Carnegie Steel Co., 66 Atl. 103.

16. *Alabama.* — Campbell *v.* Hatchett, 55 Ala. 548; Folmar *v.* Lehman-Durr Co., 41 So. 750; Bishop *v.* Clay Ins. Co., 49 Conn. 167.

Florida. — Jackson *v.* Magbee, 21 Fla. 622 ("relief will only be granted in cases of written instruments when there is a plain mistake, clearly made out by satisfactory proof").

Georgia. — Bell *v.* Americus, etc., R. Co., 76 Ga. 754 (equity will not reform a written contract of subscription by inserting a condition therein, except upon proof that the parties intended, at the time of executing the contract, to insert it and that it was omitted by fraud, accident, or mistake of fact).

Illinois. — Shay *v.* Pettes, 35 Ill. 360.

Indiana. — Nelson *v.* Davis, 40 Ind. 366.

Iowa. — Fritzler *v.* Robinson, 70 Iowa 500, 31 N. W. 61 (it must be shown that the failure to make the instrument express the intent of the parties arose from mistake or oversight in drafting it).

Maryland. — Dulany *v.* Rogers, 50 Md. 524, 533 ("the burden is upon the complainant to show that the written agreement either did not express the common intention of the parties, or that it was executed by him by mistake, such as will justify a court of equity in setting it aside").

Massachusetts. — Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290, 317; German-American Ins. Co *v.* Davis, 131 Mass. 316.

Missouri. — Griffin *v.* Miller, 188 Mo. 327, 87 S. W. 455.

New Jersey. — Ramsey *v.* Smith, 32 N. J. Eq. 28.

New York. — Coles *v.* Bowne, 10 Paige Ch. 526, 535; Lyman *v.* United Ins. Co., 17 Johns. 373; Nevius *v.* Dunlap, 33 N. Y. 676; Simpkins *v.* Taylor, 81 Hun 467, 31 N. Y. Supp. 169.

Oregon. — Mitchell *v.* Holman, 30 Or. 280, 47 Pac. 616.

Pennsylvania. — Snyder *v.* Phillips, 25 Pa. Super. Ct. 648.

were inserted that were agreed to be left out, or that words or stipulations were omitted which were agreed to be inserted, by mistake,[17] or because of the fraud or inequitable conduct of one of the parties thereto.[18]

Where mistake alone is the basis of the plaintiff's claim, it is not necessary to produce any evidence of fraud.[19] But where reformation is sought upon the ground of mistake, and not of fraud, he must show in just what such mistake or error consisted,[20] and what

Wyoming. — Stoll *v.* Nagle, 86 Pac. 26.

17. *Indiana.* — Nelson *v.* Davis, 40 Ind. 366; Allen *v.* Anderson, 44 Ind. 395; Baldwin *v.* Kerlin, 46 Ind. 426; Heavenridge *v.* Mondy, 49 Ind. 434; Easter *v.* Severin, 78 Ind 540; Baker *v.* Pyatt, 108 Ind. 61, 9 N. E. 112; Board of Comrs. *v.* Owens, 138 Ind. 183, 37 N. E. 602 (where reversionary clause was omitted from deed).

Missouri. — Griffin *v.* Miller, 188 Mo. 327, 87 S. W. 455 (evidence that grantor retained the deed, which his heirs sought to have reformed, for several months after it was executed, justified an inference that the provision claimed to have been inserted by mistake was not so inserted).

New Jersey. — Henderson *v.* Stokes, 42 N. J. Eq. 586, 8 Atl. 718.

New York. — Wemple *v.* Stewart, 22 Barb. 154 ("a written contract, in the absence of fraud, can only be reformed where it is shown by satisfactory proof that there is a plain mistake in the contract, by the accidental omission or insertion of a material stipulation contrary to the intention of both parties, by expressing something different in substance from the truth of that intent, and under a mutual mistake"); Nevius *v.* Dunlap, 33 N. Y. 676; Jackson *v.* Andrews, 59 N. Y. 244 ("to entitle the plaintiff to a reformation of the contract, he must prove . . . that this intention was frustrated either from some fraud, accident, or the mutual mistake of the parties"); Christopher & T. St. R. Co. *v.* Twenty-third St. R. Co., 149 N. Y. 51, 43 N. E. 538; Simpkins *v.* Taylor, 81 Hun 467, 31 N. Y. Supp. 169; Drachler *v.* Foote, 88 App. Div. 270, 84 N. Y. Supp. 977.

18. Hearne *v.* Marine Ins. Co., 20 Wall. (U. S.) 488; Folmar *v.* Lehman-Durr Co. (Ala.), 41 So. 750; Reese *v.* Wyman, 9 Ga. 430, 438; Fritz *v.* Fritz, 94 Minn. 264, 102 N. W. 705; Coles *v.* Bowne, 10 Paige Ch. (N. Y.) 526, 535; Jackson *v.* Andrews, 59 N. Y. 244.

19. Proof that plaintiff, an old woman, inexperienced in business, signed a contract of sale supposing it to be the lease orally agreed on, held sufficient. Moore *v.* Copp, 119 Cal. 429, 51 Pac. 630.

20. *United States.* — Hearne *v.* Marine Ins. Co., 20 Wall. 488 ("the party alleging the mistake must show exactly in what it consists and the correction that should be made"); Dean *v.* Equitable F. Ins. Co., 7 Fed. Cas. No. 3,705; Spare *v.* Home Mut. Ins. Co., 19 Fed. 14.

California. — Hochstein *v.* Berghauser, 123 Cal. 681, 56 Pac. 547 ("the party alleging the mistake must show exactly in what it consists").

Florida. — Greeley *v.* De Cottes, 24 Fla. 475, 488, 5 So. 239 (the mistake must be plainly shown).

Georgia. — Wyche *v.* Greene, 11 Ga. 159, 171.

Idaho. — Houser *v.* Austin, 2 Idaho 204, 10 Pac. 37.

Illinois. — Turner *v.* Kelly, 70 Ill. 85, 99.

Iowa. — Hervey *v.* Savery, 48 Iowa 313.

Maine. — Farley *v.* Bryant, 32 Me. 474, 483 ("the precise mistake or error should be clearly ascertained. When it is alleged that certain words, letters or figures have been inserted or omitted by mistake, the proof should establish the facts alleged. If there be a failure to do this, and the testimony shows that by a legal construction the deed may operate contrary to the expectations of the grantor, and convey land which he

the language of the instrument should have been, in order properly to express the intention of the parties who executed it,[21] for reformation will never be decreed upon evidence of mere probabilities as to what the parties originally intended.[22]

But this does not mean that the party seeking reformation must prove that certain specified words, actually agreed on, were omitted from the instrument. Proof is sufficient that the parties had agreed to accomplish a particular object by the instrument to be executed, and that the instrument as executed is insufficient to effectuate their intention.[23]

5. Necessity for Reformation. — He must further show by clear and satisfactory evidence that the variance of the instrument as executed from the real intention of the parties is material,[24] that at the time of the execution of the instrument he was ignorant of the mistake;[25] that it did not occur through his own negligence;[26] that the execution of the instrument containing the mistake was due to excusable inadvertence on his part,[27] and that in the execution of the instrument he has not been lacking in ordinary care and

did not intend to convey, a court of equity would not be authorized to reform the deed").

Massachusetts. — Sawyer *v.* Hovey, 3 Allen 331, 81 Am. Dec. 659.

New Jersey. — Graham *v.* Berryman, 19 N. J. Eq. 29.

New York. — Christopher & T. St. R. Co. *v.* Twenty-third St. R. Co., 149 N. Y. 51, 43 N. E. 538.

Texas. — Waco Tap R. Co. *v.* Shirley, 45 Tex. 355.

Virginia. — Donaldson *v.* Levine, 93 Va. 472, 25 S. E. 541.

21. *United States.* — Hearne *v.* Marine Ins. Co., 20 Wall. 488.

California. — Hochstein *v.* Berghauser, 123 Cal. 681, 56 Pac. 547.

Connecticut. — Bishop *v.* Clay Ins. Co., 49 Conn. 167.

Georgia. — Wyche *v.* Greene, 11 Ga. 159, 176 ("the mistake should be made out by the clearest and most unequivocal evidence").

Indiana. — Hileman *v.* Wright, 9 Ind. 126.

New Jersey. — Ramsey *v.* Smith, 32 N. J. Eq. 28 ("one who seeks to rectify an instrument on the ground of mistake must be able to prove not only that there has been a mistake, but must be able to show exactly the form to which the deed ought to be brought in order that it can be set right according to what was really intended by the parties").

New York. — Roberts *v.* Derby, 68 Hun 299, 23 N. Y. Supp. 34; Sternbach *v.* Friedman, 29 App. Div. 480, 51 N. Y. Supp. 1068.

North Carolina. — Southern Finishing & W. Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681.

Virginia. — Donaldson *v.* Levine, 93 Va. 472, 25 S. E. 541.

22. Shay *v.* Pettes, 35 Ill. 360; Weed *v.* Whitehead, 1 App. Div. 192, 37 N. Y. Supp. 178.

23. Leitensdorfer *v.* Delphy, 15 Mo. 160, 55 Am. Dec. 137.

24. Bishop *v.* Clay Ins. Co., 49 Conn. 167; Nevius *v.* Dunlap, 33 N. Y. 676; Drachler *v.* Foote, 88 App. Div. 270, 84 N. Y. Supp. 977.

25. Evidence showing that plaintiff was aware of the omission from the instrument of the provision sought to be inserted on reformation, and that he signed it relying upon the other party's promise to carry out the agreement of the parties as if such provision were contained in the instrument, is not sufficient. Admrs. of Ligon *v.* Rogers, 12 Ga. 280.

26. Mitchell *v.* Holman, 30 Or. 280, 47 Pac. 616.

27. Crymes *v.* Sanders, 93 U. S. 55; Barth *v.* Deuel, 11 Colo. 494, 19 Pac. 471, the court must be satisfied that but for the mistake the complainant would not have assumed

vigilance,[28] although the rule does not go so far as to require the party seeking reformation to prove affirmatively that the mistake was such as he could not have discovered by reasonable diligence.[29]

He must show that the amendment sought would conform the contract to the intention of both parties,[30] and that it is necessary in order that the writing may correctly speak the agreement as it was actually made and understood by both parties that it be reformed,[31] and that he would be prejudiced by a failure to reform.[32]

6. Mutuality. — It is the general rule that the party seeking reformation of an instrument has the burden of showing that the mistake was on the part of, or was due to, the error or inadvertence of both parties to the instrument; in other words, that evidence of a *mutual* mistake is essential in an action of this character. This is the rule in the federal courts,[33] and in the courts of Alabama,[34] and probably of California,[35] although some of the California decisions would seem to indicate that it is not always necessary to prove a mutual mistake, and that all that is required is evidence of a mistake on the part of the party seeking reformation.[36]

It is the rule in Connecticut,[37] Georgia,[38] Illinois,[39] and Indiana.[40]

the obligation from which he seeks to be relieved.

28. Pyne *v.* Knight, 130 Iowa 113, 106 N. W. 505; Stern *v.* Ladew, 47 App. Div. 331, 62 N. Y. Supp. 267 ("it is also a familiar rule that the party who asserts the existence of a mistake must show that he has not been lacking in any care or vigilance which the circumstances demanded of him").

29. Jackson *v.* Magbee, 21 Fla. 622; Monroe *v.* Skelton, 36 Ind. 302.

30. Lyman *v.* United Ins. Co., 17 Johns. (N. Y.) 373; Drachler *v.* Foote, 88 App. Div. 270, 84 N. Y. Supp. 977.

31. Roszell *v.* Roszell, 109 Ind. 354, 10 N. E. 114; Andrews *v.* Andrews, 81 Me. 337, 17 Atl. 166 ("that the reformation, at least in some of the particulars alleged, is necessary in order that the deed may correctly speak the actual intention of both parties, and thereby perfect and perpetuate their real agreement").

32. Conaway *v.* Gore, 24 Kan. 389.

33. Hearne *v.* Marine Ins. Co. 20 Wall. (U. S.) 488 ("it must appear that both have done what neither intended"). Spare *v.* Home Mut. Ins. Co., 19 Fed. 14.

34. Clark *v.* Hart, 57 Ala. 390; Folmar *v.* Lehman-Durr Co. (Ala.), 41 So. 750 ("in order to reform a contract which fails to express some important element thereof, it must appear that the parties mutually intended that it should have been so expressed").

35. Hochstein *v.* Berghauser, 123 Cal. 681, 547, 56 Pac. 547, *holding* that "unless the mistake was mutual or was accompanied by fraud, the parties are to be governed by the terms of the instrument as it is executed. . . . It must appear that both have done what neither intended."

36. Capelli *v.* Dondero, 123 Cal. 324, 55 Pac. 1057, mistake as to location of surveyed line; Moore *v.* Copp, 119 Cal. 429, 51 Pac. 630, where an aged woman, inexperienced in business, had signed a contract without reading it, believing it to be a lease and not a contract of sale.

37. Thompsonville Scale Mfg. Co. *v.* Osgood, 26 Conn. 16; Bishop *v.* Clay Ins. Co., 49 Conn. 167.

38. Bell *v.* Americus etc. R. Co., 76 Ala. 754.

39. Douglas *v.* Grant, 12 Ill. App. 273; Gray *v.* Merchants Ins. Co., 113 Ill. App. 537.

40. Nelson *v.* Davis, 40 Ind. 366 ("it is not enough, in cases of this kind, to show the sense and intention of one of the parties to the contract; it must be shown incontrovertibly that the sense and intention

In Iowa, the decisions are decidedly conflicting, the general rule being affirmed and followed in some cases,[41] and doubted in others.[42] It is followed in Kansas,[43] Kentucky,[44] Maine,[45] Maryland,[46] Massachusetts,[47] Michigan,[48] Mississippi,[49] Missouri,[50] Nebraska,[51] New Jersey,[52] and generally in New York.[53]

The rule is well stated in an early New York case to the effect that it is not enough to show the sense and intention of one of the parties to the contract; it must be shown incontrovertibly that the sense and intention of the other party concurred in it; that they both understood the contract as it is alleged it ought to have been and as in fact it was, but for the mistake,[54] although it has been doubted in at least one decision in that state.[55] It is followed in

of the other party concurred in it; in other words, it must be proved that they both understood the contract as it is alleged it ought to have been and in fact it was, but for the mistake"). Baker *v.* Pyatt, 108 Ind. 61, 9 N. E. 112; Roszell *v.* Roszell, 109 Ind. 354, 10 N. E. 114.

41. Wackendorf *v.* Lancaster, 61 Iowa 509, 14 N. W. 316, 16 N. W. 533; Holmes *v.* Rogers (Iowa), 80 N. W. 522; Pyne *v.* Knight, 130 Iowa 113, 106 N. W. 505.

42. Fitchner *v.* Fidelity Mut. F. Assn. (Iowa), 68 N. W. 710 ("it may well be questioned . . . whether such is the rule in this state").

43. Conaway *v.* Gore, 24 Kan. 389.

44. Forman *v.* Woods, 20 Ky. L. Rep. 1700, 50 S. W. 61; Woods *v.* Inman, 20 Ky. L. Rep. 1700, 50 S. W. 61.

45. Butman *v.* Hussey, 30 Me. 263; Andrews *v.* Andrews, 81 Me. 337, 17 Atl. 166; Cross *v.* Bean, 81 Me. 525, 17 Atl. 710.

46. Dulany *v.* Rogers, 50 Md. 524, 533; Conner *v.* Groh, 90 Md. 674, 45 Atl. 1024; Cohen *v.* Numsen (Md.), 65 Atl. 432.

47. Sawyer *v.* Hovey, 3 Allen (Mass.) 331, 81 Am. Dec. 659, Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45; *s. c.* 107 Mass. 290, 316; German-American Ins. Co. *v.* Davis, 131 Mass. 316 ("otherwise, if a contract should be reformed upon proof of the mistake of one of the parties as to its terms or legal effect, the injustice would be done of imposing upon the other party a contract to which he had never assented").

48. Ludington *v.* Ford, 33 Mich. 123.

49. Jones *v.* Jones (Miss.), 41 So. 373.

50. Parker *v.* Vanhoozer, 142 Mo. 621, 44 S. W. 728; Griffin *v.* Miller, 188 Mo. 327, 87 S. W. 455.

51. Nebraska Loan & T. Co. *v.* Ignowski, 54 Neb. 398, 74 N. W. 852.

52. Ramsey *v.* Smith, 32 N. J. Eq. 28; Henderson *v.* Stokes, 42 N. J. Eq. 586, 8 Atl. 718.

53. *New York.* — Lyman *v.* United Ins. Co., 17 Johns. 373; Wemple *v.* Stewart, 22 Barb. 154; Nevius *v.* Dunlap, 33 N. Y. 676; Jackson *v.* Andrews, 59 N. Y. 244; Mead *v.* Westchester F. Ins. Co., 64 N. Y. 453; Paine *v.* Jones, 75 N. Y. 593; Allison Bros. *v.* Allison, 144 N. Y. 21, 38 N. E. 956; Christopher & T. St. R. Co. *v.* Twenty-third St. R. Co., 149 N. Y. 51, 43 N. E. 538; Sternbach *v.* Friedman, 23 Misc. 173, 50 N. Y. Supp. 1025; Stern *v.* Ladew, 47 App. Div. 331, 62 N. Y. Supp. 267; Roussel *v.* Lux, 39 Misc. 508, 75 N. Y. Supp. 341; Dougherty *v.* Lion F. Ins. Co., 41 Misc. 285, 84 N. Y. Supp. 10; Drachler *v.* Foote, 88 App. Div. 270, 84 N. Y. Supp. 977 ("he must show that the material stipulation which he claims was omitted or inserted contrary to the intention of both parties and under a mutual mistake"); Albro *v.* Gowland, 98 App. Div. 474, 90 N. Y. Supp. 796; Duke *v.* Stuart, 45 Misc. 120, 91 N. Y. Supp. 885.

54. Lyman *v.* United Ins. Co., 17 Johns. (N. Y.) 373.

55. "I am not aware of any adjudged case in which it has been

North Carolina,[56] North Dakota,[57] Ohio,[58] Oregon,[59] Rhode Island,[60] Texas,[61] Utah,[62] Wisconsin,[63] and Wyoming.[64]

It is not enough for the party seeking reformation to prove that he made the mistake himself. He must also show that the other contracting party labored under a similar delusion,[65] or he must prove a mistake on his own part, accompanied by fraud on the part of the other party,[66] or such acts on the latter's part as would clearly be inequitable between the parties;[67] unless it is proved that the party resisting reformation knew of the mistake and is seeking to take an unfair advantage of it.[68]

Evidence, however, that the mistake was made by the person who drew up the instrument, and who is shown to have acted as the agent for both parties, is sufficient evidence of a mutual mistake on the part of such parties.[69]

Probably the best rule is that laid down in a New York case, namely, that where the alleged error consists in a mistake of the scrivener or of any inadvertence whereby the writing fails to express the agreement actually made, evidence that the mistake was

held that there must be proof of a mutual mistake of fact by the parties to a written contract, or some fraud on the part of the party not mistaken, to entitle the party who made the mistake and who suffers by it, to have such contract reformed so that it will truly express the oral agreement of the parties which was to be carried into effect by the written contract." Rider *v.* Powell, 28 N. Y. 310.

56. Kornegay *v.* Everett, 99 N. C. 30, 5 S. E. 418; Southern Finishing & W. Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681.

57. Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301.

58. Stewart *v.* Gordon, 60 Ohio St. 170, 53 N. E. 797.

59. Stephens *v.* Murton, 6 Or. 193; Kleinsorge *v.* Rohse, 25 Or. 51, 34 Pac. 874; Mitchell *v.* Holman, 30 Or. 280, 47 Pac. 616; Stein *v.* Phillips, 47 Or. 545, 84 Pac. 793.

60. Diman *v.* Providence, W. & B. R. Co., 5 R. I. 130.

61. Westchester F. Ins. Co. *v.* Wagner (Tex. Civ. App.), 38 S. W. 214.

62. Deseret Nat. Bank *v.* Dinwoodey, 17 Utah 43, 53 Pac. 215.

63. James *v.* Cutler, 54 Wis. 172, 10 N. W. 147.

64. Stoll *v.* Nagle (Wyo.), 86 Pac. 26.

65. Drachler *v.* Foote, 88 App. Div. 270, 84 N. Y. Supp. 977; Nevius *v.* Dunlap, 33 N. Y. 676; Stanley *v.* Marshall, 206 Ill. 20, 69 N. E. 58; Goode *v.* Riley, 153 Mass. 585, 28 N. E. 228.

66. Griswold *v.* Hazard, 26 Fed. 135; Pyne *v.* Knight, 130 Iowa 113, 106 N. W. 505; Nevius *v.* Dunlap, 33 N. Y. 676 ("it is not enough to show that he (plaintiff) made the mistake himself; that through inadvertence and error on his part he executed an instrument, the stipulations of which do not express what he intended. He must also show that the other contracting party labored under a similar delusion"); Kleinsorge *v.* Rohse, 25 Or. 51, 34 Pac. 874; James *v.* Cutler, 54 Wis. 172, 10 N. W. 147.

67. Kleinsorge *v.* Rohse, 25 Or. 51, 34 Pac. 874; Paine *v.* Jones, 75 N. Y. 593; Duke *v.* Stuart, 45 Misc. 120, 91 N. Y. Supp. 885.

68. Towne of Essex *v.* Day, 52 Conn. 483, 495.

69. Williamson *v.* Brown, 195 Mo. 313, 93 S. W. 791, evidence that the deed in question was drawn up by a justice of the peace, who acted for both the grantor and the grantee.

mutual is not necessary; but where it is sought to reform *the agreement itself* such evidence is necessary.[70]

7. Good Faith. — The party seeking to reform an instrument with respect to the obligation thereby imposed on the other party thereto has the burden of proving by a fair preponderance of evidence that he has himself performed or is ready to perform his part of the obligation.[71]

8. Part Performance. — It is not necessary, in an action to reform a written instrument, to prove part performance of the agreement upon which it was founded and which it is claimed it was intended to express.[72]

9. Notice. — Where the instrument has been assigned or transferred by the other party thereto to a *bona fide* holder for a valuable consideration, he must prove that such assignee had notice of the error at the time of the assignment.[73]

II. PREPONDERANCE OF EVIDENCE.

1. General Rule. — It is the general rule that a party seeking reformation of a written instrument must produce more than a mere preponderance of evidence in order to authorize the court to grant the relief sought. This rule obtains in the federal courts,[74] and those of Alabama,[75] Arkansas,[76] Florida,[77] Illinois,[78] Iowa,[79]

70. Born *v.* Schrenkeisen, 110 N. Y. 55, 17 N. E. 339 ("it is only where the action is to reform the agreement itself that it is required that it should be alleged in the pleading and proved on the trial that the mistake was mutual. Where there is no mistake about the agreement and the only mistake alleged is in the reduction of the agreement to writing, such mistake of the scrivener or of either party, no matter how it occurred, may be corrected"); Pitcher *v.* Hennessey, 48 N. Y. 415; Marks *v.* Taylor, 23 Utah 152, 63 Pac. 897.

71. Williams *v.* Husky (Mo.), 90 S. W. 425, is a case where grantee seeking to reform a deed was refused reformation until he should show performance of his obligation to maintain grantor for life.

72. Conaway *v.* Gore, 24 Kan. 389.

73. Adams *v.* Stevens, 49 Me. 362; Foster *v.* Kingsley, 67 Me. 152 (an action to reform a bond).

74. Howland *v.* Blake, 97 U. S. 624.

75. Hertzler *v.* Stevens, 119 Ala. 333, 24 So. 521; Hough *v.* Smith, 132 Ala. 204, 31 So. 500.

76. McGuigan *v.* Gaines, 71 Ark. 614, 77 S. W. 52; Goerke *v.* Rodgers, 75 Ark. 72, 86 S. W. 837; Tillar *v.* Wilson (Ark.), 96 S. W. 381; Arkansas Mut. F. Ins. Co. *v.* Witham (Ark.), 101 S. W. 721; Davenport *v.* Hudspeth (Ark.), 98 S. W. 699.

77. Jackson *v.* Magbee, 21 Fla. 622.

78. Warrick *v.* Smith, 36 Ill. App. 619, *affirming s. c.* 137 Ill. 504, 27 N. E. 709; Smith *v.* Rust, 112 Ill. App. 84.

79. Strayer *v.* Stone, 47 Iowa 333 (equity will not interfere to correct a deed on the ground of mistake, unless the fact of such mistake is established by a clear preponderance of evidence); Wachendorf *v.* Lancaster, 61 Iowa 509, 14 N. W. 316, 16 N. W. 533; Taylor *v.* Sheridan, 91 Iowa 720, 59 N. W. 19; Chapman *v.* Dunwell, 115 Iowa 533, 88 N. W. 1067; Stroupe *v.* Bridger (Iowa), 90 N. W. 704; Merchants Nat. Bank *v.* Murphy, 125 Iowa 607, 101 N. W. 441.

Kansas,[80] Kentucky,[81] Maryland,[82] Massachusetts,[83] Minnesota,[84] Mississippi,[85] Missouri,[86] New York,[87] North Carolina,[88] Ohio,[89] and Utah.[90] It applies equally to a defendant setting up mistake in an instrument as a defense to an action brought against him to enforce an obligation created by such instrument,[91] and it has been held that a very convincing preponderance will be required,[92] although of course a clear preponderance is generally held sufficient.[93]

2. Rule in Michigan and Nebraska. — The rule requiring more than a preponderance of evidence on the part of a party seeking a decree of reformation does not obtain in Michigan,[94] nor in Nebraska.[95]

80. Brundige *v.* Blair, 43 Kan. 364, 23 Pac. 482; McCormick Harv. Mach. Co. *v.* Hayes (Kan. App.), 53 Pac. 70 (the jury should be instructed that a mere preponderance of the evidence is not sufficient, but that the facts must be made to appear beyond reasonable controversy).

81. Forman *v.* Woods, 20 Ky. L. Rep. 1700, 50 S. W. 61; Woods *v.* Inman, 20 Ky. L. Rep. 1700, 50 S. W. 61; Crabtree *v.* Sisk (Ky.), 99 S. W. 268.

82. Conner *v.* Groh, 90 Md. 674, 45 Atl. 1024.

83. Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45; *s. c.* 107 Mass. 290, 316.

84. Mikiska *v.* Mikiska, 90 Minn. 258, 95 N. W. 910; Fritz *v.* Fritz, 94 Minn. 264, 102 N. W. 705.

85. Not only is a preponderance of evidence required, but the plaintiff seeking to reform a deed, the recitals of which are definite and unambiguous, must establish the fact of mutual mistake or of fraud, practically to the exclusion of every other reasonable hypothesis. Jones *v.* Jones (Miss.), 41 So. 373.

86. Sweet *v.* Owens, 109 Mo. 1, 18 S. W. 928; Parker *v.* Vanhoozer, 142 Mo. 621, 44 S. W. 728; Brown *v.* Gwin, 197 Mo. 499, 95 S. W. 208.

87. Allison Bros. *v.* Allison, 144 N. Y. 21, 38 N. E. 956 (*holding* uncorroborated testimony of two parties as to statements alleged to have been made by a third party to the instrument, which were explicitly denied by the latter, insufficient to justify reformation); Simpkins *v.* Taylor, 81 Hun 467, 31 N. Y. Supp. 169; Weed *v.* Whitehead, 1 App. Div. 192, 37 N. Y. Supp. 178; Burt *v.* Quackenbush, 72 App. Div. 547, 75 N. Y. Supp. 1031; Duke *v.* Stuart, 45 Misc. 120, 91 N. Y. Supp. 885.

88. Ely *v.* Early, 94 N. C. 1; Kornegay *v.* Everett, 99 N. C. 30, 5 S. E. 418; Hemphill *v.* Hemphill, 99 N. C. 436, 6 S. E. 201.

89. Stewart *v.* Gordon, 60 Ohio St. 170, 53 N. E. 797.

90. "If it were once established that the effect of the terms of a written instrument could be avoided by a bare preponderance of parol evidence, the gates to perjury would soon be wide open." Chambers *v.* Emery, 13 Utah 374, 45 Pac. 192.

91. Wieneke *v.* Deputy, 31 Ind. App. 621, 68 N. E. 921; McTucker *v.* Taggart, 29 Iowa 478; Fowle *v.* Pitt, 183 Mass. 351, 67 N. E. 343.

92. Reynolds *v.* Campbell, 45 Mich. 529, 8 N. W. 581, is a case where it was sought to so reform a deed as to make it subject to mortgages and by excepting a crop from the interest conveyed.

93. Hoyer *v.* King, 101 Iowa 363, 70 N. W. 695; Heffron *v.* Fogel, 40 Wash. 698, 82 Pac. 1003; Kammermeyer *v.* Hilz, 116 Wis. 313, 92 N. W. 1107, where receipt was so reformed as to read "in full."

94. "A preponderance of the evidence is all that is required in any civil case to sustain a verdict, judgment, or decree." Fitch *v.* Vatter, 143 Mich. 568, 107 N. W. 106.

95. "A preponderance of the evidence is all that is required in any civil action. The express terms of a written instrument or the relation of the parties concerned therein, may raise such presumptions that proof of more than ordinary cogency is required to create a preponderance.

3. Exceptions to General Rule. — Where the oath of the defendant to his answer is waived, a mere preponderance as to the alleged mistake is sufficient.[96]

Where it is shown or admitted that there is a mistake in the form of the instrument and that a different sort of instrument was intended, and the controversy is merely as to what sort of instrument would best express the original intentions of the parties, the same stringency of proof is not required that is demanded in showing the existence of a mistake in the first place,[97] and the ordinary rule as to preponderance of evidence controls as to the consideration, the performance, and the prejudice,[98] and as to proof of what was intended to be the language of the instrument.[99]

4. Number of Witnesses. — It has been held in some states that the evidence of one witness alone is sufficient to prove mistake in an instrument sought to be reformed, although a sworn denial has been filed by the defendant, as for instance the testimony of the scrivener who drafted it,[1] although this means merely that it is not incumbent on the party seeking reformation to prove his case by a greater number of witnesses than one. While in other states it is held that the testimony of at least two creditable witnesses is necessary where there is a verified answer denying the allegations of the complaint as to the existence of a mistake in the instrument sought to be reformed,[2] or at least the evidence of one witness

Until overcome by clear and convincing proof the terms of the instrument stand as evidence of the intention of the parties. This is as far as the rule goes." Topping *v.* Jeanette, 64 Neb. 834, 90 N. W. 911.

96. Fishell *v.* Bell, 1 Clarke Ch. (N. Y.) 37.

97. Palmer *v.* Hartford Ins. Co., 54 Conn. 488, 501, 9 Atl. 248; Mitchell *v.* Wellman, 80 Ala. 16, is a case where it was admitted that a conveyance absolute in form was not an unconditional sale, and the controversy was merely whether it was intended as a mortgage or a conditional sale. Where the parties both agree that there is a mistake in the description in a deed, but one claims that it should be reformed so as to make it agree with the description in the orginal contract of sale which was in writing, and the other that it should be made to conform to a subsequent survey, the parol evidence as to the adoption of which by the parties is uncertain and vague, the court will so reform the deed as to make it conform to the written agreement as to description. Merritt *v.* Setz, 19 Pa. Super. Ct. 505.

98. Conaway *v.* Gore, 24 Kan. 389.

99. Where the defendant admits the existence of a mistake, a preponderance of testimony suffices to prove what was intended to be inserted in place of the erroneous matter. Bunse *v.* Agee, 47 Mo. 270.

1. Where decrees *pro confesso* are taken against all but one of the defendants and the latter answers that he knows nothing about the alleged mistake, the clear and direct testimony of one witness is sufficient to authorize a decree of reformation. Godwin *v.* Yonge, 22 Ala. 553.

Worley *v.* Tuggle, 4 Bush (Ky.) 168, (basing decision upon Ky. Civ. Code, § 142).

2. American Mtge. Co. *v.* O'Hara, 56 Fed 278, 5 C. C. A. 502 (mere proof of suspicious circumstances is not sufficient corroborating evidence); Marquette Timb. Co. *v.* Abeles (Ark.), 99 S. W. 685 (a court of equity will not grant reformation of a deed on the testimony of a single witness, who appears to be

together with strongly corroborating circumstantial evidence.[3]

The testimony of the wife, supporting that of her husband, to a fact denied by the defendant in his answer, is held entitled to the weight of a corroborating circumstance, sufficient within this rule,[4] although in Pennsylvania the testimony of a husband and wife, the latter being in corroboration of the former, has been held equivalent to the testimony of but one witness.[5]

It has been questioned whether after the death of the grantee, the unaided testimony of the grantor alone, however intelligent and credible he may be as a witness, would be sufficient to justify reformation.[6]

III. CONFLICT OF EVIDENCE.

1. In General. — A direct conflict of equally credible testimony or even the existence of some credible testimony to the contrary, as to the existence or mutuality (where mutuality is required to be proved) of the mistake alleged is generally held conclusive as against reformation.[7]

interested in the outcome of the litigation); Farley *v.* Bryant, 32 Me. 474, 488; Brawdy *v.* Brawdy, 7 Pa. St. 157; Phillips *v.* Meily, 106 Pa. St. 536; *In re* Sutch's Estate, 201 Pa. St. 317, 50 Atl. 946 (a chancellor invariably refuses to reform a written instrument on the uncorroborated testimony of a single witness); Shattuck *v.* Gay, 45 Vt. 87 (what is deemed equal to the testimony of two witnesses is required).

3. In order to justify the reformation of a contract, where the mistake is denied by one of the parties thereto, the testimony of the other party seeking to have it altered must be corroborated by another witness or the equivalent thereof. North & W. B. R. Co. *v.* Swank, 14 Wkly. Notes Cas. (Pa.) 444.

"The denials of the answer upon the knowledge of the grantee must have been overborne by the testimony of one witness with strong corroborating circumstances, or two positive witnesses; or they must have been so at variance with the facts and circumstances disclosed by the pleadings and evidence as to leave no doubt in the mind of the court." Kent *v.* Lasley, 24 Wis. 654.

4. Sharp *v.* Behr, 117 Fed. 864.

5. Sower *v.* Weaver, 78 Pa. St. 443.

6. Kent *v.* Lasley, 24 Wis. 654; McClellan *v.* Sandford, 26 Wis. 595.

7. *United States.*— Pope *v.* Hoopes, 90 Fed. 451, 33 C. C. A. 595; Barker *v.* Pullman Palace Car Co., 124 Fed. 555.

Alabama. — Lockhart *v.* Cameron, 29 Ala. 355; Smith *v.* Allen, 102 Ala. 406, 14 So. 760.

Arkansas. — Webb *v.* Nease, 66 Ark. 155, 49 S. W. 1081 (where some of the parties to the deed were dead and the evidence as to mistake was contradictory); Georke *v.* Rodgers, 75 Ark. 72, 86 S. W. 837 (denying reformation where there were an equal number of reliable witnesses for plaintiff and for defendant).

Colorado. — Jaeger *v.* Whitsett, 3 Colo. 105.

Iowa. — First Pres. Church *v.* Logan, 77 Iowa 326, 42 N. W. 310; Des Moines Co. Agr. Soc. *v.* Tubbessing, 87 Iowa 138, 54 N. W. 68.

Kentucky. — Watkin *v.* Lee, 8 Ky. L. Rep. 357 (where the parties disagreed as to the real terms of the prior verbal agreement); Christian *v.* Rose, 15 Ky. L. Rep. 145, 22 S. W. 553; Coleman *v.* Illinois L. Ins. Co., 26 Ky. L. Rep. 900, 82 S. W. 616.

Maryland. — Atlantic & G. C. Con. Coal Co. *v.* Maryland Coal Co., 62 Md. 135.

Missouri. — Bobb *v.* Bobb, 7 Mo.

2. Where Mistake Clearly Shown. — The mere fact of conflict of evidence, however, will not deprive the plaintiff of relief where the mistake is clearly established to the satisfaction of the court.[8]

IV. SUFFICIENCY OF EVIDENCE.

1. Degree of Proof Required. — A. In General. — As the exercise of the jurisdiction to reform an instrument in writing involves invasion of a salutary rule of evidence, the courts will proceed with the utmost caution;[9] and reformation being a remedy peculiar to the jurisdiction of courts of equity, the evidence requisite to establish a case and warrant a decree of reformation must always be sufficient to move the conscience of the chancellor to reform the instrument,[10] or such full and strict evidence as will be sufficient to satisfy the mind of the court,[11] and if the proof is uncertain in any

App. 501 (a direct conflict of evidence is conclusive against reformation of a deed).

New Jersey. — Rowley *v.* Flannelly, 30 N. J. Eq. 612; Green *v.* Stone, 54 N. J. Eq. 387, 34 Atl. 1099. 55 Am. St. Rep. 577.

New York. — New York Ice Co. *v.* Northwestern Ins. Co., 31 Barb. 72; Allison Bros. *v.* Allison, 144 N. Y. 21, 38 N. E. 956 (*holding* uncorroborated evidence of two of the parties to an assignment of a patent as to statements by the third party, explicitly denied by him, insufficient to justify reforming the instrument so as to make it cover property not described therein).

Ohio. — Potter *v.* Potter, 27 Ohio St. 84.

Oregon. — Stein *v.* Phillips, 47 Or. 545, 84 Pac. 793 (where the evidence consisted mainly in the conflicting statements of the two contracting parties).

Pennsylvania. — Gehres *v.* Crawford, 9 Atl. 508; Jackson *v.* Payne, 114 Pa. St. 67, 6 Atl. 340.

Washington. — Heffron *v.* Vogel, 40 Wash. 698, 82 Pac. 1003.

8. McGuigan *v.* Gaines, 71 Ark. 614, 77 S. W. 52 ("but although the mistake must be clearly proved, it does not follow that the courts must refuse relief in all cases where there is conflict in the testimony or evidence, for it often happens that, notwithstanding such conflict, the facts of a case may be clearly and decisively proved."); Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823 (where the mind of the court is satisfied the relief will not be denied merely because there is a conflict of evidence as to the mistake); Jenkins *v.* Lefaiver, 9 N. Y. Supp. 19, 29 N. Y. St. 886; Highlands *v.* Philadelphia & R. R. Co., 209 Pa. St. 286, 58 Atl. 560, (*holding* proof need not be indubitable in the sense that there must be no opposing testimony, but only in the sense that it must carry clear conviction of its truth); Aetna Ins. Co. *v.* Brannon (Tex. Civ. App.), 91 S. W. 614 ("it is not essential that both the plaintiff and defendant should agree in their evidence that a mistake was made").

9. Campbell *v.* Hatchett, 55 Ala. 548; Clark *v.* Hart, 57 Ala. 390; Ohlander *v.* Dexter, 97 Ala. 476, 12 So. 51; Kilgore *v.* Redmill, 121 Ala. 485, 25 So. 766; Folmar *v.* Lehman-Durr Co. (Ala.), 41 So. 750.

"But in such cases, where the court is asked to reform a written contract against the will of one of the parties thereto, a court must, as a matter of common prudence, proceed with caution and will decree a reformation only where the evidence shows clearly and conclusively that justice requires it." McGuigan *v.* Gaines, 71 Ark. 614, 77 S. W. 52; Strayer *v.* Stone, 47 Iowa 333.

10. Storms *v.* Dorflinger (Pa.), 17 Atl. 347; Kornegay *v.* Everett, 99 N. C. 30, 5 S. E. 418; Loftin *v.* Loftin, 96 N. C. 94. 1 S. E. 837.

11. Coale *v.* Merryman, 35 Md.

material respect it will be held insufficient.[12] Where the testimony is of such an indecisive character as to leave a substantial doubt in the mind of the court as to what the real agreement was, the reformation prayed for will be refused,[13] as where the evidence is uncertain as to what land was intended to be described or conveyed in a deed or mortgage sought to be reformed, although the evidence shows that land was included therein which the parties did not intend the instrument to cover.[14]

There is much diversity of judicial expression as to just what degree of proof is required to successfully maintain a suit for reformation of an instrument, and it cannot even be said that uniform rules exist in the respective states.[15]

It must always be such as will make out the mistake to the entire satisfaction of the court, and not be loose, equivocal or contradictory, leaving the mistake open to doubt.[16]

382; Ivinson *v.* Hutton, 98 U. S. 79; Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 435; Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290, 317; Wittey *v.* Deff, 2 Ky. L. Rep. 230 (the chancellor should be well satisfied that the draftsman failed to embody the real contract between the parties).

12. Alexander *v.* Caldwell, 55 Ala. 517 (even though the court may feel that a great wrong has been done); Berry *v.* Sowell, 72 Ala. 17; Hough *v.* Smith, 132 Ala. 204, 31 So. 500; Meier *v.* Bell, 119 Wis. 482, 97 N. W. 186.

13. Clopton *v.* Martin, 11 Ala. 187; Barker *v.* Pullman's Palace Car Co., 124 Fed. 555; Greditzer *v.* Continental Ins. Co., 91 Mo. App. 534; Dougherty *v.* Lion Ins. Co., 41 Miss. 285, *holding* bare fact of inclusion in deed of property not owned by grantor, together with general testimony as to existence of mistake, insufficient.

Whatever of mere doubt and uncertainty the evidence may generate, must be resolved against the plaintiff. Campbell *v.* Hatchett, 55 Ala. 548; Underwood *v.* Cave, 176 Mo. 1, 75 S. W. 451.

If uncertain in any material respect it will be held insufficient. Alexander *v.* Caldwell, 55 Ala. 517.

14. Turner *v.* Hart, 1 Fed. 295; Alexander *v.* Caldwell, 55 Ala. 517 (refusing to reform mortgage which described lands not intended to be covered because proof was uncertain as to what lands were intended in lieu of those described by mistake); Bartlett *v.* Brown, 121 Mo. 353, 25 S. W. 1108.

15. Wyche *v.* Greene, 11 Ga. 159; Southard *v.* Curley, 134 N. Y. 148, 31 N. E. 330, 30 Am. St. Rep. 642, 16 L. R. A. 561, reviewing many cases.

16. *England.* — Shelburne *v.* Inchiquin, 1 Brown Ch. 338.

United States. — Graves *v.* Boston Marine Ins. Co., 2 Cranch 419; Tilghman *v.* Tilghman, 23 Fed. Cas. No. 14,045; United States *v.* Monroe, 27 Fed. Cas. No. 15,835; Pope *v.* Hoopes, 84 Fed. 929, *s. c.* 90 Fed. 451, 33 C. C. A. 595.

Alabama. — Lockhart *v.* Cameron, 29 Ala. 355; Turner *v.* Kelly, 70 Ala. 85, 99; Moore *v.* Tate, 114 Ala. 582, 21 So. 820.

California. — Lestrate *v.* Barth, 19 Cal. 660, 675; Leonis *v.* Lazzarovich, 55 Cal. 52.

Connecticut. — Bishop *v.* Clay Ins. Co., 49 Conn. 167; Palmer *v.* Hartford Ins. Co., 54 Conn. 488, 501, 9 Atl. 248.

Florida. — Neal *v.* Gregory, 19 Fla. 356; Jacobs *v.* Parodi, 50 Fla. 541, 39 So. 833.

Georgia. — Wyche *v.* Greene, 11 Ga. 159, 171; Admrs. of Ligon *v.* Rogers, 12 Ga. 281; Wall *v.* Arrington, 13 Ga. 88.

Illinois. — Cleary *v.* Babcock, 41 Ill. 271; Miner *v.* Hess, 47 Ill. 170

B. Specific Rules. — Some courts have laid down the rule that the degree of proof required in an action for the reformation of a written instrument is the same strength of evidence as is required

("it must leave little, if any, doubt"); Palmer *v.* Converse, 60 Ill. 313; Sutherland *v.* Sutherland, 69 Ill. 481; Moore *v.* Munn, 69 Ill. 591; Peck *v.* Arehart, 95 Ill. 113; Hamlon *v.* Sullivant, 11 Ill. App. 423.

Indiana. — Hileman *v.* Wright, 9 Ind. 126; Dale *v.* Evans, 14 Ind. 288; Oiler *v.* Gard, 23 Ind. 212; Habee *v* Viele, 148 Ind. 116, 45 N. E. 783, 47 N. E. 1.

Iowa. — Reynolds *v.* Meelick, 17 Iowa 585 (assignment of note and mortgage); Clute *v.* Frasier, 58 Iowa 268, 12 N. W. 327; Cummins *v.* Monteith, 61 Iowa 541, 16 N. W. 591; Jurgensen *v.* Carlesen, 97 Iowa 627, 66 N. W. 877.

Kansas. — Conaway *v.* Gore, 24 Kan. 389; Brundige *v.* Blair, 43 Kan. 364, 23 Pac. 482.

Kentucky. — Worley *v.* Tuggle, 4 Bush 168 ("the case must be clearly made out, else the courts should hold to the written memorial as the highest and best evidence of the contract"); Graves *v.* Mattingly, 6 Bush 361; Fitzpatrick *v.* Ringo, 9 Ky. L. Rep. 503, 5 S. W. 431.

Maine. — Peterson *v.* Grover, 20 Me. 363; Farley *v.* Bryant, 32 Me. 474 ("the mistake must be precisely alleged and clearly proved. . . . To authorize the court to reform the deed there should appear to have been a plain mistake clearly proved"); Tucker *v.* Madden, 44 Me. 206, 216.

Nebraska. — Nebraska Loan & T. Co. *v.* Ignowski, 54 Neb. 398, 74 N. W. 852.

New Jersey. — Graham *v.* Berryman, 19 N. J. 29 (testimony of witnesses voluntarily given, as to frauds committed by themselves, is not sufficiently credible to come within the rule); Burgin *v.* Giberson, 26 N. J. Eq. 72; Rowley *v.* Flannelly, 30 N. J. Eq. 612 ("when the evidence, in demonstration of mistake, is doubtful or equivocal, or strongly contradicted, so that it is impossible for the mind to reach a strong conviction as to the truth, the court will not change what is written").

New York. — Gillespie *v.* Moon, 2 Johns. Ch. 585; Lyman *v.* United Ins. Co., 17 Johns. 373; Humphreys *v.* Hurtt, 50 How. Pr. 291; Boardman *v.* Davidson, 7 Abb. Pr. (N. S.) 439; Wemple *v.* Stewart, 22 Barb. 154; Nevius *v.* Dunlap, 33 N. Y. 676, 680 ("whenever the evidence is loose, equivocal or contradictory, or is in its texture open to doubts or opposing presumptions, the relief will not be granted"); Whittemore *v.* Farrington, 76 N. Y. 452; Ford *v.* Joyce, 78 N. Y. 618 (*holding* that the mistake should be proved as much to the satisfaction of the court as if admitted); Southard *v.* Curley, 134 N. Y. 148, 31 N. E. 330, 30 Am. St. Rep. 642, 16 L. R. A. 561 (reviewing many decisions as to degree of evidence necessary in actions for reformation); Allison Bros. *v.* Allison, 144 N. Y. 21, 38 N. E. 956; Sternback *v.* Friedman, 23 Misc. 173, 50 N. Y. Supp. 1025.

Ohio. — Thompson *v.* Thompson, 18 Ohio St. 73; Roberts *v.* Elmore, 4 Wkly. L. Gaz. 393, 3 Ohio Dec. 208.

Oregon. — Shively *v.* Welch, 2 Or. 288; Newsom *v.* Greenwood, 4 Or. 119; Lewis *v.* Lewis, 4 Or. 177; McCoy *v.* Bayley, 8 Or. 196; Remillard *v.* Prescott, 8 Or. 37; Epstein *v.* State Ins. Co., 21 Or. 179, 27 Pac. 1045 (a policy of fire insurance covering various separate articles will not be reformed so as to cover the property *en masse* upon the uncorroborated evidence of the insured and his wife, which is uncertain and vague and is contradicted by the testimony of the company's agent that he informed the insured as to the rules of the company requiring policy to specify amount on each article).

Pennsylvania. — Edmond's Appeal, 59 Pa. St. 220; Graham *v.* Carnegie Steel Co., 66 Atl. 103 (the recollection of the witnesses as to the facts must be clear).

Utah. — Ewing *v.* Keith, 16 Utah 312, 52 Pac. 4; Deseret Nat. Bank *v.* Dinwoodey, 17 Utah 43, 53 Pac. 215.

Vermont. — Lyman *v.* Little, 15 Vt. 576 ("equity will not correct a mistake

to establish a trust;[17] in some other states it is held that the evidence must be clear and convincing,[18] or that it must be very

in a written instrument except on clear and undoubted testimony").

West Virginia. — Western Min. & Mfg. Co. *v.* Peytona Cannel Coal Co., 8 W. Va. 406; Allen *v.* Yater, 17 W. Va. 128; Jarrell *v.* Jarrell, 27 W. Va. 743; Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39; Robinson *v.* Braiden, 44 W. Va. 183, 28 S. E. 798; Koen *v.* Kerns, 47 W. Va. 575, 35 S. E. 902.

Wisconsin. — Fowler *v.* Adams, 13 Wis. 458; Meier *v.* Bell, 119 Wis. 482, 97 N. W. 186.

17. Modrell *v.* Riddle, 82 Mo. 31.

18. *United States.* — Griswold *v.* Hazard, 26 Fed. 135; Fulton *v.* Colwell, 112 Fed. 331, 50 C. C. A. 537; Harvey *v.* United States, 12 Ct. Cl. 141 (no room for doubt should be left that it was the intention of the parties to make the contract as claimed by the plaintiff, and that such intention was frustrated by fraud or mutual mistake).

Alabama. — Clopton *v.* Martin, 11 Ala. 187 (if proofs are doubtful and unsatisfactory, and mistake not entirely plain, equity will withhold relief); Johnson *v.* Crutcher, 48 Ala. 368; Clark *v.* Hart, 57 Ala. 390; Marsh *v.* Marsh, 74 Ala. 418; Weathers *v.* Hill, 92 Ala. 492, 9 So. 412; Dexter *v.* Ohlander, 95 Ala. 467, 10 So. 527; Mitchell *v.* Wellman, 80 Ala. 16 (*holding* that when the question is whether a conveyance absolute on its face was intended as a mortgage, the party so asserting must show by clear and convincing evidence that such was the intention and understanding of the parties); Peagler *v.* Stabler, 91 Ala. 308, 9 So. 157 (where the instrument is absolute in form and the grantee insists that it declares the whole contract, before it can be declared a mortgage at suit of the grantor the proof must be clear and convincing); Miller *v.* Morris (Ala.), 27 So. 401.

Arkansas. — Webb *v.* Nease, 66 Ark. 155, 49 S. W. 1081.

California. — Monterey County *v.* Seegleken, 36 Pac. 515.

Illinois. — Harms *v.* Coryell, 177 Ill. 496, 53 N. E. 87; Gray *v.* Merchants' Ins. Co., 113 Ill. App. 537.

Iowa. — Fritzler *v.* Robinson, 70 Iowa 500, 31 N. W. 61; Foley *v.* Hamilton, 89 Iowa 686, 57 N. W. 439; Johnson *v.* Farmers' Ins. Co., 126 Iowa 565, 102 N. W. 502 (*holding* that if there be a substantial doubt, plaintiff must fail).

Maryland. — Ranstead *v.* Allen, 85 Md. 482, 37 Atl. 155; Conner *v.* Groh, 90 Md. 674, 45 Atl. 1024.

Minnesota. — Humphreys *v.* Shellenberger, 89 Minn. 327, 94 N. W. 1083; Fritz *v.* Fritz, 94 Minn. 264, 102 N. W. 705.

Missouri. — Parker *v.* Van Hoozer, 142 Mo. 621, 44 S. W. 728; Griffin *v.* Miller, 188 Mo. 327, 87 S. W. 455; Grand Lodge A. O. U. W. *v.* Sater, 44 Mo. App. 445 (certificate of insurance).

Nebraska. — Slobodisky *v.* Phenix Ins. Co., 52 Neb. 395, 72 N. W. 483; Baker *v.* Montgomery, 110 N. W. 695.

New Jersey. — Rowley *v.* Flannelly, 30 N. J. Eq. 612.

New York. — Heelas *v.* Slevin, 53 How. Pr. 356; Mead *v.* Westchester F. Ins. Co., 64 N. Y. 453; Simpkins *v.* Taylor, 81 Hun 467, 31 N. Y. Supp. 169; Weed *v.* Whitehead, 1 App. Div. 192, 37 N. Y. Supp. 178; Drachler *v.* Foote, 88 App. Div. 270, 84 N. Y. Supp. 977; Duke *v.* Stuart, 45 Misc. 120, 91 N. Y. Supp. 885.

North Carolina. — Harrison *v.* Howard, 36 N. C. (1 Ired. Eq.) 407; Kornegay *v.* Everett, 99 N. C. 30, 5 S. E. 418; Giles *v.* Hunter, 103 N. C. 194, 9 S. E. 549; Harding *v.* Long, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775; Jones *v.* Perkins, 54 N. C. 337 (suit to reform a deed of gift of a slave); Shields *v.* Whitaker, 82 N. C. 516; Ely *v.* Early, 94 N. C. 1; Williams *v.* Hodges, 95 N. C. 32; Loftin *v.* Loftin, 96 N. C. 94, 1 S. E. 837; Smiley *v.* Pearce, 98 N. C. 185, 3 S. E. 631; Plummer *v.* Baskerville, 36 N. C. (1 Ired. Eq.) 252; Deans *v.* Dortch, 40 N. C. (5 Ired. Eq.) 331; Fisher *v.* Carroll, 41 N. C. (6 Ired. Eq.) 485.

North Dakota. — Merchant *v.* Pielke, 9 N. D. 182, 82 N. W. 878.

Ohio. — Clayton *v.* Freet, 10 Ohio

clear,[19] or by the clearest evidence,[20] or clear and satisfactory,[21]

St. 544 ("how far evidence should be satisfactory to the mind of a court is necessarily a question of degree and must depend to some extent upon the character of the judicial minds of the judges"); Potter *v.* Potter, 27 Ohio St. 84; Farr *v.* Ricker, 46 Ohio St. 265, 21 N. E. 354 (endorsement on a promissory note); Neininger *v.* State, 50 Ohio St. 394, 34 N. E. 633, 40 Am. St. Rep. 674; Stewart *v.* Gordon, 60 Ohio St. 170, 53 N. E. 797; Northwestern Ohio Gas Co. *v.* Tiffin, 59 Ohio St. 420, 54 N. E. 77.

Pennsylvania. — Moliere *v.* Pennsylvania F. Ins. Co., 5 Rawle 342.

Tennessee. — Eatherly *v.* Eatherly, 1 Cold. 461 (to reform a will).

Texas. — Waco Tap R. Co. *v.* Shirley, 45 Tex. 355; Moore *v.* Giesecke, 76 Tex. 543, 13 S. W. 290; Westchester F. Ins. Co. *v.* Wagner (Tex. Civ. App.), 38 S. W. 214.

Utah. — Ewing *v.* Keith, 16 Utah 312, 52 Pac. 4; Deseret Nat. Bank *v.* Dinwoodey, 17 Utah 43, 53 Pac. 215.

Wisconsin. — Kent *v.* Lasley, 24 Wis. 654; Kruse *v.* Koelzer, 124 Wis. 536, 102 N. W. 1072.

19. Stephens *v.* Murton, 6 Or. 193.

20. Hearne *v.* Marine Ins. Co., 20 Wall. (U. S.) 488; Arnold *v.* Fowler, 44 Ala. 167 (equity will not reform a written contract so that one of the parties will receive a much smaller sum, except upon the clearest evidence of mistake); Reese *v.* Wyman, 9 Ga. 430, 438 (chancery will exercise the power of reforming a written contract "sparingly and with great caution, and only upon the clearest proof of the intention of the parties, and of the mistake or accident upon which it (the jurisdiction) is invoked"); Lyman *v.* United Ins. Co., 17 Johns. (N. Y.) 373.

21. *United States.* — Harrison *v.* Hartford F. Ins. Co., 30 Fed. 862.

Alabama. — Trap *v.* Moore, 21 Ala. 693; Alexander *v.* Caldwell, 55 Ala. 517; Hemphill *v.* Moody, 64 Ala. 468.

Arkansas. — Steward *v.* Pettigrew, 28 Ark. 372.

California. — Hochstein *v.* Berghauser, 123 Cal. 681, 56 Pac. 547.

Colorado. — Connecticut F. Ins. Co. *v.* Smith, 10 Colo. App. 121, 51 Pac. 170 (fire insurance policy).

Florida. — Greeley *v.* De Cottes, 24 Fla. 475, 490, 5 So. 239.

Illinois. — Warrick *v.* Smith, 36 Ill. App. 619, *affirming s. c.* 137 Ill. 504, 27 N. E. 709; Northfield Farmers' Tp. Ins. Co. *v.* Sweet, 46 Ill. App. 598 (to reform insurance policy); McDonald *v.* Starkey, 42 Ill. 442 (reformation of a lease by insertion of a declaration of a use denied); Stanley *v.* Marshall, 206 Ill. 20, 69 N. E. 58.

Iowa. — Gelpcke *v.* Blake, 15 Iowa 387, 83 Am. Dec. 418; Hervey *v.* Savery, 48 Iowa 313; Clute *v.* Frasier, 58 Iowa 268, 12 N. W. 327; Stewart *v.* McArthur, 77 Iowa 162, 41 N. W. 604; First Pres. Church *v.* Logan, 77 Iowa 326, 42 N. W. 310; West *v.* West, 90 Iowa 41, 57 N. W. 639; Osmundson *v.* Thompson, 90 Iowa 755, 57 N. W. 863; Herring *v.* Peaslee, 92 Iowa 391, 60 N. W. 650; Montgomery *v.* Mann, 120 Iowa 609, 94 N. W. 1109; Brown *v.* Ward, 119 Iowa 604, 93 N. W. 587; Rensink *v.* Wiggers, 99 Iowa 39, 68 N. W. 569 ("there must be that measure or degree of proof which produces in the unprejudiced mind the belief and conviction of the truth of the fact asserted, having in view all the facts and circumstances surrounding the transaction. A fact thus established may be said to have been proven by testimony which is clear and satisfactory") Schrimper *v.* Chicago, M. & St. P. R. Co., 82 N. W. 916; Merchants' Nat. Bank *v.* Murphy, 125 Iowa 607, 101 N. W. 441; Holmes *v.* Rogers, 80 N. W. 522; Wold *v.* Newgard, 94 N. W. 859; Sauer *v.* Nehls, 121 Iowa 184, 96 N. W. 759.

Kentucky. — Triplett *v.* Gill, 7 J. J. Marsh. 432; French *v.* Asher L. Co., 41 S. W. 261; Graves *v.* Mattingly, 6 Bush 361; Crabtree *v.* Sisk, 99 S. W. 268.

Maryland. — Ellinger *v.* Crowl, 17 Md. 361, 373; Milligan *v.* Pleasants, 74 Md. 8, 21 Atl. 695; Ranstead *v.* Allen, 85 Md. 482, 37 Atl. 15; O'Keefe *v.* Irvington, 87 Md. 196,

or clear, exact and satisfactory,[22] or clear, free from suspicion, and entirely satisfactory,[23] or strong and satisfactory,[24] or clear, strong and satisfactory,[25] or clear, strong and convincing,[26] or the strongest

39 Atl. 428; Cohen *v.* Numsen, 65 Atl. 432.

Michigan. — Johnson *v.* Wilson, 111 Mich. 114, 69 N. W. 149 (contract for sale of land).

Minnesota. — Massev *v.* Lindeni, 107 N. W. 146.

New Jersey. — Ramsey *v.* Smith, 32 N. J. Eq. 28; Cummins *v.* Bulgin, 37 N. J. Eq. 476.

New York. — Miaghan *v.* Hartford F. Ins. Co., 12 Hun 321 (fire insurance policy); Phoenix F. Ins. Co. *v.* Gurnee, 1 Paige 278, 19 Am. Dec. 431 (to reform fire insurance policy); Roberts *v.* Derby, 68 Hun 299, 23 N. Y. Supp. 34; Stern *v.* Ladew, 47 App. Div. 331, 62 N. Y. Supp. 267.

Ohio. — Davenport *v.* Sovil, 6 Ohio St. 459.

Oregon. — Epstein *v.* State Ins. Co., 21 Or. 179, 27 Pac. 1045; Kleinsorge *v.* Rohse, 25 Or. 51, 34 Pac. 874; Mitchell *v.* Holman, 30 Or. 280, 47 Pac. 616; Stein *v.* Phillips, 47 Or. 545, 84 Pac. 793.

Pennsylvania. — Sylvius *v.* Kosek, 117 Pa. St. 67, 11 Atl. 392, 2 Am. St. Rep. 645.

Tennessee. — Sawyers *v.* Sawyers, 106 Tenn. 597, 61 S. W. 1022.

Wisconsin. — Harter *v.* Christoph, 32 Wis. 245; James *v.* Cutler, 54 Wis. 172, 180, 10 N. W. 147; Silbar *v.* Ryder, 63 Wis. 106, 23 N. W. 106.

Wyoming. — Stoll *v.* Nagle, 86 Pac. 26.

22. *Alabama.* — Campbell *v.* Hatchett, 55 Ala. 548 ("in all cases, unless the mistake is admitted, it must be proved by clear, exact, and satisfactory evidence that the mistake exists — that the writing deviates from the intention and understanding of both parties at the time of its execution, or the court will decline interference"); Ohlander *v.* Dexter, 97 Ala. 476, 12 So. 51; Guilmartin *v.* Urquhart, 82 Ala. 570, 1 So. 897; Tyson *v.* Chestnut, 100 Ala. 571, 13 So. 763; Smith *v.* Allen, 102 Ala. 406, 14 So. 760; Burnell *v.* Morris, 106 Ala. 349, 18 So. 82; Kilgore *v.* Redmill, 121 Ala. 485, 25 So. 766; Folmar *v.* Lehman-Durr Co., 41 So. 750.

Missouri. — Tesson *v.* Atlantic Mut. Ins. Co., 40 Mo. 33, 93 Am. Dec. 293.

New York. — Kent *v.* Manchester, 29 Barb. 595.

Tennessee. — Wood *v.* Goodrich, 9 Yerg. 266; Perry *v.* Pearson, 1 Humph. 431; Helm *v.* Wright, 2 Humph. 72; Bailey *v.* Bailey, 8 Humph. 230; Davidson *v.* Greer, 3 Sneed 384; Barnes *v.* Gregory, 1 Head 230; Talley *v.* Courtney, 1 Heisk. 715; Johnson *v.* Johnson, 8 Baxt. 261; Kelley *v.* McKinney, 5 Lea 164; Deakins *v.* Alley, 9 Lea 494; Rogers *v.* Smith (Tenn. Ch. App.), 48 S. W. 700.

Wisconsin. — Harrison *v.* Juneau Bank, 17 Wis. 340.

23. Shay *v.* Pettes, 35 Ill. 360.

24. Avery *v.* Chappel, 6 Conn. 270, 16 Am. Dec. 53; Kuchenbeiser *v.* Beckert, 41 Ill. 172; Goltra *v.* Sanasack, 53 Ill. 456; Sapp *v.* Phelps, 92 Ill. 588; Canedy *v.* Marcy, 13 Gray (Mass.) 373 ("the evidence must make it clear"); Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232.

25. *Georgia.* — Greer *v.* Caldwell, 14 Ga. 207, 215, 58 Am. Dec. 553.

Massachusetts. — Sawyer *v.* Hovey, 3 Allen 331, 81 Am. Dec. 659; Canedy *v.* Marcy, 13 Gray 373.

New York. — Curtis *v.* Giles, 7 Misc. 590, 28 N. Y. Supp. 489; Albro *v.* Gowland, 98 App. Div. 474, 90 N. Y. Supp. 796.

North Carolina. — Southern Finishing & W. Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681 ("by strong and convincing proof, and in the clearest and most satisfactory manner").

West Virginia. — Weidebusch *v.* Hartenstein, 12 W. Va. 760; Fishbach *v.* Ball, 34 W. Va. 644, 12 S. E. 856.

26. *California.* — Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 8 Am. St. Rep. 823.

and most convincing.[27] In others that it must be clear, positive and convincing,[28] or clear, full and decisive,[29], or, by the clearest and most unequivocal evidence,[30] or clear, unequivocal and satisfactory,[31]

Illinois. — Smith *v.* Rust, 112 Ill. App. 84; Gray *v.* Merchants' Ins. Co., 113 Ill. App. 537.

North Carolina. — Southern F. & W. Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681.

North Dakota. — Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301.

Ohio. — Markey *v.* Waldo, 18 Ohio C. C. 849 (in a suit to reform a contract).

Oregon. — Foster *v.* Schmeer, 15 Or. 363, 15 Pac. 626.

Vermont. — Goodell *v.* Field, 15 Vt. 448.

27. Goerke *v.* Rodgers, 75 Ark. 72, 86 S. W. 837; Hunter *v.* Bilyeu, 30 Ill. 228, 248; McTucker *v.* Taggart, 29 Iowa 478.

28. *Alabama.* — Sellers & Co. *v.* Grace, 43 So. 716.

Nebraska. — Topping *v.* Jeanette, 64, Neb. 834, 90 N. W. 911.

New York. — Christopher & T. St. R. Co. *v.* Twenty-third St. R. Co., 149 N. Y. 51, 43 N. E. 538; Jamaica Sav. Bank *v.* Taylor, 72 App. Div. 567, 76 N. Y. Supp. 790; Dougherty *v.* Lion F. Ins. Co., 41 Misc. 285, 84 N. Y. Supp. 10; Roussel *v.* Lux, 39 Misc. 508, 90 N. Y. Supp. 341.

Pennsylvania. — Thayer *v.* Seep, 168 Pa. St. 414, 31 Atl. 1072; Snyder *v.* Phillips, 25 Pa. Super. Ct. 648 (*holding* that an instruction to the jury that the evidence must be "clear, precise, and convincing," was correct).

29. *Arkansas.* — McGuigan *v.* Gaines, 71 Ark. 614, 77 S. W. 52; Tillar *v.* Wilson, 96 S. W. 381; Foster *v.* Beidler, 96 S. W. 175; Arkansas Mut. F. Ins. Co. *v.* Witham, 101 S. W. 721.

California. — Hathaway *v.* Brady, 23 Cal. 121 ("must clearly and fully establish the fact").

Iowa. — Bowman *v.* Besley, 122 Iowa 42, 97 N. W. 60.

Kansas. — McCormick Harv. Mach. Co. *v.* Hayes, 7 Kan. App. 141, 53 Pac. 70.

Kentucky. — Forman *v.* Woods, 20 Ky. L. Rep. 1700, 50 S. W. 61; Woods *v.* Inman, 20 Ky. L. Rep. 1700, 50 S. W. 61.

Massachusetts. — German-American Ins. Co. *v.* Davis, 131 Mass. 316; Richardson *v.* Adams, 171 Mass. 447, 50 N. E. 941.

New York. — Lyman *v.* United Ins. Co., 17 Johns. 373.

North Carolina. — Kornegay *v.* Everett, 99 N. C. 30, 5 S. E. 418.

Vermont. — Shattuck *v.* Gay, 45 Vt. 87.

Virginia. — Leas' Exr. *v.* Eidson, 9 Gratt. 277.

Wisconsin. — Newton *v.* Holley, 6 Wis. 592.

30. *Arkansas.* — Carnall *v.* Wilson, 14 Ark. 482.

Georgia. — Wyche *v.* Greene, 11 Ga. 159, 176; Wall *v.* Arrington, 13 Ga. 88 (equity will require "the strongest and clearest evidence to establish the mistake").

Kentucky. — Overstreet *v.* Mouser, 14 Ky. L. Rep. 480 (suit to reform an antenuptial contract on account of a mistake as to its legal effect).

Maryland. — Hall *v.* Clagett, 2 Md. Ch. 151 ("the mistake must be made out in the most unequivocal manner, and to the entire satisfaction of the court"); Philpot *v.* Elliott, 4 Md. Ch. 273 ("it is indispensably necessary that it [the mistake] be demonstrated in the clearest and most unequivocal manner, for if there be a reasonable doubt upon the subject the court must withhold its aid").

Missouri. — Frederick *v.* Henderson, 94 Mo. 98, 7 S. W. 186.

New York. — Johnstown Min. Co. *v.* Butte & B. Min. Co., 60 App. Div. 344, 70 N. Y. Supp. 257.

Vermont. — Abbott *v.* Flint's Admr., 78 Vt. 274, 62 Atl. 721.

Wisconsin. — McClellan *v.* Sanford, 26 Wis. 595.

31. Gelpcke *v.* Blake, 15 Iowa 387, 83 Am. Dec. 418; Tufts *v.* Larned, 27 Iowa 330; Murphy *v.* First Nat. Bank, 95 Iowa 325, 63 N. W. 702;

or the most unequivocal,[32] or the strongest and most overwhelming,[33] or free from doubt.[34] While in some decisions the rule is stated thus: "The mistake should be plain; and it should be clearly made out by proofs which are satisfactory,"[35] or "clear and strong, so as to establish the mistake to the entire satisfaction of the court."[36]

C. Reasonable Doubt Rule. — Some courts have applied the rule of evidence which obtains in criminal prosecutions to suits for reformation and require that a party who seeks a decree reforming a written instrument shall prove beyond a reasonable doubt the fact that it does not, owing to a mistake therein, express the real intention and agreement of the parties; and it has been held that the degree of evidence required is such as to leave no fair and reasonable doubt upon the mind that the instrument does not embody the final intentions of the parties,[37] or such as will strike all minds alike

Chapman *v.* Dunwell, 115 Iowa 533, 88 N. W. 1067; Stroupe *v.* Bridger (Iowa), 90 N. W. 704.

32. Wyche *v.* Greene, 16 Ga. 49, 63 (especially where the grantor himself was the draftsman of the instrument); Gelpcke *v.* Blake, 15 Iowa 387, 83 Am. Dec. 418; State *v.* Frank's Admr., 51 Mo. 98 (reformation of a bond against a surety).

33. Rogers *v.* Smith, 4 Pa. St. 93, is a case where it was sought to reform a deed of marriage settlement so as to diminish the rights of the wife.

34. Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

35. Wyche *v.* Greene, 11 Ga. 159; French *v.* Asher Lumb. Co. (Ky.), 41 S. W. 261; Gillespie *v.* Moon, 2 Johns. Ch. (N. Y.) 585; Lyman *v.* United Ins. Co., 2 Johns. Ch. (N. Y.) 630; Bradford *v.* Union Bank, 13 How. (U. S.) 57.

36. Admrs. of Ligon *v.* Rogers, 12 Ga. 281, 288; Adair *v.* Adair, 38 Ga. 46; Cross *v.* Bean, 81 Me. 525, 17 Atl. 710; Case *v.* Peters, 20 Mich. 298; Gillespie *v.* Moon, 2 Johns. Ch. (N. Y.) 585.

37. *Connecticut.* — Bishop *v.* Clay Ins. Co., 49 Conn. 167 ("the evidence must be such as to leave no reasonable doubt upon the mind of the court" as to in what the mistake consists and how it should be corrected).

Florida. — Franklin *v.* Jones, 22 Fla. 526 ("the writing should be taken to be the sole expositor of the intent of the parties until the contrary is established by full and satisfactory proof beyond reasonable controversy").

Georgia. — Muller *v.* Rhuman, 62 Ga. 332.

Idaho. — Houser *v.* Austin, 2 Idaho 204, 10 Pac. 37.

Illinois. — Douglas *v.* Grant, 12 Ill. App. 273.

Indiana. — Linn *v.* Barkey, 7 Ind. 69 ("to authorize a court of equity to reform a written instrument on the ground of mistake, it must be established beyond reasonable controversy, and be made entirely plain, that the instrument does not express the intent of the parties").

Iowa. — Tufts *v.* Larned, 27 Iowa 330 ("the writing ought to be accepted as a full and correct expression of the contract of the parties until the contrary is established beyond fair or reasonable controversy").

Maryland. — Hall *v.* Clagett, 2 Md. Ch. 151.

Massachusetts. — Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290, 317 (approving an instruction to the jury that "proof beyond a reasonable doubt is such a degree of proof as the jury would act upon in important affairs of life, and as would satisfy their judgments and consciences of the fact to be proved").

Mississippi. — Jones *v.* Jones, 41 So. 373 ("practically to the exclusion of every other reasonable hypothesis").

New Jersey. — Rowley *v.* Flan-

as being unquestionable and free from reasonable doubt,[38] or clear, satisfactory and free from reasonable doubt,[39] or clear, precise and indubitable, that is of such weight and directness as to make out the facts alleged beyond a reasonable doubt.[40]

This is the established rule in Pennsylvania,[41] although a case lately decided in that state has apparently laid down one more in accordance with the present trend of authority.[42] Other courts have said that the proof must be to the degree of moral certainty,[43]

nelly, 30 N. J. Eq. 612 ("until a mistake has been established by such force of proof as leaves no rational doubt of the fact, no change in the writing sought to be reformed is entitled to be called a correction").

New York. — Coles *v.* Bowne, 10 Paige Ch. 526, 535; Devereux *v.* Sun Fire Office, 4 N. Y. Supp. 655, 20 N. Y. St. 584. See Christopher & T. St. R. Co. *v.* Twenty-third St. R. Co., 149 N. Y. 51, 43 N. E. 538 (but this is not now the rule in New York); Jamaica Sav. Bank *v.* Taylor, 72 App. Div. 567, 76 N. Y. Supp. 790; Southard *v.* Curley, 134 N. Y. 148, 31 N. E. 330, 30 Am. St. Rep. 642, 16 L. R. A. 561.

Virginia. — Shenandoah Val. R. Co. *v.* Dunlop, 86 Va. 346, 10 S. E. 239 (the party alleging the mistake must show, by evidence which leaves no reasonable doubt upon the mind of the court, not only exactly in what the mistake, if any, consists, but the correction that should be made. A rule less rigid would be frought with infinite mischief, since it would be destructive to the certainty and safety of written contracts); Donaldson *v.* Levine, 93 Va. 472, 25 S. E. 541.

38. Moser *v.* Libenguth, 2 Rawle (Pa.) 428; Lake *v.* Meacham, 13 Wis. 355.

39. *United States.* — Hearne *v.* Marine Ins. Co., 20 Wall. 488.

California. — Cox *v.* Woods, 67 Cal. 317, 7 Pac. 722.

Georgia. — Wyche *v.* Greene, 11 Ga. 159, 171 (the mistake should be made out by evidence clear of all reasonable doubt).

Iowa. — Clute *v.* Frasier, 58 Iowa 268, 12 N. W. 327; Wachendorf *v.* Lancaster, 61 Iowa 509, 14 N. W. 316, 16 N. W. 533; Pyne *v.* Knight, 130 Iowa 113, 106 N. W. 505.

Massachusetts. — Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45.

New Jersey. — Whelen *v.* Osgoodby, 62 N. J. Eq. 571, 50 Atl. 692 ("either mistake or fraud must be proved not only by the weight of evidence, but beyond a rational doubt").

Ohio. — Rothchild *v.* Bell, 10 Ohio Dec. 179.

40. Drachler *v.* Foote, 88 App. Div. 270, 84 N. Y. Supp. 977.

41. *Pennsylvania.* — Stine *v.* Sherk, 1 Watts & S. 195; Edmond's Appeal, 59 Pa. St. 220; Phillips *v.* Meily, 106 Pa. St. 536; Highlands *v.* Philadelphia R. Co., 209 Pa. St. 286, 58 Atl. 560; Boyertown Nat. Bank *v.* Hartman, 147 Pa. St. 558, 23 Atl. 842, 30 Am. St. Rep. 759; Honesdale Glass Co. *v.* Storms, 125 Pa. St. 268, *s. c. sub nom.* Storms *v.* Dorflinger, 17 Atl. 347; Hart *v.* Carroll, 85 Pa. St. 508; Thomas *v.* Loose, 114 Pa. St. 35, 6 Atl. 326; Jones *v.* Backus, 114 Pa. St. 120, 6 Atl. 335; North *v.* Williams, 120 Pa. St. 109, 13 Atl. 723, 6 Am. St. Rep. 695. *In re* Sutch's Estate, 201 Pa. St. 317, 50 Atl. 946; Graham *v.* Carnegie Steel Co., 66 Atl. 103 (and of such weight and directness as to carry conviction to the mind); Williamson *v.* Carpenter, 205 Pa. St. 164, 54 Atl. 718; Replogle *v.* Singer, 19 Pa. Super. Ct. 442 (where the plaintiff's testimony is full of uncertainty he will be denied reformation); Hastings *v.* Burchfield, 28 Pa. Super. Ct. 309 (suit to reform a lease by inserting a covenant for quiet enjoyment against strangers).

42. Highlands *v.* Philadelphia R. Co., 209 Pa. St. 286, 58 Atl. 560, holds that the proof need not be absolutely indubitable, but only that it must be such as to carry a clear conviction of the truth of the allegations as to mistake.

43. Spare *v.* Home Mut. Ins. Co.,

or as much to the satisfaction of the court as if admitted,[44] or by incontrovertible proof,[45] or almost incontrovertible,[46] or conclusive,[47] or strong and conclusive,[48] or clear, satisfactory and conclusive,[49] or the most satisfactory.[50]

The rule requiring the proof of mistake or fraud to be clear, satisfactory and decisive has been held by some courts to mean that there must be sufficient evidence to satisfy an unprejudiced mind beyond a *reasonable doubt,* but not necessarily that the court or jury must be convinced beyond all doubt whatever.[51]

The "reasonable doubt rule" has been expressly repudiated in a number of decisions, and in a comparatively late New York case, which carefully reviews a number of the decisions upon this question; it is held that "this strong rule of criminal procedure has not become a part of the practice in civil actions of this character (reformation of instruments) and all that is necessary is that a plain mistake be clearly made out by satisfactory proofs."[52] Other courts have also held that the "reasonable doubt" rule does not obtain in suits for reformation of instruments.[53]

19 Fed. 14; Bowell *v.* Heaton, 40 Kan. 36, 18 Pac. 901.

"We understand the rule to be, in actions to reform written instruments on the ground of mutual mistake, that the evidence must be clear and convincing, when, as in this case, it is parol. It is not enough that there is shown a probability of mistake but there must be a moral certainty of it; in other words, it must be established beyond a reasonable doubt." Schaefer *v.* Mills, 69 Kan. 25, 76 Pac. 436.

44. Ford *v.* Joyce, 78 N. Y. 618.

45. Henderson *v.* Stokes, 42 N. J. Eq. 586, 8 Atl. 718 ("the rule is thus inexorable to save the court from the danger of making contracts for parties").

46. Beard *v.* Hubble, 9 Gill (Md.) 420 ("almost incontrovertible proof").

47. Dulany *v.* Rogers, 50 Md. 524, 533; Griswold *v.* Smith, 10 Vt. 452.

48. Vaughn *v.* Digman, 19 Ky. L. Rep. 1340, 43 S. W. 251.

"The evidence should be strong and conclusive, and in some cases it has been held, should be beyond all reasonable doubt. But perhaps this expression is too strong. There must be at least very conclusive evidence that by mistake the contract does not represent the intention of the parties." Little *v.* Webster, 48 Hun 620, 1 N. Y. Supp. 315.

49. Cummings *v.* Monteith, 61 Iowa 541, 16 N. W. 591.

50. Hunt *v.* Gray, 76 Iowa 268, 41 N. W. 14.

51. Greeley *v.* De Cottes, 24 Fla. 475, 5 So. 239; West *v.* West, 90 Iowa 41, 57 N. W. 639 (where evidence showed that a feeble and aged mother signed a deed prepared by her son); Farley *v.* Bryant, 32 Me. 474 (action to reform a deed as to description).

Evidence which produces a clear conviction of the precise facts in issue is all that is required. The law does not require proof so convincing as to leave no doubt resting on the minds of the jurors. It is enough if there be evidence sufficient to satisfy an unprejudiced mind beyond reasonable doubt. Snyder *v.* Phillips, 25 Pa. Super. Ct. 648.

52. Southard *v.* Curley, 134 N. Y. 148, 31 N. E. 330, 30 Am. St. Rep. 642, 16 L. R. A. 561; Jamaica Sav. Bank *v.* Taylor, 72 App. Div. 567, 76 N. Y. Supp. 790 ("the authorities in this state do not require that the proof should be beyond a reasonable doubt").

53. Miller *v.* Morris, 123 Ala. 164, 27 So. 401; Warrick *v.* Smith, 36 Ill. App. 619, *affirming s. c.* 137 Ill. 504, 27 N. E. 709.

A careful study of the cases upon this subject leads to the conclusion that a strong tendency exists in the later decisions to materially relax the strictness of the rules laid down in the earlier cases. And the true rule would appear to be that laid down in an early Missouri case, that although it is said that the evidence required to prove a mistake must be as satisfactory as if the mistake were admitted, yet this, and similar remarks of judges, form no rule of law to direct courts in dispensing justice; but that when the mind of a judge is entirely convinced upon any disputed question, whether of fact or law, he is bound to act upon the conviction.[54]

D. Best Evidence. — Not only must the evidence be clear and unequivocal, but it must be the best evidence.[55]

E. To Prove Fraud. — Where the error in the instrument is claimed to have occurred through the fraud of the party resisting reformation, such fraud must of course be clearly proved to entitle the plaintiff to his decree, as in the case of mistake.[56]

F. Where Plaintiff Prepared the Instrument. — Where it appears that the party setting up the alleged mistake himself pre-

" Wherever the answer is overcome by parol proofs, and the mind of the court is satisfied as to the mistake in reducing the agreement of the parties into writing so as not to express their true intent and understanding, the court can and ought to rectify the mistake and prevent the one party from taking a fraudulent or oppressive advantage of the mistake." Inskoe *v.* Proctor, 6 T. B. Mon. (Ky.) 311.

Wall *v.* Meilke, 89 Minn. 232, 94 N. W. 68 (*reversing* Guernsey *v.* American Ins. Co., 17 Minn. 104, which had held that the mistake must be established " clear of all reasonable doubt ").

"It is often said that the mistake must be established indubitably, or beyond a reasonable doubt. Such is not the rule in this state. A preponderance of the evidence is all that is required in any civil action. The express terms of a written instrument, or the relations of the parties concerned therein, may raise such presumptions that proof of more than ordinary cogency is required to create a preponderance. Until overcome by clear and convincing proof the terms of the instrument stand as evidence of the intention of the parties. This is as far as the rule goes. Where the extrinsic evidence is full, unequivocal and satisfactory the terms of the instrument alone will not suffice to sustain a decree denying reformation." Topping *v.* Jeanette, 64 Neb. 834, 90 N. W. 911.

Harding *v.* Long, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775, holds that an instruction to the jury that they must be satisfied beyond all reasonable doubt is erroneous, and states the true rule to be that satisfactory proof is all that is required.

Highlands *v.* Philadelphia & R. Co., 209 Pa. St. 286, 58 Atl. 560, holds that proof need not be indubitable, but that it must carry clear conviction of its truth.

54. Leitensdorfer *v.* Delphy, 15 Mo. 160, 167, 55 Am. Dec. 137 (*approved* in Williamson *v.* Brown, 195 Mo. 313, 93 S. W. 791); Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823 (where the court is satisfied relief will not be denied simply because of a conflict of evidence as to the mistake).

55. "The failure to examine the subscribing witnesses or satisfactorily to account for their not being examined, cast a shade of suspicion over the cause of the complainant, and induced the court to regard with more jealousy, and examine with stricter scrutiny, the less convincing proof upon which he relied." Kent *v.* Lasley, 24 Wis. 654.

56. Griswold *v.* Hazard, 26 Fed. 135.

pared the instrument which he seeks to have reformed,[57] or caused it to be prepared by his own attorney, he will be required to establish his case by especially clear proof.[58]

G. Against Subsequent Purchaser or Assignee. — It has been held that where the reformation of an instrument is sought as against a subsequent *bona fide* purchaser without notice, the court will demand even stricter proof than when it is sought as against one of the original parties to the instrument;[59] and some of the decisions hold that the burden is upon the complainant to show that a purchaser had notice of the alleged mistake.[60]

Even where all the parties to an instrument join in the application for its reformation, the courts require clear proof of the alleged mistake where the reformation sought would affect the rights of third parties acquired under the instrument in question.[61]

H. After Long Delay. — Where the party seeking reformation has allowed a long period of time to elapse before seeking to have the instrument altered, especially strong evidence will be required before equity will interfere to reform the instrument.[62] On the

57. Wells *v.* Ogden, 30 Wis. 637; Wyche *v.* Greene, 16 Ga. 47, 63.

58. Vary *v.* Shea, 36 Mich. 388 (in such a case the mistake must be shown "beyond cavil").

59. McIntosh *v.* Saunders, 68 Ill. 128 (where a deed was sought to be reformed as to description of the land conveyed); Bent *v.* Coleman, 89 Ill. 364; Harms *v.* Coryell, 177 Ill. 496, 53 N. E. 87; Peck *v.* Arehart, 95 Ill. 113.

60. Snyder *v.* Grandstaff, 96 Va. 473, 31 S. E. 647.

61. Brocking *v.* Straat, 17 Mo. App. 296 (where the effect of the reformation of the deed would be to postpone a lien); Devereux *v.* Sun Fire Office, 4 N. Y. Supp. 655, 20 N. Y. St. 584.

62. *United States.* — Travelers' Ins. Co. *v.* Henderson, 69 Fed. 762, 16 C. C. A. 390 (especially where some event has occurred rendering any alteration in the terms of the policy of great importance to the party seeking reformation).

California. — Hochstein *v.* Berghauser, 123 Cal. 681, 56 Pac. 547 (where over twenty years had elapsed).

Georgia. — Wyche *v.* Greene, 11 Ga. 159 (where over thirty years have elapsed, the mistake must be made out by the most explicit and unequivocal evidence).

Illinois. — Nicoll *v.* Mason, 49 Ill. 358 (equity will not interfere, after over twenty-five years lapse of time to reform a deed unless there be the most positive and satisfactory evidence of the intention of the parties upon execution of the deed); Harms *v.* Coryell, 177 Ill. 496, 53 N. E. 87 (where thirty years had elapsed and the grantor had been a party to several suits involving his title to the land described in the deed which he sought to have reformed); Seeley *v.* Baldwin, 185 Ill. 211, 56 N. E. 1075 (where the grantor, whose heirs seek reformation, himself wrote the deed and the action was brought thirty years after such grantor's death).

Iowa. — First Presbyterian Church *v.* Logan, 77 Iowa 326, 42 N. W. 310 (where ten years had elapsed and the evidence was somewhat conflicting).

Kentucky. — Yocum *v.* Foreman, 14 Bush 494 (where the contract had been recognized by all parties for eleven years without discovery of any mistake in its provisions, it will not be reformed upon proof of admissions of one of the parties, together with other evidence contradicting its terms).

Maryland. — Keedy *v.* Nally, 63 Md. 311 (after lapse of twenty-two

other hand, a long lapse of time, during which the party resisting reformation, apparently by his conduct or silence, has acquiesced in the plaintiff's conception of the real agreement between them, is a strong circumstance in favor of granting the reformation sought.[63]

I. Where the Mistake Is Apparent Upon the Instrument.

years and the death of one party, reformation denied); Stiles *v.* Willis, 66 Md. 552, 8 Atl. 353 (after eleven years, reformation denied).

Missouri. — Bobb *v.* Bobb, 89 Mo. 411, 4 S. W. 511 (where the trust created by the deed sought to be reformed had been administered for twenty-four years without objection); Davidson *v.* Mayhew, 169 Mo. 258, 68 S. W. 1031 (where the grantee seeking to reform a deed had possession thereof for fifteen years prior to the grantor's death and brought his action four years after such death).

Montana. — Fitschen *v.* Thomas, 9 Mont. 52, 22 Pac. 450 (where suit was not commenced until two years after discovery of the mistake).

New Jersey. — Durant *v.* Bacot, 15 N. J. Eq. 411; Paulison *v.* Van Iderstine, 29 N. J. Eq. 594 (refusing to reform a deed and mortgage, as to description, six years after execution); Hupsch *v.* Resch, 45 N. J. Eq. 657, 18 Atl. 372 (refusing reformation of a deed after nine years had elapsed and the grantee had died).

Ohio. — Whitney *v.* Denton, 3 Wkly. L. Bul. 870 (evidence almost amounting to a demonstration will be required to authorize reformation of a contract executed seventeen years previously).

Pennsylvania. — Hunter's Estate, 147 Pa. St. 549, 23 Atl. 973 (refusing to reform a deed thirty years after its execution, on the testimony of one witness alone).

Tennessee. — Campbell *v.* Foster, 2 Tenn. Ch. 402 (after long delay and the death of interested parties to an instrument, reformation will not be granted except upon proof beyond a reasonable doubt); Rogers *v.* Smith (Tenn. Ch. App.), 48 S. W. 700 (where the plaintiff had waited four years after being informed that an instrument which he had thought a deed was in reality a mortgage, before suing for its reformation); Ferring *v.* Fleischman (Tenn. Ch. App.) 39 S. W. 19 (refusing to reform a deed over twenty-one years after execution).

Virginia. — Persinger's Admr. *v.* Chapman, 93 Va. 349, 25 S. E. 5 (a partnership settlement will not be reformed where no objection was made for two years, except upon the clearest evidence).

But see Miller *v.* Small, 10 Ky. L. Rep. 859, 10 S. W. 810 (where a deed was reformed after ten years lapse of time, the evidence of mistake being clear); Harrington *v.* Brewer, 56 Mich. 301, 22 N. W. 813 (reformation decreed after fifteen years, plaintiff having relied on defendant's false representations and defendant having failed to act); Dod *v.* Paul, 43 N. J. Eq. 302, 11 Atl. 817 (reforming deed after seventeen years, the evidence clearly showing that by mistake the wrong lot number was inserted), and Skerrett *v.* Presbyterian Soc., 41 Ohio St. 606 (reforming a deed as to description by lot number after fifty years, where both parties had acted upon the theory that the land conveyed was that described in the description sought to be substituted).

63. Harrington *v.* Brewer, 56 Mich. 301, 22 N. W. 813 (reforming a contract to convey land after fifteen years lapse of time, on evidence that defendant had fraudulently inserted the purchase price, made false representations to plaintiff, an illiterate man, and had allowed him to make valuable improvements and had never demanded interest as provided by the agreement as written); Skerrett *v.* Presbyterian Soc., 41 Ohio St. 606 (where defendant had for fifty years occupied the lot which plaintiff claimed the parties had intended to convey); Kellogg *v.* Chapman, 30 Fed. 882 (where defendant had failed for twenty-two years to assert any title to the land alleged by plaintiff

Where an inspection of the instrument sought to be corrected is sufficient to disclose the mistake claimed, no other evidence will be required.[64]

J. Where Mistake Is Admitted or Appears From Conduct of Parties. — Where the mistake is admitted, the power to relieve is said to be as clear as when the mistake is shown by proof, either parol or written.[65] Where the evidence of the acts and conduct of

to have been omitted from the deed by mistake).

64. Where the face of the deed shows the grantor's intention to convey the fee, but the deed does not operate to do so, it will be reformed on the evidence of the instrument itself. Sampson *v.* Mudge, 13 Fed. 260.

But see Mitchell *v.* Wellman, 80 Ala. 16, *holding* that the existence of a covenant to reconvey was not sufficient to show that a conveyance was intended as a mortgage.

Wagenblast *v.* Washburn, 12 Cal. 208, is a case where use of word "west" instead of "east" made lot conveyed apparently extend into the middle of a street.

In Eggspieller *v.* Nockles, 58 Iowa 649, 12 N. W. 708, a title bond described the property by metes and bounds and then referred to it by the name of the whole tract in which it was situated, it being evident that it was the particularly described land and not the tract which was intended to be conveyed.

A recital in a deed that a right of way and water for the purpose of erecting a mill and residence were included in the conveyance, together with a general warranty for said purposes, together with the grantee's admission that he intended at the time to build such structure, is sufficient evidence to support a finding that an express covenant on the part of the grantee to erect the same was omitted by mistake. Harris *v.* Calmes (Ky.), 38 S. W. 6.

Perry *v.* Knight, 85 Me. 184, 27 Atl. 96, is a case where a deed conveyed a certain interest and contained a claim reserving to the grantor the identical interest conveyed.

Michel *v.* Tinsley, 69 Mo. 442, is a case where the deed sought to be reformed contained words of warranty. The seal and the words "grant, bargain and sell," claimed to have been omitted by mistake, will be added to it without parol testimony to show the mistake.

Pinchback *v.* Bessemer M. & M. Co., 137 N. C. 171, 49 S. E. 106, is a case where the mistake was shown by discrepancies between essential recitals and the description in a deed.

Reep *v.* Lyman, 6 Ohio C. C. (N. S.) 113, holds that where inspection of a note sought to be reformed shows a mistake in the dates specified for maturity of different installments, such mistake need not be shown by other evidence.

Where it is evident on the face of a bond that there was a clerical error in inserting the amount of the penalty, as by writing "$8.—" instead of "$800.—" it will be reformed. Appeal of Clement, 2 Penny (Pa.) 313.

In Abbott *v.* International Bldg. & L. Assn., 86 Tex. 467, 25 S. W. 620, the contract sought to be reformed provided for payment of $26 per month on thirteen shares, "as provided in the by-laws," which were made a part of said contract, the by-laws providing only for payment of $1 on each share.

65. *United States.* — Walden *v.* Skinner, 101 U. S. 577, 583.

Arkansas. — Allen *v.* McGaughey, 31 Ark. 252.

California. — Savings & Loan Soc. *v.* Meeke, 66 Cal. 371, 5 Pac. 624 (reforming mortgage of separate property of a married woman, clerical mistake in description being admitted).

Connecticut. — Palmer *v.* Hartford Ins. Co., 54 Conn. 488, 9 Atl. 248.

Maine. — Peterson *v.* Grover, 20 Me. 363.

Mississippi. — Simmons *v.* North, 3 Smed. & M. 67.

North Carolina. — Kornegay *v.*

the respective parties is so clear as to justify the inference necessary to enable the court to grant the relief sought, direct and positive proof that the instrument does not express the real intention of the parties is not always necessary,[66] and relief will be granted in some cases, not only where the fact of the mistake is expressly established, but where it is fairly inferable from the nature of the transaction.[67]

K. Testimony of Scrivener. — It has been held that the testimony of the draftsman who drew up the instrument sought to be reformed, that he did not draw it in accordance to the instructions of the parties, is entitled to great weight,[68] although his testimony as to absence of instructions on any particular point is not of much weight.[69]

L. Illustrative Examples. — It is manifestly impossible to give anything approaching a complete enumeration of the particular matters or circumstances, evidence of which has been held either sufficient or insufficient to warrant courts of equity in decreeing reformation. Manifestly these things depend almost altogether upon the facts of each individual case and the mind of the particular judge or court. But in the notes will be found grouped together a number of cases which are illustrative, in a general way, of the rules above stated, and in which the evidence reviewed has been held sufficient to authorize reformation on the one hand,[70] or insufficient

Everett, 99 N. C. 30, 5 S. E. 418.

South Carolina. — Sullivan *v.* Latimer, 38 S. C. 417, 17 S. E. 221 (where the language of a deed and the manner of executing it indicate that a seal was intended to be affixed, it will be reformed by adding a seal).

Vermont. — Town of Colchester *v.* Culver, 29 Vt. 111 (where the deed sought to be reformed by adding a seal contains the expression, "Witness my hand and seal," and was properly executed by the grantor, it is apparent that the seal was omitted by mistake).

66. It is not essential that there should be direct and positive proof that the instrument does not express the true intent of the parties where the acts and conduct of the parties warrant the inference necessary to warrant the court in giving the relief sought. Jenner *v.* Brooks, 77 Conn. 384, 59 Atl. 508.

"Such mistake may be established by evidence of the circumstances and nature of the transaction and the conduct and relation of the parties thereto, provided the inference to be drawn therefrom clearly and satisfactorily prove the alleged mistake." Massey *v.* Lindeni (Minn.), 107 N. W. 146.

67. Wyche *v.* Greene, 11 Ga. 159, 172.

68. "Whatever courts may have held as to the nature or character of proof necessary to correct mistakes in deeds, we suppose none can be more forcible than the testimony of the draftsman himself, that he had not drawn the instrument according to the instructions he received." Cooke *v.* Husbands, 11 Md. 492, 511.

Evidence that the person who drew up the mortgage intended to include other land than that covered thereby is strong evidence of the mistake of description alleged. Marks *v.* Taylor, 23 Utah 152, 63 Pac. 897.

69. Showman *v.* Miller, 6 Md. 479.

70. **Acknowledgment.** — Testimony of the notary public who took the acknowledgment sought to be reformed, that all the requisites to a valid acknowledgment were observed and that by mistake he at-

tached a defective certificate is sufficient. Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823.

Assignment. — Reynolds *v.* Meelick, 17 Iowa 585.

Bill of Sale. — Testimony that agreement made at time of sale of a slave was that his soundness was not warranted and that warranty was put in subsequently-drawn bill of sale under mistaken idea as to its effect, is sufficient. Clopton *v.* Martin, 11 Ala. 187.

Bond. — Foley *v.* Hamilton, 89 Iowa 686, 57 N. W. 439.

Contracts. — Hartstein *v.* Hartstein, 74 Wis. 1, 41 N. W. 721, (contract for support of parents); Kessel *v.* Kessel, 79 Wis. 289, 48 N. W. 382, (direct evidence that the party seeking reformation did not understand the English language, and failed to understand the instrument when explained to him, and that the defendant gave certain instructions to the scrivener, as to preparation of the instrument, which were not followed out by him, which facts defendant failed to deny).

Contract of Agency. — Wyckoff *v.* Victor Sew. Mach. Co., 43 Mich. 309, 5 N. W. 405 (evidence of two witnesses as against that of one).

Contracts to Convey Realty. Moore *v.* Copp, 119 Cal. 429, 51 Pac. 630 (evidence that plaintiff, an old woman, without business experience, and having implicit trust in the defendant who himself prepared the instrument, signed a contract of sale without reading it, thinking it was a lease); McMillin *v.* McMillin, 7 T. B. Mon. (Ky.) 560 (testimony that by the contract as executed land was included which the grantor did not own or claim); Smith *v.* Watson, 88 Iowa 73, 55 N. W. 68 (testimony of attorney who drew the contract that he failed to make it express the intent of the parties, of the agent who negotiated the sale, and of the plaintiff himself, as to their real intent); Osterhout & Fox Lumb. Co. *v.* Rice, 93 Mich. 353, 53 N. W. 540 (evidence of custom to reserve pine timber, of knowledge of buyer thereof, and of acquiescence in cutting same by grantor after sale, sufficient to warrant reformation by including pine timber in reservation claim); Fero *v.* Loud & Sons Lumb. Co., 101 Mich. 310, 59 N. W. 603; Hale *v.* Young, 24 Neb. 464, 39 N. W. 406 (testimony of plaintiff, corroborated by that of an agent of defendant and by another disinterested witness); Stryker *v.* Schuyler, 51 Hun 637, 3 N. Y. Supp. 513.

Deeds. — *Illinois.* — Jenkins *v.* Cohen, 138 Ill. 634, 28 N. E. 792; Kyner *v.* Boll, 182 Ill. 171, 54 N. E. 925.

Indiana. — Hamilton County *v.* Owens, 138 Ind. 183, 37 N. E. 602.

Iowa. — West *v.* West, 90 Iowa 41, 57 N. W. 639 (testimony of several witnesses and evidence of defendant's remark that "he had got the" plaintiff).

Kansas. — Schaefer *v.* Mills, 69 Kan. 25, 76 Pac. 436.

Kentucky. — Worley *v.* Tuggle, 4 Bush 168 (evidence of draftsman that parties had instructed him to include provision for vendor's lien in deed, and evidence that both he and the parties thought the deed so provided, whereas in law it did not); Moye *v.* Lane, 12 S. W. 154 (testimony of the surveyor, corroborated by that of other witnesses, in an action to reform a deed as to description, that a certain corner was located elsewhere than as called for in the deed); Barnes *v.* Barnes, 12 Ky. L. Rep. 708, 15 S. W. 1 (evidence of draftsman of a deed sought to be reformed, and of the grantor and one grantee that grantor had intended the deed to convey one-half to a son and one-half to his wife).

Michigan. — Kinyon *v.* Young, 44 Mich. 339, 6 N. W. 835; Damm *v.* Moon, 48 Mich. 510, 12 N. W. 679 (where evidence showed that according to description sought to be reformed, the boundary line of the lot sold would cut through the grantor's own residence); Strickland *v.* Barber, 76 Mich. 310, 43 N. W. 449.

Minnesota. — Layman *v.* Minneapolis Realty Co., 60 Minn. 136, 62 N. W. 113; Martini *v.* Christensen, 60 Minn. 491, 62 N. W. 1127.

Missouri. — Cooper *v.* Deal, 114 Mo. 527, 22 S. W. 31.

New Jersey. — Loss *v.* Obry, 22 N. J. Eq. 52 (evidence that plaintiff intended to convey only a part of the

on the other to warrant the court to grant the relief sought.[71]

2. Nature of Mistake. — A. Evidence of Mistake of Law Insufficient. — It is the rule in a number of the states that evidence of a mistake of law is not sufficient to sustain a petition for the reformation of an instrument in writing; that the evidence required to warrant the court in decreeing such relief

tract described and that defendant had subsequently purchased another part of such tract from plaintiff).

Pennsylvania. — Highlands *v.* Philadelphia & R. Co., 209 Pa. St. 286, 58 Atl. 560.

Vermont. — Town of Colchester *v.* Culver, 29 Vt. 111, and Sullivan *v.* Latimer, 38 S. C. 417, 17 S. E. 221 (both holding that the fact that the deed has the clause "witness my hand and seal," and was properly executed by the grantor, is sufficient evidence that the seal was omitted by mistake).

Washington. — Seward *v.* Spurgeon, 9 Wash. 74, 37 Pac. 303.

Fire Insurance Policies. — North American Ins. Co. *v.* Whipple, 2 Biss. 418, 18 Fed. Cas. No. 10,315; Lancashire Ins. Co. *v.* Lucas, 17 Ky. L. Rep. 1324, 34 S. W. 899 (evidence that plaintiff applied in his own name for a policy insuring property to which he alone had title, and only discovered after a loss that it had been made payable to his wife, held sufficient to authorize reformation as to name of insured); Grand View Bldg. Assn. *v.* Northern Assur. Co. (Neb.), 102 N. W. 246.

Leases. — Wilson *v.* Moriarty, 88 Cal. 207, 26 Pac. 85 (evidence of plaintiff's absolute illiteracy, of defendant's shrewdness and the confidence in which he was held by plaintiff, and that defendant himself drew the lease but did not read it to plaintiff); Reid *v.* Cook, 88 Iowa 717, 54 N. W. 353 (evidence that corn, in which the rent was to be paid, was to be measured as under a prior lease and of how it was measured thereunder).

Mortgages. — Giselman *v.* Starr, 106 Cal. 651, 40 Pac. 8; Shattuck *v.* Gay, 45 Vt. 87; Murdoch *v.* Leonard, 15 Wash. 142, 45 Pac. 751 (in an action to reform a mortgage as to description, evidence that defendants had received the rents of the property claimed by plaintiff to be that really intended to be described, had tried to effect a loan thereon, etc.); Kropp *v.* Kropp, 97 Wis. 137, 72 N. W. 381 (evidence that purchase money, notes and mortgage were made on sale of individual property of K. and that the papers were all delivered to him, and that all payments were made to him; whereas by mistake of the scrivener the notes and mortgage were made payable to K's wife).

Promissory Notes. — Inksoe *v.* Proctor, 6 T. B. Mon (Ky.) 311; Turpin *v.* Gresham, 106 Iowa 187, 76 N. W. 680 is a case where note sought to be reformed contained a printed promise to pay the principal five years after date, interest payable annually until paid, and a written recital that it should be payable in eight dollar monthly installments with interest on the amount paid, and the maker and the scrivener testified that the agreement was that during the five years no payments were to be required other than the monthly installments, with interest thereon.

71. Allen *v.* Carter, 8 Mo. App. 585 (the testimony of witnesses present during the negotiations but who are unable to testify as to the final agreement reached by the parties); Gehres *v.* Crawford (Pa.), 9 Atl. 508; Jackson *v.* Payne, 114 Pa. St. 67, 6 Atl. 340 (the unsupported testimony of one of the parties as against the testimony of the other party and the instrument itself); Denny *v.* Barber, 72 Ark. 546, 81 S. W. 1055; Albro *v.* Cowland, 98 App. Div. 474, 90 N. Y. Supp. 796; Joswich *v.* Faber, 93 Minn. 387, 101 N. W. 614.

Acknowledgment. — Spencer *v.* Reese, 165 Pa. St. 158, 30 Atl. 722.

Assignment. — Moran *v.* McLarty, 75 N. Y. 25 (when it appeared that plaintiff had full opportunity to read the instrument prior to execution but failed to do so).

Assignment of Mortgage. — Weed *v.* Whitehead, 1 App. Div. 192, 37 N. Y. Supp. 178.

Antenuptial Contract. — Overstreet *v.* Mouser, 14 Ky. L. Rep. 480.

Application to Purchase Public Land. — Where the descriptions in the application to purchase, filed at the Land Office, in the receiver's duplicate receipt, and in the tract book all tally, evidence that the number of the application was written on another tract on the plat in the Land Office is not sufficient to warrant reformation of the application. Iowa R. Land Co. *v.* Adkins, 38 Iowa 351.

Arbitration Award. — Preston *v.* Whitcomb, 17 Vt. 183 (evidence of one arbitrator).

Bill of Sale. — In Atkinson *v.* Farrington Co. (N. J.), 28 Atl. 315, the scrivener testified that he followed the mutual directions of the parties in drafting the instrument, and the evidence showed that the vendor had full opportunity to examine it before execution.

Building Contracts. — Douglas *v.* Grant, 12 Ill. App. 273.

Contracts. — Sauer *v.* Nehls, 121 Iowa 184, 96 N. W. 759 (to change agreement of loan so that it would constitute a gift from father to son); Meredith *v.* Holmes, 105 Mo. App. 343, 80 S. W. 61 (to show mistake in a contract for the sale of corporation stock); Moran *v.* McLarty, 11 Hun (N. Y.) 66, *s. c. affirmed* 75 N. Y. 25 (evidence that the plaintiff was not cognizant of and did not intend to agree to certain conditions in a contract, it being shown that he had full opportunity for examination); Hirschback *v.* Schmalz, 54 Hun 637, 7 N. Y. Supp. 377 (evidence that plaintiff's purpose in making the contract could not be accomplished unless the clause alleged to have been left out by mistake were inserted, where plaintiff's agent testified that he had read the agreement without objection).

Contracts to Convey Realty. — Albro *v.* Gowland, 98 App. Div. 474, 90 N. Y. Supp. 796.

Deeds. — *Alabama.* — Burnell *v.* Morris, 106 Ala. 349, 18 So. 82 (testimony of mortgagee seeking reformation of a deed executed by himself to the purchaser at the mortgage sale that he employed an attorney to foreclose and prepare a deed for the purchaser, and signed such deed without reading it over, supposing that it contained only a conveyance of his interest as mortgagee, and testimony of the attorney that he made a mistake in drafting it, the defendant introducing evidence to the contrary).

California. — Emery *v.* Lowe, 140 Cal. 379, 73 Pac. 981 (to so reform a deed as to make it a mortgage).

Illinois. — Ruffner *v.* McConnel, 17 Ill. 212, 63 Am. Dec. 362; Kellogg *v.* Hastings, 70 Ill. 598 (evidence in suit to reform a deed so as to make it convey land other than that described therein, that the grantor at the time of execution of the deed owned such other land and not the tract described in the deed as executed); Schwass *v.* Hershey, 125 Ill. 653, 18 N. E. 272; Rexroat *v.* Vaughn, 181 Ill. 167, 54 N. E. 917.

Iowa. — Stewart *v.* McArthur, 77 Iowa 162, 41 N. W. 604; Bowman *v.* Besley, 122 Iowa 42, 97 N. W. 60 (to alter deed so as to charge grantee with assumption of a mortgage); Hoyer *v.* King, 101 Iowa 363, 70 N. W. 695 (refusing to reform by adding a reservation of the right to use a lane).

Kentucky. — Long *v.* Long, 12 Ky. L. Rep. 883, 15 S. W. 853.

Michigan. — Bates *v.* Bates, 56 Mich. 405, 23 N. W. 63.

Minnesota. — Comstock *v.* Comstock, 76 Minn. 396, 79 N. W. 300.

Missouri. — Bartlett *v.* Brown, 121 Mo. 353, 25 S. W. 1108; Fanning *v.* Doan, 139 Mo. 392, 41 S. W. 742 (recollection of three witnesses as to declarations of deceased grantors, made eighteen or nineteen years previously); Underwood *v.* Cave, 176 Mo. 1, 75 S. W. 451 (evidence that a deed included property not owned by the grantor, and the testimony of two witnesses in a general way, as to what land was sold. "There should be some testimony applicable to the instrument sought to be corrected").

New Jersey. — Flaacke *v.* Jersey City, 28 N. J. Eq. 110.

New York. — Dunworth *v.* Dunworth, 13 N. Y. Supp. 489, 37 N. Y. St. 905.

is evidence of a mistake in fact; and that evidence which merely shows that the parties failed to understand the legal effect of the instrument at the time they executed it, or that they executed it in the belief that the terms used therein would have a different effect in law from that which the law imports to such terms, is not sufficient. This is the rule in the federal courts,[72] and in those

Pennsylvania. — Hollenback's Appeal, 121 Pa. St. 322, 15 Atl. 616; Breneisser *v.* Davis, 141 Pa. St. 85, 21 Atl. 508 (deed of executors).

Texas. — Jackson *v.* Martin (Tex. Civ. App.), 73 S. W. 832 (to change a deed into a mortgage).

Virginia. — Fudge *v.* Payne, 86 Va. 303, 10 S. E. 7; French *v.* Chapman, 88 Va. 317, 13 S. E. 479.

Wisconsin. — Wells *v.* Ogden, 30 Wis. 637.

Deed of Gift. — Rumbly *v.* Stainton, 24 Ala. 712.

Sheriff's Deed.— Rice *v.* Poynter, 15 Kan. 263.

Deed of Trust. — In O'Connell *v.* Koob, 16 App. D. C. 161, the testimony of the plaintiff, an illiterate person, was contradicted by that of the attorney who drew the deed, the notary before whom it was acknowledged and the other parties to the instrument.

Fire Insurance Policies. — *United States.* — Spare *v.* Home Mut. Ins. Co., 9 Sawy. 142.

Alabama. — Mitchell *v.* Capital City Ins. Co., 110 Ala. 583, 17 So. 678.

Connecticut. — Bishop *v.* Clay Ins. Co., 49 Conn. 167.

Massachusetts. — German-American Ins. Co. *v.* Davis, 131 Mass. 316.

Nebraska. — Slobodisky *v.* Phenix Ins. Co., 52 Neb. 395, 72 N. W. 483.

New Jersey. —Dougherty *v.* Greenwich Ins. Co. (N. J. Eq.), 33 Atl. 295.

New York. — Bartholomew *v.* Mercantile Ins. Co., 34 Hun 263; Mead *v.* Westchester F. Ins. Co., 64 N. Y. 453.

Wisconsin. — Meiswinkel *v.* St. Paul F. & M. Ins. Co., 75 Wis. 147, 43 N. W. 669, 6 L. R. A. 200.

Leases. — In Chapman *v.* Dunwell, 115 Iowa 533, 88 N. W. 1067, the only witnesses to the negotiations were the parties to the loan, who directly disputed each other, and the plaintiff who drew the lease was himself an attorney. Wood *v.* Gordon, 13 N. Y. Supp. 595.

Phillips *v.* Port Townsend Lodge, 8 Wash. 529, 36 Pac. 476 (evidence in an action to reform a lease by inserting a covenant on the part of the lessor to repair, that several days before execution of the lease the lessor stated that the premises would be kept in good repair).

Mortgages. — American Mtg. Co. *v.* O'Harra, 56 Fed. 278, 5 C. C. A. 502; Cox *v.* Woods, 67 Cal. 317, 7 Pac. 122 (evidence of maker of note that "per annum" should have been "per month" in interest clause of promissory note); Shay *v.* Pettes, 35 Ill. 360 (to reform mortgage by changing description of land therein); Ker. *v.* Eversbed, 41 La. Ann. 15, 6 So. 566; Bartlett *v.* Paterson, 9 Ohio Dec. 73 (evidence in a suit to reform a mortgage so as to include two tracts therein to the effect that a short time prior to execution thereof, the mortgagor had expressed an intention to include all his land).

Promissory Notes. — Botsford *v.* McLean, 42 Barb. (N. Y.) 445 (refusing to add "with interest" to a promissory note on evidence that a chattel mortgage given to secure said note, provided for interest); Ahlborn *v.* Wolff, 118 Pa. St. 242, 11 Atl. 799; Mifflin Co. Nat. Bk. *v.* Thompson, 144 Pa. St. 393, 22 Atl. 714.

72. Hunt *v.* Rousmaniere, 1 Pet. (U. S.) 1, is frequently cited both in support of and as opposed to the theory that evidence will be received to show a mistake of law in an action for reformation. Justice Washington held clearly that "mistake of this character is not ground for reforming a deed founded on such mistake." Andrews *v.* Essex F. & M. Ins. Co., 3 Mason (U. S.) 6; Delaware Ins. Co. *v.* Hogan, 2 Wash. C. C. (U. S.) 4.

of Alabama,[73] Georgia,[74] Indiana,[75] Maine,[76] Maryland,[77] Missouri,[78] New York,[79] and Oregon.[80] It was formerly the rule in Iowa,[81] although the later decisions in that state have departed from it.[82]

It is the intention of the parties at the time the contract is executed which is to be considered and ascertained, and not what they could or would have done, had they anticipated the subsequent developments or consequences which resulted from the contract.[83] Under this rule the evidence, requisite to support a decree of reformation, is such as will show that the error consisted in not drawing up the instrument according to the agreement that was made by the parties;[84] and where the evidence shows that the instrument con-

73. "There can be, in view of the evidence, no denial that the conveyance is precisely such as was designed by the parties; nor can it be contended that there was an agreement it should be of a different nature and character. There is no term introduced which they did not intend, at the time of its execution, should be introduced; nor is there the omission of any term it was intended to introduce. . . . When a written instrument is, in its terms, clear and unambiguous, . . . in the absence of fraud, or of mistake of fact, a court of equity cannot take jurisdiction to reform it, because the parties, or either of them, may not have apprehended its legal effect." Kelly *v.* Turner, 74 Ala. 513.

74. Caudell *v.* Caudell (Ga.), 55 S. E. 1028.

75. Oiler *v.* Gard, 23 Ind. 212, 219; Barnes *v.* Bartlett, 47 Ind. 98 ("to entitle a party to the reformation of a written instrument it must be made to clearly appear that there was a mistake of fact and not of law"); Jones *v.* Sweet, 77 Ind. 187, 193; Baker *v.* Pyatt, 108 Ind. 61, 9 N. E. 112.

76. "Conveyances are not to be reformed and made to read in such manner as may best carry into effect the intentions of the parties as ascertained from parol testimony, when there is no satisfactory proof that they did not use the language which they intended to use." Farley *v.* Bryant, 32 Me. 474.

77. Showman *v.* Miller, 6 Md. 479.

78. Tesson *v.* Atlantic Mut. Ins. Co., 40 Mo. 33, 93 Am. Dec. 293.

79. Keisselbrack *v.* Livingston, 4 Johns. Ch. (N. Y.) 144; Paines *v.* Jones, 75 N. Y. 593; Dougherty *v.* Lion F. Ins. Co., 41 Misc. 285, 84 N. Y. Supp. 10; Duke *v.* Stuart, 45 Misc. 120, 91 N. Y. Supp. 885.

80. Mitchell *v.* Holman, 30 Or. 280, 47 Pac. 616. But see Stephens *v.* Murton, 6 Or. 193, intimating that evidence that the parties thought the instrument would have a different effect might be sufficient, but refusing reformation because it was not shown that the mistake was mutual.

81. Strayer *v.* Stone, 47 Iowa 333.

82. Lee *v.* Percival, 85 Iowa 639, 52 N. W. 543, holds that a promissory note which had been so executed as to bind the individuals who had signed it, had been so signed with with the intention to bind a corporation of which they were the officers, and that the mistake was due to ignorance of the legal effect of the manner of signing such note, was sufficient to warrant a reformation of the note so as to bind the corporation only.

Western Wheeled Scraper Co. *v.* Stickleman, 122 Iowa 396, 98 N. W. 139, holds that evidence that the parties intended to bind the township only, sufficient to authorize reformation of a promissory note so signed as to import a personal liability on the part of the trustees who executed it.

83. Turner *v.* Kelley, 70 Ala. 85, 99; Ohlander *v.* Dexter, 97 Ala. 476, 12 So. 51; Nelson *v.* Davis, 40 Ind. 366 (evidence which merely shows that the parties were mistaken as to the legal effect of the instrument is insufficient to support a decree); Barnes *v.* Bartlett, 47 Ind. 98; Farley *v.* Bryant, 32 Me. 474.

84. Hunt *v.* Rousemaniere, 1 Pet.

tained the precise language the parties intended it should contain, reformation will be denied, although it is shown that the parties were mistaken as to the legal effect of such language.[85]

B. Contrary Rule. — In California, under a statutory provision, a contrary rule prevails, and proof of a mistake of law as to the legal effect of the instrument is sufficient.[86]

This also appears to be the rule in Connecticut,[87] Iowa (under the later decisions in that state),[88] Kentucky,[89] Massachusetts,[90] Minnesota,[91] North Carolina, [92] Ohio,[93] Pennsylvania,[94] Vermont,[95] and Wisconsin.[96]

(U. S.) 1; Andrews *v.* Essex F. & M. Ins. Co., 3 Mason (U. S.) 6; Delaware Ins. Co. *v.* Hogan, 2 Wash. C. C. (U. S.) 4; Kelly *v.* Turner, 74 Ala. 513.

"It must appear that the mistake consisted in not drawing up the instrument according to the agreement that was made. The court cannot supply an agreement that never was made." Tesson *v.* Atlantic Mut. Ins Co., 40 Mo. 33, 93 Am. Dec. 293.

85. *United States.* — Hunt *v* Rousmaniere, 1 Pet. 1.

Alabama. — Kelly *v.* Turner, 74 Ala. 513.

Indiana. — Nelson *v.* Davis, 40 Ind. 366; Easter *v.* Severin, 78 Ind. 540.

Iowa. — Strayer *v.* Stone, 47 Iowa 333.

Maine. — Farley *v.* Bryant, 32 Me. 474.

Maryland. — Showman *v.* Miller, 6 Md. 479.

New York. — Paine *v.* Jones, 75 N. Y. 593.

86. Cal. Civ. Code, § 3401; Ward *v.* Waterman, 85 Cal. 488, 500, 24 Pac. 930.

87. Stedwell *v.* Anderson, 21 Conn. 139.

In Woodbury Sav. Bank *v.* Charter Oak F. & M. Ins. Co., 31 Conn. 517, the court said: "The papers would have been made out right if they had known how to do it, and it is immaterial whether the mistake was one of fact or of law."

88. Lee *v.* Percival, 85 Iowa 639, 52 N. W. 543; Western Wheeled Scraper Co. *v.* Stickelman, 122 Iowa 396, 89 N. W. 139, cited *ante*.

89. Overstreet *v.* Mouser, 14 Ky. L. Rep. 480, is a case admitting evidence to show that the plaintiff, a wife seeking reformation of an antenuptial contract, was mistaken as to the legal effect of the terms used therein, but denying reformation because the evidence was not sufficiently decisive.

90. "But we are of opinion that courts of equity in such cases are not limited to affording relief only in case of mistake of fact; and that a mistake in the legal effect of a description in a deed, or in the use of technical language, may be relieved against upon proper proof." Canedy *v.* Marcy, 13 Gray (Mass.) 373.

91. Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232; Benson *v.* Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816.

Evidence of a mistake as to the legal import of the language used in the instrument, which prevented the real agreement from being embodied therein, is sufficient. Wall *v.* Meilke, 89 Minn. 232, 94 N. W. 688.

92. Kornegay *v.* Everett, 99 N. C. 30, 5 S. E. 418; McKay *v.* Simpson, 41 N. C. (6 Ired. Eq.) 452; Hart *v.* Roper, 41 N. C. (6 Ired. Eq.) 349; Lynam *v.* Califer, 64 N. C. 572; Lutz *v.* Thompson, 87 N. C. 334.

93. McNaughten *v.* Partridge, 11 Ohio 223; Clayton *v.* Freet, 10 Ohio St. 544.

94. Womack *v.* Eacker, 62 N. C. (Phil. Eq.) 161.

95. "When the written contract, as applied to the subject-matter, conveys a different right, or effectuates a different purpose, from that intended by the parties, and that is made clear and certain, courts of equity will not refuse redress, although the language of the contract was intentionally used." Tabor *v.* Cilley, 53 Vt. 487.

96. Green Bay Canal Co. *v.*

A distinction has been drawn between cases where the instrument is what the parties agreed it should be, but its legal effect is unexpected, and those in which the instrument was designed to carry into effect an existing, binding agreement, but by mistake fails to do so, and in the latter class of cases it has been held that it is immaterial whether the evidence discloses a mistake of fact or of law.[97]

V. ADMISSIBILITY.

1. In General. — An action for the reformation of an instrument in writing, being a proceeding in equity,[98] the same strict rules of evidence that are applicable to actions at law do not apply as to admissibility of testimony, and generally speaking, the courts will show great liberality in hearing any evidence which may tend to throw light on the real intentions of the parties, and show what they contemplated in executing the instrument.[99]

Evidence of mistake of fact, as that the instrument contained something which the parties did not intend to incorporate therein, or failed to contain something which it should have contained, is of course admissible to support the contention of a party suing for the reformation of an instrument, and a defendant in an action upon a written instrument may plead mistake therein and ask for reformation thereof by way of defense, and in such cases evidence of mistake is likewise admissible.[1]

2. Evidence of Mistake of Law. — In some of the states it is held that the evidence will be confined to the inquiry as to what the language of the instrument in question was intended to be. This is the rule in the federal courts,[2] and in the courts of Alabama,[3] Indi-

Hewitt, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588 (reforming deed so as to convey an undivided half only, the evidence showing that the parties supposed the deed, as executed, would convey only such interest, whereas it had the legal effect of conveying the whole tract). But see Kyle *v.* Fehley, 81 Wis. 67, 51 N. W. 257, 29 Am. St. Rep. 866 (which apparently recognizes the contrary rule).

97. Oliver *v.* Mutual Com. Ins. Co., 2 Curt. (U. S.) 277, 299. But see Hunt *v.* Rousmaniere, 1 Pet. (U. S.) 1, 15, in which the court held that "mistake of this character (as to the legal effect of the instrument) is not ground for reforming a deed."

98. Clopton *v.* Martin, 11 Ala. 187; Johnson *v.* Crutcher, 48 Ala. 368; Cunningham *v.* Wrenn, 23 Ill. 64.

99. Green *v.* Caldwell, 14 Ga. 207; Southern Finishing & W. Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681; Langdon *v.* Keith, 9 Vt. 299; Allen *v.* Hutchinson, 45 Wis. 259 (any evidence tending to show the intention of the parties is admissible).

1. 1 Rev. Laws Mass. p. 1554, c. 173, 28; Fowle *v.* Pitt, 183 Mass. 351, 67 N. E. 343; Wieneke *v.* Deputy, 31 Ind. App. 621, 68 N. E. 921 (holding evidence of mistake in plaintiff's deed admissible under a general denial in an action for ejectment); Neininger *v.* State, 50 Ohio St. 394, 34 N. E. 633, 40 Am. St. Rep. 674.

2. Hunt *v.* Rousmaniere, 1 Pet. (U. S.) 1.

3. Kelly *v.* Turner, 74 Ala. 513; Meredith *v.* O'Neale, 10 Ala. 828.

ana,[4] Iowa (earlier cases),[5] Maine,[6] Maryland,[7] and New York.[8]

Evidence will not be received as to what the party seeking reformation understood would be the legal effect of the instrument,[9] or to show that the parties, or one of them, supposed that certain words used in the instrument would have an effect different from that given them by law,[10] and this rule is based upon the maxim that all men are conclusively presumed to know the law.[11]

In California, under a statutory provision, the courts will receive evidence as to what the instrument was intended to mean, that is, what was intended by the parties to be its legal consequences, and the evidence will not be confined to showing what the language of the instrument was intended to be.[12] Such evidence is also held admissible in Connecticut,[13] Iowa (later cases),[14] Kentucky,[15] Massachusetts,[16] Minnesota,[17] North Carolina,[18] Ohio,[19] Pennsylvania,[20] Vermont,[21] and Wisconsin.[22]

4. Nelson *v.* Davis, 40 Ind. 366; Jones *v.* Sweet, 77 Ind. 187; Easter *v.* Severin, 78 Ind. 540.

5. Strayer *v.* Stone, 47 Iowa 333.

6. Farley *v.* Bryant, 32 Me. 474.

7. Showman *v.* Miller, 6 Md. 479.

8. Paine *v.* Jones, 75 N. Y. 593.

9. *United States.* — Andrews *v.* Essex F. & M. Ins. Co., 3 Mason 6; Delaware Ins. Co. *v.* Hogan, 2 Wash. C. C. 4.

Alabama. — Clopton *v.* Martin, 11 Ala. 187; Trapp *v.* Moore, 21 Ala. 693; Kelly *v.* Turner, 74 Ala. 513; Ohlander *v.* Dexter, 97 Ala. 476, 12 So. 51.

Connecticut. — Wheaton *v.* Wheaton, 9 Conn. 96 (where plaintiff sought to show that he had signed a promissory note supposing that such notes were payable only at death of obligee).

Georgia. — Caudell *v.* Caudell, 55 S. E. 1028.

Indiana. — Barnes *v.* Bartlett, 47 Ind. 98; Jones *v.* Sweet, 77 Ind. 187, 193.

Maine. — Farley *v.* Bryant, 32 Me. 474, 483 ("conveyances are not to be reformed and made to read in such manner as may best carry into effect the intentions of the parties as ascertained from parol testimony, where there is no satisfactory proof that they did not use the language which they intended to use").

Missouri. — Tesson *v.* Atlantic Mut. Ins. Co., 40 Mo. 33, 93 Am. Dec. 293.

New York. — Keisselbrack *v.* Livingston, 4 Johns. Ch. 144; Paine *v.* Jones, 75 N. Y. 593; Duke *v.* Stuart, 45 Misc. 120, 91 N. Y. Supp. 885.

Oregon. — Mitchell *v.* Holman, 30 Or. 280, 47 Pac. 616.

10. Farley *v.* Bryant, 32 Me. 474, 488.

11. Hemphill *v.* Moody, 64 Ala. 468.

12. California Civil Code, § 3401; Ward *v.* Waterman, 85 Cal. 488, 500, 24 Pac. 930.

13. Stedwell *v.* Anderson, 21 Conn. 139; Woodbury Sav. Bank *v.* Charter Oak F. & M. Ins. Co., 31 Conn. 517.

14. Lee *v.* Percival, 85 Iowa 639, 52 N. W. 543; Western Wheeled Scraper Co. *v.* Stickleman, 122 Iowa 396, 98 N. W. 139.

15. Overstreet *v.* Mouser, 14 Ky. L. Rep. 480.

16. Canedy *v.* Marcy, 13 Gray (Mass.) 373.

17. Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232; Benson *v.* Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816; Wall *v.* Meilke, 89 Minn. 232, 94 N. W. 688.

18. Kornegay *v.* Everett, 99 N. C. 30, 5 S. E. 418; McKay *v.* Simpson, 41 N. C. (6 Ired. Eq.) 452; Hart *v.* Roper, 41 N. C. (6 Ired. Eq.) 349; Lynam *v.* Califer, 64 N. C. 572; Lutz *v.* Thompson, 87 N. C. 334.

19. McNaughten *v.* Partridge, 11 Ohio 223; Clayton *v.* Freet, 10 Ohio St. 544.

20. Womack *v.* Eacker, 6 N. C. (Phil. Eq.) 161.

21. Tabor *v.* Cilley, 53 Vt. 487.

22. Green Bay Canal Co. *v.*

3. Parol Evidence. — The very nature of an action for the reformation of a written instrument renders necessary a departure from the ordinary rule forbidding the admission of parol testimony to vary the terms of a written instrument, and it is therefore held that a plaintiff alleging a mistake in a written instrument and asking for a decree reforming the same, may produce parol evidence to support his contention,[23] and this applies where, in an action upon or to enforce an instrument, the defendant pleads mistake therein and asks that it be corrected.[24] In fact it was doubted, in some of the earlier cases which admitted parol evidence, offered by a defendant seeking to correct an instrument as against a plaintiff seeking specific performance, whether the same sort of evidence was admissible, when offered by a plaintiff seeking reformation and specific performance.[25] It was held that while such evidence was admissible on the part of a defendant who claimed the existence of a mistake in an instrument which the plaintiff sought to have specifically enforced as against him, it was not admissible to prove the contention of a plaintiff who sought to have a written instrument altered.[26] Where the agreement had been partially performed by the

Hewitt, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588. But see Kyle *v.* Fehley, 81 Wis. 67, 51 N. W. 257, 29 Am. St. Rep. 866.

23. *Arkansas.* — Stewart *v.* Pettigrew, 28 Ark. 372; Allen *v.* McGaughey, 31 Ark. 252.

California. — Pierson *v.* McCahill, 21 Cal. 122 ("this rule is not applicable where a mistake has been made, and the object is to correct it").

Georgia. — Rogers *v.* Atkinson, 1 Ga. 12, 26.

Illinois. — Hunter *v.* Bilyeu, 30 Ill. 228, 247 (containing elaborate discussion of the reason for admitting parol evidence in actions of this character); McLennan *v.* Johnston, 60 Ill. 306 (the Statute of Frauds does not apply where parol evidence is sought to be introduced for the purpose of sustaining an action in a court of equity to correct a mistake in an instrument).

Maine. — Peterson *v.* Grover, 20 Me. 363 (courts of equity admit an exception to the rule where a mistake is alleged, and if it be clearly proved or admitted they give relief); Farley *v.* Bryant, 32 Me. 474.

Massachusetts. — Canedy *v.* Marcy, 13 Gray 373.

Pennsylvania. — Schettiger *v.* Hopple, 3 Grant Cas. 54.

Vermont. — Barry *v.* Harris, 49 Vt. 392; Tabor *v.* Cilley, 53 Vt. 487.

24. "A rule of evidence adopted by the courts as a protection against fraud and false swearing, would . . . become the very instrument of the fraud it was intended to prevent if there did not exist some authority to correct the universality of its application." Insurance Co. *v.* Wilkinson, 13 Wall. (U. S.) 222.

"Evidence of fraud or mistake is seldom found in the instrument itself, from which it follows that unless parol evidence may be admitted for that purpose the aggrieved party would have as little hope of redress in a court of equity as in a court of law." Walden *v.* Skinner, 101 U. S. 577, 583; Gillespie *v.* Moon, 2 Johns. Ch. (N. Y.) 585, 595.

"It is admitted everywhere that a defendant in equity may allege, and prove by parol, a mistake in a contract sought to be enforced against him." Davenport *v.* Sovil, 6 Ohio St. 459; Barry *v.* Harris, 49 Vt. 392.

25. Keisselbrack *v.* Livingston, 4 Johns. Ch. (N. Y.) 144.

26. Elder *v.* Elder, 10 Me. 80; Gillespie *v.* Moon, 2 Johns. Ch. (N. Y.) 585; Osborn *v.* Phelps, 19 Conn. 63, 72, 48 Am. Dec. 133 (the dis-

party sought to be charged, according to these same decisions parol evidence was admissible to show mistake in an action for reformation.[27] This supposed distinction, which was based upon decisions of the chancery courts of Great Britain, has long since been disregarded, and is no longer the law in this country,[28] and it is now the general rule that parol evidence showing mistake or fraud is admissible in an action brought to reform an instrument and to obtain a decree of specific performance thereof when thus reformed.[29]

Some of the earlier cases held, however, that parol evidence is never admissible to show a mistake in an instrument within the Statute of Frauds, for the purpose of reforming such instrument, by inserting matter therein; since to admit such testimony would nullify the statute,[30] and this still appears to be the rule in Rhode Island,[31] and was asserted as late as 1869 in Massachusetts.[32] It is, however, probably not the rule in that state at the present time.[33]

tinction was based upon the ground that "it is one thing to limit the effect of an instrument and another to extend it beyond what its terms import").

27. "But if the parties have so far executed the contract (to convey land) by putting the complainants in possession, so that it would be a fraud on them to insist that their agreement was not in writing, . . . the statute is not contravened by letting in the evidence." Moale *v.* Buchanan, 11 Gill & J. (Md.) 314, 324.

28. See note 23, under V, 3, *ante*.

29. Walden *v.* Skinner, 101 U. S. 577, 583; Bellows *v.* Stone, 14 N. H. 175. And see cases note 28, next preceding.

30. Osborn *v.* Phelps, 19 Conn. 63, 48 Am. Dec. 133 (*holding* that where an agreement for the sale of land, by mistake is not in accordance with the intention of the parties, parol evidence is not admissible for the purpose of reforming it; although parol evidence *is* admissible where a mistake in such an instrument is set up as a defense in an action for specific performance thereof); Elder *v.* Elder, 10 Me. 80 (action to reform agreement to convey land); Moale *v.* Buchanan, 11 Gill & J. (Md.) 314, 324 (evidence ought not to be let in to show the mistake in the contract (to convey real property), where the complainant is seeking to enforce the contract, because it would controvert the Statute of Frauds and charge a party with the sale of lands by an agreement not in writing); Dwight *v.* Pomeroy, 17 Mass. 303, 9 Am. Dec. 148 (an execution to reform a deed of assignment in trust, executed by an insolvent debtor).

31. Macomber *v.* Peckham, 16 R. I 485, 17 Atl. 910, holds that, in an action to reform a contract to convey land and to enforce it as reformed, evidence that the parties agreed to buy and sell a certain tract, and that by mutual mistake the written agreement failed to include all of it, is not admissible.

32. Glass *v.* Hulbert, 102 Mass. 24, 3 Am. Rep. 418, holds that parol evidence is inadmissible to show an omission, by mistake, in a deed sought to be reformed, whereby it failed to convey all the land which the parties had agreed to convey.

33. Goode *v.* Riley, 153 Mass. 585, 28 N. E. 228, *holding* that a deed may be reformed, where although both the parties intended that the language used therein should be incorporated in the description, they both understood that by such language a smaller parcel of land would be conveyed than was in fact described and that parol evidence was admissible to show that the agreement was to convey such smaller parcel.

The general rule now is that fraud or mistake always constitutes an exception to the general rule that parol evidence is inadmissible for the purpose of contradicting, adding to or varying the language of a written instrument. Parol evidence is always admissible in case of mistake or fraud in actions in equity to rescind a contract, or to reform an agreement so as to make it speak the real intention of the parties,[34] and hence, of course, to show what the

34. *United States.* — Oliver *v.* Mutual Commercial Ins. Co., 2 Curt. (U. S.) 277; Ivinson *v.* Hutton, 98 U. S. 79 (an action to reform an agreement settling up a partnership); Snell *v.* Insurance Co., 98 U. S. 85; Walden *v.* Skinner, 101 U. S. 577, 583.

Alabama. — Meredith *v.* Richardson & O'Neal, 10 Ala. 828 (admitting parol evidence in an action to reform a bond, to show that its recitals were erroneous as to the amount of the execution and the names of the parties).

Arkansas. — McGuigan *v.* Gaines, 71 Ark. 614, 77 S. W. 52 (an action to reform a deed); Steward *v.* Pettigrew, 28 Ark. 372 (*holding* that mistake in records, *e.g.* sheriff's return, as well as in written instruments, may be corrected on parol evidence).

California. — Palmer *v.* Vance, 13 Cal. 553 (*holding* oral evidence admissible to show a mistake in the recital of an undertaking on release of attachment, as to the amount for which the attachment issued); Kee *v.* Davis, 137 Cal. 456, 70 Pac. 294; Isenhoot *v.* Chamberlain, 59 Cal. 630; and Capelli *v.* Dondero, 123 Cal. 324, 55 Pac. 1057 (all admitting oral evidence to show mistakes in deeds sought to be reformed).

Connecticut. — Wheaton *v.* Wheaton, 9 Conn. 96; Washburn *v.* Merrills, 1 Day 139, 2 Am. Dec. 59 (to show that a deed absolute upon its face was intended by the parties as a mortgage only); Palmer *v.* Hartford Ins. Co., 54 Conn. 488 (where plaintiffs claimed that they had applied to the company for a renewal policy, to be on the same terms as the expiring policy, which the company agreed to issue, but instead of which it issued a policy materially differing in terms, which plaintiffs supposing it to be like the former policy did not read until after a loss occurred thereunder); Bishop *v.* Clay Ins. Co., 49 Conn. 167 (where policy was issued to certain trustees in their official capacity only, whereas it was contended by the insured seeking reformation that the intention was that their individual interests should be insured); Parsons *v.* Hosmer, 2 Root 1, 1 Am. Dec. 58, (admitting parol evidence to show that by mistake a policy of insurance which had been left with the company to be filled out after the premium had been paid, had been made payable to a party other than the person intended to be made beneficiary).

Florida. — Jackson *v.* Magbee, 21 Fla. 622.

Georgia. — Wall *v.* Arrington, 13 Ga. 88; Greer *v.* Caldwell, 14 Ga. 207, 58 Am. Dec. 553 (to show that an absolute bill of sale of a negro was intended as a pledge only); Kitchens *v.* Usry, 121 Ga. 294, 48 S. E. 945 (*holding* parol evidence admissible to show that by a mistake made by the scrivener who drafted the deed sought to be reformed, it failed to include all the property intended to be conveyed); Wyche *v.* Green, 11 Ga. 169, *s. c.* 16 Ga. 61 (admitting oral evidence to show that by mistake of the scrivener an instrument loaning certain negroes to the donee for life was so drawn as to have the effect of an absolute gift).

Illinois. — Gray *v.* Merchants Ins. Co., 113 Ill. App. 537; Hunter *v.* Bilyeu, 30 Ill. 228; McLennan *v.* Johnston, 60 Ill. 306; McCornack *v.* Sage, 87 Ill. 484; Ewing *v.* Sandoval Coal Co., 110 Ill. 290; Purviance *v.* Holt, 8 Ill. 394, 405, and Ferguson *v.* Sutphen, 8 Ill. 547, 750, (both holding parol evidence admissible to

show a mistake whereby an instrument intended to operate as a mortgage was so drawn as to be a deed absolute on its face); Gray *v.* Merchants Ins. Co., 113 Ill. App. 537 (*holding* parol evidence admissible to show that an insurance policy as issued differed materially from the parol agreement of the parties as to the form of policy to be delivered, the company having issued a policy with a co-insurance clause which insured had failed to read upon its receipt, relying upon the agent's promise to deliver a policy in the usual form taken by the insured on all his property).

Indiana. — Gray *v.* Woods, 4 Blackf. 432; Hileman *v.* Wright, 9 Ind. 126; Monroe *v.* Shelton, 36 Ind. 302; Jones *v.* Sweet, 77 Ind. 187 (*holding* parol evidence admissible in a suit to reform a mortgage in which, by a mistake of the scrivener, a term in the description and the date were written differently from such term and date as intended by the mortgagors); Hamilton County *v.* Owens, 138 Ind. 183, 37 N. E. 602; Wieneke *v.* Deputy, 31 Ind. App. 621, 68 N. E. 921 (to show a mistake in a deed).

Iowa. — Clute *v.* Frasier, 58 Iowa 268; Commercial Bank *v.* McLeod, 67 Iowa 718, 25 N. W. 894 (suit to reform a promissory note); Lee *v.* Percival, 85 Iowa 639 (admitting parol to show that a promissory note binding the officers of a corporation individually was intended to be so drafted as to bind the corporation only); Turpin *v.* Gresham, 106 Iowa 187, 76 N. W. 680 (to show that the parties contemplated payment of a five year note in monthly installments); Western Wheeled Scraper Co. *v.* Stickleman, 122 Iowa 396, 98 N. W. 139 (to show that although the note sought to be reformed imported a personal obligation of the makers, who were township trustees, it was the intention of all the parties thereto that it should be binding only on the township).

Kentucky. — Worley *v.* Tuggle, 4 Bush 168 ("whatever may be said as to the danger of admitting parol or extraneous evidence to contradict, alter or add to written instruments, it is now settled by such an overwhelming current of authority, both in the American states and in England, that this may be done when, through mistake, oversight or fraud, the written memorial does not truly set out the contract, as scarcely to be regarded as longer an open question"); Inskoe *v.* Proctor, 6 T. B. Mon. 311; Forman *v.* Woods, 20 Ky. L. Rep. 1700, 50 S. W. 61; Woods *v.* Inman, 20 Ky. L. Rep. 1700, 50 S. W. 61; Nutall *v.* Nutall, 26 Ky. L. Rep. 671, 82 S. W. 377 (*holding* parol evidence admissible to show that by a mistake on the part of the scrivener, a deed failed to include the property intended).

Maine. — Peterson *v.* Grover, 20 Me. 363; Reed *v.* Reed, 75 Me. 264, and Knapp *v.* Bailey, 79 Me. 195, 9 Atl. 122 (both holding parol evidence admissible to prove that a deed absolute upon its face was intended by the parties as a mere mortgage); Farley *v.* Bryant, 32 Me. 474.

Maryland. — Moale *v.* Buchanan, 11 Gill & J. 314; Wood *v.* Patterson, 4 Md. Ch. 335 ("and it is now settled in this state that there are many cases in which parol evidence at the instance of the complainant may be received to rectify a contract in writing"). Coale *v.* Merryman, 35 Md. 382 (to show a mistake in a deed); Cooke *v.* Husbands, 11 Md. 511 (*holding* such evidence admissible to show that the deed sought to be reformed conveyed a greater interest in the property involved than was intended by the parties thereto); Philpott *v.* Elliott, 4 Md. Ch. 273 (to show the existence of an error in the description of property leased); Hall *v.* Claggett, 2 Md. Ch. 151 (*holding* parol evidence admissible to show an error in a partnership settlement agreement).

Massachusetts. — Canedy *v.* Marcy, 13 Gray 373 (to show that a deed conveyed a greater interest in the property than was intended); Goode *v.* Riley, 153 Mass. 585, 28 N. E. 228.

Minnesota. — Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232; Place *v.* Johnson, 20 Minn. 219, 232 (where parties agreed on sale of a tract which was supposed to contain twenty acres, and a description was inserted

real agreement was,[35] and that the writing, through mistake, does not express the intention of the parties, and does not contain their real agreement, either because of an omission or of an inclusion of certain language therein,[36] or that words were omitted from the

in the deed which merely described twenty acres out of the entire tract, which in fact contained twenty-three).

Missouri. — Parker *v.* Vanhoozer, 142 Mo. 621, 44 S. W. 728.

Nebraska. — Slobodisky *v.* Phenix Ins. Co., 52 Neb. 395, 72 N. W. 483 (*holding* it proper to show by parol evidence, in a suit to reform a policy, that the parties had agreed that, despite the condition in the policy to the contrary, the insured might take out additional insurance). Story *v.* Gammell, 67 Neb. 709, 94 N. W. 982, (in an action to reform a deed).

New Hampshire. — Tilton *v.* Tilton, 9 N. H. 385 (to show that in a deed made upon partition pursuant to a verbal award, a parcel assigned to the plaintiff was omitted by mistake).

New York. — Meyer *v.* Lathrop, 73 N. Y. 315; Ford *v.* Joyce, 78 N. Y. 618; Lyman *v.* United Ins. Co., 17 Johns. 373; Fishell *v.* Bell, 1 Clark Ch. 37 (to show a mistake in a conveyance); Gillespie *v.* Moon, 2 Johns. Ch. 585, 599 (*holding* parol admissible to show that a deed conveyed a greater interest than had been intended by the parties); Rider *v.* Powell, 28 N. Y. 300, 314 (admitting parol evidence to show that by mistake a bond and mortgage clause as to interest was improperly drawn); Everett *v.* Jones, 60 Hun 576, 14 N. Y. Supp. 395.

North Carolina. — Lehew *v.* Hewett, 138 N. C. 6, 50 S. E. 459 (admitting parol evidence of a preliminary oral agreement between the grantor and grantee in a suit to reform a deed); Newsom *v.* Bufferlow, 1 Dev. Eq. 379.

North Dakota. — Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301.

Ohio. — Clayton *v.* Freet, 10 Ohio St. 544; Neininger *v.* State, 50 Ohio St. 394, 400, 34 N. E. 633, 40 Am. St. Rep. 674 (an action to reform a bond); Davenport *v.* Sovil, 6 Ohio St. 460, (*holding* parol evidence admissible in a suit to reform a mortgage, the description whereof failed to embrace the land intended to be mortgaged, but embraced other land which the mortgagor did not own).

Oklahoma. — Marshall *v.* Homier, 13 Okla. 264, 74 Pac. 368.

Pennsylvania. — Bartle *v.* Vosbury, 3 Grant Cas. 277; North & W. B. R. Co. *v.* Swank, 14 Wkly. Notes Cas. 444; Shugart *v.* Moore, 78 Pa. St. 469.

Tennessee. — Barnes *v.* Gregory, 38 Tenn. 230.

Texas. — Hughes *v.* Delaney, 44 Tex. 529; Goff *v.* Jones, 70 Tex. 572.

Vermont. — Goodell *v.* Field, 15 Vt. 448; Langdon *v.* Keith, 9 Vt. 299 (to show mistake in assigning mortgagee's interest instead of a portion thereof only); Blodgett *v.* Hobart, 18 Vt. 414 (*holding* parol evidence admissible to show that by mistake a mortgage excluded land intended to be included therein).

Virginia. — French *v.* Chapman, 88 Va. 317, 13 S. E. 479.

West Virginia. — Fishback *v.* Ball, 34 W. Va. 644, 12 S. E. 856.

Wyoming. — Stoll *v.* Nagle, 86 Pac. 26.

35. See cases under preceding note; and also Peagler *v.* Stabler, 91 Ala. 308; Parish *v.* Gates, 29 Ala. 261; Cotton States L. Ins. Co. *v.* Carter, 65 Ga. 228 (an action to reform an insurance policy); Vaughn *v.* Digman, 19 Ky. L. Rep. 1340, 43 S. W. 251.

36. Kee *v.* Davis, 137 Cal. 456, 70 Pac. 294 (reforming contract for sale of land which had stated the amount of an encumbrance thereon, but omitted to state its nature); Cotton States L. Ins. Co. *v.* Carter, 65 Ga. 228; Kitchens *v.* Usry, 121 Ga. 294, 48 S. E. 945; Jones *v.* Sweet, 77 Ind. 187; Western Wheeled Scraper Co. *v.* McMillen (Neb.), 99 N. W. 512 (admitting parol evidence to show that a note, in form binding directors personally, was intended to bind the corporation only). *Contra.* — Osborn *v.* Phelps, 19 Conn. 63, 48 Am. Dec. 133.

instrument by mistake,[37] or to show fraud in the execution of the instrument.[38]

There are, however, decisions holding that parol evidence will not be received to show a mistake consisting of the omission from a deed, of land which the parties intended to convey,[39] and it has been held that parol evidence is not admissible to show that a conveyance in form absolute was in reality intended to operate as a conditional sale merely, or as a sale with the right to repurchase reserved.[40]

Parol evidence will not be received for the purpose of showing a mistake in the terms of a will.[41]

It is admissible to show that a certain word or phrase used in an instrument had a particular or technical meaning in the particular neighborhood where, or at the particular time when, the instrument was executed, where the reformation prayed for consists in the substitution for such word or phrase of other language conveying such alleged meaning,[42] or to explain what was meant by the use of an apparently technical phrase in the instrument,[43] but not to show what meaning the parties had ascribed to a term employed in an instrument which has a well settled legal construction.[44]

Where there is no ambiguity in the writing, and it is not claimed or proved that any language which the parties intended should be incorporated therein was omitted, or any language inserted which they did not intend to insert, parol evidence is not admissible to

37. Hathaway *v.* Brady, 23 Cal. 121 ("per month" omitted after statement of rate of interest in a promissory note).

38. Murray *v.* Dake, 46 Cal. 644 (where lessor assured lessee that under provisions of lease he might erect an additional story on leased building); Vaughn *v.* Digman, 19 Ky. L. Rep. 1340, 43 S. W. 251.

39. Glass *v.* Hurlburt, 102 Mass. 24, holds that where the proposed reformation will so alter the instrument as to make it operate to convey a right or interest which can only be conveyed by an instrument in writing, and for which no writing has ever existed, parol will not be received to prove the omission or mistake.

40. Peagler *v.* Stabler, 91 Ala. 308, 9 So. 157.

41. Avery *v.* Chappel, 6 Conn. 270, holds parol evidence inadmissible to show that the testator's intention was to make certain provisions in his will, and that he directed the scrivener to so draw it, but that by mistake the scrivener so drew the will as to make a different disposition of testator's property. But in Eatherly *v.* Eatherly, 41 Tenn. 461, it was held that a will may be reformed where there is a mistake therein which is apparent upon the face of the instrument, and that parol evidence may be introduced in an action to reform the same.

42. Broadwell *v.* Broadwell, 6 Ill. 599, 611 (but holding the proof insufficient to show that "bond" had a special meaning where the instrument was executed).

43. Pitcher *v.* Hennessey, 48 N. Y. 415 (to explain meaning of "risks of navigation" in an agreement to navigate a boat).

44. Hearne *v.* Marine Ins. Co., 20 Wall. (U. S.) 488 (evidence that it was understood, according to a usage, that a vessel insured for a voyage to a particular port might stop at another port also); Maher *v.* Hibernia Ins. Co., 67 N. Y. 283 (term "occupied as a dwelling house," in an insurance policy).

show the sense in which the parties intended the words of the instrument.[45]

It is held in Iowa that parol evidence is not admissible for the purpose of showing a different or additional consideration where the consideration is expressed and fully stated in the instrument sought to be reformed.[46]

But, while admissible, parol evidence tending to show an error or mistake in a written instrument will always be received with great caution,[47] and the rule against admission of parol evidence is not so far relaxed that parol evidence of previous or contemporaneous negotiations, stipulations, or terms, not incorporated in the written instrument will be admitted to vary or contradict its terms, unless it is first proved that at the time of executing such instrument it was intended and understood by the parties thereto that such stipulations or terms should be incorporated therein, and that they were omitted by fraud, accident or mistake.[48]

Of course the relaxation of the rule as to admission of parol evidence applies only in a direct application to correct an instrument, and where a pleading simply states the terms of a contract, the introduction of a written agreement respecting the subject-matter cannot be followed by oral proof of a material clause alleged to have been omitted by mistake from the writing.[49]

4. Intentions. — In general, any competent evidence which throws light upon the intentions of both parties to the instrument will be admitted.[50]

45. Hunt *v.* Gray, 76 Iowa 268, 41 N. W. 14; Maher *v.* Hibernia Ins. Co., 67 N. Y. 283 (terms used in a settled legal construction cannot be contradicted by parol evidence); Jacobs *v.* Parodi, 50 Fla. 541, 39 So. 833.

46. Cedar Rapids & M. R. Co. *v.* Boone County, 34 Iowa 45; Kelly *v.* Railway Co., 93 Iowa 436, 61 N. W. 957; De Goey *v.* Van Wyh, 97 Iowa 491, 66 N. W. 787; Schrimper *v.* Chicago, M. & St. P. R. Co. (Iowa), 82 N. W. 916 (as to show that part of the consideration for a deed of right of way to a railroad company was that an under crossing should be built).

47. See note 9, under IV, A, *ante;* McGuigan *v.* Gaines, 71 Ark. 614, 77 S. W. 52; Worley *v.* Tuggle, 4 Bush (Ky.) 168; Little *v.* Webster, 48 Hun 620, 1 N. Y. Supp. 315 ("parol communications leading to a contract, consisting of propositions and answers, must necessarily be vague and uncertain"); Drachler *v.* Foote, 88 App. Div. 270, 84 N. Y. Supp. 977.

48. Gelpcke *v.* Blake, 15 Iowa 387; Jack *v.* Naber, 15 Iowa 450.

49. Pierson *v.* McCahill, 21 Cal. 122.

50. In Southern Finishing & W. Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681, where the action is to reform a deed executed by the plaintiff, and alleged to convey a larger tract than was intended by the parties, any testimony tending to show the intentions of the parties is admissible. Thus the evidence of the grantor's secretary is admissible in an action by the grantor to reform a deed alleged to convey more than was intended, to show what was really intended to be conveyed, the secretary having negotiated the sale and conducted the entire transaction in grantor's behalf. Allen *v.* Hutchinson, 45 Wis. 259 (an action to reform a lease which the plaintiff contended failed to cover all the land agreed upon to be leased).

Evidence of conversations between the parties prior to execution of the instrument sought to be reformed, and in which the details of the agreement to be entered into were discussed, are admissible to prove what was the understanding of the parties as to the agreement;[51] and evidence of statements made at the time the instrument was executed, and in the presence of all of the parties, by a person not a party but who appears to have assisted all of the parties, and to have participated in the agreement, will be received to throw light upon the real intentions of the parties.[52] But evidence of the intentions of one party only is not admissible unless it is shown that they were understood by the other party.[53]

5. Previous Negotiations. — Evidence of negotiations between the parties prior to execution of the instrument sought to be reformed, which negotiations are not incorporated therein, is admissible only after proof that the time of the actual execution of the instrument the parties intended that the result of such negotiations should be incorporated therein.[54]

6. Circumstances Surrounding Execution. — Generally speaking, extrinsic evidence is admissible to show the relations of the parties when not disclosed by the instrument itself;[55] and testimony tending to show the facts surrounding the parties at the time the instrument was executed, and what was the preliminary verbal contract between them is competent to show the intention of the parties and whether or not the instrument fairly speaks that intention;[56] and to show the circumstances existing at the time of the execution of the instrument, and which the parties had in mind at that time,[57]

51. In Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119, evidence of conversations between the agent of the insured and the underwriter in relation to the object of the policy about to be issued, was held admissible in an action to reform such policy. Pitcher *v.* Hennessey, 48 N. Y. 415.

52. Wendt *v.* Diemer, 9 Kan. App. 481, 58 Pac. 1003.

53. Bobb *v.* Bobb, 7 Mo. App. 501, is a case refusing to allow proof of intentions of grantor of a deed without proof that they were understood by the grantee.

54. Jones *v.* Sweet, 77 Ind. 187; Gelpcke *v.* Blake, 15 Iowa 387, 83 Am. Dec. 418; Jack *v.* Naber, 15 Iowa 450.

55. Jacobs *v.* Parodi, 50 Fla. 541, 39 So. 833.

Where the mistake claimed is the omission of a seal on a promissory note, evidence of the facts that the parties were half-brother and sister living in the same family, and that the note was taken by way of accommodation for another, which bore a seal, are admissible to show that it was intended to place a seal upon such note. McCown *v.* Sims, 69 N. C. 159.

56. Reese *v.* Rhodes (Ariz.), 73 Pac. 446 (action to reform a deed absolute in form into a mortgage); Jacobs *v.* Parodi, 50 Fla. 541, 39 So. 833 (to show mistake of fact); Gray *v.* Merchants' Ins. Co., 113 Ill. App. 537 (to show real agreement of the parties); Jones *v.* Sweet, 77 Ind. 187 (testimony as to preliminary conversation at which details of proposed mortgage loan were discussed); Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119.

57. In an action to reform a deed by omitting a certain word, where it is shown that a second deed was made substantially like the one in question but omitting such word, testimony of a person present at the

and to establish what was the subject-matter of the agreement.[58]

7. Knowledge of Defendant. — Evidence is admissible to show that the party resisting reformation had knowledge of the existence of the facts or circumstances relied upon by the plaintiff to show that the intention of the parties at the time the instrument was executed was not correctly expressed therein, as for example that the land conveyed by a deed containing a warranty against incumbrances was subject to an easement.[59]

8. Subsequent Acts. — Evidence of the subsequent acts of the party against whom reformation is sought is admissible to show that his understanding of the original agreement of the parties was that claimed by the party seeking reformation.[60]

9. Declarations and Admissions. — Evidence of the declarations of the party resisting reformation are admissible to show that his understanding of what the instrument was to provide or contain was the same as that of the party seeking reformation,[61] or that the

execution of the latter as to what was said by the parties relative to the necessity of the second deed to correct the first, is admissible as part of the *res gestae*. Kyner *v.* Boll, 182 Ill. 171, 54 N. E. 925.

58. Goode *v.* Riley, 153 Mass. 585, 28 N. E. 228 (admitting evidence in an action to reform a deed alleged to convey more land than intended, to show that the parties, being on the land in question, knew the area thereof); Reed *v.* Reed, 75 Me. 264.

Mitchell *v.* Wellman, 80 Ala. 16 (to determine whether a conveyance absolute in form was intended as a mortgage, or merely as a conditional sale).

59. In Knapp *v.* White, 23 Conn. 529, 539, grantor sought to reform a deed by excepting from the warranty against incumbrances a certain right to maintain a ditch across the land.

60. Evidence of a subsequent deed executed by the defendant three years after the partition upon which the deed sought to be reformed was based, is admissible to show that he regarded a certain road as his boundary line. Capelli *v.* Dondero, 123 Cal. 324, 55 Pac. 1057.

61. Alexander *v.* Caldwell, 55 Ala. 517, holds evidence of declarations of mortgagor competent evidence against subsequent, but not against prior grantee, in action to reform mortgage.

Lestrade *v.* Barth, 19 Cal. 660, 675, holds that evidence of the original grantor's declarations and conduct in fencing the land sold, in locating a building thereon, and of his agreement as to a partition wall between himself and his grantees, is admissible to show a mistake as to the location of a boundary line, in a suit to reform a subsequent deed.

Greer *v.* Caldwell, 14 Ga. 207, 58 Am. Dec. 553, is a case admitting evidence of declarations of defendant that he had only a lien on a negro, in an action to reform a deed absolute which plaintiff claimed had been intended merely as a pledge.

Place *v.* Johnson, 20 Minn. 219, holds that in a proceeding on the part of the grantee to reform a deed in respect to the quantity of land conveyed thereby, evidence as to representations made by the grantor as to the boundaries and the amount of land to be included therein is admissible.

In an action to reform an acknowledgment of a husband and wife, defective in failing to show a separate examination of each by the notary, the acts and declarations of the wife at the time of execution and subsequently thereto are admissible. Kilbourn *v.* Fury, 26 Ohio St. 153; Meeks *v.* Stillwell, 54 Ohio St. 541, 44 N. E. 267.

Pulaski Iron Co. *v.* Palmer, 89 Va. 384, 16 S. E. 275, is a case admitting

party seeking reformation was induced by him to refrain from examining the instrument prior to its execution or acceptance,[62] or to show that the plaintiff was not satisfied, on executing the instrument, that it contained the exact agreement of the parties, and sought to have it changed but was persuaded by the acts and declarations of the other party thereto.[63]

Evidence of the grantor's admission of a mistake in the deed is competent evidence on the part of the grantee seeking reformation, not only against him, but also against a subsequent purchaser at an execution sale under an execution against such grantor.[64]

Evidence of declarations made subsequent to the execution of the deed sought to be reformed, by one not a party thereto, are not admissible unless his authority to speak for the party sought to be bound by such declarations is first proved.[65]

Parol evidence of the defendant's declarations tending to support plaintiff's contention as to the mistake, made long prior to the action for reformation, will not be sufficient unless corroborated by other facts and circumstances.[66] Nor will evidence of the grantor's declarations or statements, made long after the execution of the instrument, be admitted to show a mistake therein, in an action for reformation brought by the grantee.[67]

a letter written by the grantor within a week after execution of the contract of sale, in which he stated that he understood that the agreement was to cover all mineral in the land "reserving to myself all of the lead and zinc," in support of plaintiff grantee's claim that a reservation of iron ore also had been inserted in the deed by mistake.

62. In Aetna Ins. Co. *v.* Brannon (Tex. Civ. App.), 91 S. W. 614, evidence was admitted that insurance agent assured plaintiff that the policy sought to be reformed was "all right."

63. "This evidence was material and competent, as tending to show, that the plaintiff was not careless; was not thoughtlessly satisfied with the terms of the policy, but sought an emendation thereof, and was balked of a successful pursuit thereof by the action and declaration of the defendants." Maher *v.* Hibernia Ins. Co., 67 N. Y. 283.

In an action to reform a fire insurance policy, the agent's statement, made upon delivery of the policy, that it was "all right and would stand in any court" is admissible. Aetna Ins. Co. *v.* Brannon (Tex. Civ. App.), 91 S. W. 614.

64. Allen *v.* McGaughey, 31 Ark. 252.

65. In a suit by the grantor for reformation of his deed, evidence of declarations of the husband of the grantee, made long after the execution of such deed, are not admissible except for purposes of impeachment, unless it be first shown that said husband was authorized to speak for his wife. Montgomery *v.* Mann, 120 Iowa 609, 94 N. W. 1109.

66. Gillespie *v.* Moon, 2 Johns. Ch. (N. Y.) 585, is a case where the declarations in question had been made thirteen years previous to the commencement of the action.

Statements by the deceased beneficiary as to his understanding of the terms of the policy sought by his heirs to be reformed, made two years after issuance of the policy, are not admissible to show a mistake in the policy. Bowers *v.* New York L. Ins. Co., 68 Fed. 785.

67. A letter written nearly eight years after the execution of the declaration of trust sought to be reformed, by the creator of the trust,

As to whether evidence of declarations made by the party seeking reformation is admissible, the authorities are not uniform, it having been held that evidence of statements of the party seeking reformation as to his understanding of the terms of the instrument sought to be reformed, is not admissible.[68] On the other hand it has been held that the party seeking reformation in order to corroborate his testimony as to the intentions of the parties, may introduce evidence as to his declarations made prior to the execution of the instrument sought to be reformed.[69]

The testimony of a party seeking reformation, or of one interested in the outcome of the litigation, will not be admitted in evidence as to the declarations of a deceased grantor whose deed is sought to be reformed.[70] And while testimony as to declarations of a long deceased grantor, given by a disinterested witness, are admissible for what such evidence is worth, it is regarded as of little weight and never amounts to direct proof of the facts claimed to have been admitted.[71]

10. Statements and Representations. — Evidence of statements,[72] or representations made by the party resisting reformation, at or prior to the time of signing the instrument, are admissible to throw light on the actual agreement and real intention of the parties.[73]

is not admissible as evidence to show the alleged mistake. Richardson *v.* Adams, 171 Mass. 447, 50 N. E. 941.

68. Bowers *v.* New York L. Ins. Co., 68 Fed. 785.

Adair *v.* Adair, 38 Ga. 46, holds that testimony as to a grantor's declarations, made subsequent to the execution of a deed and in the absence of the grantee, is not admissible as evidence on the part of himself or his successor to show mistake in an action by him or them to reform such deed.

69. Adair *v.* Adair, 38 Ga. 46.

In a suit to reform a mistake as to the amount of mortgage notes given for the purchase money of land, evidence of the plaintiff's (mortgagor's) declarations, made prior to the execution of the papers, as to the price agreed upon are admissible in corroboration of his testimony as to the same. Jones. *v.* Warren, 134 N. C. 390, 46 S. E. 740.

70. Sauer *v.* Nehls, 121 Iowa 184, 96 N. W. 759, is a case refusing to admit the testimony of a son seeking reformation of a mortgage executed by him in favor of his deceased father, as to an agreement with his father that the loan should be cancelled on the father's death.

Parker *v.* Vanhoozer, 142 Mo. 621, 44 S. W. 728; Comstock *v.* Comstock, 76 Minn. 396, 79 N. W. 300; so held even though the witness himself took no part in the conversation during the course of which such declarations were made.

71. Fanning *v.* Doan, 139 Mo. 392, 41 S. W. 742 ("this kind of evidence has always been received with great care and when not supported by other evidence is generally entitled to but little weight"); Cornet *v.* Bertelsmann, 61 Mo. 118; Ringo *v.* Richardson, 53 Mo. 385.

72. Evidence of defendant's statements on delivering an insurance policy are admissible to show that plaintiff did not agree that it expressed the real contract of the parties, and desired it changed, but was dissuaded by the company's agent's assurance that it covered such agreement. Maher *v.* Hibernia Ins. Co., 67 N. Y. 283, 291.

73. In an action to reform a deed, plaintiff alleging that the agreement was to convey "the Johnson Place" supposed to contain twenty

11. Acquiescence. — Evidence offered by the defendant tending to show that the party seeking reformation has acquiesced in the terms of the agreement as executed, and has acted thereunder without protest, is of course admissible,[74] and the plaintiff may introduce evidence showing that the defendant by his conduct has apparently acquiesced in the construction contended for by plaintiff.[75]

Evidence of the defendant's silence may be received for the purpose of proving acquiescence on his part,[76] and where it is claimed that a deed by mistake failed to except from its covenants a right to maintain a certain ditch, and existence of such right is shown to have been known originally to both parties, letters written by them pending negotiations for the sale and containing no allusion to such ditch right are admissible to show that the existence of such incumbrance was acquiesced in by the parties.[77]

12. Usages and Customs. — Evidence of a usage will not be admitted to show that by the unambiguous language employed in the instrument sought to be reformed, the parties contemplated something not provided for by the instrument as executed.[78]

13. Other Instruments. — Other writings are admissible in evidence to show the mistake alleged to exist in the instrument sought to be reformed,[79] and it has been held that equity will

acres, more or less, and that it actually contained twenty-three acres, and that by defendant's fraud an exact description describing but twenty acres and omitting a portion of the tract, was inserted in the deed, may show that defendant had pointed out the boundaries of the entire tract prior to delivery of the deed. Place *v.* Johnson, 20 Minn. 219, 232.

74. Farley *v.* Bryant, 32 Me. 474.

75. Knapp *v.* White, 23 Conn. 529.

76. Where plaintiff claimed that deed which conveyed two lots was intended to cover but one, it was held that evidence that the grantee entered on one lot only, and made no claim and asserted no title to the other until after the mistake was called to his attention, was admissible to show that both parties intended that only the one lot should be conveyed. Herring *v.* Peaslee, 92 Iowa 391, 60 N. W. 650.

77. Knapp *v.* White, 23 Conn. 529, 539.

78. Hearne *v.* Marine Ins. Co., 20 Wall. (U. S.) 488, holds that in an action to reform a policy of marine insurance evidence is not admissible to show a usage that vessels bound for a particular port in Cuba might visit at two ports, one for discharge and another for loading; such usage being inconsistent with the tenor of the contract as a whole.

79. Wyche *v.* Greene, 11 Ga. 159, 172; Reed *v.* Reed, 75 Me. 264 (where a conveyance is made by a deed absolute in form, it may be shown by a written instrument not under seal to have been intended merely as a mortgage); Morrison *v.* Jones, 31 Mont. 154, 77 Pac. 507 (an agreement whereby the grantee agreed to reconvey on certain conditions, executed concurrently with a deed covering the same premises, is admissible in an action to reform such deed by changing it into a mortgage).

In an action to reform a fire insurance policy by striking therefrom a certain clause, in which the plaintiff has testified that the policy was to be in the same form as a previous policy, evidence of the form of such other policy is admissible to show that it contained no such clause Van Tuyl *v.* Westchester F. Ins. Co., 55 N. Y. 657. But see Moale *v.* Buchanan, 11 Gill & J. (Md.) 314 (which holds that parol evidence is admissible to connect separate

grant relief more readily where the mistake is thus shown.[80]

14. Inadequacy of Consideration. — While evidence of mere inadequacy of price is not sufficient of itself to warrant a decree of reformation, yet such evidence will be received in connection with that of other facts tending to show fraud or mistake such as will warrant reformation.[81]

15. Value of Property Involved. — Evidence of the value of the property which is the subject of a conveyance sought to be reformed, is too remote to be admissible for the purpose of showing that the grantor did not intend to convey it all.[82]

16. Testimony of Draftsman. — The testimony of the person who drafted the instrument for the parties is always admissible to show that by his mistake their intentions were not carried out, and such testimony is entitled to great weight.[83]

17. Testimony of Parties to the Suit. — The testimony of a party to an action for reformation is ordinarily admissible to show the original agreement of the parties to the instrument sought to be reformed,[84] or to show the intention of the parties in executing the instrument.[85]

It has been held in states where the rule obtains that a party can not be compelled to testify against himself in a civil action, that the testimony of a defendant in a suit to reform an instrument can not be used against other defendants, where the plaintiff, in order to obtain relief, must obtain a decree against *all* of the defendants.[86]

written papers for the purpose of showing mistake in an action to reform a contract to convey real property, not sufficient in itself under the Statute of Frauds).

80. Wyche *v.* Greene, 11 Ga. 159, 172; Donaldson *v.* Levine, 93 Va. 472, 25 S. E. 541 ("where the mistake is established by other preliminary written agreements, equity more readily interferes than in cases where the mistake is to be established by parol evidence").

81. Baldwin *v.* National Hedge etc. Co., 73 Fed. 574, 19 C. C. A. 575.

82. Where defendant, in an action for breach of a covenant against incumbrances, claimed that the covenant was not intended to include a certain easement and sought to show the value placed on such easement by the owner thereof. Huyck *v.* Andrews, 113 N. Y. 81, 20 N. E. 581, 10 Am. St. Rep. 432, 3 L. R. A. 789.

83. Cooke *v.* Husbands, 11 Md. 492, 511 (no testimony can be more forcible); Marks *v.* Taylor, 23 Utah 152, 63 Pac. 897 (the draftsman's testimony that he included other land than that intended in drawing up the mortgage is not only admissible, but is strong evidence of the alleged mistake).

84. Shay *v.* Pettes, 35 Ill. 360.

85. Southern F. & W. Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681; Shay *v.* Pettes, 35 Ill. 360 (*holding*, however, that to justify reformation, his testimony should be corroborated by other evidence, or by circumstances showing that the other party had the same intentions as he himself had; Farley *v.* Bryant, 32 Me. 474, 484 (but a defendant cannot use the testimony of a co-defendant to prevent the obtaining of a decree of reformation against them both).

86. Farley *v.* Bryant, 32 Me. 474, 484 (and that is so, irrespective of the witness's willingness or unwillingness to testify).

Where a party is seeking to reform a deed by substituting his name for that of the grantee therein, alleging that the latter merely purchased the land as the plaintiff's agent and for his benefit, his testimony as to transactions between himself and such grantor will not be admitted after the latter's death.[87]

VI. PRESUMPTIONS.

1. Correctness of Instrument. — In an action to reform a written instrument, there is a strong presumption in favor of the correctness of such instrument, based on its existence in the form in which it was executed.[88] So, too, there is a presumption that the writing was carefully and deliberately prepared and executed,[89] and that all previous negotiations and proposals had been abandoned,[90] and that it was the sole expositor of the intent of the parties,[91] and that it was the final and correct expression of their real agreement and expresses their exact intentions,[92] and that any variance therefrom has been caused by a subsequent change of intention on the part

87. Hutchinson's Admr. *v.* Nichols, 21 Ky. L. Rep. 949, 53 S. W. 661.

88. *United States.* — Barker *v.* Pullman Palace Car Co., 124 Fed. 555; Harrison *v.* Hartford Ins. Co., 30 Fed. 862.

Alabama. — Clopton *v.* Martin, 11 Ala. 187.

Connecticut. — Palmer *v.* Hartford Ins. Co., 54 Conn. 488, 501, 9 Atl. 248 ("the presumption in favor of the written over the spoken agreement is almost resistless").

Georgia. — Reese *v.* Wyman, 9 Ga. 430, 437.

Indiana. — Earl *v.* Van Matta, 29 Ind. App. 532, 64 N. E. 901.

Massachusetts. — Canedy *v.* Marcy, 13 Gray 373; Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45.

New York. — Halliday *v.* White, 21 N. Y. Supp. 878; Duke *v.* Stuart, 45 Misc. 120, 91 N. Y. Supp. 885.

North Carolina. — Southern Finishing & W. Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681.

Ohio. — Potter *v.* Potter, 27 Ohio St. 84.

Utah. — Ewing *v.* Keith, 16 Utah 312, 52 Pac. 4; Deseret Nat. Bank *v.* Dinwoodey, 17 Utah 43, 53 Pac. 215.

89. Christopher & T. St. R. Co. *v.* Twenty-Third St. R. Co., 149 N. Y. 51, 43 N. E. 538; Southern Finishing & W. Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681.

90. Folmar *v.* Lehman-Durr Co. (Ala.), 41 So. 750; Parker *v.* Vanhoozer, 142 Mo. 621, 44 S. W. 728; Griffin *v.* Miller, 188 Mo. 327, 87 S. W. 455.

91. Franklin *v.* Jones, 22 Fla. 526; Jacobs *v.* Parodi, 50 Fla. 541, 39 So. 833.

92. *United States.* — Pope *v.* Hoopes, 90 Fed. 451, 33 C. C. A. 595.

Alabama. — Campbell *v.* Hatchett, 55 Ala. 548 ("the presumption is that the written instrument contains the conclusion of all previous negotiations, the final agreement of both parties"); Smith *v.* Allen, 102 Ala. 406, 14 So. 760; Kilgore *v.* Redmill, 121 Ala. 485, 25 So. 766; Folmar *v.* Lehman-Durr Co., 41 So. 750.

Florida. — Franklin *v.* Jones, 22 Fla. 526.

Indiana. — Oiler *v.* Gard, 23 Ind. 212.

Iowa. — Tufts *v.* Larned, 27 Iowa 330; Hervey *v.* Savery, 48 Iowa 313.

Maryland. — National F. Ins. Co. *v.* Crane, 16 Md. 260, 293, 77 Am. Dec. 289.

Minnesota. — Whitney *v.* Smith, 33 Minn. 124, 22 N. W. 181.

Missouri. — Parker *v.* Vanhoozer, 142 Mo. 621, 44 S. W. 728; Griffin *v.* Miller, 188 Mo. 327, 87 S. W. 455.

of the parties who executed it,[93] which presumption, while only *prima facie*,[94] must, as has been stated, be overcome by the party seeking reformation, by clear, satisfactory and convincing evidence.[95] It will always be presumed that all of the parties to an instrument intended to make an equitable and conscionable agreement.[96]

2. Continuance of Original Agreement. — Where it is shown that the minds of the parties had met and that they had reached an agreement as to what was to be incorporated into the instrument sought to be reformed, it will be presumed in the absence of proof to the contrary, that they remained in the same condition of agreement until the instrument was executed.[97]

3. That the Parties Understood Their Agreement. — In an action to reform a written instrument it will be presumed that the party claiming that a material portion of the agreement was omitted from the writing, knew when he executed it that it was not contained therein.[98]

New York. — Gillespie *v.* Moon, 2 Johns. Ch. 585, 595; Boardman *v.* Davidson, 7 Abb. Pr. (N. S.) 439; Nevius *v.* Dunlap, 33 N. Y. 676; Little *v.* Webster, 1 N. Y. Supp. 315; Drachler *v.* Foote, 88 App. Div. 270, 84 N. Y. Supp. 977; Christopher & T. St. R. Co. *v.* Twenty-Third St. R. Co., 149 N. Y. 51, 43 N. E. 538.

North Carolina. — Southern Finishing & W. Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681.

Ohio. — Davenport *v.* Sovil, 6 Ohio St. 459.

Oregon. — Kleinsorge *v.* Rohse, 25 Or. 51, 34 Pac. 874.

Wisconsin. — Kent *v.* Lasley, 24 Wis. 654; Newton *v.* Holley, 6 Wis. 592; Harter *v.* Christoph, 32 Wis. 245; McClellan *v.* Sanford, 26 Wis. 595.

93. Tilghman *v.* Tilghman, 23 Fed. Cas. No. 14,045; Whitney *v.* Smith, 33 Minn. 124, 22 N. W. 181 (the fact that a deed differs from the contract to convey, in pursuance of which it was executed, does not of itself make out a case for reformation of the deed. There must be proof that the discrepancy arose from mistake or fraud); Syms *v.* Mayor, 18 Jones & S. (N. Y. Super. Ct.) 289 (the fact that previous leases between the parties have contained stipulations for renewals raises no presumption that such a stipulation was omitted by fraud, accident or mistake); Donaldson *v.* Levine, 93 Va. 472, 25 S. E. 541 ("the very circumstance that the final instrument of conveyance differs from the preliminary contract affords of itself some presumption of an intentional change of purpose or agreement, unless there is some recital in it or some other attending circumstance which demonstrates that it was merely in pursuance of the original contract"); Koen *v.* Kerns, 47 W. Va. 575, 35 S. E. 902.

94. Parker *v.* Vanhoozer, 142 Mo. 621, 44 S. W. 728; Southern Finishing & W. Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681.

95. See note 2, under I, 1.

96. San Jose Ranch Co. *v.* San Jose L. & W. Co., 132 Cal. 582, 64 Pac. 1097.

97. Ward *v.* Waterman, 85 Cal. 488, 502, 24 Pac. 930; holds it unnecessary that the mind of an attorney in fact, who was authorized merely to execute a declaration of trust on behalf of his principal, should be shown to have met in agreement with the other party at the time of signing the declaration.

98. Admrs. of Ligon *v.* Rogers, 12 Ga. 281, 288; Baker *v.* Pyatt, 108 Ind. 61, 9 N. E. 112 (*holding* that it must be presumed that the parties both knew at the time they executed

4. That the Parties Intended the Probable Consequences of Their Acts. — The rule that a man is presumed to know the natural and probable consequences of his acts has been applied in actions to reform written instruments.[99]

5. Miscellaneous Presumptions. — Where, in an action to correct a deed by adding to the warranty against incumbrances a clause excepting a certain easement plainly appearing upon the land, the fact that certain buildings, connected with and essential to the enjoyment of such easement were excepted, raises a presumption that it was the intention of the parties to exclude from such warranty whatever incumbrances there might be upon the land.[1]

When it is once shown or conceded that the instrument does not correctly state the actual agreement of the parties, it will be presumed either that the parties were mutually mistaken as to the facts therein recited, or that one party has been overreached by the conduct of the other.[2]

In an action to reform a mortgage against the original mortgagor and a subsequent purchaser, it will be presumed that the latter was a *bona fide* purchaser for a valuable consideration.[3]

The presence of a seal upon the instrument sought to be reformed raises no presumption, in an action for reformation, that there was good and valuable consideration therefor where the instrument itself is void for uncertainty.[4]

Where the instrument sought to be reformed appears to be manifestly unjust and inequitable as to the plaintiff and he was induced to execute it by persons whose relations to him were fiduciary, and under circumstances savoring of undue influence or unfair advantage, it will be presumed that he did not fully understand its provisions and the burden is shifted upon the defendant to clearly prove that the plaintiff fully understood and freely assented to the instrument as executed by him.[5]

VII. ON APPEAL.

The rule that the evidence warranting the reformation of an

the deed in question what description was inserted therein).

99. Woodman *v.* Woodman, 3 Me. 350; Hall *v.* Reed, 2 Barb. Ch. (N. Y.) 500 (refusing reformation sought by plaintiff because of his mistake as to the legal effect of the instrument).

Knapp *v.* White, 23 Conn. 529, 542 (*holding* that where a grantee has full knowledge of the existence of a ditch across the land, conveying water to a mill on other property, and with such knowledge accepts a deed warranting against incumbrances, he will be presumed to know that the warranty was not meant to include such ditch right, and that his title would be subject to such easement).

1. Knapp *v.* White, 23 Conn. 529, 540.
2. Roszell *v.* Roszell, 109 Ind. 355.
3. Easter *v.* Severin, 64 Ind. 375.
4. Sharpe *v.* Rogers, 12 Minn. 174.
5. Sanderlin *v.* Robinson, 59 N. C. (6 Jones Eq.) 155, is a case where an elderly woman, about to be married, was induced by her brothers to sign a marriage contract by which her property was conveyed to a trustee in such a manner as to deprive her of the rents and profits therefrom.

instrument must be clear and convincing, and not loose, equivocal, or contradictory, is only applicable to the trial of actions for reformation, and is not controlling in an appeal from a judgment of reformation.[6]

In the absence of a showing to the contrary the appellate court will assume that the trial court properly understood the quantum of proof required to sustain suits to reform instruments,[7] and although the evidence given at the trial was conflicting, it will be considered sufficient to justify the findings and judgment if it tends to show mistake or fraud;[8] hence where the evidence tending to prove the alleged mistake, if uncontradicted, would make a *prima facie* case, the appellate court will not reverse the judgment on the ground that such evidence is contradicted by other evidence,[9] or on the ground of variance, when it appears that by the judgment appealed from substantial justice has been done.[10]

But these rules do not apply where the appellate court has power to review the facts, and the latter must assume the responsibility of examining the whole case and determining from the evidence where the truth lies.[11]

VIII. ON REVIEW OF REFEREE'S FINDINGS.

Where, in an action for reformation the matter is referred to a referee for the purpose of taking testimony and finding the facts, the court should only consider the admissibility of the evidence received to prove the facts for which it was offered, and while it may supply any defect in the referee's report in not finding upon

6. Clayton *v.* Freet, 10 Ohio St. 544; Monterey County *v.* Seegleken (Cal.), 36 Pac. 515.

7. Nixon *v.* Harmon, 17 Colo. 276, 29 Pac. 808.

Judgment of reformation will not be reversed upon the ground that the evidence does not support the judgment, unless the record discloses the fact that the findings are clearly against the preponderance of the evidence. Littlejohn *v.* County Line Creamery Co., 14 S. D. 312, 85 N. W. 588; James *v.* Cutler, 54 Wis. 172, 10 N. W. 147; Silbar *v.* Ryder, 63 Wis. 106.

8. Wilson *v.* Moriarty, 88 Cal. 207, 26 Pac. 85 (action to reform lease); Hochstein *v.* Berghauser, 123 Cal. 681, 56 Pac. 547; Parker *v.* Vanhoozer, 142 Mo. 621, 44 S. W. 728 (*holding* that on appeal the judgment of the court below, decreeing reformation of an instrument, will be presumed to be correct).

9. Moore *v.* Copp, 119 Cal. 429, 437, 51 Pac. 630; Ward *v.* Waterman, 85 Cal. 488, 504, 24 Pac. 930; Wilson *v.* Moriarty, 88 Cal. 207, 26 Pac. 85; Jarnatt *v.* Cooper, 59 Cal. 703; Capelli *v.* Dondero, 123 Cal. 324, 55 Pac. 1057 (where there is evidence supporting the findings the supreme court will not examine the evidence to determine as to the weight of conflicting testimony).

10. Adair *v.* McDonald, 42 Ga. 506; Cordes *v.* Coates, 78 Wis. 641, 47 N. W. 949 (the judgment will not be reversed on the ground that a finding as to mistake varied from the allegations in the complaint, when such finding was based upon evidence admitted without objection at the trial).

11. Moran *v.* McLarty, 75 N. Y. 25; Parker *v.* Vanhoozer, 142 Mo. 621, 44 S. W. 728 (it has been held in Missouri, where on chancery appeals the supreme court has juris-

all of the facts which were in issue, it should not pass upon the *sufficiency* of such evidence to support the findings.[12]

diction to re-examine the whole record, that that court will arrive at its own conclusions regarding the facts, despite the presumption in favor of the correctness of the trial court's judgment).

12. Knapp *v.* White, 23 Conn. 529; Howe *v.* Russell, 36 Me. 115.

REFRESHING MEMORY.

By Willoughby Rodman and Roscoe G. Clark.

I. GENERAL STATEMENT.

Where the witness has no independent recollection of the fact concerning which his testimony is required, or when his recollection of the fact is imperfect, he may, under proper circumstances, refresh[1] his memory by referring to a memorandum, an entry in a

1. "Refresh." — In Greenleaf on Ev. (16 Ed. § 436) it is said that the witness may "refresh and assist" his memory.

In State *v.* Bacon, 41 Vt. 526, 98 Am. Dec. 616, it is said that a witness has a right to refer to a written memorandum on the ground that it "aids" his memory.

The supreme court of Wisconsin also refers to a certain memorandum as "aiding" the memory. Hill *v.* State, 17 Wis. 675, 86 Am. Dec. 736.

Phillips on Ev. uses the expression "assist his memory," and is so quoted in Merrill *v.* Ithaca & O. R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130.

In Davis *v.* Field, 56 Vt. 426, the court uses the expression "quickened and refreshed."

In Riordon *v.* Davis, 9 La. 239, 29 Am. Dec. 442, the court states that a memorandum is sufficient if it "restores" the memory of a witness, citing as authority, 1 Stark. (Eng.) 128.

The supreme court of Alabama uses the expression "to revive a faded memory." Acklen's Exr. *v.* Hickman, 63 Ala. 494, 35 Am. Rep. 54

"To excite the recollection of the

book, letter, contract, newspaper or any other written instrument.[2]

II. WHEN WITNESS MAY REFER TO WRITING.

1. Reference Permissible Under Two Conditions. — A witness may refer to any proper writing for the purpose of ascertaining whether or not it will refresh his memory, and then, if it does, or if he can say that he knew when he made it or when he saw it, that it was a true statement of facts, he may use it in testifying: First, when after examining the memorandum the witness' memory is thereby so refreshed that he can testify as a matter of independent recollection to facts pertinent to the issue. Second, when the wit-

witness" is the expression used by the court in Harvey *v.* State, 40 Ind. 516.

The words "awakens his memory to the recollection" are used by the court in State *v.* Smith, 99 Iowa 26, 68 N. W. 428.

The purpose of such reference is to refresh, quicken and awaken the memory of a witness. Davenport *v.* McKee, 94 N. C. 325.

The recollection of a witness invigorated. — Hart *v.* Hummel, 3 Pa. St. 414.

2. *England.* — Tanner *v.* People, 2 Esp. 406; Catt *v.* Howard, 3 Stark. 3, 14 E. C. L. 143; Henry *v.* Lee, 2 Chitt. 124; Wood *v.* Cooper, 1 Car. & K. 645; Topham *v.* M'Gregor, 1 Car. & K. 320; Burton *v.* Plummer, 2 Ad. & El. 341, 29 E. C. L. 113; Maugham *v.* Hubbard, 8 Barn. & C. 14, 19 E. C. L. 147.

United States. — Putnam *v.* United States, 162 U. S. 687; New York & C. Min. S. & Co. *v.* Fraser, 130 U. S. 611.

Alabama. — Acklen's Exr. *v.* Hickman, 63 Ala. 494, 35 Am. Rep. 54; Calloway *v.* Varner, 77 Ala. 541, 54 Am. Rep. 78; Rutherford's Admr. *v.* Branch Bank at Mobile, 14 Ala. 92, 101; Holmes *v.* Gayle & Bower, 1 Ala. 517; Mims *v.* Sturdevant, 36 Ala. 636; Godden *v.* Pierson, 42 Ala. 370; Billingslea *v.* State, 85 Ala. 323, 5 So. 137; Munden *v.* Bailey, 70 Ala. 63; Jaques *v.* Horton, 76 Ala. 238; Beddo *v.* Smith, Minor 397; Cundiff *v.* Orms, 7 Port. 58.

Arkansas. — Woodruff *v.* State, 61 Ark. 157, 171, 32 S. W. 102.

California. — McGowan *v.* McDonald, 111 Cal. 57, 69, 43 Pac. 418, 52 Am. St. Rep. 149; Treadwell *v.* Wells, 4 Cal. 260; People *v.* Cotta, 49 Cal. 166; People *v.* LeRoy, 65 Cal. 613, 4 Pac. 649; Paige *v.* Carter, 64 Cal. 489, 2 Pac. 260; People *v.* Vann, 129 Cal. 118, 61 Pac. 776; Bailey *v.* Dale, 71 Cal. 34, 11 Pac. 804.

Colorado. — Lawson *v.* Glass, 6 Colo. 134; Rohrig *v.* Pearson, 15 Colo. 127, 24 Pac. 1083.

Connecticut. — Erie Preserving Co. *v.* Miller, 52 Conn. 444, 52 Am. Rep. 607; Card *v.* Foot, 56 Conn. 369, 15 Atl. 371, 7 Am. St. Rep. 311; Curtis *v.* Bradley, 65 Conn. 99, 31 Atl. 591, 48 Am. St. Rep. 177.

Delaware. — Nichols *v.* Vinson, 9 Houst. 274, 32 Atl. 225.

District of Columbia. — Laas *v.* Scott, 26 App. D. C. 354; O'Brien *v.* United States, 27 App. D. C. 263; Howard *v.* Chesapeake & O. R. Co., 11 App. D. C. 300.

Florida. — Jenkins *v.* State, 31 Fla. 196, 12 So. 677; Adams, Admr., *v.* Board of Trustees I. I. Fund, 37 Fla. 266, 294, 20 So. 266.

Georgia. — Finch *v.* Barclay, 87 Ga. 393, 13 S. E. 566; Schmidt *v.* Wambacker, 62 Ga. 321; Georgia Code, § 5284.

Illinois. — Kunder *v.* Smith, 45 Ill. App. 368; Sanders *v.* Hutchinson, 26 Ill. App. 633; Bush *v.* Stanley, 122 Ill. 406, 417, 13 N. E. 249; Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413; Chicago & A. R. Co. *v.* Adler, 56 Ill. 344; Clifford *v.* Drake, 110 Ill. 135; Lawrence *v.* Stiles, 16 Ill. App. 489, 500; Elston *v.* Kennicott, 46 Ill. 187, 206; Chicago & W. Coal Co. *v.* Liddell, 69 Ill. 639; Wolcott *v.* Heath, 78 Ill. 433; Bonnet *v.* Glatt-

feldt, 120 Ill. 166, 174, 11 N. E. 250; Iglehart *v.* Jernegan, 16 Ill. 513.

Indiana. — Prather *v.* Pritchard, 26 Ind. 65.

Iowa. — State Bank *v.* Brewer, 100 Iowa 576, 69 N. W. 1011.

Kansas. — Sanders *v.* Wakefield, 41 Kan. 11, 20 Pac. 518.

Louisiana. — Riordon *v.* Davis, 9 La. 239, 29 Am. Dec. 442; Chiapella *v.* Brown, 14 La. Ann. 189; Davidson *v.* De Lallande, 12 La. Ann. 826.

Maine. — State *v.* Lull, 37 Me. 246; Welcome *v.* Batchelder, 23 Me. 85.

Maryland. — Martin *v.* Good, 14 Md. 398, 74 Am. Dec. 545; Bullock *v.* Hunter, 44 Md. 416; Morris *v.* Columbian Iron Wks. & D. D. Co., 76 Md. 354, 25 Atl. 417.

Massachusetts. — Com. *v.* Ford, 130 Mass. 64, 39 Am. Rep. 426; Miller *v.* Shay, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449.

Michigan. — Skeels *v.* Starrett, 57 Mich. 350, 24 N. W. 98; Ford *v.* Savage, 111 Mich. 144, 69 N. W. 240; Heenan *v.* Forest City P. & V. Co., 138 Mich. 548, 101 N. W. 806.

Minnesota. — Chute *v.* State, 19 Minn. 271; Paine *v.* Sherwood, 19 Minn. 315.

Mississippi. — Henderson *v.* Ilsley, 11 Smed. & M. 9, 49 Am. Dec. 41; Meyer *v.* Blakemore, 54 Miss. 570.

Missouri. — Wernwag *v.* Chicago & A. R. Co., 20 Mo. App. 473; Krider *v.* Milner, 99 Mo. 145, 12 S. W. 461, 17 Am. St. Rep. 549; Third Nat. Bank *v.* Owen, 101 Mo. 558, 14 S. W. 632; Robertson *v.* Reed, 38 Mo. App. 32.

Nebraska. — Labaree *v.* Klosterman, 33 Neb. 150, 49 N. W. 1102; Murray *v.* Cunningham, 10 Neb. 167, 4 N. W. 319, 953; Anderson *v.* Imhoff, 34 Neb. 335, 51 N. W. 854.

Nevada. — Pinschower *v.* Hanks, 18 Nev. 99, 1 Pac. 454.

New Hampshire. — Webster *v.* Clark, 30 N. H. 245; Haven *v.* Wendell, 11 N. H. 112; Watson *v.* Walker, 23 N. H. 471; George *v.* Joy, 19 N. H. 544.

New York. — Holladay *v.* Marsh, 3 Wend. 142, 20 Am. Dec. 678; National Ulster County Bank *v.* Madden, 114 N. Y. 280, 21 N. E. 408, 11 Am. St. Rep. 736; Lawrence *v.* Barker, 5 Wend. 301; Feeter *v.* Heath, 11 Wend. 477; Bartholomew *v.* Lyon, 67 Barb. 86; Morse *v.* Cloyes, 11 Barb. 100; Calkins *v.* Vrooman, 90 N. Y. 675; Raux *v.* Brand, 90 N. Y. 309; Scott *v.* Slingerland, 44 Hun 254. Rule recognized in Merrill *v.* Ithaca & O. R. Co., 16 Wend. 586, 30 Am. Dec. 130.

North Carolina. — Davenport *v.* McKee, 94 N. C. 325.

Oregon. — State *v.* Moran, 15 Or. 262, 14 Pac. 419; State *v.* Magers, 35 Or. 520, 57 Pac. 197.

Pennsylvania. — Heart *v.* Hummel, 3 Pa. St. 414; Dodge *v.* Bache, 57 Pa. St. 421; Babb *v.* Clemson, 12 Serg. & R. 328; First Nat. Bank *v.* First Nat. Bank, 114 Pa. St. 1, 6 Atl. 366.

South Carolina. — Nicholson *v.* Withers, 2 McCord 428, 12 Am. Dec. 739; State *v.* Collins, 15 S. C. 373, 40 Am. Rep. 697.

Texas. — Franks *v.* State (Tex.), 45 S. W. 1013; Luttrell *v.* State, 40 Tex. Crim. 651, 51 S. W. 930; Smith *v.* State (Tex. Crim.), 81 S. W. 936; Walker *v.* State (Tex. Crim.), 94 S. W. 230.

Utah. — State *v.* Haworth, 24 Utah 398, 68 Pac. 155.

Vermont. — State *v.* Bacon, 41 Vt. 526, 98 Am. Dec. 616.

Washington. — Williams *v.* Miller & Co., 1 Wash. Ty. 88.

Wisconsin. — Hill *v.* State, 17 Wis. 675, 86 Am. Dec. 736; McCourt *v.* Peppard, 126 Wis. 326, 105 N. W. 809.

Wyoming. — Kahn *v.* Traders' Ins. Co., 4 Wyo. 419, 471, 34 Pac. 1059, 62 Am. St. Rep. 47, 78.

The California statute referred to in California cases cited above provides as follows: "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular

ness, after examining the memorandum, cannot testify to an existing knowledge of the facts independent of the memorandum.[3] But it

facts, but such evidence must be received with caution." Cal. Code. Civ. Proc. § 2047.

A like statute has been enacted in Oregon. See Hill's Anno. Laws of Oregon § 836 (1892), and an identical one in Montana. See Montana C. C. P. § 3375.

Reference is usually made for purpose of refreshing memory as to fact set out in a writing, but may be made for the purpose of re-enforcing one's mental conception of other facts. The court said: "A witness who shows himself to be acquainted with another's handwriting may before, or at the trial, refer to papers in his possession which he knows to be in the handwriting of the other, to refresh his memory before testifying." Thomas *v.* State, 103 Ind. 419, 431, 2 N. E. 808; Abbott's Trial Ev. 395, Redford *v.* Peggy, 6 Rand. (Va.) 316; Smith *v.* Walton, 8 Gill (Md.) 77; McNair *v.* Com., 26 Pa. St. 388.

3. Acklen's Exr. *v.* Hickman, 63 Ala. 494, 35 Am. Rep. 54. In this case the court says: "The law recognizes the right of a witness to consult memoranda in aid of his recollection, under two conditions: First, when after examining a memorandum made by himself, or known and recognized by him as stating the facts truly, his memory is thereby so refreshed that he can testify, as matter of independent recollection, to facts pertinent to the issue. In cases of this class, the witness testifies to what he asserts are facts within his own knowledge; and the only distinguishing difference between testimony thus given, and ordinary evidence of facts, is that the witness, by invoking the assistance of the memorandum, admits that without such assistance, his recollection of the transaction he testifies to had become more or less obscured. In cases falling within this class, the memorandum is not thereby made evidence in the cause, and its contents are not made known to the jury, unless opposing counsel call out the same on cross-examination. This he may do, for the purpose of testing its sufficiency to revive a faded or fading recollection, if for no other reason. In the second class are embraced cases in which the witness, after examining the memorandum, cannot testify to an existing knowledge of the fact, independent of the memorandum. In other words, cases in which the memorandum fails to refresh and revive the recollection, and thus constitute it present knowledge. If the evidence of knowledge proceed no further than this, neither the memorandum, nor the testimony of the witness, can go before the jury. If, however, the witness go further, and testify that at or about the time the memorandum was made, he knew its contents, and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum. The two are the equivalent of a present, positive statement of the witness, affirming the truth of the memorandum. 1 Greenl. Ev., 436-7; Bondurant *v.* Bank, 7 Ala. 830. Under these rules the circuit court erred in allowing the memorandum to be given in evidence to the jury. The court erred, also, in allowing the witness to refresh his recollection by the credit indorsed in the handwriting of Hickman. True, he stated he saw the indorsement made; but he did not testify that he knew, or ever had known, it contained a true statement of the facts. If he had testified that he saw the indorsement made, and observed its contents, and knew at the time that they were true, this would have brought the testimony within the second of the rules stated above, and would have let in both the testimony and the memorandum, notwithstanding the witness, at the time of the trial, had no independent recollection of the facts shown by the indorsement."

In Davis *v.* Field, 56 Vt. 426, it is said: "There seems to be two classes of cases on this subject: 1. Where the witness, by referring to the memorandum, has his memory quickened and refreshed thereby, so

he is enabled to swear to an actual recollection. 2. Where the witness, after referring to the memorandum, undertakes to swear to the fact, yet not because he remembers it, but because of his confidence in the correctness of the memorandum. In both cases the oath of the witness is the primary, substantial evidence relied upon; in the former, the oath being grounded on actual recollection, and in the latter, on the faith reposed in the verity of the memorandum, in which case, in order to judge of the credibility of oath, and the reliance to be placed upon the testimony of the witness, the memorandum must be original and contemporary and produced in court."

In Lawrence *v.* Stiles, 16 Ill. App. 489, 500, it is said: "Although as to matter of fact a witness can testify only from his own knowledge and recollection, and not from hearsay, yet he may refresh and assist his memory by the use of a written instrument, memorandum or entry in a book. And the authorities recognize two kinds of recollection by aid of the writing, from which he may testify — the one being actual and the other imputed, one absolute and independent of the writing after reference to it, the other still dependent upon and inferred from it. When he finally testifies from the kind first mentioned, being the first class described by Greenleaf in § 437, the character of the writing by which it is refreshed is immaterial. It may be one not made by witness, nor in the regular course of business, nor contemporaneous with the fact, nor even an original, nor need it be produced on the trial. And it is because it may be of such a character — not of itself capable of inspiring absolute confidence, but only of bringing to mind what he had known and forgotten — that the witness is required, after using it for that purpose, to speak from a present, actual, and independent recollection. This is the common case and the general rule. 1 Greenl. Ev. § 436. But there are others which are exceptional, where such a recollection is not required, its place being supplied by what is deemed equivalent as a ground of assurance and accepted from necessity to prevent a failure of justice. Thus where the writing is an original, made at or about the time of the occurrence, and the witness recollects that he has seen it before, and that when he saw it he know the contents to be correct, which is the second class described by Greenleaf, his testimony to the fact itself is received as if it was based on actual recollection; for his knowledge of it is thereby shown to be actual and certain, as well, though inferentially, as if it were so based. Here, however, since he cannot be cross-examined in relation to the fact or circumstances because he has no actual recollection of them, the writing on which he relies must be produced, in order that the other party may cross-examine in relation to it and have the benefit of every part of it. With this security against falsehood and error it is deemed safe, as well as necessary, to admit the testimony."

In Bank *v.* Zorn, 14 S. C. 444, the court said: "The rule upon this subject, in its broadest outline, embraces two classes of cases: first, where the witness, after referring to the paper, speaks from his own memory, and depends upon his own recollections as to the facts testified to; second, where he relies upon the paper and testifies only because he finds the facts contained therein. In the first class the paper is always permitted to be used by the witness without regard to when or by whom made. In the second class this rule of admission is much more stringent. In fact, it cannot be used unless it be an original paper made by the witness himself, and contemporaneously with the transaction referred to. Admitted under any other circumstances, it would be obnoxious to the doctrine of hearsay and other important principles regulating the admission of evidence, and would render the administration of justice uncertain and doubtful. The principle above laid down will be found sustained in 1 Greenl., § 436; State *v.* Rawls, 2 N. & McC. 331; Cleverly *v.* McCullough, 2 Hill 446; and O'Neale *v.* Walton, 1 Rich. 234."

is sometimes said that reference for either purpose as mentioned above is permissible under three conditions.[4]

2. Simple Refreshment. — A witness may use a writing when it is used to assist his memory, his recollection of a fact being imperfect,[5] or when his recollection of an estimate of a fact is imperfect.[6]

3. Where Witness Reduced the Facts to Writing. — Where the witness has no independent recollection of the facts, but states that he reduced them to writing at a time when he had a perfect recollection of them, he may refer to such writing.[7]

The contrary is held in Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211. See note 8.

4. Greenleaf on Ev., 16th Ed. 437; Howard *v.* McDonough, 77 N. Y. 592.

5. *Alabama.* — Godden *v.* Pierson, 42 Ala. 370.

Arkansas. — Greenwich Ins. Co. *v.* State, 74 Ark. 72, 84 S. W. 1025.

California. — People *v.* Vann, 129 Cal. 118, 61 Pac. 776.

Florida. — Jenkins *v.* State, 31 Fla. 196, 12 So. 677.

Georgia. — Schall *v.* Eisner, 58 Ga. 190.

Illinois. — Brown *v.* Galesburg P. B. Co., 132 Ill. 648, 24 N. E. 522; Kunder *v.* Smith, 45 Ill. App. 368.

Maryland. — Billingslea *v.* Smith, 77 Md. 504, 26 Atl. 1077.

Montana. — Kipp *v.* Silverman, 25 Mont. 296, 64 Pac. 884.

New Hampshire. — Converse *v.* Hobbs, 64 N. H. 42, 5 Atl. 832.

New York. — Doyle *v.* New York E. & E. I. Co., 80 N. Y. 631; Kendall *v.* Stone, 2 Sandf. 269, 285; Murray *v.* Great Western Ins. Co., 39 Hun 581; Clark *v.* National Shoe & L. Bank, 32 App. Div. 316, 52 N. Y. Supp. 1064; Blanding *v.* Cohen, 101 App. Div. 442, 92 N. Y. Supp. 93; Ascheim *v.* Levinsohn, 91 N. Y. Supp. 157; Rogers *v.* U. S. F. & G. Co., 84 N. Y. Supp. 203.

North Carolina. — State *v.* Teachey, 138 N. C. 587, 50 S. E. 232.

Pennsylvania. — Babb *v.* Clemson, 12 Serg. & R. 328.

South Dakota. — State *v.* Stevens, 16 S. D. 309, 92 N. W. 420.

Texas. — Ussleton *v.* State (Tex. Crim.), 85 S. W. 21; Sisk *v.* State (Tex. App.), 13 S. W. 647; Smith *v.* State (Tex. Crim.), 81 S. W. 936.

Utah. — State *v.* Haworth, 24 Utah 398, 68 Pac. 155.

"A witness is always permitted to use a memorandum of particulars to assist his memory, when the subject consists of numerous items of account or of many articles." King *v.* Faber, 51 Pa. St. 387.

In Prather *v.* Pritchard, 26 Ind. 65, the witness was asked as to number of feet in a certain quantity of lumber. He answered about 5,595 feet. On cross-examination he admitted that he stated the number of feet from a memorandum held in his hand, but that he had measured the lumber and made the memorandum at the time; that aside from the memorandum he could not state the exact number of feet, but independent of the memorandum he did recollect that there was about 6,000 feet. The court held the evidence to be proper.

6. In Nichols *v.* White, 41 Hun (N. Y.) 152, the witness had made an estimate of a quantity of coal and reduced the same to writing at the time. It was objected to his using such writing to refresh his memory on the ground that he was thus testifying to an estimate of a fact rather than to a fact. The court held that the right existed in either case.

7. *England.* — Maugham *v.* Hubbard, 8 Barn. & C. 14, 19 E. C. L. 147.

United States. — Tribune Assn. *v.* Follwell, 107 Fed. 646, 46 C. C. A. 526; Bailey *v.* Warner, 118 Fed. 395, 55 C. C. A. 329.

Alabama. — Mims *v.* Sturdevant, 36 Ala. 636; Cowles *v.* State, 50 Ala. 454.

4. Where Witness Has Seen the Writing Before. — So also where the witness recollects having seen the writing before, and though

Arkansas. — Woodruff *v.* State, 61 Ark. 157, 171, 32 S. W. 102.

Colorado. — Rohrig *v.* Pearson, 15 Colo. 127, 24 Pac. 1083.

Florida. — Adams, Admr. *v.* Board of Trustees I. I. Fund, 37 Fla. 266, 294, 20 So. 266.

Georgia. — Schmidt *v.* Wambacker, 62 Ga. 321.

Illinois. — Severns *v.* Tribby, 48 Ill. 195; Fitzgerald *v.* Benner, 219 Ill. 485, 76 N. E. 709.

Indiana. — Sage *v.* State, 127 Ind. 15, 26 N. E. 667; Southern R. Co. *v.* State (Ind. App.), 72 N. E. 174.

Iowa. — State *v.* Smith, 99 Iowa 26, 68 N. W. 428; O'Brien *v.* Stambach, 101 Iowa 40, 69 N. W. 1133.

Maryland. — Billingslea *v.* Smith, 77 Md. 504, 26 Atl. 1077; Evans v. Murphy, 86 Md. 498, 40 Atl. 109.

Massachusetts. — Costello *v.* Crowell, 133 Mass. 352; Morrison *v.* Chapin, 97 Mass. 72; Holden *v.* Prudential L. Ins. Co. of America, 191 Mass. 153, 77 N. E. 309; Dugan *v.* Mahoney, 11 Allen 572.

Michigan. — Welch *v.* Palmer, 85 Mich. 310, 48 N. W. 552; People *v.* Kennedy, 105 Mich. 434, 63 N. W. 405.

Nebraska. — Lipscomb *v.* Lyon, 19 Neb. 511, 521, 27 N. W. 731.

Nevada. — McCausland *v.* Ralston, 12 Nev. 195, 217; Pinschower *v.* Hanks, 18 Nev. 99, 1 Pac. 454.

New Hampshire. — Tuttle *v.* Robinson, 33 N. H. 104.

New York. — Stuart *v.* Binsse, 10 Bosw. 436; Halsey *v.* Sinsebaugh, 15 N. Y. 485, *overruling* Lawrence *v.* Barker, 5 Wend. 301, and Feeter *v.* Heath, 11 Wend. 477.

Pennsylvania. — Dodge *v.* Bache, 57 Pa. St. 421; Clark *v.* Union Traction Co., 210 Pa. St. 636, 60 Atl. 302.

South Carolina. — State *v.* Rawls, 2 Nott & McC. 331; Haig *v.* Newton, 1 Mill 423; Corporation of Columbia *v.* Harrison, 2 Mill 213; Franklin *v.* Atlanta & C. A. L. R. Co., 74 S. C. 332, 54 S. E. 578.

Wisconsin. — Manning *v.* School Dist. No. 6, 124 Wis. 84, 102 N. W. 356; Loose *v.* State, 120 Wis. 115, 97 N. W. 526; Anderson *v.* Arpin Hardwood Lumb. Co., 110 N. W. 788.

In Rex *v.* St. Martin's Leicester, 2 Ad. & El. 210, 29 E. C. L. 78, an agent made a parol lease and entered a memorandum of the terms in a book, which was produced; but the agent stated that he had no memory of the transaction except from the book, without which he would not, of his own knowledge, be able to speak to the fact, but on reading the entry he had no doubt that the fact really happened; it was held sufficient.

In People *v.* Vann, 129 Cal. 118, 61 Pac. 776, the question was as to the age of a child. The mother as a witness used a memorandum as to the date of birth to refresh her memory. This memorandum was made by her, at the time of birth, in the family Bible. This was permitted. The physician who attended the mother at the time of birth also testified to the same fact, after refreshing his memory from an entry made in his cash-book by himself at the time. This was permitted.

In State *v.* Colwell, 3 R. I. 132, the court said: "The witness whose testimony was excepted to, stated distinctly, that after examining the memorandum made by him as to the day on which the sale was made, his memory was not so refreshed that he could then swear from his memory that the sale took place on that day. Had the testimony stopped here, it ought not to have passed to the jury; but as the witness went further, and producing his memorandum, testified that when he made it it was true, he supposed it was, he knew it was, there seems to be no reason for excluding the testimony from the jury. If testimony of this kind is to be rejected, one of the principal objects of making memorandums of this kind will be entirely lost. Most people, after committing a fact to writing as a memorial of it, dismiss the matter from their recollections, and cease to remember or try to remember it, trusting to the memorandum so made. And when the memorandum is produced, all they can say is,

he has now no independent recollection of the facts mentioned in it, yet remembers that at the time he saw it he knew its contents to be correct, he may use it in testifying.[8]

that they made it and knew it was true when it was made. Such occurrences are frequent in the technical proof of the execution of old deeds and wills, and unless admitted, many of the most important muniments of title to property would be lost, and that by taking means to preserve them."

Writing Slightly Altered. — In Blodgett *v.* Webster, 24 N. H. 91, it was held that the witness might testify from such writing even though it had been slightly altered by him after the time when it was first written, upon information that he had made a mistake as to one particular in the writing.

8. *England.* — Burrough *v.* Martin, 2 Campb. 112; Burton *v.* Plummer, 2 Ad. & El. 341, 29 E. C. L. 113.

United States. — Pacific Coast S. S. Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135.

California. — People *v.* McFarlane, 138 Cal. 481, 71 Pac. 568.

Delaware. — Rogers *v.* Fenimore, 41 Atl. 886.

Illinois. — Lawrence *v.* Stiles, 16 Ill. App. 489, 500.

Indiana. — Houk *v.* Branson, 17 Ind. App. 119, 45 N. E. 78.

Maine. — State *v.* Lull, 37 Me. 246.

Michigan. — Crane Lumber Co. *v.* Bellows, 116 Mich. 304, 74 N. W. 481.

Nebraska. — City of Kearney *v.* Themanson, 48 Neb. 74, 66 N. W. 996.

New Hampshire. — Webster *v.* Clark, 30 N. H. 245.

New York. — Krom *v.* Levy, 1 Hun 171.

Oregon. — Oyler *v.* Dantoff, 36 Or. 357, 59 Pac. 474.

South Carolina. — Henry Sonneborn & Co. *v.* Southern R. Co., 65 S. C. 502, 44 S. E. 77.

Texas. — McFadden *v.* State, 14 S. W. 128.

Wisconsin. — Folsom *v.* Log-Driving Co., 41 Wis. 602.

In Coffin *v.* Vincent, 12 Cush. (Mass.) 98, which was trespass for taking and carrying away certain sheep, the defendants attempted to prove that the sheep were taken by them as field drivers, while roaming at large, and for that cause were taken up and impounded. To prove this they called a witness to show the contents of the notice posted by them as field drivers, which notice had been lost or destroyed; and in testifying to its contents it was held that the witness could refresh his recollection by referring to a form of such notice, which, though not made by himself, he had compared with the notice posted up and found them to correspond.

In Bartlett *v.* Hoyt, 33 N. H. 151, the court said: "It is a familiar principle that if the memory of a witness is at fault in relation to matters of which he made a written memorandum at the time of the transaction, which memorandum he knows to be correct, he may refresh his recollection by recurring to the memorandum, and then testify to the facts there stated, as existing in his recollection; and this, too, whether the recurrence to the writing actually revives the recollection of the facts or not. Nor is it necessary that the writing should be by the hand of the witness, if it existed at the time of the transaction, and can be clearly identified by him, as a paper which he then examined, while the facts were fresh in his recollection, and which he then knew contained a correct statement of the particulars mentioned in it. Jacob *v.* Lindsay, 1 East 460; Burrough *v.* Martin, 2 Camp. 112; Burton *v.* Plummer, 2 Ad. & Ec. 343; 1 Greenl. Ev., sec. 437, note 2."

In Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211, the witness testified from a memorandum made many years before the trial by witness' bookkeeper from items appearing upon his books. These items were entered from original data furnished by witness' foreman under the supervision of the witness, and the latter testified that he had personal knowledge of their correctness.

5. Where Witness Knows the Writing To Be Genuine. — Where the witness has no present recollection of the facts, or of having made a correct written memorandum of them, or where the writing is not recognized by the witness as one he remembers having seen, but, nevertheless, knowing the writing to be genuine, his mind is so convinced that he is, on that ground, enabled to swear positively as to the fact, such testimony has been admitted though usually only when the writing referred to was made in the ordinary course of business and is itself admissible in evidence, or where the witness recognizes his own signature.[9] And it has been held that when a

9. Erie Preserving Co. *v.* Miller, 52 Conn. 444, 52 Am. Rep. 607; Leonard *v.* Mixon, 96 Ga. 239, 23 S. E. 80; Dugan *v.* Mahoney, 11 Allen (Mass.) 572; Haven *v.* Wendell, 11 N. H. 112; Merrill *v.* Ithaca & O. R. Co., 16 Wend. (N. Y.) 586; Mattocks *v.* Lyman, 16 Vt. 113; Mitchell *v.* Churchman, 4 Humph. (Tenn.) 218.

In Maugham *v.* Hubbard, 8 Barn. & C. 14, 19 E. C. L. 147, a witness, called to prove the receipt of a sum of money, was shown an acknowledgment of the receipt of such money, signed by himself, and on seeing it, said that he had no doubt he received it, although he had no recollection of the fact. It was held that this was sufficient parol evidence of the payment of the money.

In Martin *v.* Good, 14 Md. 398, 74 Am. Dec. 545, a person sued his partner to recover a firm debt paid by plaintiff, but which according to the terms of their agreement of settlement defendant had agreed to pay. "To prove the agreement, a clerk of the firm was introduced as a witness, and shown a memorandum of the agreement. He knew the handwriting to be his own, and that he would not have written an instrument not in accordance with the understanding between the parties, but he could not recall when he wrote it, nor did the paper so refresh his memory as to enable him to remember any of its contents. He was convinced that the instrument correctly stated the terms of the agreement. His testimony was admitted for the purpose of proving the contract sued on, and Martin excepted." *Held,* that his testimony was properly admitted. The court says: "Whatever rules may have existed, as shown by the early cases, requiring that the witness should be able to say, after reading a memorandum, that his memory was so far refreshed as to enable him to testify to the facts therein stated, independently of the memorandum, it is very certain that they are not now enforced with the same strictness as formerly. In this country and in England the doctrine has been extended and applied to cases where justice would otherwise have failed, and, as we think, on grounds quite compatible with fundamental principles. . . . The same principle applies where persons are called to prove the execution of deeds and other writings to which their names appear as witnesses, or to speak of dates, amounts, and other details which a man cannot carry in his mind, but of which they have made memoranda. They may have no recollection of the facts, and yet, with the utmost safety, be willing to swear that they have no doubt of their occurrence, merely because their handwriting would not have appeared in connection with them if they had not taken place as therein stated."

In Van Dyne *v.* Thayre, 19 Wend. (N. Y.) 162, the witness had formerly assisted in making an inventory of an estate. The question was as to the existence of a certain mortgage as a part of said estate. He testified that he had had charge of the papers belonging to the estate, that an entry in the inventory indicating the existence of the mortgage had been made by *him* from *papers before him* at the time, but that at the time of his testifying he had no recollection of the mortgage other than what he received from the entry

person is called as a witness to prove the execution of an instrument witnessed by him, it is not necessary that he be able to recollect the circumstances attending his attestation, nor the fact that he saw the maker of the instrument sign it. It is enough, *prima facie*, if he swears to his signature, and that it would not have been affixed but for the purpose of attestation.[10]

6. When Witness Knows Transaction Took Place. — If a witness, on looking at a writing, is able to testify that he knows the trans-

in the inventory. This is held to be admissible. The court, in giving his reasons, illustrated in this way: "A man says: 'Here is my name as a subscribing witness to a deed. I remember nothing of placing it there, but I never would have done so had I not seen its execution.' It is every-day practice to receive a deed, the execution of which is proved in this way. . . . The declaration of the witness that *he* made the entry from papers which he actually had *before him*, I consider quite equivalent if not more than equal to the declaration supposed of the attesting witness."

In Alvord *v.* Collin, 20 Pick. (Mass.) 418, the question was as to whether a notice of sale had been posted up. Witness testified, upon being shown a writing signed by him certifying to the posting up of such notice, that the signature was in his handwriting and that he had no doubt the certificate stated the truth, though he had no recollection of the fact. Such testimony was held competent.

In Bullard *v.* Wilson, 5 Martin N. S. (La.) 196, the witness had no recollection of having given a notice of protest, but he had no doubt that he had given it, since there was a memorandum to that effect on the back of it, and he testified that he never made such a memorandum without giving the notice. The court said: "This is as good evidence of the notice as is possible to be expected. A notary who daily protests and gives notice of the protest of a great number of notes cannot possibly be able, at a distance of time, to recollect the very day he gave a particular notice, unless immediately after he gave it he made a memorandum of it; and it is from the information which his memorandum recalls that he can satisfactorily establish either the day, place, or the person whom he notifies."

10. Davis *v.* Field, 56 Vt. 426.

In Pearson *v.* Wightman, 1 Mill (S. C.) 336, 12 Am. Dec. 636, the question was as to the validity of a will. Witness testified that he had no recollection of signing the will as a witness. He doubted whether the handwriting was his, but would not be positive that it was not, and that if his name had been cut out of the will he should have thought it was his handwriting. The court said: "Now, I hold it not to be necessary that a subscribing witness should recollect the time and occasion when he subscribed the instrument as a witness. It is enough if he recognizes his handwriting and is perfectly assured in his own mind that he never subscribed an instrument as a witness without having seen it executed or acknowledged, as the nature of the act requires."

In Graham *v.* Lockhart, 8 Ala. 9, the witness whose name appeared to a deed as a subscribing witness stated that his signature was genuine, that he had a faint recollection that some such instrument had been signed by him as a witness one afternoon some time before, but except from the genuineness of his signature to the deed he could not say that he knew anything positive about it. The court said: "It is not essential, to let in a deed as evidence, that the subscribing witness should remember, with precision, its execution by the parties. If this was the rule, the imperfections of the witness's memory would avoid the deed. Here, however, he stated that his signature, as a subscribing witness, was genuine, and that it would

action therein noted took place, though he has no present memory of it, his testimony is admissible.[11]

not have been placed there, unless he had been called to witness the instrument. This, in our opinion, was sufficient to let in the deed to the jury, though it would obviously be of little reliance, if the question at issue had been the execution, or non-execution, of the deed."

11. Graham *v.* Lockhart, 8 Ala. 9; Mayberry *v.* Holbrook, 182 Mass. 463, 65 N. E. 849; Wernwag *v.* Chicago & A. R. Co., 20 Mo. App. 473; Lamberty *v.* Roberts, 56 Hun 644, 9 N. Y. Supp. 607; State *v.* Dean, 72 S. C. 74, 51 S. E. 524; Sharpe *v.* Bingley, 1 Mill (S. C.) 373, 12 Am. Dec. 643; Davis *v.* Field, 56 Vt. 426.

In Topham *v.* M'Gregor, 1 Car. & K. (Eng.) 320, the editor of a newspaper swore that A. was the writer of a certain article which had appeared in that paper many years before, that the manuscript had been lost. These articles were written on atmospheric conditions and hence were confined within certain well defined lines. A. stated that he had been in the habit of writing such articles for the newspaper in question, but that he had no recollection of having sent the particular article referred to. He swore, however, that all the statements made in the articles he did send were true. *Held,* that the newspaper might be put into A's hand, in order to refresh his memory, and that he might be asked whether, looking at the article, he had any doubt that the fact was as therein stated.

In Dugan *v.* Mahoney, 11 Allen (Mass.) 572, which was an action for goods sold and delivered, two witnesses were called to prove the delivery of numerous parcels. Neither had any recollection of the facts, but were able to swear to them positively from certain entries and checks made by them in memorandum books in the regular and usual course of business. It does not appear that they remembered having seen these entries before and that when they saw them they knew them to be correct, but they knew they were made by them and were positive that they would not have been made if the fact had not been as stated. The supreme court said: "It is obvious that this species of evidence must be admissible in regard to numbers, dates, sales and deliveries of goods, payments and receipts of money, accounts, and the like, in respect to which no memory could be expected to be sufficiently retentive, without depending upon memoranda; and even memoranda would not bring the transaction to present recollection. In such cases, if the witness on looking at the writing is able to testify that he knows the transaction took place, though he has no present memory of it, his testimony is admissible."

In Eby *v.* Eby's Assignee, 5 Pa. St. 435, a witness testified: "The paper was a memorandum I made at the time, in the presence of the parties and by their directions. . . . I don't recollect that Jacob, the younger, admitted the bond to be due. It is only because I see the words there that I say he admitted it, for I would not have put it down if he had not."

In Dodge *v.* Bache, 57 Pa. St. 421, the question was as to the truth of entries in a book. Witness had kept the book, and on the stand testified that he believed the entries were correct. The lower court rejected the testimony, but the higher court held this to be error. The court said: "We may assume that the witness, having looked at the entries, was still unwilling to testify that he recollected the dates, but was willing to say that he believed them to be correct. On what was such a belief necessarily founded? It could only be on his knowledge that the entries were a truthful record of his transactions made at the time. In general it is true that a witness must testify to facts in his personal knowledge and recollection, but it is not a universal rule. On questions of the identity of persons and handwriting, it is everyday's practice for witnesses to state that they believe the person to be the same or the hand-

Weight of Evidence Based Upon Writing. — It has been said that the testimony of a witness who swears positively from written memoranda, though they do not recall to his memory a recollection of the facts, is admissible; and that such testimony is better evidence than an adventurous and unaided recollection.[12]

Public Record. — Witness. — Public Officer. — A public officer called as a witness may refresh his memory by entries in the records of his office, which he knew at the time of making to be correctly made.[13]

7. Essentials To Right To Use Writing. — A. Must Be Able To Say That the Writing Is True. — The witness must be able to say that the writing is a true statement.[14]

writing to be that of a particular individual, although they will not speak positively, and the degree of credit to be attached to the evidence is a question for the jury. Starkie on Ev., ed. of 1860, p. 173; Watson *v.* Brewster, 1 Barr 381. It is impossible for any man to testify from his own knowledge how old he is. In the nature of things he has no personal recollection of when he was born. But who doubts that he can state his belief as to the fact?"

In Schettler *v.* Jones, 20 Wis. 412, the court said: "We think the sounder and better rule to be, that if the witness can swear positively that the memoranda or entries were made according to the truth of the facts, and consequently that the facts did exist, that is sufficient, though they may not remain in his memory at the time he gives his testimony. He may testify from the entries, and when he does so, he swears positively to the truth of the facts stated in them."

12. Pearson *v.* Wightman, 1 Mill (S. C.) 336, 12 Am. Dec. 636; Wernwag *v.* Chicago & A. R. Co., 20 Mo. App. 473; Solomon R. Co. *v.* Jones, 34 Kan. 443, 458, 8 Pac. 730; Haig *v.* Newton, 1 Mill (S. C.) 423; Sharpe *v.* Bingley, 1 Mill (S. C.) 373, 12 Am. Dec. 643; State *v.* Rawls, 2 Nott & McC. (S. C.) 331.

13. Davis *v.* Field, 56 Vt. 426.

In Sasscer *v.* Farmers' Bank, 4 Md. 409, a notary was called as a witness to prove the circumstances under which a protest was made and the notice given. He produced in court the record of his notarial acts and the original protest and proposed to inspect the same with a view of refreshing his memory in regard to the subject. This was held to be proper.

In Bank *v.* Cowan, 7 Humph. (Tenn.) 70, the court said: "To require that a notary shall particularly recollect every specific case where he protests commercial paper and directs notice to the parties entitled thereto, would be to defeat recoveries to a very great extent upon such instruments, for in the nature of things it is impossible for a notary to retain such recollection when the amount of business done by him is extensive. It is sufficient in such cases, if the statement be contained in his notarial book, and it was his habit to make such entries at the happening of the event in such cases; his belief based upon such entry is good evidence, and should be received."

De Facto Public Officer. — "The declarations of a person who is dead, whose deposition was taken under a commission defectively executed, may be given in evidence by the person who took his evidence as a commissioner, though not legally empowered to administer an oath, and he may turn to the deposition to refresh his memory; but such declarations are not to be received as made on oath." Tolley *v.* Ford, 1 Har. & J. (Md.) 413.

14. *Illinois.* — Chicago & A. R. Co. *v.* Adler, 56 Ill. 344.

Iowa. — Oberholtzer *v.* Hazen, 101 Iowa 340, 70 N. W. 207.

It is not sufficient for witness to swear that he made a memorandum which he believes to be true, and that he relies upon it without any present recollection of the facts.[15]

B. Memory Must Appear at Fault. — Before witness will be permitted to refer to a writing it must appear that his memory is at fault concerning the matters to which his testimony is sought.[16]

Maryland. — Hopper *v.* Beck, 83 Md. 647, 34 Atl. 474.

Michigan. — Hopkins *v.* Sanford, 41 Mich. 243, 2 N. W. 39.

Minnesota. — Stickney *v.* Bronson, 5 Minn. 215.

New York. — McCarthy *v.* Meaney, 94 App. Div. 614, 88 N. Y. Supp. 1108, *affirmed* in 183 N. Y. 190, 76 N. E. 36; Lawrence *v.* Barker, 5 Wend. 301.

Vermont. — Downer *v.* Rowell, 24 Vt. 343.

In Lewis *v.* Kramer, 3 Md. 265, it was held that a witness might not refresh his memory by reference to a writing made by himself, but at the dictation of another, where witness had no recollection or knowledge of the facts set out in such writing. In the language of the court: "Williams (the witness) could have no recollection of the facts except as being hearsay, received by him from the clerk, and if he could remember them perfectly as detailed to him, he would not be allowed to give them in evidence."

Must Swear to the Truth of Such Statement. — Redden *v.* Spruance, 4 Harr. (Del.) 265. This was a case where a witness was called upon to testify as to the contents of a letter which he had written. He had no independent recollection of the facts stated in the letter or of the fact that he wrote the letter; but upon its production he recognized his handwriting and remembered writing it. He was willing to swear from general confidence in his own veracity that what the letter contained was true, but was unable to testify on oath as to any fact contained in the letter. The court said: "He is unable to testify on oath as to any fact contained in the letter; and, however good his general character may be, whether proved to be such by himself or by others, it is not good enough, nor is any man's good enough, to dispense with the necessity of an oath, or make an unsworn statement evidence. The question is not whether the witness is a man whose unsworn statements verbally or in writing are likely to be true; it is whether facts so stated can be admitted in evidence without an oath to verify them, and that oath founded upon a knowledge or recollection of the facts, and not merely upon the writer's general reliance on the accuracy as well as truth of his own statements."

15. Lawrence *v.* Barker, 5 Wend. (N. Y.) 301; Redden *v.* Spruance, 4 Harr. (Del.) 265.

In Butler *v.* Benson, 1 Barb. (N. Y.) 526, the court said: "The rule is well settled that the witness may use his memorandum to refresh his recollection. But it is not evidence to go to the jury, even though he swears he thinks it correct. He may refresh his memory, and then if his recollection recalls the transaction, that recollection is testimony to go to the jury. He must be conscious of the reality of the matters he swears to at the time he testifies, and it is not sufficient that his mind recurs to the memorandum and he himself believes that true."

16. State *v.* Baldwin, 36 Kan. 1, 15, 12 Pac. 318; Pittsburgh, C. C. & St. L. R. Co. *v.* Lewis, 18 Ky. L. Rep. 957, 38 S. W. 482; Morris *v.* New York City R. Co., 91 N. Y. Supp. 16; Sackett *v.* Spencer, 29 Barb. (N. Y.) 180; Thurman *v.* Mosher, 3 Thomp. & C. (N. Y.) 583; Coxe Bros. & Co. *v.* Milbrath, 110 Wis. 499, 86 N. W. 174.

In National Ulster County Bank *v.* Madden, 114 N. Y. 280, 21 N. E. 408, 11 Am. St. Rep. 633, action was brought against an indorser of certain checks. Defendant testified that when indorsed by him no time of payment was expressed in any of the checks; also that when he indorsed

But it has been said that it need not be shown that it is necessary for the witness to assist his memory by the memorandum.[17]

C. Not Necessary That Witness Should Have an Actual Recollection of the Facts. — It is not necessary that the witness should have an actual recollection of the facts. It is sufficient that the witness is able to state that the memorandum is correct.[18]

them he made a memorandum entry of the dates, amount and time when payable; and on his examination in chief was permitted, against plaintiff's objection, to read these memoranda to the jury. The court says: "In holding, as we do, that entries made by a witness are not admissible, unless it appear that he does not recollect the occurrence to which they relate independently of them, we but reaffirm what may be deemed the rule already quite well established in that respect. In the present case it not only did not so appear, but the evidence of the defendant fairly indicated that his recollection was distinct of the facts in issue to which his memoranda referred."

In Young *v.* Catlett, 6 Duer (N. Y.) 437, the court said: "We do not see the propriety of putting into the hands of a witness a paper, for the purpose of refreshing his recollection, when his memory is already fresh, and his recollection full on the subject of inquiry."

Memory Must Be Exhausted. In Holliday *v.* Holgate, 17 L. T. 18, counsel wished to place in the hands of his witness proceedings in another court for the purpose of refreshing his memory. The court said that counsel must exhaust the memory of the witness first.

17. Callowav *v.* Varner, 77 Ala. 541, 54 Am. Rep. 78. In this case the court says: "It need not be shown that it is necessary for the witness to assist his memory by the memorandum. 'The witness, by invoking the assistance of the memorandum admits that without such assistance his recollection of the transaction he testifies to had become more or less obscured.'"

In Chute *v.* State, 19 Minn. 271, the court said "F. B. Long, a witness for the prosecution, testified that he examined the building above mentioned, and made a written report of the result of such examination. The witness testifying that he knew that the report (which was produced and identified) was accurate when made, the court, upon the offer of the county attorney, allowed the witness to examine it to refresh his recollection. . . . The defendant's counsel argues that this was improper, because it did not appear that the witness did not recollect the facts without refreshing his memory. If he did so recollect, while it would certainly seem to be *idle* to refresh his memory, yet it is not easy to see in what respect the defendant could have been injured, nor what worse could be said of the inspection of the report than that it was unnecessary. If, on the other hand, the memory of the witness required refreshing, his examination of the report was entirely unobjectionable."

18. *Colorado.* — Lawson *v.* Glass, 6 Colo. 134.

Massachusetts. — Costello *v.* Crowell, 133 Mass. 352.

Missouri. — Ward *v.* D. A. Morr T. & S. Co., 119 Mo. App. 83, 95 S. W. 964.

New York. — Wise *v.* Phoenix Fire Ins. Co., 101 N. Y. 637, 4 N. E. 634; Halsey *v.* Sinsebaugh, 15 N. Y. 485.

Ohio. — Shriedley *v.* State, 23 Ohio St. 130.

Pennsylvania. — Mead *v.* White, 8 Atl. 913; Bank *v.* Boraef, 1 Rawle 152.

South Carolina. — State *v.* Rawls, 2 Nott & McC. 331.

Tennessee. — Bank *v.* Cowan, 7 Humph. 70.

Vermont. — Davis *v.* Field, 56 Vt. 426.

In Downer *v.* Rowell, 24 Vt. 343, the court said: "And the consideration that the witness could not swear from memory, is not, at present, regarded as important. All that is required is, that the witness shall

Old Doctrine. — The old doctrine was that the witness might use the writing for the sole purpose of refreshing or assisting his memory and that he must testify from his own recollection as assisted or revived by the writing. In other words, it was essential that he should testify from an independent recollection.[19]

Cannot Be Assumed That Witness Testifies From Independent Recollection. — It was held where there was no evidence to the effect that a witness testified from independent recollection and the circum-

be able to state that the memorandum is correct. He may then read it, as well as repeat it. The certainty of its contents being the truth is not affected by that, either way. Where a transaction is remote, out of mind, or consists of a multiplicity of facts, a detail of dates, sums, etc., or a long narrative, like the testimony of a witness, where certainty is desirable, nothing could be satisfactory but minutes made at the time. Hence the old rule, that the witness must be able to swear from memory, is now pretty much exploded."

In Cowles *v.* State, 50 Ala. 454, it was material to ascertain the dates of the shipment of certain quantities of cotton. Witness, who was an agent of a railroad company, testified that he had no recollection of having shipped said cotton, or when it was shipped, but that his books showed the dates. The lower court allowed the witness to state, "that from the entries in his books, which he had in court, said cotton was shipped on the 11th of October, 1871." The testimony was held by the supreme court to have been properly admitted.

19. *Alabama.* — Calloway *v.* Varner, 77 Ala. 541, 54 Am. Rep. 78; Stoudenmire *v.* Harper Bros., 81 Ala. 242, 1 So. 857.

Delaware. — Fitzgibbon's Admr. *v.* Kinney, 3 Harr. 72, 317.

Georgia. — Hematite Min. Co. *v.* East Tennessee R. Co., 92 Ga. 268, 18 S. E. 24.

Illinois. — Elston *v.* Kennicott, 46 Ill. 187, 206; Chicago & W. Coal. Co. *v.* Liddell, 69 Ill. 639.

Indiana. — Southern R. Co. *v.* State, 165 Ind. 613, 75 N. E. 272.

Iowa. — Waite *v.* High, 96 Iowa 742, 65 N. W. 397.

Kentucky. — Calvert *v.* Fitzgerald, 1 Litt. Sel. Cas. 388.

Massachusetts — Glover *v.* Hunnewell, 6 Pick. 222.

Nebraska. — Murray *v.* Cunningham, 10 Neb. 167, 4 N. W. 319, 953.

North Carolina. — Howie *v.* Rea, 75 N. C. 326.

In United States *v.* Wood, 3 Wash. C. C. (U. S.) 440, the court said: "He may refresh his memory from notes which he took of the evidence at the trial, or from a newspaper, printed by himself, containing the evidence of Hare, as taken down by the witness; but he must be sure of the accuracy of the statement, from his own recollection, and not merely from a confidence in the accuracy of the statement to which he refers. The witness acknowledged that he could not say that he recollected the words of Hare, although he felt the most entire confidence that he had taken them down as the witness had uttered them, and that they are truly copied into the paper published under his own inspection. The court refused to suffer him to be examined."

"The rule is correct that a witness cannot read from a memorandum as testimony, even when made by himself. He can refresh his recollections by looking at the writing, but he must then testify from his recollection." Wilde *v.* Hexter, 50 Barb. (N. Y.) 448.

The court in Vastbinder *v.* Metcalf, 3 Ala. 100, says: "A witness who has made a memorandum of facts may refresh his memory by referring to it; and if by that means he obtains a recollection of the facts themselves, as distinct from the memorandum, his statement is evidence."

stances were suspicious, it could not be assumed that he so testified.[20]

Recollection Not Revived. — Where a witness neither recollects the fact set out in a writing nor recognizes the writing as a true statement of the fact, his testimony, to the extent to which it is founded on the writing, is mere hearsay.[21]

8. Witness May Be Compelled To Refresh His Memory. — It has been held that the court may compel a witness to inspect a paper which is present in court, if the paper is suitable for the purpose and there is reason to believe that by reading it his memory may be so refreshed as to enable him to recollect clearly the facts to which his testimony is directed.[22]

20. Dwight *v.* Cutting, 91 Hun 38, 36 N. Y. Supp. 99.

21. Hematite Min. Co. *v.* East Tennessee R. Co., 92 Ga. 268, 18 S. E. 24.

In Bondurant *v.* Bank of Alabama, 7 Ala. 830, the court says: "It is said a witness may refresh, and assist, his memory, by the use of a memorandum, written instrument, or entry in a book; and that it is not necessary that the writing should have been made by the witness himself, or that it should be an original, if, after inspecting it, he can speak to the facts from his own recollection. So where the witness recollects that he saw the paper, while the facts were fresh in his memory, and remembers that he then knew, that the particulars therein mentioned, were correctly stated. And a writing, which is in itself inadmissible evidence, may be referred to, by the witness, for the purpose of refreshing his memory. But where the witness neither recollects the fact, nor remembers to have recognized the written statement, as true, and the writing was not made by him, his testimony, so far as it is founded upon the written paper, is but hearsay; and a witness can no more be permitted to give evidence of his inference from what a third person has written, than from what a third person has said. (Greenl. on Ev. 483; 2 Nott & McC. Rep. 334; Minor's Rep. 397; 3 T. Rep. 752, 11 Wend. Rep. 485; 2 Phil. Ev. C. & H's. Notes, 754, 759; 3 Id. 1238-9; 3 Porter's Rep. 430.)" To same effect, see Crawford *v.* Branch Bank, 8 Ala. 79; Mobile Life Ins. Co. *v.* Egger, 67 Ala. 134.

In Chicago & A. R. Co. *v.* Adler, 56 Ill. 344, the court says: "It has been held by this court that a witness may use a memorandum to refresh his memory. Dunlap *v.* Berry, 4 Scam. 372. But while the witness may use the memorandum to refresh his memory, he must be able to state that he remembers the facts. If he has no recollection of the circumstances, and can only say they are true because he finds them on his memorandum, it would not be proper to permit the witness to either read or speak from the memorandum. If, in this case, the witness could say that he remembered the omission to ring the bell or to sound the whistle, no objection is perceived in permitting him to refer to his paper to ascertain the several dates, provided he can say that he knows them to be true, because they were true when made and were noted at the time. But the witness must be able to say the facts thus noted are true. And the witness may use a copy of the original memorandum, but, unless he can give satisfactory reasons for using the copy, that fact might impair the weight of his evidence with the jury. That fact would go to the credit, and not to the competency, of his testimony. But, before he can be permitted to refresh his memory from the copy, he must be clear and explicit in his evidence that it is truly transcribed from the original, and that the original was correctly made, and was true when it was made."

22. State *v.* Staton, 114 N. C. 813, 19 S. E. 96.

In Chapin *v.* Lapham, 20 Pick. (Mass.) 467, the court said: "But

9. Procedure. — A. Care Should Be Exercised By Court. In permitting the use of writings to assist the memory of a witness, great care should be exercised by the courts to guard against forgery and imposition.[23]

And when a witness is permitted by a court to refresh his recollection by reference to proper data, unless there is something to show clearly that the court erred, an appellate court should not grant a new trial or reverse a judgment.[24]

B. Objection Should Be Made and Exception Taken on Trial. — If witness is improperly refused privilege of refreshing memory, an exception should be taken during the trial. Where an exception is not then taken, but is assigned as cause for granting a new trial, it will not *per se* be sufficient cause for obtaining a reversal of the judgment of the inferior court overruling a motion for a new trial.[25]

C. Counsel Improperly Refused Privilege. — If counsel is improperly refused privilege of allowing witness to use memorandum to refresh his memory and afterwards at the trial the memo-

there are other cases, in which it would lead to an entire perversion and frustration of the purposes of justice, if a witness could not be required to refresh his memory, and prepare himself to testify, by an examination of papers in his own custody or power, or when they are produced at the trial. As where a mate of a vessel, who had kept his cargo book, or an inspector of elections his tally list, or a clerk in a warehouse his memorandum of the receipt and delivery of goods, they may testify with great accuracy by the aid of their memoranda, but very imperfectly, or not at all, without. And multitudes of similar cases might be suggested. Suppose these witnesses, from malice or caprice, or still worse, from a desire to favor the adverse party, should refuse to examine their memoranda; the rights of life, liberty, property or reputation, public and political, as well as private, civil and social rights, might be affected and put in jeopardy. It would be hardly going beyond the principle contended for, to say that an attesting witness, called to prove a will or deed, if he chose to close his eyes and refuse to look at the instrument, might not be required to look at it, and thus qualify himself to say whether he attested it or not. . . . The witness is bound under his oath to testify the whole truth, and he ought to do what is reasonable to enable him to perform that duty, faithfully and sincerely, according to the spirit of his oath."

23. Merrill *v.* Ithaca & O. R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130; Lycoming County M. I. Co. *v.* Schreffler, 44 Pa. St. 269; Sinclair *v.* Stevenson, 1 Car. & P. 582, 11 E. C. L. 480; Rex *v.* Ramsden, 2 Car. & P. 603, 12 E. C. L. 283.

24. Madigan *v.* DeGraff, 17 Minn. 52; French *v.* Millville Mfg. Co., 70 N. J. L. 699, 59 Atl. 214.

In Ashby *v.* Elsberry & N. H. Gravel Road Co., 111 Mo. App. 79, 85 S. W. 957, the court said: "Watson, a witness for plaintiff, was partially examined by referring to his evidence on the former trial, as preserved in the bill of exceptions, to which mode of examination defendant duly objected and excepted. If the witness was reluctant, or if his memory was clouded, we can see no impropriety in this course of examination. It was a matter resting very largely in the discretion of the trial judge, and, if it does not appear he abused his discretion, such an examination, though out of the usual course, does not call for a reversal of the judgment."

25. Key *v.* Lynn, 4 Litt. (Ky.) 338.

randum is introduced in evidence, thereby no prejudice occurring, counsel is in no position to complain of such error.[26]

D. How to Take Advantage of Facts Learned Through Cross-Examination. — When on cross-examination it appears that witness was not properly qualified to refresh his memory from writing used on direct examination, cross-examining counsel should move that the evidence be stricken from the record.[27]

III. WHEN WITNESS MAY NOT REFER TO WRITING.

1. Counsel Not Permitted To Lead By Use of Writing. — If a witness' memory is not at fault, counsel will not be permitted to lead him by putting a paper in his hands, under pretext of refreshing his memory,[28] or of reading to him statements made on a former occasion for a like purpose.[29]

26. Davis *v.* State, 51 Neb. 301, 70 N. W. 984, 997; McFadden *v.* State (Tex.), 14 S. W. 128; Haines *v.* Cadwell, 40 Or. 229, 66 Pac. 910.

27. State Bank *v.* Brewer, 100 Iowa 576, 69 N. W. 1011.

28. Sackett *v.* Spencer, 29 Barb. (N. Y.) 180; Chamberlain *v.* Sands, 27 Me. 458.

In Young *v.* Catlett, 6 Duer (N. Y.) 437, a witness on the part of the defendant, after having been examined for some time, by the counsel for the defendant, and having answered promptly the questions that were put to him, was asked to look, for the purpose of refreshing his memory, at a memorandum, copied by himself from entries, made in the books by others than himself. The plaintiff objected that the witness ought not to be allowed to look at the memorandum. The objection was sustained, and the defendant excepted. The court said. . . . "We do not perceive the propriety of putting into the hands of a witness a paper, for the purpose of refreshing his recollection, when his memory is already fresh, and his recollection full, on the subject of inquiry. On the contrary, if the witness assumes to know and to remember, and does answer the inquiries proposed, we not only think it unnecessary to refresh his recollection, but that it would be unjust to the adverse party to permit it."

"I am not aware of any principle which justifies the use by a party of a prior written statement of a witness of such party to instruct him what to say, under pretext of refreshing his memory, when he has not shown any weakness of recollection." Haack *v.* Fearing, 5 Rob. (N. Y.) 528, 539.

29. Sylvester *v.* State, 46 Fla. 166, 35 So. 142.

The text is well illustrated in Bashford *v.* People, 24 Mich. 244. The court said: "It appears that while a witness was on the stand being examined in chief, and without the slightest occasion, so far as is shown by the record, for doing anything by way of refreshing his recollection, the following proceedings took place. The counsel for the prosecution, presenting the witness a paper, said: 'This is your deposition given on the examination?' The answer was, 'Yes, sir.' The counsel then said, 'If the court please, I propose to read part of his deposition, by way of refreshing his recollection.' To this the judge presiding at the trial replied, 'That is perfectly proper;' and against the objection of the prisoner, the counsel then publicly read a portion of the paper in the presence of the witness, the court and the jury, and then asked the witness whether, after having heard that read, he recollected certain facts mentioned in the question. We think the circuit judge erred in holding this to be entirely proper. It was, on the other hand, quite out of the ordinary course, and

Inconsistent Statements. — Counsel may ask his own witness, when surprised by the latter's testimony, or when such witness is apparently hostile, whether at a certain time and place he has not made inconsistent statements with his testimony on the stand, or he may probe him as to such statements, if his primary purpose in doing so is to refresh the witness' memory and not to impeach him.[30]

was eminently unfair to the prisoner. The usual course requires the witness, when he does not profess or appear to have forgotten the circumstances, to give his testimony in response to questions which simply call his attention to the points he is to speak to; and by that course while one party calls out the facts, the other is enabled to test both the recollection and the truthfulness of the witness by the best methods the law can provide. Unless the facts occurring on the trial were different from what appear from the record, we know of no authority which would sanction the course taken, and the reasons appear to us to be all against it. If the practice were admissible, the rule against leading questions would not be of the least importance; for in this way it would be easy to put into the mouth of the witness the very words it was desired he should repeat; and where he had been sworn before, all possible discrepancies would be avoided.'"

30. *England.* — Melhuish *v.* Collier, 15 Q. B. Div. 878, 15 Ad. & El. (N. S.) 878; Reg. *v.* Williams, 6 Cox C. C. 343.

Alabama. — White *v.* State, 87 Ala. 24, 5 So. 829; Louisville & N. R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130; Griffith *v.* State, 90 Ala. 583, 8 So. 812; Thompson *v.* State, 99 Ala. 173, 13 So. 753.

Arkansas. — Thomasson *v.* State, 97 S. W. 297.

Iowa. — Hall *v.* Chicago, R. I. & P. R. Co., 84 Iowa 311, 51 N. W. 150; State *v.* Cummins, 76 Iowa 133, 40 N. W. 124.

Kansas. — State *v.* Sorter, 52 Kan. 531, 34 Pac. 1036.

Kentucky. — Butler *v.* Com., 2 S. W. 228.

Michigan. — People *v.* Palmer, 105 Mich. 568, 63 N. W. 656; People *v.* O'Neill, 107 Mich. 556, 65 N. W. 540; Gilbert *v.* Michigan Cent. R. Co., 116 Mich. 610, 74 N. W. 1010.

Minnesota. — State *v.* Johnson, 12 Minn. 476.

New Mexico. — Territory *v.* Livingston, 84 Pac. 1021.

New York. — People *v.* Sherman, 61 Hun 623, 16 N. Y. Supp. 782, *affirmed* in 133 N. Y. 349, 31 N. E. 107; People *v.* Kelley, 113 N. Y. 647, 21 N. E. 122.

North Dakota. — George *v.* Triplett, 5 N. D. 50, 63 N. W. 891.

Rhode Island. — Hildreth *v.* Aldrich, 15 R. I. 163, 1 Atl. 249.

Texas. — White *v.* State, 18 Tex. App. 57; Hartsfield *v.* State, 29 S. W. 777; Fitzpatrick *v.* State, 37 Tex. Crim. 20, 38 S. W. 806; Carpenter *v.* State (Tex. Crim.), 51 S. W. 227.

In Bullard *v.* Pearsall, 53 Barb. (N. Y.) 230, the court said: "The further question has frequently arisen whether the party calling the witness should, upon being taken by surprise by unexpected testimony, be permitted to interrogate the witness in respect to his own previous declarations, inconsistent with his evidence. Upon this point there is considerable conflict in the authorities. We are of opinion that such questions may be asked of the witness for the purpose of probing his recollection, recalling to his mind the statements he has previously made, and drawing out an explanation of his apparent inconsistency. This course of examination may result in satisfying the witness that he has fallen into error and that his original statements were correct, and it is calculated to elicit the truth. It is also proper for the purpose of showing the circumstances which induced the party to call him. Though the answers of the witness may involve him in contradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry."

In People *v.* Sherman, 133 N. Y. 349, 31 N. E. 107, the court said: "I do not think that the court transcended its just discretion in the examination of Klieves. Called by the prosecution he manifested a disposition to favor the defendant and keep back or soften injurious facts. Necessarily some degree of latitude in his examination was allowable. I do not think that any effort was made on behalf of the people to impeach him. On the contrary the effort was to make him tell all that he knew. For that purpose it was proper to refresh his recollection or remove his hesitation by recalling to his mind what he had already testified to before the grand jury. The right to ask the witness leading questions was asserted by the prosecution, admitted by the defense to be within the discretion of the court, and that mode of examination permitted. The court made no ruling which allowed an impeachment of the witness, explicitly declaring that no such question had yet arisen. We think no error was committed."

In Sigler *v.* State, 7 Tex. App. 283, it is said to be often necessary, in the course of an examination, to call the attention of the witness specially to some fact which may refresh his recollection and cause him to modify a previous statement made with the utmost honesty and sincerity, but susceptible, from its looseness, of a construction never intended by the witness.

In Hart *v.* Maloney, 101 App. Div. 37, 91 N. Y. Supp. 922, the court said: "The objection raised to the witness Wood refreshing his memory by reading from his evidence upon a previous trial affords no ground for a reversal, assuming it to have been erroneous. It related entirely to the matter of a special contract for the delivery of $20,000 of stock, and this branch of the case was withdrawn from the consideration of the jury, so that the testimony was, in effect, stricken out of the case. We are of opinion, however, that it was not error to permit the witness to refresh his memory. He had testified: 'I did not have any conversation with Maloney with reference to any proposition or offer that he made to Williamson on that day; nor that evening, I think, if I remember it now.' Counsel, in calling attention to the above, said: 'Now, in order to refresh your recollection, I want to call your attention to testimony that you gave on the last trial.' After objection and exception the witness was permitted to read over the minutes, and he then replied: 'After reading that my recollection is refreshed. Just as we were leaving — as I was about leaving — Mr. Maloney said that $325,000 was all right, plus the stock that he talked to Williamson about.' This witness was not hostile. The purpose of this reference to the minutes was not to impeach or contradict the witness, but was simply for the purpose of bringing out just what occurred, and the reading of the minutes appears to have had no other effect than to call his attention to a matter of detail which had evidently escaped him at the time, but which he recalled on his previous testimony being shown him. It simply permitted the witness to correct his testimony in a matter which might otherwise have been brought out on cross-examination to discredit him, and, as the claim for compensation in stock was withdrawn from the jury, the defendant could not have been injured by its admission in any event. See Honstine *v.* O'Donnell, 5 Hun 472, 474, 475, and authority there cited; Maloney *v.* Martin, 81 App. Div. 432, 80 N. Y. Supp. 763, affirmed without opinion 178 N. Y. 552, 70 N. E. 1102."

In Humble *v.* Shoemaker, 70 Iowa 223, 30 N. W. 492, "The defendant introduced as a witness one Wilkerson, who gave material evidence for the defendant, but as to one material matter the defendant claimed that he was surprised by the evidence of such witness, and we think he was. Counsel for the defendant then asked the witness if he did not 'tell such counsel, during the term of court, in front of the court-house,' differently from what he testified to. Other questions of the same character were asked. These questions were objected to on the ground of incompetency, and because the defendant could not impeach his own

Extent to Which Counsel May Go. — It has been said that the extent to which counsel may go in probing the recollection of a hostile or disappointing witness lies within the discretion of the trial court.[31]

Counsel Should State Purpose. — If counsel for purpose of refreshing witness' memory, inquires as to inconsistent statements, he should state his purpose at the trial; for, an objection having been made and exception taken at the trial because such questions tended

witness. We do not think a party is bound absolutely by what a witness introduced by him states. He certainly can show a different state of facts by another witness; and we think he may, if taken by surprise, ask his witness if he has not stated differently to the party or his counsel. Upon his attention being called to the time and place, he may be able truthfully to correct his evidence; and the weight of authority, we think, is in favor of this rule. 1 Greenl. Ev., § 444; Bullard *v.* Pearsall, 53 N. Y. 230; Melhuish *v.* Collier, 15 Adol. & E. (N. S.) 878. We do not desire to be understood as holding that a party can impeach his own witness, but only that he may make the requisite inquiries for the purpose of aiding the witness to recollect and testify to the truth."

In Spaulding *v.* Chicago, St. P. & K. C. R. Co., 98 Iowa 205, 67 N. W. 227, the court said: "The witnesses who had personal knowledge of the movements of Hanley and of the train, at the time of the accident, and who found him after it occurred, were employes of the defendant. Their testimony was essential to enable the plaintiff to establish a case, and they were placed upon the witness stand by him. Their testimony was not satisfactory to him, and he was permitted by the district court to refresh their recollections by reading somewhat freely from a transcript of their evidence given on the first trial. In what was thus done, we do not find any error. Although it is a general rule that a party may not impeach his own witness by introducing evidence to show that he is unworthy of belief, yet a party surprised by the testimony of a witness may call his attention to conflicting statements made at another time, not for the purpose of laying the foundation for impeachment, but to test and quicken his recollection, and give him an opportunity to correct his testimony, and to show that it has surprised the party who called him."

In Hurley *v.* State, 46 Ohio St. 320, 21 N. E. 645, the court said: "We think it a reasonable rule, that a party who calls a witness and is taken by surprise by his unexpected adverse testimony, may be permitted to interrogate him in respect to declarations and statements previously made by him which are inconsistent with his testimony, for the purpose of refreshing his recollection and inducing him to correct his testimony, or explain his apparent inconsistency, and for such purpose his previous declarations may be repeated to him, and he may be called upon to say whether they were made by him."

Held To Be Proper Either for Refreshing Memory of Witness or of Impeaching Him. — In Battishill *v.* Humphreys, 64 Mich. 514, 38 N. W. 581, it is held to be competent to interrogate a witness as to testimony given by him upon a former trial, for the purpose of refreshing his recollection or of impeaching him.

31. Thomasson *v.* State (Ark.), 97 S. W. 297.

In Avery *v.* Mattice, 56 Hun 639, 9 N. Y. Supp. 166, the court said: "The witness Bagley was called by the plaintiff and testified that he had no recollection of the transaction whatever. The plaintiff, in order to probe or refresh his recollection, asked him when he first heard of plaintiff's claim against the defendant. The referee sustained defendant's objection to the question. The fact sought was not competent upon the

to impeach the witness, counsel cannot on appeal, for the first time, suggest that his proposed course of examination was conducted for a purpose not disclosed in the court below.[32]

2. Cannot Testify From Writing Alone. — The witness cannot testify from a writing when he has no personal knowledge of the truth of the contents of such writing.[33]

issue, and the extent to which a party may probe the recollection of his witness, who disappoints him, is largely within the discretion of the referee, and we cannot say that he unwisely exercised it."

32. In Moore *v.* Chicago R. Co., 59 Miss. 243, the court said: "We cannot consider the case now as it would have been, if the plaintiff had stated in the court below his purpose to be only to refresh the memory of his witnesses, and not to impeach their credibility. The objection interposed by the defendant was predicated on the supposition that the intention was to impeach their credibility. The court acted on this objection as stated, and the plaintiff excepted to the ruling of the court on the point as thus presented. He cannot now for the first time suggest that his proposed course of examination was legitimate for a purpose not disclosed in the court below. To permit this, would be for this court to review, not the case actually tried in the lower court, but one which might have been tried. The court did not err in declining to direct the persons, whose names were suggested by the plaintiff, to be sworn as witnesses in the case."

33. *England.* — Dupuy *v.* Truman, 2 Y. & C. C. 341.

United States. — Stewart *v.* Morris, 88 Fed. 461, 32 C. C. A. 7.

Alabama. — Kentucky Ref. Co. *v.* Conner, 39 So. 728.

California. — People *v.* Ah Yute, 56 Cal. 119.

Connecticut. — Erie Preserving Co. *v.* Miller, 52 Conn. 444, 52 Am. Rep. 607.

Delaware. — Fitzgibbons *v.* Kinney, 3 Harr. 317.

Georgia. — Hematite Co. *v.* East Tennessee R. Co., 92 Ga. 268, 18 S. E. 24; Akins *v.* Georgia R. & Bkg. Co., 111 Ga. 815, 35 S. E. 671.

Illinois. — Keith *v.* Mafit, 38 Ill. 303; Russell, Burdsall & Ward *v.* Excelsior Stove & Mfg. Co., 120 Ill. App. 23.

Iowa. — Oberholtzer *v.* Hazen, 101 Iowa 340, 70 N. W. 207.

Louisiana. — Pargood *v.* Guice, Admr., 6 La. 75, 25 Am. Dec. 202.

Maryland. — Lewis *v.* Kramer, 3 Md. 265, 288; Hopper *v.* Beck, 83 Md. 647, 34 Atl. 474.

Massachusetts. — Davis *v.* Allen, 9 Gray 322.

Michigan. — Richmond *v.* Atkinson, 58 Mich. 413, 25 N. W. 328.

Missouri. — Steffen *v.* Bauer, 70 Mo. 399; State *v.* Fannon, 158 Mo. 149, 59 S. W. 75.

Nebraska. — Burlington & M. R. Co. *v.* Wallace, 28 Neb. 179, 44 N. W. 223; Pease Piano Co. *v.* Cameron, 56 Neb. 561, 76 N. W. 1053; U. P. S. Baking Co. *v.* Omaha St. R. Co., 94 N. W. 533.

New Jersey. — Titus *v.* Gunn, 69 N. J. L. 410, 55 Atl. 735.

New York. — Palmer *v.* People, 19 Hun 372; Kirschner *v.* Hirschberg, 90 N. Y. Supp. 351; Rothenberg *v.* Herman, 90 N. Y. Supp. 431; Emanuel *v.* Maryland Casualty Co., 47 Misc. 378, 94 N. Y. Supp. 36; Mills *v.* McMullen, 4 App. Div. 27, 38 N. Y. Supp. 705.

South Carolina. — Fritz *v.* Burriss, 41 S. C. 149, 19 S. E. 304.

Texas. — Missouri K. & T. R. Co. *v.* Huggins (Tex. Civ. App.), 53 S. W. 1029.

Vermont. — Pingree *v.* Johnson, 69 Vt. 225, 39 Atl. 202.

Washington. — Brotton *v.* Langert, 1 Wash. 227, 23 Pac. 803.

In United States *v.* Wood, 3 Wash. C. C. (U. S.) 440, the court said: "He (the witness) must be sure of the accuracy of the statement, from his own recollection, and not merely from a confidence in the accuracy of the statement to which he refers."

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In Waite *v.* High, 96 Iowa 742, 65 N. W. 397, witness stated that quantities of flour had been transferred from one party to another, but did not know the number of sacks. He was then asked by counsel: "Can you refresh your recollection as to the number by looking at that memorandum?" To this he answered, "Not to make my memory state the fact. I can only state what the statement contains." By the court: "There was no error in holding that the witness might not state what the statement contained."

In Reed *v.* Orton, 105 Pa. St. 294, the court said: "They also handed him (the witness) the judge's notes of a former trial, taken in January, 1871, showing that he had then testified in regard to the service of the notice. Having looked at these papers the witness was asked to state whether he had served the notice on W. W. Reed, executor of Henry Cadwell, and if so, when. His reply was: 'I can only state that this is my signature to a notice. I have no recollection other than is contained in Judge Vincent's notes of testimony. I see by them I testified some eleven years ago.' In answer to the question whether he was a witness at the former trial in 1871, he said, 'I think so; am not positive about it.' By numerous questions it was sought to elicit from the witness some testimony as to the service of the notice, but he steadfastly adhered to the position that he had no personal recollection in regard to it. The plaintiffs were then permitted, against the objection of defendant, to ask this question: 'Now, refreshing your recollection from those notes, state what you testified, in January, 1871, as to having served this notice on W. W. Reed?' His answer was, 'If the notes of Judge Vincent are correct, I did testify that I served that notice on the first Monday of September or October in 1868, and, if I so testified at trial, I did serve the notice.' On cross-examination he reiterated, in substance, what he had repeatedly said before, that he had then no personal recollection in regard to the matter. This is a brief outline of the facts upon which the first assignment of error is based, and we have no hesitation in saying that the kind of testimony thus elicited, and afterwards submitted to the jury, is wholly incompetent for any purpose."

In Hall *v.* Ray, 18 N. H. 126, the language of the witness in relation to the facts stated by him was this: "All which facts I have ascertained by examining the books and memoranda of the bank kept by me." In construing these words, the court said: "We think that the most obvious and the fairest inference to be drawn from the expression of the witness is, that he makes his statements upon the faith and credit of the books and memoranda; that he could not know and could not believe them, independently of their contents, and remembered nothing except what they contained. . . . The testimony of the witness should have been excluded."

In Texas & P. R. Co. *v.* Leggett (Tex. Civ. App.), 86 S. W. 1066, the court said: "This appeal is from a judgment recovered by appellee in a suit brought by him for damages to a shipment of cattle caused by the alleged negligence of defendant. The damages were alleged to have been caused by delay in loading and transporting and rough handling while on defendant's cars. Allen C. Thomas testified to the effect that on December 31st he sold the cattle at Ft. Worth, their destination, for plaintiff, giving numbers, classes, weights, and prices. His testimony as to the weights of the cattle and the prices they sold for was objected to by the appellant upon the ground that it appeared from his cross-examination that he did not see the cattle weighed, and that he was testifying from the records kept in the office of the North Texas Live Stock Commission Company, and was obliged to consult

Objection of No Avail. — Where a witness testifies apparently from writing alone and an objection is thereupon made, if afterward the witness testifies from his own knowledge, the objection cannot prevail.[34]

3. Notes From Writings. — No Personal Knowledge. — Nor will a witness be permitted to testify from notes and memoranda which he has made from writings prepared by other persons, it not appearing that witness has any personal knowledge of the matters contained in the writing.[35]

the records for the purpose of answering as he had. While a witness may refresh his recollection by written memoranda made by himself, or which he knows to be correctly made, it is apparent that the witness in this instance was not using the records for that purpose, but was simply reciting what was written in them, without knowing whether the statements therein were true or false."

In Alabama & V. R. Co. *v.* Coleman, 78 Miss. 182, 28 So. 828, it seems that S. S. Coleman, plaintiff in the court below, had brought suit against the railway company to recover damages for the injury and the killing of certain stock shipped by him. In testifying as to the fact of shipment and as to the value of stock shipped he referred to a memorandum to refresh his memory, which memorandum was made by another, and of the contents of which witness had no personal knowledge. The court said: "We decline to pass upon the competency of the testimony of Coleman, based on memoranda or statements — whatever they were — which Coleman was allowed to use to refresh his memory. If they were memoranda — the ones he testified from — made by himself or under his direction at the time of the occurrence of the events recited in them, with personal knowledge that they so occurred, they could be so used. If they were — the ones used on the trial — copies from entries made by a bookkeeper, without personal knowledge of the truth of the entries, long afterwards, it would be idle to say Coleman could refresh his memory from such memoranda, made not by himself, but by another. In such case the witness must once have known personally the truth of the fact recited in the entry, and so have had once, as to it, a memory, now, on the witness stand, by the entry then made by himself or one under his direction, to be refreshed. As to a happening touching which a witness never had any actual personal knowledge, he never at any time had any memory to be refreshed."

34. Mudge *v.* Pierce, 32 Me. 165.

35. Hematite Co. *v.* East Tennessee R. Co., 92 Ga. 268, 18 S. E. 24; Seaverns *v.* Tribby, 48 Ill. 195; Haish *v.* Dreyfus, 111 Ill. App. 44; Dryden *v.* Barnes, 101 Md. 346, 61 Atl. 342.

In Crawford *v.* Branch Bank, 8 Ala. 79, it was held that a bank clerk could not testify from memoranda which he had taken from books of the bank, he not having been a clerk at the time the book entries in question were made.

In Douglas *v.* Leighton, 57 Minn. 81, 50 N. W. 827, the plaintiff was allowed to refresh his memory for the purpose of testifying, by the examination of figures which he had transcribed from a book into which his foreman, who had no personal knowledge of the matter, had copied what appeared upon a tally board kept by still another of plaintiff's employes. The court said: "Here the witness had no knowledge, and consequently no recollection, of the number of logs unloaded at the landing, except as he had been told or informed by his foreman, who also was unable to speak of his own knowledge or recollection. The testimony of the witness, so far as it was founded upon the copy made by him, or so far as it would have had a foundation if he had used the

Question as to Whether Writing Does Assist Memory, Legitimate Subject of Inquiry. — The question whether or not the memorandum or writing referred to does assist the witness' memory is a legitimate subject of inquiry.[36]

4. Under Certain Circumstances Witness Cannot Refer to Writing Made By Another. — It has been held that witness may not refer to memorandum made by a person other than himself unless he testifies that he knew it contained a true statement of facts,[37] or un-

book kept by his foreman, was but hearsay, and a witness can no more be permitted to give evidence of his inference from what a third person has written than from what a third person has said." See Eder *v.* Reilly, 48 Minn. 437, 51 N. W. 226.

In Miller *v.* Boykin, 70 Ala. 469, 477, the court says: "In order that a witness may thus refresh his recollection, or prove the contents of a memorandum, where they were once known to be true, and are forgotten, it is indispensable that, the witness himself should, at some time previous, have had a *personal knowledge* of the truth of the facts sought to be proved."

In Walker *v.* State, 117 Ala. 42, 23 So. 149, the court said: "The witness further testified that he made the memorandum B, not at the time defendant admitted the collections, etc., nor while he was present, but made it from notes, at his room at the hotel, about an hour afterwards. The bill of exceptions recites that the exhibit 'was not admitted as evidence, but witness was permitted to examine it to refresh his recollection, and it might go to the jury the better to enable to remember what witness said.' It is seen from the above statement that witness does not show that the memorandum was made up from notes taken by him on the examination of defendant's accounts had by him with the defendant. Probably such was the case, but it does not so appear. It could not be said, from his statement, when or from what data or evidence he made the notes from which the memorandum was made up. The notes may have been of the purest hearsay character, of the truth of which the witness had no knowledge, and possessing no binding force on the defendant. The witness did not testify to the truth of what the notes showed, nor how he knew it. Under these circumstances, we think it was not proper to permit the witness to refer to the memorandum to refresh his recollection."

In Kirschner *v.* Hirschberg, 90 N. Y. Supp. 351, the witness was a bookkeeper. She kept the time of men employed by her employer. Her entries were made from information received from the foreman who handed her coupons indicating the length of time each man had worked. She had no personal knowledge of these facts recorded by her. She was not allowed to refer to such book to refresh her memory and state the length of time a certain man had been employed.

36. Duncan *v.* Seeley, 34 Mich. 369; Kouba *v.* Horacek, 53 Hun 636, 6 N. Y. Supp. 250.

37. Acklen's Exr. *v.* Hickman, 63 Ala. 494, 35 Am. Rep. 54; Green *v.* Caulk, 16 Md. 556, 574; Lewis *v.* Kramer, 3 Md. 265.

In Fritz *v.* Burriss, 41 S. C. 149, 19 S. E. 304, the court said: 'There is but one single question in the case, and that is, whether his honor, the presiding judge, committed error of law in refusing to admit as evidence a part of the testimony of the witness, R. W. Gamble, upon the grounds, 'that the witness got his information from the business books of the late firm of Joseph H. Coates & Co., kept by C. L. Williams in Savannah, and does not state he had independent knowledge of them at the time, and that he could not state of his own knowledge.' The judge held that the witness could testify as to all matters that he knew of his own knowledge. He admitted his answers to the cross-interrogatory, and all the

less the writing used in testifying, be verified in some other way.[38]

5. Court May Refuse Witness Privilege. — The court may, on its own motion, refuse to permit witness to refresh his memory by referring to a memorandum.[39]

testimony of C. E. Williams, who had been the bookkeeper of the late firm, and knew of his own knowledge all matters contained in the account. But as to part of the answers of the witness, R. W. Gamble, to the seventh direct interrogatory, he held as follows: 'The rule is, that a witness may refresh his memory from any memorandum that he made, or that he saw made, or knew to be correct; but unless it is a writing of that kind, I do not think he can use it, and I don't think the testimony here comes up to the requirements.' (Exception taken.)" *Held*, no error.

In Chamberlin *v.* Sands, 27 Me. 458, the court said: 'The suit is upon a bond made by debtors with sureties to their creditor in conformity to the provisions of the statute c. 148. A certificate made by two justices of the peace and of the quorum, in the form prescribed, was introduced to prove performance of one of the conditions of the bond. The plaintiff called one of them as a witness and proposed to place in his hands a letter addressed to him by the plaintiff's attorney, purporting to state the facts, as they occurred on August 24, 1844, being the day of the date of the certificate, to refresh his recollection. An objection was interposed. The counsel being called upon for his reasons stated, that it was drawn up by him when the facts were fresh in his recollection, and was examined by the witness, when the facts were fresh in the recollection of the witness, and that it was admitted by him to be correct. 1. It is contended, that the presiding judge incorrectly decided, that the document could not be properly used by the witness for that purpose. If it had been recognized by the witness as containing a correct statement of the facts as they were known to him at the time, when it was first presented to him, he might have been permitted to use it for that purpose, although it had been drawn up by another person more than twenty days after the events transpired. This does not appear; nor is it apparent, that the witness desired to have the use of it. The counsel appears to have rested the right to have the witness use it, not upon an examination of the witness as to his knowledge of its accuracy, but upon his own statement respecting it. . . . Upon examination of all the proceedings at the trial as exhibited in the bill of exceptions, the paper does not appear, except from remarks of counsel, at any time to have been recognized by the witness as containing a correct account of the transactions; but rather to have been pressed upon his consideration to influence his mind during his examination. The decision of the court under such circumstances cannot be considered as affording just cause of complaint."

In Miller *v.* Boykin, 70 Ala. 469, the witness was a postmaster. After refreshing his memory from a memorandum, he testified as to time of arrival of mail. The memorandum was not made by him nor in his presence; but he had certified to the accuracy of such writing upon information received from others. *Held*, that it was error to allow witness to testify under these circumstances, as he had no personal knowledge of the truth of the facts sought to be proved.

38. Eder *v.* Reilly, 48 Minn. 437, 51 N. W. 226.

39. Doe *v.* Perkins, 3 Durnf. & E. (Eng.) 749; Ballard *v.* Ballard, 5 Rich. L. (S. C.) 495; O'Neale *v.* Walton, 1 Rich. L. (S. C.) 234.

In Morris *v.* Lachman, 68 Cal. 109, 8 Pac. 799, the court said: "We are inclined to the opinion that the court was right in refusing, of its own motion, to allow the witness, Tracy, to refresh his memory from an affidavit before that time

6. Erroneous Use Not Always Ground for Reversal. — It has been said that even when a writing has been improperly used by witness, if no prejudicial error occurs, the former judgment or report will not be reversed or set aside.[40]

7. Error in Permitting Use of Writing Not Cured By Instruction. If a writing which witness should not have been permitted to use, is used by him and taken to the jury, an instruction to the effect that the jury are not to consider the paper as evidence does not free the use of it from injury.[41]

IV. HOW WITNESS MAY REFER TO WRITING.

1. Memory Refreshed in One of Two Ways. — A witness refreshes his memory by an inspection of a writing,[42] or in some instances by

sworn to and subscribed by him *ex parte*, for the reason that the plaintiff did not include in the offer made by her counsel proof that the witness had written the affidavit, or that it had been done under *his direction*, at the time the facts occurred or immediately thereafter, or at any other time when the facts were fresh in his memory, and that he knew that the same were correctly stated in the writing. (§ 2047, Code Civ. Proc.)"

40. Schuyler Nat. Bank *v.* Bollong, 24 Neb. 825, 40 N. W. 413; Green *v.* Brown, 3 Barb. (N. Y.) 119.

In Kunder *v.* Smith, 45 Ill. App. 368, the court said: "It is objected that the court erred in allowing the memorandum of the contract made by the appellee Smith, to be read in evidence. We do not understand that it was read in evidence. The court only allowed the witness to refer to it to refresh his memory and state what it was. We see no error in allowing the testimony. Even if it could be regarded as improper, we should not be disposed to regard it as reversible error, as the clear preponderance of the other evidence in the case was in appellee's favor."

41. **Instruction.** — Stoudenmire *v.* Harper Bros., 81 Ala. 242, 1 So. 857. In this case the court said: "The witness testified that the memorandum produced was not a copy of the original entries in the books, but a summary or addition of the amounts as entered, and it was not shown when either the copy or the original entries were made. The original books were in court. Under the rules stated the witness should not have been permitted to refresh his memory by the memorandum, nor counsel to exhibit it to the jury in argument, nor should the jury have been allowed to take it with them in their retirement. The instruction to the jury, that they were not to consider it as evidence, does not free the use of it from injury. If not evidence, it was improper to let it go before the jury."

42. Hawes *v.* State, 88 Ala. 37, 7 So. 302; New York Min. Co. *v.* Fraser, 130 U. S. 611; Acklen *v.* Hickman, 63 Ala. 494, 35 Am. Rep. 54; Stahl *v.* Duluth, 71 Minn. 341, 74 N. W. 143; Maugham *v.* Hubbard, 8 Barn. & C. 14, 19 E. C. L. 147.

In Erie Preserving Co. *v.* Miller, 52 Conn. 444, 52 Am. Rep. 607, it is said that a witness may refresh his memory as to dates, before coming into court by turning to entries in his account books, and may make copies of such entries to use on the witness stand.

In Brotton *v.* Langert, 1 Wash. 227, 23 Pac. 803, it is said that the usual course is to allow the witness to read the memorandum, and then to testify to knowledge of the facts as to which he has thus refreshed his memory.

When Refreshing Memory as to Former Testimony. — In United State *v.* Cross, 20 D. C. 365, it is

its being read to him during his direct or cross-examination.[43]

2. Presence of Writing When Necessary. — A. NOT NECESSARY WHEN USED TO ASSIST MEMORY. — When a writing is used only for the purpose of assisting the memory of the witness, it is not

held that a witness can only refresh his memory by *reference* to some record, entry or memorandum, and not by hearing his former oral testimony repeated to him. See also Velott *v.* Lewis, 102 Pa. St. 326.

The contrary is held in Ehrisman *v.* Scott, 5 Ind. App. 596, 32 N. E. 867, and also Pickard *v.* Bryant, 92 Mich. 430, 52 N. W. 788; Southern R. Co. *v.* Shelton, 136 Ala. 191, 34 So. 194, 202.

Manner Left Largely to Discretion of Trial Judge. — The manner in which a witness shall be allowed to refresh his recollection must be left largely to the discretion of the trial judge. Johnson *v.* Coles, 21 Minn. 108. See also People *v.* Polhamus, 8 App. Div. 133, 40 N. Y. Supp. 491.

Witness May Inspect Before Answering Each Question. — It is held in Godden *v.* Pierson, 42 Ala. 370, that a witness may inspect a memorandum for the purpose of refreshing his memory, before answering each question put to him.

43. People *v.* McFarlane, 138 Cal. 481, 71 Pac. 568; Pickard *v.* Bryant, 92 Mich. 430, 52 N. W. 788; Spaulding *v.* Chicago, St. P. & K. C. R. Co., 98 Iowa 205, 67 N. W. 227; Ehrisman *v.* Scott, 5 Ind. App. 596, 32 N. E. 867; Southern R. Co. *v.* Shelton, 136 Ala. 191, 34 So. 194, 202.

In Burney, Admr. *v.* Ball, 24 Ga. 505, 513, the court said: "While Mr. Newsom, a witness in behalf of the complainant, was under examination, a question was propounded to him as to some material fact, which not recollecting, counsel for complainant proposed to refresh his memory by reading to him a part of his deposition taken in this case. The court refused to allow the deposition to be read for this purpose; and this constitutes the second exception upon which error is assigned. Upon what ground the objection was put by the defendant's solicitor, and sustained by the court, does not appear. The argument before us concedes that the witness might have been permitted to read his own deposition to refresh his memory; and the rule of evidence is well settled, that he may. (1 Greenl. Ev. 436, *and notes.*) But it is insisted that it cannot be read to him in the presence and hearing of the jury. Had the objection below been put upon this ground, it might probably, in this particular case, have been obviated by handing the witness his own deposition and permitting him to read it. But there are cases where this cannot be done. The witness may be blind, or so illiterate as to be unable to read, and we are not prepared to hold that his memory may not be refreshed by his having his sworn testimony read to him. His interrogatories were sued out, executed and returned under the statute, and but for his accidental attendance on court, the whole of the depositions would have been read as evidence to the jury. It is rather a sharp practice, we think, not to allow a portion of such proof to be read to the witness in the presence of the jury to refresh his memory."

In Harvey *v.* State, 40 Ind. 516, the witness was illiterate. It was held proper to read to her such writing as might refresh her memory.

In Catt *v.* Howard, 3 Stark. 3, 14 E. C. L. 143, the witness was blind, and a writing was allowed to be read to him to refresh his memory.

Reading Should Not Take Place in Presence of Jury. — It is held in Com. *v.* Fox, 7 Gray (Mass.) 585, that the memorandum should not be read to the witness in the presence of the jury, but that the witness should withdraw with one of the counsel on each side, and that the paper should be read to the witness by them, without comment, and he should then return and proceed with his testimony.

Contrary Held. — In Indiana it is

necessary that it be produced in court.[44] But it has been said that

held that a memorandum may be read in the presence of the jury to a witness to refresh his memory. See Harvey *v.* State, 40 Ind. 516.

44. Burton *v.* Plummer, 2 Ad. & El. 341, 29 E. C. L. 113; Olds *v.* Powell, 10 Ala. 393; Trustees of Wabash & E. Canal *v.* Bledsoe, 5 Ind. 133; M'Ilvoy *v.* Cochran, 3 Litt. (Ky.) 454; First Nat. Bank *v.* First Nat. Bank, 114 Pa. St. 1, 6 Atl. 366; Faver *v.* Bowers (Tex. Civ. App.), 33 S. W. 131; Hamilton *v.* Rice, 15 Tex. 382.

In State *v.* Collins, 15 S. C. 373, 40 Am. Rep. 697, defendant was indicted for murder. To show certain facts in regard to the death of deceased, witnesses were permitted to refer to records of the hospital where he died. This procedure was held proper. On appeal, the supreme court quotes from 1 Greenl. Ev. § 436, cites a number of South Carolina cases, and says: "Applying the principles deducible from the foregoing authorities to the case in hand, we do not see how the first and second grounds of appeal can be sustained. It appears that the hospital records were only resorted to by the witnesses for the purpose of refreshing their memories as to certain details, dates, etc., and there was no offer or attempt to use these records as testimony, and there was no necessity for the production in court of these records. Where a memorandum or other writing is referred to by a witness simply to refresh his memory, and it is not proposed to use such memorandum or writing as testimony, but to rely entirely upon the recollection of the witness as refreshed by such memorandum or writing, there can be no necessity for producing the same in court, for it may be, as in the case of State *v.* Cardoza, *supra*, that the writing resorted to for that purpose is of such a character as to be altogether unintelligible to any one but the witness himself; and yet upon the principle of the association of ideas it may be quite sufficient to restore the recollection of a fact which had faded from the memory of the witness."

In Davenport *v.* McKee, 94 N. C. 325, witness, upon being introduced, stated that he could testify as to certain facts, if allowed to refresh his memory by a writing which he had with him. He was not allowed to do so. Afterwards in the further progress of the trial he again took the stand and stated that he was then prepared to testify to such facts without reference to any document. The plain inference was that while off the stand he had refreshed his memory. The lower court did not allow him to do so; but the higher court held this to be error, saying that it was not necessary that the memorandum so used should be produced in court, at least unless the court so required.

In McCormick *v.* Cleal, 12 App. D. C. 335, a mechanic assisted his memory by a receipted bill for certain patterns made for his use. The receipted bill was not offered in evidence, and for that reason the commission was of the opinion that the proof of dates by reference to it should be disregarded. This view is clearly erroneous. It is not even necessary that documents from which a witness may have refreshed his memory, be produced at the examination.

In Lowrie *v.* Taylor, 27 App. D. C. 522, witness referred to entry in cash-book as being one of the means by which he had refreshed his memory. For the purpose the book was used, it was not essential that it should be brought into court.

In State *v.* Cheek, 35 N. C. (13 Ired. L.) 114, the witness stated that he had refreshed his memory from an account book which he had kept, to enable him to testify as to the fact in question. The book was not produced on the trial. The court said that inasmuch as the book was not evidence and the witness was obliged, after seeing it, to speak from his remembrance of the facts, it could serve no purpose to compel him to bring his book to court.

failure of production may afford matter of observation to the jury.[45]

Failure of Production No Cause for Exception. — It has been said that requiring a witness to produce a memorandum which is not in court and which he has not been summoned to produce, but which has been used by him to refresh his memory, is a matter within the discretion of the court, and the refusal to require it is no cause for exception.[46]

B. Necessary When Witness Relies on Writing. — If witness cannot swear to any fact from recollection any further than because he finds it in the book or paper used to refresh his memory, the book or paper must be produced.[47]

45. Hamilton *v.* Rice, 15 Tex. 382; Faver *v.* Bowers (Tex. Civ. App.), 33 S. W. 131.

In McCormick *v.* Cleal, 12 App. D. C. 335, it is said that the failure to produce at the examination the documents from which a witness may have refreshed his memory would often cause the evidence to be regarded as of little weight.

Libbey, J., in Davie *v.* Jones, 68 Me. 393, said: "The plaintiff was a witness in his own behalf to prove the sale and delivery of the articles for which he claimed to recover. He used what he testified was a copy of his account on his book to refresh his recollection, and, after so doing, testified to the sale and delivery of the articles at the dates contained in the bill annexed to the writ. He afterwards stated that he had his book of original entries, made by himself, in court; and on cross-examination was asked to produce it. Under instructions from his counsel not to do so, and a ruling of the presiding judge that he was not legally obliged to do so, he refused to produce it. Having testified by refreshing his recollection by referring to what he said was a copy, and having the original in court, the refusal to produce it that it might be seen whether it would support his testimony or not, was an act in court as a witness and party which it was competent for the jury to consider in weighing his evidence. The refusal by the presiding judge, on request, to tell them so was virtually withdrawing it from their consideration. The competency of the fact as evidence was a question of law for the court. The weight to be given to it was for the jury."

In State *v.* Cheek, 35 N. C. (13 Ired. L.) 114, the court said: "At most, the absence of it (*i.e.* the memorandum) could only affect the confidence the jury might yield to his statement, as it might not be as great as if the refreshing of his memory accompanied the giving of his testimony."

46. Com. *v.* Lannan, 13 Allen (Mass.) 563.

47. *England.* — Tanner *v.* Taylor, 2 Esp. 406; Jones *v.* Stroud, 2 Car. & P. 196, 12 E. C. L. 86; Beech *v.* Jones, 5 C. B. 696.

Alabama. — Holmes *v.* Gayle, 1 Ala. 517.

Georgia. — Bank *v.* Brown, Dud. 62.

Iowa. — Adoe *v.* Zangs, 41 Iowa 536.

Maine. — Stanwood *v.* McLellan, 48 Me. 275.

Missouri. — Wernwag *v.* Chicago & A. R. Co., 20 Mo. App. 473.

New Hampshire. — Hall *v.* Ray, 18 N. H. 126.

Tennessee. — Rogers *v.* Burton, Peck 108.

Texas. — Ft. Worth & D. C. R. Co. *v.* Garlington (Tex. Civ. App.), 92 S. W. 270.

In Dupuy *v.* Truman, 2 Y. & C. C. (Eng.) 341, the cashier of a banking house, upon his examination as a witness, stated that he had ascertained from the clearing book kept by him and in his own handwriting, that a certain sum of money was paid in notes of a particular description. The statement was founded solely on the witness' knowledge of the book and of his

C. When Witness Refers to Copy. — When witness refers to copy of memorandum to refresh his memory, the opposite party may call for the original, to test the sufficiency and accuracy of the copy.[48] If, when called for, the original is not produced and satisfactory reasons are not given for the failure to produce it, and for using a copy, this circumstance may be considered by the jury in weighing witness' evidence.[49]

V. HOW SUCH TESTIMONY OFFERED IN EVIDENCE.

1. Oral Testimony. — Witness, after refreshing his memory from writing before him, may orally, after having laid aside the paper, give his testimony to the jury.[50]

2. Testimony From Writing. — Witness may read the contents

own handwriting, and not from any recollection of the fact deposed to; and the book was not produced. *Held*, that under these circumstances the statement could not be received as evidence of the fact deposed to, though it might serve as a ground for further inquiry.

In Doe *v.* Perkins, 3 Durnf. & E. (Eng.) 749, the question was, at what time of the year the annual leases of several tenants expired. The witness whose testimony was objected to went around with the receiver of the rents to the different tenants, whose declarations, respecting the time when they severally became tenants, were minuted in a book. When witness was sworn he referred to extracts or memoranda from that book, confessing he had no memory of his own of the specific facts. On the first trial this evidence was objected to on the ground that as the witness did not pretend to speak to facts from his own recollection he ought not to be permitted to give evidence from any extracts, but that the original book ought to be produced. The presiding judge, however, admitted the evidence. On a motion for a new trial, Lord Kenyon, after adverting to the case of Tanner *v.* Taylor, above mentioned, said that the rule appeared to have been clearly settled, and that every day's practice agreed with it. And that comparing the case with the general rule, the court was clearly of the opinion that the witness ought not to have been permitted to speak to facts from extracts which he made use of at that trial; and a new trial was granted.

Production Discretionary With Court. — In Loose *v.* State, 120 Wis. 115, 97 N. W. 526, it is held that under the circumstances as stated above, the memorandum need not be produced unless the court so orders.

48. Calloway *v.* Varner, 77 Ala. 541, 54 Am. Rep. 78; Doyle *v.* Illinois Cent. R. Co., 113 Ill. App. 532; Davie *v.* Jones, 68 Me. 393.

49. Calloway *v.* Varner, 77 Ala. 541, 54 Am. Rep. 78; Chicago & A. R. Co. *v.* Adler, 56 Ill. 344; Davie *v.* Jones, 68 Me. 393.

50. Rogers *v.* U. S. F. & G. Co., 84 N. Y. Supp. 203; Harrison *v.* Middleton, 11 Gratt. (Va.) 527; Scott *v.* Slingerland, 44 Hun (N. Y.) 254; Wilde *v.* Hexter, 50 Barb. (N. Y.) 448.

The usual course is to allow the witness to read the memorandum, and then to testify to knowledge of the facts as to which he has thus refreshed his memory. Brotton *v.* Langert, 1 Wash. 227, 23 Pac. 803.

May Explain Ambiguous Items. Witness may explain ambiguous items in memorandum used by him to refresh his memory. Daniels *v.* Smith, 54 Hun 639, 8 N. Y. Supp. 128.

of such writing to the jury, or in other words, he may testify from the writing.[51]

3. Inspection By Jury. — Witness may show the writing to the jury for their inspection. But by this, the writing does not necessarily become an exhibit.[52] Memoranda used merely for the pur-

51. Bogue *v.* Newcombe, 1 N. Y. Sup. Ct. 251; McCormick *v.* Pennsylvania Cent. R. Co., 49 N. Y. 303; King *v.* Faber, 51 Pa. St. 387; Sage *v.* State, 127 Ind. 15, 26 N. E. 667; Mims *v.* Sturdevant, 36 Ala. 636.

In State *v.* Cardoza, 11 S. C. 195, 238, the court said: "The witness, it is true, read from the book, but that is not inconsistent with the use of the book for refreshing his memory; it was, at most, only anticipating what would probably have taken place under cross-examination at the defendant's request had it not been called for by the counsel for the state."

In Myers *v.* Weger, 62 N. J. L. 432, 42 Atl. 280, it appears that on the former trial, a witness, by way of refreshing his memory, had read to the jury an extract from a book of account. It was objected that the witness should not have been allowed to read to the jury the above mentioned extract. The court said: "The use by a witness of his own memorandum, made at or near the time of the events recorded, is not merely to refresh the memory by reviving faint impressions, but also to supplement the memory by preserving details that would otherwise be forgotten. In a case of the latter class the witness is able to prove the details, not by remembering the particulars that compose them, but because the circumstances under which the memorandum was made afford satisfactory assurance that at the time of the entry its contents were known by the witness to be true. It follows that a witness, in using his own memorandum, may not merely refer to it, but may also testify from it."

In Moynahan *v.* Perkins (Colo.), 85 Pac. 1132, the court said: "The plaintiff, who was a witness on his own behalf, sufficiently laid the foundation for the admission of his books of account in evidence, but his counsel, electing not to offer them in evidence, examined him in regard to the items they contained, and, over a general objection, the witness was permitted to refer to the books to refresh his memory, and read the entries therein. This objection might be disregarded because it specified no grounds, or in any manner suggested to the court any reasons, why the testimony was inadmissible. Ward *v.* Wilms, 16 Colo. 86, 27 Pac. 247; Hindry *v.* McPhee, 11 Colo. App. 398, 53 Pac. 389. The only reason advanced here in support of this objection is that the witness recollected the greater part of the transactions, independent of the books, and there was no necessity to refer to them. As we have stated, the foundation was sufficiently laid for the introduction of the books themselves, and we are unable to perceive any material difference between admitting them directly in evidence, and allowing the witness to refer to them to refresh his memory, or to read the entries therein to the jury."

Memorandum by Being Read Is Not Thereby Made an Exhibit. — In Bigelow *v.* Hall, 91 N. Y. 145, the witness offered to read a paper by way of refreshing his memory as to the contents thereof. The lower court held: "If he made the memorandum and can't recollect the items without reference to the paper, he can read the paper." To this ruling and decision counsel excepted. The witness then read the items from the paper. The New York court of appeals in reviewing this case, said: "He (the lower court) did not say he could read it in evidence, nor was the memorandum introduced in evidence of itself; the items only were read, and there is no statement in the case that anything more was done."

52. In Mason *v.* Phelps, 48 Mich. 126, 11 N. W. 413, 837, witness after

pose of refreshing witness' memory should not be taken out by jury to be considered by jury while deliberating on a verdict.[53]

4. Memoranda Read to Witness. — A writing having been read to the witness, he may then testify to facts concerning which his memory has thus been refreshed.[54]

5. Memory Refreshed Off the Stand. — The witness may refresh his memory from a writing before going on the stand and then speak from memory thus refreshed.[55]

VI. WHAT WRITINGS MAY BE REFERRED TO.

1. Writings Made By Witness. — A witness may refer to a writing, entry or memorandum made by himself.[56] The memoran-

having stated that she kept a certain account in a book and having produced the same, was requested to show the book to the jury that they might see the manner in which she kept it. This was objected to, but allowed. The court said: "The book was used as a memorandum to refresh the recollection of the witness; and after she had testified that she knew it to be correct, she might have read the entries, or repeated them as her evidence. Showing the book was no more than this."

53. Faver *v.* Bowers (Tex. Civ. App.), 33 S. W. 131; Stoudenmire *v.* Harper, 81 Ala. 242, 1 So. 857.

54. People *v.* McFarlane, 138 Cal. 481, 71 Pac. 568; People *v.* Joy, 135 Cal. XIX, 66 Pac. 964; Butler *v.* Com. (Ky.), 2 S. W. 228.

In Smith *v.* State, 46 Tex. Crim. 267, 81 S. W. 936, the court said: "The ninth bill of exceptions complains of the following: 'The state introduced J. W. Hunnicutt, and, after he had testified to conversations with witness Smith, counsel for state proposed to refresh his memory by reading a statement made and signed by him before the grand jury, and, after hearing the statement, he stated it was correct, and that he knew the statement was correct, independent of said written statement, and that same merely refreshed his memory of the facts therein detailed.' The bill is quite lengthy, and we will not detail it. We do not think there was any error in this."

In Ehrisman *v.* Scott, 5 Ind. App. 596, 32 N. E. 867, extracts from a paper containing an examination of the witness upon the same subject at a previous trial were read to the witness for the purpose of refreshing his memory, and he was asked if, after having heard such passages read over to him, he did not now recollect the facts as he formerly testified, to which he made an affirmative response. *Held*, that there was no error in this.

55. Loose *v.* State, 120 Wis. 115, 97 N. W. 526; White *v.* Allen, 3 Or. 103.

In State *v.* Moran, 15 Or. 262, 14 Pac. 419, it appeared that the witness had been a grand juror. In preparing to testify as to what had transpired before that body, he had used, to refresh his memory, before going on the stand, a memorandum made by another. This was objected to on the ground that witness had referred to the memorandum before going on the stand. *Held*, that the objection does not go to the competency of the evidence offered, but to its credibility.

56. *England.* — Kensington *v.* Inglis, 8 East 273; Maugham *v.* Hubbard, 8 Barn. & C. 14, 19 E. C. L. 147.

Arizona. — United States *v.* Tenney, 8 Pac. 295.

Alabama. — Vastbinder *v.* Metcalf, 3 Ala. 100; Godden *v.* Pierson, 42 Ala. 370; Hasie *v.* Alabama & V. R. Co., 78 Miss. 413, 28 So. 941; Black *v.* Pate, 130 Ala. 514, 30 So. 434.

dum may be written in a character intelligible only to the witness.[57]

Proof Made or Offered as to Authenticity. — When it is proposed to submit a memorandum to witness for the purpose of refreshing his memory, proof must be made or offered to the effect that the writing was made by witness, or that it had been done under his direction at the time the facts occurred, or immediately thereafter, or at any time when the facts were fresh in his memory, and he knew that the same were correctly stated in the writing, or that the witness saw the writing at a time when the facts therein stated were fresh in his memory and he therefore knows it to be a true statement.[58]

Arkansas. — Woodruff *v.* State, 61 Ark. 157, 171, 32 S. W. 102; Greenwich Ins. Co. *v.* State, 74 Ark. 72, 84 S. W. 1025.

California. — People *v.* Vann, 129 Cal. 118, 61 Pac. 776; People *v.* Westlake, 134 Cal. 505, 66 Pac. 731.

Colorado. — Rohrig *v.* Pearson, 15 Colo. 127, 24 Pac. 1083; Lawson *v.* Glass, 6 Colo. 134.

Florida. — Jenkins *v.* State, 31 Fla. 196, 12 So. 677; Adams' Admr. *v.* Board of Trustees I. I. Fund, 37 Fla. 266, 294, 20 So. 266.

Georgia. — Schall *v.* Eisner, 58 Ga. 190; Schmidt *v.* Wambacker, 62 Ga. 321; Johnson *v.* State, 125 Ga. 243, 54 S. E. 184.

Indiana. — Johnson, Admr. *v.* Culver, Admr., 116 Ind. 278, 290, 19 N. E. 129.

Iowa. — State Bank *v.* Brewer, 100 Iowa 576, 69 N. W. 1011.

Louisiana. — Chiapella *v.* Brown, 14 La. Ann. 189; Moran's Heirs *v.* Societe Catholique D'Education Religieuse, 107 La. 286, 31 So. 658.

Maryland. — Spiker *v.* Nydegger, 30 Md. 315.

Michigan. — Skeels *v.* Starrett, 57 Mich. 350, 24 N. W. 98; Ford *v.* Savage, 111 Mich. 144, 69 N. W. 240; Heenan *v.* Forest City P. & V. Co., 138 Mich. 548, 101 N. W. 806.

Missouri. — State *v.* Kennedy, 154 Mo. 268, 55 S. W. 293.

Nebraska. — Johnson *v.* Spaulding, 95 N. W. 808.

New York. — People *v.* Wilmarth, 29 App. Div. 612, 51 N. Y. Supp. 688; Rogers *v.* United States F. & G. Co., 84 N. Y. Supp. 203.

North Carolina. — Neil *v.* Childs, 32 N. C. (10 Ired. L.) 195.

Pennsylvania. — Heart *v.* Hummel, 3 Pa. St. 414; Bank *v.* Brown, 5 Serg. & R. 226.

Texas. — Franks *v.* State, 45 S. W. 1013; Luttrell *v.* State, 40 Tex. Crim. 651, 51 S. W. 930; Smith *v.* State, 46 Tex. Crim. 267, 81 S. W. 936; Walker *v.* State (Tex. Crim.), 94 S. W. 230.

Utah. — State *v.* Haworth, 24 Utah 398, 68 Pac. 155.

Washington. — Williams *v.* Miller, 1 Wash. Ty. 88.

Wisconsin. — McCourt *v.* Peppard, 126 Wis. 326, 105 N. W. 809.

It is immaterial that the writing was written with a pencil and had been for some time in the witness' custody prior to the time he used it. Stetson *v.* Godfrey, 20 N. H. 227.

57. In State *v.* Cardoza, 11 S. C. 195, opposing counsel objected to use of a memorandum by witness to refresh his memory because it was written by him in characters not capable of being read by any one other than himself. This was held to be immaterial.

58. Crawford *v.* Branch Bank, 8 Ala. 79; Wagar Lumb. Co. *v.* Sullivan Log. Co., 120 Ala. 558, 24 So. 949; Wellman *v.* Jones, 124 Ala. 580, 27 So. 416; Morris *v.* Lachman, 68 Cal. 109, 8 Pac. 799; Webster *v.* Clark, 30 N. H. 245; McGibbon *v.* Walsh, 109 Wis. 670, 85 N. W. 409.

In Jones *v.* Johns, 2 Cranch C. C. (U. S.) 426, the court said: "The witness shall be permitted to refresh his memory only from the original entries made by himself or another in his presence. In addition to this, if he has no distinct recollection, independent of such entries, of each particular item charged, he must, at least, have a distinct recollection of

2. Writings Made By Persons Other Than the Witness. — A witness may refer to a writing made by a person other than himself, providing he can, from an inspection of it, speak to the facts from his own recollection, or having seen the writing at a time when the facts therein stated were fresh in his recollection, he therefore knows the writing to be a true statement.[59] The foregoing is in

such work as is charged in the account generally, being done by the plaintiff for the defendant; and if, after having so refreshed his memory, he can swear that the work was done as charged in such entry, his testimony will be competent evidence."

59. *England.* — Reg. *v.* Mullins, 3 Cox C. C. 526; Reg *v.* Philpotts, 5 Cox C. C. 329; Lord Talbot *v.* Cusick, 17 Irish C. L. R. 213.

United States. — Flint *v.* Kennedy, 33 Fed. 820; Breese *v.* United States, 106 Fed. 680, 45 C. C. A. 535; Pacific Coast S. S. Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 191, 36 C. C. A. 135; Bragg Mfg. Co. *v.* Mayor, etc. of New York, 141 Fed. 118.

Alabama. — Beddo *v.* Smith, 1 Minor 397.

Arkansas. — Bowden *v.* Spellman, 59 Ark. 251, 262, 27 S. W. 602.

Georgia. — Shrouder *v.* State, 121 Ga. 615, 49 S. E. 702; Civil Code 1895, § 5284.

Illinois. — Bredt *v.* Simpson, Hall, M. & Co., 95 Ill. App. 333.

Kansas. — Western Union Tel. Co. *v.* Collins, 7 Kan. App. 97, 53 Pac. 74.

Louisiana. — State *v.* Aspara, 113 La. 940, 37 So. 883.

Massachusetts. — Com. *v.* Ford, 130 Mass. 64, 39 Am. Rep. 426; Com. *v.* Burton, 183 Mass. 461, 67 N. E. 419; Fay *v.* Walsh, 190 Mass. 374, 77 N. E. 44.

Michigan. — Cameron *v.* Blackman, 39 Mich. 108.

Minnesota. — Culver *v.* Scott & Wolston Lumb. Co., 53 Minn. 360, 55 N. W. 552.

Missouri. — Taussig *v.* Schields, 26 Mo. App. 318.

Nebraska. — Labaree *v.* Klosterman, 33 Neb. 150, 49 N. W. 1102.

New Hampshire. — Huckins *v.* P. M. F. I. Co., 31 N. H. 238.

New York. — Huff *v.* Bennett, 6 N. Y. 337; Bigelow *v.* Hall, 91 N. Y. 145; Sturm *v.* Atlantic M. I. Co., 38 N. Y. Super. Ct. 281, 318; Smith *v.* Randall, 3 N. Y. Super. Ct. 798; Howland *v.* Sheriff of Queen's County, 5 Sandf. 219; Steubing *v.* New York El. R. Co., 64 Hun 639, 19 N. Y. Supp. 313; Taft *v.* Little, 78 App. Div. 74, 79 N. Y. Supp. 507, *reversed* in 178 N. Y. 127, 70 N. E. 211; Geer *v.* New York City R. Co., 50 Misc. 517, 99 N. Y. Supp. 483.

Oregon. — State *v.* Moran, 15 Or. 262, 275, 14 Pac. 419; State *v.* Magers, 35 Or. 520, 57 Pac. 197; Hill's Anno. L. of Or. § 836.

Pennsylvania. — Wells Whip Co. *v.* Tanners' Mut. F. Ins. Co., 209 Pa. St. 488, 58 Atl. 894.

South Carolina. — State *v.* Collins, 15 S. C. 373, 40 Am. Rep. 697; Berry *v.* Jourdan, 11 Rich. L. 67; Bank *v.* Zorn, 14 S. C. 444; Heath *v.* South Bend R. Co., 24 S. E. 166.

Texas. — Miller & English *v.* Jannett & Franke, 63 Tex. 82.

Virginia. — Harrison *v.* Middleton, 11 Gratt. 527, 546.

Wisconsin. — Hazer *v.* Streich, 92 Wis. 505, 66 N. W. 720.

In Henry *v.* Lee, 2 Chitt. (Eng.) 124, where a witness was allowed to refresh his memory from a document not written by him, Lord Ellenborough said: "If upon looking at any document he can so far refresh his memory as to recollect the circumstance, it is sufficient; and it makes no difference that the memorandum was not written by himself, for it is not the memorandum that is the evidence, but the recollection of the witness."

Burrough *v.* Martin, 2 Campb. (Eng.) 112, was an action on a charter party. A witness was called to give an account of the voyage, and the log-book was laid before him for the purpose of refreshing his memory. Being asked whether he had written it himself, he said that he had not, but that from time to

time he examined the entries in it while the events recorded were fresh in his recollection, and that he always found the entries accurate. Lord Ellenborough said: "If the witness looked at the log-book from time to time, while the occurrences mentioned in it were recent and fresh in his recollection, it is as good as if he had written the whole with his own hand. This collation gave him an ample opportunity to ascertain the correctness of the entries, and he may therefore refer to these on the same principle that witnesses are allowed to refresh their memory by reading letters and other documents which they themselves have written."

In Hill *v.* State, 17 Wis. 675, 86 Am. Dec. 736, defendant was indicted for larceny of treasury notes. The court says: "On the trial a witness was called to describe the notes; and as she could not describe them without refreshing her recollection, she was allowed to use for that purpose a memorandum which had been made by another person at the time the notes were found, but for the making of which the witness furnished the paper, and read the numbers of the notes to the other person, who wrote them down. The record is not very specific or clear in respect to what the witness said about the memorandum, though we understand it as meaning that she testified positively that such a memorandum was made, and that she believed the one presented to her to be the same one. The bill of exceptions then states that 'the witness testified to the description of the treasury notes from the memorandum, although she had no recollection of the description without the aid of the memorandum'; and it is claimed that this evidence was erroneously admitted. It is claimed by the prisoner's counsel that the witness could not be allowed to refresh her recollection by a memorandum not made by herself. But however this may be in cases where it is designed to use or read the memorandum in connection with the testimony of the witness, the latter not being able, even after refreshing his memory, to retain any present recollection of the facts stated, but only to say generally that he knew at the time that they were correctly stated, such clearly is not the rule where the witness, after seeing the memorandum, is able, by its aid, to recall the facts and testify to them as a matter of recollection. In such cases it matters not whether the memorandum was made by the witness or another, 'for it is his recollection, and not the memorandum, which is the evidence'; 1 Greenl. Ev., § 436; 2 Phill. Ev., Cowen & Hill's Notes, 922, 923; Dorsey *v.* Gassaway, 2 Har. & J. 410 (3 Am. Dec. 557); Coffin *v.* Vincent, 12 Cush. 98. Such we understand to have been the case here. For we understand the statement in the bill of exceptions above quoted to mean that the witness, after using the memorandum, testified to the description of the notes from her recollection, although she could not have recollected it unless her memory had been thus aided. This evidence was therefore properly received."

In Calloway *v.* Varner, 77 Ala. 541, 54 Am. Rep. 78, it is said that witness may refer to memorandum made by him, or by another, if he knows it to be correct.

In Card *v.* Foot, 56 Conn. 369, 15 Atl. 371, 7 Am. St. Rep. 311, a witness who testified that she had been engaged in business as a milliner and dressmaker and that her customers were of the wealthy class, was asked to name her customers. *Held,* that she might refresh her memory as to their names by referring to memorandum made by her son at her dictation.

In I. & G. N. R. Co. *v.* Blanton, Nunnelly & Co., 63 Tex. 109, plaintiffs shipped by the defendant's road a quantity of cotton to Galveston consigned to the firm of P. J. Willis & Bro., merchants of that city. Plaintiffs alleged that by the negligence of defendants a portion of the cotton had been damaged. The court said: "They proved by the witnesses J. P. Willis and Zeigler that when the cotton came to the hands of the consignees a considerable part of it was damaged. These facts they well understood from their personal knowledge; they had re-

accordance with the weight of authority; but the contrary is held.[60]

ceived the cotton from the defendant's cars; had seen the damaged bales rejected by the public weigher. They had removed these damaged bales to the pickery belonging to the firm, where, under their supervision, the bales were opened, the damaged cotton removed, and the sound cotton re-baled. They then caused it to be taken to the public weigher, there they saw it re-weighed, the difference in the weight indicating the loss on each bale. Certainly they were competent witnesses to prove these facts. But, as no man could possibly retain in his memory all the infinite details of a business like this, the firm require all these minutiae to be reduced to writing by a yard clerk (in this case the witness Zeigler) and returned into the office, where they are copied into a book and thus preserved in a permanent form. A copy from this book does not of itself prove the facts recorded there; but it enables the witness who has transacted the business to recall all the details of the transaction. And it is not necessary that the witness should himself have made the entries in the book, if he knows from the general course of the business that the books are correctly kept."

In State *v.* Lull, 37 Me. 246, the court said: "The witness was permitted to refresh his recollection by, and to read a list of articles from a schedule made by his clerk in his presence, and under his direction and inspection. 'It does not seem to be necessary that the writing should have been so made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection.' 1 Greenl. Ev., § 436. So the witness in this case read a description of the goods named in the schedule, made under his direction and inspection, and testified to their correctness; thus both the paper and its use comes within the rule."

In Springs *v.* South Bound R. Co., 46 S. C. 104, 110, 24 S. E. 166, a witness, who was a cotton dealer, was called upon to testify as to the price at which he had sold a certain lot of cotton. To refresh his memory he referred to a memorandum made by another dealer in relation to this same lot of cotton. The court said: "A witness called suddenly to speak of transactions with others in the past, possibly of many details making up the transaction, has, for the moment, forgotten the circumstances, but the instant his memory thereof is stirred, a full consciousness of these transactions as verities of his own knowledge comes back to him. So it was with Mr. Springs in this case. With the multitude of similar transactions in cotton, he was not able, of himself, to speak of the price at which he sold the cotton; but the moment he saw Ober's account of such sales, he knew, of his own knowledge, what the prices were, and having testified on this occasion that his knowledge, after refreshing his memory by a sight of the paper prepared by Ober at the time of these transactions, was positive, and existed apart from the paper, his testimony was competent, and should not have been struck out."

60. **Author Alone Can Refer to Writing.** — It is held in Massey *v.* Hackett, 12 La. Ann. 54, that the author of a writing is the only one competent to refresh his memory from it. See also Pargood *v.* Guice, Admr., 6 La. 75, 25 Am. Dec. 202.

Manchester Assur. Co. *v.* Oregon R. Co., 46 Or. 162, 79 Pac. 60; B. & C. Anno. Codes of Oregon, § 848. In the above case, the court in construing this statute, said: "The statute has changed this rule, so that now a memorandum must have been made by the witness himself, or under his direction. This statute in the light of the law as it formerly stood, was probably designed to apply more particularly, if not exclusively, to those memoranda where, after consultation by the witness, his memory is not so refreshed that he can speak from his own recollection independently of the writing."

In Printup *v.* James, 73 Ga. 583,

Not Necessary That Writing Be in Handwriting of Witness. — It is not necessary that the writing be in witness' handwriting.[61]

3. Copy May Be Used. — It is immaterial that the writing used by witness is not the original writing or memorandum; he may use a copy of it if it be sufficient to refresh his memory.[62]

it is doubted whether it is possible for the recollection of a witness to be refreshed by an instrument which he did not prepare.

In Lenney *v.* Finley, 118 Ga. 427, 45 S. E. 317, there is, however, a distinct ruling that the recollection of a witness may be refreshed by such an instrument, provided he ultimately swears from his recollection as thus refreshed; but that, in order to testify positively from the paper itself he must either have made the paper himself or have seen it at some time when the facts were fresh in his memory and when he knew the facts stated in the paper to be correct.

61. *England.* — Wood *v.* Cooper, 1 Car. & K. 645; Burrough *v.* Martin, 2 Campb. 112; Lord Talbot *v.* Cusick, 17 Irish C. L. R. 213; Henry *v.* Lee, 2 Chitt. 124.

Missouri. — Rose *v.* Rubeling, 24 Mo. App. 369.

Texas. — Crystal Mfg. Co. *v.* San Antonio Brew. Assn., 8 Tex. Civ. App. 1, 27 S. W. 210; Miller & English *v.* Jannett & Franke, 63 Tex. 82.

Vermont. — Davis *v.* Field, 56 Vt. 426.

In Orr *v.* Farmers' Alliance W. & C. Co., 97 Ga. 241, 22 S. E. 937, it is said that a witness may refresh his memory by reference to a book, the entries on which were made by a party other than the witness from memoranda furnished by witness, and which book witness had checked from said memoranda.

62. *England.* — Tanner *v.* Taylor, 2 Esp. 406.

Alabama. — Calloway *v.* Varner, 77 Ala. 541, 54 Am. Rep. 78; Anderson *v.* English, 121 Ala. 272, 25 So. 748; Hawes *v.* State, 88 Ala. 37, 7 So. 302; Powell *v.* Henry, 96 Ala. 412, 11 So. 311; Bondurant *v.* Bank, 7 Ala. 830.

Arkansas. — Milwaukee Harvester Co. *v.* Tymich, 68 Ark. 255, 58 S. W. 252.

California. — People *v.* Monroe, 33 Pac. 776; People *v.* Brown, 84 Pac. 670; People *v.* Lowrie, 87 Pac. 253.

Colorado. — Lawson *v.* Glass, 6 Colo. 134.

Delaware. — Curry *v.* Warner Co., 2 Marv. 98, 42 Atl. 425.

Florida. — Adams *v.* Board of Trustees I. I. Fund, 37 Fla. 266, 294, 20 So. 266.

Georgia. — Finch *v.* Barclay, 87 Ga. 393, 13 S. E. 566.

Illinois. — Seaverns *v.* Tribby, 48 Ill. 195; Bredt *v.* Simpson, Hall, M. & Co., 95 Ill. App. 333.

Maryland. — Pierce *v.* Bangor & A. R. Co., 47 Atl. 144.

Massachusetts. — Com. *v.* Burton, 183 Mass. 461, 67 N. E. 419.

Michigan. — Hudnutt *v.* Comstock, 50 Mich. 596, 16 N. W. 157; Welch *v.* Palmer, 85 Mich. 310, 48 N. W. 552; Snyder *v.* Patton & Gibson Co., 143 Mich. 350, 106 N. W. 1106.

Minnesota. — Paine *v.* Sherwood, 19 Minn. 270.

Missouri. — Ward *v.* D. A. Morr, T. & S. Co., 119 Mo. App. 83, 95 S. W. 964.

Nebraska. — Murray *v.* Cunningham, 10 Neb. 167, 4 N. W. 319, 953; Anderson *v.* Imhoff, 34 Neb. 335, 51 N. W. 854.

New York. — Filkins *v.* Baker, 6 Lans. 516; Frindel *v.* Schaikewitz, 16 App. Div. 143, 45 N. Y. Supp. 104.

Oklahoma. — Flohr *v.* Territory, 14 Okla. 477, 78 Pac. 565.

Oregon. — Haines *v.* Cadwell, 40 Or. 229, 66 Pac. 910.

Pennsylvania. — Edwards *v.* Gimbel, 202 Pa. St. 30, 51 Atl. 357.

Rhode Island. — Welch & Co. *v.* Greene, 24 R. I. 515, 54 Atl. 54.

South Carolina. — Berry *v.* Jourdan, 11 Rich. L. 67; Sloan *v.* Courtenay, 54 S. C. 314, 32 S. E. 431, 440.

Virginia. — Harrison *v.* Middleton, 11 Gratt. 527, 547.

Texas. — I. & G. N. R. Co. *v.* Blanton, N. & Co., 63 Tex. 109; Riley *v.* State, 44 S. W. 698; San

Antonio & A. P. R. Co. *v.* Turner (Tex. Civ. App.), 94 S. W. 214.

In Horne *v.* Mackenzie, 6 Cl. & F. (Eng.) 628, a surveyor made a survey and report which he furnished to his employers, and being called as a witness produced a printed copy of this report, on the margin of which he had two days before made a few jottings to assist him in giving his explanations as a witness. The printed report had been made up from his own original notes, of which it was in substance, though not in words, a transcript, and it was held that he might look at the printed copy to refresh his memory.

In Burton *v.* Plummer, 2 Ad. & El. 341, 29 E. C. L. 113, a clerk of a tradesman entered the transactions in trade as they occurred, from his own knowledge, and the tradesman copied them into a ledger in the presence of the clerk, who checked them as they were copied. It was held that the clerk might use the entries in the ledger to refresh his memory, though the waste-book was not produced, nor its absence accounted for, the entries in the ledger having been made as by the clerk himself.

In Bullock *v.* Hunter, 44 Md. 416, the court said: "The defendant objected to the placing of the account in the hands of the witness, and his refreshing his memory from it, from time to time; but this objection was overruled and the defendant excepted. We have no doubt of the correctness of this ruling. The objection on the part of the appellant is that the account is not an original paper made by the witness at or about the time of the transaction, but a mere copy, taken from *memoranda* which had been made by him, and was therefore inadmissible and for this he cites, Green *v.* Caulk, 16 Md. 556; Ward *v.* Leitch, 30 Md. 326, and Jones *v.* Stroud, 2 C. & P. 196, (12 E. C. L., 86). Conceding that the account is to be considered as only a copy, and not an original entry of the transactions, the case is clearly distinguishable from those cited, by the fact that the witness had a distinct recollection of the several transactions independently of the paper, and was able to testify from his own recollection, after looking at the account which was used merely for the purpose of refreshing his memory."

The case of Erie Preserving Co. *v.* Miller, 52 Conn. 444, is strongly in point. There the witness, for the purpose of refreshing his recollection as to the number of crates received and the times when received, referred to certain memoranda in his hands which he testified were true copies of the way-bills in the office, all of which he had examined. The defendant objected to the evidence because the original way-bills were not produced and identified by the witness, but the court overruled the objection and admitted the evidence. On appeal to the supreme court of errors the ruling was sustained.

The contrary is held in Jones *v.* Jones, 94 N. C. 111. This was a case where the original and copy were both in court and at the witness' disposal. The copy was not allowed to be used. The court cites as authority *Starkie on Evidence, p.* 181, where it is held, "Whether the writing be used merely as an instrument for restoring the recollection of a fact, or be offered to be read as containing a true account of particulars entirely forgotten, it must in conformity with the general principles of evidence, be the best for the purpose the case admits of." See also Burton *v.* Plummer, 2 Ad. & El. 348, 29 E. C. L. 113, *dissenting* opinion by Patterson, J.

In Jones *v.* Stroud, 2 Car. & P. 196, 12 E. C. L. 86, the question was as to whether the witness could refresh his memory from a copy made about six months after the original, it appearing in evidence that the original was mutilated. The court held that he could not, that he could only look at the original memorandum made near the time of the transaction to which the writing related.

Witness May Refer to a Copy of a Copy of a certain writing. Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413; Brinkley Car Wks. Mfg. Co.

When Original Must Be Used. — But it is held that he must use the original writing, where he relies upon the paper and testifies only because he finds the facts contained therein.[63]

Limitation on Rule as To Use of Copy. — If copy is used, witness must be able to testify that the original entry was, when made, a true statement of the facts.[64]

v. Farrell, 72 Ark. 354, 80 S. W. 749; Wernwag *v.* Chicago & A. R. Co., 20 Mo. App. 473.

63. Watson *v.* Miller Bros., 82 Tex. 279, 17 S. W. 1053; Ragsdale *v.* Southern R., 72 S. C. 120, 51 S. E. 540; Tanner *v.* Taylor, 2 Esp. (Eng.) 406; Green *v.* Caulk, 16 Md. 556.

In Volusia County Bank *v.* Bigelow, 45 Fla. 638, 33 So. 704, the court said: "There is a clear and obvious distinction between the use of a memorandum for the purpose of stimulating the memory and its use as a basis for testimony regarding transactions as to which there is no independent recollection. In the former case it is immaterial what constitutes the spur to memory, as the testimony, when given, rests solely upon the independent recollection of the witness. In the latter case the memorandum furnishes no mental stimulus, and the testimony of a witness by reference thereto derives whatever force it possesses from the fact that the memorandum is the record of a past recollection, reduced to writing while there was an existing independent recollection. It is for that reason that a memorandum, to be available in such cases, must have been made at or about the time of the happening of the transaction, so that it may safely be assumed that the recollection was then sufficiently fresh to correctly express it. The assumed reliability of the memorandum as a contemporaneous record is the sole justification of its use by the witness, and hence it is essential in such cases that the witness should produce and testify by reference to the original memorandum."

Original Should Be Admitted as Independent Evidence. — It is held in Eatman *v.* State, 48 Fla. 21, 37 So. 576, that where the original is admissible in itself and the witness cannot testify independently of memoranda taken from the original, the original as the best evidence should be admitted to the exclusion of the testimony of the witness.

64. Calloway *v.* Varner, 77 Ala. 541, 54 Am. Rep. 78; Stoudenmire *v.* Harper Bros., 81 Ala. 242, 1 So. 857; Mayor & Aldermen of Birmingham *v.* McPoland, 96 Ala. 363, 11 So. 427; Wellman *v.* Jones, 124 Ala. 580, 27 So. 416; Merrill *v.* Sullivan, 68 Fed. 509, 15 C. C. A. 553; Jones *v.* State (Ala.), 41 So. 299.

"But, before he can be permitted to refresh his memory from the copy, he must be clear and explicit in his evidence that it is truly transcribed from the original, and that the original was correctly made, and was true when it was made." Chicago & A. R. Co. *v.* Adler, 56 Ill. 444.

In Jaques *v.* Horton, 76 Ala. 238, the court says: "The purpose of the rule is, to assist, for the ascertainment of truth, a recollection which the witness, by invoking or requiring the aid of a memorandum, admits is indistinct or uncertain. An untrue or inaccurate memorandum, instead of affording aid in recollecting *the facts*, to which the witness must testify as matter of independent recollection, tends to suggest what is not true, and to mislead the memory of the witness. While the tendency has been to relax the rule to some extent, we apprehend that no court has so far relaxed it, as to allow a witness, for the purpose of refreshing his memory, to inspect a paper purporting to be a copy, but which is not known or recognized by the witness, nor verified as a true copy of the original. A paper, purporting to be a copy of the lost will, was exhibited to the witness Thomas for the avowed purpose of refreshing his recollection of its contents. It professes to set out the contents of the will in exact phraseology, as drafted in due form, and executed

Reading from Copy. — Witness must not read from a copy.[65] The contrary is held.[66]

When It Appears That Writing Is a Summary. — When it appears that the memorandum in question is not a copy of the original entries, but a summary or addition of the amounts as entered, and it does not appear when the original entries or the memorandum was

with due formalities. The effect of inspecting such a paper, on the mind of the average witness, is to obscure, or confuse, or warp the memory. The alleged copy accompanied the application of the proponent to probate the will, and was produced by her on the trial. If it is a true copy, it was prepared by some one, who had the original before him. The proponent has the power to give information in what manner, and from whom it was obtained. When she presented it to the Court of Probate as a copy of the will, and prayed that, 'after proper proceedings and proof, it may be probated, and admitted to record as the true will,' she avouched its correctness, and asserted her readiness to establish it substantially; yet no evidence was offered, or proposed to be offered, to show by whom it was made, or from whom or when procured. To allow a witness, under such circumstances, to inspect such paper, for the purpose of refreshing his memory of the contents of the original, would impair the reliability of testimony, endanger the rights of litigants, and obstruct the due administration of the law."

Evans *v.* Bolling, 8 Port. (Ala.) 546. In this case the court refused to permit a witness to refresh his memory as to contents of a lost bond, by reference to a copy made by the clerk. The genuineness of the copy was not acknowledged; it could not, therefore, be referred to for any purpose as evidence.

In Walker *v.* State, 117 Ala. 42, 23 So. 149, the court said: "It could not be said, from his statement, when or from what data or evidence be made the notes from which the memorandum was made up. The notes may have been of the purest hearsay character, of the truth of which the witness had no knowledge, and possessing no binding force on the defendant. The witness did not testify to the truth of what the notes showed, nor how he knew it. Under these circumstances, we think it was not proper to permit the witness to refer to the memorandum to refresh his recollection."

65. In Bonnet *v.* Glattfeldt, 120 Ill. 166, 11 N. E. 250, the court said: "We think the only legal question which arises in this regard, is as to reading from the copy. The original entries, if shown to have been correctly made, might have been read in evidence, but not the copy of them. The latter might be used to refresh the memory. The copy of a writing, as well as the original, may be referred to by a witness, if his memory, refreshed thereby, enables him to testify from his own recollection of the original facts, independent of his confidence in the accuracy of the copy. But he is not, in such case, to read from the copy."

In Caldwell *v.* Bowen, 80 Mich. 382, 45 N. W. 185, the court said: "Mr. Pungs says he could not remember the figures, but could remember that he went there and got the statement, and the paper he held was a copy of it. He was permitted to read from the copy held in his hand. As we have said, the copy could not be used in evidence; and it did not appear in the case that the witness, after having refreshed his recollection from the paper, was able to state what Mr. Adams told him, and from which he made his report to R. G. Dun & Co. The effect of receiving the evidence by reading from the paper was the same as though the paper was put in evidence. It was, therefore, but hearsay, and wholly incompetent."

66. Hudnutt *v.* Comstock, 50 Mich. 596, 16 N. W. 157; Lipscomb *v.* Lyon, 19 Neb. 511, 27 N. W. 731.

made, witness may not refer to the memorandum.[67] But witness may refer to an aggregate when he has an independent recollection of the facts.[68]

4. It is Not Necessary That Writing Be Admissible as Evidence. To be used by witness, it is not necessary that the writing should itself be admissible as evidence.[69]

67. Stoudenmire *v.* Harper Bros., 81 Ala. 242, 1 So. 857.

68. Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625.

69. *England.* — Maugham *v.* Hubbard, 8 Barn. & C. 14, 19 E. C. L. 147; Jacob *v.* Lindsay, 1 East 460; Rampert *v.* Cohen, 4 Esp. 213.

California. — People *v.* Vann, 129 Cal. 118, 61 Pac. 776.

Georgia. — Schall *v.* Eisner, 58 Ga. 190.

Indiana. — Ellis *v.* Baird, 31 Ind. App. 295, 67 N. E. 960.

Kansas. — McNeely *v.* Duff, 50 Kan. 488, 31 Pac. 1061.

Kentucky. — Wilson *v.* Com., 21 Ky. L. Rep. 1333, 54 S. W. 946.

Louisiana. — Moran's Heirs *v.* Societe Catholique, etc., 107 La. 286, 31 So. 658.

Massachusetts. — Dugan *v.* Mahoney, 93 Mass. 572; Allwright *v.* Skillings, 188 Mass. 538, 74 N. E. 944; Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770.

New Hampshire. — Wolfborrough *v.* Alton, 18 N. H. 185.

New Jersey. — North Hudson County R. Co. *v.* May, 48 N. J. L. 401, 5 Atl. 276; French *v.* Millville Mfg. Co., 70 N. J. L. 699, 59 Atl. 214.

New York. — Haffner *v.* Schmuck, 49 App. Div. 193, 63 N. Y. Supp. 55, *affirmed* in 168 N. Y. 649, 61 N. E. 1130.

South Carolina. — Hicks *v.* Southern R. Co., 38 S. E. 725.

South Dakota. — Smith *v.* Hawley, 14 S. D. 638, 86 N. W. 652.

Tennessee — McNeely *v.* Pearson, 42 S. W. 165.

Virginia. — Harrison *v.* Middleton, 11 Gratt. 527.

Vermont. — State *v.* Costa, 78 Vt. 198, 62 Atl. 38.

West Virginia. — Vinal *v.* Gilman, 21 W. Va. 301.

Wyoming. — Martin *v.* Union Pac. R. Co., 1 Wyo. 143.

In Krider *v.* Milner, 99 Mo. 145, 12 S. W. 461, a surveyor was permitted to use a copy of a survey made by him, although the original survey was not made in accordance with the requirements of a statute providing for record of such survey, and was therefore not itself admissible in evidence.

In Phoenix Ins. Co. *v.* Public Parks Am. Co., 63 Ark. 187, 203, 37 S. W. 959, the court says: "The inventory, etc., should not have been read as evidence. It was not admissible to prove any fact to which the witness could testify from his recollection, or as independent evidence. But it could have been used to refresh the memory of the witness; and if, upon examining it, he was unable to remember what it contains, but knew its contents to be true, he might have so testified, and then read them to the jury, and in that way the facts stated in it might have been proved. In that manner it could have been received and considered by the jury as any other evidence."

In Kendall *v.* Bean, 12 Rob. (La.) 407, the court said: "Our attention has been drawn to a bill of exceptions taken to the opinion of the judge, who refused to admit in evidence the books of the defendants which they had offered to corroborate by the testimony of their witnesses, as to the days on which the several transactions took place, and to prove in whose handwriting the original entries were made. The judge, we think, correctly held, that the books of the defendants could not be admitted for any purpose whatever; but that witnesses, who had made entries in them of matters within their personal knowledge, might refer to such entries to refresh their memory. The civil code expressly provides, that the books of merchants

Writing Not Made Admissible By Such Use. — The fact that a writing has been used by a witness for the purpose of refreshing his memory does not make the writing itself admissible as evidence of the facts therein contained, if the witness' memory was so revived that he could testify independently of the memorandum.[70]

cannot be given in evidence in their favor. Art. 2244."

70. *United States.* — Vicksburg & M. R. Co. *v.* O'Brien, 119 U. S. 99.

Connecticut. — Erie Preserving Co. *v.* Miller, 52 Conn. 444; Curtis *v.* Bradley, 65 Conn. 99, 31 Atl. 591.

Georgia. — Schall *v.* Eisner, 58 Ga. 190.

Illinois. — Kent *v.* Mason, 1 Ill. App. 466.

Massachusetss. — Com. *v.* Jeffs, 132 Mass. 5.

Montana. — Kipp *v.* Silverman, 25 Mont. 296, 64 Pac. 884.

New Hampshire. — Kelsea *v.* Fletcher, 48 N. H. 282.

New York. — Russell *v.* Hudson R. Co., 17 N. Y. 134.

W. Virginia. — State *v.* Legg, 59 W. Va. 315, 53 S. E. 545.

In Acklen's Exr. *v.* Hickman, 63 Ala. 494, 35 Am. Rep. 54, the court said: "The law recognizes the right of a witness to consult memoranda in aid of his recollection, under two conditions: *First*, when, after examining a memorandum made by himself, or known and recognized by him as stating the facts truly, his memory is thereby so refreshed that he can testify, as matter of independent recollection, of facts pertinent to the issue. In cases of this class, the witness testifies to what he asserts are facts within his own knowledge; and the only distinguishing difference between testimony thus given, and ordinary evidence of facts, is that the witness, by invoking the assistance of the memorandum, admits that, without such assistance, his recollection of the transaction he testifies to, had become more or less obscured. In cases falling within this class, the memorandum is not thereby made evidence in the cause, and its contents are not made known to the jury, unless opposing counsel call out the same on cross-examination. This he may do, for the purpose of testing its sufficiency to revive a faded or fading recollection, if for no other reason. In the second class are embraced cases in which the witness, after examining the memorandum, cannot testify to an existing knowledge of the fact, independent of the memorandum. In other word, cases in which the memorandum fails to refresh and revive the recollection, and thus constitute it present knowledge. If the evidence of knowledge proceed no further than this, neither the memorandum, nor the testimony of the witness, can go before the jury. If, however, the witness go further, and testify that, at or about the time the memorandum was made, he knew its contents, and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum. The two are the equivalent of a present, positive statement of the witness, affirming the truth of the contents of the memorandum. — 1 Greenl. Ev. 436-7; Bondurant *v.* Bank, 7 Ala. 830."

It is said by the court in Palmer *v.* Hartford Dredging Co., 73 Conn. 182, 47 Atl. 125, "a witness for the defendant refreshed his memory from a writing made by himself, and then testified fully from memory alone. The defendant then offered the writing itself in evidence to corroborate the oral evidence of the witness, and the court excluded it. This ruling was correct, unless the writing was admissible in corroboration, as claimed. Where a writing does in truth refresh the memory of a witness, and he can and does testify fully from memory, the general rule is that the writing itself is not admissible in evidence. . . . Here the writing was not claimed as evidence in itself, but only as evidence in corroboration; its exclusion on that ground could not have injured the defendant. It was not admissible in corroboration. Assuming that it contained statements previous-

According to the Weight of Authority. — When the witness' memory is not so revived, but he is able to swear as to the authenticity of the writing, his testimony and the writing in connection with each other are both competent evidence.[71]

ly made by the witness consistent with his oral evidence, the general rule is that a party cannot strengthen the testimony of his own witness by showing that he has made previous statements to the same effect as his testimony."

In Baum *v.* Reay, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561, the court said: "The inventory was admissible in evidence only as memoranda to refresh the memory of the witness. It was not competent evidence to prove the facts stated in the inventory itself. The defendant was not injured by the rejection of the testimony, because the witness had already been permitted to testify to all he could have testified to, using the inventory as a memorandum."

71. *United States.* — Continental Ins. Co. *v.* Insurance Co., 51 Fed. 884, 2 C. C. A. 535.

Illinois. — Kent *v.* Mason, 1 Ill. App. 466.

Kansas. — City of Garden City *v.* Heller, 61 Kan. 767, 60 Pac. 1060.

Maryland. — Owens *v.* State, 67 Md. 307, 10 Atl. 210, 302.

Minnesota. — Newell *v.* Houlton, 22 Minn. 19.

Michigan. — Welch *v.* Palmer, 85 Mich. 310, 48 N. W. 552.

Nebraska. — Gross *v.* Scheel, 67 Neb. 223, 93 N. W. 418.

New Hampshire. — Watson *v.* Walker, 23 N. H. 471.

New York. — Guy *v.* Mead, 22 N. Y. 462; Cole *v.* Jessup, 10 N. Y. 96, *s. c.* 9 Barb. 395; Howard *v.* McDonough, 77 N. Y. 592; Bank *v.* Culver, 2 Hill 531; National Ulster Co. Bank *v.* Madden, 114 N. Y. 280, 21 N. E. 408; Philbins *v.* Patrick, 6 Abb. Pr. (N. S.) 284; Sherlock *v.* German-American Ins. Co., 21 App. Div. 18, 47 N. Y. Supp. 315; Merrill *v.* Ithaca & O. R. Co., 16 Wend. 586.

Ohio. — Shriedley *v.* State, 23 Ohio St. 130; Moots *v.* State, 21 Ohio St. 653.

Oregon. — Manchester Assur. Co. *v.* Oregon R. Co., 46 Or. 162, 79 Pac. 60.

Pennsylvania. — Eby *v.* Eby's Assignee, 5 Pa. St. 435.

Vermont. — Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57; Lapham *v.* Kelley, 35 Vt. 195; Williams *v.* Wager, 64 Vt. 326, 24 Atl. 765; Bates *v.* Sabin, 64 Vt. 511, 24 Atl. 1013.

Wisconsin. — Manning *v.* School Dist. No. 6, 124 Wis. 84, 102 N. W. 356; Nehrling *v.* Herold Co., 112 Wis. 558, 88 N. W. 614.

In Haven *v.* Wendell, 11 N. H. 112, the court said: "The memorandum itself was here admitted in evidence, in connection with his testimony that he heard certain matters — that he made a memorandum of those matters — that this is that paper — and that it is a true statement of what then took place. The memorandum, therefore, became part of the testimony of the witness; and the question is, whether the paper itself may be received to show the particulars of what then occurred, the witness testifying that he has now no recollection of all the particulars, but that he has no doubt the facts there stated are true, and that he should, within a short time subsequent, have sworn to them from his recollection. . . . And we are of opinion that the admissibility of the paper in evidence, in connection with, and as a part of the testimony of the witness, may be established upon the soundest principles. It is not disputed that the witness might have been admitted to testify to these facts as existing in his recollection. If the paper be authentic, his record of the fact, made at the time when he was much less liable to mistake, is much better than his recollection of the facts so long afterwards. It is agreed, and no doubt exists, that he might refer to the paper to refresh his recollection, and then testify to the facts there stated, as existing in his recollection. But if he has not a recollection without the use of the

paper, the evidence is after all derived mainly from the paper, and is no better than his declaration that he made the paper at the time — that he has no doubt it contains the facts as they took place — that he should have sworn to them soon after, from memory, although he does not now recollect them except by the paper."

In Halsey *v.* Sinsebaugh, 15 N. Y. 485, the court, citing many authorities, says: "Although the memorandum, from which the witness was called upon to testify in this case, consisted of the minutes of testimony taken upon a previous trial of the cause, I am not aware that such cases are governed by any peculiar rule, but regard the exception taken by the defendant's counsel as presenting the general question, whether a memorandum made at or about the time when the event or transaction mentioned in it took place, and where the author swears that he knows it to have been correct when made, can be read to the jury in connection with the oral testimony of the witness; or whether the evidence is confined to what the witness is able to recollect, after refreshing his memory by referring to the memorandum. The learned judge who presided at the trial, seems to have followed the rule laid down by Mr. Phillips, in his work upon evidence, which is, in substance, that such memoranda may be used to refresh the recollection of the witness, but can have no force as evidence, unless the witness, after referring to the memorandum, has a present recollection of the facts to which the memorandum relates. This was, no doubt, at one time, supposed to be the true rule, and as such it was adopted and followed in several cases, by the courts of this and other states. (Lawrence *v.* Barker, 5 Wend. 301; Feeter *v.* Heath, 11 Wend. 485; Calvert *v.* Fitzgerald, 1 Litt. Se. Cas., 388; The Juniata Bank *v.* Brown, 5 Serg. & Rawle, 232.) But in the case of The State *v.* Rawls (2 Nott & McCord. 334), this rule was subjected to a critical examination by the Constitutional Court of South Carolina, and was, as I think, proved to have originated in a misapprehension of the cases of Doe *v.* Perkins and Tanner *v.* Taylor, cited by Mr. Phillips in its support. The commentary by Nott, J., upon those cases shows conclusively that the memoranda there produced, were not the originals, made by the witness at the time the events occurred, but mere copies or extracts from such originals taken long afterwards. This commentary, which is quoted *in extenso* and approved by Cowen, J., in the case of Merrill *v.* The Ithaca and Oswego Railway Company (16 Wend. 596), seems to be entirely just and sound; and I entertain no doubt that Mr. Phillips fell into an error from not discriminating with sufficient care between the original memorandum itself and a mere copy. This subject is treated with much learning and ability in the Notes to Phillips' Evidence, by Messrs. Cowen & Hill (note 528 to p. 290), where the authorities bearing upon it are elaborately reviewed; and I fully assent to the principle there stated, 'that an *original* memorandum, made by the witness *presently* after the facts noted in it transpired, and proved by the same witness at the trial, may be read by him, and is evidence to the jury of the facts contained in the memorandum, although the witness may have totally forgotten such facts at the time of the trial.'"

In Russell *v.* Hudson River R. Co., 17 N. Y. 134, the court said: "But there is another question which I deem it expedient briefly to consider. Upon the trial, the plaintiff's counsel offered in evidence a memorandum made by the witness then under examination, relating to the extent of the plaintiff's injuries. The witness stated that the memorandum was made at the time of its date, which was about the time of the accident, and that when it was made he knew it to be true. The reading of this memorandum in evidence was objected to, but was permitted. It is insisted that a memorandum thus made can only be referred to for the purpose of refreshing the recollection of the witness, but can, under no circumstances, be made evidence *per se*. That unless the witness, after thus refreshing his memory, can swear to the facts from

Different Rulings Made. — But some jurisdictions have made differ-

recollection, his testimony, as is said by Mr. Phillips, in his work on Evidence, 'will amount to nothing.' (1 Phil. Ev., 289.) . . . A witness who says that after refreshing his memory by a written memorandum, made by himself at or about the time of the occurrence, he cannot recollect the facts, but that he is confident that he knew the memorandum to be correct when it was made, is not required to swear to the facts in positive terms, but the memorandum itself is received in connection with and as auxiliary to the oral testimony. . . . It is, however, an indispensable preliminary to the introduction of such a memorandum in evidence, that it should appear, as it did in the case of Halsey *v.* Sinsebaugh (*supra*), that the witness is unable with the aid of the memorandum to speak from memory as to the facts"

As to the use of refreshing memoranda and their admissibility in evidence, the supreme court of Connecticut says, in Curtis *v.* Bradley, 65 Conn. 99, 31 Atl. 591, 48 Am. St. Rep. 177, "The right of a witness to refresh his memory is a settled and necessary rule of evidence. The application of that rule is often difficult, involving delicate distinctions. We are not called upon now to draw the line which limits the right of a witness to the use of such aids as, under the subtle laws of association, serve to refresh his memory. All courts recognize that right, and rightly hold that the thing used to refresh the memory is not by reason of such use itself admissible as evidence. When in the application of the rule a document like the one in question was presented to the witness and absolutely failed to refresh his memory, its exclusion as a means of refreshing his memory became imperative; but the evidence of the document was so clearly essential to a fair and just trial, that its use in some form seemed also imperative. Instead of treating the paper as itself competent documentary evidence, resort was had to a palpable fiction; the paper is read by the witness, and the knowledge the witness once had of the facts stated by the paper is imputed to him as still existing, and the statement of the paper is received as the testimony of the witness, and the paper itself, the only witness capable of making the statement, is excluded. The use of such a fiction in the administration of justice can rarely if ever be justified. It is certainly uncalled for in this instance. The principles of law invoked to justify the fiction are amply sufficient to support, indeed to demand, the admission of the document as evidence. There is no occasion to sacrifice truth in order to secure justice. . . . A memorandum of details which are essential to the full proof of a transaction at issue, proved to have been made substantially at the time of the transaction, and under such circumstances that the memorandum can make a correct statement of such details as they were then known to the person who made the memorandum, or saw it made, and who is himself a witness and testifies to the transaction, but has lost all recollection of such details, is, in connection with the testimony of such witness, admissible as evidence; because such memorandum is in itself evidence of a fact closely relevant, plainly material, and essential to a just trial, and because no principle of the law of evidence or rule of public policy justifies its exclusion; and such memorandum may properly be marked as an exhibit."

"He (witness) had forgotten the facts therein stated, but was able to say in substance that the contents of the letters were undoubtedly true at the time they were written, although he was then unable to remember them. Under these circumstances it seems to me these papers were admissible as auxiliary to the testimony of Eldredge (witness) and as memorandums made by him, of a then existing state of facts." Lewis *v.* Ingersoll, 1 Keyes (N. Y.) 357.

ent rulings as to the admissibility of such a writing in connection with the witness' testimony.[72]

5. Time When Writing Made. — As to the time when a writing used to assist witness' memory should have been made, no definite rule has been established. It is most frequently said that it must have been made at the time of the fact in question, or recently afterwards. At the farthest, it ought to have been made before such a period of time has elapsed as to render it probable that the memory of the witness may have become deficient.[73]

Exact Contemporaneity Not Essential. — It is not essential that the memorandum should be contemporary with the facts. It is sufficient that it be made when the facts were fresh in the recollection of the witness, and that the reading of the memorandum restores the recollection of the fact which has faded from his memory.[74]

72. In England It Is Excluded. Alcock *v.* Royal Ex. Assur. Co., 13 Q. B. 292.

In Massachusetts and Some Other States It Is Excluded.

Arkansas. — Phoenix Ins. Co. *v.* Public Parks Am. Co., 63 Ark. 187, 37 S. W. 959.

California. — People *v.* Elyea, 14 Cal. 144.

Iowa. — Adae *v.* Zangs, 41 Iowa 536.

Massachusetts. — Field *v.* Thompson, 119 Mass. 151; Dugan *v.* Mahoney, 11 Allen 572; Townsend Bank *v.* Whitney, 3 Allen 454.

Nebraska. — Lipscomb *v.* Lyon, 19 Neb. 511, 27 N. W. 731.

Pennsylvania. — Lightner *v.* Wike, 4 Serg. & R. 203.

In the federal jurisdiction the question is still open. In Insurance Co. *v.* Weides, 14 Wall. (U. S.) 380, the court indicates the admissibility of the writing as evidence; but the opinion in Bates *v.* Preble, 151 U. S. 149, shows that the court is not committed to the general doctrine that such memoranda are admissible for any other purpose than to refresh the memory of the witness.

73. *England.* — Whitfield *v.* Aland, 2 Car. & K. 1015; Burton *v.* Plummer, 2 Ad. & El. 341, 29 E. C. L. 113; Wood *v.* Cooper, 1 Car. & K. 645.

Alabama. — Howell *v.* Carden, 99 Ala. 100, 10 So. 640.

California. — Paige *v.* Carter, 64 Cal. 489, 2 Pac. 260.

Colorado. — Lawson *v.* Glass, 6 Colo. 134.

Nebraska. — Schuyler Nat. Bank *v.* Bollong, 24 Neb. 825, 40 N. W. 413; Atchison, T. & S. F. R. Co. *v.* Lawler, 40 Neb. 356, 58 N. W. 968.

South Carolina. — State *v.* Cardoza, 11 S. C. 195, 239.

Texas. — Rice *v.* Ward, 56 S. W. 747.

The memorandum used to refresh the memory must have been made "while the occurrences mentioned in it were recent and fresh in his recollection." Lord Ellenborough in Burrough *v.* Martin, 2 Campb. (Eng.) 112: "Written contemporaneously with the transaction;" Chief Justice Tindal in Steinkeller *v.* Newton, 9 Car. & P. (Eng.) 313, or "contemporaneously or nearly so with the facts deposed to;" Chief Justice Wilde (afterwards Lord Chancellor Truro) in Whitfield *v.* Aland, 2 Car. & K. (Eng.) 1015. See also Burton *v.* Plummer, 2 Ad. & El. 341, 29 E. C. L. 113.

In Wood *v.* Cooper, 1 Car. & K. (Eng.) 645, it is held that witness may use a writing to refresh his memory if made near the time of the transaction by himself, if the facts are then fresh in witness' memory.

"The general remark of law writers is, that the writing must have been made at the time of the fact in question, or recently afterwards." O'Neale *v.* Walton, 1 Rich. L. (S. C.) 234.

74. Riordon *v.* Davis, 9 La. 239, 29 Am. Dec. 442; State *v.* Collins,

Rule Does Not Apply to Cases of Independent Recollection. — But the rule as to contemporaneity does not refer to cases where the witness, after refreshing his memory from a writing, has an independent recollection of the facts to which it relates. In this event the writing may be used without regarding the time at which it was made.[75]

15 S. C. 373, 40 Am. Rep. 697; Com. *v.* Clancy, 154 Mass. 128, 27 N. E. 1001; Sibley W. & S. Co. *v.* Durand Co., 102 Ill. App. 406, *affirmed* in 200 Ill. 354, 65 N. E. 676; Kahn *v.* Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059; Gunberg *v.* United States, 145 Fed. 81.

Paige *v.* Carter, 64 Cal. 489, 2 Pac. 260: "Although not made at the time the occurrences took place . . . if made under his direction at any time when the fact was fresh in his memory, it was proper to allow him to refresh his memory by it." See also California Code Civ. Proc., § 2047.

75. Bank *v.* Zorn, 14 S. C. 444; Volusia County Bank *v.* Bigelow, 45 Fla. 638, 33 So. 704.

In Folsom *v.* A. R. Log-Driving Co., 41 Wis. 602, the court said: "One exception relied on for a reversal of the judgment is that taken to the ruling of the circuit court holding that the witness Folsom might resort to a paper to refresh his memory as to matters about which he was testifying. The witness gave this account of the paper: 'This memorandum,' he said, 'is a copy drawn recently from an original which I made at the time of the facts or occurrences it refers to. This copy was made in town — some of them in Alden. This paper was drawn from and is a copy of a paper which I copied from my original memorandum of the facts at the time of their occurrence. The copy from which I copied this was brought by me from home, and was not kept by me because it had been defaced in carrying it, and hence this new copy was drawn off from it by Kittle, I dictating the whole. I know that copy is correct; a true copy from the original, which was also defaced; and the original memorandum was correct when I made it.' The witness added that he resorted to the paper to refresh his memory, and in resorting to it his memory was refreshed. The objection to the witness testifying from the paper was placed upon the ground that it did not appear to be a memorandum made at the time, or a copy of the memorandum made at the time, of the occurrences. We are of the opinion that the objection was properly overruled." After citing many authorities the court continues: "In the present case, the witness, after resorting to the memorandum, was able to speak of facts from recollection. It is true, this kind of evidence is open to more or less suspicion because of the unconscious effect which the memorandum may have upon the mind of the witness, and which may lead him to suppose he recalls facts when he really does not. But this affects the credibility rather than the competency of the testimony. The witness gave estimates of the quantity and value of hay injured or destroyed in the years 1871, 1872, 1873 and 1874, by the flowage complained of. It is said that such estimates were mere wild guesses, and afforded no basis for the assessment of damages, and for that reason ought to have been excluded. But it is obvious that this objection also goes to the credibility or value of such testimony. We must presume that the jury scrutinized it, and only gave it the consideration which should be attached to it. It was not impossible for the witness, by an effort of memory, to recall such dates and amounts as he detailed in his testimony. It was the province of the jury to determine what his estimates were worth."

In Pinney *v.* Andrus, 41 Vt. 631, the witness made use of a memorandum to refresh his memory, which memorandum had been made apparently some time after the trans-

Not Necessary That Every Detail Be Recalled. — When witness refers to memorandum made at the time of the occurrence of the fact in question, it is not essential that the memorandum recall to his recollection every detail of the transaction concerning which the memorandum was made. It is sufficient that the memorandum inform him that it was correctly made and that he performed the act thereby recorded.[76]

6. Witness Must Have Been Connected With Writing. — Where a memorandum or writing is presented to a witness for the purpose of refreshing his memory, it must either have been made by the witness or under his direction, or he must be connected with it in

action to which it related. The court said: "It is also objected by the defendant that the plaintiff was improperly allowed to testify from or refer to a certain memorandum produced by him on trial. It is obvious that a memorandum made from recollection merely, and so long after the alleged transaction to which it refers, would not be likely to aid the recollection of the witness, or add to the weight of his testimony. If the court allowed the paper as evidence generally to refresh the recollection of the witness, we think it was wrong. But as a paper containing dates, figures and amounts within the recollection of the witness, but being matters which he could not carry in his mind, it might be referred to by him, not for the purpose of refreshing his recollection as to the correctness of the entries, but for the purpose of enabling him to state with accuracy the details of things of which he had from recollection made a memorandum, but could not carry them in his mind so as to be able to repeat them without the aid of the paper."

76. In Lawyer *v.* Smith, 8 Mich. 411, subscribing witnesses to a will were called upon, after a lapse of thirty years, to testify as to its proper execution. The court said: "It could not be expected, after the lapse of thirty years, they should recollect all the particulars attending the execution. It was for the jury to give such weight to their evidence as they might think it entitled to, under all the circumstances of the case."

In Graham *v.* Lockhart, 8 Ala. 9, the witness was called upon to attest the validity of his signature, as a witness, to a deed. He could not remember, with precision, its execution by the parties, but he swore that his signature, as a subscribing witness, was genuine, and that it would not have been placed there unless he had been called to witness the instrument. His testimony was admitted.

Nicholson *v.* Withers, 2 McCord (S. C.) 428, 13 Am. Dec. 739. This case involved an action upon an open account. A witness who had kept plaintiff's books was permitted to refer to them in testifying in support of plaintiff's allegation that certain goods had been delivered to defendant. The court says: "But when the account is proved by a disinterested witness, the entries in the books are nothing more than memoranda by which to refresh his memory. By refreshing his memory, it is not to be understood that the memoranda must bring to his recollection that every article was actually delivered. They can only inform him that he made the entries and enable him, therefore, to say that he delivered the articles at the time. And in this case the witness not only swears that he made the entries, but that according to the best of his recollection he delivered the goods. Also suppose they had been articles delivered by a farmer, such as corn, flour, pork, cotton, etc., might they not have been proved in this way? And a merchant's accounts may be proved according to the rules of the common law as well as any other, when he is prepared with common law testimony for the purpose."

such a way as to make it competent for the purpose for which it is proposed to use it.[77]

Memorandum Must Emanate From Witness. — And it has also been said that the writing should emanate from the witness himself and should have been made of his own free will and accord, and not by or at the recommendation of the party in whose favor he is called to testify.[78]

7. Examples. — For a list of memoranda held to have been properly used, see note.[79] And for a list of numerous writings which

77. Putnam *v.* United States, 162 U. S. 687; Crawford *v.* Branch Bank, 8 Ala. 79; Wagar Lumb. Co. *v.* Sullivan Logging Co., 120 Ala. 558, 24 So. 949; Paige *v.* Carter, 64 Cal. 489, 2 Pac. 260. See also Cal. Code Civ. Proc. § 2047; Steele *v.* Wisner, 141 Pa. St. 63, 21 Atl. 527; Rice *v.* Ward (Tex.), 56 S. W. 747.

78. O'Neale *v.* Walton, 1 Rich. L. (S. C.) 234; Spring G. M. Ins. Co. *v.* Evans, 15 Md. 54; Swartz *v.* Chickering, 58 Md. 290; Ballard *v.* Ballard, 5 Rich. L. (S. C.) 495; Rice *v.* Ward (Tex.), 56 S. W. 747.

Where a witness had herself noted down the transactions from time to time as they occurred, but had requested the plaintiff's solicitor to digest her notes into the form of a deposition, which she had afterwards revised, corrected and transcribed, Lord Chancellor Hardwick suppressed the deposition, with strong expressions of indignation. The language of the Lord Chancellor may be instructive as to the principle we have under consideration. The case is quoted in Doe *v.* Perkins, 3 Durnf. & E. (Eng.) 749. "Should the court connive at such proceedings as these, depositions would be really no better than affidavits." "To be sure," he continued to say, "a man may use papers at law in some cases, but I have known some judges (and I think I adhere chiefly to that rule myself) let them use only papers drawn up as the facts happened, and all other papers I have bid them put in their pockets; and if any had been offered which had been drawn up by an attorney, I should have reprimanded him severely."

"The paper should contain not only what the writer was conscious of at the time the matter was noted, but should be one emanating from the witness himself, or made out under his immediate direction and of his own free will and accord." O'Neale *v.* Walton, 1 Rich. L. (S. C.) 234.

In Ballard *v.* Ballard, 5 Rich. L. (S. C.) 495, it appeared that the writing had been made the day following the day of the transaction to which it related. The witness' testimony, after reference to the writing, was refused. It is probable that under ordinary circumstances it would have been admitted; but in this case it also appeared that the witness had had a conference with others in relation to the preparation of the writing and that it did not emanate from the witness himself.

79. Documents Used as Refreshing Memory. — Certificate. — Copy Of. — Copy of certificate of weight of grain weighed at an elevator, the certificate having been taken from books of the elevator company which were made up from papers known as "track tickets" used by the "weigh man" of elevator company, in action involving the quantity of wheat received at a certain place. Wernwag *v.* Chicago & A. R. Co., 20 Mo. App. 473.

Tax Lists. — Used to refresh memory of lister who testified that the lists were not in his handwriting, but that he signed and swore to them. Used by lister to refresh memory of fact that a certain person resided in the tax district at a given time. Davis *v.* Field, 56 Vt. 426. See 1 Whart. § 518.

Way Bills, Copies Of. — To show that certain freight was received, such copies may be referred to by the freight clerk. Erie Preserving

Co. *v.* Miller, 52 Conn. 444, 52 Am. Rep. 607.

Memoranda. — Witness may refresh his recollection as to dying declarations of the deceased from memoranda made at the time of such declaration. State *v.* Teachey, 138 N. C. 587, 50 S. E. 232; State *v.* Whitson, 111 N. C. 695, 16 S. E. 332; State *v.* Finley, 118 N. C. 1161, 24 S. E. 495; State *v.* Craine, 120 N. C. 601, 27 S. E. 72; Foley *v.* State, 11 Wyo. 464, 72 Pac. 627; Fuqua *v.* Com., 24 Ky. L. Rep. 2204, 73 S. W. 782.

In an action for damages caused by trespassing cattle, witness was permitted to refer to memoranda, made by himself at the time, showing how many times he had seen defendant's cattle trespassing upon plaintiff's land. Holliday *v.* Marsh, 3 Wend. (N. Y.) 142, 20 Am. Dec. 678.

Memorandum showing names of customers of a person engaged in business, memorandum having been made by a son of such person at her dictation, and in her presence. Card *v.* Foot, 56 Conn. 369, 15 Atl. 371, 7 Am. St. Rep. 311. Slips of paper upon which witness, at request of and in the presence of a builder, wrote down the names of men employed on a certain building and their time, were held to have been properly used to refresh memory of a witness in an action to recover for labor and materials furnished in the construction of such building. Curtis *v.* Bradley, 65 Conn. 99, 31 Atl. 591, 48 Am. St. Rep. 177.

Memorandum of statements of person accused of murder showing the circumstances and reduced to writing by witness at the time. People *v.* Cotta, 49 Cal. 166; People *v.* Le Roy, 65 Cal. 613, 4 Pac. 649.

Memorandum. — In People *v.* Vann, 129 Cal. 118, 61 Pac. 776, defendant was accused of an assault with intent to commit rape upon a girl under the age of consent. It, therefore, became material to determine the age of the latter. Witness, who was the mother of the girl, after refreshing her memory from an entry made by her in the family bible at the time of birth, testified to the date of birth. This testimony was admitted.

Memorandum made by an officer showing how service of process was made, could properly be referred to by him in testifying as to facts of which he had no recollection independent of the memorandum, the same having been made at the time of service. McClaskey *v.* Bair, 45 Fed. 151.

Memorandum of Entries in Account Book. — Godden *v.* Pierson, 42 Ala. 370.

Letters. — Witness may refer to letters passing between himself and another person. Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 799, 12 S. E. 18.

Letter Book. — In a case where the issue was, had a certain note been taken out of the statute of limitations by promise of payment, witness was permitted to refer to a letter book to fix date of the promise relied upon. Henderson *v.* Ilsley, 11 Smed. & M. (Miss.) 9, 49 Am. Dec. 41.

Account Books. — Entries in account books showing delivery of articles of merchandise may be referred to by person who made them at the time, to show delivery of the articles in question. Nicholson *v.* Withers, 2 McCord (S. C.) 428, 13 Am. Dec. 739; Wolcott *v.* Heath, 78 Ill. 433.

It has been held that witness may not refer to entries in account book unless they were made by himself. Pargood *v.* Guice, Admr., 6 La. 75, 25 Am. Dec. 202.

In Miller *v.* Shay, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449, it was held, upon trial of an issue involving the number of loads of sand delivered, that a witness was properly permitted to refer to an account book in which he had kept account of the number of loads by drawing a straight line on a page of the book for each load, making his marks from daily reports of his teamsters, each of whom made a chalk mark upon the side of his cart for each load delivered. Bookkeeper of party may refer to his employer's books. Treadwell *v.* Wells, 4 Cal. 260; Beddo *v.* Smith, 1 Minor (Ala.) 397.

Account Books. — Memorandum From. — Godden *v.* Pierson, 42 Ala.

370; Bonnet *v.* Glattfeldt, 120 Ill. 166, 174, 11 N. E. 250.

Account. — Copy Of. — Lawson *v.* Glass, 6 Colo. 134; New York Min. Co. *v.* Fraser, 130 U. S. 611.

Physician's Cash Book. — On issue as to date of birth of a certain child, it is proper to permit the attending physician to refer to an entry in his cash book showing the date of his attendance upon the mother, he having stated that he made the entry at the time, and knew the date from the entry. People *v.* Vann, 129 Cal. 118, 61 Pac. 776.

Testimony Taken on Former Trial. A witness may refresh his memory by referring to summary of his testimony given upon a former trial of the action in which his testimony is desired. Riordon *v.* Davis, 9 La. 239, 29 Am. Dec. 442. See Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811; People *v.* Durrant, 116 Cal. 179, 213, 48 Pac. 75. In this case the court says: "The witness would have had the undoubted right to read his testimony given upon the examination for the purpose of refreshing his memory. (Code Civ. Proc., § 2047.) Such a transcript may at least be regarded as a private memorandum. (Reid *v.* Reid, 73 Cal. 206.) When a witness called by a party fails to testify to matters previously within his recollection, or gives evidence in apparent variance with that formerly given, it is not incumbent upon the party producing the witness to wait for the assaults of the cross-examination to expose seeming inconsistencies and discrepancies. While he may not impeach his witness (saving under certain exceptional circumstances), he may with propriety refresh his recollection, to the end that the witness and his present evidence may both be put fairly and in their proper light before the jury. The answer above quoted affords a good illustration of this. The witness admits the discrepancy between his former and his present testimony, and candidly explains it as arising from a doubt created by his former cross-examination. There was here no impropriety and no injury to defendant." See also People *v.* Ammerman, 118 Cal. 23, 50 Pac. 15.

Testimony Before Grand Jury. In testifying upon a trial, witness may refresh his memory by referring to his testimony concerning the same matters given before a grand jury, reduced to writing, and signed by witness. Billingslea *v.* State, 85 Ala. 323, 5 So. 137; State *v.* Miller, 53 Iowa 84, 154, 209, 4 N. W. 838, 900, 1083.

Affidavit. — Made by witness five years before trial when the facts in question were fresh in his mind. Feeter *v.* Heath, 11 Wend. (N. Y.) 477.

Deposition of Witness. — Taken before magistrate at preliminary hearing. See Atkins *v.* State, 16 Ark. 568.

Transcript of Testimony. — A shorthand reporter, in testifying concerning the testimony given by a witness upon a former trial of an action in which his testimony is sought, may refresh his memory by reading from shorthand notes taken by him as reporter. In such case the reporter may record the testimony in question by question and answer. Bailey *v.* Dale, 71 Cal. 34, 11 Pac. 804. See also Ellis *v.* State, 25 Fla. 702, 710, 6 So. 768; Sage *v.* State, 127 Ind. 15, 26 N. E. 667; State *v.* Smith, 99 Iowa 26, 68 N. W. 428; State *v.* George, 60 Minn. 503, 63 N. W. 100; Small *v.* Poffenbarger, 37 Neb. 234, 49 N. W. 337.

Notes of Testimony. — Witness called for purpose of impeachment may refer to notes made by him of testimony given upon previous trial by witness sought to be impeached. Olds *v.* Powell, 10 Ala. 393; People *v.* Sexton, 132 Cal. 37, 34 Pac. 107; Burbank *v.* Dennis, 101 Cal. 90, 35 Pac. 444, Code Civ. Proc., § 2047.

Estimate of Value. — In action for the value of certain work done, it was held that a witness who had been appointed one of two experts to examine the value of the work, could refer to an estimate of value made by himself and another person, and reduced to writing at the time. Riordon *v.* Davis, 9 La. 239, 29 Am. Dec. 442.

Document Set Forth in Pleading. In action against a sheriff for false return of an execution, the execution having been lost, a witness was per-

mitted to refresh his memory by referring to a copy of the return as set forth in a pleading filed in the cause. Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413.

Summons, Form Of. — Wise *v.* Loring, 59 Mo. App. 269.

Contract. — In an action between partners to enforce liability created by agreement of settlement, a clerk of the firm who prepared the agreement may refresh his memory by refering to it when called to show its existence and nature. Martin *v.* Good, 14 Md. 398, 74 Am. Dec. 545.

Treasury Notes. — Memorandum Of. — In Stall *v.* Hill, 17 Wis. 675, 86 Am. Dec. 736, on trial for larceny of treasury notes, witness was permitted to refer to memorandum of the notes made by third person with the assistance of witness, in order to testify in response to question calling for a description of the notes.

Hospital Records. — In order to testify concerning the last illness and death of a certain person, witness may refer to records of the hospital in which the death occurred. State *v.* Collins, 15 S. C. 373, 40 Am. Rep. 697.

Newspaper Report. — A newspaper reporter, called as a witness, may refresh his memory by referring to the report, printed from statement made by him at the time, of the events concerning which his testimony is required. Com. *v.* Ford, 130 Mass. 64, 39 Am. Rep. 426; Clifford *v.* Drake, 110 Ill. 135. See also Jackson *v.* State, 66 Miss. 89, 5 So. 690, 14 Am. St. Rep. 542.

In Hawes *v.* The State, 88 Ala. 37, 7 So. 302, a newspaper reporter testified that he made notes of a conversation and from them wrote an account for a newspaper. This account was published, after being cut down and some parts of it being omitted. It was shown that the notes had been destroyed. The reporter, on the stand, was allowed to refer to the article as published, to refresh his memory.

Survey. — In action of ejectment, a surveyor may use copy of a survey made to be filed as a record, although, by reason of informality, the original survey did not constitute a public record. Krider *v.* Milner, 99 Mo. 145, 12 S. W. 461, 17 Am. St. Rep. 549.

Plat of Land. — It was held in Cundiff *v.* Orms, 7 Port. (Ala.) 58, that a plat of land made by a surveyor, might be used by him to refresh his memory relative to facts contained therein.

Bank-Book. — Pass-book showing account between a bank and its depositor, may be used by depositor to refresh his memory concerning the amount of his deposits, drafts and balances. McGowan *v.* McDonald, 111 Cal. 57, 69, 43 Pac. 418, 52 Am. St. Rep. 149. This case was decided under a statute which provided: "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution." The court says: "It is claimed that this section did not authorize the witnesses to refresh their memories by looking at the books, but we think it did. The entries of his deposits were admittedly made in the presence of the witness and under his direction, and he knew at the time that they were correct. There can be no question, therefore, that as to them he could refresh his memory from the book. And the entries of the amounts drawn out were clearly made under the direction of the witness, for he handed in his book to have such entries made and the balance struck; and when the book was returned to him he checked it up from his own books and knew that the balance stated was correct. This was at a time when the matter was fresh in his memory and when he knew that the same was correctly stated. In our opinion, therefore, the case comes

have been held by the courts to have been improperly used, see note.[80]

8. Court Reporter's Notes. — It is said that no new rule need be

fairly within the rule declared by the code, and there was no error in the ruling complained of."

Schedule of Property. — In action on a fire insurance policy, it was held that, to show what merchandise was destroyed by fire, a witness was properly permitted to refer to a schedule of such merchandise made up, shortly after the fire, from duplicate invoices furnished by wholesalers, and from memory, it appearing that the books and invoices of insured were destroyed by the fire. Kahn *v.* Traders' Insurance Co., 4 Wyo. 419, 471, 34 Pac. 1059, 62 Am. St. Rep. 47, 78.

List of Property. — A former owner of property destroyed was allowed to testify to the number and kind of shelf bottles sold by him to plaintiff's assignors, being those subsequently destroyed. He refreshed his memory from a list, which he had made from recollection a short time before the trial. This was competent.

Notarial Record. — The clerk of a deceased notary was permitted to testify as to facts related in the above named record. Sharp *v.* Bingley, 1 Mill (S. C.) 373, 12 Am. Dec. 643. See also Sasser *v.* Farmers Bank, 4 Md. 409.

Jail Record. — A jail record may be referred to by the jailer when made by himself, to refresh his memory as to dates when a prisoner was in jail and when discharged.

Railway Ticket. — It was proper to permit the witness to refer to a single trip ticket in order to refresh his memory of the precise words printed on an excursion ticket when he testified that their conditions were identical in all respects save one relating exclusively to the use of the return coupon. Howard *v.* Railway Co., 11 App. (D. C.) 300.

Ledger. — Entries of amounts in ledger may be used by bookkeeper to refresh his memory as to such amounts. O'Brien *v.* United States, 27 U. S. 763.

Diary containing notes of daily events, kept by witness for fifteen years, and written at the time of their occurrences, was used to refresh the memory of a witness. Sanders *v.* Wakefield, 41 Kan. 11, 20 Pac. 518.

Bill of Particulars. — Witness may refer to bill of particulars in a former suit to refresh his memory. Avery *v.* Knight, 99 Mich. 311, 58 N. W. 316.

80. What Writings Cannot Be Used. — Memoranda taken from books of bank by clerk who did not keep the books or superintend making of the entries in question. Crawford *v.* Branch Bank, 8 Ala. 79.

Written memorandum of times of arrival of mails kept by postmaster. Miller *v.* Boykin, 70 Ala. 469.

Tax Lists cannot, for purpose of showing value of property, be used to refresh memory of person who did not make the entries therein shown. Hudson *v.* State, 61 Ala. 333.

Writings Made at the Dictation of an Interpreter. — See People *v.* Ahyute, 56 Cal. 119. In this case, it was said by the court: "These statements were not spoken by the defendant in English. They were spoken in a foreign language, and translated into the English language for the use of the court, the jury and the reporter. In taking them down in shorthand, the reporter received them from the lips of the interpreter, and not from the defendant. It is, therefore, evident that the reporter did not understand the language in which the defendant spoke, and that he did not pretend to testify from his own knowledge or recollection of what the witness said, but from the shorthand notes of what the interpreter had said. The interpreter, or some other witness who heard and understood the language in which the statements of the defendant were made, should have been called to prove them."

"It is well settled that memoranda are inadmissible to refresh the memory of a witness unless reduced to

writing at or shortly after the time of the transaction, and while it must have been fresh in his memory. The memorandum must have been 'presently committed to writing.' Lord Holt, in Sandwell *v.* Sandwell, Comb. 445, S. C. Holt 295: 'While the occurrences mentioned in it were recent and fresh in his recollection.' Lord Ellenborough, in Burrough *v.* Martin, 2 Camp. 112; 'Written contemporaneously with the transaction.' Chief Justice Tindal in Steinheller *v.* Newton, 9 Car. & P. 313; or, 'Contemporaneously or nearly so with the facts referred to.' Chief Justice Wilde (afterwards Lord Chancellor Truro), in Whitefield *v.* Aland, 2 Car. & K. 1015." Parsons *v.* Wilkinson, 113 U. S. 656, also cited as "Maxwell's Executors *v.* Wilkinson." In this case it was held improper to admit a memorandum made about twenty months after the transaction in question.

In Spring Garden Mut. Ins. Co. *v.* Evans, 15 Md. 54. 74 Am. Dec. 555, it was held that a witness could not refresh his memory by referring to an affidavit of loss on an insurance policy, it appearing that the affidavit had been made nearly five months after the occurrence of the facts therein set forth. See also Swartz *v.* Chickering, 58 Md. 290. Memorandum made seven months after transaction. See Weston *v.* Brown, 30 Neb. 609, 46 N. W. 826.

In Parsons *v.* Wilkinson, 113 U. S. 656, the court, after using the language above quoted, continues: "The reasons for limiting the time within which the memorandum must have been made are, to say the least, quite as strong when the witness, after reading it, has no recollection of the facts stated in it, but testifies to the truth of those facts only because of his confidence that he must have known them to be true when he signed the memorandum. The very essence, however, of the right to thus refresh the memory of the witness is, that the matter used for that purpose be contemporaneous with the occurrences as to which the witness is called upon to testify. Indeed, the rule which allows a witness to refresh his memory by writings or memoranda is founded solely on the reason that the law presupposes that the matters, used for the purpose, were reduced to writing so shortly after the occurrence, when the facts were fresh in the mind of the witness, that he can with safety be allowed to recur to them in order to remove any weakening of memory on his part, which may have supervened from lapse of time."

Putnam *v.* United States, 162 U. S. 687. In this case it was held that it was error to permit a witness to refresh his memory by referring to testimony given before a grand jury, while he testified concerning a conversation held four months prior to the time of testifying before the grand jury. The court says: "We think it clear that testimony given after this lapse of time was not contemporaneous, and that it would not support a reasonable probability that the memory of the witness, if impaired at the time of the trial, was not equally so when his testimony on the prior occasion was committed to writing." The court continues: "In conflict with the well settled rule to which we have just referred, there are some adjudications of the courts of last resort of several states, noted in the margin of this opinion, holding that there exists an exception to the general rule which restricts the right to refresh memory to contemporaneous memoranda or writing. This exception is said to arise when a party is surprised by the unexpectedly adverse testimony of his own witness, in which case he may, for the purpose of refreshing the memory of the witness, be permitted to ask him as to any prior statements, whether oral or written, without reference to their contemporaneousness. The error of this conclusion, as we shall hereafter demonstrate, originally arose from a misconception of the doctrine laid down in Wright *v.* Beckett or Melhuish *v.* Collier, *infra,* and has been continued by merely following this first departure from correct principles. And this confusion of thought and misunderstanding of those cases seems to have operated upon the mind of the trial court, for it said 'it is a thing often done, and when counsel say they are surprised by

declared concerning the use of shorthand notes for the purpose of refreshing memory. The old rules are applicable.[81]

the way a witness recollects a thing, it is within the discretion of the court to allow counsel to direct the attention of the witness to something which may refresh his recollection.' But the right of counsel to refresh the memory of a witness in no way depends on the surprise which may have been created by the testimony of the witness. The right to refresh the memory of a witness, by proper matter, exists independently of surprise. Where a legal instrument for refreshing the memory exists, it may be availed of by the witness himself or may be permitted to be referred to by the court without reference to the course of the examining counsel. Surprise on the part of the examiner of a witness by the latter's unexpected adverse testimony, on direct examination, was among the elements by which it was determined that the right existed to ask a witness as to contradictory statements previously made by him, not for the purpose of refreshing his memory, but with the object of neutralizing or overthrowing his testimony, and this course was only allowed where the right to neutralize or impeach the testimony of one's own witness existed. Indeed, this doctrine of surprise was a part of the controversy as to whether one could be allowed to neutralize or contradict the testimony of his own witness under given conditions which was long agitated, and which culminated in some of the states of the Union and in England in statutory provision on the subject. The court discussed the authorities cited in opposition to its view, and concludes that they 'all rest upon the mistaken idea' that in case a party is surprised by the testimony of his own witness, he may, for the purpose of refreshing the memory of the witness, be permitted to ask him as to any prior statements, whether oral or written, without reference to their contemporaneousness."

Memoranda of Former Testimony. In Brown *v.* State, 28 Ga. 199, it was held that a memorandum of former testimony could not be read to the witness for the purpose of refreshing his memory. It is said that there were other grave objections to its use; but that this was sufficient, viz: that the memorandum was not made by the witness himself.

In Mims *v.* Sturdevant, 36 Ala. 636, it is said that a witness may read to the jury a written memorandum of facts which he made "presently upon their occurrence" when he does not remember the facts, but is able to swear that he knew the memorandum to be correct when he made it. See also Stoudenmire *v.* Harper Bros., 81 Ala. 242, 1 So. 857.

Memoranda as to Contents of Trunk. — Bergman *v.* Shoudy, 9 Wash. 331, 37 Pac. 453. This was an action to recover the value of a trunk and its contents, which the plaintiff had stored with the defendant, a warehouseman. The plaintiff, in testifying as to the contents of the trunk, was not allowed to use a memorandum stating the contents thereof, to refresh her memory, it appearing that the memorandum had been made by her seven months after she had deposited the trunk with the warehouseman.

Memoranda Made For Purposes of the Case. — In Downs *v.* Downs (Iowa), 102 N. W. 431, a memorandum made for purposes of the case was not allowed to be used for the purpose of refreshing a witness' memory.

81. In State *v.* Smith, 99 Iowa 26, 68 N. W. 428, the court said: "It is sometimes said that, as the use of stenographic reports in the trial of cases is of modern origin, some new rule should be declared; but not so, we think, as a proper understanding of old and well established rules is plainly applicable to such questions." The court then refers to Greenleaf on Ev., 14 Ed., § 436.

A. Who May Refer to Notes. — Reporter May Refer to Notes. — A shorthand court reporter may refer to notes taken at a former trial, to refresh his memory, enabling him thereby to give the testimony of a witness at such former trial.[82]

An Unofficial Reporter May Refer to Notes. — It is held that even an unofficial reporter may do so.[83]

B. Reporter Must Be Able to Say Notes Were Correct. — The reporter must be able to swear that his notes were a correct statement of the facts.[84] In some cases it is presumed that the notes were correctly made from the fact that it is the duty of an official reporter to make correct notes.[85]

82. Lipscomb *v.* Lyon, 19 Neb. 511, 27 N. W. 731; Higgins *v.* State, 157 Ind. 57, 60 N. E. 685; Houk *v.* Branson, 17 Ind. App. 119, 45 N. E. 78; Miles *v.* Walker, 66 Neb. 728, 92 N. W. 1014.

In Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811, the court said: "Hood had previously testified that he was the official reporter at that trial, and had heard the witness Campbell testify, and had made the shorthand notes in question, and that if permitted to refresh his memory by reading them, he could then, from his *recollection* of Campbell's former evidence, state what he had then sworn to. This the court permitted to be done, allowing Hood to read the testimony of Campbell by question and answer. That was not allowing the testimony of Campbell in shorthand to be read as a *deposition*, but was permitting Hood, who could recollect the testimony given on a former trial of the same cause, to state from such recollection, refreshed by the reading of his shorthand notes, what Campbell (who at the time of the present trial was without the jurisdiction of the court) had formerly sworn to in the reporter's hearing. And such action of the court was proper."

In Ellis *v.* State, 25 Fla. 702, 710, 6 So. 768, the reporter, as a witness, in giving evidence as to testimony on a former trial, "thought he got down substantially what each witness stated." He was allowed to refresh his memory from his notes.

In Sage *v.* State, 127 Ind. 15, 26 N. E. 667, which was a prosecution for murder in the first degree, it was held not error to permit the stenographer to read, from his shorthand copy of the evidence, the testimony of a witness given on a former trial, who had since died.

83. In State *v.* George, 60 Minn. 503, 63 N. W. 100, the stenographer present at the preliminary examination, was not an official reporter, not having been sworn as required by the laws of that state. After refreshing his memory from his notes taken at the preliminary examination, he gave evidence as to what a witness had testified to at that time, witness having died in the meantime. The stenographer's testimony was allowed.

84. Miles *v.* Walker, 66 Neb. 728, 92 N. W. 1014; Higgins *v.* State, 157 Ind. 57, 60 N. E. 685; Sage *v.* State, 127 Ind. 15, 26 N. E. 667.

In Lipscomb *v.* Lyon, 19 Neb. 511, 27 N. W. 731, it is held competent for a reporter, after having refreshed his memory from his notes taken on a former trial, to give in evidence such testimony taken at that trial, though the reporter admits that even with the aid of his notes he cannot remember the facts, yet that he knew that he took the testimony down correctly at the time.

In Small *v.* Poffenbarger, 32 Neb. 234, 49 N. W. 337, a stenographer was called upon to give in evidence testimony given on a former trial. The court said: "The witness must testify from her own recollection, upon refreshing her memory from her notes at the testimony, if she states that she does recollect what the witness said." But it is doubtless true that in this case the stenographer was not acting in an official capacity, hence, the distinction.

85. State *v.* Smith, 99 Iowa 26,

C. Transcript of Testimony May Be Used by Reporter. — Transcript of testimony, or in other words, a copy of stenographic notes, may be used by the reporter who made the original notes to refresh his memory, a proper foundation having been laid.[86]

Transcript Admissible Evidence. — A reporter's transcript may be admitted in evidence in connection with the oath of the reporter vouching for its authenticity.[87]

68 N. W. 428. It is said in Sage *v.* State, 127 Ind. 15, 26 N. E. 667, that there is much reason for a distinction between an official stenographer, when called as a witness, and an ordinary witness. Approved in Bass *v.* State, 136 Ind. 165, 36 N. E. 124.

86. Lipscomb *v.* Lyon, 19 Neb. 511, 27 N. W. 731.

Reporter Must Have Independent Recollection. — It is held in Davis *v.* State, 47 Fla. 26, 36 So. 170, that the reporter, to refresh his memory from a transcript, must have an independent recollection of the facts to which the transcript relates. If he has no independent recollection as to facts, but relies on his accuracy in taking testimony, he must use the original notes taken at the time. The court cites as authority Volusia County Bank *v.* Bigelow, 45 Fla. 638, 33 So. 704.

Carbon Copy of Longhand Transcript May Be Used by Reporter. In Harmon *v.* Territory, 15 Okla. 147, 79 Pac. 765, the court said: "Counsel for defendant, as a fourth ground for the reversal of the judgment, urge that it was incompetent for the stenographer of the Third Judicial District, Frank Inglis, in his testimony, which was offered for the purpose of impeaching the testimony of Tom Underwood, to use a carbon copy of his longhand transcript of his stenographic notes of Underwood's testimony taken in another case. Mr. Inglis testified that this carbon copy was made by himself, and was a correct transcript of Underwood's testimony in the case referred to; that he had examined it, and found no changes made in the same since it was made, and he was thereupon permitted to use such carbon transcript in testifying with reference to what Underwood's former testimony was. Counsel urge that, in order for the transcript to be competent for the purpose used, it should be a transcript as required by § 1904, Wilson's Rev. & Ann. St. 1903, which provides: 'Sec. 1904. The shorthand reporter shall file his notes taken in any case with the clerk,' etc. 'Any longhand transcript of notes so filed, duly certified by the reporter of the court who took the evidence as correct, shall be admissible in evidence,' etc. In the first place, the provision of the statute above referred to has little, if any, application to the proposition here submitted. No attempt was made to file the longhand transcript of Underwood's testimony. To have done so would have required a full compliance with the provisions of the statute. But in this case the official reporter was himself testifying to certain questions which were put to and answered by Underwood in the former case, and for the purpose of accuracy was using a carbon copy of his longhand transcript, which, having been made by himself, was by him known and proved to be correct. We think the court committed no error in so allowing its use. In fact, we do not think a carbon copy of any longhand transcript of a stenographer's official notes, made by the stenographer himself at the time he makes the transcript and as a part of that transaction, is a copy in the sense in which the word 'copy' is ordinarily used, any more than several books or newspapers printed upon the same press at the same time and from the same type are copies of each other."

87. Wright *v.* Wright, 58 Kan. 525, 50 Pac. 444; Klepsch *v.* Donald, 8 Wash. 162, 35 Pac. 621; State *v.* Smith, 99 Iowa 26, 68 N. W. 428; Bass *v.* State, 136 Ind. 165, 36 N. E. 124; Smith *v.* Scully, 66 Kan. 139, 71 Pac. 249.

D. Party Other Than Reporter May Refer. — And a witness may refer to such transcript to refresh his memory as to testimony given by him on a former occasion.[88] And a plaintiff may read to a defendant's witness a stenographic report of the latter's testimony on a former trial, thereby refreshing his memory.[89]

E. Minutes Read by Reporter to Witness to Refresh the Latter's Memory. — The reporter may read the minutes of witness' former testimony to him to refresh his memory.[90]

F. Need Not Be Admissible in Itself. — While the minutes of the testimony given by a witness on a preliminary examination cannot be offered in evidence at the trial of the defendant to impeach such witness, because he did not sign the memorandum, the notes may, nevertheless, be used to refresh the memory of the person who made them in order that he may contradict the testimony of the witness, if a proper foundation therefor has been laid.[91]

VII. CROSS-EXAMINATION.

1. Right of Inspection. — It is the right of the opposing counsel to inspect a memorandum used by a witness while testifying to refresh his recollection.[92] When the writing is in the form of a

In Higgins *v.* State, 157 Ind. 57, 60 N. E. 685, the court said: "If a person takes the evidence at the time it is given, either in longhand or shorthand, and can testify as to the accuracy of his notes, they may be read in evidence. . . . Such person may read in evidence such copy made at the time, although aside from said copy, he has no recollection of what the witness said, and this may be done in all cases when such person would be allowed to testify to the same facts from memory."

88. State *v.* Aspara, 113 La. 940, 37 So. 883; Connell *v.* State, 45 Tex. Crim. 142, 75 S. W. 512.

In Portsmouth St. R. Co. *v.* Peed's Admr., 102 Va. 662, 47 S. E. 850, the court said: "The remaining assignment is the refusal of the court to permit a witness who had testified on a former occasion to refresh his memory from the stenographer's minutes of his testimony." It was permissible to allow this reference to the minutes for the *bona fide* purpose of refreshing the memory of the witness, but not to contradict him. The rule in such case does not require that the paper should have been made by the witness. Harrison *v.* Middleton, 11 Gratt. (Va.) 527, 544.

89. Southern R. Co. *v.* Shelton, 136 Ala. 191, 34 So. 194.

90. In Pickard *v.* Bryant, 92 Mich. 430, 52 N. W. 788, it was held that counsel should be allowed to have reporter read minutes of witness' former testimony to him to refresh his memory, though he first stated that his object was to impeach the witness, which was refused by the lower court.

91. State *v.* Hayden, 45 Iowa 11; State *v.* Adams, 78 Iowa 292, 43 N. W. 194; Sanders *v.* State, 105 Ala. 4, 16 So. 935.

92. People *v.* Salsbury, 134 Mich. 537, 96 N. W. 936, 949; McKivitt *v.* Com., 30 Iowa 455; Com. *v.* Haley, 13 Allen (Mass.) 587; Chute *v.* State, 19 Minn. 271; Parks *v.* Biebel, 18 Colo. App. 12, 69 Pac. 273.

In Sinclair *v.* Stephenson, 1 Car. & P. 582, 11 E. C. L. 480, the court held: "If a paper be put into the hands of a witness for the purpose of refreshing his memory, the opposite counsel has a right to see it."

In Rex *v.* Ramsden, 2 Car. & P. 603, 12 E. C. L. 283, the counsel for defendants, on cross-examination, put

a paper into the hands of a witness for the crown to refresh his memory as to date. The attorney-general, (Sir James Scarlett) wished to look at the paper. The counsel for the prisoners submitted that the attorney-general had no right to see it unless he would put it in evidence. To this Lord Tenterden, C.J., answered: "You put the paper into the hands of the witness to refresh his memory. It is usual for the opposite counsel to see it, and examine upon it. I think he has a right to see it."

In Peck *v.* Lake, 3 Lans. (N. Y.) 136, the court said: "*Nisi prius* reports in this state being rare, it would probably be difficult to find any authority in our reports on this question, for I apprehend it has been the almost invariable practice of the judge where a witness has been using a memorandum on the stand to require the witness at once to submit it to the inspection of the counsel examining or the other party, upon the request being made. I think the rule is founded in good sense. Very improper uses may be made of memoranda, to suggest, regulate or control the testimony of a witness, and the right of the counsel to inspect them furnishes some safeguard against their abuse."

In Duncan *v.* Seeley, 34 Mich. 369, plaintiff, on the stand, was questioned by his counsel as to the time when he was at a certain place, it being deemed important to show that he was there on a certain day. Witness said he could not state positively without looking at something to refresh his memory. After professing to look, he stated that what he had looked at did refresh his memory. He was then called upon by defendant's counsel to produce the memorandum at which he had looked, but the counsel for plaintiff objected, and the lower court sustained the objection. The supreme court said: "We think that this was erroneous. The witness was in effect testifying not from recollection, but from something which he professed to have in writing; and the other party had a right to know what the memorandum was on which he relied, and whether it had any legitimate tendency to bring the fact in controversy to mind. It would be a dangerous doctrine which would permit a witness to testify from secret memoranda in the way which was permitted here."

In Tibbetts *v.* Sternberg, 66 Barb. (N. Y.) 201, it does not appear conclusively that a memorandum had been used by the witness in the lower court. The supreme court assumes this and renders his opinion accordingly, a part of which is as follows: "When the referee was called on to compel the production of the paper, it does not appear, except inferentially, that the witness had, or used, a memorandum, save by the allegation of counsel. The case says, the defendant's counsel requested the witness to allow him to examine the memorandum used by him (the witness) in giving, on his direct examination, the amount of logs; and the plaintiff declined to comply with his request. This is a tacit admission by the witness that he had and used such a paper. No objection or suggestion was made by the plaintiff's counsel that he had no such paper; the witness did not deny it; and the referee did not ask him whether he did or did not have it; but he seemed to assume that the witness had it, and yet refused to require the witness to produce it. This was an error, for which we must reverse this judgment. The production of the paper might have been of no value to the defendant, but it is the principle thus sought to be established that is mischievous and dangerous. The right of a party to protection against the introduction against him of false, forged or manufactured evidence, which he is not permitted to inspect, must not be invaded a hair's breadth. It is too valuable to be trifled with, or to permit the court to enter into any calculation as to how far it may be encroached upon without injury to the party."

Not Entitled To Inspect Where Memorandum Fails To Refresh. In Reg. *v.* Duncombe, 8 Car. & P. 369, 34 E. C. L. 432, which was an action against a party for publishing an obscene libel, the defendant's counsel, on cross-examination, put

book and but a part of such book is used by the witness, that part only can be examined by adverse counsel for purpose of cross-examination.[93]

Proper Application Should Be Made. — Application for exercise of privilege of inspection should be directed to the court.[94] But such right does not exist where counsel presents writing to witness for identification only.[95] This is true according to the weight of au-

into a witness' hands a paper for the purpose of refreshing his memory. Lord Denman, C.J., said: "I take the distinction to be this, if a paper is put into a witness' hands, and it leads to anything, that is, if anything comes of the questions founded upon it, the opposite counsel has a right to see the paper, and re-examine upon it; but if the thing misses entirely, and nothing comes of it, the opposite counsel has no right to look at it. The paper was not shown to the counsel for the prosecution."

93. Com. *v.* Haley, 13 Allen (Mass.) 587; Parks *v.* Biebel, 18 Colo. App. 12, 69 Pac. 273.

94. Parks *v.* Biebel, 18 Colo. App. 12, 69 Pac. 273: "This suit was brought by plaintiff to recover a balance due him upon account for services rendered in hauling the said building material and for work upon the road. Upon trial the plaintiff testified in his own behalf. In testifying he referred to a small memorandum book where he had made some memoranda in reference to some items, and dates of the work done by him. During the cross-examination the following occurred: 'Q. How much have you on the book, that you actually performed labor there? A. I have not the dates there, but we simply charged twenty days for doing this work. Q. Let's see that book. A. No, you don't, either. (Witness refuses to let examining counsel see the book. Counsel for defendants move to suppress all the testimony of the witness which goes to any of the labor stated to be in this book, unless counsel and the jury have the right to inspect the book). By the court: The evidence of the witness is that he did a certain amount of work. On cross-examination the defendants seek to have him particularize the days that he worked. The witness refers to his book to try and refresh his memory on that point. The court will not sustain the motion to strike out the evidence that he gives, if he attempts to use the book, unless it is admitted for inspection. The motion will be overruled.' Defendants claim this ruling of the court to have been reversible error. It may be conceded that where a witness, in testifying, makes use of memoranda for the purpose of aiding him in testifying, and where it appears that he could not testify precisely as to amounts and dates without the aid of such memoranda, opposing counsel shall be allowed the privilege of inspecting such memoranda; but it is equally true that proper application must be made for the exercise of such privilege. Here no application was made to the court for this privilege, and the court was not even requested to instruct the witness that counsel had a right to inspect the memoranda. Under the facts as presented, we think there was no error."

95. Stiles *v.* Allen, 5 Allen (Mass.) 320; Rice *v.* Rice (N. J.), 19 Atl. 736; Lord *v.* Colvin, 23 L. J. Ch. (Eng.) 469.

In Sinclair *v.* Stevenson, 1 Car. & Payne 582, 11 E. C. L. 480, Best, C.J., said: "If you put a paper into the hands of a witness in order to refresh his memory, the other side have a right to see it; if you merely give it to him to prove a hand-writing, they have not such right."

Houser *v.* State, 93 Ind. 228. This was a prosecution for bastardy. In the trial court, while the relatrix was testifying, the prosecuting attorney handed two letters to her, asking if she knew the handwriting. Appellant's counsel objected to the question, and demanded an inspection of the letters. The court overruled his objection, and at that time re-

thority; but the contrary has been held in at least one case.[96]

2. Right of Opponent To Use Refreshing Memorandum for Cross-Examination. — When the writing is present in court and is used by witness for purpose of refreshing his memory, counsel for the adversary of the party calling the witness has the right to use it for purpose of cross-examination, and witness must permit him to so use it.[97] If witness refuses to permit opposing counsel to so use writing upon objection of his own counsel and this is sustained by

fused him an inspection of the letters. The supreme court said: "He had no right to an inspection of them until they were offered in evidence."

96. Entitled To Inspect But Not To Possess. — In Arnold *v.* Chesebrough, 30 Fed. 145, Benedict, J., said: "It appears that on a former occasion when one Harran was examined as a witness for the plaintiff in this case, the defendant's counsel exhibited to Harran what purported to be a signature attached to certain papers, and inquired of the witness whether the signature was his. As to some of the signatures Harran was unable to state; as to others, he said the signature was his. The papers were thereupon marked for identification by the examiner, and retained by the defendant's counsel. Upon these facts the plaintiff now claims the right to inspect the papers and the signatures of which were so exhibited to Harran. I have often ruled at *nisi prius* that the exhibition of a paper to a witness on the stand entitled the other side to an inspection of the paper so shown the witness. This ruling has not proceeded upon the ground that a paper becomes evidence in a cause by the mere proof of its execution, but upon the ground that a party is entitled to be informed as to what transpires between his opponent and a witness while on the stand. The mere exhibition of a paper to a witness on the stand does not make the paper evidence, nor does it entitle the opposite party to a possession of the paper; but such an exhibition does, in my opinion, entitle the opposite party to see the paper so exhibited."

97. Com. *v.* Haley, 13 Allen (Mass.) 587; Cortland Mfg. Co. *v.* Platt, 83 Mich. 419, 428, 47 N. W. 330; Wernwag *v.* Chicago & A. R. Co., 20 Mo. App. 473; Peck *v.* Lake, 3 Lans. (N. Y.) 136; Schwickert *v.* Levin, 76 App. Div. 373, 78 N. Y. Supp. 394; Mt. Terry Min. Co. *v.* White, 10 S. D. 620, 74 N. W. 1060.

In State *v.* Bacon, 41 Vt. 526, 98 Am. Dec. 616, the court says: "Text-writers treating the subject seem to entertain this view: 'If the memory of the witness is refreshed by a paper put into his hands, the adverse party may cross-examine the witness upon that paper'; 1 Greenl. Ev., § 466. 'It is always,' says Phillips (vol. 1, p. 289), 'and very reasonable when a witness speaks from memoranda that the counsel shall have an opportunity of looking at them when he is cross-examining the witness'; and Starkie (vol. 1, p. 179) asserts the same doctrine. He remarks: 'The witness may be cross-examined as to other parts of the entry. . . . If the document be produced, the opposite counsel is entitled to cross-examine from it.' See also part 1, Cowen and Hill's Notes, 2d ed., 757; Rex *v.* Ramsden, 2 Car. & P. 603; S. C., 12 Eng. Com. L. 758. The view as presented by these authorities is alone consistent with the party's right to cross-examine the witness upon whose credibility the question in issue somewhat depends, and which, it is said, constitutes a 'strong test, both of the ability and willingness of the witness to declare the truth.' In no other way can his accuracy and recollection be ascertained and tested, which in all cases are proper matters of inquiry with a view to weighing his evidence, and the range of inquiry is open to this extent. And a witness cannot deprive a party of this right, or shield himself from the obligation of disclosing the whole

the court, such error will not be cured by offer of witness on the conclusion of his testimony to produce the writing in question.[98]

3. May Cross-Examine as to Attending Circumstances. — In cross-

truth to this end, or refuse the production and examination of a memorandum which is in court, and upon which he relies and refers, for the reason disclosed by this case; certainly not, unless it appears to the court that he had a reasonable ground of belief that he would subject himself to personal injury in consequence of producing and allowing an examination of it. This decision of the recorder was therefore incorrect."

Also in McKivitt *v.* Com., 30 Iowa 455, the court, after having used the language quoted in note 99 *post*, continues: "The plaintiff having testified as before stated, the defendant asked to be permitted to examine the book to see if it contained the items of plaintiff's account. The plaintiff interposed the same objection as before, which was sustained. This ruling of the court is assigned as the second error. We are of opinion that the defendant should not have been denied the privilege of an examination of the book. In Greenl. upon Ev., § 437, it is said that where the writing is used only for the purpose of assisting the memory of the witness, it does not seem necessary that it should be produced in court, though its absence may afford matter of observation to the jury. Yet its absence could hardly afford matter of just observation if the other party would have no right to examine it when produced in court. In the other class of cases where the witness recollects having seen the writing before and remembers that, at the time he saw it, he knew the contents to be correct, though he has, at the time it is produced, no independent recollection of the facts mentioned in it, the writing itself *must be produced* in court in order that the other party may cross-examine. In support of the foregoing views, see Cowen & Hill's notes to Phillips on Evidence, vol. 4, part II, p. 733, and cases cited."

In Chute *v.* State, 19 Minn. 271, the court said: "Defendant's counsel asked the court to require that he be allowed to inspect the report above mentioned for the purpose of cross-examining the witness Long, but the court denied the request. We see no good reason for the denial. The witness had sworn that the report was accurate when made, and it was handed to and examined by him for the purpose of refreshing his recollection. Why should not the opposite counsel have been permitted to inspect it that he might see what it was; that he might cross-examine as to its accuracy, and as to the time when and the person by whom it was made; and that he might ascertain by inspection and cross-examination whether it was such a document as could properly and reliably be referred to by the witness for the purpose of refreshing his recollection." If it was important for the prosecution that the witness should be permitted to examine it, why was it not equally important for the defense to ascertain by its inspection, as well as otherwise, whether its examination was really calculated fairly to subserve the purpose for which it was offered to the witness? We think the court erred in refusing defendant's request. Rex *v.* Ramsden, 2 Car. & P. 603, 12 E. C. L. 283; Hardy's Case, 24 How. St. Tr. 824; Merrill *v.* Ithaca & O. R. Co., 16 Wend. 586, 600, 1 Greenl. Ev. 466."

98. In Duncan *v.* Seeley, 34 Mich. 369, the court, after using the language as quoted in note 92 *ante*, continued: "The error was not cured in this case by the plaintiff offering on the next day, on the conclusion of his testimony, to produce the memorandum. The defendant was entitled to see it at the time in order to test the candor and integrity of the witness; and the opportunity for such a test might be lost by a delay which an unscrupulous witness might improve by preparing or procuring some thing to exhibit."

examination witness may be interrogated concerning the facts attending the execution of the writing, its execution and nature, and may be asked how and to what extent his memory is refreshed by the writing, and he may be asked as to other matters with this end in view.[99]

Where witness on direct examination testified that his memory was refreshed, but not *how*, and opposing counsel on cross-examination fails to inquire into the source of the witness' information, an objection to such testimony is not well taken in a motion to strike out.[1]

When witness recollects having seen the writing before, and although he now has no independent recollection of the facts therein stated, yet remembers that at the time he saw it, he knew its contents to be correct, the writing *must be produced in court,* in order that the other party may use it for purpose of cross-examination.[2] But if the opposite party to the one calling the witness does not attempt to base any cross-examination on the writing referred to by

99. State *v.* Bacon, 41 Vt. 426, 98 Am. Dec. 616.

Day, J., in McKivitt *v.* Com., 30 Iowa 455, said: "Upon the trial of the cause the plaintiff as a witness in his own behalf, for the purpose of refreshing his memory, referred to a book in which he stated he had entered a part, but not all the items charged in his account. On cross-examination plaintiff gave at length the character and kind of work, dates, etc., from the book. Counsel for defendant then asked plaintiff whether item forty-one and divers other items of his account, were found in said book. To this the counsel for plaintiff objected, unless the defendant proposed to offer the book in evidence, for the reason that 'the book was not in evidence, and plaintiff had been asked no question concerning it except as he referred to it to refresh his memory.' The sustaining of this objection is the first error assigned. The witness should have been allowed to answer the question. The object of judicial investigations is to discover and elicit truth, not to suppress it. In furtherance of this end, great latitude is properly allowed in cross-examinations. Whatever is pertinent to the direct examination, and furnishes the means of determining the knowledge, the honesty, the intelligence or the bias of the witness should always be laid before the jury. In judicial determinations, where facts are to be established by moral evidence, the slightest circumstances are always important, and often sufficient to turn the scales of justice. The witness here had stated, that the book did not contain all the items of account. He had also frequently referred to it during his testimony for the purpose of refreshing his memory. The defendant had a right, upon cross-examination, to ascertain the extent to which the witness testified from independent recollection, and how far his memory was refreshed by the book. The effect of such testimony, probably, would have been but slight; but however inconsiderable its weight, it should have gone to the jury, and been allowed such effect as the circumstances warranted." See Reid *v.* Reid, 73 Cal. 206, 14 Pac. 781; Ward *v.* Morr T. & S. Co., 119 Mo. App. 83, 95 S. W. 964.

1. Marks *v.* Orth, Exrx., 121 Ind. 10, 22 N. E. 668.

2. Jaques *v.* Horton, 76 Ala. 238;

the witness, nor ask that it be produced for that purpose, the party failing to produce is not prejudiced thereby.[3]

4. Discretion of Court. — It is within the discretion of the court to allow or not to allow memoranda used by a witness to refresh his recollection, to be exhibited to the jury by way of cross-examination.[4]

Lawrence *v.* Stiles, 16 Ill. App. 489, 501; Ft. Worth & D. C. R. Co. *v.* Garlington (Tex.), 92 S. W. 270.

3. Adae & Co. *v.* Zangs, 41 Iowa 536; Wernwag *v.* Chicago & A. R. Co., 20 Mo. App. 473.

4. Newman *v.* Com. (Pa.), 7 Atl. 132.

REFUSAL TO PRODUCE EVIDENCE.—See Presumptions; Spoliation

REGISTERS OF DEEDS.—See Abstracts of Title; Records.

REGISTRATION.—See Records.

RELATIONSHIP.—See Descent and Distribution; Incest; Legitimacy; Parent and Child; Pedigree.

RELEASE.

By W. L. Willie.

CROSS-REFERENCES:

Consideration;
Contract;
Fraud;
Parol Evidence;
Payment;
Written Instruments.

I. BURDEN OF PROOF.

1. In General. — The burden of proving a release is upon the party setting it up.[1]

2. Upon Party Impeaching or Avoiding. — Where a release is set

1. Under Replication of Non Est Factum to a release set up by defendant the burden is cast upon the defendant to prove the genuineness of the release. Swecker *v.* Swecker, 87 Va. 305, 12 S. E. 1056.

Thus in an action of trover by the landlord against the tenant for conversion of wood wrongfully cut from the rented premises, where tenant claims that the landlord had released the cause of action, the burden of proving such release is upon the tenant. Brooks *v.* Rogers, 101 Ala. 111, 13 So. 386.

Where a release is pleaded in defense, and not denied, but matter is pleaded by plaintiff in avoidance of the release, the burden to establish the release is removed from defendant, and the burden to establish the matter in avoidance devolves upon the plaintiff. Hawes *v.* Burlington, C. R. & N. R. Co., 64 Iowa 315, 20 N. W. 717; St. Louis & B. R. Co. *v.* Erlinger, 112 Ill. App. 506

Valuable Consideration. — The burden of proof is upon party attacking release to show that it was not supported by a valuable consideration. Missouri, K. & T. R. Co. *v.* Pennington (Tex. Civ. App.), 32 S. W. 706.

up in defense to a cause of action, the burden of proof rests upon the plaintiff who seeks to impeach or avoid such release.[2]

II. PRESUMPTIONS.

1. Instrument Purporting To Be a Release is presumed technically to be so; but that presumption may be rebutted by positive proof.[3]

2. Presumption of Delivery. — It is no objection to a release that it was endorsed upon back of agreement, and remained after execution of it with the plaintiff; for if a formal delivery were necessary, it will be presumed to have been made, and that it remained with plaintiff with consent of the other party.[4]

3. Presumption from Delivery of the Intent as to Its Taking Effect. — Where the delivery of an instrument purporting to release a claim is shown, it will be presumed to have been delivered with intent to take effect absolutely.[5]

4. Presumption as to Date of Delivery in Absence of Evidence of Actual Date. — Where there is no proof of the actual time of the delivery of an instrument, it will be presumed to have been delivered on day of date.[6]

5. Presumption of Acceptance. — The release of a debt need not be shown to have been expressly accepted by the debtor, for the law presumes the acceptance, and it cannot be revoked by the creditor.[7]

6. Presumption of Consideration. — A written release is presumptive evidence of consideration,[8] and the burden is upon the party impeaching or avoiding it.[9]

2. Hawes *v.* Burlington, C. R. & N. R. Co., 64 Iowa 315, 20 N. W. 717; Caster *v.* Bernstein (Cal.), 84 Pac. 244; Missouri, K. & T. R. Co. *v.* Pennington (Tex. Civ. App.), 32 S. W. 706; Chicago & A. R. Co. *v.* Jennings, 114 Ill. App. 622; St. Louis & B. R. Co. *v.* Erlinger, 112 Ill. App. 506.

To Show Conditional Delivery. The burden of proving that a delivered instrument was not to take effect absolutely is upon the party attacking it. Davison *v.* Tams, 30 Misc. 156, 63 N. Y. Supp. 828.

3. Dillingham *v.* Estill, 3 Dana (Ky.) 21.

4. Fitch *v.* Forman, 14 Johns. (N. Y.) 172.

A formal act of delivery is not essential if there be any act evincing the intent. Goodrich *v.* Walker, 1 Johns. Cas. (N. Y.) 255.

Delivery May Be Inferred From Words Without Acts, or From Acts With Words or From Both Combined. — Hughes *v.* Esten, 4 J. J. Marsh (Ky.) 572; Verplank *v.* Sterry, 12 Johns. (N. Y.) 536; Folly *v.* Vantuyl, 9 N. J. L. 153; McKinney *v.* Rhoads, 5 Watts (Pa.) 343.

5. Davison *v.* Tams, 30 Misc. 156, 63 N. Y. Supp. 828.

6. This presumption will not be affected by the fact that the acknowledgment to it is taken on a day subsequent to its date, where it does not appear from such acknowledgment that on the day of the date thereof the party executing same was in possession thereof. Crager *v.* Reis, 12 N. Y. Supp. 729.

7. Lee *v.* Ferguson, 5 La. Ann. 532.

8. Caster *v.* Bernstein (Cal.), 84 Pac. 244.

9. Missouri, K. & T. R. Co. *v.* Pennington (Tex. Civ. App.), 32 S.

III. NATURE AND EFFECT OF RELEASE AS EVIDENCE.

1. In General. — Unless impeached for fraud, duress, mistake or some like cause, or traversed as not genuine, a release is conclusive in defense of an action.[10]

2. Where the Interest or Liability Is Joint. — A. Sealed Release. — a. *In General.* — Where two have a joint personal interest, a technical release under seal by one is competent in bar of an action by the other,[11] or where the liability is joint against two tort-feasors or trespassers, or single against either, a technical release

W. 706, and see cases cited in note 2.

Joint creditors are each presumed to have received his share according to contract, where they unite in a common acquittance. Marty *v.* His Creditors, 5 Rob. (La.) 193.

10. T. & P. R. Co. *v.* Burke, 1 White & W. Civ. App. Cas. (Tex.) § 946, p. 531.

In the absence of fraud or mistake, an agreement of settlement and release of an unliquidated or disputed claim as conclusively estops the parties from reviving and litigating it as a final judgment. Such agreements of compromise are uniformly favored and upheld. Chicago & N. W. R. Co. *v.* Wilcox, 116 Fed. 913, 54 C. C. A. 147.

A release under seal is conclusive between the parties, unless there is fraud in obtaining it, and if given by one in possession of lands and having a right thereto, will operate to pass such right. Clark *v.* Clough, 65 N. H. 43, 23 Atl. 526.

Where the release is not obtained by fraud, it is error to instruct the jury, in an action at law, that the burden is on the defendant to show that the plaintiff signed the release with knowledge that she was releasing her right of action against the defendant. Davis *v.* Weatherly, 119 Ill. App. 238.

A release by an employe of his employer from all claims for damages resulting from an accident occurring during the employment, is valid and binding, although based upon a pre-existing contract exonerating his employer from liability for injuries resulting from negligence or otherwise. Brown *v.* Baltimore & O. R. Co., 6 App. D. C. 237.

Unless impeached for fraud the plaintiff will not be allowed to prove that the release was without consideration, or that the amount paid is in reality not all that was due. Spitze *v.* Baltimore & O. R. Co., 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378.

Where S. authorized C. to settle a suit brought by B. against S., and to adjust all the matters and pay all dues and costs, a receipt signed by B. stating that he had received of S., by the hands of C., $411, etc., in full, of judgment and execution in the cause, was held to be *prima facie* evidence of a payment of so much money by C., so as to authorize him to set it off against a demand of S., unless S. could show fraud or some abuse of authority by C. Sherman *v.* Crosby, 11 Johns. (N. Y.) 70.

Where a release is in general terms, and there is no limitation by way of recital or otherwise, the instrument is itself the only competent evidence of the agreement of the parties, unless avoided for fraud, duress, mistake, or some like cause. Kirchner *v.* Sewing Mach. Co., 135 N. Y. 182, 31 N. E. 1104.

11. *England.* — Nicholson *v.* Revill, 4 Ad. & El. 675, 31 E. C. L. 166.

Canada. — Fisher *v.* Patton, 5 U. C. Q. B. (O. S.) 741.

United States. — United States *v.* Thompson, Gilp. 614; United States *v.* Murphy, 15 Fed. 589; Connecticut Fire Ins. Co. *v.* Oldendorff, 73 Fed. 88, 19 C. C. A. 379.

Georgia. — Campbell & Co. *v.* Brown, 20 Ga. 415.

Illinois. — Benjamin *v.* McConnell, 9 Ill. 536, 46 Am. Dec. 474.

Indiana. — Thomas *v.* Wilson, 6 Blackf. 203.

Maine. — Houston *v.* Darling, 16 Me. 413.

under seal of damages to one is a bar to an action against the other.[12]

b. *Quasi-Joint Tortfeasors.* — The principle is alike applicable to quasi-joint tortfeasors, and where several tortfeasors or tres-

Maryland. — Gibson *v.* McCormick, 10 Gill & J. 65; Booth *v.* Campbell, 15 Md. 569.

Massachusetts. — Ward *v.* Johnson, 13 Mass. 148; Leddy *v.* Barney, 139 Mass. 394, 2 N. E. 107.

Nebraska. — Neligh *v.* Bradford, 1 Neb. 451; Lamb *v.* Gregory, 12 Neb. 506, 11 N. W. 755; Scofield *v.* Clark, 48 Neb. 711, 67 N. W. 754.

New Hampshire. — Gould *v.* Gould, 4 N. H. 173.

New York. — Coonley *v.* Wood, 36 Hun 559.

North Carolina. — Dudley *v.* Bland, 83 N. C. 200.

Oregon. — Crawford *v.* Roberts, 8 Or. 324.

West Virginia. — Maslin *v.* Hiett, 37 W. Va. 15, 16 S. E. 437.

Release Must Be So Intended and Free From Fraud in order to discharge the entire obligation. Lumberman's Ins. Co. *v.* Preble, 50 Ill. 332.

A Covenant Not to Sue one of the joint obligors or promisors does not amount to a release, but is a covenant only. It does at law discharge either of the joint obligors or promisors; and a suit may, notwithstanding such covenant, be brought upon the original contract against all, if it is a joint contract, or the one to whom the covenant was not given, if the contract is joint and several. Frink *v.* Green, 5 Barb. (N. Y.) 455. See Tuckerman *v.* Newhall, 17 Mass. 581.

Where No Partnership Exists Between Joint Creditors.— One or more of several joint creditors between whom no partnership exists cannot release the common debtor so as to conclude the co-creditor who does not assent to such release. Though they may thus defeat an action at law, it does not follow that a recovery in equity may not be had. Upjohn *v.* Ewing, 2 Ohio St. 14.

Division of Claim by Joint Creditors Between Themselves. — As a general rule, joint creditors by a division of the claim between themselves cannot acquire a separate right of action against debtor, either at law or in equity, but where the debtor himself procures the release of a part of them, he cannot object to the others proceeding against him in equity. The cases of Joy *v.* Wurtz, 2 Wash. C. C. (U. S.) 266; Hosack *v.* Rogers, 8 Paige (N. Y.) 229; Lowe *v.* Morgan, 1 Bro. Ch. (Eng.) 368 are not opposed to this decision.

A Release by One of Several Plaintiffs Without the Assent of the Others does not affect their right of recovery, and when executed after suit, it does not bar the expense of the suit theretofore incurred. Harris *v.* Swanson & Bro., 67 Ala. 486.

12. *England.* — Dufresne *v.* Hutchinson, 3 Taunt. 117; Thurman *v.* Wild, 11 Ad. & El. 453, 39 E. C. L. 145.

Arkansas. — Montgomery *v.* Erwin, 24 Ark. 540.

California. — Urton *v.* Price, 57 Cal. 270; Tompkins *v.* Clay St. R. Co., 66 Cal. 163, 4 Pac. 1165; Chetwood *v.* California Nat. Bk., 113 Cal. 414, 45 Pac. 704.

Colorado. — Denver & R. G. R. Co. *v.* Sullivan, 21 Colo. 302, 41 Pac. 501.

Connecticut. — Ayer *v.* Ashmead, 31 Conn. 447, 83 Am. Dec. 154.

Iowa. — Turner *v.* Hitchcock, 20 Iowa 310; Long *v.* Long, 57 Iowa 497, 10 N. W. 875; Atwood *v.* Brown, 72 Iowa 723, 32 N. W. 108.

Kansas. — Westbrook *v.* Mize, 35 Kan. 299, 10 Pac. 881.

Louisiana. — Owen *v.* Brown, 13 La. Ann. 201; Orr *v.* Hamilton, 36 La. Ann. 790.

Maine. — Gilpatrick *v.* Hunter, 24 Me. 18, 41 Am. Dec. 370.

Maryland. — Gunther *v.* Lee, 45 Md. 60, 24 Am. Rep. 504.

Massachusetts. — Brown *v.* Cambridge, 3 Allen 474.

New Jersey. — Spurr *v.* North Hudson R. Co., 56 N. J. L. 346, 28 Atl. 582.

New York. — Johanson *v.* New York City, 71 App. Div. 561, 76 N.

passers contribute to the cause of the injury, whether or not there is any concert of action between them, a release of one discharges all.[13]

c. *Where Right of Action Against the Other Is Reserved.* — Although in a technical release under seal of one tortfeasor or trespasser the right of action against the other is expressly reserved, the release will nevertheless operate in the latter's favor.[14]

B. Unsealed Release. — But a release of one of two or several joint debtors which is not under seal is no bar to an action against the other;[15] and whether a release of one of two joint tortfeasors or trespassers which is not a technical sealed release is a bar to an

Y. Supp. 119; Lord *v.* Tiffany, 98 N. Y. 412, 50 Am. Rep. 689.

North Carolina. — Brown *v.* Louisberg, 126 N. C. 701, 36 S. E. 166, 78 Am. St. Rep. 677; Burn *v.* Womble, 131 N. C. 173, 42 S. E. 573.

Texas. — McGehee *v.* Shafer, 15 Tex. 198.

Vermont. — Eastman *v.* Grant, 34 Vt. 387.

Virginia. — Ruble *v.* Turner, 2 Hen. & M. 38.

The acceptance of a verdict and judgment against one tortfeasor is not conclusive evidence of a claim for damage, and should be left to a jury under proper instruction for decision. Owen *v.* Brockschmidt, 54 Mo. 285.

13. Denver & R. G. R. Co. *v.* Sullivan, 21 Colo. 302, 41 Pac. 501; Wabash, St. L. & P. R. Co. *v.* Shacklet, 105 Ill. 364, 44 Am. Rep. 791; City of Valparaiso *v.* Moffitt, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522; Miller *v.* Beck, 108 Iowa 575, 79 N. W. 344; Aldrich *v.* Parnell, 147 Mass. 409, 18 N. E. 170; Knickerbacker *v.* Colver, 8 Cow. (N. Y.) 111; Breslin *v.* Peck, 38 Hun (N. Y.) 623.

Publication of Libel in Different Papers. — The publication of the same libel in different papers being distinct torts, a satisfaction of a judgment against one newspaper is no bar to a recovery against the other. Woods *v.* Pangburn, 75 N. Y. 495.

14. *Maryland.* — Gunther *v.* Lee, 45 Md. 60, 24 Am. Rep. 504.

New York. — Delong *v.* Curtis, 35 Hun 94; Smith *v.* Consolidated Gas Co., 36 Misc. 131, 72 N. Y. Supp. 1084; Brogan *v.* Hanan, 55 App. Div. 92, 66 N. Y. Supp. 1066.

Ohio. — Ellis *v.* Bitze, 2 Ohio 89, 15 Am. Dec. 534.

Pennsylvania. — Williams *v.* LeBar, 141 Pa. St. 149, 21 Atl. 525; Seither *v.* Philadelphia Tract. Co., 125 Pa. St. 397, 17 Atl. 338, 11 Am St. Rep. 905, 4 L. R. A. 54 (although he is the one whose negligence or default caused the injury).

Washington. — Abb *v.* Northern Pac. R. Co., 28 Wash. 428, 68 Pac. 954, 92 Am. St. Rep. 864, 58 L. R. A. 313.

15. *California.* — Armstrong *v.* Hayward, 6 Cal. 184.

Iowa. — Haney Mfg. Co. *v.* Adaza Coop. Co., 108 Iowa 313, 79 N. W. 79.

Kentucky. — Williamson *v.* McGinnis, 11 B. Mon. 74, 52 Am. Dec. 561.

Maine. — Drinkwater *v.* Jordan, 46 Me. 432.

Massachusetts. — Shaw *v.* Pratt, 22 Pick. 305; Pond *v.* Williams, 1 Gray 630; Bemis *v.* Hoseley, 16 Gray 63.

Missouri. — McAllister *v.* Dennin, 27 Mo. 40; Prior *v.* Kelso, 81 Mo. 241.

New Hampshire. — Berry *v.* Gillis, 17 N. H. 9, 43 Am. Dec. 584.

New Jersey. — Crane *v.* Alling, 15 N. J. L. 423; Line *v.* Nelson, 38 N. J. L. 358.

New York. — Harrison *v.* Close, 2 Johns. 448, 3 Am. Dec. 444; Bronson *v.* Fitzhugh, 1 Hill 185; Frink *v.* Green, 5 Barb. 455; Schramm *v.* Brooklyn Heights R. Co., 35 App. Div. 334, 54 N. Y. Supp. 945; Finch *v.* Simon, 61 App. Div. 139, 70 N. Y. Supp. 361.

Pennsylvania. — Burke *v.* Noble, 48 Pa. St. 168; Greenwald *v.* Kaster, 86 Pa. St. 45.

action against the other is a question of fact, and unless it otherwise appears it will operate only as a *pro tanto* bar against the other tortfeasor or trespasser.[16]

C. Release by Operation of Law of an action *ex contractu* against one of several persons jointly bound and severally, extinguishes the liability of all, unless the judgment has been obtained by a defense which applies peculiarly and alone to the party in whose favor it has been rendered.[17]

IV. IMPEACHMENT.

1. Mode of Impeachment. — A. In General. — That one who has made a written surrender of a valuable right, or release of a substantial cause of action, may repudiate the same upon sufficient

South Carolina. — Hope *v.* Johnson, 11 Rich. L. 135.

Tennessee. — Evans *v.* Pegg, 3 Coldw. 395.

Texas. — Clifton *v.* Foster (Tex. Civ. App.), 20 S. W. 1005.

Vermont. — Brown *v.* Marsh, 7 Vt. 320.

No Release Allowed by Implication. — A release of joint trespassers must be a technical release under seal, expressly stating the cause of action to be discharged without conviction or exception, and no release will be allowed by implication. Blass *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752.

16. Bowman *v.* Davis, 13 Colo. 297, 22 Pac. 507; Knapp *v.* Roche, 94 N. Y. 329; Irvine *v.* Milbank, 15 Abb. Pr. N. S. (N. Y.) 378; Blass *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752; Pogel *v.* Meilke, 60 Wis. 248, 18 N. W. 927.

Although an agreement not to sue one of several joint and several contractors, or joint trespassers, made upon a sufficient consideration, is not a technical release or discharge of the debt or damages, yet to avoid circuity of action, the party with whom the agreement has been made may set it up in bar of an action against him for such debt or damage. But in absence of any technical release or discharge under seal of one joint trespasser, the receipt of money from him with an agreement not to prosecute him, discharges the other only when such money is received as an accord and satisfaction for the whole injury; where it is received only as a part satisfaction, it discharges the others only *pro tanto;* and the question is for the jury at least where the amount of the damages does not rest chiefly in discretion, but is the subject of proof and computation. Ellis *v.* Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830.

Partial Settlement. — A settlement made by one joint trespasser for one-half of property taken, will not preclude the owner from maintaining an action against the other to recover the balance. McCrillis *v.* Hawes, 38 Me. 566.

A Partial Settlement by One Is Proper in Mitigation of Damages Against the Other. — Knapp *v.* Roche, 94 N. Y. 329; Chamberlin *v.* Murphy, 41 Vt. 110; Smith *v.* Gayle, 58 Ala. 600.

17. Hunt *v.* Terril's Heirs, 7 J. J. Marsh. (Ky.) 67.

If a judgment by default be rendered against one of two defendants, and the other appear and interpose a successful defense to the merits of the action, such defense will enure to the benefit of both, and the party in default is entitled to be discharged also. Bruton *v.* Gregory, 8 Ark. 177.

Release by court. — A release by the court (not obligee) of one of several joint sureties on a guardian's bond under authority of statute, does not release the other. Frederick *v.* Moore, 13 B. Mon. (Ky.) 470.

A discharge of one of several joint debtors which does not relate to the merits of the contract, and only concerns the person of one of the promisors, as infancy, limitation, and

showing of fraud or mistake, even where the demand thus released is disputed or unliquidated, is held to be too well established to admit of controversy.[18] But in an action at law in federal courts it is not admissible to show that a release, which on its face constitutes a complete bar to an action, was given under a mistake of fact, such as in equity would cause its rescission or cancellation.[19]

B. RES GESTAE. — Statements of the parties at the time of the execution of the release,[20] and the facts and circumstances surrounding the transaction bearing on the question of good faith of the parties are admissible as part of the transaction.[21]

bankruptcy, does not avail the remaining joint-debtors who have not the same privilege. Harrison *v.* McCormick, 122 Cal. 651, 55 Pac. 592; Thomas *v.* Mueller, 106 Ill. 36.

18. *Iowa.* — Rauen *v.* Prudential Ins. Co., 129 Iowa 725, 106 N. W. 198; Barton *v.* Fuson, 81 Iowa 575, 47 N. W. 774; Sullivan *v.* Collins, 18 Iowa 228; Levi *v.* Karrick, 13 Iowa 344.

Kansas. — Railway Co. *v.* Goodholm, 61 Kan. 758, 60 Pac. 1066.

Kentucky. — Anderson *v.* Bacon, 1 Marsh. 48; Titus *v.* Rochester German Ins. Co., 97 Ky. 567, 31 S. W. 127, 53 Am. St. Rep. 426, 28 L. R. A. 478.

Maine. — Jordan *v.* Stevens, 51 Me. 78, 81 Am. Dec. 556.

Massachusetts. — Warder *v.* Tucker, 7 Mass. 449, 5 Am. Dec. 62; Haven *v.* Foster, 9 Pick. 112, 19 Am. Dec. 353.

Mississippi. — Railway Co. *v.* Jones, 73 Miss. 110, 19 So. 105, 55 Am. St. Rep. 488.

New Jersey. — Henry *v.* Imperial Council, 52 N. J. Eq. 770, 29 Atl. 508.

New York. — Kirchner *v.* Sewing Mach. Co., 135 N. Y. 182, 31 N. E. 1104.

Pennsylvania. — *In re* Fisher's Estate, 189 Pa. St. 179, 42 Atl. 8.

Tennessee. — Byers *v.* Nashville, C. & St. L. R. Co., 94 Tenn. 345, 29 S. W. 128.

Texas. — Railway Co. *v.* Brown (Tex. Civ. App.), 69 S. W. 651.

Utah. — Toland *v.* Corey, 6 Utah 392, 24 Pac. 190.

Whether a release of a debt was fairly obtained is a question of fact which may be raised in any action where such release is made the basis of defense. Rauen *v.* Prudential Ins. Co., 129 Iowa 725, 106 N. W. 198. See O'Donnell *v.* Clinton, 145 Mass. 461, 14 N. E. 747; Chicago City R. Co. *v.* Uhter, 212 Ill. 174, 72 N. E. 195; Pioneer Cooperage Co. *v.* Romanowicz, 186 Ill. 9, 57 N. E. 864; Indiana, D. & W. R. Co. *v.* Fowler, 201 Ill. 152, 66 N. E. 394, 94 Am. St. Rep. 158.

Where defendant's testimony tended to establish a release, and plaintiff's that the arrangement was not concluded and the release never delivered, the question was one of fact for the jury. Cleveland *v.* Rothschild, 132 Mich. 625, 94 N. W. 184.

19. Messinger *v.* New England Mut. Ins. Co., 59 Fed. 529.

20. See article "RES GESTAE."

In an action against a street railway company for personal injuries, defendant relied upon a document purporting to be a release executed by plaintiff. Plaintiff testified that she was induced to sign the paper by the fraud of a certain claim agent of the defendant, and was allowed against the objection of defendant to state the portion of the conversation that she had with the claim agent which occurred after she had signed the paper. *Held*, that the admission of the evidence was not error, because it was a part of the conversation during which the paper was signed, and having a bearing on the good faith in alleging fraud. Keefe *v.* Norfolk Sub. St. R. Co., 185 Mass. 247, 70 N. E. 46.

21. Chicago & A. R. Co. *v.* Jennings, 114 Ill. App. 622; Missouri P. R. Co. *v.* Brazzil, 72 Tex. 233, 10 S. W. 403.

C. Impeachment of Witness to Release to Show Fraud. Where a release is sought to be avoided for fraud, it is competent to impeach a witness to ask him on cross-examination whether he had witnessed several other releases of the same character for the same party.[22]

2. Sufficiency of Evidence To Impeach. — A. In General. Proof of fraud or mistake sufficient to avoid a release must be clear, unequivocal and convincing. A mere preponderance of evidence is insufficient.[23]

B. Inadequacy of Consideration alone is not sufficient to set aside a release, unless such consideration is so inadequate as to shock the moral sense, but it may be considered along with other evidence as tending to show fraud.[24]

C. Mistake. — A mistake of a past or present fact may warrant a rescission of a contract of settlement and release. But a mistake in opinion or belief relative to the future duration or effect of a personal injury, or a mistake in prophecy or opinion as to an uncertain future event, is not a mistake of fact, and no ground for avoidance of contract of settlement.[25]

22. Dorsett *v.* Clement-Ross Mfg. Co., 131 N. C. 254, 42 S. E. 612.

23. See article "Fraud," Vol. VI., and "Written Instruments."

Chicago & N. W. R. Co. *v.* Wilcox, 116 Fed. 913, 54 C. C. A. 147; Pennsylvania R. Co. *v.* Shay, 82 Pa. St. 198; Bierer's Appeal, 92 Pa. St. 265.

In order to sustain a replication charging fraud in obtaining a release there must appear such words and acts upon the part of defendant as induce a reasonable belief upon the part of the jury that the mind of plaintiff was overpersuaded and the execution of such release obtained by fraud upon the part of defendant. Chicago & A. R. Co. *v.* Jennings, 114 Ill. App. 622.

24. See articles "Consideration," Vol. III, "Fraud," Vol. VI, "Parol Evidence," Vol. IX, and "Written Instruments."

Inadequacy of consideration is not fraud, but only evidence of fraud, and release will not be set aside for mere inadequacy of consideration. Dorset *v.* Clement-Ross Mfg. Co., 131 N. C. 254, 42 S. E. 612.

Want of Consideration is held to be no ground for impeachment of a sealed release. Gray *v.* Barton, 55 N. Y. 68; Torry *v.* Black, 58 N. Y. 185.

Unsealed Instrument. — A New Jersey statute providing that the consideration of an unsealed instrument may be controverted, is held not to apply to a release. Waln *v.* Waln, 58 N. J. L. 640, 34 Atl. 1068.

Where Release Recites No Consideration and the evidence in support of plaintiff's allegation of fraud is uncontradicted, the burden is upon defendant to rebut the presumption of fraud arising from want of consideration. Boutten *v.* Wellington & P. R. Co., 128 N. C. 337, 38 S. E. 920.

Unless impeached for fraud, duress, or traversed as not genuine, the plaintiff will not be allowed to prove that the release was without consideration, nor can it be shown that the amount paid in reality is not all that was due. Spitze *v.* Baltimore & O. R. Co., 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378.

25. Statement by a railway claim agent that the right of an injured passenger with whom he was making settlement was doubtful, is not merely an expression of an opinion as to law. International & G. N. R. Co. *v.* Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189. The distinction between a statement of facts and an expression of an opinion is pointed out in Chicago & N. W. R. Co. *v.* Wilcox, 116 Fed. 913, 54 C. C. A. 147.

Plaintiff knew when she settled

D. Fraud. — A misrepresentation as to the purport or character of the release,[26] or a misrepresentation or concealment of material fact relative to the settlement, is sufficient evidence of fraud,[27] although the party did not read the release.[28] But the mere fact that the party did not read the release in the absence of clear evidence of fraud is insufficient ground of impeachment.[29] The fact that plaintiff is ill at the time of executing a release, though it bears on the question of his capacity, is not proof of fraud where the party admits a perfect understanding of the contract and its effect

with railway company that her hip had been broken and that it was a bad break. She was induced by the statement of her own physician, who was also the company's physician, to believe, and did believe, that she would be well within a year, and that she settled upon that basis. She was mistaken, and her injury and disability turned out to be permanent. *Held,* that her mistake was not one of fact, but a mistake of opinion and belief as to a future event, and it furnished no ground for avoidance of release. Chicago & N. W. R. Co. *v.* Wilcox, 116 Fed. 913, 54 C. C. A. 147.

26. False Representation as to Character of Paper Signed Vitiates the Release Where Releasor Is Guilty of No Negligence.

California. — Smith *v.* Steamship Co., 99 Cal. 462, 34 Pac. 84; Meyer *v.* Haas, 126 Cal. 560, 58 Pac. 1042.

District of Columbia. — Chesapeake & O. R. Co. *v.* Howard, 14 App. D. C. 263.

Illinois. — Eagle Packet Co. *v.* Defries, 94 Ill. 598, 34 Am. Rep. 245; Pioneer Cooperage Co. *v.* Romanowicz, 186 Ill. 9, 57 N. E. 864.

Iowa. — O'Brien *v.* Chicago M. R. Co., 89 Iowa 644, 57 N. W. 425.

Kentucky. — Addyston Pipe & Steel Co. *v.* Copple, 94 Ky. 292, 22 S. W. 323.

Massachusetts. — Mullen *v.* Old Colony R. Co., 127 Mass. 86, 34 Am. Rep. 349; Jackson *v.* Olney, 140 Mass. 195, 4 N. E. 225.

Michigan. — O'Neil *v.* Lake Superior Iron Co., 63 Mich 690, 30 N. W. 688.

Minnesota. — Hinkle *v.* Minneapolis & St. L. R. Co., 31 Minn. 434, 18 N. W. 275; Schus *v.* Powers-Simpson Co., 85 Minn. 447, 89 N. W. 68, 69 L. R. A. 887.

New York. — Shaw *v.* Webber, 79 Hun 307, 29 N. Y. Supp. 437; O'Meara *v.* Brooklyn City R. Co., 16 App. Div. 204, 44 N. Y. Supp. 721.

Washington. — Pederson *v.* Seattle Consol. R. Co., 6 Wash. 202, 33 Pac. 351.

Wisconsin. — Schultz *v.* Chicago & N. W. R. Co., 44 Wis. 638; Lusted *v.* Chicago & N. W. R. Co., 71 Wis. 391, 36 N. W. 857.

27. Wheeler *v.* Metropolitan Stock Exchange, 72 N. H. 315, 56 Atl. 754.

But see T. & P. R. Co. *v.* Burke, 1 White & W. Civ. App. Cases (Tex.) §946, page 531, where it is held that the fact that plaintiff signed the release with the understanding and upon the promise of the defendant, that the settlement upon which the release was executed was incorrect, and upon the promise of the defendant's agent that it should be corrected, is insufficient to avoid same.

28. Evidence that a party to whom a release was given suppressed and misstated material facts during preliminary negotiations, warrants a finding that such release was obtained by fraud. Wheeler *v.* Metropolitan Stock Exchange, 72 N. H. 315, 56 Atl. 754.

The intentional concealment by the releasee of a cause of action existing in favor of releasor, of which he was ignorant, will be sufficient to estop the former from insisting upon any advantage to be derived from mistake of the latter. Kirchner *v.* Sewing Mach. Co., 135 N. Y. 182, 31 N. E. 1104.

29. Ordinarily, the mere negligence of a person in signing a receipt without reading the same will

upon his rights.[30] Though there is no evidence of actual fraud in procuring plaintiff's signature to a release, the question of whether she was able to understand the nature of release is a question for the jury.[31] The fact that a release is obtained by a railway physician from the person injured, who is under physician's treatment at the time, furnishes no evidence of fraud, where the patient knows that the physician is in defendant's employ, accepts payment of the consideration, and fully understands the contents and effect of the release, and the latter correctly describes the injuries received.[32]

not conclude such person, nor prevent explanation or denial of what it contains, and especially so if it appears that such person was induced to sign the paper by the misrepresentation and fraud of the other party. Railway Co. *v.* Lovelace, 57 Kan. 195, 45 Pac. 590.

Where an injured railway employe who had been sent to the company's hospital had signed an instrument without reading it, but at the request of hospital clerk, who represented the paper to be a discharge from hospital, but which was in fact a release of plaintiff's damages against the company, it was held that defendant could not avail itself of plaintiff's negligence in signing receipt as plaintiff relied on a positive misrepresentation of fact. Evidence was sufficient to sustain finding of fraud in execution of release. International & G. N. R. Co. *v.* Harris, (Tex. Civ. App.), 65 S. W. 885 (writ of error denied by supreme court).

30. Where plaintiff alleges that he was tricked into signing a written release by the way paper was read to him, though admitting that he was able to read the same, it is *held,* that to be relieved from the effect of his carelessness in not insisting on the right to read the release himself, he must clearly show that he was defrauded. The Annie L. Mulford, 107 Fed. 525.

One who has signed a written release cannot avoid its effect by saying merely that he did not read it or know its contents, for his signing under such circumstances raises a presumption of gross negligence. Albrecht *v.* Milwaukee & S. R. Co., 87 Wis. 105, 58 N. W. 72, 41 Am. St. Rep. 30.

Evidence was held not to justify a verdict avoiding a release executed by plaintiff after it had been read to her, the plaintiff claiming that she paid no atttention to the reading because of previous fraudulent statements as to its contents. McCall *v.* Bushnell, 41 Minn. 37, 42 N. W. 545.

31. McFarland *v.* Missouri Pac. R. Co., 125 Mo. 253, 28 S. W. 590.

32. Bertrand *v.* St. Louis Trans. Co., 108 Mo. 70, 82 S. W. 1089.

If a party not insane seeks to avoid a release given by her while her mental faculties were temporarily impaired, the burden of proof is upon her to show the mental incapacity, and not upon the other party to show that her mind was not impaired. Chicago W. D. R. Co. *v.* Mills, 91 Ill. 39.

Burden of proof is on plaintiff to show that his condition of mind rendered him incapable of understanding the effect of his release. Galveston H. & S. A. R. Co. *v.* Green (Tex. Civ. App.), 91 S. W. 380.

Evidence held sufficient to show that plaintiff's condition was such at the time of signing release as to warrant setting it aside. Bliss *v.* New York Cent. & H. R. R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504.

Evidence that at the time plaintiff signed the release she was in bed suffering pain, and that she was weak and nervous, and weeping under the strain of her sufferings, is entitled to weight in determining whether she signed the release under such false impression as to her rights as will warrant the avoidance of the release. Rockwell *v.* Traction Co., 25 App. D. C. 98. See McFarland *v.* Missouri Pac. R. Co., 125 Mo. 253, 28 S. W. 590.

It is not necessary to avoid a re-

E. Attorney's Lien for Fees. — The fact that plaintiff's attorney had a lien on the cause of action for fees is insufficient to affect the validity of settlement between the parties.[33]

V. CONTRADICTION AND VARYING TERMS OF RELEASE.

1. When Parol Evidence Inadmissible. — A. In General. — A release which in plain terms states that the money paid to the releasor was in full settlement of a particular claim, is not subject to be contradicted or varied by parol testimony.[34]

B. That Particular Debt Was Not Included in General Release of all demands cannot be shown by parol.[35]

lease of damages for injuries, where the transaction is between physician and patient, to show that patient had unquestioned belief in the infallibility of physician's judgment to whom he has given his confidence, and to accept without question or doubt the statements and representations made, by which he is induced to part with property. It is sufficient if the statements made, and assurances given by the physician induce the patient to part with his property, even though he may have some doubt as to their absolute correctness. Viallet *v.* Consolidated R. & P. Co., 30 Utah 260, 84 Pac. 496. See Peterson *v.* Chicago, M. & St. P. R. Co., 38 Minn. 511, 39 N. W. 485.

Evidence held sufficient to support conclusion that a release of damages by an injured railway passenger was procured by fraud and false representation through conspiracy between company's physician and its claim agent. International & G. N. R. Co. *v.* Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189 (rehearing refused).

Evidence Held Sufficient To Show Fraud Warranting Avoidance of Release.

United States. — Shook *v.* Illinois Cent. R. Co., 115 Fed. 57.

Illinois. — Chicago & A. R. Co. *v.* Jennings, 217 Ill. 494, 75 N. E. 560.

Massachusetts. — Bliss *v.* New York Cent. R. R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504.

Missouri. — Robertson *v.* Fuller Const. Co., 115 Mo. App. 456, 92 S. W. 130.

New Jersey. — Mullaney *v.* Mullaney, 65 N. J. Eq. 384, 54 Atl. 1086.

New York. — Myers *v.* Metropolitan L. Ins. Co., 62 App. Div. 572, 71 N. Y. Supp. 157.

Pennsylvania. — Clayton *v.* Traction Co., 204 Pa. St. 536, 54 Atl. 332.

Washington. — Pederson *v.* Seattle Consol. R. Co., 6 Wash. 202, 33 Pac. 351.

Evidence Held Insufficient To Show Fraud. — Naretti *v.* Scully, 133 Fed. 828; East St. Louis P. & P. Co. *v.* Hightower, 9 Ill. App. 297; Dorwin *v.* Westbrook, 86 Hun 363, 33 N. Y. Supp. 449; Railway Co. *v.* Lovelace, 57 Kan. 195, 45 Pac. 590.

Question for Jury. — Boutten *v.* Wellington & P. R. Co., 128 N. C. 337, 38 S. E. 920; Pioneer Cooperage Co. *v.* Romanowicz, 186 Ill. 9, 57 N. E. 864.

33. Williams *v.* Wilson, 17 Misc. 317, 40 N. Y. Supp. 350.

The fact that a party induced by fraud to sign a release was partly influenced to do so by immediate need of money will not prevent the setting aside of the release for the fraud. International & G. N. R. Co. *v.* Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189.

34. Denver & R. G. R. Co. *v.* Sullivan, 21 Colo. 302, 41 Pac. 501.

35. Pierson *v.* Hooker, 3 Johns. (N. Y.) 68.

If the words of a release fairly import a general discharge, their effect may not be limited so as to exclude a demand simply upon proof that at the time of its execution the releasor had no knowledge of the existence of the demand. Kirchner *v.* Sewing Mach. Co., 135 N. Y. 182, 31 N. E. 1104.

C. Matters Not Specified Therein cannot be shown by parol to have been embraced in a release which is unambiguous in its terms.[36]

D. Promise To Pay Debt as Consideration for Release. Parol evidence is inadmissible to show that the creditor executed the release at the request of the debtor who promised to pay him at a certain time, and that upon that consideration he executed the release.[37]

2. When Parol Evidence Admissible. — That releasor had no knowledge of its contents when he signed the release, and that he did not intend to execute an instrument of that character, may be established by parol.[38]

36. Brady *v.* Read, 94 N. Y. 631.
37. Stearns *v.* Tappin, 5 Duer (N. Y.) 294.
38. Lord *v.* American Mut. Acc. Assn., 89 Wis. 19, 61 N. W. 293, 46 Am. St. Rep. 815.

RELEVANCY.

By Charles S. Burnell.

CROSS-REFERENCES:

Age;
Competency;
Death; Domicil;
Hearsay;
Marriage; Materiality;
Pedigree;
Threats.

I. IN GENERAL.

1. Definitions. — The term "relevancy," as applied to evidence, has been variously defined; in the notes below will be found a number of these definitions.[1]

1. Relevancy is that which conduces to the proof of a pertinent hypothesis. Hence it is relevant to put in evidence any circumstances which tend to make the proposition at issue more or less probable. Wharton on Ev. § § 20, 21.

The meaning of the word "relevant," as applied to testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist the court or jury in arriving at the truth in regard to it. Moran *v.* Abbey, 58 Cal. 163.

The word "relevant" means that any two facts to which it is applied are so related to each other that according to the ordinary course of events one, either taken by itself or in connection with other facts, proves or renders possible the past, present or future existence of the other. Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998; Buckwalter *v.* Arnett, 17 Ky. L. Rep. 1,233, 34 S. W. 238.

Any testimony which will assist the court or jury in determining which party speaks the truth as to the issues in the action is relevant and should be received, where to admit it does not override other formal rules of evidence. Prior *v.* Oglesby, 50 Fla. 248, 39 So. 593.

"By the term 'relevant' we do not mean that the evidence shall be addressed with positive directness to the disputed point, but we mean evidence which, according to the common course of events, either taken by itself or in connection with other facts, proves or renders probable, the past, present or future existence of the other." Seller *v.* Jenkins, 97 Ind. 430, 438.

"The word 'relevant' means that any two facts to which it is applied

Same in Criminal as in Civil Proceedings. — As to the relevancy of evidence, there is no distinction between the rules in civil and in criminal proceedings, and these definitions apply to both alike.[2]

2. Logic as the Test of Relevancy. — A. In General. — The rules of logic are of controlling force in determining the relevancy of any particular line of testimony,[3] and generally speaking, any evidence is relevant which logically tends to prove or to disprove a material fact which is in issue in the action.[4] Thus evidence directly attesting to the existence or non-existence of the fact in

are so related to each other that according to the common course of events one either taken by itself, or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other." Cole *v.* Boardman, 63 N. H. 580, *quoting* from Stephens Digest of the Law of Evidence.

Relevancy, as applied to testimony, means that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth thereof. Platner *v.* Platner, 78 N. Y. 90; Porter *v.* Valentine, 18 Misc. 213, 41 N. Y. Supp. 507.

Relevancy is that which "conduces to prove a pertinent theory in a case" or one which influences or controls the case. Levy *v.* Campbell (Tex.), 20 S. W. 196.

2. The same general rules as to the relevancy of evidence obtain in both civil and criminal proceedings. Bell *v.* Troy, 35 Ala. 184.

3. "The law furnishes no test of relevancy. For this it tacitly refers to logic, assuming that the principles of reasoning are known to its judges and ministers; just as a vast multitude of things are assumed, as being already sufficiently known." Thayer, Prelim. Treatise, 265.

4. *England.* — Rex *v.* Ellis, 6 Barn. & C. 145, 13 E. C. L. 123; Rex *v.* Murphy, 8 Car. & P. 297, 34 E. C. L. 397; Furneaux *v.* Hutchins, 2 Cowp. 807; Doe d. Foster *v.* Sisson, 12 East 62; Rex *v.* Egerton, 1 Russ. & Ry. (C. C.) 375; Rex *v.* Watson, 2 Stark. 116, 3 E. C. L. 273.

United States. — Insurance Co. *v.* Weide, 11 Wall. 438; Thompson *v.* Bowie, 4 Wall. 463; Butler *v.* Walkins, 13 Wall. 456; Standard Oil Co. *v.* Van Etten, 107 U. S. 325.

Alabama. — Governor *v.* Campbell, 17 Ala. 566; O'Neal *v.* McKinna, 116 Ala. 606, 22 So. 905 (an answer, although not responsive to the question, is admissible if relevant, unless the party propounding the question objects on the ground that it is not responsive); Bell *v.* Troy, 35 Ala. 184; Ashley *v.* Martin, 50 Ala. 537; Shealy *v.* Edwards, 75 Ala. 411; Alabama G. S. R. Co. *v.* Guest, 144 Ala. 373, 39 So. 654 (any fact is relevant which logically tends to prove or to disprove a fact in issue).

Arkansas. — Ward *v.* Young, 42 Ark. 542, 554 (it is relevant to put in evidence any facts or circumstances which tend to make the proposition at issue more or less probable).

California. — Riverside Water Co. *v.* Gage, 108 Cal. 240, 41 Pac. 299; Henry *v.* Southern Pac. R. Co., 50 Cal. 184 (*holding* that evidence of any circumstances which, with other circumstances, tends to prove a fact in issue, is relevant); Moran *v.* Abbey, 58 Cal. 163 (whatever testimony assists in deciding which party speaks the truth of the issue is relevant, and, when to admit it would not override other formal rules of evidence, it should be admitted).

Connecticut. — Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998; Belden *v.* Lamb, 17 Conn. 441.

Florida. — Prior *v.* Oglesby, 50 Fla. 248, 39 So. 593 (any evidence which will assist the court in determining which party speaks the truth as to the contested issues in an action is relevant and admissible if otherwise competent).

Georgia. — Walker *v.* Roberts, 20

Ga. 15; Selma, R. & D. Co. *v.* Keith, 53 Ga. 178; Baker *v.* Lyman, 53 Ga. 339; Sample *v.* Lipscomb, 18 Ga. 687 (every act or circumstance serving to elucidate or throw light upon the issues is relevant).

Illinois. — Hunter *v.* Harris, 29 Ill. App. 200; Thomas Knapp Print. & B. Co. *v.* Guthrie, 64 Ill. App. 523; Willoughby *v.* Dewey, 54 Ill. 266; Hough *v.* Cook, 69 Ill. 581.

Indiana. — Newell *v.* Downs, 8 Blackf. 523; Hall *v.* Stanley, 86 Ind. 219; Ogle *v.* Brooks, 87 Ind. 600; West *v.* Cavins, 74 Ind. 265 (in an action on a note made by a testator, evidence that the testator sent money to the payee is relevant as tending to prove that the note was given to compensate the payee for services, etc.).

Iowa. — Moline Plow Co. *v.* Braden, 71 Iowa 141, 32 N. W. 247; Hancock *v.* Wilson, 39 Iowa 47; Mann *v.* Sioux City & P. R. Co., 46 Iowa 637; High *v.* Kistner, 44 Iowa 79 (evidence explaining the conduct of the parties, and which aided in determining the truth of other testimony); Smyth *v.* Ward, 46 Iowa 339.

Kansas. — Lyons *v.* Berlau, 67 Kan. 426, 73 Pac. 52.

Louisiana. — Meyer *v.* Farmer, 36 La. Ann. 785 (in an action by a purchaser to recover the purchase price by reason of his eviction from the property by judicial decree, the act of sale is relevant); Hudson *v.* Lafayette, 18 La. 295 (a defendant in an action to enjoin him from disturbing the plaintiff's possession may show that the latter is himself a trespasser on public land of which he is the administrator).

Maine. — Nickerson *v.* Gould, 82 Me. 512, 20 Atl. 86; Eaton *v.* New England Tel. Co., 68 Me. 63; Trull *v.* True, 33 Me. 367 (any testimony is relevant which would have a tendency, however remote, to establish the probability or the improbability of the fact in issue).

Maryland. — Brooks *v.* Winters, 39 Md. 505.

Massachusetts. — Walker *v.* Swasey, 86 Mass. 527; Marcy *v.* Barnes, 16 Gray 161; Fitzgerald *v.* Pendergast, 114 Mass. 424; Huntsman *v.* Nichols, 116 Mass. 521; Hill *v.* Crompton 119 Mass. 367; Brierly *v.* Davol Mills, 128 Mass. 291.

Michigan. — Briscoe *v.* Eckley, 35 Mich. 112 (in an action for labor and materials, it is relevant for the defendants to introduce written evidence that the labor and materials were for sub-contractors, in order to show that credit was not given to defendants but to such sub-contractors); Comstock *v.* Smith, 20 Mich. 338 (*holding* that the relevancy of testimony offered in rebuttal is not to be tested by its convincing or persuasive character, but by whether it tends to cut down, limit, explain or obviate the evidence which it is sought to rebut, or to illustrate some legitimate answer thereto); Welch *v.* Ware, 32 Mich 77; Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499.

Minnesota. — Glassberg *v.* Olson, 89 Minn. 195, 94 N. W. 554.

Missouri. — Mosby *v.* McKee Commission Co., 91 Mo. App. 500; Ferguson *v.* Thatcher, 79 Mo. 511.

Nebraska. — Darner *v.* Daggett, 35 Neb. 695, 53 N. W. 608; Chamberlain *v.* Chamberlain Bkg. House, 93 N. W. 1021.

Nevada. — State *v.* Rhoades, 6 Nev. 352 (the only point to be determined in ascertaining whether or not testimony is relevant, is whether it has a tendency to establish a legitimate case or defense relied on).

New Hampshire. — Reagan *v.* Manchester St. R. Co., 72 N. H. 298, 56 Atl. 314; Wiggin *v.* Scammon, 27 N. H. 260; Tucker *v.* Peaslee, 36 N. H. 168; Hovey *v.* Grant, 52 N. H. 569; Amoskeag Mfg. Co. *v.* Head, 59 N. H. 332; Green *v.* Gilbert, 60 N. H. 146.

New York. — O'Hara *v.* Kelsey, 60 App. Div. 604, 70 N. Y. Supp. 14; Freese *v.* Veith, 7 N. Y. Supp. 134, 26 N. Y. St. 113; Wayne & Ontario Col. Ins. *v.* Devinney, 43 Barb. 220; People *v.* Horton, 64 N. Y. 58, 610; Read *v.* Decker, 67 N. Y. 182; Platner *v.* Platner, 78 N. Y. 90; Hagerty *v.* Andrews, 94 N. Y. 195.

North Carolina. — Hart *v.* Newland, 10 N. C. (3 Hawks) 122.

Ohio. — Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679; Findlay Brew. Co. *v.* Bauer, 50 Ohio St. 560, 35 N.

issue is always relevant and is always admissible unless excluded on other grounds.[5]

Evidence is relevant which tends to raise a presumption of the existence or non-existence of the fact in issue,[6] as by proving facts other than the fact at issue, which by experience have been found to be so closely associated with the fact at issue as to render its existence or non-existence more or less probable,[7] or to show the relations of the parties to the controversy with each other.[8]

Evidence of facts which are not logically connected with the issues,[9] or the existence of which raises no reasonable presumption

E. 55; Tompkins *v.* Starr, 41 Ohio St. 305.

Pennsylvania. — Rodgers *v.* Stophel, 32 Pa. St. 111; Atkins *v.* Payne, 190 Pa. St. 5, 42 Atl. 378; Fitzwater *v.* Stout, 16 Pa. St. 22; Pratt *v.* H. M. Richards Jewelry Co., 69 Pa. St. 53; Walls *v.* Walls, 170 Pa. St. 48, 32 Atl. 649 (any circumstance is relevant which makes more probable the hypothesis set up); Arnold *v.* Macungie Sav. Bank, 71 Pa. St. 287.

South Carolina. — Blakeley *v.* Frazier, 20 S. C. 144.

Tennessee. — Hudson *v.* State, 3 Coldw. 355; Fry *v.* Provident Sav. L. Assur. Soc. (Tenn. Ch.), 38 S. W. 116 (otherwise irrelevant testimony cannot be made relevant by being directed to the proof of an immaterial issue).

Vermont. — Richardson *v.* Royalton & W. Tpk. Co., 6 Vt. 496; Bedell *v.* Foss, 50 Vt. 94; Luce *v.* Hoisington, 56 Vt. 436.

Wisconsin. — Kavanaugh *v.* Wausau, 120 Wis. 611, 98 N. W. 550; Johnson *v.* Filkington, 39 Wis. 62.

5. Schuchardt *v.* Allens, 1 Wall. (U. S.) 359; Jones *v.* Vanzandt, 2 McLean (U. S.) 596; Moline Plow Co. *v.* Braden, 71 Iowa, 141, 32 N. W. 247; Lightfoot *v.* People, 16 Mich. 507; Tucker *v.* Peaslee, 36 N. H. 167; Haughey *v.* Stickler, 2 Watts & S. (Pa.) 411; Hudson *v.* State, 3 Coldw. (Tenn.) 355.

6. When a fact in evidence necessarily accompanies the facts at issue, it raises a strong presumption of the existence of the fact sought to be proved. If such fact ordinarily accompanies the fact at issue, it raises a probable presumption of the existence of the fact sought to be established; but if the fact sought to be admitted in evidence only occasionally accompanies the fact of issue, it raises only a very slight presumption, but even then it may, in connection with other relevant and consistent facts and circumstances, be admitted as an element in circumstantial evidence. United States *v.* Searcey, 26 Fed. 435.

Any fact may be submitted to the jury which may be established by competent means, and affords any fair presumption or inference as to the question in dispute. Wells *v.* Fairbank, 5 Tex. 582.

7. *California.* — People *v.* Phipps, 39 Cal. 326.

Louisiana. — State *v.* Coleman, 22 La. Ann. 455.

Massachusetts. — Com. *v.* Webster, 5 Cush. 295.

Mississippi. — Pitts *v.* State, 43 Miss. 472.

Missouri. — State *v.* Avery, 113 Mo. 475, 21 S. W. 193.

Nevada. — State *v.* Van Winkle, 6 Nev. 340.

New York. — People *v.* Hamilton, 137 N. Y. 531, 32 N. E. 1071.

North Carolina. — Rippey *v.* Miller, 46 N. C. (1 Jones L.) 479, 62 Am. Dec. 177.

Texas. — Moreno *v.* State (Tex. Crim.), 21 S. W. 924.

8. Evidence tending to show the relations of the parties and the circumstances surrounding the transaction is relevant. Colwell *v.* Adams, 51 Mich. 491, 16 N. W. 870.

9. *United States.* — Polk *v.* Wendell, 5 Wheat. 293; Wyatt *v.* Harden, Hempst. 17, 30 Fed. Cas. No. 18,106*a* (evidence of facts which form the ground of a different action is irrelevant).

Alabama. — Miller *v.* Boykin, 70

as to the existence or non-existence of the facts in issue, is irrelevant.[10]

B. REMOTENESS. — Legal relevancy is not, however, always co-extensive with logical relevancy in general, and not all facts which

Ala. 469; Magee *v.* Billingsley, 3 Ala. 679; Lewis *v.* Lee County, 73 Ala. 148 (evidence as to the use made by a defaulting county treasurer of the funds in his hands is irrelevant in an action on his official bond for failure to account for such money); Birmingham Nat. Bank *v.* Bradley, 108 Ala. 205, 19 So. 791 (in an action to recover the amount paid on alleged raised check, where the sole issue was the fraudulent alteration thereof, evidence that the plaintiff bank had gone out of business prior to the trial is irrelevant).

Arkansas. — Green *v.* State, 59 Ark. 246, 27 S. W. 5; State *v.* Roper, 8 Ark. 491; St. Louis, I. M. & S. R. Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170.

California. — Dyas *v.* Southern Pac. Co., 140 Cal. 296, 75 Pac. 972.

Colorado. — Hannan *v.* Anderson, 15 Colo. 433, 62 Pac. 961.

Georgia. — Claflin *v.* Briant, 58 Ga. 414; Lenney *v.* Finley, 118 Ga. 427, 45 S. E. 317.

Illinois. — Razor *v.* Razor, 149 Ill. 621, 36 N. E. 963; Doran *v.* Mullen, 78 Ill. 342.

Indiana. — Elwood Iron Wks. *v.* Stevens, 47 N. E. 237.

Iowa. — Adams *v.* Chicago, M. & St. P. R. Co., 93 Iowa 565, 61 N. W. 1059; Savery *v.* Spaulding, 8 Iowa, 239 (where, in an action of trespass, the material issue was the validity of an assignment alleged to have been in fraud of creditors, evidence as to the proper location of a cellar for storage of goods is irrelevant).

Kansas. — Neosho Valley Inv. Co. *v.* Hannum, 63 Kan. 621, 66 Pac. 631.

Kentucky. — Winlock *v.* Hardy, 4 Litt. 272; Nesbit *v.* Gregory, 7 J. J. Marsh. 270; Mason *v.* Bruner, 10 Ky. L. Rep. 155.

Maryland. — Maslin *v.* Thomas, 8 Gill 18.

Massachusetts. — Brooks *v.* Boston, 19 Pick. 174; Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60; Stanwood *v.* Comer, 118 Mass. 54.

Missouri. — Hartt *v.* McNeil, 47 Mo. 526; Gaskill *v.* Dodson Lead Co., 84 Mo. 521.

Nebraska. — Gross *v.* Bunn, 10 Neb. 217, 4 N. W. 1048; Arabian Horse Co. *v.* Bivens, 96 N. W. 621.

New Jersey. — Peterson *v.* Christianson, 68 N. J. L. 392, 56 Atl. 288.

New York. — National Trust Co. *v.* Roberts, 10 Jones & S. 100; Deutchmann *v.* Third Avenue R. Co., 87 App. Div. 503, 84 N. Y. Supp. 887; Allen *v.* James, 7 Daly 13.

Pennsylvania. — Express Pub. Co. *v.* Aldine Press, 126 Pa. St. 347, 17 Atl. 608; Harris *v.* Tyson, 24 Pa. St. 347; Foster *v.* Shaw, 7 Serg. & R. 156; Hays *v.* Pittsburgh & S. R. Co., 38 Pa. St. 81 (in an action on an original subscription to a corporation, evidence of the defendant's assignment of the stock is irrelevant).

Tennessee. — Heatherly *v.* Bridges, 1 Heisk. 220; Hudson *v.* State, 3 Coldw. 355.

Texas. — Leach *v.* Millard, 9 Tex. 551.

Utah. — Jensen *v.* McCormick, 26 Utah 142, 72 Pac. 630.

Vermont. — Lewis *v.* Barker, 55 Vt. 21.

Wisconsin. — Kavanaugh *v.* Wausau, 120 Wis. 611, 98 N. W. 550.

10. Facts and circumstances which, if established, are incapable of raising any reasonable presumption in reference to a material fact or question involved in the issues, are not relevant. State *v.* Campbell, 17 Ala. 566.

In a suit by a bank to recover the amount paid on an alleged raised check, evidence that the cashier of the bank which drew the check had defaulted is irrelevant. Birmingham Nat. Bk. *v.* Bradley, 108 Ala. 205, 19 So. 791.

A receipt for produce is not relevant as proof of any indebtedness on the part of the party who signed it. Abrams *v.* Taylor, 21 Ill. 102.

Evidence of the thickness of veins of coal in a mine nearly two miles

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;[11] and whenever the court, acting in the exercise of a sound discretion,[12] feels that a fact is not of

from the land involved, is irrelevant to prove the existence of coal on such land. Mier *v.* Phillips Fuel Co., 130 Iowa 570, 107 N. W. 621.

Evidence that the surveyor has admitted an entry or made a survey, or that a patent has issued in a certain name, is not relevant as proof of the existence of a person bearing such name. Finlay *v.* Humble, 2 A. K. Marsh. (Ky.) 569.

The fact of the obtaining of a notarial certificate of citizenship, such as is usually obtained by a person about to go to a foreign country is not evidence that the person who obtained it was about to leave the country. Foster *v.* Davis, 1 Litt. (Ky.) 71.

In an action on an oral building contract, in which the defendant sets up a different contract as to the kind of building to be built, it is not relevant for the plaintiff to show the impossibility of erecting a more substantial structure on the premises for the price sued for. Campau *v.* Moran, 31 Mich. 280.

The fact that the defendant's son was a shrewd man of business, is irrelevant on the point that he had not accepted from the defendant a transfer of a certain property in fraud of his father's creditors. Arnold *v.* Harris, 142 Mich. 275, 105 N. W. 744.

The opinion of an expert that it is possible to stop a train running at a certain speed, within a certain distance, is irrelevant where it has been shown that the train in question was running at a greater speed. Frost *v.* Wilwaukee & N. R. Co., 96 Mich. 470, 56 N. W. 19.

On an issue as to whether a person had heard a certain conversation while standing in a particular place, evidence as to whether he could have heard it at a more distant point is irrelevant. McLaughlin *v.* Webster, 141 N. Y. 26, 35 N. E. 1081.

Evidence which tends to prove a hypothetical state of facts as they might have existed is irrelevant. Hart *v.* Evans, 8 Pa. St. 13.

11. Wheeler *v.* Packer, 4 Conn. 102; Funk *v.* United States, 16 App. D. C. 478; Stinehouse *v.* State, 47 Ind. 17; Names *v.* Union Ins. Co., 104 Iowa 612, 74 N. W. 14; Baltimore Chemical Mfg. Co. *v.* Dobbin, 23 Md. 210; Hawkins *v.* James, 69 Miss. 274, 13 So. 813; Home Fire Ins. Co. *v.* Kuhlman, 58 Neb. 488, 78 N. W. 936.

"The trial to which the parties are entitled is not an endless one, nor one unreasonably protracted and exhausting. There may be a vast amount of evidence, relevant in a certain sense, but so unimportant when compared with an abundance of better evidence easily available as to be properly excluded . . . on the ground that, as a matter of fact, it has so slight or remote a bearing on the case that it would be unjust or unreasonable to prolong and complicate the trial by such an investigation as would be necessary for obtaining from it any useful information." Amoskeag Mfg. Co. *v.* Head, 59 N. H. 332.

Cole *v.* Boardman, 63 N. H. 580, 4 Atl. 572; Lamprey *v.* Donacour, 58 N. H. 376 (legal relevancy includes logical relevancy, but has a higher evidentiary force); Featherman *v.* Miller, 45 Pa. St. 96; Moore *v.* United States, 150 U. S. 57.

12. The court should consider whether more direct or convincing proof is already before the court or could be obtained by the exercise of reasonable diligence. Long *v.* Travellers' Ins. Co., 113 Iowa 259, 85 N. W. 24.

On the border line of relevancy, conflicting decisions are to be expected. Facts which may strongly affect the mind of one judge may not impress another in the slightest de-

sufficient probative force or value, because so remote as to time[13]

gree. Nickerson *v.* Gould, 82 Me. 512, 20 Atl. 86.

Competent evidence should not be rejected as irrelevant merely because it appears that the same ultimate fact can be shown in a more direct and simple manner. Miller *v.* Shay, 142 Mass. 598, 8 N. E. 419.

It is largely a question for the trial court to decide whether or not it will receive evidence which, although relevant, is remote. Sunter *v.* Sunter, 190 Mass. 449, 77 N. E. 497.

The mere fact that testimony relating to negligence referred to a time nine months previous to the accident, did not render its admission erroneous. Missouri K. & T. R. Co. *v.* Parrott (Tex. Civ. App.), 96 S. W. 950.

It was not error to receive evidence that plaintiff, who had testified that he never drank, was drunk several years before the assault which was the subject of the action. McQuiggan *v.* Ladd (Vt.), 64 Atl. 503.

13. *California.* — Dyas *v.* Southern Pac. Co., 140 Cal. 296, 73 Pac. 972; People *v.* Davidson, 83 Pac. 161 (where the right of a township to elect certain officers was dependent upon its population, evidence of a census taken several months after the election is too remote to be received).

Delaware. — White *v.* Wilmington City R. Co., 63 Atl. 931 (in an action for personal injuries received in a collision between a street car and a vehicle, testimony of the motorman and of a cab driver as to the existence, a year after the accident, of a custom of allowing funerals to pass without breaking through them, is too remote).

Illinois. — Larminie *v.* Carley, 114 Ill. 196, 29 N. E. 382; Trude *v.* Meyer, 82 Ill. 535; Eureka Coal Co. *v.* Braidwood, 72 Ill. 625.

Indiana. — Goodwin *v.* State, 96 Ind. 550.

Iowa. — Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69; Huggard *v.* Glucose Sugar R. Co., 109 N. W. 475 (witness will not be allowed to testify that he saw anyone enter a certain closet "on or before" the day upon which its condition is in issue); Jones *v.* Hopkins, 32 Iowa 503; Evans *v.* Elwood, 123 Iowa 92, 98 N. W. 584.

Kentucky. — Rudd *v.* Hanna, 4 Mon. 528 (where the fact at issue was the existence of consideration for a deed, evidence of a transaction after the execution of the deed is irrelevant as proof of consideration).

Massachusetts. — Miner *v.* Connecticut R. Co., 153 Mass. 398, 26 N. E. 994; Com. *v.* Pomeroy, 117 Mass. 143; White *v.* Graves, 107 Mass. 325 (where the issue is mental capacity of the grantor in a deed at the time of the execution, evidence of the condition of his mind a year later is irrelevant); Morrissey *v.* Ingham, 111 Mass. 63 (in an action for damages for having had sexual intercourse with plaintiff by force and communicating a venereal disease to her, evidence that several months prior to the alleged occurance the defendant had passed a night in a house of prostitution is too remote to be regarded as relevant); Zinn *v.* Rice, 161 Mass. 571, 37 N. E. 747.

Mississippi. — Jones *v.* State, 26 Miss. 247.

Missouri. — Grant *v.* Hathaway, 96 S. W. 417 (the price paid for mules eleven months prior to their alleged conversion is too remote to be received on an issue as to the amount of damages for such conversion); New Era Mfg. Co. *v.* O'Reilly, 197 Mo. 466, 95 S. W. 322 (evidence as to the results of a test of a dynamo made two and a half years after it had broken down is irrelevant to prove the capacity of the dynamo when first installed).

Nebraska. — Cutting *v.* Baker, 43 Neb. 470, 61 N. W. 726; Patrick *v.* State, 16 Neb. 330, 20 N. W. 121.

Nevada. — Ferraris *v.* Jyle, 19 Nev. 435, 14 Pac. 529.

New Hampshire. — Cote *v.* Grand Trunk R. Co., 70 N. H. 620, 49 Atl. 567.

New Jersey. — Johnson *v.* Mason, 70 N. J. L. 13, 56 Atl. 137.

or place,[14] or so uncertain[15] or conjectural in its nature[16] that it

New York. — Gibson *v.* American Mut. L. Ins. Co., 37 N. Y. 580; Maimone *v.* Dry Dock, E. B. & B. R. Co., 58 App. Div. 383, 68 N. Y. Supp. 1073; Liberty Wall Paper Co. *v.* Stoner Wall Paper Mfg. Co., 178 N. Y. 219, 70 N. E. 501 (an assignment of a contract, signed after the commencement of the action, is irrelevant as evidence that the plaintiff was the owner of the contract at the time the action was brought).

Pennslyvania. — Montgomery County *v.* Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407.

Vermont. — Harris *v.* Holmes, 30 Vt. 352.

Wisconsin. — Kavanaugh *v.* Wausau, 120 Wis. 611, 98 N. W. 550.

14. Evidence of other fires of incendiary origin, about the time of the fire in question, while relevant, is too remote in an action against a warehouseman for failure to deliver goods destroyed by fire. Jungclaus *v.* Great Northern R. Co., 99 Minn. 515, 108 N. W. 1118.

Where an overflow of a watercourse was partly caused by rainfall, evidence of the amount of rain which fell at the same time in a valley about eight miles away was too remote to be received, although relevant. Carhart *v.* State, 100 N. Y. Supp. 499.

15. *England.* — Underwood *v.* Wing, 4 De. G. M. & G. 633, 3 Eq. Rep. 794; 1 Jur. N. S. 159, 24 L. J. Ch. 293, 43 Eng. Reprint 655.

Alabama. — Watson *v.* Byers, 6 Ala. 393.

California. — People *v.* Tarbox, 115 Cal. 57, 46 Pac. 896.

Indiana. — Central Union Telephone Co. *v.* Swoveland, 14 Ind. App. 341, 42 N. E. 1035.

Maryland. — Gunther *v.* Bennett, 72 Md. 384, 19 Atl. 1048.

Massachusetts. — Phillips *v.* Middlesex Co., 127 Mass. 262.

Minnesota. — Lovejoy *v.* Howe, 55 Minn. 353, 57 N. W. 57; Thayer *v.* Barney, 12 Minn. 502.

New Hampshire. — State *v.* Flanders, 38 N. H. 324.

South Carolina. — Hopper *v.* Hopper, 61 S. C. 124, 39 S. E. 366.

Vermont. — Melvin *v.* Bullard, 35 Vt. 268.

Wisconsin. — Barney *v.* Douglass, 22 Wis. 464.

Non-Production of Better Evidence. — A party cannot complain that evidence offered by his adversary is uncertain, if he himself fails to furnish better and more definite evidence which it is within his power to do. Richmond *v.* Dubuque S. C. R. Co., 40 Iowa, 264.

To the same point, see Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608. But see Ashley *v.* Wilson, 61 Ga. 297, *holding* that evidence is not too uncertain to be relevant merely because other and additional evidence is required to make it certain. See Fulton *v.* MacCracken, 18 Md. 528, *holding* that testimony given by a witness in a hesitating and uncertain manner is not thereby rendered irrelevant.

16. *United States.* — United States *v.* Ross, 92 U. S. 281; Goodman *v.* Simonds, 20 How. 343.

California. — Muller *v.* Southern Pac. B. R. Co., 83 Cal. 240, 23 Pac. 265.

Connecticut. — Thompson *v.* Stewart, 3 Conn. 171 (where from the nature of the subject as to which he is testifying, the fact could not be within the knowledge of the witness, the fact that he swears positively to such fact, does not render his testimony relevant).

District of Columbia. — Second Natl. Bank *v.* Averell, 2 App. D. C. 470, 25 L. R. A. 761.

Illinois. — North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486, 29 N. E. 899, *affirming s. c.* 40 Ill. App. 331; Pioneer Fire-Proof Construction Co. *v.* Sandberg, 98 Ill. App. 36; Atchison, T. & S. F. R. Co. *v.* Alsdurf, 68 Ill. App. 149.

Maine. — Pike *v.* Crehore, 40 Me. 503.

Massachusetts. — Pond *v.* Pond, 132 Mass. 219; Tufts *v.* Charlestown, 4 Gray 537.

Michigan. — Van Deusen *v.* Cathcart, 43 Mich. 258, 5 N. W. 319.

Minnesota. —Briggs *v.* Minneapo-

can have little or no weight as tending to prove the disputed fact, it may be rejected, although strictly speaking it would be relevant testimony.

Evidence, however, cannot be said to be too remote as to time to be legally relevant where the existence, at that time, of the fact testified to raises a fair inference of its existence at the time involved in the inquiry.[17] Nor can it be said to be too conjectural merely because the witness has used conjectural phraseology in testifying.[18]

Greater liberality will be accorded in the admission of evidence affecting the probabilities of a hypothesis, where, if it be explainable, opportunity is left within the power of the opposing party to submit an explanation of it.[19]

3. Intrinsic Relevancy. — A. In General. — To render testimony relevant it is not necessary that proof of the mere existence or non-existence of the fact or circumstance testified to should absolutely and in itself prove the existence or non-existence of the main fact in issue,[20] for weight and sufficiency are not necessarily the

lis St. R. Co., 52 Minn. 36, 53 N. W. 1019.

Missouri. — Rutledge *v.* Missouri Pac. R. Co., 110 Mo. 312, 19 S. W. 38.

New Hampshire. — Smith *v.* New England Bank, 70 N. H. 187, 46 Atl. 230.

New York. — Newell *v.* Doty, 33 N. Y. 83; Elliott *v.* Gibbons, 31 N. Y. 67; Benedict *v.* Penfield, 42 Hun 176.

Pennsylvania. — Schuylkill River E. S. R. Co. *v.* Stocker, 128 Pa. St. 233, 18 Atl. 399; Hart *v.* Evans, 8 Pa. St. 13.

Texas. — Ragsdale *v.* Robinson, 48 Tex. 379; City of Dallas *v.* Kahn, 9 Tex. Civ. App. 19, 29 S. W. 98; Galveston, H. & S. A. R. Co. *v.* Duelm (Tex. Civ. App.), 23 S. W. 596.

17. Sturdevant's Appeal, 71 Conn. 392, 42 Atl. 70; Laplante *v.* Warren Cotton Mills, 165 Mass. 487, 43 N. E. 294; Dale *v.* Brooklyn City R. Co. 3 Thomp. & C. (N. Y.) 686; Bank of State *v.* Southern Natl. Bank, 170 N. Y. 1, 62 N. E. 677; McCulloch *v.* Dobson, 133 N. Y. 114, 30 N. E. 641, *affirming s. c.* 15 N. Y. Supp. 602; Mason *v.* Raplee, 66 Barb. (N. Y.) 180; Ware *v.* Shafer (Tex. Civ. App.), 27 S. W. 764.

Evidence of facts occurring either before or after the principal transaction, but which are directly related to the subject-matter of the controversy, are relevant. Horton *v.* Reynolds, 8 Tex. 284.

18. Louisville & N. R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35 (as that he "guessed"); People *v.* Soap, 127 Cal. 408, 59 Pac. 771, ("presume"); Chatfield *v.* Bunnell, 69 Conn. 511, 37 Atl. 1074, and Atlanta Consol. St. R. Co. *v.* Beauchamp, 93 Ga. 6, 19 S. E. 24, ("suppose").

In Fulton *v.* Maccracken, 18 Md. 528, a witness testified in a hesitating manner that he had "no doubt" mailed certain notices but could not say he precisely remembered the distinct fact.

If the expression used by the witness may, under the circumstances, fairly be regarded as indicating the exercise of judgment, his testimony should not be rejected as irrelevant because his manner of expressing himself was conjectural; as where he testifies to his "impressions." State *v.* Flanders, 30 N. H. 324; State *v.* Wilson, 9 Wash. 16, 36 Pac. 967.

19. Seller *v.* Jenkins, 97 Ind. 430, 438; Nickerson *v.* Gould, 82 Me. 512, 20 Atl. 86; State *v.* Witham, 72 Me. 531.

20. *United States.* — Deitsch *v.* Wiggins, 15 Wall. 539; United States *v.* Searcey, 26 Fed. 435;

test of relevancy of either oral testimony or documentary evidence.[21]

United States *v.* Flowery, 1 Spr. 109, 25 Fed. Cas. No. 15,122; Schuchardt *v.* Allens, 1 Wall. 359.

Alabama. — McNeill *v.* Reynolds, 9 Ala. 313; Sanders *v.* Stokes, 30 Ala. 432; Harold *v.* Floyd, 3 Ala. 16; Cuthbert *v.* Newell, 7 Ala. 457, and Laroque *v.* Russell, 7 Ala. 798 (all holding that evidence which is relevant to an issue in the case cannot be excluded because unless assisted by other evidence it will not establish the fact at issue).

Connecticut. — Belden *v.* Lamb, 17 Conn. 441; Bartlett *v.* Evarts, 8 Conn. 523.

Florida. — Robinson *v.* Hayer, 35 Fla. 544, 17 So. 745 (in an action for breach of a contract to save the purchaser of a cargo against any just reclamation thereon, plaintiff may testify that he paid a lump sum as reclamation, there being other testimony showing the reclamation to be proper and the amount correct).

Georgia. — Molyneux *v.* Collier, 13 Ga. 406 (the issue being the existence of an agreement to accept one-third of a debt in full settlement, evidence of a payment made by other persons prior to such agreement is relevant as showing the total amount due); Walker *v.* Mitchell, 41 Ga. 102; Columbus Omnibus Co. *v.* Semmes, 27 Ga. 283; Mosely *v.* Gordon, 16 Ga. 384.

Illinois. — Slack *v.* McLogan, 15 Ill. 242; Hulick *v.* Scovil, 9 Ill. 159; Willoughby *v.* Dewey, 54 Ill. 266.

Indiana. — Indianapolis, P. & C. R. Co. *v.* Anthony, 43 Ind. 183; Seller *v.* Jenkins, 97 Ind. 430, 438 ("by the term 'relevant' we do not mean that the evidence shall be addressed with positive directness to the disputed point, but we mean evidence which, according to the common course of events, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence of the other").

Iowa. — Hatcher *v.* Dunn, 102 Iowa 411, 71 N. W. 343; Hancock *v.* Wilson, 39 Iowa 47; Hollenbeck *v.* Stanberry, 38 Iowa 325; Farwell *v.* Tyler, 5 Iowa 535.

Kansas. — Musel *v.* Komarlk, 7 Kan. App. 789, 54 Pac. 19; Lyons *v.* Berlau, 67 Kan. 426, 73 Pac. 52.

Louisiana. — Brander *v.* Ferriday, 16 La. 296; Guidry *v.* Grivot, 2 Mart. (N. S.) 13; Deslonde *v.* Le Breret, 5 La. 96.

Maine. — State *v.* McAllister, 24 Me. 139.

Maryland. — Townshend *v.* Townshend, 6 Md. 295; Lowes *v.* Holbrook, 1 Harr. & J. 153.

Michigan. — Comstock *v.* Smith, 20 Mich. 338.

Minnesota. — Glassberg *v.* Olson, 89 Minn. 195, 94 N. W. 554.

Mississippi. — Williams *v.* Newberry, 32 Miss. 256.

Missouri. — Gardner *v.* Crenshaw, 27 S. W. 612; Platte Co. *v.* Marshall, 10 Mo. 345; Sugg *v.* Memphis P. Co. 40 Mo. 442; Winston *v.* Wales, 13 Mo. 569; Lane *v.* Kingsberry, 11 Mo. 402.

Mosby *v.* McKee Commission Co. 91 Mo. App. 500 (this is especially true in cases in which circumstantial evidence must necessarily be resorted to).

Nebraska. — Chamberlin *v.* Chamberlin Banking House, 93 N. W. 1021.

New Hampshire. — Tucker *v.* Peaslee, 36 N. H. 167.

New York. — People *v.* Gonzalez, 35 N. Y. 49; Fitton *v.* Brooklyn City R. Co., 5 N. Y. Supp. 641.

North Carolina. — Lockhart *v.* Bell, 86 N. C. 443.

Pennsylvania. — Garrigues *v.* Harris, 17 Pa. St. 344; Haughey *v.* Strickler, 2 Watts & S. 411; Com. *v.* Leeds, 11 Phila. 296, (*affirmed s. c.* in 83 Pa. St. 453); Tams *v.* Bullitt, 35 Pa. St. 308.

Texas. — Neil *v.* Keese, 5 Tex. 23, 51 Am. Dec. 746.

Vermont. — Wason *v.* Rowe, 16 Vt. 525.

Washington. — Tolmie *v.* Dean, 1 Wash. Ter. 46.

Wisconsin. — Nichols *v.* Brabazon, 94 Wis. 549, 69 N. W. 342; Block *v.* Milwaukee St. R. Co., 89 Wis. 371, 61 N. W. 1101.

21. *Alabama.* — Williams *v.* Haney, 3 Ala. 371; Jones *v.* Sterns, 28 Ala. 677; McCreary *v.* Turk, 29 Ala. 244; Sanders *v.* Stokes, 30 Ala. 432; Gib-

B. Connection With Other Testimony. — It suffices to render offered testimony admissible that it is relevant when taken in connection with evidence already introduced,[22] or that it may reasonably be expected to become relevant in connection with other testi-

son *v.* Hatchett, 24 Ala. 201 (any evidence, however slight, which tends to prove a material fact, is sufficiently relevant).

Illinois. — Hunter *v.* Harris, 29 Ill. App. 200, *s. c.* 131 Ill. 482, 23 N. E. 626.

Indiana. — Harbor *v.* Morgan, 4 Ind. 158.

Iowa. — Hoadley *v.* Hammond, 63 Iowa 599, 19 N. W. 794.

Kentucky. — Rucker *v.* Hamilton, 3 Dana 36.

Louisiana. — Lazare *v.* Peytavin, 9 Mart. (O. S.) 567.

Maryland. — Richardson *v.* Milburn, 17 Md. 67 (legal evidence which is pertinent to the issue is relevant, although weak and inconclusive in itself).

Massachusetts. — Kellogg *v.* Kimball, 122 Mass. 163; Com. *v.* O'Neil, 169 Mass. 394, 48 N. E. 134; Com. *v.* Williams, 171 Mass. 461, 50 N. E. 1035.

Missouri. — Winston *v.* Wales, 13 Mo. 569 (the court has no right to exclude testimony merely because insufficient in weight).

New Hampshire. — Eaton *v.* Wilton, 32 N. H. 352; Tucker *v.* Peaslee, 36 N. H. 167.

Pennsylvania. — Brown *v.* Clark, 14 Pa. St. 469 (evidence relevant to the issue, although insufficient in itself to prove the same, should be admitted, especially if it is illustrative of other important facts involved in the action).

Washington. — Tolmie *v.* Deane, 1 Wash. Ter. 46 (although evidence offered fails to attain the full measure of what is required to sustain the party's allegations, yet if it is a connecting link in the chain of facts necessary for him to prove, it should be admitted and left to the jury to pass upon its sufficiency); Brown *v.* Porter, 7 Wash. 327, 34 Pac. 1105 (it is not error to admit evidence which, although of slight significance in itself, is pertinent to the issue of the trial).

22. Johnson *v.* Calnan, 19 Colo. 168, 34 Pac. 905; Simmons *v.* Haas, 56 Md. 153; Suzett *v.* Buckels, 7 How. (Miss.) 663; Seymour *v.* Fellows, 77 N. Y. 178; Witherup *v.* Hill, 9 Serg. & R. (Pa.) 11; Missouri Pac. R. Co. *v.* Scott (Tex. Civ. App.), 26 S. W. 239; Wright *v.* Willis, 2 Allen (Mass.) 191.

Receipts for payments not involved in the action are relevant to show that the aggregate of all payments equals a certain sum, evidenced by a receipt in evidence, for a larger amount than that involved in the suit. Williams *v.* Fitzpatrick, 20 Ala. 791.

Where a witness to the identity of a lottery ticket testified that he wrote the number thereof on a paper which was no longer in his possession, and that without it he could not recall the number, but that on a former trial he had testified as to a ticket and had identified it with the aid of said memorandum, the testimony of another witness that the ticket was the same as that produced at such former trial, rendered the testimony of the first witness relevant. Barnum *v.* Barnum, 9 Conn. 242.

Testimony which is in itself not sufficiently full and complete to show its relevancy, may be rendered admissible by other evidence showing its connection. Mosely *v.* Gordon, 16 Ga. 384.

After the plaintiff in an action against a corporation for money due on account has testified that he paid out of his own funds a draft drawn upon him by the president of said corporation, for the purpose of paying its debts, such draft is relevant evidence in connection with such testimony. Peru Coal Co. *v.* Merrick, 79 Ill. 112.

Facts and circumstances which, standing alone, would be irrelevant, may, when taken together with other facts and circumstances appearing in evidence, be relevant as tending to fairly prove the averments of the

mony to be subsequently introduced,[23] for the relevancy of evidence may be established after its admission, and evidence intrinsically

declaration. Heffernan *v.* Bail, 109 Ill. App. 231.

Testimony, which although irrelevant in itself and legally insufficient to establish an issue, is one of many items of proof and is rebutting evidence, is deemed relevant and should go to the jury. Townshend *v.* Townshend, 6 Md. 295.

Where in an action by a copartnership for goods sold to the defendant, their books, kept by one partner, have been introduced, and that partner has testified that he made the entries and delivered the goods to another partner to be delivered to the defendant, the latter partner may testify that he did deliver the goods to the defendant. Harwood *v.* Mulry, 8 Gray (Mass.) 250.

In an action for enticing away a slave, when one witness has described the slave, it is relevant for another witness to testify to having seen a slave answering such description on the defendant's premises. Stanton *v.* Estey Mfg. Co., 90 Mich. 12, 51 N. W. 101.

Scott *v.* Coxe's Admr., 20 Ala. 294, holds that the fact of the plaintiff's having frequently been seen to purchase groceries from defendant, whose grocery store was the only one in town, did not warrant the presumption that plaintiff bought his entire supply from defendant so as to make relevant evidence of the amount of groceries necessary for plaintiff's family or actually used by them.

An expert's testimony as to the distance within which he could bring to a stop an engine running at a certain speed, on observing a signal to stop, is irrelevant when, although a witness testified that he signaled an engineer to stop, there was no evidence that the engineer saw or heard the signal. Adams *v.* Chicago, M. & St. P. R. Co., 93 Iowa 565, 61 N. W. 1059.

23. *United States.* — United States *v.* Flowery, 1 Spr. 109, 25 Fed. Cas. No. 15,122.

Alabama. — Aycock *v.* Johnson, 119 Ala. 405, 24 So. 543; Tuggle *v.* Barclay, 6 Ala. 407; Crenshaw *v.* Davenport, 6 Ala. 390.

Arkansas. — Tucker *v.* West, 29 Ark. 386.

Georgia. — Mosely *v.* Gordon, 16 Ga. 384; Morgan *v.* Jones, 24 Ga. 155.

Kansas. — Ballou *v.* Humphrey, 8 Kan. 219.

Massachusetts. — Com. *v.* Williams, 171 Mass. 461, 50 N. E. 1035.

Michigan. — Passmore *v.* Passmore, 50 Mich. 626, 16 N. W. 170.

Missouri. — DeArman *v.* Taggart, 65 Mo. App. 82.

Pennsylvania. — Trego *v.* Lewis, 58 Pa. St. 463.

Texas. — Texas Tram & Lumb. Co. *v.* Gwin (Tex. Civ. App.), 52 S. W. 110.

A power of attorney to "sell lots unsold" is not admissible unless proof be made that the lot in controversy was "unsold" when the power was executed. Gardiner *v.* Schmaelzle, 47 Cal. 588.

A witness in an action for damages for the wrongful expulsion of a passenger from a train may testify as to what he heard at the time, leaving it for other witnesses to identify the persons who made the statements testified to. Indianapolis, P. & C. R. Co. *v.* Anthony, 43 Ind. 183.

Where there is a controversy as to the exact location of the land in question in an action of trespass, a deed to plaintiff of half of the land is relevant if followed by proof that the grantors had power to execute such deed. Lowes *v.* Holbrook, 1 Har. & J. (Md.) 153.

"Evidence which is colorless, taken by itself, which establishes neither a constituent nor a fact pointing by inference to a constituent of a crime, may be made significant by other evidence, and so may be made admissible. It need not be self-justifying without regard to the other circumstances proved." Com. *v.* O'Neil, 169 Mass. 394, 48 N. E. 134.

The court should not exclude depositions offered for the purpose of showing the unsoundness of a horse on the ground that they do not suffi-

irrelevant when admitted may be made relevant by evidence subsequently introduced.[24]

C. Promise To Connect. — Thus it lies within the discretion of the court[25] to admit testimony of apparent irrelevancy upon the statement of counsel that it constitutes a portion of a chain of evidence relevant as a whole, and the promise that it will be followed by other testimony in connection with which its relevancy will be apparent.[26] But unless such promise is made, the testimony should not be received,[27] and if not so followed, it must be stricken out and disregarded; the general rule being that evidence of this character must be preceded or followed by other evidence together with which it forms a chain of testimony relevant as a whole.[28]

ciently identify the horse, when the identity may be proved by other evidence. Wason *v.* Rowe, 16 Vt. 525.

24. United States *v.* Flowery, 1 Spr. 109, 25 Fed. Cas. No. 15,122; Crenshaw *v.* Davenport, 6 Ala. 390; Abney *v.* Kingsland, 10 Ala. 355; Moffit *v.* Aetna Axle etc. Co., 41 Conn. 27; Van Buren *v.* Wells, 19 Wend. (N. Y.) 203; Yeatman *v.* Hart, 6 Humph. (Tenn.) 375; Harris *v.* Holmes, 30 Vt. 352.

25. *Alabama.* — Abney *v.* Kingsland, 10 Ala. 355.

Connecticut. — Clark *v.* Beach, 6 Conn. 142; Moppin *v.* Aetna Axle etc. Co., 41 Conn. 27.

Kentucky. — Winlock *v.* Hardy, 4 Litt. 272; Harris *v.* Paynes, 5 Litt. 105.

Maryland. — Davis *v.* Calvert, 5 Gill & J. 269.

Massachusetts. — Com. *v.* Dam, 107 Mass. 210.

Mississippi. — Lake *v.* Munford, 4 Smed. & M. 312.

New York. — People *v.* Genung, 11 Wend. 18.

Pennsylvania. — Weidler *v.* Farmers' Bank, 11 Serg. & R. 134.

Vermont. — Harris *v.* Holmes, 30 Vt. 352.

Virginia. — Rowt *v.* Kile, 1 Leigh 216.

26. Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276; Hall *v.* Durham, 109 Ind. 434, 9 N. E. 926, 10 N. E. 581; Watson Coal & Min. Co. *v.* James, 72 Iowa 184, 33 N. W. 622; Express Pub. Co. *v.* Aldine Press, 126 Pa. St. 347, 17 Atl. 608.

Facts which, did they stand alone, would be irrelevant, may be admitted upon the statement of counsel that they constitute a portion of a chain of evidence which, as a whole, will be relevant to the issue. United States *v.* Flowery, 1 Spr. 109, 25 Fed. Cas. No. 15,122.

"This question of relevancy is always more or less intimately connected with every trial, and its improper reception frequently supports the main argument for reversal. The court should reach some positive convictions regarding the relevancy of proposed evidence, before admitting it; but where the admissibility of evidence depends upon several facts, to some extent independent of each other, and where each fact must be proved to complete the chain of evidence, the exercise of a sound judicial discretion does not require the court, uniformly, to interfere in the order of the testimony. A beginning must be made somewhere; and when the court is satisfied that the counsel is acting in good faith and intends fairly to supply each particular link till the chain of testimony is perfect, the evidence, as offered, may come in, subject to objection, to be stricken out and go for nothing if the necessary connecting portion be not supplied." Rex *v.* Fursey, 6 Car. & P. 81, 25 E. C. L. 293.

27. Pollock *v.* Talcott, 30 Pa. Super. Ct. 622.

28. *Alabama.* — Watson *v.* Byen, 6 Ala. 393 (an admission that part of the account sued on is correct, is irrelevant unless accompanied by proof of what particular portion was meant); Bell *v.* Pharr, 7 Ala. 807

(evidence that certain receipts were written by certain persons for the defendant is irrelevant in the absence of evidence that such persons were his agents at the time the receipts were signed); Carlisle *v.* Davis, 9 Ala. 858; Memphis & C. R. Co. *v.* Maples, 63 Ala. 607; Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276 (whether the defendant company in an action for damages for personal injuries offered the plaintiff a position after the accident, is irrelevant unless followed by evidence as to the terms of the offer); Raisin Fertilizer Co. *v.* J. J. Barrow, Jr. Co., 97 Ala. 694, 12 So. 388.

Arkansas. — Phelan *v.* Dalson, 14 Ark. 79.

California. — Gardiner *v.* Schmaelzle, 47 Cal. 588 (a power of attorney to "sell lots unsold" is irrelevant unless accompanied by proof that the lot in controversy in the action was unsold at the time the power was executed); Ellen *v.* Lewison, 88 Cal. 253, 26 Pac. 109.

Connecticut. — Bristol *v.* Warner, 19 Conn. 7.

Georgia. — Mosely *v.* Gordon, 16 Ga. 384; Morgan *v.* Jones, 24 Ga. 155 (letters of administration granted to a husband upon the estate of his deceased wife are not relevant in support of his title to her property unless there is proof of some title greater than a life estate in the wife); Dodson *v.* McCauley, 62 Ga. 130.

Illinois. — Doran *v.* Mullen, 78 Ill. 342; Williams *v.* Case, 79 Ill. 356; Montgomery *v.* Brush, 121 Ill. 513, 13 N. E. 230; Razor *v.* Razor, 149 Ill. 621, 36 N. E. 963 (a letter written to a wife, defendant in a suit for divorce, found in her possession and containing a proposal to meet her for adulterous purposes, is irrelevant in the absence of extrinsic evidence that it was an answer to a letter written by her, or that she acquiesced in the proposal contained in it).

Indiana. — McGill *v.* Kennedy, 11 Ind. 20; Indianapolis, P. & C. Co. *v.* Anthony, 43 Ind. 183; Robinson *v.* State, 60 Ind. 26; Burnett *v.* Overton, 67 Ind. 557; Hall *v.* Durham, 109 Ind. 434, 9 N. E. 926, 10 N. E. 581.

Iowa. — Watson Coal & Min. Co. *v.* James, 72 Iowa 184, 33 N. W. 622; Sutherland *v.* Standard Life & Acc. Ins. Co., 87 Iowa 505, 54 N. W. 453.

Kentucky. — Louisville, etc. R. Co. *v.* Marriott, 5 Ky. L. Rep. 932 (evidence as to the distance within which a witness had seen trains stop is irrelevant unless there is testimony as to the rate of speed of such trains); Henderson Belt R. Co. *v.* Stopp, 14 Ky. L. Rep. 111.

Louisiana. — Guerin *v.* Bagneries, 13 La. 14.

Maine. — Bennett *v.* Treat, 28 Me. 212; Pike *v.* Crehore, 40 Me. 503; Rumrill *v.* Adams, 57 Me. 565 (in an action for services rendered to defendant's testator, the value of a devise by the latter to the plaintiff is irrelevant unless accompanied by proof that it was made and accepted in payment of plaintiff's claim for the services sued on).

Massachusetts. — Brooke *v.* Boston, 19 Pick. (Mass.) 174; Higgins *v.* McCabe, 126 Mass. 13; Murphy *v.* Stanley, 136 Mass. 133 (evidence of a notification intended to be given to a party is irrelevant unless it be shown that he received it); Borden *v.* Boardman, 157 Mass. 410, 32 N. E. 469.

Michigan. — Kimball *v.* Kimball, 16 Mich. 211; Hill *v.* Chambers, 30 Mich. 432; Griffin *v.* Fulton Iron & Eng. Wks., 42 Mich. 571, 4 N. W. 297; White *v.* Ross, 47 Mich. 172, 10 N. W. 188; Simpson *v.* Waldby, 63 Mich. 439, 30 N. W. 199; Julius King Optical Co. *v.* Treat, 72 Mich. 599, 40 N. W. 912; Stoinski *v.* Pulte, 77 Mich. 322, 43 N. W. 979 (where the plaintiff in ejectment has produced in support of his title merely an executory contract of sale and has not shown any title in his vendor, evidence as to the size of the lot in question is irrelevant).

Minnesota. — Farnham *v.* Thompson, 32 Minn. 22, 18 N. W. 833 (evidence that during the time of the embezzlement an alleged embezzling employe was living in an extravagant manner is irrelevant, unless it be also shown that he had not sufficient income so to live); Ryan *v.* Ryan, 58 Minn. 91, 59 N. W. 974.

Missouri. — Mattingly *v.* Hayden, 1 Mo. 439 (in ejectment, proof of title in a decedent's legal representa-

4. Partial Relevancy. — It may be that certain evidence would be relevant upon the theory of the case advanced by one party, but irrelevant upon the theory of the adverse party. In such a case evidence upon each theory may be received, to be considered by the court, or by the jury under the proper instructions.[29] So testimony is not to be regarded as irrelevant because it tends to support only a portion of the case of the party offering it.[30]

II. BURDEN OF PROOF.

An apparent and reasonable connection must be made to appear between the evidentiary fact and the principal fact which the evidence in question is claimed to tend to prove,[31] and where this is

tives is irrelevant unless it be shown that plaintiff is one of such legal representatives).

Nevada. — Ferraris *v.* Kyle, 19 Nev. 435, 14 Pac. 529.

New York. — Whiting *v.* Otis, 1 Bosw. 420; Delafield *v.* DeGrauw, 9 Bosw. 1; Benkard *v.* Babcock, 2 Robt. 175; Wing *v.* Rochester, 9 N. Y. St. 473 (in an action for damages caused by depositing sewerage in a stream flowing through the plaintiff's premises, evidence that excrement from cholera patients would not become disinfected prior to reaching plaintiff's premises is irrelevant in the absence of any evidence that there was cholera in the city); Eldridge *v.* Atlas S. S. Co., 58 Hun 96, 11 N. Y. Supp. 468; Bacon *v.* Hanna, 63 Hun 625, 17 N. Y. Supp. 430; Ehrehart *v.* Wood, 71 Hun 609, 25 N. Y. Supp. 31; Silverman *v.* Simons, 14 Misc. 222, 35 N. Y. Supp. 668.

North Carolina. — Lockhart *v.* Bell, 86 N. C. 443.

Ohio. — Sun Mut. Ins. Co. *v.* Hock, 8 Ohio C. C. 341; Hutchinson *v.* Canal Bank, 3 Ohio St. 490.

Pennsylvania. — Reed *v.* Dickey, 1 Watts 152; Miltenberger *v.* Schlegel, 7 Pa. St. 241; Wingate *v.* Mechanics' Bank, 10 Pa. St. 104; Tripner *v.* Abrahams, 47 Pa. St. 220; Marsh *v.* Nordyke & Marmon Co., 15 Atl. 875; Express Pub. Co. *v.* Aldine Press, 126 Pa. St. 347, 17 Atl. 608.

Tennessee. — Heatherly *v.* Bridges, 1 Heisk. 220.

Texas. — Compton *v.* Young, 26 Tex. 644; Missouri Pac. R. Co. *v.* Lamothe, 76 Tex. 219, 13 S. W. 194; D. M. Osborne & Co. *v.* Ayers (Tex. Civ. App.), 32 S. W. 73.

West Virginia. — Hubbard *v.* Kelley, 8 W. Va. 46.

Wisconsin. — Barney *v.* Douglass, 22 Wis. 464.

29. Lyons *v.* Berlau, 67 Kan. 426, 73 Pac. 52.

That the testimony of the plaintiff is relevant only as to his own theory of the case does not render it inadmissible, for he has the right to have the case go before the jury upon his theory if there is any evidence to support it. Wilcox *v.* Young, 66 Mich. 687, 33 N. W. 765.

Where the parties have different theories as to the terms of the oral agreement sued on, the testimony of other witnesses in support of either theory is relevant. Bewick *v.* Butterfield, 60 Mich. 203, 26 N. W. 881.

The admission of certain evidence was held proper on the ground that it was relevant upon the *quantum meruit* theory advanced by one party, although it was irrelevant under the other party's theory of agency. Radel *v.* Lesher, 137 Fed. 719, 70 C. C. A. 411.

30. That testimony tends to support only one part of plaintiff's case does not render it irrelevant. Gardner *v.* Crenshaw, 122 Mo. 79, 27 S. W. 612.

Evidence irrelevant to the avowed purpose for which it is offered is not admissible, although it might be relevant on some other theory. Leach *v.* Millard, 9 Tex. 551.

31. Durkee *v.* India Mut. Ins. Co., 159 Mass. 514, 34 N. E. 1133; Baird *v.* Gillett, 47 N. Y. 186; Thompson

not apparent, the burden of showing the relevancy of the evidence offered, either intrinsically or in connection with other evidence, is upon the party offering it.[32]

III. DOUBTFUL RELEVANCY.

In some instances an inference pertinent to the issue might be made from certain testimony by some men, while in the minds of others no such inference would arise. In such cases, where the relevancy of the testimony is doubtful, if the case is being tried before a jury, the doubt should be resolved in favor of the admission of the testimony in question;[33] and where the question as to whether certain evidence is relevant depends upon the proof of another fact, the proper course is to submit the evidence of both facts to the jury.[34]

IV. PRELIMINARY TESTIMONY.

Facts, not otherwise relevant, but proof of the existence of which is a necessary preliminary to maintaining the relevancy of other

v. Bowie, 4 Wall. (U. S.) 463; United States *v.* Ross, 92 U. S. 281; Xenia Bank *v.* Stewart, 114 U. S. 224.

Agreement of entries in abstract book of measurer of mechanical work with those in a bill of particulars is irrelevant where the figures in the latter have been transferred to the former and not *vice versa*. Green *v.* Caulk, 16 Md. 556.

In an action for setting fire to the plaintiff's factory by sparks from a locomotive, evidence that the witness was a passenger on the same train the following day and noticed a car-load of cotton seed hulls burning at a station, is irrelevant in the absence of proof that the fire was started by sparks from the engine. Johnson *v.* Atlantic Coast Line R. Co., 140 N. C. 574, 53 S. E. 362.

32. *Alabama.* — Crenshaw *v.* Davenport, 6 Ala. 390 (*holding* that whenever testimony is offered which is seemingly irrelevant to the issues, it is the duty of the party offering it to show how it can be made relevant by connecting it with other facts, either already in evidence or intended to be offered); Tuggle *v.* Barclay, 66 Ala. 407; Beddow *v.* Bagley, 39 So. 773.

Connecticut. — Bristol *v.* Warner, 19 Conn. 17.

Illinois. — Williams *v.* Case, 79 Ill. 356.

Indiana. — Hall *v.* Durham, 109 Ind. 434, 9 N. E. 926, 10 N. E. 581; Waterbury *v.* Miller, 13 Ind. App. 197, 41 N. E. 383.

Iowa. — Gibson *v.* Burlington, C. R. & N. R. Co., 107 Iowa 596, 78 N. W. 190.

New York. — Chapin *v.* Hollister, 7 Lans. 456; Ehrehart *v.* Wood, 71 Hun 609, 25 N. Y. Supp. 31.

Ohio. — Hutchinson *v.* Canal Bank, 3 Ohio St. 490.

Pennsylvania. — Marsh *v.* Nordyke, etc. Co., 15 Atl. 875; Tripner *v.* Abrahams, 47 Pa. St. 220.

Texas. — Compton *v.* Young, 26 Tex. 644; Osborne *v.* Ayers (Tex. Civ. App.), 32 S. W. 73.

West Virginia. — Hubbard *v.* Kelley, 8 W. Va. 46.

33. When the testimony is such that the jury may or may not make from it an inference pertinent to the issue, it should generally be admitted in evidence. Walker *v.* Roberts, 20 Ga. 15.

No evidence should be excluded from the jury unless it is clearly irrelevant. Shannon *v.* Kinny, 1 A. K. Marsh. (Ky.) 3.

34. Day *v.* Sharp, 4 Whart. (Pa.) 339, 34 Am. Dec. 509.

evidence, will ordinarily be received as part of the proof of such evidence, and as merely introductory and by way of inducement.[35]

Well-known examples of this rule are the admissibility, as relevant preliminary proof, of facts tending to show the identity of a cause of action,[36] upon a plea in abatement or of *res judicata*

35. Hunt *v.* Sevyney (Cal.), 33 Pac. 854; Bates *v.* Ball, 72 Ill. 108; Cook *v.* Woodruff, 97 Ind. 134; Hitchcock *v.* Burgett, 38 Mich. 507; Garrigues *v.* Harris, 17 Pa. St. 344; Sullivan *v.* Myers, 28 W. Va. 375; Booth *v.* Upshur, 26 Tex. 64.

A plaintiff suing as administrator to recover bonds alleged to belong to the decedent's estate and which had never been in plaintiff's possession, may testify that he learned of their existence from others and by his own notion of the decedent's wealth, for although relating to acts of the plaintiff and third persons, it was relevant as introductory evidence and by way of inducement. David *v.* David, 66 Ala. 139.

An otherwise irrelevant conversation may be admitted as introductory to showing that certain notes were to be signed jointly. Griel *v.* Loma, 86 Ala. 132, 5 So. 325.

Testimony which, in connection with other testimony, tends to illustrate the issue or to aid in determining the truth, should not be rejected as irrelevant, although it does not appear to be relevant when standing alone. Walker *v.* Mitchell, 41 Ga. 102.

The issue being the acknowledgment of a debt by the maker of notes so as to remove the bar of limitations, a witness who has received a letter from such maker referring to notes and containing money to be applied thereon, may testify that he was the agent for the lender and had such notes in his possession, and that they were the only notes held by him and that he applied said remittance thereon. First Nat. Bank *v.* Woodman, 93 Iowa 668, 62 N. W. 28.

Evidence of the condition of property sold at a time subsequent to that when representations as to its condition were made by the vendor is relevant for the purpose of showing that the condition at the time said representations were made could not have been as represented. Mason *v.* Raflee, 66 Barb. (N. Y.) 180.

A void decree is relevant as tending to show that a subsequently executed deed was intended to cure the defect. Stinson *v.* Porter, 12 Or. 444, 8 Pac. 454.

In *scire facias* on a judgment on a bond executed by the defendant's testator, evidence that such bond was discovered among the decedent's papers in the presence of the plaintiff is relevant as tending to show the acts and declarations of plaintiff when the bond was discovered. Porter *v.* Nelson, 121 Pa. St. 628, 15 Atl. 852.

A fact is admissible, although its existence would not prove the whole issue, but would merely constitute part of the foundation for other testimony relevant to the issue. Neil *v.* Keese, 5 Tex. 23, 51 Am. Dec. 746.

In an action against the lessee's assignee, for rent, wherein the defendant claims that he assigned his interest and surrendered possession to another party prior to the accrual of the rent sued for, it is relevant for the defendant to testify as to what he did with the lease as preliminary to proof of the assignment claimed. Tibbals *v.* Iffland, 10 Wash. 451, 39 Pac. 102.

The record of the conviction of the payee of a sealed note for the forgery thereof is not relevant in a civil action on the note in a foreign court for the purpose of laying a foundation for introducing a transcript of the testimony of subscribing witnesses, deceased at the time of the civil trial. Harger *v.* Thomas, 44 Pa. St. 128.

36. Harris *v.* Miner, 28 Ill. 135; Dupuis *v.* Interior Constr. Co., 88 Mich. 103, 50 N. W. 103; Walker *v.* Wilmington, C. & A. R. Co., 26 S. C. 80, 1 S. E. 366.

A plaintiff in replevin for a slave who claims under a deed of trust may introduce in evidence the bills

or the accuracy of a set of books,[37] or of a picture,[38] or to render a witness' testimony more certain by establishing a date, or the time when a transaction testified to by him took place,[39] or by the

of sale under which the defendant claims title, for the purpose of identifying the slave. Yarborough *v.* Arnold, 20 Ark. 592.

It was error to reject proof of the hire of a negro where the same might have thrown light upon the character of the transaction by showing that the original debt sued on had not been paid by the hire. Greer *v.* Caldwell, 14 Ga. 207.

37. Hunt *v.* Swyney (Cal.), 33 Pac. 854; Schuchman *v.* Winterbottom, 9 N. Y. Supp. 733, 31 N. Y. St. 184, *affirmed* 130 N. Y. 699, 30 N. E. 63; Thommon *v.* Kalbach, 12 Serg. & R. (Pa.) 238; Beckwith *v.* Thompson, 63 Fed. 232, 11 C. C. A. 149.

Testimony showing the manner in which books were kept and of their correctness is relevant. West Coast Lumb. Co. *v.* Newkirk, 80 Cal. 275, 22 Pac. 231.

Where the record book of entries of prices made by a board of trade was offered in evidence to prove the selling price of wheat in the market, it was proper to receive testimony, in connection therewith, that such book was used and relied on by the board of trade and dealers generally, to settle differences on 'change. Campbell *v.* Wright, 8 N. Y. St. 471.

38. It is relevant for a witness to testify that a photograph introduced in evidence is a correct representation of the place where the accident involved in the action occurred. Miller *v.* Louisville, N. A. & C. R. Co., 128 Ind. 97, 27 N. E. 339.

39. Stewart *v.* Anderson, 111 Iowa 329, 82 N. W. 770; Rollins *v.* Bartlett, 21 Me. 565; Artcher *v.* McDuffie, 5 Barb. (N. Y.) 147; Town of Cavendish *v.* Troy, 41 Vt. 99; Goodnow *v.* Parsons, 36 Vt. 46; Perry *v.* Graham, 18 Ala. 822; Braswell *v.* Gay, 75 N. C. 515.

A witness having testified that a certain occurrence took place on the Sunday before a certain trial, it is relevant to show the date of such trial in order to fix the date of the occurrence testified to. Quintard *v.* Corcoran, 50 Conn. 34.

Evidence of the schedule time for the arrival of trains at a certain point is relevant as tending to show the customary time thereof, and to prove the time of arrival during a specified time, without proof that such trains did in fact arrive as per schedule during such period. State *v.* Gadbois, 89 Iowa 25, 56 N. W. 272.

Where a witness has testified as to the happening of an event during a particular period, and the time of the same is material, he may strengthen his testimony by showing that it happened before, after or at the same time as a particular transaction, event, or epoch, and the date thereof can then be proved with greater certainty. Goodhand *v.* Benton, 6 Gil. & J. (Md.) 481.

A witness may fix the date of an accident to a horse about which he is testifying, by testifying that on the evening of the same day some person told him that plaintiff's horse had been injured that day. McDonald *v.* Inhabitants of Savoy, 110 Mass. 49.

When the date of an act or circumstance is in dispute, it may be fixed by the contemporaneous, prior, or subsequent occurrence of other well known or distinctly remembered acts. Ritter *v.* Springfield First Nat. Bank, 30 Mo. App. 652.

Where a witness has testified that an event in issue occurred at the same time as the execution of a certain murderer, the depositions of the clerk of the court in which such murderer had been convicted, and of an editor of a newspaper as to the date of such execution, were relevant. Levels *v.* St. Louis & H. R. Co., 196 Mo. 606, 94 S. W. 275.

Evidence that a bank failed to issue certain of its notes until two years after their date is relevant to prove when they were received by a debtor of the bank. Selfridge *v.* Northampton Bank, 8 Watts & S. (Pa.) 320.

On an issue as to the date of a receipt, evidence that the party received money at the time he claims

statement of facts referred to in an agreement already in evidence.[40]

V. EXPLANATORY TESTIMONY.

Testimony is usually relevant which in itself would be irrelevant but which by explaining, throwing light on, or unfolding a circumstance or situation, aids in establishing the relevancy of other evidence offered or given by the party seeking to introduce such explanatory evidence;[41] and the same is true of explanatory evidence,

the receipt to be dated, is relevant. Armstrong *v.* Burrows, 6 Watts (Pa.) 266.

A will dated two years prior to a deed is relevant to show the nature of the issue and the relation of the parties in an action, the issue of which was whether said deed was delivered prior to the grantor's death. Shuman *v.* Shuman, 27 Pa. St. 90.

A letter from the president of a railroad company speaking of the road as "now located" is no evidence that at the date of the letter the road was not completed. Chambers County *v.* Clews, 88 U. S. 317.

Evidence that country postmasters often mailed letters in person at a certain city is irrelevant as proof of the date of mailing of a particular letter. Miller *v.* Boykin, 70 Ala. 469.

The issue being whether a post dated check was received by the bank after business hours, the cashier's testimony that if the check had been presented during business hours it would not have been received as a deposit is irrelevant. Second Nat. Bank *v.* Averell, 2 App. D. C. 470.

40. Hughes *v.* Gross, 166 Mass. 61, 43 N. E. 1031; Krech *v.* Pacific R. Co., 64 Mo. 172; Marshall *v.* Baltimore & O. R. Co., 57 Ill. 314.

41. *United States.* — Marshall *v.* Baltimore & O. R. Co., 16 How. 314.

Alabama. — Casey *v.* Holmes, 10 Ala. 776; Smiley *v.* Hooper, 41 So. 660; Holman *v.* Clark, 41 So. 765.

Connecticut. — Barnum *v.* Barnum, 9 Conn. 242.

Georgia. — Brown *v.* Matthews, 79 Ga. 1, 4 S. E. 13.

Illinois. — Overtoom *v.* Chicago & E. I. R. Co., 181 Ill. 323, 54 N. E. 898; Peru Coal Co. *v.* Merrick, 79 Ill. 112; Thomas Knapp Print. & B. Co. *v.* Guthrie, 64 Ill. App. 523.

Indiana. — Buckeye Mfg. Co. *v.* Woolley Foundry & Mach. Wks., 26 Ind. 7, 58 N. E. 1069.

Iowa. — Graves *v.* Merchants' & B. Ins. Co., 82 Iowa 637, 49 N. W. 65.

Kansas. — Collier *v.* Blake, 14 Kan. 250; Schuster, Tootle & Co. *v.* Stout & Wingert, 30 Kan. 529, 2 Pac. 642.

Maryland. — Keedy *v.* Newcomer, 1 Md. 241.

Massachusetts. — Ford *v.* Terrell, 9 Gray 401.

Michigan. — Davis *v.* Teachout, 126 Mich. 135, 85 N. W. 475; Duplanty *v.* Stokes, 103 Mich. 630, 61 N. W. 1015; Canadian Bank of Com. *v.* Coumbe, 47 Mich. 358, 11 N. W. 196.

New Hampshire. — Whitcher *v.* Boston & M. R. Co., 70 N. H. 242, 46 Atl. 740; Dodge *v.* Carroll, 59 N. H. 237 (to show motive).

New Jersey. — Trenton Pass. R. Co. *v.* Cooper, 60 N. J. L. 219, 37 Atl. 730.

New York. — Tracy *v.* McManus, 58 N. Y. 257 (to show motive).

Pennsylvania. — Allen *v.* Willard, 57 Pa. St. 374; Holler *v.* Weiner, 15 Pa. St. 242; Brown *v.* Clark, 14 Pa. St. 469.

South Carolina. — Merchants' & Planters' Nat. Bank *v.* Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750.

Texas. — Jennings *v.* State, 42 Tex. Crim. 78, 57 S. W. 642; Missouri Pac. R. Co. *v.* Gernon, 84 Tex. 141, 19 S. W. 461; International & G. N. R. Co. *v.* True, 23 Tex. Civ. App. 523, 57 S. W. 977; Stone *v.* Moore (Tex. Civ. App.), 48 S. W. 1097; Warren *v.* Wallis, 42 Tex. 472 (*holding* it not relevant for one witness to explain the evidence given by another, and which has been read at the trial).

Vermont. — Smith's Admr. *v.* Smith, 78 Vt. 33, 61 Atl. 558.

the object of which is to diminish the force of evidence introduced by the adverse party, by explaining away its seemingly adverse character.[42]

Virginia. — Parsons *v.* Harper, 16 Gratt. 64 (to show motive).

West Virginia. — Sullivan *v.* Myers, 28 W. Va. 375.

Existence of Indictment. — David *v.* David, 66 Ala. 139.

Evidence not otherwise relevant, but at the same time not inconsistent with the record, may be admitted to explain and give point and direction to it. Young *v.* Fuller, 29 Ala. 464.

Evidence was admitted that payment of salvage was made under protest and only in order to get possession of the goods. Weaver *v.* Alabama Coal Mfg. Co., 35 Ala. 176.

Evidence of subsequent conduct, *e. g.*, payment of taxes by alleged grantor, is relevant on an issue as to whether a deed purporting to have been executed by him was in fact a forgery. Haight *v.* Vallet, 89 Cal. 245, 26 Pac. 897.

A Trust Deed Introduced To Explain an Ancient Adverse Claim, the grounds of which the witness failed to recall. Head *v.* Selleck, 76 Conn. 706, 57 Atl. 281.

A conversation otherwise objectionable as hearsay may be relevant as an explanatory fact. Atlanta St. R. Co. *v.* Walker, 93 Ga. 462, 21 S. E. 48.

Where the defendant in a damage suit for personal injuries claims that the plaintiff was intoxicated and proves that he had a bottle of whiskey, half empty, with him at the time of the accident, and the plaintiff has testified that he had not drunk any of the liquor, it is relevant for him to show, in explanation, what disposition had been made of the whiskey taken from the bottle. Atlantic Coast Line R. Co. *v.* Taylor, 125 Ga. 454, 54 S. E. 622.

The genuineness of a note being in issue, the defendant may introduce evidence of facts excluding the possibility or probability of its execution at the time and place specified on its face. Hunter *v.* Harris, 131 Ill. 482, 23 N. E. 626.

Where evidence material to the issue is sought to be introduced, other evidence incidental thereto, and which is necessary in order to properly explain such material evidence, is relevant. Hayward *v.* Scott, 114 Ill. App. 531.

Evidence Abstractly Inadmissible for irrelevancy may be received when it tends to explain pertinent facts. State *v.* Lyon, 10 Iowa 340.

Explanation of Words Used in a Conversation. — Martin *v.* Algona, 40 Iowa 390.

To Show Accuracy of a Thermometer. — Hatcher *v.* Dunn (Iowa), 66 N. W. 905.

To Explain Meaning of Letter. Divers *v.* Fulton, 8 Gill & J. (Md.) 202.

To Throw Light on Conduct of Party. — Hughes *v.* Gross, 166 Mass. 61, 43 N. E. 1031.

The issue being the granting of a license contrary to the agreement involved in the suit, to use certain patented devices on "drop-feed" sewing machines, it is relevant for a witness to testify as to when, if ever, he first heard the term "drop-feed" applied to a certain make of machines. Florence Sew. Mach. Co. *v.* Grover & Baker Sew. Mach. Co., 110 Mass. 70.

Where the defendant in an action upon a draft claims it was a forgery, it may be shown that about the time of its date its maker was seeking to borrow money. Stevenson *v.* Stewart, 11 Pa. St. 307.

Admitting Books of Firm To Show Nature of Interest Therein Admitted by Defendant. — Thommon *v.* Kalbach, 12 Serg. & R. (Pa.) 238.

To Prove Existence of Indictment. Tibbals *v.* Iffland, 10 Wash. 451, 39 Pac. 102.

42. *United States.* — Burley *v.* German-American Bank, 111 U. S. 216; United States *v.* Lumsden, 1 Bond 5, 26 Fed. Cas. No. 15,641; Crane & Co. *v.* Fry, 126 Fed. 278, 61 C. C. A. 260; Marshall *v.* Baltimore & O. R. Co., 16 How. 314 (letter referred to in agreement held relevant for purpose of explaining

VI. SUPPLEMENTARY TESTIMONY.

In order to establish or illustrate his case to the best advantage, a party should be allowed, so far as consistent with the general rules of evidence and the speedy and orderly dispatch of judicial business, to enhance the weight of his own, or to minimize that of the adverse party's evidence, hence it is held that facts are relevant which tend to render probable the contention of the party producing them,[43] as by showing his good faith, where that is material,[44] or by explaining facts which might be suggestive of bad faith if not explained.[45] And conversely, evidence, the probative effect of which

the agreement); Southern Pac. Co. *v.* Rauh, 49 Fed. 696, 1 C. C. A. 416 (evidence that the plaintiff in a damage suit had several children, all of tender years, held relevant as explaining why the members of his family were not called to testify as to his condition).

Alabama. — Edgar *v.* McArn, 22 Ala. 796; Curtis *v.* Parker, 136 Ala. 217, 33 So. 935.

California. — People *v.* Philbon, 138 Cal. 530, 71 Pac. 650; Herd *v.* Tuohy, 133 Cal. 55, 65 Pac. 139; People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; People *v.* Hogdon, 55 Cal. 72; Muller *v.* Hale, 138 Cal. 163, 71 Pac. 81.

Iowa. — State *v.* Perigo, 45 N. W. 399.

Kentucky. — Grimes *v.* Talbot, 1 A. K. Marsh. 205.

Missouri. — Blair *v.* Marks, 27 Mo. 579; Baker *v.* Pulitzer Pub. Co., 103 Mo. App. 54, 77 S. W. 585; Hill Bros. *v.* Seneca Bank, 100 Mo. App. 230, 73 S. W. 307.

New York. — Woodrick *v.* Woodrick, 141 N. Y. 457, 36 N. E. 395; Lewy *v.* Blumenthal, 83 App. Div. 8, 82 N. Y. Supp. 344.

South Dakota. — Reynolds *v.* Hinrichs, 16 S. D. 602, 94 N. W. 694; Aldous *v.* Olverson, 17 S. D. 190, 95 N. W. 917.

Tennessee. — Morton *v.* State, 91 Tenn. 437, 19 S. W. 225.

Texas. — Missouri, K. & T. R. Co. *v.* Criswell, 34 Tex. Civ. App. 278, 78 S. W. 388; Pecos & N. T. R. Co. *v.* Williams, 34 Tex. Civ. App. 100, 78 S. W. 5.

Vermont. — Holbrook *v.* Murray, 20 Vt. 525.

43. Schwerin *v.* DeGraff, 21 Minn. 354; Chamberlain *v.* Chamberlain Banking House (Neb.), 93 N. W. 1021; Kavanaugh *v.* Wausau, 120 Wis. 611, 98 N. W. 550.

44. Schuster, Tootle & Co. *v.* Stout & Wingert, 30 Kan. 529, 2 Pac. 642; Divers *v.* Fulton, 8 Gill & J. (Md.) 202; Smitson *v.* Southern Pacific Co., 37 Or. 74, 60 Pac. 907; Durgin *v.* Danville, 47 Vt. 95; Cross *v.* Willard, 46 Vt. 73; Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389 (a conversation embodying the statement of a claim held prior to presenting such claim to the defendant); Southern Pac. Co. *v.* Rauh, 49 Fed. 696, 1 C. C. A. 416.

45. Reasons for Failing To Call Certain Witnesses. — Testimony is relevant that the wife of a plaintiff in a damage suit, who could have substantiated his testimony as to his physical condition, was too ill to attend the trial. Richmond & D. R. Co. *v.* Garner, 91 Ga. 27, 16 S. E. 110.

Evidence That a Material Witness Was Out of the State. — Penobscot Boom Corp. *v.* Brown, 16 Me. 237.

Reason Assigned Must Be Such as Would Be an Excuse if True. Learned *v.* Hall, 133 Mass. 417, and Hanson *v.* Carlton, 6 Allen (Mass.) 276.

Evidence is relevant that the defendant, in an action for damages for an assault, knew the whereabouts of a witness whose presence in a room adjoining that in which the assault had been alleged by plaintiff to have been committed, had been shown by defendant, such evidence being relevant for the purpose of overcoming the inference which defendant sought to draw from plain-

is to show that the adverse party's contention is probably unsound because not maintained in good faith, is held to be relevant.[46] Thus evidence of the failure of the adverse party to call a witness who has knowledge of important facts,[47] or of his concealing or destroy-

tiff's failure to produce such witness. Hart *v.* Walker, 100 Mich. 406, 59 N. W. 174.

Evidence That a Material Witness Was in the Penitentiary. — Pease *v.* Smith, 61 N. Y. 477.

Evidence That a Material Witness Was Insane. — Stafford *v.* Morning Journal Assn., 68 Hun 461, 22 N. Y. Supp. 1008.

Evidence of a Fruitless Search for a Witness. — McGuire *v.* Broadway & S. A. R. Co., 62 Hun 623, 16 N. Y. Supp. 922.

Evidence on Part of Plaintiff That Two Absent Eye-Witnesses Were Employes of Defendant and Had Been Duly Subpoenaed by Plaintiff. Weatherford M. W. R. Co. *v.* Duncan, 88 Tex. 611, 32 S. W. 878; Southern Pac. Co. *v.* Rauh, 49 Fed. 696, 1 C. C. A. 416.

Reason for Failure To Produce Certain Books. — Reason for the destruction of books before the trial. Gage *v.* Chesebro, 49 Wis. 486, 5 N. W. 881.

46. Evidence Is Relevant of Adverse Party's Failure To Advance a Claim Under Proper Circumstances. Rutherford *v.* McIvor, 21 Ala. 750; Noble *v.* White, 103 Iowa 352, 72 N. W. 556.

Evidence That Adverse Party Has Attempted To Influence or Bribe Witness. — Egan *v.* Bowker, 5 Allen (Mass.) 449.

Evidence of Other Party's Failure To Present a Claim. — Webster *v.* Sibley, 72 Mich. 630, 40 N. W. 772.

Evidence of Bribery by Adverse Party. — Taylor *v.* Gilman, 60 N. H. 506; Flanigan *v.* Guggenheim Smelt. Co., 63 N. J. L. 647, 44 Atl. 762.

Fact That Adverse Party Refused To Allow Reasonable Examination To Be Made. — McCarthy *v.* Gallagher, 4 Misc. 188, 23 N. Y. Supp. 884, *affirming s. c.* 23 N. Y. Supp. 313.

Adverse Party's Failure To Take Depositions. — Judevine *v.* Weaks, 57 Vt. 278.

Fact That Adverse Party Failed To Advance His Claim at the Proper Time. — Strong *v.* Slicer, 35 Vt. 40.

It is proper to present to the jury evidence of the adverse party's wealth and resources, in order to enable them to judge whether or not he has been able to produce all the evidence in his favor. Daub *v.* Northern Pac. R. Co., 18 Fed. 625.

Evidence offered by the defendant that the plaintiff's attorney had informed him upon serving the summons that if no defense were interposed, there would be no costs, held relevant. Johnson *v.* Carley, 53 How. Pr. (N. Y.) 326.

47. *England.* — Attorney-General *v.* Queen's Free Chapel, 24 Beav. 679, 53 Eng. Reprint 520.

Canada. — Lowell *v.* Todd, 15 U. C. C. P. 306; Attorney-General *v.* Halliday, 26 U. C. Q. B. 397.

Arkansas. — Miller *v.* Jones, 32 Ark. 337.

Connecticut. — Merwin *v.* Ward, 15 Conn. 377.

Indiana. — Thompson *v.* Thompson, 9 Ind. 323.

Massachusetts. — McDonough *v.* O'Niel, 113 Mass. 92.

Michigan. — Wallace *v.* Harris, 32 Mich. 380; Cole *v.* Lake Shore & M. S. R. Co., 81 Mich. 156, 45 N. W. 983; Cooley *v.* Foltz, 85 Mich. 47, 48 N. W. 176; Cole *v.* Lake Shore & M. S. R. Co., 95 Mich. 77, 54 N. W. 638.

New Jersey. — Jones *v.* Knauss, 31 N. J. Eq. 609.

New York. — Bleecher *v.* Johnston, 69 N. Y. 309; People *v.* Horey, 92 N. Y. 554.

Pennsylvania. — Frick *v.* Barbour, 64 Pa. St. 120; Brown *v.* Schock, 77 Pa. St. 471.

South Carolina. — Danner *v.* South Carolina R. Co., 4 Rich. L. 329, 55 Am. Dec. 678.

Vermont. — Durgin *v.* Danville, 47 Vt. 95.

ing evidence,[48] or of his attempts to fabricate it,[49] or to prevent a proper investigation of the matter in controversy, is relevant.[50] And in criminal prosecutions, evidence that the defendant had concealed or disguised himself or had escaped or attempted to do so, is relevant, not only to rebut the presumption of innocence, but as affirmative evidence tending to show his guilt.[51]

Evidence tending to show the weight that should be accorded to certain testimony on the part of either plaintiff or defendant,[52] or to throw light on the question of the credibility of witnesses,[53] is generally held to be relevant.

48. *England.* — Attorney-General *v.* Queen's Free Chapel, 24 Beav. 679, 53 Eng. Reprint 520.

Canada. — Briggs *v.* McBride, 17 N. B. 663; Hunter *v.* Lauder, 8 U. C. L. J. N. S. 17.

United States. — Clifton *v.* United States, 4 How. 242.

Alabama. — Phoenix Ins. Co. *v.* Moog, 78 Ala. 284.

Illinois. — Lyons *v.* Lawrence, 12 Ill. App. 531; Chicago City R. Co. *v.* McMahon, 103 Ill. 485.

Indiana. — Thompson *v.* Thompson, 9 Ind. 323.

Kentucky. — Moon *v.* Storg, 8 Dana 226; Benjamin *v.* Ellinger, 80 Ky. 472.

Louisiana. — Crescent City Ice Co. *v.* Ermann, 36 La. Ann. 841.

Missouri. — State *v.* Chamberlain, 89 Mo. 129, 1 S. W. 145.

New Jersey. — Jones *v.* Knauss, 31 N. J. Eq. 609; Van Ness *v.* Van Ness, 32 N. J. Eq. 669.

Wisconsin. — Dimond *v.* Henderson, 47 Wis. 172, 2 N. W. 73.

49. *United States.* — The Steam Propeller Tillie, 7 Ben. 382.

Canada. — Briggs *v.* McBride, 17 N. B. 663; Hunter *v.* Lauder, 8 U. C. L. J. N. S. 17.

Alabama. — Phoenix Ins. Co. *v.* Moog, 78 Ala. 284.

Georgia. — Savannah, F. & W. R. Co. *v.* Gray, 77 Ga. 440, 3 S. E. 158.

Illinois. — Winchell *v.* Edwards, 57 Ill. 41.

Kentucky. — Benjamin *v.* Ellinger, 80 Ky. 472.

Louisiana. — Crescent City Ice Co. *v.* Ermann, 36 La. Ann. 841.

Massachusetts. — Com. *v.* Webster, 5 Cush. 316.

Missouri. — State *v.* Chamberlain, 89 Mo. 129, 1 S. W. 145.

New Hampshire. — State *v.* Knapp, 45 N. H. 148.

50. Chicago City R. Co. *v.* McMahon, 103 Ill. 485; Donohue *v.* People, 56 N. Y. 208; Cruikshank *v.* Gordon, 118 N. Y. 178, 23 N. E. 457; Moriarty *v.* London, C. & D. R. Co., L. R. 5 Q. B. 314; Hastings *v.* Stetson, 130 Mass. 76; Baily *v.* Shaw, 24 N. H. 297.

51. *Illinois.* — Lyons *v.* Lawrence, 12 Ill. App. 531.

Kentucky. — Baker *v.* Com., 13 Ky. L. Rep., 17 S. W. 625.

Massachusetts. — Com. *v.* Tolliver, 119 Mass. 312.

Missouri. — State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

New Hampshire. — State *v.* Palmer, 65 N. H. 216, 20 Atl. 6.

New York. — Ryan *v.* People, 79 N. Y. 593.

North Carolina. — State *v.* Whitson, 111 N. C. 695, 16 S. E. 332.

Pennsylvania. — Com. *v.* McMahon, 145 Pa. St. 413, 22 Atl. 971.

Wisconsin. — Ryan *v.* State, 83 Wis. 486, 53 N. W. 836.

The mere fact that the defendant left the country after the crime was committed is irrelevant unless it also be shown that he did so to avoid arrest. State *v.* Marshall, 115 Mo. 383, 22 S. W. 452.

It is not relevant to show that the defendant had an opportunity to escape and refused to do so. People *v.* Rathbun, 21 Wend. (N. Y.) 509.

52. Glassberg *v.* Olson, 89 Minn. 195, 94 N. W. 554; Campbell *v.* Wright, 8 N. Y. St. 471.

53. As Impeached by Contradiction. — Fordsville Bkg. Co. *v.* Thompson, 23 Ky. L. Rep. 1276, 65 S. W. 6; Glassberg *v.* Olson, 89 Minn. 195, 94 N. W. 554; Reagan *v.*

Generally, and especially where the testimony is conflicting and the case in doubt, evidence of all the circumstances surrounding the particular transaction in dispute, and of the relations of the parties will be regarded as relevant to the extent that it will aid the jury in determining the reasonableness or unreasonableness of the respective claims of the parties,[54] and the court may, if it sees fit, receive aid from any evidence which, while not relevant to the issue, is corroborative of other testimony and serves to throw light upon the controversy.[55]

VII. NEGATIVE TESTIMONY.

To render testimony relevant it is not necessary that it affirmatively show the existence or non-existence of a fact or circumstance;[56] for instance, if the circumstances are such that it would properly be inferred that if an alleged fact had existed it would have been seen or heard by the witness or that he would have known of it;[57] the witness' testimony that he did not see[58] nor hear it,[59]

Manchester St. R., 72 N. H. 298, 56 Atl. 314; Evansich *v.* Gulf, C. & S. F. R. Co., 61 Tex. 24.

As Affected by Their Bias. Yarbrough *v.* State, 105 Ala. 43, 16 So. 758; Scott *v.* United States, 172 U. S. 343.

54. *United States.* — Insurance Co. *v.* Weide, 11 Wall. 438; J. S. Tappan Co. *v.* M'Laughlin, 120 Fed. 705.

Colorado. — Dexter *v.* Collins, 21 Colo. 455, 42 Pac. 664.

Illinois. — Stolph *v.* Blair, 68 Ill. 541.

Kansas. — Holman *v.* Raynesford, 3 Kan. App. 676, 44 Pac. 910.

Missouri. — Mosby *v.* McKee Commission Co., 91 Mo. App. 500.

Nebraska. — Chamberlain *v.* Chamberlain Banking House, 93 N. W. 1021.

New York. — Dodge *v.* Weill, 158 N. Y. 346, 53 N. E. 33; Barney *v.* Fuller, 133 N. Y. 605, 30 N. E. 1007.

Pennsylvania. — Mertz *v.* Detweiler, 8 Watts & S. 376; Van Sciver Co. *v.* McPherson, 199 Pa. St. 331, 49 Atl. 73.

55. Cook *v.* Malone, 128 Ala. 662, 29 So. 653; Mosby *v.* McKee Commission Co., 91 Mo. App. 500; Blaisdell *v.* Davis, 72 Vt. 295, 48 Atl. 14; Houghton *v.* Clough, 30 Vt. 312.

56. Shannon *v.* Castner, 21 Pa. Super. Ct. 294.

57. East Tennessee, V. & G. R. Co. *v.* Carloss, 77 Ala. 443; Lawson *v.* Hicks, 38 Ala. 279; Blakely *v.* Blakely, 33 Ala. 611; Thomas *v.* Degraffenreid, 17 Ala. 602; Chambers *v.* Hill, 34 Mich. 523; Dawson *v.* State (Tex. Crim.), 41 S. W. 599. But see Pelly *v.* Denison & S. R. Co. (Tex. Civ. App.), 78 S. W. 542.

58. Testimony is relevant that the witness was looking in a certain direction to see whatever could be seen and did not see a light which another witness swore was there. Whittaker *v.* New York & H. R. Co., 19 Jones & S. (N. Y.) 287; Gulf, C. & S. F. R. Co. *v.* Gross (Tex. Civ. App.), 21 S. W. 186.

59. *Alabama.* — Ward *v.* Reynolds, 32 Ala. 384.

Georgia. — Beall *v.* Beall, 10 Ga. 342.

Illinois. — West Chicago St. R. Co. *v.* Kennelly, 170 Ill. 508, 48 N. E. 996.

Indiana. — City of Indianapolis *v.* Emmelman, 108 Ind. 530, 9 N. E. 155; Persons *v.* McKibben, 5 Ind. 261.

New Hampshire. — Stone *v.* Boston & M. R. Co., 72 N. H. 206, 55 Atl. 359.

New York. — Greany *v.* Long Island R. Co., 101 N. Y. 419, 5 N. E. 425; Ratcliffe *v.* Gray, 4 Abb. Dec. 4.

North Carolina. — Edwards *v.* Atlantic Coast Line R. Co., 129 N. C.

or that he had no knowledge of the existence of it, is relevant.[60] And where, if a fact existed, a memorandum, entry or record of it would naturally have been made in a certain place or manner, it has been held relevant to show that no such memorandum,[61] entry,[62]

78, 39 S. E. 730; Newlizer *v.* Jackson, 52 N. C. 351.

Texas. — Wallace *v.* Byers, 14 Tex. Civ. App. 574, 38 S. W. 228.

Utah. — Haun *v.* Rio Grande W. R. Co., 22 Utah 346, 62 Pac. 908.

Testimony that had a train passed witness would have heard it, and that he heard none, is relevant. East Tennessee, V. & G. R. Co. *v.* Carloss, 77 Ala. 443.

A witness experienced in the construction and management of locomotives may testify that he had never heard of an accident to a person from sparks emitted from the smokestack of an engine. Higgins *v.* Cherokee R. Co., 73 Ga. 149.

Non-execution of note or mortgage may tend to show that an alleged sale was not made. King *v.* Godfrey, 48 Iowa 703.

Ignorance of Existence of Drain. Hannefin *v.* Blake, 102 Mass. 297.

Non-denial of liability may be relevant, it being shown that the plaintiff and defendant had many conversations in regard to the plaintiff's claim. Proctor *v.* Old Colony R. Co., 154 Mass. 251, 28 N. E. 13.

Testimony is admissible that the plaintiff in a damage suit had never complained of injuries. Bonelle *v.* Pennsylvania R. Co., 51 Hun 640, 4 N. Y. Supp. 127.

Evidence that the witness was present at the time a declaration was alleged to have been made and did not hear any such declaration, is relevant. Lyon *v.* Marclay, 1 Watts (Pa.) 271.

It is not relevant to prove that the witness had been intimate with a certain person for fifteen years and "had never been told such a thing by him," in order to rebut proof of a certain declaration. Lawson *v.* Hicks, 38 Ala. 279.

Witnesses who have testified that they heard no signals given by a train at a crossing cannot testify that later in the day they discussed the absence of signals among themselves. Sanborn *v.* Detroit, B. C. & A. R. Co., 99 Mich. 1, 57 N. W. 1047.

Testimony that the witness never heard such a conversation as had been testified to by other witnesses, in a neighbor's family, is irrelevant. Chambers *v.* Hill, 34 Mich. 523.

60. When the situation of a witness was such that if a certain fact had existed he would in all probability have known it, the fact that he had no knowledge of it is relevant, although slight evidence of its non-existence. Thomas *v.* Degraffenreid, 17 Ala. 602; Blakely *v.* Blakely, 33 Ala. 611, and Nelson *v.* Iverson, 24 Ala. 9.

Absence of knowledge of a particular fact may be relevant. Alabama G. S. R. Co. *v.* Davis, 119 Ala. 572, 24 So. 862.

It is relevant for a witness well acquainted in the community where he resides to testify that a certain person does not reside therein. Dawson *v.* State, 38 Tex. Crim. 50, 41 S. W. 599.

It is not relevant for a witness to testify as to whether or not a certain person has money, that not being a fact open to observation. Kellen *v.* Lide, 65 Ala. 505.

61. Indorsement of Assignment on a Deed. — Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; Woodward *v.* Leavitt, 107 Mass. 453.

62. *United States.* — Polk *v.* Wendell, 5 Wheat. 293; American Surety Co. *v.* Pauly, 72 Fed. 470, 18 C. C. A. 644.

California. — People *v.* Dole, 122 Cal. 486, 55 Pac. 581.

Georgia. — Griffin *v.* Wise, 115 Ga. 610, 41 S. E. 1003.

Kansas. — Woods *v.* Hamilton, 39 Kan. 69, 17 Pac. 335.

Maryland. — Mudd *v.* Turton, 4 Gill 233.

South Dakota. — Union School-Furniture Co. *v.* Mason, 3 S. D. 147, 52 N. W. 671.

Texas. — McCamant *v.* Roberts, 80 Tex. 316, 15 S. W. 580, 1054; Greer

or record thereof exists in the place where it should have been made.[63]

The rules as to the relevancy of such negative testimony are conflicting, however, and it has been held that books of account are never relevant to establish a negative proposition,[64] and in any event, the relevancy of such testimony depends entirely upon the inference arising from disinterestedness and regularity, that if the fact had existed, such entry would have been made in the particular place in question,[65] except as to such instruments as the law requires to be placed of record in order that they shall be effective.

v. Richardson Drug Co., 1 Tex. Civ. App. 634, 20 S. W. 1127.

In Santa Rosa City R. Co. *v.* Central St. R. Co. (Cal.), 38 Pac. 986, the testimony of the city clerk that the city records contained no entry of an order for the publication of an ordinance was admitted.

Lack of Entry in Ledger. — Ford *v.* Cunningham, 87 Cal. 209, 25 Pac. 403.

It may be shown that an account book which contained a record of interest paid on the notes, made by the person who kept it, had no record of interest, having been paid out on the note sued on. Peck *v.* Pierce, 63 Conn. 310, 28 Atl. 524.

63. People *v.* Kemp, 76 Mich. 410, 43 N. W. 439; Doolittle *v.* Gavigan, 74 Mich. 11, 41 N. W. 846 (cash-book).

Postmaster's testimony that the records of his office do not show the delivery of a certain registered letter, is relevant. Knapp *v.* Day, 4 Colo. App. 21, 34 Pac. 1008.

Assessment Rolls of County. Marbourg *v.* McCormick, 23 Kan. 38.

On an issue as to a person's insolvency, evidence that the county records show no property in his name is relevant. Bristol County Sav. Bank *v.* Keavy, 128 Mass. 298.

The fact that the records of conveyances do not show that a party ever had title to land is relevant as tending to show that he did not own it. Gaston *v.* Merriam, 33 Minn. 271, 22 N. W. 614.

Absence of Record of Bond on Probate Records. — Babcock *v.* Cobb, 11 Minn. 347.

Books of Highway Commissioners, Showing No Entry of Taxes Paid By Certain Persons. — Pembroke *v.* Allenstown, 41 N. H. 365; Struthers *v.* Reese, 4 Pa. St. 129.

That Records Do Not Contain Copy of Certain Deed. — Reed *v.* Field, 15 Vt. 672; Polk *v.* Wendell, 5 Wheat. (U. S.) 293.

64. *Illinois.* — Schwarze *v.* Roessler, 40 Ill. App. 474.

Iowa. — Hyde *v.* Lookabill, 66 Iowa 453, 23 N. W. 920; Shaffer *v.* McCrackin, 90 Iowa 578, 58 N. W. 910.

Kentucky. — Lawshorn *v.* Carter, 11 Bush 7.

Massachusetts. — Morse *v.* Potter, 4 Gray 292; Burghardt *v.* Van Deusen, 4 Allen 374.

Wisconsin. — Winner *v.* Bauman, 28 Wis. 563; Second Ward Sav. Bank *v.* Shakman, 30 Wis. 333.

65. *United States.* — United States *v.* Gardner, 2 Hayw. & H. 89, 25 Fed. Cas. No. 15,186*a*.

Connecticut. — Summer *v.* Child, 2 Conn. 607.

Florida. — Parker *v.* Cleveland, 37 Fla. 39, 19 So. 344.

Illinois. — Cross *v.* Pinckneyville Mill Co., 17 Ill. 54.

Kentucky. — Estill *v.* Patrick, 4 T. B. Mon. 306.

Maryland. — Corner *v.* Pendleton, 8 Md. 337.

New York. — Roe *v.* Nichols, 5 App. Div. 472, 38 N. Y. Supp. 1100; Wilson *v.* Pope, 37 Barb. 321; Boor *v.* Moschell, 55 Hun 604, 8 N. Y. Supp. 583.

An insurance company's books are not relevant to prove that an oral contract of insurance was not entered into. Sanborn *v.* Firemen's Ins. Co., 16 Gray (Mass.) 448.

The non-entry of the receipt of goods on the buyer's books is irrelevant as to the delivery thereof.

VIII. COLLATERAL MATTERS.

1. Generally. — As a general rule evidence as to matters which are collateral and not directly in issue,[66] and which are not shown to be related to or conected with the transaction or matter at issue between the parties,[67] or evidence of wholly independent trans-

Keim *v.* Rush, 5 Watts & S. (Pa.) 377.

In an action for goods sold, plaintiff's books are not relevant to rebut defendant's testimony that he had paid for the same. Scott *v.* Bailey, 73 Vt. 49, 50 Atl. 557.

66. *Alabama.* — Bunzel *v.* Maas, 116 Ala. 68, 22 So. 568.

Colorado. — Denver & R. G. R. Co. *v.* Glasscott, 4 Colo. 270.

Maine. — Nickerson *v.* Gould, 82 Me. 512, 20 Atl. 86.

Massachusetts. — Lincoln *v.* Taunton Copper Mfg. Co., 9 Allen 181; Lewis *v.* Smith, 107 Mass. 334; Hawks *v.* Charlewant, 110 Mass. 110; Cutter *v.* Howe, 122 Mass. 541; Peverly *v.* Boston, 136 Mass. 366.

Nebraska. — Blomgren *v.* Anderson, 48 Neb. 240, 67 N. W. 187.

New Hampshire. — Wentworth *v.* Smith, 44 N. H. 419; Amoskeag Mfg. Co. *v.* Head, 59 N. H. 232.

New York. — Jackson *v.* Smith, 7 Cow. 717; Durhow *v.* McDonald, 5 Bosw. 130; Hill *v.* Syracuse R. Co., 63 N. Y. 101.

Ohio. — Findlay Brew. Co. *v.* Bauer, 50 Ohio St. 560, 35 N. E. 55.

Evidence as to rates between other points or on other railroads is irrelevant on an issue as to the reasonableness of the rates between two specified points. Anniston Mfg. Co. *v.* Southern R. Co. (Ala.), 40 So. 965.

Evidence Should Be Confined To Issues Made in Pleadings of Parties. Gould *v.* Stafford, 77 Cal. 66, 18 Pac. 879.

Testimony which does not fit the case or the issues as proved is irrelevant. Davey *v.* Southern Pac. Co., 116 Cal. 325, 48 Pac. 117.

Where both parties claim title under a common grantor, a deed to such grantor from a prior owner is irrelevant, the source of the common grantor's title not being material. Corker *v.* Stafford, 125 Ga. 428, 54 S. E. 92.

Where the injury sued for was temporary and the plaintiff claimed damages up to the commencement of the action only, evidence as to the condition of the property at the time of the trial is irrelevant. Baltimore Belt R. Co. *v.* Sattler, 102 Md. 595, 62 Atl. 1125, 64 Atl. 507.

Evidence of the plaintiff's susceptibility to undue influence generally is irrelevant upon an issue as to her mental capacity to maintain the suit at bar. Simmons *v.* Kelsey (Neb.), 107 N. W. 122.

In an action for damage to horses while being transported, evidence of their cost to the shipper is irrelevant, the market value at the point of destination being the measure of damages. Texas & Pac. R. Co. *v.* Dishman (Tex. Civ. App.), 91 S. W. 828.

The issue being the existence of a certain disease at the time of application for insurance, evidence of the cause of such disease is irrelevant. Taylor *v.* Modern Woodmen of America, 42 Wash. 304, 84 Pac. 867.

67. On an issue as to whether the defendant had acted as attorney for the plaintiff in a suit against a corporation, and whether the plaintiff had endorsed a check to him in payment of his services, testimony that a third person who claimed that he himself had performed such services, had been a stockholder in said corporation and sold his stock before the settlement of said litigation, is irrelevant. Brown *v.* Prude, 97 Ala. 639, 11 So. 838.

The testimony of a witness for the defendant as to where she went and what she did when the plaintiff attempted to keep her away from the trial is irrelevant. Harrison *v.* Harrison, 124 Iowa 525, 100 N. W. 344.

Evidence that an association of life

actions,[68] as of transactions between parties other than those connected with the particular transaction at issue,[69] are not relevant

insurance companies existed for the exchange of information concerning applicants for insurance is irrelevant for the purpose of showing knowledge by a particular company of matters claimed to have been misrepresented by an applicant, in the absence of proof that such company was a member of such association. Provident Sav. Life Assur. Soc. *v.* Whayne's Admr., 29 Ky. L. Rep. 160, 93 S. W. 1049.

In an issue as to testamentary capacity, evidence as to the finding of a jury in a proceeding between different parties and involving another will, is irrelevant. Packham *v.* Glendmeyer, 103 Md. 416, 63 Atl. 1048.

The issue being diminution in market value, evidence of depreciation in mortgage value is irrelevant. Peirson *v.* Boston El. R. Co., 191 Mass. 223, 77 N. E. 769.

In an action for damage to skins in dressing them, evidence of the effect of soda is irrelevant in the absence of evidence that soda had been used. Friedman *v.* Bindseil, 49 Misc. 639, 97 N. Y. Supp. 995.

Evidence that the witness saw a fire along the road, in a car of cotton, is irrelevant upon the issue as to whether a fire had been started in another place the previous day by sparks from defendant's locomotive. Johnson *v.* Atlantic Coast Line R. Co., 140 N. C. 581, 53 S. E. 362.

In an action for fraud and conspiracy, whereby the defendants had deprived the plaintiff of his interest in a mine, evidence of a letter written by one of the defendants to the plaintiff while they were jointly interested in another mine, and tending to show that both had used fraudulent devices to boom such mine, is irrelevant. Murray *v.* Moore, 104 Va. 707, 52 S. E. 381.

68. In an action for attorney's fees, evidence of the charge of a particular attorney in other cases is irrelevant. Fuller *v.* Stevens (Ala.), 39 So. 623.

In an action against a vendor upon a contract for the sale of land, evidence of an independent promise by the vendor, made without consideration, to advance money to the purchaser to enable him to comply with the conditions of the contract, is irrelevant. Wallace *v.* Maples, 79 Cal. 433, 21 Pac. 860.

In an action for damages for death of the defendant by negligence, evidence that upon a former trial the defendant relied upon a different defense is irrelevant. Harris *v.* Central R., 78 Ga. 525, 3 S. E. 355.

On an issue as to fraud and undue influence in the execution of a will in 1902, findings impeaching a will executed in 1903 are irrelevant in absence of evidence of a general scheme to defraud. Packham *v.* Glendmeyer, 103 Md. 416, 63 Atl. 1048.

In an action to set aside a deed given as part consideration for the taking back of merchandise sold to the grantor on the ground that such deed was fraudulently obtained, evidence that the grantor had been defrauded in purchasing the merchandise is irrelevant. Collins *v.* Jackson, 43 Mich. 558, 5 N. W. 1052.

On an issue as to whether an order for goods was given, the testimony of the salesman, who claimed to have taken it, that he took an order of the same kind from another corporation, when managed by the alleged purchaser, and that it was accepted, is irrelevant. Robert Buist Co. *v.* Lancaster Mercantile Co., 73 S. C. 48, 52 S. E. 789.

In an action for personal injuries, an affidavit in support of a motion for a new trial in another case arising out of the same accident, reciting that the plaintiff in such case had admitted contributory negligence, is irrelevant. International & G. N. R. Co. *v.* Boykin (Tex.), 89 S. W. 639.

Evidence of other stock transactions is irrelevant in an action by a broker for commissions. Ross *v.* Moskowitz (Tex. Civ. App.), 95 S. W. 86.

69. Where the plaintiff in an action in detinue claimed under a mortgage, a subsequent mortgage given

as tending to prove the existence or nature of a particular fact in issue, or a transaction between the parties, or their intention in a

by him to a bank and which did not include the property in question, is irrelevant. Holman *v.* Clark (Ala.), 41 So. 765.

In an action to abate certain structures erected by the defendant, evidence that others had occupied plaintiff's land is irrelevant. McLean *v.* Llewellyn Iron Wks. (Cal.), 83 Pac. 1082.

The statements of an attorney, made to the defendant, as to the costs in an action to which the plaintiff was not a party, are not relevant as against plaintiff. Erie City Iron Works *v.* Tatum (Cal.), 82 Pac. 92.

Evidence that the defendant took coal from the adjoining land of another party is irrelevant in an action for trespass in taking coal from plaintiff's land. Mier *v.* Phillips Fuel Co., 130 Iowa 570, 107 N. W. 621.

In an action for the recovery of land, a deed from a person not shown to have had any interest therein is irrelevant as evidence of title. McBride *v.* Steinweden, 72 Kan. 508, 83 Pac. 822.

Documents among the records of another suit against a corporation, offered on the hearing of opposition to a receiver's account, are not relevant as against the creditors of the insolvent. Ziegler *v.* Interior Decorating Co., 116 La. 752, 41 So. 59.

In an action for trespass in cutting trees, the plaintiff cannot be asked whether the value of other trees was as alleged in another suit for a similar trespass. Western Union Tel. Co. *v.* Ring, 102 Md. 677, 62 Atl. 801.

Where the question before the jury is how long a time it would take the deputy sheriff and his assistants to remove certain goods from a store and place them on wagons, it is irrelevant for the owner of the store to testify in how long a time he himself could do the same work. Com. *v.* Middleby, 187 Mass. 342, 73 N. E. 208.

Where, in garnishment proceedings, the plaintiff claimed that the garnishees owed the principal defendants on a sale of merchandise, evidence of a subsequent fraudulent transaction not connected with such sale or brought to the knowledge of the garnishees, is irrelevant. Seitz *v.* Starks, 144 Mich. 448, 108 N. W. 354.

In an action for damages for personal injuries, evidence that a physician who had treated the plaintiff had thereafter consulted with other physicians sent for by the defendant, is irrelevant. Michigan Central R. Co. *v.* Coleman, 28 Mich. 440.

In an action to restrain the defendant from building below the high-water mark which existed at the time of the grant from the state to plaintiff city, a deed from the state to another grantee containing an easement to land above the high-water mark existing at the time of the conveyance, and covering none of the land involved in the suit, was irrelevant. Atlantic City *v.* New Auditorium Pier Co. (N. J.), 63 Atl. 169.

In an action against an elevated railroad for injuries to an abutting owner's easements to light, air and access, evidence of settlements made with other owners is not relevant evidence to disprove a prescriptive right in the defendant to such easements. Hindley *v.* Manhattan R. Co., 185 N. Y. 335, 78 N. E. 276.

In an action for compensation for services in securing certain property for the defendant, evidence of another and subsequent transaction wherein plaintiffff lost money through defendant's failure to take up an option, is irrelevant. St. Louis S. W. R. Co. *v.* Irvine (Tex. Civ. App.), 89 S. W. 428.

Evidence of obligations of the plaintiff under a contract between the plaintiff and defendant similar to the contract involved in the suit, is irrelevant. Stapper *v.* Wolter (Tex. Civ. App.), 85 S. W. 850.

Evidence of the settlement of another controversy is not relevant on an issue as to the settlement of ac-

particular instance.[70] Proof, however, of similar transactions is frequently held relevant.[71]

A fact is not relevant merely because its existence is consistent with the claim of the party offering to prove it.[72] Evidence of matters which occurred long after the commencement of the action is generally irrelevant.[73]

2. General Resemblance. — Evidence of a fact, the existence of which merely renders the existence or non-existence of one of the facts in issue in the case probable by reason of its general resemblance thereto, but not by reason of its being connected therewith, is not relevant to the fact sought to be established by such evidence.[74]

IX. RELAXATION OF ORDINARY RULES OF RELEVANCY.

1. In General. — In many cases the rules of relevancy, as ordinarily applied, must of necessity be relaxed, because, on account of lapse of time, the impossibility of the existence of direct observation, the very nature of the fact in issue, or its trivial general importance, evidence which would fulfill the usual requirements of legal relevancy is unobtainable, and the only possible mode of proof is by evidence that would ordinarily be classed as irrelevant or hearsay.

counts, where the parties are not the same. Collins *v.* Denny Clay Co., 41 Wash. 136, 82 Pac. 1012.

Where the defendant pleaded fraudulent misrepresentations as a defense in a suit on a promissory note he cannot introduce evidence of representations made to third persons and not in the defendant's presence; nor printed matter, printed after the note was executed. Clark Co. *v.* Rice, 127 Wis. 451, 106 N. W. 231.

70. Evidence that a contractor had received both commission and wages from the defendant for other work and had received the same from other parties also, is irrelevant to prove such an arrangement with reference to the job involved in the suit. Shall *v.* Old Forge Co., 109 App. Div. 907, 96 N. Y. Supp. 75.

Evidence that a materialman had instructed his attorney to perfect the lien, is irrelevant on an issue as to the promise of the owner to pay the materialman if the latter would refrain from enforcing the lien. McGillivray *v.* Cremer, 125 Wis. 74, 103 N. W. 250.

Evidence of collateral transactions is sometimes relevant for the purpose of showing intent. Standard Mfg. Co. *v.* Brons, 118 Ill. App. 632.

71. See article "SIMILAR TRANSACTIONS" in this volume.

72. Hawkins *v.* James, 69 Miss. 274, 13 So. 813.

73. It was proper for the trial court to reject evidence relating to facts which occurred long after commencement of the action. Beddow *v.* Bagley (Ala.), 39 So. 773.

74. Evidence that other and similar locomotives had started fires is irrelevant to an issue as to whether sparks from a particular locomotive had set fire to plaintiff's property. Cleveland, C., C. & St. L. R. Co. *v.* Loos (Ind. App.), 77 N. E. 948.

In an action by a broker for commission for procuring a loan, which he claimed had failed because of the defendant's acts, evidence on the part of the defendant that a similar loan on the same security had been rejected, was irrelevant. Duckworth *v.* Rogers, 109 App. Div. 168, 95 N. Y. Supp. 1089.

A fact which renders the existence or non-existence of any fact in issue probable by reason of its general re-

Thus the rules of relevancy are usually relaxed in regard to the proof of age,[75] birth,[76] marriage,[77] death,[78] relationship,[79] identity,[80] mental condition or state,[81] pedigree,[82] value,[83] and ancient writings.[84]

2. Ancient Facts. — Proof of ancient facts *in pais,* which occurred at a time beyond the probable period of personal memory, being usually almost impossible of proof by direct evidence,[85] are generally allowed to be established by evidence which would ordinarily be rejected as hearsay, but which for this purpose is regarded as relevant. Such evidence may be either direct,[86] or in the form of reputation.[87]

For example, documents executed more than thirty years pre-

semblance thereto and not by reason of its being connected therewith, is deemed not to be relevant to such fact. Stuart *v.* Kohlberg (Tex. Civ. App.), 53 S. W. 596. See Ross *v.* Moskowitz (Tex. Civ. App.), 95 S. W. 86.

Evidence of the safety of swing staging in general is irrelevant upon the question of the safety of a particular stage. Lewis *v.* Crane, 78 Vt. 216, 62 Atl. 60.

75. See article on "AGE," Vol. I.

76. See article on "AGE," Vol. I, and "PEDIGREE," Vol. IX.

77. See article on "MARRIAGE," Vol. VIII.

78. See article on "DEATH AND SURVIVORSHIP." Vol. IV.

79. See article on "PEDIGREE," Vol. IX.

80. See article on "IDENTITY," Vol. VI.

81. See article on "MENTAL AND PHYSICAL STATES," Vol. VIII.

82. See article on "PEDIGREE," Vol. IX.

83. See article on "VALUE."

84. See article on "ANCIENT DOCUMENTS," Vol. I.

85. "Direct and positive proof cannot always be obtained, and in matters especially which relate to remote periods, it is necessary to resort to circumstantial evidence and presumption to supply the place of that testimony which is lost by the lapse of time and the imperfection of human memory. Such evidence in the strict legal sense is not collateral. It raises, it is true, a new and distinct inquiry; but if it affords a reasonable presumption or inference as to the principal fact or matter in issue, it is relevant and material and does not tend to distract or mislead the jury from the real point in controversy." North Brookfield *v.* Warren, 16 Gray (Mass.) 173.

"It is hard to prove ancient things;" hence the rules of relevancy will be relaxed in such cases. Hewlett *v.* Cock, 7 Wend. (N. Y.) 371.

The proof of ancient possession is always attended with difficulty. Time has removed the witnesses who could prove acts of ownership of their personal knowledge, and resort must necessarily be had to written evidence. Malcomson *v.* O'Dea, 10 H. L. C. 593, 614, 9 Jur. N. S. 1135, 9 L. T. N. S. 93, 11 Eng. Reprint 1155.

86. Casey *v.* Inloes, 1 Gill (Md.) 430. holds that no direct proof of possession in a given party can reasonably be expected after a lapse of one hundred and fifty years.

McEwen *v.* Portland, 1 Or. 303 (the exceptions spring from an obvious necessity, for the exceptions themselves point to a time of which no living witnesses could speak); *In re* Pickens (Pa.), 29 Atl. 875.

Jones *v.* Jones, 3 Strobh. L. (S. C.) 315, holds the *ante litem motam* declarations of a deceased person relevant to aid the presumption of a remote transaction. Lewis *v.* Bergess, 22 Tex. Civ. App. 252, 54 S. W. 609; Roe d. Brune *v.* Rawlings, 7 East 279, 3 Smith 254, 8 R. R. 632; *In re* Lovat, 10 App. Cas. (Eng.) 763.

87. McEwen *v.* Portland, 1 Or. 300.

viously[88] and produced from the proper custody[89] and which purport to indicate the exercise of dominion over the property mentioned therein,[90] or of acts of ownership thereof,[91] are regarded as relevant evidence to prove the fact that such transactions did take place,[92] and relevant evidence of facts which are incidentally recited therein.[93] Nor is proof of actual possession under the document in question necessary,[94] although, of course, corroboration of the document by proof of actual possession[95] adds to its weight.[96]

So also ancient proprietor's records bearing intrinsic evidence of genuineness, where by reason of lapse of time, or of death, their verification by the proper custodian cannot be obtained, are relevant evidence to prove the facts contained in such records.[97]

3. Names. — The testimony of any person who knows that a particular person has been known or designated by a certain name, is relevant to prove such fact,[98] and so also is evidence that such person is or was generally known by such name.[99] General reputa-

88. Hewlett *v.* Cook, 7 Wend. (N. Y.) 371; Plaxton *v.* Dare, 10 Barn. and C. 17, 8 L. J. O. S. K. B. 98, 5 Man. & Ry. 1, 21 E. C. L. 15 (leases); Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135; 9 L. T. 93, 11 Eng. Reprint 1155; Blandy-Jenkins *v.* Dunraven, 2 Ch. 121 (1899), 68 L. J. Ch. 589, 81 L. T. N. S. 209. And see article on "ANCIENT DOCUMENTS," Vol. I.

89. Harlan *v.* Howard, 79 Ky. 373, and cases cited in preceding note.

90. Boston *v.* Richardson, 105 Mass. 351 (granting of licenses); Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. N. S. 93, 11 Eng. Reprint 1155 (granting licenses on and executing leases covering the property).

91. Making a Partition Thereof. Floyd *v.* Tewksbury, 129 Mass. 362.

Executing Leases Thereof. — Hewlett *v.* Cock, 7 Wend. (N. Y.) 371.

Bringing a Suit for Trespass. Blandy-Jenkins *v.* Dunraven, 2 Ch. 121 (1899), 68 L. J. Ch. 589, 81 L. T. N. S. 209.

92. Harlan *v.* Howard, 79 Ky. 373; Boston *v.* Richardson, 105 Mass. 351; Baeder *v.* Jennings, 40 Fed. 199; Blandy-Jenkins *v.* Dunraven, 2 Ch. 121 (1899), 68 L. J. Ch. 589, 81 L. T. N. S. 209.

93. Plaxton *v.* Dare, 10 Barn. & C. 17, 8 L. J. O. S. K. B. 98, 5 Man. & Ry. 1, 21 E. C. L. 15, holds an ancient document relevant as evidence tending to prove that the land specified therein was situated in a particular parish.

94. Harlan *v.* Howard, 79 Ky. 373; Boston *v.* Richardson, 105 Mass. 351; Hewlett *v.* Cock, 7 Wend. (N. Y.) 371 (possession accompanying the deed is always sufficient without other proof, but is not indispensable); Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. 93, 11 Eng. Reprint 1155. But see Clarke *v.* Courtney, 5 Pet. (U. S.) 319, where proof of possession under the document was held necessary to render it relevant.

95. Proof of Subsequent Occupation of the Property. — Boston *v.* Richardson, 105 Mass. 351; Hewlett *v.* Cock, 7 Wend. (N. Y.) 371 (proof that the lessee named in such document treated the land as leased).

96. Boston *v.* Richardson, 105 Mass. 351; Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. 93, 11 Eng. Reprint 1155.

97. Goodwin *v.* Jack, 62 Me. 414.

98. People *v.* Clark, 106 Cal. 32, 39 Pac. 53.

99. United States *v.* Dodge, 1 Deady 186, 25 Fed. Cas. No. 14,974.

Proof of Married Woman's Maiden Name. — May *v.* State, 53 Tex. Crim. 54, 63 S. W. 132.

tion is also relevant to prove the designation of a house,[1] or other place.[2]

4. Race and Status. — General reputation has been held relevant evidence to show that a certain person belongs to a particular race.[3] Direct hearsay[4] and general reputation have also been held relevant as evidence of status; as whether a certain person is a free man or a slave,[5] or whether an association of individuals is incorporated;[6] but other cases are opposed to this, holding general reputation irrelevant for such purposes.[7]

5. Family History. — A. Recognition. — General experience has shown that it may be properly inferred that many facts exist from the fact that persons possessing adequate knowledge and without motives which would impel them to misrepresent would not have acted as they have done had they not believed such facts to exist; thus acts or declarations by such persons, or their acquiesence in the acts, or declarations of others are regarded as relevant evidence to prove many circumstances of family history.[8] Evidence of the recognition of a certain person,[9] or of the failure or refusal to

1. United States *v.* Dodge, 1 Deady 186, 25 Fed. Cas. No. 14,974.

2. Harris *v.* Dub, 57 Ga. 77; Rench *v.* Beltzhover, 3 Har. & J. (Md.) 469; Toole *v.* Peterson, 31 N. C. (9 Ired. L.) 180; United States *v.* Dodge, 1 Deady 186, 25 Fed. Cas. No. 14,974.

3. **To Prove That a Person Was an Indian.** — Reed *v.* State, 16 Ark. 499.

To Prove a Person a Negro. White *v.* Clements, 34 Ga. 232.

While general reputation is relevant evidence of the fact that a particular individual is a negro, such evidence is of little weight in a doubtful case. Locklayer *v.* Locklayer, 139 Ala. 354, 35 So. 1008.

4. Shorter *v.* Boswell, 2 Har. & J. (Md.) 359; Walkup *v.* Pratte, 5 Har. & J. (Md.) 51; Charlton *v.* Unis, 4 Gratt. (Va.) 58.

5. Bryan *v.* Walton, 20 Ga. 480, 509; Shorter *v.* Boswell, 2 Har. & J. (Md.) 359.

6. Fleener *v.* State, 58 Ark. 98, 23 S. W. 1; People *v.* Ah Sam, 41 Cal. 645; State *v.* Thompson, 23 Kan. 338; People *v.* Davis, 21 Wend. (N. Y.) 309; Dennis *v.* People, 1 Park. Cr. (N. Y.) 469.

7. Walls *v.* Heinsley, 4 Har. & J. (Md.) 243; Walkup *v.* Pratte, 5 Har. & J. (Md.) 51; Trice *v.* State, 2 Head (Tenn.) 591 (under a statutory provision); Gregory *v.* Baugh, 4 Rand. (Va.) 611 (evidence of a belief current in the community is irrelevant as evidence of the fact of an individual's status as a free man); Charlton *v.* Unis, 4 Gratt. (Va.) 58; Mima Queen *v.* Hepburn, 7 Cranch (U. S.) 290.

8. Jones *v.* Jones, 45 Md. 144 (marriage); Parkhurst *v.* Krellinger, 69 Vt. 375, 38 Atl. 67; Hungate *v.* Gascoyne, 10 Jur. 625, 15 L. J. Ch. 382, 2 Phil. 25, 41 Eng. Reprint 850.

9. *England.* — Hubbard *v.* Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. 442; Goodright *v.* Moss, 2 Cowp. 591; *In re* Berkely, 4 Campb. 401, 416 ("if the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached, and indeed it amounts to a daily assertion that the son is legitimate").

Alabama. — White *v.* Strother, 11 Ala. 720.

District of Columbia. — Green *v.* Norment, 5 Mackey 80.

Indiana. — De Haven *v.* De Haven, 77 Ind. 236.

Massachusetts. — Wilmington *v.* Burlington, 4 Pick. 174.

Michigan. — Van Sickle *v.* Gibson, 40 Mich. 170.

Minnesota. — Backdahl *v.* Grand

recognize him[10] by members of a particular family,[11] is relevant evidence on the question of whether or not he is a member of such family.

B. Records and Inscriptions. — Statements by whomsoever made, and of any form capable of conveying information,[12] are generally held to be relevant evidence of the matter of family history as-

Lodge A. O. U. W., 46 Minn. 61, 48 N. W. 454.

Mississippi. — Henderson *v.* Cargill, 31 Miss. 367, 409.

Nebraska. — Comstock *v.* State, 14 Neb. 205, 15 N. W. 355.

New Jersey. — Gaines *v.* Green Pond Iron Min. Co., 32 N. J. Eq. 86.

New York. — Chamberlain *v.* Chamberlain, 71 N. Y. 423.

Rhode Island. — Viall *v.* Smith, 6 R. I. 417.

Wisconsin. — Eaton *v.* Tallmadge, 24 Wis. 217.

10. Chamberlain *v.* Chamberlain, 71 N. Y. 423; *In re* Aylesford Peerage, 11 App. Cas. (Eng.) 1; Goodright *v.* Moss, 2 Cowp. (Eng.) 591.

Evidence that the father applied to the state legislature to pass an act legitimizing one of his children is relevant to prove his legitimacy. Barnum *v.* Barnum, 42 Md. 251, 304.

11. Inscriptions on Monuments or Gravestones.

England. — Doe d. Bowerman *v.* Sybourn, 2 Esp. 499, 7 T. R. 2, 4 R. R. 363; Vowles *v.* Young, 9 Ves. Jr. 172, 32 Eng. Reprint 567; Davies *v.* Lowndes, 6 Man. & G. 471, 7 Scott N. R. 141, 46 E. C. L. 471; Slaney *v.* Wade, 7 Sim. 595, 58 Eng. Reprint 965, *affirmed* in 1 Myl. & C. 338, 13 Eng. Ch. 338, 40 Eng. Reprint 404.

United States. — McClaskey *v.* Barr, 54 Fed. 781.

Alabama. — Boyett *v.* State, 130 Ala. 77, 30 So. 475.

Arkansas. — Kelly *v.* McGuire, 15 Ark. 555.

Maryland. — Barnum *v.* Barnum, 42 Md. 251, 306.

Massachusetts. — North Brookfield *v.* Warren, 16 Gray 171.

Missouri. — Smith *v.* Patterson, 95 Mo. 525, 8 S. W. 567.

New Hampshire. — Eastman *v.* Martin, 19 N. H. 152.

Pennsylvania. — Gehr *v.* Fisher, 143 Pa. St. 311, 22 Atl. 859.

Family conduct, to be relevant on a question of legitimacy or pedigree, must be that of those members of the family who, by recognizing the relationship, evince an opinion and belief on the subject. McCarty *v.* Hodges, 2 Edm. Sel. Cas. (N. Y.) 433.

12. Beckham *v.* Nacke, 56 Mo. 546; Wood *v.* Sawyer, 61 N. C. (Phill. L.) 251 (a genealogical chart); Goodright *v.* Moss, 2 Cowp. (Eng.) 591; Monkcton *v.* Attorney-General, 2 Russ & M. 147, 11 Eng. Ch. 147, 39 Eng. Reprint 350; Currie *v.* Stairs, 25 N. B. 4.

Entries in a Family Bible or Testament. — People *v.* Ratz, 115 Cal. 132, 46 Pac. 915; People *v.* Slater, 119 Cal. 620, 51 Pac. 957; Weaver *v.* Leiman, 52 Md. 708; Wiseman *v.* Cornish, 53 N. C. (8 Jones) 218; Douglass *v.* Sanderson, 2 Dall. (Pa.) 116.

When the book is once shown to be the family bible or testament, the entries therein derive their weight as evidence, not more from the fact that they were made by any particular person, than that being in that place as a family registry they must be deemed to have been assented to by those in whose custody the book has been kept. Jones *v.* Jones, 45 Md. 144.

"To require evidence of the handwriting or authorship of entries in a family bible is to mistake the distinctive character of the evidence, for it derives its weight, not from the fact that the entries are made by any particular person, but that being in that place, they are to be taken as assented to by those in whose custody the book has been." Hubbard *v.* Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. 442.

Inscriptions in Mourning Rings. An inscription is relevant "upon the presumption that a person would not wear a ring with an error upon it."

serted thereby where it affirmatively appears, either by direct or circumstantial evidence,[13] that the vehicle conveying the statement is authentic.[14] As for instance, that it has been recognized by the family or members thereof,[15] or that it has been produced from the proper custody;[16] and that such statements or declarations concerned the subject of the inquiry, a mere identity of name being insufficient,[17] and that such statements were brought to the attention of members of the family who would in all probability be apt to correct a mistake therein,[18] and that the conduct of such members in regard to such statements was such as to indicate acquiescence therein.[19] A statement not shown to have been made by one competent to make it or assented to by the famiy or some member or members thereof, is irrelevant.[20]

Vowles *v.* Young, 13 Ves. Jr. 140, 33 Eng. Reprint 247.

13. People *v.* Ratz, 115 Cal. 132, 46 Pac. 915; Slaney *v.* Wade, 1 Myl. & C. 338, 13 Eng. Ch. 338, 40 Eng. Reprint 404.

The entry of a marriage by a town clerk cannot be presumed to be actually known to the members of the families affected thereby so that its existence would imply acquiescence by them in the facts stated in such entry. Viall *v.* Smith, 6 R. I. 417.

14. Jones *v.* Jones, 45 Md. 144; Supreme Council G. S. F. *v.* Conklin, 60 N. J. L. 565, 38 Atl. 659; McClaskey *v.* Barr, 54 Fed. 781; Hubbard *v.* Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. 442.

15. *England.* — Doe d. Johnson *v.* Pembroke, 11 East 504, 11 R. R. 260; Slaney *v.* Wade, 1 Myl. & C. 338, 13 Eng. Ch. 338, 40 Eng. Reprint 404.

United States. — McClaskey *v.* Barr, 54 Fed. 781.

Maryland. — Jones *v.* Jones, 45 Md. 144.

Massachusetts. — North Brookfield *v.* Warren, 16 Gray 171.

New Hampshire. — Eastman *v.* Martin, 19 N. H. 152.

New Jersey. — Supreme Council G. S. F. *v.* Conklin, 60 N. J. L. 565, 38 Atl. 659.

North Carolina. — Wood *v.* Sawyer, 61 N. C. (Phill. L.) 251.

It is not necessary that all of the family should concur as to the correctness, but this, as well as every other relevant circumstance, should be considered by the court in determining the weight of the evidence. Southern Life Ins. Co. *v.* Wilkinson, 53 Ga. 535.

16. Hubbard *v.* Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. 442; Southern Life Ins. Co. *v.* Wilkinson, 53 Ga. 535; Douglass *v.* Sanderson, 2 Dall. (Pa.) 116; Union Cent. L. Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421.

17. Gehr *v.* Fisher, 143 Pa. St. 311, 22 Atl. 859.

18. In order to be relevant, such statement need not have been known to others. Eastman *v.* Martin, 19 N. H. 152.

A statement to be made relevant by family conduct must be shown to have been known to the person whose conduct in view thereof is relevant. Goodright *v.* Moss, 2 Cowp. (Eng.) 594. See Monkton *v.* Attorney-General, 2 Russ. & M. 147, 39 Eng. Reprint 350.

19. Eastman *v.* Martin, 19 N. H. 152; Supreme Council G. S. F. *v.* Conklin, 60 N. J. L. 565, 38 Atl. 659 (it must be shown that the entries were based upon adequate knowledge or were assented to by a member of the family in question); Dinan *v.* Supreme Council Catholic Mut. Ben. Assn., 201 Pa. St. 363, 50 Atl. 999; Goodright *v.* Moss, 2 Cowp. (Eng.) 591; Davies *v.* Lowndes, 6 Man. & G. 471, 7 Scott N. R. 141, 46 E. C. L. 471; Monkton *v.* Attorney-General, 2 Russ & M. 147, 39 Eng. Reprint 350.

20. Eastman *v.* Martin, 19 N. H.

The entry or statement in question should itself be given in evidence, for it, rather than the deduction therefrom of the witness, is relevant;[21] and this is the rule whether the statement be directly[22] or only circumstantially relevant.[23] But where, because of its bulk, weight, or location or for other like reasons it is impossible or inconvenient to produce in court the object containing a relevant inscription, properly examined and approved copies of such inscription are admissible in place thereof;[24] and where the object containing the inscription or entry has become destroyed or lost, or decayed by time and the elements, the recollection of witnesses as to such inscriptions or entries is relevant.[25]

Evidence of an appropriate entry in some family depository of such records is itself circumstantially relevant to prove a contention based upon the existence of a fact or transaction which, had it existed, would in all probability be there recorded;[26] and, conversely, evidence of the absence of such entry is equally relevant to prove the non-existence of such a fact or transaction.[27]

C. Identity. — In the absence of better and more direct evidence of identity, evidence of intrinsic facts which render identity probable, is held relevant to prove it circumstantially;[28] and evidence of declarations indicating peculiar knowledge,[29] or of a family tradition,[30] or evidence of residence in a particular place,[31] or of service in

152; Supreme Council G. S. F. *v.* Conklin, 60 N. J. L. 565, 38 Atl. 659; Dinan *v.* Supreme Council Catholic Mut. Ben. Assn., 201 Pa. St. 363, 50 Atl. 999.

A genealogical table and chart, certified under the seal of a foreign official, is irrelevant. Banert *v.* Day, 3 Wash. C. C. 243, 2 Fed. Cas. No. 836.

21. Jackson *v.* Browner, 18 Johns. (N. Y.) 37; Johns *v.* Northcutt, 49 Tex. 444; *In re* Hurlburt, 68 Vt. 366, 35 Atl. 77.

22. Harland *v.* Eastman, 107 Ill. 535; Jackson *v.* Browner, 18 Johns. (N. Y.) 36.

23. A Genealogical Chart. — Eastman *v.* Martin, 19 N. H. 152.

An Entry in a Family Bible. Douglass *v.* Sanderson, 2 Dall. (Pa.) 116; Hubbard *v.* Lees, L. R. 1 Exch. 252, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. 442.

24. Eastman *v.* Martin, 19 N. H. 152.

25. Eastman *v.* Martin, 19 N. H. 152.

26. Jackson *v.* King, 5 Cow. (N. Y.) 237.

Records of Masonic Lodge. — Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525.

27. Crouch *v.* Hooper, 16 Beav. 182, 51 Eng. Reprint 747.

28. State *v.* Ah Chuey, 14 Nev. 79.

29. Mullery *v.* Hamilton, 71 Ga. 720; Cuddy *v.* Brown, 78 Ill. 415.

Walkup *v.* Pratt, 5 Har. & J. (Md.) 51 (*holding* hearsay statements in the nature of declarations as to pedigree relevant to prove identity of a person); Wise *v.* Wynn, 59 Miss. 588; Young *v.* State, 36 Or. 417, 59 Pac. 812, 60 Pac. 711; American L. Ins. & Tr. Co. *v.* Rosenagle, 77 Pa. St. 507; Winder *v.* Little, 1 Yeates (Pa.) 152; Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; McNeil *v.* O'Connor, 79 Tex. 227, 14 S. W. 1058; Rishtone *v.* Nesbitt, 2 M. & Rob. (Eng.) 554; Shields *v.* Boucher, 1 De Gex & S. 40, 63 Eng. Reprint 962.

30. *In re* Lovat, 10 App. Cas. (Eng.) 763.

31. Wise *v.* Wynn, 59 Miss. 588; Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760.

the army at a particular time, is also relevant for the same purpose.[32]

X. EXCLUSION OF RELEVANT TESTIMONY.

Often the reception of all of the legally relevant testimony which might be produced would unnecessarily prolong the trial and would really add little or nothing of importance to the case.[33] Hence it lies within the sound discretion of the trial court to refuse to allow the introduction of evidence, which, while legally relevant, tends only to prove facts which are already admitted,[34] or are not controverted,[35] or have been sufficiently proved,[36] or where such evi-

32. Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760.

33. Wheeler *v.* Packer, 4 Conn. 102; Hawkins *v.* James, 69 Miss. 274, 13 So. 813; Home Fire Ins. Co. *v.* Kuhlman, 58 Neb. 488, 78 N. W. 936; Golden Reward Min. Co. *v.* Buxton Min. Co., 97 Fed. 413, 38 C. C. A. 228; Philips *v.* Mo, 91 Minn. 311, 97 N. W. 969; Amoskeag Mfg. Co. *v.* Head, 59 N. H. 332, 563.

34. Where the only issue is the payment of an account, and the defendant has admitted that a certain note was not connected with an alleged settlement thereof, evidence that he had executed such note after such alleged settlement was properly rejected. Snodgrass *v.* Caldwell, 90 Ala. 319, 7 So. 834. See Boseli *v.* Doran, 62 Conn. 311, 25 Atl. 242.

Evidence as to a contract and delivery of goods which were admitted by the defendant was excluded. Henkel *v.* Trubee (Conn.), 11 Atl. 722.

A certain deed was held properly excluded, it being admitted that the party offering it held title through it. Batavia Mfg. Co. *v.* Newton Wagon Co., 91 Ill. 230.

Vogel *v.* Harris, 112 Ind. 494, 14 N. E. 385 (value of defendant's property, it being admitted that he was insolvent); Scheibeck *v.* Van Derbeck, 122 Mich. 29, 80 N. W. 880.

Where it is admitted that certain land has been rendered worthless, evidence that other land, similarly situated, is successfully cultivated is properly excluded. Richardson *v.* Board of Levee Comrs., 68 Miss. 539, 9 So. 351.

Evidence going to prove a fact admitted during the course of negotiations for a compromise of the matter in litigation may be excluded. White *v.* Old Dominion S. S. Co., 102 N. Y. 661, 6 N. E. 289. Especially where the effect of such evidence would probably be to mislead or prejudice the jury. Cunningham *v.* Smith, 70 Pa. St. 450.

Letters may be excluded showing an abandonment of homestead, which has been admitted. Stallings *v.* Hullum, 89 Tex. 431, 35 S. W. 2.

Contract Offered By Defendant To Prove a Date Admitted by Plaintiff To Be Correct. — Wait *v.* Brewster, 31 Vt. 516.

35. Evidence to prove consideration for the instrument sued on was excluded when the defendant did not deny consideration. Cowan *v.* Cooper, 41 Ala. 187.

Cole *v.* Curtis, 16 Minn. 182 (evidence in support of the consideration and good faith of a bill of sale, neither having been attacked); Austin *v.* Austin, 45 Wis. 523.

36. Russell *v.* Sycamore Marsh Harvester Mfg. Co., 65 Ill. 333 (evidence need not be admitted that person made collections for another, his agency having been already proved); Lewiston *v.* Proctor, 27 Ill. 414; Norris *v.* Clark, 33 Minn. 476, 24 N. W. 128; Arabian Horse Co. *v.* Bivens (Neb.), 96 N. W. 64; Allendorph *v.* Wheeler, 101 N. Y. 649, 5 N. E. 42.

Durst *v.* Burton, 47 N. Y. 167, *affirming s. c.* 2 Lans. (N. Y.) 137 (market price at one place having been proved, evidence of market price at another place is properly rejected); Bartlett *v.* Hubert, 21 Tex. 8; Triplett *v.* Goff, 83 Va. 784, 3 S. E. 325.

dence is merely cumulative,[37] or tends to prove what is presumed by law.[38]

XI. ADMISSION OF IRRELEVANT TESTIMONY.

1. When it Tends To Injure the Objecting Party. — Where the effect, direct or incidental, of the admission of irrelevant testimony is to injure the objecting party, as by exciting a feeling of sympathy for the adverse party,[39] or a feeling of hostility to himself,[40] or to mislead the jury as to the issues[41] or confuse them in their delibera-

37. *Arkansas.* — Olmstead *v.* Hill, 2 Ark. 346.

California. — Noonan *v.* Noonan, 76 Cal. 44, 18 Pac. 98 (a judgment roll in a former action will be excluded where the court finds all the relevant facts which it would have established).

Connecticut. — Waller *v.* Graves, 20 Conn. 305.

Georgia. — White *v.* Columbus Iron Wks. Co., 113 Ga. 577, 38 S. E. 944.

Indiana. — Farmers' & C. Bldg. Assn. *v.* Rector, 22 Ind. App. 101, 53 N. E. 297.

Maine. — Glidden *v.* Dunlap, 28 Me. 379.

Massachusetts. — Parker *v.* Hardy, 24 Pick. 246.

Mississippi. — Wilson *v.* William's Heirs, 52 Miss. 487.

Missouri. — Craighead *v.* Wells, 21 Mo. 404.

New York. — People *v.* Superior Court of New York, 10 Wend. 285.

In Abenheim *v.* Samuels, 52 Hun 611, 5 N. Y. Supp. 117, it was held error to exclude relevant testimony merely because it is cumulative.

38. Evidence that a certain person had never been appointed agent for a foreign corporation may be excluded, the law being that any person receiving money for a foreign corporation shall be presumed to be its agent, and it having been shown that such person had received money for the corporation. Reger *v.* Odd Fellows' Fraternal Acc. Assn., 157 Mass. 367, 32 N. E. 469.

Oral evidence as to the meaning of a contract, from the language of which an exclusive agency would be presumed, need not be admitted to establish such agency. Norris *v.* Clark, 33 Minn. 476, 24 N. W. 128.

39. Hutchins *v.* Hutchins, 98 N. Y. 56; Mannion *v.* Hagan, 9 App. Div. 98, 41 N. Y. Supp. 86.

40. *California.* — Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878; Thomas *v.* Black, 84 Cal. 221, 23 Pac. 1037.

Illinois. — Stearns *v.* Reidy, 135 Ill. 119, 25 N. E. 762.

Indiana. — Indianapolis J. N. Co. *v.* Pugh, 6 Ind. App. 510, 33 N. E. 991.

Mississippi. — Vicksburg etc. R. Co. *v.* Patton, 31 Miss. 156.

New York. — Hoag *v.* Wright, 34 App. Div. 260, 54 N. Y. Supp. 658; Jones *v.* Bacon, 64 Hun 637, 19 N. Y. Supp. 553; Green *v.* Rochester Iron Mfg. Co., 1 Thomp. & C. 5; Fonda *v.* Lape, 56 Hun 639, 8 N. Y. Supp. 792.

North Carolina. — Deming *v.* Garney, 95 N. C. 528.

Texas. — Gulf, C. & S. F. R. Co. *v.* Hepner, 83 Tex. 136, 18 S. W. 441; Planters' Oil Co. *v.* Mansell (Tex. Civ. App.), 43 S. W. 913; Galveston, H. & S. A. R. Co. *v.* Smith (Tex. Civ. App.), 24 S. W. 668.

But see Vicksburg R. Co. *v.* Patton, 31 Miss. 156 and Pease *v.* Smith, 61 N. Y. 477. Both these cases hold that otherwise material and relevant testimony cannot be rejected because it would tend to prejudice the party with the jury.

41. Galbreath *v.* Cole, 61 Ala. 139; Mizell *v.* Travelers' Ins. Co., 44 Fla. 799, 33 So. 454; Hunter *v.* Harris, 131 Ill. 482, 23 N. E. 626.

Stearns *v.* Reidy, 135 Ill. 119, 25 N. E. 762 (admission of evidence that the attorney for the plaintiff in a damage suit had taken the case on a contingent fee, is prejudicial error

tions,[42] or to injure the objector in any other way patent to the eye of the reviewing court, such admission is reversible error.[43]

2. When No Injury Is Apparent. — When, however, the only objection that can be urged against testimony is that it is not relevant, and it is evident that the jury were neither misled nor confused by it, the present tendency of the courts is not to regard its admission as reversible error.[44] And this is especially true where the case is tried by the court without a jury.[45]

as to the plaintiff); Small *v.* Smith, 87 Ind. 186.

Indianapolis J. N. Co. *v.* Pugh, 6 Ind. App. 510, 33 N. E. 991 (in an action for libel in charging a woman with unchastity, it was error to permit the plaintiff, ostensibly for the purpose of controverting the defendant's testimony as to her bad character, to introduce evidence showing that her father had served honorably in the union army throughout the civil war, such testimony being irrelevant and calculated to prejudice the jury); Grant *v.* Libby, 71 Me. 427; Hubbard *v.* Androscoggin & K. R. Co., 39 Me. 506; Capron *v.* Adams, 28 Md. 529; Edelen *v.* Gough, 5 Gill (Md.) 103.

Campau *v.* Moran, 31 Mich. 280 (the admission of irrelevant testimony which tends to withdraw the attention of the jury from the real issue is prejudicial, and, therefore, reversible error); Lowenstein *v.* Aaron, 69 Miss. 341, 12 So. 269.

Ritter *v.* First Nat. Bank, 87 Mo. 574 (it is error to allow the admission of irrelevant testimony to corroborate a party in an unimportant particular when such testimony tends to draw the minds of the jury from the issue); Gregg *v.* Northern R., 67 N. H. 271, 41 Atl. 271; Green *v.* Rochester Iron Mfg. Co., 1 Thomp. & C. (N. Y.) 5.

Fonda *v.* Lape, 56 Hun 639, 8 N. Y. Supp. 792 (it is reversible error to allow the defendant, on cross-examination, to ask the plaintiff if he is the owner of a certain very valuable tract of land, such testimony being irrelevant and its purpose being apparently to draw the jury's attention to plaintiff's wealth as contrasted with defendant's poverty); Jones *v.* Bacon, 64 Hun 637, 19 N. Y. Supp. 553; Deming *v.* Gainey, 95 N. C. 528; Cunningham *v.* Smith, 70 Pa. St. 450; Scott *v.* Rhea, 5 Tex. 258; Galveston, H. & S. A. R. Co. *v.* Smith (Tex. Civ. App.), 24 S. W. 668; Lucas *v.* Brooks, 18 Wall. (U. S.) 436.

42. Lucas *v.* Brooks, 18 Wall. (U. S.) 436.

43. Andrews *v.* Johnston, 7 Colo. App. 551, 44 Pac. 73; Fuentes *v.* Gaines, 25 La. Ann. 85.

44. *Alabama.* — Ethridge *v.* State, 124 Ala. 106, 27 So. 320; Sanders *v.* Stokes, 30 Ala. 432; McCreary *v.* Turk, 29 Ala. 244.

Colorado. — Brown *v.* Tourtelotte, 24 Colo. App. 204, 50 Pac. 195.

Connecticut. — Meriden Sav. Bank *v.* Wellington, 64 Conn. 553, 30 Atl. 774.

Indiana. — Harbor *v.* Morgan, 4 Ind. 158.

Iowa. — Hoadley *v.* Hammond, 63 Iowa 599, 19 N. W. 794.

Kentucky. — Jones *v.* Letcher, 13 B. Mon. 363; Shannon *v.* Kinny, 1 A. K. Marsh. 3.

Louisiana. — Lazare *v.* Peytavin, 9 Mart. (O. S.) 566.

Maine. — Trull *v.* True, 33 Me. 367.

Maryland. — Richardson *v.* Milburn, 17 Md. 67.

Massachusetts. — Kellogg *v.* Kimball, 122 Mass. 163.

Michigan. — Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499.

Nevada. — State *v.* Rhoades, 6 Nev. 352.

New Hampshire. — Tucker *v.* Peaslee, 36 N. H. 167; Eaton *v.* Welton, 32 N. H. 352.

North Carolina. — Deming *v.* Gainey, 95 N. C. 528.

Pennsylvania. — Beates *v.* Retallick, 23 Pa. St. 288.

Washington. — Brown *v.* Porter, 7 Wash. 327, 34 Pac. 1105.

45. Andrews *v.* Johnston, 7 Colo.

3. Where the Objecting Party Has Introduced Like Irrelevant Testimony. — Where the party objecting to the admission of irrelevant testimony has himself previously introduced, without objection from the adverse party, irrelevant or immaterial testimony upon a certain point, it is held in many decisions that he cannot be heard to complain if the court, acting within its sound discretion in the premises,[46] permits the adverse party to produce evidence of a like irrelevant nature to rebut the evidence he himself has offered;[47]

App. 551, 44 Pac. 73 (where the issues of fact are tried by the court alone, the probability of prejudice to the objecting party from the admission of irrelevant testimony is so far diminished that no reversible error is committed by admitting it); Fuentes *v.* Gaines, 25 La. Ann. 85.

46. Treat *v.* Curtis, 124 Mass. 348; Ellsworth *v.* Potter, 41 Vt. 685.

Where a party has committed the first fault himself in introducing irrelevant evidence, it is within the discretion of the court to receive evidence upon the same subject by way of cross-examination of the witness, at the instance of the adverse party. Keeler *v.* Dleavan, 4 Barb. (N. Y.) 317.

47. *United States.* — Evening Post Pub. Co. *v.* Voight, 72 Fed. 885, 18 C. C. A. 224; Watts *v.* Southern Bell Tel. Co., 66 Fed. 460, 13 C. C. A. 579, *affirming s. c.* 66 Fed. 453; Atchison, T. & S. F. R. Co. *v.* Reesman, 60 Fed. 370, 9 C. C. A. 20; Ward *v.* Blake Mfg. Co., 56 Fed. 437, 5 C. C. A. 538; Hutter *v.* De Q. Bottle Stopper Co., 119 Fed. 190.

Alabama. — Curtis *v.* Parker, 136 Ala. 217, 33 So. 935; McIntyre *v.* White, 124 Ala. 177, 26 So. 937; Winslow *v.* State, 92 Ala. 78, 9 So. 728; Flinn *v.* Barber, 59 Ala. 446.

Arkansas. — Little Rock & Ft. S. R. Co. *v.* Tankersly, 54 Ark. 25, 14 S. W. 1099.

Colorado. — Farmers' High Line C. & R. Co. *v.* White, 32 Colo. 114, 75 Pac. 415.

Illinois. — Illinois Steel Co. *v.* Wierzbicky, 206 Ill. 201, 68 N. E. 1101, *affirming s. c.* 107 Ill. App. 69; Cleveland, C., C. & St. L. R. Co. *v.* Highsmith, 59 Ill. App. 651.

Indiana. — Brazil Block Coal Co. *v.* Gibson, 160 Ind. 319, 66 N. E. 882, 98 Am. St. Rep. 281.

Iowa. — Ingram *v.* Wackernagel, 83 Iowa 82, 48 N. W. 998 (although the proper course is for the court to strike out on its own motion, if necessary, irrelevant evidence offered in rebuttal of equally irrelevant evidence, the party who originally offered such irrelevant evidence is not prejudiced by the admission of like irrelevant evidence in rebuttal).

Kentucky. — Corley *v.* Lancaster, 81 Ky. 171. But see Norton *v.* Doe *ex dem.* Sanders, 1 Dana 14.

Louisiana. — Nousseau *v.* Thebens, 19 La. Ann. 516; Patton *v.* Philadelphia & New Orleans, 1 La. Ann. 98.

Massachusetts. — Treat *v.* Curtis, 124 Mass. 348; Shaw *v.* Stone, 1 Cush. 228.

Michigan. — Johnson *v.* Doon, 131 Mich. 452, 91 N. W. 742; Fowler *v.* Gilbert, 38 Mich. 292; Kelley *v.* Detroit, L. & N. R. Co., 80 Mich. 237, 45 N. W. 90 (a party who has asked a witness an irrelevant question cannot object if his adversary ask the same question in the same form).

Missouri. — Baker *v.* Pulitzer Pub. Co., 103 Mo. App. 54, 77 S. W. 585; Hill Bros. *v.* Seneca Bank (Mo. App.), 73 S. W. 307; South St. Louis R. Co. *v.* Plate, 15 Mo. App. 588; Taylor *v.* Penquite, 35 Mo. App. 389; Nelson Distilling Co. *v.* Hubbard, 53 Mo. App. 23 (a party cannot object to the adverse party asking the same question of a witness that he himself has asked of another witness).

Montana. — Yank *v.* Bordeaux, 29 Mont. 74, 74 Pac. 77.

Nebraska. — Clasen *v.* Pruhs, 69 Neb. 278, 95 N. W. 640; Gosnell *v.* Webster, 70 Neb. 705, 97 N. W. 1060.

New Hampshire. — Furbush *v.* Goodwin, 25 N. H. 425; Quimby *v.* Blackey, 63 N. H. 77.

and some of the decisions go so far as to hold, or at least strongly to intimate, that a party against whom irrelevant evidence has been received, even without objection, has the right to insist upon the admission of the same character of evidence on his behalf to rebut such irrelevant evidence.[48]

Many of the decisions, however, are opposed to this theory and hold that the right to object to the admission of irrelevant testimony is not waived by reason of the failure of the adverse party to object when the objecting party himself offered similar irrelevant testimony.[49]

New York.—Waldron *v.* Romaine, 22 N. Y. 368; Keeler *v.* Delavan, 4 Barb. 317; Hornum *v.* McNeil, 80 App. Div. 637, 80 N. Y. Supp. 728; James *v.* Metropolitan St. R. Co., 80 App. Div. 364, 80 N. Y. Supp. 710; Littebrant *v.* Sidney, 77 App. Div. 545, 78 N. Y. Supp. 890; Hollender *v.* New York Cent. & H. R. Co., 19 Abb. N. C. 18, 14 Daly 219 (a defendant, who, over the plaintiff's objection has introduced a witness' irrelevant opinion on a certain point, cannot object, if, in rebuttal the plaintiff asks the same question of another expert. The court held that, "having thus established the law of the case, the defendant cannot be permitted to object that the court continued to apply it in every stage of the trial").

North Carolina. — Cabiness *v.* Martin, 15 N. C. (14 Dev. L.) 106; Parker *v.* Atlantic Coast Line R. Co., 131 N. C. 827, 43 S. E. 1005; *s. c.* 133 N. C. 335, 45 S. E. 658.

Ohio. — Krause *v* Morgan, 53 Ohio St. 26, 40 N. E. 886.

Pennsylvania. — Shannon *v.* Castner, 21 Pa. Super. Ct. 294; Baker *v.* Rorke, 14 Pa. Co. Ct. 35; McElhney *v.* Pittsburgh, V. & C. R. Co., 147 Pa. St. 1, 23 Atl. 392; McCarthy *v.* Scanlon, 176 Pa. St. 262, 35 Atl. 189.

South Dakota. — Aldous *v.* Olverson, 17 S. D. 190, 95 N. W. 917; Reynolds *v.* Hinrichs, 16 S. D. 602, 94 N. W. 694.

Texas. — Missouri, K. & T. R. Co. *v.* Criswell, 34 Tex. Civ. App. 278, 78 S. W. 388; Aetna Ins Co. *v.* Fitze, 34 Tex. Civ. App. 214, 78 S. W. 370; Pecos & N. T. R. Co. *v.* Williams, 34 Tex. Civ. App. 100, 78 S. W. 5; San Antonio & A. P. R. Co. *v.* Griffith (Tex. Civ. App.), 70 S. W. 438; Missouri, K. & T. R. Co. *v.* Hawk, 30 Tex. Civ. App. 142, 69 S. W. 1037.

Vermont. — Stevenson *v.* Gunning, 64 Vt. 601, 25 Atl. 697; Ellsworth *v.* Potter, 41 Vt. 685; Lytle *v.* Bond, 40 Vt. 618.

Washington. — McNicol *v.* Collins, 30 Wash. 318, 70 Pac. 753.

Wisconsin. — Kelley *v.* Fond du Lac, 31 Wis. 179.

48. *Alabama.* — Havis *v.* Taylor, 13 Ala. 324.

Montana. — Yank *v.* Bordeaux, 29 Mont. 74, 74 Pac. 77.

Nebraska. — Gosnell *v.* Webster, 70 Neb. 705, 97 N. W. 1060.

Nevada. — Richardson *v.* Hoole, 13 Nev. 492.

New York. — Buedingen Mfg. Co. *v.* Royal Trust Co., 90 App. Div. 267, 85 N. Y. Supp. 621; Droege *v.* Baxter, 77 App. Div. 78, 79 N. Y. Supp. 29.

South Dakota. — Aldous *v.* Olverson, 17 S. D. 190, 95 N. W. 917.

49. *United States.* — Stringer *v.* Young, 3 Pet. 320.

Alabama. — Smith *v.* Pritchett, 98 Ala. 649, 13 So. 569.

California. — San Diego Land & T. Co. *v.* Neale, 88 Cal. 50, 25 Pac. 977; *s. c.* 78 Cal. 63, 20 Pac. 372.

Connecticut. — Phelps *v.* Hunt, 43 Conn. 194.

Georgia. — Stapleton *v.* Monroe, III Ga. 848, 36 S. E. 428.

Illinois. — Maxwell *v.* Durkin, 185 Ill. 546, 57 N. E. 433; Fitzsimmons & Connell Co. *v.* Braun, 199 Ill. 390, 65 N. E. 249, *affirming s. c.* 94 Ill. App. 533.

Indiana. — Shank *v.* State, 25 Ind. 207; Horne *v.* Williams, 12 Ind. 324.

Kentucky. — Norton *v.* Doe, *ex dem.* Sanders, 1 Dana 14.

Maryland. — Gorsuch *v.* Rutledge, 70 Md. 272, 17 Atl. 76; Walkup *v.* Pratt, 5 Har. & J. 51; Ruhl *v.* Corner, 63 Md. 179; Bannon *v.* Warfield, 42 Md. 22; Baltimore & S. R. Co. *v.* Woodruff, 4 Md. 242; Mitchell *v.* Sellman, 5 Md. 376.

Nebraska. — Dodge *v.* Kiene, 28 Neb. 216, 44 N. W. 191.

New York. — Farmers' & M. Bank *v.* Whinfield, 24 Wend. 419.

Pennsylvania. — Swank *v.* Phillips, 113 Pa. St. 482, 6 Atl. 450.

Virginia. — Wilkinson *v.* Jett, 7 Leigh 115.

RELIANCE.—See False Pretenses; Fraud.

RELINQUISHMENT.—See Abandonment; Public Lands.

RELOCATION.—See Mines and Minerals.

REMOTENESS OF EVIDENCE.—See Relevancy.

REMOVAL OF CAUSES.

CROSS-REFERENCE:

Domicil.

I. SCOPE.

While the subject, "Removal of Causes," includes the removal of a case from one federal court to another, from one state court to another, and from a state court to the United States circuit court, it is only in the last class of cases that questions of evidence arise upon the subject of removability proper.

II. GROUNDS FOR REMOVAL.

Since the jurisdiction of the United States circuit court in causes removed from a state court is limited to those cases enumerated in the statute, it must be established to the satisfaction of such court that the grounds for removal are sufficient to justify it in assuming jurisdiction.

1. Diversity of Citizenship. — Where removal is sought under that section of the statute providing for the removal of causes where the controversy is between citizens of different states, the diversity of citizenship of the parties is a material fact to be proved.[1] And

1. Shelton *v.* Tiffin, 6 How. (U. S.) 163; Kemna *v.* Brockhaus, 5 Fed. 732, 10 Biss. 128; Mansfield, C. & L. M. R. Co. *v.* Swan, 111 U. S. 379;

such diversity must be shown to have existed at the time of the commencement of the action.[2]

A. METHOD OF PROOF. — a. *Acts and Declarations of Intention.* Evidence of declarations of intention, acts, and any other circumstances tending to show intention as to citizenship are admissible.[3] But proof of intention to change is not enough, although all preparations for removal have been made. There must be an actual removal, together with an intention to change citizenship.[4]

b. *Residence.* — Residence is *prima facie,* but not conclusive, evidence of citizenship.[5]

c. *Exercise of Right of Suffrage.* — An exercise of the right of suffrage by a party in one state is proof of citizenship in that state.[6]

d. *Engaging in Business.* — Engaging in business, coupled with acts showing an intention of a party to make such place his home for an indefinite time, is evidence of citizenship.[7]

Anderson *v.* Watt, 138 U. S. 694.

2. Anderson *v.* Watt, 138 U. S. 694; Mullen *v.* Torrance, 9 Wheat. (U. S.) 537; Jackson *v.* Allen, 132 U. S. 27; Blair *v.* Western Female Seminary, 1 Bond. 578, 3 Fed. Cas. No. 1,486; Penfield *v.* Chesapeake, O. & S. W. R. Co., 29 Fed. 494; Mansfield, C. & L. M. R. Co. *v.* Swan, 111 U. S. 379.

3. *United States.* — Blair *v.* Western Female Seminary, 1 Bond. 578, 3 Fed. Cas. No. 1,486; Burnham *v.* Rangeley, 1 Woodb. & M. 7; Sanger *v.* Seymour, 25 Fed. 289; Winn *v.* Gilmer, 27 Fed. 817; Wright *v.* Schneider, 32 Fed. 705; Chambers *v.* Prince, 75 Fed. 176; Marks *v.* Marks, 75 Fed. 321; Shelton *v.* Tiffin, 6 How. 163; Ennis *v.* Smith, 14 How. 400.

Where the declaration of a party as to his intentions are inconsistent with his acts, his acts shall control. Butler's Lessee *v.* Farnsworth, 4 Wash. C. C. (U. S.) 101.

4. Pacific Mut. L. Ins. Co. *v.* Tompkins, 101 Fed. 539, 41 C. C. A. 488; Penfield *v.* Chesapeake, O. & S. W. R. Co., 29 Fed. 494; State Savings Assn. *v.* Howard, 31 Fed. 433; Alabama G. & S. R. Co. *v.* Carroll, 84 Fed. 772, 52 U. S. App. 442, 28 C. C. A. 207; Dresser *v.* Edison Illum. Co., 49 Fed. 257.

To prove citizenship there must be shown actual residence with the intention of remaining in such state for an indefinite time. Marks *v.* Marks, 75 Fed. 321.

5. Butler's Lessee *v.* Farnsworth, 4 Wash. C. C. (U. S.) 101; Shelton *v.* Tiffin, 6 How. (U. S.) 163; Kemna *v.* Brockhaus, 5 Fed. 732.

Proof that a man spends a good part of a year at summer and winter residences will not defeat his contention that he is a citizen of a place where he conducts his business, votes and has a permanent residence. Sanger *v.* Seymour, 25 Fed. 289.

Presumption. — "The place where a person lives is taken to be his domicil until facts adduced establish the contrary, and a domicil when acquired is presumed to continue until it is shown to have been changed." Anderson *v.* Watt, 138 U. S. 694.

Evidence of a temporary return to one's family at a former place of residence with views and for objects merely temporary does not prove a revival of a former residence. Burnham *v.* Rangeley, 1 Woodb. and M. (U. S.) 7.

6. Shelton *v.* Tiffin, 6 How. (U. S.) 163; Alabama, G. S. R. Co. *v.* Carroll, 84 Fed. 772, 52 U. S. App. 442, 28 C. C. A. 207.

Aliens. — The exercise of the right of suffrage is not sufficient in the case of an alien who has not resided in this country a sufficient length of time to complete the requirements for citizenship. Lanz *v.* Randall, 4 Dill. 425, 14 Fed. Cas. No. 8,080.

7. Knox *v.* Greenleaf, Wall. C.

e. *Question for the Jury.* — Where the evidence shows that a party has been living in two or more states, the question of his citizenship is one for the jury under proper instructions.[8]

f. *Presumptions.* — A former domicil is presumed to continue until a new one is shown.[9]

g. *Burden of Proof.* — Where the jurisdiction of the court is put in issue by a plea alleging that plaintiff is a resident of the same state as the defendant, the burden is on the defendant to prove such allegation.[10]

B. Change of Citizenship. — In case of a change of citizenship the evidence must show a *bona fide* intention of becoming a citizen of the state to which the party removes. Where it is shown that the purpose of removal was merely to bring suit in the circuit court with the intention of returning to the original state as soon as possible after suit is brought, such court will not assume jurisdiction.[11]

C. (U. S.) 108; Wright *v.* Schneider, 32 Fed. 705.

"Where an individual has resided in a state for a considerable time, being engaged in the prosecution of business, he may well be presumed to be a citizen of such state, unless the contrary appear. And this presumption is strengthened where the individual lives on a plantation and cultivates it with a large force, . . . claiming and improving the property as his own." Shelton *v.* Tiffin, 6 How. (U. S.) 163.

Evidence that a man has extensive business interests in one state, but lives with his family in another, spending only a part of the time in the state where his business is located, will not defeat his right to remove a case brought by a citizen of the latter state to the United States circuit court. Rivers *v.* Bradley, 53 Fed. 305. See also Brisenden *v.* Chamberlain, 53 Fed. 307.

8. Chicago & N. W. R. Co. *v.* Ohle, 117 U. S. 123; Rucker *v.* Bolles, 80 Fed. 504, 25 C. C. A. 600; Read *v.* Bertrand, 4 Wash C. C. (U. S.) 514.

9. Burnham *v.* Rangeley, 1 Woodb. & M. (U. S.) 7; Byrne *v.* Holt, 2 Wash. C. C. (U. S.) 282; Ennis *v.* Smith, 14 How. (U. S.) 400.

10. Sheppard *v.* Graves, 14 How. (U. S.) 505.

11. Jones *v.* League, 18 How. (U. S.) 76; Morris *v.* Gilmer, 129 U. S. 315; Castor *v.* Mitchel, 4 Wash. C. C. (U. S.) 191; Den *ex. dem.* Gardnell *v.* Sharp, 4 Wash. C. C. (U. S.) 609; Case *v.* Clarke, 5 Mason (U. S.) 70; Lehigh Min. & Mfg. Co. *v.* Kelly, 160 U. S. 327.

Burden of Proof. — An intention to remove permanently from one state to another is never to be presumed. The burden of proof to establish that point is upon the party asserting it. Read *v.* Bertrand, 4 Wash. C. C. (U. S.) 514.

To prove a change of citizenship from one state to another there must be shown "an actual removal, an actual change of domicil, with a *bona fide* intention of abandoning the former place of residence and establishing a new one, and the acts of the party must correspond with such purpose." Kemna *v.* Brockhaus, 5 Fed. 762.

"If a citizen of one state should think proper to change his domicil and to remove himself and family, if he have one, into another state with a *bona fide* intention of abandoning his former place of residence and to become an inhabitant or resident of the state to which he removes, he becomes immediately upon such removal accompanied with such intention a resident citizen of that state and may maintain an action in the circuit court of the state which he has abandoned or in that of any other state except the one in which he has settled himself. Time, in

But proof that the motive of the party removing was to bring suit in the circuit court will not alone defeat the jurisdiction of the court provided there is an actual, not pretended, change of domicil. The removal must be a real one *animo manendi*, not merely ostensible.[12]

2. Prejudice or Local Influence. — Where a party seeks to have a cause removed from a state court to the United States circuit court on the grounds of his inability to obtain justice in the state court, because of prejudice or local influence, he must prove such prejudice or local influence to the legal satisfaction of the court.[13]

With respect to the methods of making such prejudice or local influence "appear" the cases are conflicting. The court may receive evidence on the question by affidavits, or by depositions, or by oral testimony of witnesses.[14] The present state of the authorities leaves it optional with each judge to pursue any method which he may deem proper.[15] Under the act of 1867 an affidavit by the party desiring removal that he "has reason to believe, and does believe, that from prejudice or local influences he will be unable to obtain justice in such state court," was enough. But the act of 1887-8 provides that it shall be "made to appear to said circuit court that from prejudice or local influence he will not be able to

relation to his new residence, occupation, a sudden removal back to the state he had abandoned after instituting a suit in the circuit court of that state and the like are circumstances which may be relied upon to show that his first removal was not *bona fide* or intended to be permanent; but they will not be sufficient to disprove his citizenship in the place of his new domicil and to exclude him from the jurisdiction of the circuit court for the district in which he had formerly resided; if the jury are satisfied from the evidence that his first removal was *bona fide* and without an intention of returning." Cooper's Lessee *v.* Galbraith, 3 Wash. C. C. (U. S.) 546.

12. Briggs *v.* French, 2 Summ. (U. S.) 251; Pond *v.* Vermont Valley R. Co., 12 Blatch. (U. S.) 280.

13. Fisk *v.* Henarie, 142 U. S. 459; Bellaire *v.* Baltimore & O. R. Co., 146 U. S. 117; Olds Wagon Wks. *v.* Benedict, 67 Fed. 1, 14 C. C. A. 285; Short *v.* Chicago, M. & St. P. R. Co., 34 Fed. 225, 33 Fed. 114; Carson & Rand Lumb. Co. *v.* Holtzclaw, 39 Fed. 885.

As was said in the case of *In re* Pennsylvania Co., 137 U. S. 451: "Our opinion is that the circuit court must be legally (not merely morally) satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain justice in the state court. Legal satisfaction requires some proof suitable to the nature of the case; at least, an affidavit of a credible person, and a statement of facts in such affidavit which sufficiently evinces the truth of the allegation. The amount and manner of proof required in each case must be left to the discretion of the court itself. A perfunctory showing by a formal affidavit of mere belief will not be sufficient. If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of a person or persons in whom the court has confidence, this may be regarded as *prima facie* proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered."

14. Schwenk & Co. *v.* Strang, 59 Fed. 209, 8 C. C. A. 92; Malone *v.* Richmond & D. R. Co., 35 Fed. 625.

15. Walcott *v.* Watson, 46 Fed. 529.

obtain justice in such state court." Under the former act an affidavit was sufficient and its truth could not be inquired into. Many cases hold that this is still sufficient under the latter act.[16] However, the weight of authority seems to be that the affidavit shall state the facts which show prejudice or local influence and that the other party is entitled to a hearing.[17]

16. *United States.*—Neale *v.* Foster, 31 Fed. 53; Fisk *v.* Henarie, 32 Fed. 417, 35 Fed. 230; Hills *v.* Richmond & D. R. Co., 33 Fed. 81; Whelan *v.* New York, L. E. & W. R. Co., 35 Fed. 849; Huskins *v.* Cincinnati, N. O. & T. P. R. Co., 37 Fed. 504; Cooper *v.* Richmond & D. R. Co., 42 Fed. 697; Brodhead *v.* Shoemaker, 44 Fed. 518; Adelbert College W. R. Univ. *v.* Toledo, W. & W. R. Co., 47 Fed. 836; Reeves *v.* Corning, 51 Fed. 774.

17. *United States.*—Short *v.* Chicago, M. & St. P. R. Co., 33 Fed. 114, 34 Fed. 225; Malone *v.* Richmond & D. R. Co., 35 Fed. 625; Southworth *v.* Reid, 36 Fed. 451; Dennison *v.* Brown, 38 Fed. 535; Amy *v.* Manning, 38 Fed. 536; Goldworthy *v.* Chicago, M. & St. P. R. Co., 38 Fed. 769; Minnick *v.* Union Ins. Co., 40 Fed. 369; Rike *v.* Floyd, 42 Fed. 247; Niblock *v.* Alexander, 44 Fed. 306; Hall *v.* Chattanooga Agr. Wks., 48 Fed. 599; City of Tacoma *v.* Wright, 84 Fed. 836; Maher *v.* Tower Hotel Co., 94 Fed. 225.

Where a state law provides for a change of venue in such cases as the one sought to be removed, an affidavit showing prejudice in one county only is insufficient. Robinson *v.* Hardy, 38 Fed. 49. See also Rike *v.* Floyd, 42 Fed. 247.

It is not necessary to show that prejudice or local influence will affect an appellate court of the state to which the party desiring removal would have a right to appeal. City of Detroit *v.* Detroit City R. Co., 54 Fed. 1.

REMOVAL OF CLOUD.—See Title.

RENDITION.—See Extradition.

RENT.—See Landlord and Tenant.

RENUNCIATION.—See Abandonment; Executors and Administrators; Wills.

REPLEVIN.

I. MATTERS PERTAINING TO RIGHT OF ACTION AND DEFENSES.

1. Title and Right to Possession of Plaintiff. — A. PRESUMPTIONS AND BURDEN OF PROOF. — *a. In General.* — The general rule is that one seeking to recover the possession of personal property must show in himself a property, general or special, in the property in controversy, with the right to its immediate and exclusive possession at the time of commencing his action.[1] And conversely, of

1. *Arkansas.* — Schenck *v.* Griffith, 74 Ark. 557, 86 S. W. 850; Kennedy *v.* Clayton, 29 Ark. 270; Robinson *v.* Calloway, 4 Ark. 94; Hill *v.* Fellows, 25 Ark. 11; Wilson *v.* Roysston, 2 Ark. 315.

California. — Fredericks *v.* Tracy, 98 Cal. 658, 33 Pac. 750.

Connecticut. — Curnam *v.* Scheidel, 70 Conn. 13, 38 Atl. 875.

Maine. — Gillerson *v.* Mansur, 45 Me. 25; School Dist. No. 5 *v.* Lord, 44 Me. 374.

Michigan. — Metropolitan Lumb. Co. *v.* McColeman, 140 Mich. 333, 103 N. W. 809; Sanford *v.* Millikin, 114 Mich. 311, 107 N. W. 884.

Missouri. — Pilkington *v.* Trigg, 28 Mo. 95; Holliday *v.* Lewis, 15 Mo. 403.

Nebraska. — W. J. Perry L. S Comm. Co. *v.* Barto, 92 N. W. 762.

New Hampshire. — Stevens *v.* Chase, 61 N. H. 340.

New Jersey. — Chambers *v.* Hunt, 18 N. J. L. 339.

New York. — Rockwell *v.* Saunders, 19 Barb. 473; Orr *v.* New York, 64 Barb. 186.

Oklahoma. — Kerfoot *v.* State Bank, 14 Okla. 104, 77 Pac. 46.

Pennslyvania. — Lester *v.* McDonald, 18 Pa. St. 91.

Texas. — Downtain *v.* Ray, 31 Tex. Civ. App. 298, 71 S. W. 758.

Vermont. — Sprague *v.* Clark, 41 Vt. 6.

Wisconsin. — Magdeburg *v.* Uihlein, 53 Wis. 165, 10 N. W. 363.

In an action of replevin where the defendant pleads property in himself traversing the title of the plaintiff, the burden of proof is upon the plaintiff. Patterson *v.* Fowler, 22 Ark. 396, where it was held error to impose the burden of proof in such case on the defendant.

In Chas. H. Dodd & Co. *v.* Williams-Smithson Co., 27 Wash. 89, 67 Pac. 352, where defendant admitted plaintiff's title, but set up a special interest in himself, it was held that the plaintiff nevertheless had the burden of proving a right to the possession of the property and a wrongful taking or detention; and that until he did so, defendant was not required to offer proof in support of his special defense.

In Taylor *v.* True, 27 N. H. 220, the defendants filed a brief statement that the goods replevied were not the property of the plaintiffs, but of the defendants. *Held*, that the affirmative was on the plaintiffs, and that they were bound to offer evidence of property.

The plea of *non detinet* puts in issue not merely the wrongful possession but the plaintiff's right to the property, the burden of proof of which is upon the plaintiff. Patterson *v.* Fowler, 22 Ark. 396, where it was held error on the part of the trial court to impose the burden of proving property on the defendant.

In Robinson *v.* Calloway, 4 Ark. 94, it was held that evidence that the property in controversy belonged to a person deceased, that the plaintiff, as his widow, administered jointly with another person still living, that there were several heirs and had been no distribution of the estate, that after the death of the intestate the plaintiff had obtained possession of the property, had called it her own, and had had possession of it until shortly before suit was commenced, clearly show that she had no such title as would enable her to maintain replevin for the property.

Where a party suing for a chattel

course, where the proof shows neither title to the property, general or special, nor the right to the possession of the property, the plaintiff's action must fall.[2]

Proof of a Subsequently Acquired Title is not alone sufficient to maintain an action of claim and delivery or replevin.[3]

Change of Ownership. — Where there is neither averment in the pleadings nor evidence tending to show any change of ownership in the property after the action was brought and before the trial thereof, the presumption obtains that the title or right of possession has undergone no change since the commencement of the suit.[4]

b. *Right to Possession.* — **(1.) Generally.** — This rule requiring proof of property in the plaintiff in an action of replevin does not mean, however, that he must establish ownership by proof of an absolute title to the property;[5] but he must at all events show a right

proves that he purchased it from one in possession, he makes a *prima facie* case of title, and the burden of proof then shifts to the defendant. Wallace *v.* Brown, 17 Ark. 449.

In Connecticut the action of replevin is regulated entirely by statute, and in order to sustain it the plaintiff must show that he has a general or a special property in the goods with a right to their immediate possession, and that they are wrongfully detained from him. Weller *v.* Ely, 45 Conn. 547.

In Butler *v.* Estrella Raisin Vineyard Co., 124 Cal. 239, 56 Pac. 1040, it was held that a requested instruction placing upon the defendants the burden of proving by a preponderance of the evidence that the property in controversy had been purchased by them was properly refused.

In Beal *v.* McKee, 145 Ala. 657 (Memo. Op.) 39 So. 664, an action to recover a chattel, the plaintiff relied for title in the property on a mortgage executed to him by a third person. There was a total absence of any evidence tending to show that the mortgagor ever had any title to the property in question, nor was there evidence connecting the defendant's possession in any manner with the mortgagor. It was held that the plaintiff wholly failed to make out a *prima facie* right to a recovery, and that the trial court erred in refusing to give the general charge as requested by the defendant.

2. *Arkansas.* — Dixon *v.* Thatcher, 14 Ark. 141.

California. — Keech *v.* Beatty, 127 Cal. 177, 59 Pac. 837.

Colorado. — Baker *v.* Cardwell, 6 Colo. 199.

Georgia. — McEvoy *v.* Hussey, 64 Ga. 314.

Illinois. — Mulheisen *v.* Lane, 82 Ill. 117.

Mississippi. — Power *v.* Telford, 60 Miss. 195.

New York. — Livingston *v.* Miller, 48 Hun. 232.

Oregon. — Kimball Co. *v.* Redfield, 33 Or. 292, 54 Pac. 216.

Utah. — Munns *v.* Loveland, 15 Utah 250, 49 Pac. 743.

Compare Hobbs *v.* Myres, 1 B. Mon. (Ky.) 241.

3. Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684; Dillrance *v.* Murphy (Neb.), 95 N. W. 608; Britt *v.* Aylett, 11 Ark. 475, 32 Am. Dec. 282; Mathews *v.* Granger, 71 Ill. App. 467; Clark *v.* West, 23 Mich. 242; Tackaberry *v.* Gilmore, 57 Neb. 450, 78 N. W. 32; Stern *v.* Riches, 111 Wis. 589, 87 N. W. 554. Nor is evidence of such title even admissible for the plaintiff. See Dillrance *v.* Murphy (Neb.), 95 N. W. 608.

4. Hammond *v.* Solliday, 8 Colo. 610, 9 Pac. 781.

5. Hazard *v.* Hall, 5 Mo. App. 584; Miles *v.* Walther, 5 Mo. App. 595.

It is not necessary in replevin that

of possession at the time he makes demand or brings his action.[6]

(2.) Immediate Possession. — And he must show that he is en-

the plaintiff should prove an absolute title to the property as against a trespasser or wrongdoer; the right of possession is sufficient. Lamotte *v.* Wisner, 51 Md. 543.

When the action is founded on the wrongful detention of the property, and the original taking is not complained of, the plea of the general issue shall be, that the defendant does not detain the goods and chattles specified in the declaration, or any part thereof, in manner and form as therein alleged, and such plea shall put in issue not only the wrongful detention of the chattles, but also the property of the plaintiff therein. Wallace *v.* Brown, 17 Ark. 449.

6. *Arkansas.* — Carpenter *v.* Glass, 67 Ark. 135, 53 S. W. 678; Prater *v.* Frazier, 11 Ark. 249.

California. — Sutton *v.* Stephan, 101 Cal. 545, 36 Pac. 106.

Connecticut. — Spencer *v.* Roberts, 42 Conn. 75.

Georgia. — King *v.* Ford, 70 Ga. 628.

Indiana. — Entsminger *v.* Jackson, 73 Ind. 144.

Kansas. — Cooper *v.* Brown, 23 Kan. 582.

Louisiana. — Preston *v.* Zabnsky, 2 La. 226.

Maryland. — Smith *v.* Williamson, 1 Har. & J. 147; Lamotte *v.* Wisner, 51 Md. 543.

Mississippi. — Coleman *v.* Low, 13 So. 227; Frizell *v.* White, 5 Cushm. 198.

Nebraska. — Shackelford *v.* Hargreaves, 42 Neb. 680, 60 N. W. 951.

New York. — Wood *v.* Orser, 25 N. Y. 348.

Pennsylvania. — Weed *v.* Hall, 101 Pa. St. 502.

Rhode Island. — Halsted *v.* Cooper, 12 R. I. 500.

South Carolina. — Leonard *v.* Brockman, 46 S. C. 128, 24 S. E. 96.

Tennessee. — Brammell *v.* Hart, 12 Heisk. 366.

Wisconsin. — Timp *v.* Dockham, 32 Wis. 146.

To maintain an action of replevin for personal property, the plaintiff must prove not only title, general or special, in him, but he must also establish that he is entitled to immediate possession of the property in controversy. Carpenter *v.* Glass, 67 Ark. 135, 53 S. W. 678.

Plaintiff, in order to maintain an action of replevin for personal property, must prove by a preponderance of the evidence that at the time of the commencement of the action he was the owner of the property in question, and that he was entitled to immediate possession thereof. Hodges *v.* Nall, 66 Ark. 135, 49 S. W. 352.

The action of replevin in the *detinet* may be said to lie in all cases where the plaintiff has the right to property, either general or special, and the right to immediate possession of a chattle taken or detained by the defendant. Cox *v.* Morrow, 14 Ark. 603.

Although the defendant in replevin may be bound to prove his legal right to the possession of the property to the satisfaction of the jury, that cannot relieve the plaintiff of the burden of proving that he had a right to the immediate possession of the property when he commenced the action. Ott *v.* Specht, 8 Houst. (Del.) 61, 12 Atl. 721.

Under the Connecticut Statute, the plaintiff in an action of replevin must show a right to the possession in controversy accompanied by a general or a special property in the goods. Spencer *v.* Roberts, 42 Conn. 75.

In Massachusetts in order to maintain an action of replevin the plaintiff is bound to show in himself both property and right of possession. Johnson *v.* Neale, 6 Allen (Mass.) 227; Hallett *v.* Fowler, 8 Allen (Mass.) 93; Stanley *v.* Neale, 98 Mass. 343; Lewis *v.* Buttrick, 102 Mass. 412; Barry *v.* O'Brien, 103 Mass. 520. Mere previous possession without legal right is not enough. Field *v.* Fletcher, 191 Mass. 494, 78 N. E. 107.

titled to immediate possession of the property claimed in the action.[7]

(3.) Mortgagee. — A mortgagee, suing in replevin to recover possession of the mortgaged property, must show his right to the possession of the property.[8] And where the defendant does not claim under the mortgagor, the mortgagee cannot rely on his mortgage as proof of his title; but he must establish a superior title in his mortgagor.[9]

c. *Prior Possession by Plaintiff.* — **(1.) Generally.** — It is not necessary, however, that plaintiff in an action of replevin shall show that he ever had actual possession of the property before.[10]

7. *Arkansas.* — Wallace *v.* Brown, 14 Ark. 449; Hill *v.* Robinson, 16 Ark. 90; Bostick *v.* Brittain, 25 Ark. 482.

California. — Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684.

Illinois. — Currier *v.* Ford, 26 Ill. 488.

Indiana. — Noble *v.* Epperly, 6 Ind. 414.

Iowa. — Marienthal *v.* Schafer, 6 Iowa 223.

Maine. — Ingraham *v.* Martin, 15 Me. 373.

Massachusetts. — Pratt *v.* Parkman, 24 Pick. 42.

Michigan. — Clark *v.* West, 23 Mich. 242.

Mississippi. — Frizell *v.* White, 5 Cushm. 198.

Montana. — Laubenheimer *v.* McDermott, 5 Mont. 512, 6 Pac. 344.

New York. — McCurdy *v.* Brown, 1 Duer 101.

Wisconsin. — Wheeler & Wilson Mfg. Co. *v.* Teetzlaff, 53 Wis. 211, 10 N. W. 155.

The action in claim and delivery is proper only where the plaintiff establishes his right to the immediate possession of the property in controversy. Sutton *v.* Stephan, 101 Cal. 545, 36 Pac. 106.

To enable the plaintiff in an action of replevin to sustain the action, it devolves upon him to prove that he was entitled to the possession of the property on the day specified in his pleading. Bostwick *v.* Brittain, 25 Ark. 482.

To sustain an action of replevin, the plaintiff must prove that he was entitled to the immediate possession of the property at the commencement of the action. It is not sufficient to show a clear legal title to the property in controversy, but he must also be entitled to the immediate possession thereof. It is true that he is not, as an indispensable requisite, required to show title to the property, but he can never recover in any case unless he shows himself entitled to the immediate possession. Britt *v.* Aylett, 11 Ark. 475, 52 Am. Dec. 282.

8. Johnson *v.* Simpson, 77 Ind. 412; Pierce *v.* Stevens, 30 Me. 184; Kellogg *v.* Anderson, 40 Minn. 207, 41 N. W. 1045; Camp *v.* Pollock, 45 Neb. 771, 64 N. W. 231; Schweitzer *v.* Hanna, 91 Wis. 318, 64 N. W. 997.

Where the plaintiff in a replevin suit shows *prima facie* title to the cattle in controversy, the burden is on the defendant to show that the cattle described in the mortgage under which he claims are the same as those claimed by the plaintiff. First Nat. Bank *v.* Wood, 124 Mo. 72, 27 S. W. 554.

9. Musser *v.* King, 40 Neb. 892, 59 N. W. 744, 42 Am. St. Rep. 700. See also Beale *v.* McKee, 145 Ala. 657 (Memo. Op.), 39 So. 664.

10. Beebe *v.* DeBaum, 8 Ark. 510; Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684; Bunker *v.* McKenney, 63 Me. 529. *Compare* Johnson *v.* Elwood, 53 N. Y. 431, *holding* that specific articles severed from the freehold and converted cannot be recovered unless it is shown that plaintiff was in actual or constructive possession of the land at the time of the severance. *Contra.* — Cummings *v.* McGill, 6 N. C. 357.

A plaintiff who has a general or special property of goods, coupled with possession, either actual or constructive, can maintain replevin

(2.) When Sufficient. — But prior rightful possession is regarded as *prima facie* proof of title, and has been held sufficient to entitle the plaintiff to recover,[11] except perhaps as against the true owner or some person entitled to possession by virtue of some superior right.[12]

Where the Title Is in Issue and the right of possession is determined by the title, and the fact of possession is shown as a circumstance tending to show title, proof of title is necessary; the burden of proof, of course, being upon the plaintiff.[13]

Possession Need Not Be Under Claim of Title. — Possession in order to be regarded as sufficient evidence of ownership need not be under a claim of absolute title.[14]

Must Be Under Claim of Right. — But the possession by the plaintiff must be in his own right and under a claim of right.[15]

therefor, and it is error on the part of the court in the action of replevin to impose upon the plaintiff the burden of proving an actual and lawful possession of the property claimed. Wilson *v.* Royston, 2 Ark. 315.

11. *Arkansas.* — Oxley Stave Co. *v.* Staggs, 59 Ark. 370, 27 S. W. 241; Smith *v.* Graves, 25 Ark. 461.

Georgia. — McDuffie *v.* Irvine, 91 Ga. 748, 17 S. E. 1,028.

Illinois. — Cummins *v.* Holmes, 109 Ill. 15.

Maryland. — Hopper *v.* Callahan, 78 Md. 529, 28 Atl. 385.

Minnesota. — Anderson *v.* Gouldberg, 51 Minn. 294, 53 N. W. 636.

Nebraska. — Barkley *v.* Leiter, 49 Neb. 123, 68 N. W. 381.

New Jersey. — Hunt *v.* Chambers, 21 N. J. L. 620.

New York. — Johnson *v.* Carnley, 10 N. Y. 570; Frost *v.* Mott, 34 N. Y. 253.

South Carolina. — Peeples *v.* Warren, 51 S. C. 560, 29 S. E. 659.

Vermont. — Sprague *v.* Clark, 41 Vt. 6.

Wisconsin. — McCourt *v.* Bond, 64 Wis. 596, 25 N. W. 532.

Plaintiff may establish his right of possession by proving that he was in actual and undisputed possession when defendant took the property. But if he had no such possession he must prove title. Sanford *v.* Millikin, 114 Mich. 311, 107 N. W. 884.

12. Van Namee *v.* Bradley, 69 Ill. 299.

13. *United States.* — Williamson *v.* Ringgold, 4 Cranch C. C. 39.

Arkansas. — Patterson *v.* Fowler, 22 Ark. 398.

California. — Smith *v.* Arnold, 56 Cal. 640.

Illinois. — Chandler *v.* Lincoln, 52 Ill. 74; Pinkstaff *v.* Cochran, 58 Ill. App. 72.

Indiana. — Simcoke *v.* Frederick, 1 Ind. 54; Krug *v.* Herod, 69 Ind. 78.

Iowa. — Hillman *v.* Brigham, 110 Iowa 220, 81 N. W. 451.

Maine. — Webber *v.* Read, 65 Me. 564.

Massachusetts. — Gibbs *v.* Childs, 143 Mass. 103, 9 N. E. 3.

Michigan. — Hatch *v.* Fowler, 28 Mich. 205.

Nebraska. — Jenkins *v.* Mitchell, 40 Neb. 664, 59 N. W. 90.

New Jersey. — Harwood *v.* Smethurst, 29 N. J. L. 195.

Wisconsin. — Wheeler & Wilson Mfg. Co. *v.* Teetzlaff, 53 Wis. 211, 10 N. W. 155.

Where Plaintiff Alleges That He Is the Absolute and Unqualified Owner of the property in dispute, which the defendant denies, he is required to prove it. Proof that he held it in trust for another is not enough. Gevers *v.* Farmer, 109 Iowa 468, 80 N. W. 535.

On an issue of property in replevin the burden is on the plaintiff. Pennington *v.* Chandler, 5 Harr. (Del.) 394; McIlvaine *v.* Holland, 5 Harr. (Del.) 226.

14. Tatum *v.* Sharpless, 6 Phila. (Pa.) 18.

15. Davis *v.* Loftin, 6 Tex. 497;

d. *Strength of Plaintiff's Title as Basis of Recovery.* — The plaintiff in replevin must recover upon the strength of his own title or right of possession, and not upon the weakness of that of his adversary.[16]

B. Mode of Proof. — In General. — In respect of the mode of proving the title or ownership of the property in controversy, whether claimed by the plaintiff or defendant, the rules of evidence ordinarily governing that question are the same in an action of replevin as in other cases where that fact is sought to be established.[17]

Stanley *v.* Gaylord, 1 Cush. (Mass.) 536; Summons *v.* Austin, 36 Mo. 307; Mitchell *v.* Hinman, 8 Wend. (N. Y.) 667.

16. *Arizona.* — Hall *v.* Southern Pac. Co., 6 Ariz. 378, 57 Pac. 617.

Arkansas. — Kennedy *v.* Clayton, 29 Ark. 270; Robinson *v.* Calloway, 4 Ark. 94; Bostwick *v.* Britton, 25 Ark. 482.

Connecticut. — Weller *v.* Ely, 45 Conn. 547.

Illinois. — Reynolds *v.* McCormick, 62 Ill. 412.

Indiana. — Ingersoll *v.* Emmerson, 1 Ind. 76; Davis *v.* Warfield, 38 Ind. 461; Lane *v.* Sparks, 75 Ind. 278; Thompson *v.* Ross, 87 Ind. 156.

Iowa. — Burrows *v.* Waddell, 52 Iowa 195, 3 N. W. 37; Gevers *v.* Farmer, 109 Iowa 468, 80 N. W. 535; Lufkin *v.* Preston, 52 Iowa 235, 3 N. W. 58.

Louisiana. — Pritchett *v.* Coyle, 22 La. Ann. 57.

Massachusetts. — Stanley *v.* Neale, 98 Mass. 343.

Mississippi. — Wheeler *v.* Dixon, 51 Miss. 550.

Missouri. — Updyke *v.* Wheeler, 37 Mo. App. 680.

Montana. — Gallick *v.* Bordeaux, 31 Mont. 328, 78 Pac. 583.

Nebraska. — Ellsworth *v.* McDowell, 44 Neb. 707, 62 N. W. 1082; St. John *v.* Swanback, 39 Neb. 841, 58 N. W. 288; First Nat. Bank *v.* Hughes, 92 N. W. 986.

North Carolina. — Freshwater *v.* Nichols, 52 N. C. 251.

Oklahoma. — Robb *v.* Dobrinski, 14 Okla. 563, 78 Pac. 101.

Tennessee. — Dockery *v.* Miller, 9 Humph. 731.

Vermont. — Tittemore *v.* Labounty, 60 Vt. 624, 15 Atl. 196.

In an action of replevin the plaintiff must recover upon the strength of his own title, and it is immaterial whether the defendant has or has not any title; and if the plaintiff fails to show title in himself he is not entitled to recovery. Wilkins *v.* Wilson, 1 Marv. (Del.) 404, 41 Atl. 76.

The possession of a chattle interest carries with it the presumption of ownership or right of possession, and neither of these can be interrupted or disturbed unless the party claiming it shows that he has a superior paramount title. Robinson *v.* Calloway, 4 Ark. 94.

Where the defendant pleads property in a third person, the burden of proof is upon the plaintiff to show a superior title to that third person. Lamotte *v.* Wisner, 51 Md. 543.

17. See generally the articles "Ownership," Vol. IX, p. 256, and "Title."

Purchaser at Judicial Sale. — In the absence of any statute prescribing a different rule of evidence, where a purchaser through a sale under judgment and execution sues as such to recover the property purchased, the general rule is that he should produce the judgment and execution before evidence of the purchase itself is admissible; but after the proper foundation is laid the sale may be established by oral evidence, a bill of sale not being necessary to pass title in such case. Or after the introduction of a judgment and execution, a bill of sale executed by the officer selling the property is then admissible in evidence for the purchaser to establish the fact of the purchase. Kennedy *v.* Clayton, 29 Ark. 270.

Ownership at Prior Date. — The fact that the plaintiff was the owner

Failure by the Plaintiff To Return the Property for Taxation, while by no means conclusive, is a circumstance to be considered on the question of ownership.[18]

Bill of Sale. — Where plaintiff claims title and right to the possession of the property under a bill of sale from another person, the bill is of course admissible for plaintiff.[19]

Declarations of Person in Possession. — Declarations of a person in

and entitled to the possession of the property in controversy at a previous date is evidence from which the ownership of property in controversy at the commencement of the action may be deduced upon the principle that "a thing once proved to exist continues as long as is usual with things of that nature." Fredericks *v.* Tracy, 98 Cal. 658, 33 Pac. 750.

Books of Account of Third Person. — A plaintiff in replevin cannot be permitted to prove his ownership of the property in controversy by the books of account of a third person not a party to the action. Watrous *v.* Cunningham, 65 Cal. 410, 4 Pac. 408.

Chattel Mortgage. — In Flinn *v.* Ferry, 127 Cal. 648, 60 Pac. 434, where the plaintiff claimed the right to the possession of the property under a chattel mortgage given by the defendant to a third person, it was held error to refuse to permit the plaintiff to introduce in evidence an assignment of the mortgage in writing made by the mortgagee to him, duly acknowledged, and dated prior to the commencement of the action.

Where the evidence in replevin shows that the property, together with other property, was taken into the defendant's possession at the same time and in the same manner, plaintiff claiming that it was taken forcibly and without his consent, and the defendant claiming that it was voluntarily delivered to him in payment of a debt, evidence that plaintiff recovered the other part in another action wherein the defendant permitted the judgment to be taken by default is relevant and admissible as tending to rebut the defendant's claim of purchase. Youngloye *v.* Knox, 44 Fla. 743, 33 So. 427.

In Curnane *v.* Scheidel, 70 Conn. 13, 38 Atl. 875, it appeared that the plaintiff sought to recover property which he claimed belonged to himself but had been traded off without his permission to the defendant by one in whose possession the property was at the time. It was held that evidence that such third person had upon the plaintiff's suggestion procured a writ and complained against the defendant for fraud in making the trade, in which such third person was described as plaintiff and owner of the property, and which had been read to the defendant by the officer, was admissible either for the purpose of discrediting the plaintiff's claim of title, or in connection with other evidence to show a ratification by the plaintiff of the trade made with the defendant.

Upon the trial of an action to recover personal property brought by a married woman who testifies that she had given in part payment for the same other personal property belonging to herself, a declaration made by her husband before the purchase, that the property last mentioned belonged to him, is not admissible as against the plaintiff where it appears that she does not claim under her husband either the property sued for or that which she exchanged for it, and that the latter was not in the husband's possession at the time of the alleged declaration. Holton *v.* Carter, 90 Ga. 299, 15 S. E. 819.

18. Kastl *v.* Arthur, 135 Mich. 278, 97 N. W. 711.

19. Benn *v.* Oliver (Iowa), 80 N. W. 392.

In Bonesteel *v.* Gardner, 1 Dak. 372, 46 N. W. 590, it was held that a bill of sale of the property in controversy from a third person to the plaintiff was admissible as the best evidence to establish the plaintiff's title.

possession of personal property, explanatory thereof, are admissible on the issue of ownership.[20]

Direct Testimony of Plaintiff. — Of course it is proper to permit the plaintiff in replevin to testify that the property in controversy belongs to him.[21]

Disproof of Title. — Since the plaintiff in replevin must recover upon the strength of his own title, any evidence which tends to show that he did not have title to the property, or some part of it, is admissible.[22]

2. Taking, Detention or Possession By Defendant. — A. In General. — At common law the general rule was that, in order to maintain his action, the plaintiff in replevin must show an unlawful taking.[23] But under the present practice as regulated by statute in most of the states, proof of wrongful detention is sufficient, although it may appear that the original taking was legal.[24]

B. Wrongful Detention. — And not only must the plaintiff in

20. Noble *v.* Hawthorne, 107 Iowa 380, 77 N. W. 1062, *holding* also that such declarations may be oral, in writing or printed, if made while in actual possession, and in explanation of the capacity in which this is held.

Where in replevin party claims by purchase from a third person, the declarations of that person while in possession are proper evidence against his vendee. Kuhns *v.* Gates, 92 Ind. 66.

It was error to reject evidence of declarations and acts of one formerly in possession of the property, made before he sold to the person from whom defendant purchased, and under whose title defendant claims the property. People *v.* Devault, 11 Heisk. (Tenn.) 431.

21. Curnane *v.* Scheidel, 70 Conn. 13, 38 Atl. 875.

22. Gevers *v.* Farmer, 109 Iowa 468, 80 N. W. 535.

23. Mennie *v.* Blake, 6 El. & Bl. 842, 88 E. C. L. 842; Trapnall *v.* Hattier, 6 Ark. 18; Wheelock *v.* Cozzens, 6 How. (Miss.) 279; Dame *v.* Dame, 43 N. H. 37; Pangburn *v.* Partridge, 7 Johns. (N. Y.) 140, 5 Am. Dec. 250; Vaiden *v.* Bell, 3 Rand. (Va.) 448.

Contra in Massachusetts. — Whitman *v.* Merrill, 125 Mass. 127; Perry *v.* Stowe, 111 Mass. 60; Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105.

An action of replevin will not lie where there is only an unlawful detention of the property; to sustain the action there must be an unlawful taking. Harwood *v.* Smethurst, 29 N. J. L. 195.

24. *United States.* — Sutherland *v.* Brace, 73 Fed. 624, 19 C. C. A. 589; Murphy *v.* Tindall, Hempst. 10, 17 Fed. Cas. No. 9,952*a*.

California. — Flanders *v.* Locke, 53 Cal. 20.

Maine. — Bartlett *v.* Goodwin, 71 Me. 350; Seaver *v.* Dingley, 4 Me. 306.

Massachusetts. — Whitman *v.* Merrill, 125 Mass. 125.

Michigan. — Gildas *v.* Crosby, 61 Mich. 413, 28 N. W. 153.

Mississippi. — Burrage *v.* Melson, 48 Miss. 237.

Missouri. — Skinner *v.* Stouse, 4 Mo. 93.

New Hampshire. — Osgood *v.* Green, 30 N. H. 210.

Rhode Island. — Waterman *v.* Mattison, 4 R. I. 539.

An action of replevin will lie for the wrongful detention of the distress, notwithstanding the taking might be rightful. Replevin cannot be maintained against one who distrains unless he had no right to make the distress, or has abused it, or proceeded illegally after making it; and if the plaintiff sees fit to commence this form of action against him, and he justifies the taking, it has been said that the plaintiff, and not the defendant,

replevin prove possession by the defendant, but he must also show the alleged wrongful detention by the defendant.[25]

C. Place of Detention. — It has been held that proof of detention in the county where the action is instituted, if necessary at all, is required only where the immediate possession of the property is demanded.[26] Nor is it necessary that the place of detention be proved by direct evidence; it may be inferred from circumstances.[27]

D. Possession of Defendant. —It is also a general rule that, in order to support an action of replevin, the plaintiff must show that the defendant was in either actual or constructive possession of the property at the time of the demand or of the writ.[28]

E. Interference With or Control Over Property. — It is not always regarded as necessary to show an actual forcible disposses-

should be called upon to show why the action was brought. Osgood *v.* Green, 30 N. H. 210.

25. *Alabama.* — Beal *v.* McKee, 145 Ala. 657, 39 So. 664.

Arkansas. — Neis *v.* Gillen, 27 Ark. 184; Wallace *v.* Brown, 14 Ark. 449.

Delaware. — Johnson *v.* Johnson, 4 Harr. 171.

Kansas. — Redinger *v.* Jones, 68 Kan. 627, 75 Pac. 997.

Maryland. — Lamotte *v.* Wisner, 51 Md. 543.

Massachusetts. — Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105.

Nebraska. — Heidiman-Benoist Sadd. Co. *v.* Schott, 59 Neb. 20, 80 N. W. 47; Burr *v.* McCallum, 59 Neb. 326, 80 N. W. 1040, 80 Am. St. Rep. 677.

Ohio. — Stone *v.* Wilson, Wright 159.

Vermont. — Dearing & Co. *v.* Smith, 66 Vt. 60, 28 Atl. 630.

The plaintiff in an action of replevin must prove by a preponderance of the evidence that the defendant wrongfully detained the property from the plaintiff after a demand was made upon him for the property by the plaintiff. Hodges *v.* Nall, 66 Ark. 135, 49 S. W. 352.

Joint Defendants. — Where there are two or more joint defendants in the action, the plaintiff, in order to recover against all of them, must show that they were jointly connected with the taking or unlawful detention at the time the action was commenced. Jetton *v.* Smead, 29 Ark. 372.

26. Robinson *v.* Shatzley, 75 Ind. 461.

Place of Detention. — In Connecticut the rule is that in an action of replevin under the statute, the fact that the wrongful detention is based on an act of conversion which took place in another state is immaterial, and that the plaintiff is not bound to prove that the portion of the goods so described and not replevied were in the state while so wrongfully detained. If any portion of the property acquired by the same wrongful acts is shown to be within the state and its situation is known, a resort for complete redress may be had by an action of replevin. Belknap Sav. Bank *v.* Robinson, 66 Conn. 542, 34 Atl. 495. The court said: "We think the language of § 1333 of the General Statutes, which contains the Act of 1864, applies to the facts as found by the court in this case; that the fact that the wrongful detention of the goods described in the writ is based on an act of conversion which took place in another state, is immaterial, . . . and that proof of the wrongful detainer of all the goods described in the writ, including that portion of the goods not replevied, is sufficient to support a judgment, without showing that such goods not replevied were in this state while so wrongfully detained."

27. Louthain *v.* May, 77 Ind. 109.

28. *Arkansas.* — Beebe *v.* DeBaun, 8 Ark. 510; Neis *v.* Gillen, 27 Ark. 184.

California. — Riciotto *v.* Clement, 94 Cal. 105, 29 Pac. 414.

sion of the plaintiff. It is sufficient to show any unlawful interference with, or exercise of dominion over, the property by the defendant by reason of which the plaintiff is damnified.[29]

Colorado. — Rachofsky & Co. *v.* Benson, 19 Colo. App. 178, 74 Pac. 657.

Delaware. — Johnson *v.* Johnson, 4 Harr. 171.

District of Columbia. — Carpenter *v.* Starr, 1 Mack. 417.

Indiana. — Standard Oil Co. *v.* Bretz, 98 Ind. 231.

Iowa. — Hove *v.* McHenry, 60 Iowa 227, 14 N. W. 301.

Kansas. — Davis *v.* Van De Mark, 45 Kan. 130, 25 Pac. 589.

Maine. — Ramsdell *v.* Buswell, 54 Me. 546.

Michigan. — Hall *v.* Kalamazoo, 131 Mich. 404, 91 N. W. 615; Gildas *v.* Crosby, 61 Mich. 413, 28 N. W. 153; Aber *v.* Bratton, 60 Mich. 357, 27 N. W. 564.

Mississippi.—Krosmopolski *v.* Paxton, 58 Miss. 581.

Missouri. — Penn *v.* Brashear, 65 Mo. App. 24; Rogers *v.* Davis, 21 Mo. App. 150.

Nebraska. — Depriest *v.* McKinstry, 38 Neb. 194, 56 N. W. 806.

Nevada. — Gardner *v.* Brown 22 Nev. 156, 37 Pac. 240.

Oklahoma. — Robb *v.* Dobrinski, 14 Okla. 563, 78 Pac. 101.

Wisconsin. — McHugh *v.* Robinson, 71 Wis. 565, 37 N. W. 426.

Proof of Constructive Possession Sufficient. — Meixell *v.* Kirkpatrick, 33 Kan. 282, 6 Pac. 241; Coomer *v.* Gale Mfg. Co., 40 Mich. 691; Bradley *v.* Gamelle, 7 Minn. 331.

It is well established that the plaintiff in replevin must show the defendant to be in possession of the goods replevied. In the absence of other evidence, ownership or right of possession in the plaintiff and possession held by the defendant, would undoubtedly require the inference and finding that the defendant's possession was wrongful; but such fact does not change the burden of proof, which remains with the plaintiff. Morgan *v.* Jackson, 32 Ind. App. 169, 69 N. E. 410.

An action to recover the possession of personal property can not be maintained unless it is shown that at the time the action was commenced the defendant had the possession, or at all events, the power to deliver the property in satisfaction of the judgment for its possession. Where, however, the defendant had the property in his possession at the time the action was commenced he can not defeat the plaintiff's right by proof of a subsequent transfer or destruction of the property. Richards *v.* Morey, 133 Cal. 437, 65 Pac. 886.

Replevin will not lie to recover personal property unless the plaintiff proves, amongst other things, that the defendant was at the commencement of the action in possession of the property. Hodges *v.* Nall, 66 Ark. 135, 49 S. W. 352.

Proof that the defendant at the commencement of the action was in possession of the property in controversy, which had been stolen from the plaintiff and which the defendant had bought, is sufficient to entitle the plaintiff to a judgment. Worthen *v.* Thompson, 54 Ark. 151, 15 S. W. 192.

In Prater *v.* Frazier, 11 Ark. 249, it was held that the admission in evidence of the writ and return as evidence of possession of the property by the defendant was not material error, if error at all, because the fact was abundantly established by other competent testimony.

In Tomlinson *v.* Collins, 20 Conn. 364, where it was material to show that the property in controversy was at the time of bringing the action of replevin held under an attachment, it was held that the writ of replevin, which had been served but not returned to court, was, in connection with parol testimony, competent to prove the fact in question.

The sheriff who executed the writ of replevin is unquestionably a competent witness to testify to the possession of the property by the defendant. Prater *v.* Frazier, 11 Ark. 249.

29. Stewart *v.* Wells, 6 Barb. (N. Y.) 79; Latimer *v.* Wheeler, 3

3. Conditions Precedent. — A. Performance of Obligation. Sometimes the circumstances attending the plaintiff's right to the possession of the property, and hence his right of action, involve the performance upon his part of some obligation, and of course in such case it is incumbent upon him to show such performance.[30]

B. Demand and Refusal. — a. *Presumptions and Burden of Proof.* — **(1.) Generally.** — The general rule is that plaintiff in an action of replevin, unless otherwise expressly provided by statute,[31] must prove that a timely and sufficient demand was made upon the

Abb. Dec. (N. Y.) 35; Neff *v.* Thompson, 8 Barb. (N. Y.) 213.

Contra. — Wallace *v.* Brown, 17 Ark. 449, *holding* that there must be proof of an actual taking or actual detention; that proof of mere acts of ownership without manual possession is not enough. See also Newman *v.* Jenne, 47 Me. 520; Kittridge *v.* Miller, 45 Mich. 478, 8 N. W. 94.

Actual possession of the property by the defendant at the time of the writ is not always an essential fact necessary to be established in order to maintain replevin. Harkey *v.* Tillman, 40 Ark. 551. The court said: "That would be a very inconvenient rule, which would enable one who had wrongfully taken or detained property from the owner to refuse to deliver, and hold to the last moment before the writ, and then evade a suit by a transfer of possession. His successor might do the same; and his after him; and so on *toties quoties*, until the costs of writs to the owner would consume the property." See also Washington *v.* Love, 34 Ark. 93.

Where the Unlawful Detention Is in Issue, it is not enough to show merely that the defendant was in possession of real estate on which the property was situated. There must be evidence that the defendant exercised some acts of ownership over the property, or in some way prevented the plaintiff from taking possession of it. Kennedy *v.* Clayton, 29 Ark. 270.

30. Edwin *v.* Jacobson, 47 Ill. App 93.

Replevin can not be maintained for property in the possession of another, who has a lien upon it for charges, until it is proved that the charges have been paid. Hill *v.* Robinson, 16 Ark. 90.

In Order That a Bailor, suing to replevy goods stored with a warehouseman, may recover therefor, he must establish the fact that he either paid or tendered the amount due for storage and other expenses for which the warehouseman has a lien upon the goods. Burr *v.* Daugherty, 21 Ark. 559.

In an Action of Replevin by a Defrauded Vendor against the fraudulent vendee or against a *mala fide* purchaser from such vendee, the plaintiff is entitled to recover without proof of his having reimbursed or offered to reimburse the defendant for freight charges which the latter had paid to obtain possession of the property. Soper Lumb. Co. *v.* Halsted & Harmount Co., 73 Conn. 547, 48 Atl. 425.

Replevin Is Maintainable Against a Tax Collector for goods wrongfully seized by him for alleged unpaid taxes of the plaintiff, but if the owner relies upon a tender of all the taxes due as entitling him to a return of the goods, he must show a continuous tender up to and during the trial, to entitle him to a recovery. Miller *v.* McGehee, 60 Miss. 903.

31. Dearing *v.* Ford, 13 Smed. & M. (Miss.) 269.

In Delaware it is expressly provided by statute that in all actions of replevin no proof of demand shall be necessary, but the bringing of the suit shall be considered a sufficient demand for all purposes, and the failure at the trial to prove any demand shall not be ground for a nonsuit. Stockwell *v.* Robinson, 9 Houst. (Del.) 313, 32 Atl. 528, *holding*, however, that if the defendant

defendant for the property in controversy, and that the defendant refused to comply with that demand.[32] And when proof of demand is necessary, the evidence must show that it was made when the defendant was in possession and control.[33]

(2.) Property Rightfully Taken By or in Possession of Defendant. So where it appears that the defendant in replevin took or came into possession of the property in good faith and legally, the plaintiff must show a demand and refusal.[34]

in replevin become lawfully possessed of the goods and surrenders them immediately upon service of the writ issued, without a previous demand, he is not liable for costs.

32. Hodges *v.* Nall, 66 Ark. 135, 49 S. W. 352; Lamping *v.* Keenan, 9 Colo. 390, 12 Pac. 434; Roach *v.* Binder, 1 Colo. 322; Ingalls *v.* Bulkley, 13 Ill. 315; Toledo, St. L. & K. C. R. Co. *v.* American Refrigerator Trans. Co., 41 Ill. App. 625. And see cases cited in succeeding notes.

In Howard *v.* Braun, 14 S. D. 579, 86 N. W. 635, *quoting* from Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268, the court says: "The rule which requires a demand is a technical one. The reason of it is that the law presumes that the party in possession of property not his own will respect the rights of the true owner when informed of them, and that upon demand being made he will surrender without suit. . . . Where the circumstances are such as to show that a demand would have been unavailing, no demand is necessary."

Proof of demand is required only when it is necessary to establish the termination of the defendant's right of possession, or to establish it in the plaintiff; and when both parties claim the absolute ownership of the property, possession of which is sought by the plaintiff and the right of possession incident to such ownership, proof of demand is not necessary. Leek *v.* Chesley, 98 Iowa 593, 67 N. W. 580.

In an action of replevin it is not indispensably necessary to show a demand upon the defendant to return the property before suit brought. A demand serves no purpose, except to establish a conversion or a wrongful detention; when that can be established without showing a demand, a demand is unnecessary. When defendant in his answer admits the detention, and claims title in himself, the title alone is put in issue, and no demand need be shown. Perkins *v.* Barnes, 3 Nev. 557.

Where It Appears That There Were Several Joint Owners of a divisible chattel in the possession of one, replevin can not be maintained by another joint owner for his share until he has proved a demand and refusal, or conversion. Hill *v.* Robinson, 16 Ark. 90.

In Trowbridge *v.* Bosworth, 45 Conn. 166, plaintiff was a poundkeeper and had had possession of defendant's cattle for several days when some person without the knowledge or consent of either party illegally broke the gate of the pound and allowed the cattle in question to escape and return to the defendant's enclosure. The plaintiff merely sent notice to the defendant of the fact of the cattle's escape, and the cattle not being returned to the pound the plaintiff brought replevin for them. It was held that the defendant was not in the position of a wrongdoer and consequently it was necessary for the plaintiff to show that a demand had been made upon the defendant and that the defendant had refused to comply with the demand; that presumptively a demand would have been complied with and that the defendant was not to be burdened with the expense of defending the action until it was shown that he had placed himself in the wrong by a refusal.

33. West *v.* Graff, 23 Ind. App. 410, 55 N. E. 506.

34. *Arkansas.* — Prater *v.* Frazier, 11 Ark. 249.

California. — McNally *v.* Connolly, 9 Pac. 169.

Colorado. — Roach *v.* Binder, 1 Colo. 322.

(3.) Demand Unavailing. — But proof of a demand and refusal is not necessary where the circumstances, as appear by the evidence, are such as to show that a demand would have been unavailing.[35]

(4.) Denial of Plaintiff's Claim and Claim of Right to Possession By Defendant. — Where the defendant denies the plaintiff's claim to right of possession, and asserts ownership in himself, proof of a demand and refusal is not necessary.[36]

Connecticut. — Lynch *v.* Beecher, 38 Conn. 490.

Illinois. — Ohio & M. R. Co. *v.* Noe, 77 Ill. 513; Ehle *v.* Deitz, 32 Ill. App. 547.

Indiana. — Torian *v.* McClure, 83 Ind. 310.

Iowa. — Gilchrist *v.* Moore, 7 Iowa 9.

Maine. — Newman *v.* Jenne, 47 Me. 520.

Michigan. — Adams *v.* Wood, 51 Mich. 411, 16 N. W. 788.

Minnesota. — Stratton *v.* Allen, 7 Minn. 502; Jumiska *v.* Andrews, 87 Minn. 515, 92 N. W. 470.

New York. — Treak *v.* Hathorn, 3 Hun 646.

North Carolina. — Felton *v.* Hales, 67 N. C. 107.

Wisconsin. — George *v.* McGovern, 83 Wis. 555, 53 N. W. 899, 35 Am. St. Rep. 77. See also Alrichs *v.* Bowers, 3 Houst. (Del.) 367.

In replevin against one who has acquired the property in good faith it is necessary to prove a demand and refusal to deliver before suit, or something equivalent to it. Roach *v.* Binder, 1 Colo. 322.

Where a Person Buys Personal Property in Good Faith without notice from a wrongful taker, he is not liable in replevin by the real owner without a demand. Ledbetter *v.* Embree, 12 Ind. App. 617, 40 N. E. 928. *Compare* Prime *v.* Cobb, 63 Me. 200.

35. Hennessey *v.* Barnett, 12 Colo. App. 254, 55 Pac. 197; Sinamaker *v.* Rose, 62 Ill. App. 118 (where the defendant stated in advance that he would not deliver the property, and refused to listen to a demand); Roper *v.* Harrison, 37 Kan. 243, 15 Pac. 219; Wadleigh *v.* Buckingham, 80 Wis. 230, 49 N. W. 745 (where the defendant forbade the plaintiff from interfering with the property and threatened to arrest him if he did so).

In Keller *v.* Robinson Co., 153 Ill. 458, 38 N. E. 1072, it appeared that a demand was made after the suit was begun and the writ issued, but not before, and that the demand made was refused. It was conceded that such a demand and refusal did not prove a wrongful detention at the time of bringing the action, but it was contended that the fact that the defendant refused to surrender the property after the writ was issued was evidence tending to prove that a demand before the suit was brought would have been unavailing. The court said: "This position we regard as untenable. The defendant had a perfect right to rely upon the defense that no proper demand of him had been made. When he refused to release his levy he had that complete defense to the action. To say that his refusal, then, is evidence that he would have done so before the suit was brought if he had been put to his election to give up the property or take the risk of litigation on the right of property alone, is, we think, illogical, and if established as a rule of law would practically dispense with a demand before suit in every case."

36. *Arkansas.* — Henry *v.* Fine, 23 Ark. 417; McNeil *v.* Arnold, 17 Ark. 154.

California.—California Cured Fruit Assn. *v.* Stelling, 141 Cal. 713, 75 Pac. 320; Latta *v.* Tutton, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30.

Colorado. — Hennessey *v.* Barnett, 12 Colo. App. 254, 55 Pac. 197.

Dakota. — Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268.

Florida. — Webster *v.* Brunswick-Balke Callender Co., 37 Fla. 433, 20 So. 536.

Illinois. — Kingman & Co. *v.* Reinemer, 58 Ill. App. 173.

Iowa. — Leek *v.* Chesley, 98 Iowa 593, 67 N. W. 580; Smith *v.* McLean,

(5.) Property Wrongfully Taken By or in Possession of Defendant. So, too, where it appears that the defendant wrongfully took or obtained possession of the property, proof of a demand and refusal is not necessary.[37]

24 Iowa 322; Redding *v.* Page, 52 Iowa 406, 3 N. W. 427.

Kansas. — Bliss *v.* Couch, 46 Kan. 400, 26 Pac. 706; State Bank *v.* Norduff, 2 Kan. App. 55, 43 Pac. 312; Greenawalt *v.* Wilson, 52 Kan. 109, 34 Pac. 403.

Maine. — Lewis *v.* Smart, 67 Me. 206; O'Neil *v.* Bailey, 68 Me. 429.

Massachusetts. — Freelove *v.* Freelove, 128 Mass. 190.

Minnesota. — Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853.

Mississippi. — Newell *v.* Newell, 34 Miss. 385.

Nebraska. — Herman *v.* Kneipp, 59 Neb. 208, 80 N. W. 816; Ogden *v.* Warren, 36 Neb. 715, 55 N. W. 221.

North Carolina. — Buffkins *v.* Eason, 112 N. C. 162, 16 S. E. 916.

Washington. — Seattle Nat. Bank *v.* Meerwaldt, 8 Wash. 630, 36 Pac. 763.

Wisconsin. — Byrne *v.* Byrne, 89 Wis. 659, 62 N. W. 413.

Wyoming. — Bunce *v.* McMahon, 6 Wyo. 24, 42 Pac. 23.

In an Action by a Pledgor to recover the pledged property where the defendant, pledgee, claims ownership of the property under a sale to him, the plaintiff need not show a demand and refusal to deliver the property. Latta *v.* Tutton, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30.

When the Plaintiff Claims the Ownership of the Property and the right of possession is incident to that ownership and the defendant's right claimed is precisely that of the plaintiff, proof of a demand is not required. Lamping *v.* Keenan, 9 Colo. 390, 12 Pac. 434; *citing* Smith *v.* McLean, 24 Iowa 322; Shoemaker *v.* Simpson, 16 Kan. 43; Pyle *v.* Warren, 2 Neb. 241; Homan *v.* Laboo, 1 Neb. 204; Eldred *v.* Oconto Co., 33 Wis. 133.

The owner of property may maintain an action of replevin therefor without proof of a previous demand, where the defendant has exercised acts of ownership over the property inconsistent with the plaintiff's title, as by attempting to sell it, etc. Prater *v.* Frazier, 11 Ark. 249.

37. *California.* — McNally *v.* Connolly, 9 Pac. 169; Cerf *v.* Phillips, 75 Cal. 185, 16 Pac. 778; Sharon *v.* Nunan, 63 Cal. 234.

Connecticut. — Lynch *v.* Beecher, 38 Conn. 490.

Delaware. — Windsor *v.* Boyce, 1 Houst. 605.

Indiana. — Robinson *v.* Shatzley, 75 Ind. 461; Jones *v.* Smith, 123 Ind. 585, 24 N. E. 368; Hamilton *v.* Browning, 94 Ind. 242.

Iowa. — Kennedy *v.* Roberts, 105 Iowa 521, 75 N. W. 363.

Kansas. — Schmidt *v.* Bender, 39 Kan. 437, 18 Pac. 491.

Maine. — Ayers *v.* Hewett, 19 Me. 281.

Massachusetts. — Bisbee *v.* Fadden, 140 Mass. 6, 1 N. E. 742.

Michigan. — Reeder *v.* Moore, 95 Mich. 594, 55 N. W. 436; Congdon *v.* Bailey, 121 Mich. 570, 80 N. W. 369.

Minnesota. — Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853.

New York. — Jessop *v.* Miller, 1 Keyes 321.

South Carolina. — Burckhalter *v.* Mitchell, 27 S. C. 240, 3 S. E. 225.

Wisconsin. — Hyland *v.* Bohn Mfg. Co., 92 Wis. 157, 65 N. W. 170.

Where Possession of the Property Is Claimed To Have Been Obtained by False and fraudulent representations, proof of a demand is not necessary. Salisbury *v.* Barton, 63 Kan. 552, 66 Pac. 618.

Where a Mortgagor in Possession Sells Property without mortgagee's permission, proof of demand is unnecessary. Partridge *v.* Swazey, 46 Me. 414.

Where the defendant in replevin with the general issue pleads also property in himself and in third parties, whose bailiff he is, avows the taking and demands a return, it is not necessary for the plaintiff to prove a demand for the goods previous to suing out the writ of replevin. Lewis *v.* Smart, 67 Me. 206;

(6.) Property Wrongfully Converted. — Again, proof of a conversion on the part of the defendant, or of acts amounting to conversion, will dispense with the necessity of proof of a demand and refusal.[38]

(7.) Property Taken Under Process. — Where the property in controversy, which was seized by the defendant under process, was found in the actual custody of the person named in the writ, the levy thereon gives the officer lawful possession, and in such case proof of a demand and refusal is necessary.[39] But where the property was taken from the possession of the plaintiff, who is a stranger to the writ, the officer's possession is wrongful, and proof of a demand and refusal is not necessary.[40]

b. *Mode of Proof.* — Of course the fact of a demand and refusal may be established by the direct testimony of the plaintiff or some person acting for him in that behalf. It has been held, however, that

Seaver *v.* Dingley, 4 Me. 306; O'Neil *v.* Bailey, 68 Me. 429.

38. Beebe *v.* De Baun, 8 Ark. 510; Sinamaker *v.* Rose, 62 Ill. App 118; Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853; Cox *v.* Albert, 78 Ind. 241.

In Cerf *v.* Phillips, 75 Cal. 185, 16 Pac. 778, where the defendants had not obtained a lawful possession of the property but had purchased it from those who had no right to sell it, and the defendants in taking possession of it under the attempted and void sale converted it to their own use unlawfully, it was held that no proof of demand was necessary.

39. Hicks *v.* Britt, 21 Ark. 422; Stone *v.* O'Brien, 7 Colo. 458, 4 Pac. 792. *Compare* Hopkins *v.* Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480.

In an action of replevin by a mortgagee to recover the mortgaged property taken from the mortgagor on execution, it is incumbent upon the plaintiff to prove a demand and refusal to return the property, although evidence thereof may be dispensed with by proof of a waiver of demand by the defendant, or by showing that it would have been unavailing. Keller *v.* Robinson & Co., 153 Ill. 458, 38 N. E. 1072, *affirming* 55 Ill. App. 56. The court said that where a mortgage contains the insecurity clause, the mortgagee may immediately, upon the taking by the officer, exercise the right given by that clause and demand possession of the property, and if refused he may maintain trover or replevin in the *detinet* for the wrongful detention; that "this is a reasonable and just rule, and under it the plaintiff below could only maintain its action by proof that the defendant, at the time the suit was brought, wrongfully detained the property. The usual manner of making such proof is by showing a demand and refusal, but such evidence may be dispensed with by proof of a waiver of demand by the defendant, or showing that it would have been unavailing."

40. *California.* — Wellman *v.* English, 38 Cal. 583; Sargent *v.* Sturm, 23 Cal. 359; Boulware *v.* Craddock, 30 Cal. 190.

Colorado. — Stone *v.* O'Brien, 7 Colo. 458, 4 Pac. 792; Smith *v.* Jensen, 13 Colo. 213, 22 Pac. 434.

Kansas. — Burgwald *v.* Donelson, 2 Kan. App. 301, 43 Pac. 100.

New York. — Schwabeland *v.* Holahan, 10 Misc. 176, 30 N. Y. Supp. 910; Burchett *v.* Purdy, 2 Okla. 391, 37 Pac. 1053.

In Ledley *v.* Hays, 1 Cal. 160, an action to replevin property of the plaintiff, it appeared that the defendant, as sheriff had seized upon the property while in the possession of another under an execution against the latter, who at the time of the seizure told the sheriff that the plaintiff owned the property, and it was accordingly held that proof of a demand by the plaintiff was not necessary.

a demand cannot be inferred from the actions, conduct and conversations of the parties.[41]

4. Defenses. — A. In General. — In a replevin suit against an officer, he may justify under a writ still in his possession where the period for the return thereof has not expired.[42]

Where the Legal Identity of the Property Has Not Been Destroyed the owner is entitled to recover the whole of it or its full value, and the defendant cannot introduce evidence of labor and expenditure bestowed upon the property.[43]

B. Offer of Restoration. — The defendant in replevin may of course show that before the commencement of the action he offered to restore the property to the possession of the plaintiff.[44]

C. Restoration of Property to Plaintiff. — So also the defendant may show that the property was restored to the plaintiff.[45]

D. Invalidity of Plaintiff's Title. — As to whether or not the defendant may, by way of defense, show facts establishing the in-

41. Roach *v.* Binder, 1 Colo. 322, *holding* it error to charge the jury that they may do so.

42. Kingsbury *v.* Buchanan, 11 Iowa 387. See also Blackman *v.* Wheaton, 13 Minn. 326; Cheeseman *v.* Fenton, 13 Wyo. 436, 80 Pac. 823; Truitt *v.* Revill, 4 Harr. (Del.) 71.

In Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811, where the property in controversy had been attached by the defendant, as an officer, it was held that the judgment roll in the case in which the attachment had been issued was admissible in evidence for the defendant because he had set up by way of defense the seizure under the writ of attachment, and that such proof was proper even though the plaintiff was not a party to the suit, it not being pretended that that suit in any way settled the question of ownership as against him, but was merely in support of the officer's plea of a justifiable taking into his possession of the property.

The Writ Upon Which Property Was Attached With the Officer's Return upon it, and the schedule of the attached property, are admissible in evidence in an action of replevin to recover the property, in justification of the defendant's title, and are not rendered incompetent by the fact that at the time when the replevin suit was brought, execution had been issued and levied upon the property attached. Bray *v.* Raymond, 166 Mass. 146, 44 N. E. 131.

43. Gray *v.* Robinson, 4 Ariz. 24, 33 Pac. 712. In this case, which was for the recovery of the possession of a crop of grain, the court refused to hear proof of the cost of thrashing and hauling the grain expended by the defendant, sheriff, and made no deduction therefor in the judgment. It was contended by the defendants that they should have been allowed these costs for the reason that it was spent in bettering the property in ignorance of the claim of the plaintiff, but the action of the trial court was sustained on the theory that "it was the business of the sheriff, under the writ, to have levied upon and sold the property in the stack, and he was scarcely justified in expending labor or cost upon it which was not necessary for its preservation."

In Acree *v.* Bufford, 80 Miss. 565, 31 So. 898, an action of replevin by a landowner against the defendant who had cut and removed certain timber under the belief that he had title, it was held that the defendant could show in reduction of damages the cost of getting out the timber and floating it to the place where it was taken.

44. Savage *v.* Perkins, 11 How. Pr. (N. Y.) 17; Church *v.* Frost, 3 Thomp. & Co. (N. Y.) 318.

45. Kiefer *v.* Carrier, 53 Wis. 404, 10 N. W. 562. And see Harrow *v.* Ryan, 31 Iowa 156.

validity of the plaintiff's title, the cases are not harmonious. Some of the courts hold that he can do so, as by showing that the conveyance, under which the plaintiff claims, was given in fraud of creditors of his grantor.[46]

E. Title in Defendant. — The defendant in replevin may, however, show that title to the property instead of being in the plaintiff is in himself.[47]

F. Title in Third Person. — So, too, the defendant in replevin may show that the title to the property in controversy is in a third person.[48]

46. Gates *v.* Gates, 15 Mass. 310; Pierce *v.* Hill, 35 Mich. 194, 24 Am. Rep. 541 (replevin against a sheriff where the defendant was permitted to show such defense); Mullen *v.* Noonan, 44 Minn. 541, 47 N. W. 164; Thayer *v.* Willet, 5 Bosw. (N. Y.) 344, 9 Abb. Pr. 325; Paris *v.* Du Pre, 17 S. C. 282. *Compare* Griswold *v.* Sundback, 6 S. D. 269, 60 N. W. 1068; Wyman *v.* Gould, 47 Me. 159.

47. *United States.*— Dermott *v.* Wallach, 1 Black 96.

Illinois. — Van Namee *v.* Bradley, 69 Ill. 299.

Indiana. — Darter *v.* Brown, 48 Ind. 395; James *v.* Fowler, 90 Ind. 563.

Iowa. — Lytle *v.* Crum, 50 Iowa 37.

Michigan. — Bush *v.* Nester, 70 Mich. 525, 38 N. W. 458.

Mississippi. — Lee *v.* Portwood, 41 Miss. 109.

Missouri.—Kingsbury *v.* Lane's Exrs., 17 Mo. 261.

Nebraska. — Schmitt & Bros. Co. *v.* Mahoney, 60 Neb. 20, 82 N. W. 99.

New York. — Mitchell *v.* Hinman, 8 Wend. 667.

Pennsylvania. — Hill *v.* Miller, 5 Serg. & R. 355; Elliott *v.* Powell, 10 Watts 453, 36 Am. Dec. 200.

South Carolina. — Peeples *v.* Warren, 51 S. C. 560, 29 S. E. 659.

In claim and delivery, the defendant by his answer denied all the allegations of the complaint and set up a bill of sale as his title; it was held that the plaintiff may show that the bill of sale was intended as a mortgage, and that it had been paid, thus defeating the defendant's alleged title. Williams *v.* Griffin, 58 S. C. 370, 36 S. E. 665.

48. *Illinois.* — Edwards *v.* McCurdy, 13 Ill. 496.

Indiana. — Davis *v.* Warfield, 38 Ind. 461; Hall *v.* Henline, 9 Ind. 256.

Kentucky. — Tuley *v.* Mauzey, 4 B. Mon. 5.

Minnesota. — Loomis *v.* Youle, 1 Minn. 175.

Nebraska. — Fuller *v.* Brownell, 48 Neb. 145, 67 N. W. 6.

New York. — Ingraham *v.* Hammond, 1 Hill. 353.

Oregon. — Spores *v.* Boogs, 6 Or. 122.

Compare Reed *v.* Reed, 13 Iowa 5; Corbitt *v.* Heisey, 15 Iowa 296.

The defendant in an action of replevin can defeat the action by showing title in a third person without proof connecting himself with that third person. Robinson *v.* Calloway, 4 Ark. 94. *Compare* Van Namee *v.* Bradley, 69 Ill. 299.

In an action of replevin against an officer who holds the property in controversy as the property of a third person under a writ of attachment and the defendant justifies under that writ, it is not necessary that the defendant should prove that the writ of attachment was duly returned or that there was cause for suing out the attachment. McCraw *v.* Welch, 2 Colo. 284.

In Williams *v.* Finlayson, 49 Fla. 264, 38 So. 50, the defendant had, as sheriff, seized the property in the hands of the plaintiffs under writs of attachment issued against the plaintiffs' vendor, based on the ground that the transaction between the plaintiffs and their vendor was fraudulent as to the vendor's creditors, and it was held that on the trial of the replevin action, there being evidence tending to show that the plaintiffs had paid a fair value for the property, and there being no

G. Taking As Agent for Another. — It has been held that the defendant cannot show that he took the property while acting as agent for another.[49]

5. Damages. — A. Burden of Proof. — The plaintiff, in an action of replevin, must show by competent evidence the nature and extent of the injury he has suffered by the act of his adversary; otherwise he can recover only nominal damages.[50] And so, too, if a return is adjudged to the defendant, nominal damages only can be awarded unless he adduce proof of actual damages.[51] But there need be no proof to sustain the awarding of nominal damages. Nominal damages, at least, are awarded without proof of actual injury.[52]

circumstances which would raise the legal presumption that the transaction was fraudulent, the burden of proving by a preponderance of the evidence that the transaction was fraudulent was on the defendant.

In Edmunds *v.* Leavitt, 27 N. H. 108, the defendant, in order to show the ownership of personal property to be in a third person, introduced evidence of acts of ownership over the property in question, and also over other similar property; he then, for the same purpose of showing ownership in the property in dispute to be in such third person, proposed to show that some months after the controversy arose, the property not in dispute was sold by such third person. *Held,* that the evidence was incompetent.

Under a general denial in an action in claim and delivery against a sheriff, the defendant may show that the goods in controversy are the property of a third person, and that his possession is rightful, by virtue of a writ of attachment under which said property was seized. Conner *v.* Knott, 8 S. D. 304, 66 N. W. 461.

In Michigan it is held that, if the plaintiff bases his right to recover upon proof of title, the defendant may defeat his recovery by proving title in a third person. Nicholson *v.* Dyer, 45 Mich. 610, 8 N. W. 515; Upham *v.* Caldwell, 100 Mich. 264, 58 N. W. 1001. But if the property was taken from the actual and undisputed possession of the plaintiff, the defendant cannot defeat recovery by proving title in a third person. In such case he must prove that he himself has a title superior to that of the plaintiff. Rose *v.* Eaton, 77 Mich. 247, 43 N. W. 972; Conely *v.* Dudley, 111 Mich. 122, 69 N. W. 151; Sanford *v.* Millikin, 144 Mich. 311, 107 N. W. 884.

49. Warder-Bushnell & Glessner Co. *v.* Harris, 81 Iowa 153, 46 N. W. 859.

50. *Colorado.* — Sopris *v.* Webster, 1 Colo. 507; Hammond *v.* Solliday, 8 Colo. 610, 9 Pac. 781.

Indiana. — Cardwill *v.* Gilmore, 86 Ind. 428.

Massachusetts. — Whitman *v.* Merrill, 125 Mass. 127.

Michigan. — Phenix *v.* Clark, 2 Mich. 327.

Missouri. — Brown *v.* Emerson, 18 Mo. 103.

Nebraska. — Frey *v.* Dreyhos, 7 Neb. 194.

South Carolina. — Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797.

Tennessee. — Mann *v.* Grose, 4 Heisk. 403.

Vermont. — Starkey *v.* Waite, 69 Vt. 193, 37 Atl. 292.

Wisconsin. — Riess *v.* Delles, 45 Wis. 662.

Where a person has been decreed to be the owner of a mule, in the possession of another, he is entitled to recover it, and hire for its services while in the possession of defendant, but he cannot recover its value in money, in default of delivery, without proof of what the property is worth. Dangerfield *v.* Fauver, 19 La. Ann. 171.

51. Seabury *v.* Ross, 69 Ill. 533; Bartlett *v.* Brickett, 14 Allen (Mass.) 62; Treat *v.* Staples, Holmes 1, 24 Fed. Cas. No. 14,162; Washington Ice Co. *v.* Webster, 62 Me. 341.

52. Hammond *v.* Solliday, 8 Colo.

B. Scope and Mode of Inquiry. — *a. In General.* — While, of course, when no fraud or malice is involved, the purpose of awarding damages in replevin is to compensate the injured party for the wrong suffered by him,[53] yet no absolutely uniform and inflexible rule can be laid down controlling the ascertainment of such compensation, and the scope and mode of inquiry in relation thereto.

Speculative Damages. — On the question of damages the inquiry must be confined to the immediate injury resulting from the taking and detention of the property, and not to any remote or speculative injury growing out of such taking and detention.[54]

Exemplary Damages. — The plaintiff in an action of replevin is entitled not only to actual damages for the detention, but if he shows that the defendant has been guilty of fraud, malice or oppression, exemplary damages may also be awarded.[55]

b. *Damages for the Taking or Detention.* — **(1.) Generally.** Where replevin is in the *cepit*, it is proper to permit the plaintiff to prove the damages accruing from the taking.[56]

Detention of Property. — The detention of the property is an important element to be considered in ascertaining the compensation to be awarded, and it is proper to permit proof of damages accruing therefrom;[57] although this is not the rule in all the states.[58]

Defendant's Damages for Wrongful Taking and Detention. — So, too, where the defendant prevails in the action, he is entitled to prove

610, 9 Pac. 781; Robinson *v.* Shatzley, 75 Ind. 461.

53. Livestock Gazette Pub. Co. *v.* Union Stock Yard Co., 114 Cal. 447, 46 Pac. 286.

54. Kelly *v.* Altemus, 34 Ark. 184, 36 Am. Rep. 6. In this case the detention of the property, which was tools owned and used by the plaintiff as a carpenter, lasted but three days, it was held that the plaintiff was improperly permitted to show that by reason of the detention he had been thrown out of employment for ten days. See also Smith *v.* Bryant, 1 Kan. App. 754, 41 Pac. 1069; Ascher *v.* Schaeper, 25 Mo. App. 1; Riley *v.* Littlefield, 84 Mich. 22, 47 N. W. 576; Jones *v.* Hiers, 57 S. C. 427, 35 S. E. 748.

The damages arising from the possible loss of customers in not having the goods ready for sale, or in purchasing goods of the same description as those replevied, to fulfill existing contracts, are too remote, contingent and indefinite to become an element of damages. Washington Ice Co. *v.* Webster, 62 Me. 341.

55. Holt *v.* Van Eps, 1 Dak. 206, 46 N. W. 689. See also Cable *v.* Dakin, 20 Wend. (N. Y.) 172.

56. Town *v.* Wilson, 8 Ark. 464; Wright *v.* Mathews, 2 Blackf. (Ind.) 187.

57. Hickey *v.* Coschina, 133 Cal. 81, 65 Pac. 313; Truitt *v.* Revill, 4 Harr. (Del.) 71; Hoover *v.* Rhoads, 6 Iowa 505; Hanselman *v.* Kegel, 60 Mich. 540, 27 N. W. 678; Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745.

A plaintiff in replevin to whom the property has been delivered, is entitled, if the verdict be in his favor, merely to damages for its detention. Burnett *v.* Bealmear, 79 Md. 36, 28 Atl. 898.

In an action of replevin, the damages recoverable for the detention of property are not limited to such as have accrued when the suit is instituted, but may be estimated to the date of the verdict. Lesser *v.* Norman, 51 Ark. 301, 11 S. W. 281.

58. In Nebraska, if the property is not returned, detention cannot be considered; the measure of damages is the value of the property as proved, with legal interest from

such damages as he has suffered by virtue of the wrongful taking and detention by the plaintiff under the writ.[59]

(2.) Use of Property and Rental Value. — Where the property is valuable for use or service only, the value of the use of the property is the controlling element to be considered in ascertaining the compensation for the wrongful detention.[60]

the unlawful taking. Romberg *v.* Hughes, 18 Neb. 579, 26 N. W. 351.

59. Quinnipiac Brew. Co. *v.* Hackbarth, 74 Conn. 392, 50 Atl. 1023; Washington Ice Co. *v.* Webster, 68 Me. 449; Boston Loan Co. *v.* Myers, 143 Mass. 446, 9 N. E. 805; Ward *v.* Anderberg, 36 Minn. 300, 30 N. W. 890; Schrandt *v.* Young, 62 Neb. 254, 86 N. W. 1085; Nichols *v.* Shepard Co. *v.* Paulson, 10 N. D. 440, 87 N. W. 977.

Where a defendant is entitled to a return, he is likewise entitled to damages and costs. The damages are to be the compensation for the interruption of his possession, the loss of the use of the goods from the time of the replevin till their restoration, and their deterioration within the intervening time. Washington Ice Co. *v.* Webster, 62 Me. 341.

If defendant pleads property in himself, on verdict in his favor, he is entitled to a return of the property and also to damages. The amount of damages depends upon defendant's interest in the property, whether as bailee or absolute owner, the time he had been deprived of it, its character, etc. Noble *v.* Epperly, 6 Ind. 468.

60. *Arkansas.* — Minkwitz *v.* Steen, 36 Ark. 260; Kelly *v.* Altemus, 34 Ark. 184, 36 Am. Rep. 6 (carpenters' tools).

Colorado. — Machette *v.* Wanless, 2 Colo. 169 (domestic animals).

Idaho. — Sebree *v.* Smith, 2 Idaho 359, 16 Pac. 915.

Illinois. — Butler *v.* Mehrling, 15 Ill. 488.

Indiana. — Farrar *v.* Eash, 5 Ind. App. 238, 31 N. E. 1125 (horse).

Kansas. — Werner *v.* Graley, 54 Kan. 383, 38 Pac. 482; Kennett *v.* Fickel, 41 Kan. 211, 21 Pac. 93; Ladd *v.* Brewer, 17 Kan. 204; Yandle *v.* Kingsbury, 17 Kan. 145, 22 Am. Rep. 282.

Louisiana. — Sears *v.* Wilson, 5 La. Ann. 689.

Minnesota. — Peerless Mach. Co. *v.* Gates, 61 Minn. 124, 63 N. W. 260 (threshing machine); Williams *v.* Wood, 61 Minn. 194, 63 N. W. 492.

Missouri. — Anchor Milling Co. *v.* Walsh, 24 Mo. App. 97.

Montana. — Chauvin *v.* Valiton, 8 Mont. 451, 20 Pac. 658, 3 L. R. A. 194.

New York. — Allen *v.* Fox, 51 N. Y. 562, 10 Am. Rep. 641.

North Dakota. — Northrup *v.* Cross, 2 N. D. 433, 51 N. W. 718.

Oregon. — Coffin *v.* Taylor, 16 Or. 375, 18 Pac. 638.

Tennessee. — Stanley *v.* Donohoe, 16 Lea 492.

In an action of replevin of claim and delivery where the property sought to be recovered is valuable for use aside from its intrinsic value, and the prevailing party claimed damages for the loss of its use in his pleadings, the measure of damages is the value thereof and the reasonable value of its use during the detention. And in determining the value of its use, the taxes which the prevailing party would have paid had he retained possession thereof and the actual and ordinary risk incident to the possession thereof should be considered. Sebree *v.* Smith, 2 Idaho 359, 16 Pac. 915.

Upon an issue as to the fair, reasonable, ordinary, use value of a tram engine designed and used for sawmill purposes, it is not proper to admit as proof of the use value of such tram engine, evidence of the market rental value of a railroad locomotive engine, larger, heavier, more expensive, and designed primarily for use upon a railroad, even though such locomotive engine could be used to accomplish the same work as the tram engine. Ocala Foundry & M. Wks. *v.* Lester, 49 Fla. 199, 38 So. 51.

Sometimes, however, it has been held that the plaintiff must show that he was in a position to use the property during such detention.[61] And, too, sometimes, it is held that unless the evidence shows a purpose or intention to use the property on the part of the owner, the value of the use cannot be considered.[62]

Defendant's Damages. — So, also, where the defendant is successful in the action, and the property is of such nature as to be of use to the defendant, he should be permitted to show what the property was worth to him during the period of detention by the plaintiff under his writ.[63]

(3.) Interest. — The general rule is that in all cases where actual damages are shown, interest upon the value of the property during the time of the detention will be awarded to the prevailing party, unless special damages are shown, or unless the damages are shown to amount to more than interest.[64] And in some cases the interest

61. Barney *v.* Douglass, 22 Wis. 464.

62. Smith *v.* Stevens, 14 Colo. App. 491, 60 Pac. 580.

63. Hartley State Bank *v.* McCorkell, 91 Iowa 660, 60 N. W. 197; Boston Loan Co. *v.* Myers, 143 Mass. 446, 9 N. E. 805; Burt *v.* Burt, 41 Mich. 82, 1 N. W. 936; Hutchinson *v.* Hutchinson, 102 Mich. 635, 61 N. W. 60; Schrandt *v.* Young, 62 Neb. 254, 86 N. W. 1085.

64. *United States.* — Saling *v.* Bolander, 125 Fed. 701, 60 C. C. A. 469.

Alabama. — Curry *v.* Wilson, 48 Ala. 638.

Colorado. — Machette *v.* Wanless, 2 Colo. 169; Tucker *v.* Parks, 7 Colo. 62, 298, 1 Pac. 427, 3 Pac. 486.

Georgia. — Macon Co. *v.* Meador, 67 Ga. 672.

Iowa. — McCoy *v.* Connell, 40 Iowa 457.

Kansas. — Werner *v.* Graley, 54 Kan. 383, 38 Pac. 482.

Massachusetts. — Stevens *v.* Tuite, 104 Mass. 328; Bartlett *v.* Brickett, 14 Allen 62.

Missouri. — Woodburn *v.* Cogdal, 39 Mo. 222.

New Jersey. — Caldwell *v.* West, 21 N. J. L. 411.

New York. — Allen *v.* Fox, 51 N. Y. 567; Hampton & B. R. & Lumb. Co. *v.* Sizer, 35 Misc. 391, 71 N. Y. Supp. 990; Twinam *v.* Swart, 4 Lans. 263.

Wisconsin. — Graves *v.* Sittig, 5 Wis. 219; Wadleigh *v.* Buckingham, 80 Wis. 230, 49 N. W. 745; Bigelow *v.* Doolittle, 36 Wis. 115.

When the property is goods or merchandise capable of physical use or enjoyment, the damages assessed are interest upon their value to the time of the rendition of the verdict in the replevin suit, or compensation for the loss of their use and enjoyment when that exceeds interest. Washington Ice Co. *v.* Webster, 62 Me. 341.

The ordinary measure of damages for the plaintiff in replevin, in the absence of proof of special damage, is legal interest on the value of the property, in addition to the property itself or its value. This is the rule as to property which has no usable value except for consumption. As to property having a usable value by way of bailment for hire, like horses, tools, etc., the true measure is the value of the use during the detention. There may, of course, be special damages for the deterioration of the property. But there is no warrant in law or reason in holding the measure of damages to be what the plaintiff might have made by the use of the property in his own labor or business. Kelly *v.* Altemus, 34 Ark. 184, 36 Am. Rep. 6.

In an action to recover the possession of personal property, or the value thereof, in case delivery cannot be had, and damages for the detention, the plaintiff is not entitled to a gross sum for the damages and

on the value of the property during the detention by the plaintiff has been allowed the defendant.[65]

(4.) Depreciation in Value of Property. — Depreciation in the value of the property during the detention may also be shown.[66] And the defendant, if successful, may be permitted to show such depreciation.[67]

(5.) Expenses, Attorney's Fees, Etc. — As a general rule, expenses of the plaintiff in endeavoring to recover his property are not regarded as elements proper to be shown as an item of damages.[68]

also interest on the value of the property from the time it was taken; such an allowance would amount to double damages. Freeborn *v.* Norcross, 49 Cal. 313. See also Garcia *v.* Gunn, 119 Cal. 315. 51 Pac. 684.

65. Hurd *v.* Gallaher, 14 Iowa 394; Hooker *v.* Hammill, 7 Neb. 231; Collins *v.* Houston, 138 Pa. St. 481, 21 Atl. 234. *Compare* Boston Loan Co. *v.* Myers, 143 Mass. 446, 9 N. E. 805.

66. Stevenson *v.* Smith, 28 Cal. 102; Russell *v.* Smith, 14 Kan. 366; Hall *v.* Tillman, 110 N. C. 220. 14 S. E. 745; Wadleigh *v.* Buckingham, 80 Wis. 230. 49 N. W. 745; Clow *v.* Yount, 93 Ill. App. 112; Schars *v.* Barnd, 27 Neb. 94, 42 N. W. 906; Riley *v.* Littlefield, 84 Mich. 22, 47 N. W. 576.

67. Teel *v.* Miles, 51 Neb. 542, 71 N. W. 296; Bowersock *v.* Adams, 59 Kan. 779, 54 Pac. 1064.

68. Blackwell *v.* Acton, 38 Ind. 425; Taylor *v.* Morton, 61 Miss. 24; Young *v.* Atwood, 5 Hun (N. Y.) 234; Loeb *v.* Mann, 39 S. C. 465, 18 S. E. 1. See also Wildman *v.* Sterritt, 80 Mich. 651, 45 N. W. 657. *Compare*, Brennan *v.* Shinkle, 89 Ill. 604; Yelton *v.* Slinkard, 85 Ind. 190.

In California it has been held proper to allow as damages compensation for the time and money expended in pursuit of the property. Cain *v.* Cody (Cal.), 29 Pac. 778. In Arzaga *v.* Villalba, 85 Cal. 191, 24 Pac. 656, it was urged that the plaintiff could not recover what she expended in pursuit of the property. The court in *distinguishing* Kelly *v.* McKibben, 54 Cal. 192, and Reddington *v.* Nunan, 60 Cal. 632, said: "These cases seem to lay down the rule that expenses in pursuit of the property can be recovered only in actions 'for' the conversion, and not in actions to recover the property itself. Undoubtedly the property itself is a different thing from damages for its conversion. The pleader may unquestionably omit one of them. He may not allege any damages from the conversion; and if not, he cannot recover any. In that sense, it is true that in an action to recover the property itself (i. e., the property *only*) the plaintiff cannot recover damages for the conversion. But it is perfectly clear that the party may have sustained damages from the conversion outside of the loss of the value of the property itself. The code expressly provides that 'the detriment caused by the wrongful conversion of personal property is presumed to be: . . . 3. A fair compensation for the time and money properly expended in pursuit of the property.' (Civ. Code, § 3336.) If, therefore, he has made such expenditures, he is entitled to recover them as damages for the wrongful act of the defendant. He is also undoubtedly entitled to a recovery of the property itself, if possession thereof can be had. Why should he be compelled to waive one or the other, or to bring separate actions for relief on account of the same wrong? To say that the expenses of pursuit can be recovered in an action for the conversion, but not in an action for the property itself, is to say that the expenses of pursuit can be recovered where the party abandons the pursuit, but not where he follows it up, and is successful; in other words, that the expenses of pursuit cannot be recovered when he pursues, but only when he ceases to do so. We can perceive no reason for such a result. There is

Nor are attorney's fees and other expenses in the replevin suit, other than costs strictly allowable, considered as items of damages proper to be shown and allowed.[69] And the same rule applies where the defendant is successful, to prevent his recovery for such expenses.[70]

c. *Value of Property.* — (1.) **Generally.** — Where the property in controversy is not delivered to the plaintiff, but is allowed to remain in the possession of the defendant, and the plaintiff succeeds in his action, the value of the property is one of the elements of compensation proper to be shown.[71] And, too, if the plaintiff obtained possession of the property and the defendant is successful, both in an

nothing in the statute which points to it. The provision establishes the measure of damages for 'the wrongful conversion of personal property.' And we do not see any reason for saying that this means that the damages can be recovered only in the old rigid form of action in which a recovery therefor used to be allowed at common law. Under the code, if a complaint states a cause of action of any kind, a recovery may be had accordingly. As above stated, a recovery of the expenses of pursuit is not inconsistent with a recovery in the same action of the property itself." It was accordingly held that the doctrine of these cases must be limited to cases where the plaintiff has so framed his complaint as to seek only a recovery of the property and has not alleged any damages, but that when he makes proper allegations of damage he may have judgment for it as well as for the property itself; that in that case the complaint alleged that the defendant took the plaintiff's property and refused to return it on demand, which amounted to a conversion, and which was proved by the evidence, and it was held that the statutory measure of damages for a conversion applied.

69. Harris *v.* Smith, 132 Cal. 316, 64 Pac. 409; Hays *v.* Windsor, 130 Cal. 230, 62 Pac. 395; Park *v.* McDaniels, 37 Vt. 594; Earl *v.* Tupper, 45 Vt. 275; Mix *v.* Kepner, 81 Mo. 93; Knight *v.* Beckwith Com. Co., 6 Wyo. 500, 46 Pac. 1094. *Compare* Taylor *v.* Morton, 61 Miss. 24, *holding* that upon proof of wilful wrong upon the part of the defendant, plaintiff's attorney's fee may be allowed.

Plaintiff is not entitled to recover either the value of the time lost by him in prosecuting his claim, or his attorney's fees, unless there be more than a mere wrong; something akin to fraud, oppression, or malice. Taylor *v.* Morton, 61 Miss. 24; Whitfield *v.* Whitfield, 40 Miss. 352; Chicago R. Co. *v.* Scurr, 59 Miss. 456, 42 Am. Rep. 373.

70. Hays *v.* Windsor, 130 Cal. 230, 62 Pac. 395; Becker *v.* Staab, 114 Iowa 319, 86 N. W. 305; Cowden *v.* Lockridge, 60 Miss. 385.

The Allowance of Attorney's Fees, by way of damages to the defendant, was improper. Such an allowance in replevin can only be made under circumstances which would warrant the imposition of punitory or exemplary damages, and even then is denied in some of the states. Nothing like wilful wrong, fraud, malice, or oppression having been shown here, the allowance was erroneous. Cowden *v.* Lockridge, 60 Miss. 385; Taylor *v.* Morton, 61 Miss. 24.

71. *Arkansas.* — Jetton *v.* Smead, 29 Ark. 372.

California. — Henderson *v.* Hart, 122 Cal. 332, 54 Pac. 1110.

Indiana. — Burket *v.* Pheister, 114 Ind. 503, 16 N. E. 813.

Kansas. — Lamont *v.* Williams, 43 Kan. 558, 23 Pac. 592.

Kentucky. — Bates *v.* Buchanan, 2 Bush 117.

Michigan. — Merrill *v.* Butler, 18 Mich. 294.

Missouri. — Paddock *v.* Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254.

New Jersey. — Frazier *v.* Fredericks, 24 N. J. L. 162; Lindauer *v.* Teeter, 41 N. J. L. 255.

North Carolina. — Spencer *v.* Bell, 109 N. C. 39, 13 S. E. 704.

action at common law,[72] and in an action under the statute,[73] the value of the property may be shown.

Ohio. — Pugh *v.* Calloway, 10 Ohio St. 488.

Texas. — Morris *v.* Coburn, 71 Tex. 406, 9 S. W. 345.

Wisconsin. — Findlay *v.* Knickerbocker Ice Co., 104 Wis. 375, 80 N. W. 436.

In Smith *v.* Stevens, 33 Colo. 427, 81 Pac. 35, an action of replevin to recover a cow and the value of her use, it was held that the question whether or not a milch cow when kept and used in connection with the running of a hotel is profitable is not a question upon which the opinion of the hotel keeper, as an expert witness, should be received in evidence.

In an action to recover the possession of property wrongfully seized, or the value thereof in case return cannot be had, the plaintiff should be permitted to produce evidence as to the value of the property at the time and place of the conversion; he should not be limited in his right of recovery to the price for which the defendant may have sold the property. Cowden *v.* Finney, 9 Idaho 619, 75 Pac. 765; Cowden *v.* Mills, 9 Idaho 626, 75 Pac. 766.

In Nebraska it is held that in replevin, where the property has been returned to the defendant because of the failure of the plaintiff to give the statutory undertaking, and the action proceeds as one for conversion, the measure of his damages, in case the right of property and right of possession are found in his favor, is the market value of the property with lawful interest thereon. Baum Iron Co. *v.* Union Sav. Bank, 50 Neb. 387, 69 N. W. 939; Honaker *v.* Vesey, 57 Neb. 413, 77 N. W. 1100.

Value. — In Michigan, § 10,658, Comp. Laws 1897, which provides that if the plaintiff in replevin fails after the appraisal to furnish the required bond the property shall be returned to the person from whom it was taken, has been materially amended by Act No. 246, p. 384, Pub. Acts 1899, which provides among other things that defendant may give a bond and retain the property. § 10,680, by the same act has also been amended, and now provides that whenever the plaintiff or defendant shall be entitled to a return or surrender of the property replevied, instead of taking judgment for such return or surrender as above provided, he may take judgment for the value of the property replevied. And in Gustin *v.* Embury-Clark Lumb. Co., 145 Mich. 101, 108 N. W. 650, where the plaintiff did not give bond, it was held that he was entitled to show and recover the value of his property actually taken under the writ of replevin, at the place where taken, deducting any increase in value after conversion added by the defendant's labor or expense to the time of commencement of suit.

On an inquest after default in replevin, the value of the property should be proved in order that an alternative judgment may be rendered, as well as the damages sustained by the detention of the property. Jetton *v.* Smead, 29 Ark. 372.

72. Clark *v.* Adair, 3 Harr. (Del.) 113.

73. *United States.* — Williams *v.* Morrison, 29 Fed. 282.

Arizona. — Levy *v.* Leatherwood, 5 Ariz. 244, 52 Pac. 359.

California. — Myers *v.* Moulton, 71 Cal. 498, 12 Pac. 505.

Illinois. — Janes *v.* Gilbert, 168 Ill. 627, 48 N. E. 177.

Iowa. — Minthon *v.* Lewis, 78 Iowa 620, 43 N. W. 465.

Kansas. — Higbee *v.* McMillan, 18 Kan. 133.

Maine. — Washington Ice Co. *v.* Webster, 62 Me. 341.

Mississippi. — Pearce *v.* Twichell, 41 Miss. 344.

New Jersey. — Frazier *v.* Fredericks, 24 N. J. L. 162.

North Carolina. — Rawlings *v.* Neal, 126 N. C. 271, 35 S. E. 597.

South Carolina. — Laborde *v.* Rumpa, 1 McCord 15.

Wisconsin. — Puncheon *v.* Hill, 38 Wis. 156.

In the Case of Choses in Action the legal presumption is that they are worth the amount of the principal and interest indicated on the face

(2.) Time of Fixing Value. — Many of the courts hold that, for the purpose of arriving at the value of the property, the inquiry should be confined to the time of the conversion or when delivery was refused.[74] Other courts, however, have permitted proof of the highest market value of the property between the time of conversion and the trial.[75]

Recovery by Defendant. — And where the defendant is successful, the value of the property at the time of the taking by plaintiff, is, by some of the courts, regarded as the proper estimate.[76] While by other courts, the value of the property at the time of the trial is regarded as the proper value.[77]

of the instrument at the time of the taking and detention, and that amount with legal interest to the time of the trial is *prima facie* the measure of the plaintiff's damages. Holt *v.* Van Eps, 1 Dak. 206, 46 N. W. 689.

74. *Georgia.* — Bell *v.* Bell, 20 Ga. 250.

Illinois. — Keaggy *v.* Hite, 12 Ill. 99; Otter *v.* Williams, 21 Ill. 118.

Kentucky. — Lillard *v.* Whittaker, 3 Bibb 92; Greer *v.* Powell, 1 Bush 489.

Maine. — Cushing *v.* Longfellow, 26 Me. 307; Robinson *v.* Barrows, 48 Me. 186.

Maryland. — Baltimore M. Ins. Co. *v.* Dalrymple, 25 Md. 269.

Massachusetts. — Parsons *v.* Martin, 11 Gray 111; Greenfield Bank *v.* Leavitt, 17 Pick. 1.

Michigan. — Hanselman *v.* Kegel, 60 Mich. 540, 27 N. W. 678; Ripley *v.* Davis, 15 Mich. 75, 90 Am. Dec. 262.

Mississippi. — Whitfield *v.* Whitfield, 40 Miss. 352.

New Jersey. — Maguire *v.* Dutton, 54 N. J. L. 597, 25 Atl. 254.

New York. — Ormsby *v.* Vennour Copper Co., 56 N. Y. 623; Spica *v.* Waters, 65 Barb. 227.

Pennsylvania. — Jacoby *v.* Laussatt, 6 Serg. & R. 300.

South Carolina. — Davies *v.* Richardson, 1 Bay 102.

Wisconsin. — Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762.

In Missouri the value is assessed as of the date of trial. Chapman *v.* Kerr, 80 Mo. 158; Merrill Chem. Co. *v.* Nickells, 66 Mo. App. 678. *Compare* Jennings *v.* Sparkman, 48 Mo. App. 246, where this rule could not be applied because the party in possession had scattered the property, and it was held proper to permit the other party to show the value when last accessible to him, some three years before the trial. See also Baum Iron Co. *v.* Union Sav. Bank, 50 Neb. 387, 69 N. W. 939; Gardner *v.* Brown, 22 Nev. 156, 37 Pac. 240.

In Gardner *v.* Brown, 22 Nev. 156, 37 Pac. 240, an instruction that plaintiff could recover the highest value between the taking and trial was held erroneous. The court says: "When the plaintiff asks for the return of the specific property, or its value, if a return cannot be had, the value of the property at the time of trial is the only complete indemnity."

75. Tully *v.* Harbor, 35 Cal. 302, 95 Am. Dec. 102; Homer *v.* Hathaway, 33 Cal. 119; Barnett *v.* Thompson, 37 Ga. 335; Markham *v.* Jordan, 41 N. Y. 235; Burt *v.* Dutcher, 34 N. Y. 493. *Compare* Mathews *v.* Coe, 49 N. Y. 57; Baker *v.* Drake, 53 N. Y. 213, where the court said that this rule had been recognized in several cases when the value was fluctuating, but that its soundness as a general rule is seriously to be questioned; Page *v.* Fowler, 39 Cal. 416, where the court says that what is the highest market value within a reasonable time is the true inquiry. See also Scott *v.* Rogers, 31 N. Y. 678.

76. Garrett *v.* Hood, 3 Kan. 231; Berthold *v.* Fox, 13 Minn. 501, 97 Am. Dec. 243; Connelly *v.* Edgerton, 22 Neb. 82, 34 N. W. 76.

77. Just *v.* Porter, 64 Mich. 565, 31 N. W. 444; Suydam *v.* Jenkins, 3 Sandf. (N. Y.) 614.

(3.) Place of Value. — The place where the value is to be considered is often a question of importance. The general rule in this respect is that the inquiry is to be directed to the value of the property at the place of conversion.[78]

(4.) Mode of Proof. — The mode of proving the value of the property is no different from that in other cases where value is a fact in issue.[79]

Recitals in Plaintiff's Affidavit or Bond. — The recitals as to the value of the property, contained in plaintiff's affidavit or bond, are competent evidence on behalf of the defendant,[80] although they will not preclude the plaintiff from showing the true value of the property to be less than thus stated.[81]

C. Reduction of Damages. — The defendant in replevin may in the case of choses in action show in reduction of damages the fact of payment in whole or in part, the inability of the maker to pay wholly or partially, the release of the maker from his undertaking, the invalidity of the instrument or other matters which would legitimately affect or diminish its value.[82]

II. ACTIONS ON BONDS AND UNDERTAKINGS.

1. Breach of Conditions. — Burden of Proof. — In an action upon a bond or undertaking in replevin, all the facts necessary to make absolute the liability of the sureties, that is, the facts showing the failure of the principal obligor to perform the condition of the bond, must be proved. The right of action upon the bond or undertaking

Where property is found to be in possession of plaintiff, but the title is in the defendant, as well as the right of possession, the rule as to the measure of damages is as follows: "The value of the property and the damages for detention, etc., must be found separately. . . . The value of the property at the time of the assessment, is the value to be found by the jury. . . . If the property has been depreciated in the hands of the plaintiff, in consequence of the replevy, the jury should consider such depreciation in their estimate of damage, occasioned by the taking and detention." Mix *v.* Kepner, 81 Mo. 93; Chapman *v.* Kerr, 80 Mo. 158; Pope *v.* Jenkins, 30 Mo. 528.

78. Fort *v.* Saunders, 5 Heisk. (Tenn.) 487. See also Washington Ice Co. *v.* Webster, 68 Me. 449.

79. See Black *v.* Black, 74 Cal. 520, 16 Pac. 311; Lamont *v.* Williams, 43 Kan. 558, 23 Pac. 592; Minthon *v.* Lewis, 78 Iowa 620, 43 N. W. 465; Jennings *v.* Prentice, 39 Mich. 421; Newton *v.* Brown, 1 Utah 287.

Opinion Evidence. — Stevens *v.* Chase, 61 N. H. 340; Curme, Dunn & Co. *v.* Rauh, 100 Ind. 247. See article "Value."

80. Weil *v.* Ryus, 39 Kan. 564, 18 Pac. 524; Butts *v.* Woods, 4 N. M. 187, 16 Pac. 617.

81. Luin *v.* Wright, 18 Tex. 317; Jenkins *v.* Steanka, 19 Wis. 126, 88 Am. Dec. 675. *Compare* Weyerhaeuser *v.* Foster, 60 Minn. 223, 61 N. W. 1129.

82. Holt *v.* Van Eps, 1 Dak. 206, 46 N. W. 689.

On an Inquest After Default in Replevin, the defendant may properly be permitted to introduce evidence in mitigation of the damages, but none to defeat the action. Jetton *v.* Smead, 29 Ark. 372.

grows out of a breach of its conditions, and the burden is upon the plaintiff to show the conditions broken.[83]

A Judgment Against the Plaintiff in Replevin Is Proof of a breach of the bond in an action against the sureties.[84]

The Writ of Replevin is competent and relevant evidence in an action on a replevin bond, under the suggestion of breaches.[85]

2. Conditions Precedent. — Where a return was awarded in the replevin suit, the judgment establishes the liability on the condition of the bond, and proof of execution or other demand for return of the property is not necessary, in order to maintain the action on the bond.[86]

3. Conclusiveness of Adjudication in Replevin Suit. — A. In General. — The general rule is that matters at issue and determined in the replevin suit cannot be again inquired into in the action on the bond or undertaking.[87]

83. Gallup *v.* Wortmann, 11 Colo. App. 308, 53 Pac. 247; Swartz *v.* English, 4 Kan. App. 509, 44 Pac. 1004; McManus *v.* Donohue, 175 Mass. 308, 56 N. E. 291. See also Wiseman *v.* Lynn, 39 Ind. 250.

In an action on a replevin bond the burden is on the plaintiff to prove his cause of action, that is, a breach of the condition to prosecute the replevin suit to effect. Fielding *v.* Silverstein, 70 Conn. 605, 40 Atl. 454, holding that upon this question a judgment *de retorno* is conclusive.

In Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928, the property in controversy had been replevied from an officer who had seized it under a writ of attachment. The plaintiff in the replevin suit failed in his action and the officer got judgment for the return of the property. The attachment plaintiff afterward obtained a judgment against the attachment defendant for a sum much greater than the value of the property. It was held in an action by the officer against the surety on the replevin bond that it was not necessary for the plaintiff to show that demand for payment of the judgment in the attachment suit had been made on the defendant in attachment, or search made for property on which to levy the execution.

Proof That Judgment Is Still Unpaid. — Where property is levied upon as the property of a judgment debtor, to satisfy a judgment against him, and the same is replevied from the sheriff by other parties claiming to own it, but who fail to prosecute such action; in an action by the judgment creditor, or by the sheriff representing him, on the undertaking given in the replevin action, his right to recover rests upon his right to have the replevied property applied to the payment of such judgment, and so it should be shown that such judgment is still unpaid. Knott *v.* Sherman, 7 S. D. 522, 64 N. W. 542.

84. Cheatham *v.* Morrison, 37 S. C. 187, 15 S. E. 924.

85. West *v.* Caldwell, 23 N. J. L. 736.

86. Sweeney *v.* Lomme, 22 Wall. (U. S.) 208; Wright *v.* Quirk, 105 Mass. 44; Robertson *v.* Davidson, 14 Minn. 554; Potter *v.* James, 7 R. I. 312. *Contra.* — Phillips *v.* Waterhouse, 40 Mich. 273.

In Persse *v.* Watrous, 30 Conn. 139, an action on a replevin bond, it was held that proof of demand upon the bond, either for the penalty thereof or for the amount of the judgment obtained in the attachment suit, out of which the replevin action grew, was not necessary as a condition to maintaining the action on the bond.

87. Colorado Springs Co. *v.* Hopkins, 6 Colo. 206; Huggeford *v.* Ford, 11 Pick. (Mass.) 223; Thomson *v.* Joplin, 12 S. C. 580; Cheatham *v.* Morrison, 37 S. C. 187, 15 S. E. 924.

Judgment in claim and delivery is conclusive upon both parties thereto

as to the right of possession of the property in dispute and of its value, and the damages to which the successful party is entitled to the date of the judgment. Paulson *v.* Nichols & Shephard Co., 8 N. D. 606, 80 N. W. 765.

In Ginica *v.* Atwood, 8 Cal. 446, it was held that the facts, which on a trial by jury would have been found in the original replevin action, are by a nonsuit therein left to the jury called in the action on the undertaking so far as the conditions of the undertaking will authorize an inquiry into them.

In Colorado Under a Statute (§ 204 of the Civil Code) providing that in a judgment for the defendant for a return of the property, or the value thereof, in case a recovery cannot be had and damages for taking and withholding the same, the amount of the judgment recovered by the defendant in the replevin action is conclusive in a subsequent action upon the replevin bond. Cantrill *v.* Babcock, 11 Colo. 142, 458, 18 Pac. 342.

In Hannon *v.* O'Dell, 71 Conn. 698, 43 Atl. 147, an action on a replevin bond, it appeared that in the action of replevin the main issue was as to whether or not a third person, whose interest in the tangible assets of a copartnership had been attached by the replevin defendant, was a member of the firm, and that that issue was decided in favor of the replevin defendant and a judgment rendered for a return of the property. The replevin plaintiff failed to return the property, and after the replevin defendant had obtained judgment against the alleged copartner in his attachment suit he brought the action on the replevin bond. It was held that the value or amount of the interest in the copartnership in question was not in issue in the replevin suit nor affected by the judgment rendered; and in the action on the bond the defendants therein were at liberty to offer evidence as to the amount and extent of that interest in mitigation of damages.

The surety in a replevin bond contracts with reference to the action of his principal in prosecuting the replevin suit, and he is therefore concluded, as is his principal, by the judgment and orders made in that suit; and the record showing a change of venue and judgment of dismissal with an order for the return of the property is conclusive evidence against him of the breach of the conditions of his bond. Schott *v.* Youree, 142 Ill. 233, 31 N. E. 591, *affirming* 41 Ill. App. 476.

In Walls *v.* Johnson, 16 Ind. 374, L., becoming pecuniarily embarrassed, made an assignment of his property to F. & H. Certain judgment creditors of L. caused executions to be issued, placed in hands of the sheriff, and levied on said goods. The assignees replevied the goods, gave bond, and did not prosecute suit to effect, and a return of goods was adjudged but not made. The sheriff and execution plaintiffs joined in this suit on the bond. Sureties alleged in answer that judgment in replevin suit was fraudulent. The court said: "Admitting, without deciding, that under the code, the judgment might be impeached in this collateral suit, for fraud, . . . still it must be for fraud of the defendants in recovering the judgment."

Where the plaintiff in a replevin proceeding obtains possession of the property, neither he nor his sureties can, in an action on the bond, impeach the sheriff's return, or question the authority of the person who seized the property upon the writ and from whose hands he accepted it. McFadden *v.* Ross, 108 Ind. 512, 8 N. E. 161.

The plaintiff, in an action of replevin, and his sureties, are estopped to deny the regularity of the proceedings, or to say that there was no consideration for the bond executed by them to secure possession of the property. The delivery of the property is sufficient consideration for the bond. McFadden *v.* Fritz, 110 Ind. 1, 10 N. E. 120.

The failure of the jury, in replevin, to assess the value of the property, as the statute requires, will not prevent the defendant from recovering its value in a suit on the undertaking when return is adjudged and is not made, or damages for injury to the goods while held by the plaintiff. Yelton *v.* Slinkard, 85 Ind. 190.

B. Title and Right to Possession. — a. *In General.* — The general rule is that if the title and right to the possession of the property was adjudicated and determined in the replevin suit, all such questions are regarded as finally settled, and the obligors in the bond cannot, in a subsequent action thereon, introduce any evidence respecting the title to the property for any purpose, whether it be in bar of the action or to mitigate the damages.[88] But where the title and right to the possession of the property were not determined in the replevin suit evidence in respect thereto may be given by the de-

Goods were replevied without right from an attaching officer, and judgment was rendered against the defendant in the original action. In an action against a surety on the replevin bond, on the question of the amount for which execution should issue, the defendant offered to prove that the goods were necessary household furniture of the judgment debtor, and exempt from being taken on execution. *Held,* that the evidence was properly excluded. Capen *v.* Bartlett, 153 Mass. 346, 26 N. E. 873.

88. Ernst Bros. *v.* Hogue, 86 Ala. 502, 5 So. 738; Hawley *v.* Warner, 12 Iowa 42; Boyd *v.* Huffaker, 40 Kan. 634, 20 Pac. 459; Cumberland Coal & Iron Co. *v.* Tilghman, 13 Md. 74 (*holding* that the defendant may, however, show the title of plaintiff in replevin was of short duration, and terminated by contract soon after the rendition of the judgment); Wells *v.* Griffin, 2 Head (Tenn.) 568. See also Hershler *v.* Reynolds, 22 Iowa 152.

In Lee *v.* Grimes, 4 Colo. 185, an action on a replevin bond, it appeared that under an agreement the matters in controversy in the replevin suit were submitted to arbitration, the agreement providing that the award should be final, and the arbitrators found for the defendant and that the property was in him; it was *held,* that in the action on the bond the principal therein was estopped to say that the action was not determined on the merits, that the sureties although not parties to the action of replevin were concluded by the judgment thereon by force of their undertaking; and accordingly in an action on the bond evidence that the relation of mortgagor and mortgagee existed between the parties was not admissible in mitigation of damages.

In Woods *v.* Kessler, 93 Ind. 356, a suit on a replevin bond averring a judgment of return of the property, or, on failure, for its value found, and for breach a failure to return or pay the value, an answer by a surety on the bond that the plaintiff's ownership of the property was subject to a mortgage thereon, held by the surety, due and unpaid, was held bad. So, also, an answer of property in the principal of bond, the question of ownership and right of possession being *res adjudicata.*

In Smith *v.* Lisher, 23 Ind. 500, J. S. replevied a mare from G. L., gave bond, and took the mare into possession. J. S. lost the suit and failed to return the mare and this suit is brought on the bond. J. S. answered and alleged title to said mare in M. S. A demurrer to the answer was sustained. The court says: "The determination of a replevin suit may or may not be conclusive of the right of property, according to the circumstances of the case. When the right of property is put in issue and decided on, it is then *res adjudicata,* and cannot, on general principles, be again inquired into, in a suit between the same parties. If, however, the right has not been tried, it remains, as a matter of course, an open question."

In an action on a replevin bond given in an action of replevin, instituted before a tribunal without jurisdiction, the defendant cannot show that the property replevied is in him. McDermott *v.* Isbell, 4 Cal. 113.

fendant in the action on the bond for the purpose of mitigating the damages.[89]

b. *Voluntary Nonsuit.* — A voluntary nonsuit by the plaintiff in a replevin action and failure to deliver the property according to the stipulation of the bond constitutes a breach of the condition, and the obligors cannot, in an action on the bond, give evidence as to the ownership as a bar to the action; but proof of ownership is admissible in mitigation of the damages.[90]

89. *Indiana.* — McFadden *v.* Ross, 108 Ind. 513, 8 N. E. 161; Miller *v.* Cheney, 88 Ind. 466.

Iowa. — Buck *v.* Rhodes, 11 Iowa 348.

Maine. — Tuck *v.* Moses, 58 Me. 461; Jones *v.* Smith, 79 Me. 452, 10 Atl. 256; Buck *v.* Collins, 69 Me. 445.

Maryland. — Crabbs *v.* Koontz, 69 Md. 59, 13 Atl. 591.

Massachusetts. — Easter *v.* Foster, 173 Mass. 39, 53 N. E. 132, 73 Am. St. Rep. 257; Leonard *v.* Whitney, 109 Mass. 265; Bartlett *v.* Kidder, 14 Gray 449.

In Magerstadt *v.* Harder, 199 Ill. 271, 65 N. E. 225, *reversing* 95 Ill. App. 303, an action against the surety on a replevin bond, it was held that on the assessment of damages, the defendant, who was in default, should for the purpose of mitigating damages have been permitted to prove that the interest of the plaintiff was merely that of a lien-holder, but that since he was in default and had filed no plea as permitted by the statute it was not proper to permit the defendant to show that the lien was subordinate to the lien of his principal, the plaintiff in the replevin suit.

In Colorado a Statute provides that in an action on a replevin bond where the merits of the case have not been determined in the action of replevin the defendant may show his title to the property in dispute in the replevin suit, except in cases where the plaintiff in the action of replevin shall have voluntarily dismissed his suit or submitted to a non-suit. In Clark *v.* Howell, 3 Colo. 564, there was a voluntary dismissal of the replevin suit and a judgment for the return of the property. The only defense set up to the action on the bond was that the merit of the replevin suit had not been determined and that the plaintiff in that action was the owner of the property replevied. It was held that the case came within the exception of § 14 of the Colorado Code of Civil Procedure, and that the matters pleaded constituted no defense: "That where a plaintiff in replevin suffers a voluntary dismissal or nonsuit, and judgment of *retorno habendo* is awarded, in a suit on the replevin bond, the defendant cannot in bar of the action, or in mitigation of damages, show property in the plaintiff in replevin." See Lee *v.* Grimes, 4 Colo. 185.

90. Savage *v.* Gunter, 32 Ala. 463. See also Pearl *v.* Garlock, 61 Mich. 419, 28 N. W. 155, 1 Am. St. Rep. 603.

In Allen *v.* Woodford, 36 Conn. 143, an action on a replevin bond, it appeared that the writ of replevin after service had not been returned to court through the negligence either of the plaintiff or of the officer making the service, and it was held that in the action on the bond the defendant might be permitted to show in mitigation of damages that the property in controversy belonged to the plaintiff in the replevin suit; *distinguishing* Ormsbee *v.* Davis, 16 Conn. 567. In the latter case the plaintiff in the replevin suit had withdrawn the action after the return of the writ to the court, whereupon the court rendered judgment against the plaintiff for the return of the property. He refused to return it and action was brought on the replevin bond. One ground of defense was that he was the owner of the property and this he claimed was a legal excuse for not complying with the judgment of the court. But the court held otherwise; that the judgment of return could only be ren-

c. *Judgment of Dismissal.* — So also a judgment of dismissal not followed by a summary judgment for the assessed value of the property will not preclude the obligors on the replevin bond, in an action thereon, from proving ownership of the property in mitigation of damages, although not in bar of the action.[91]

4. Defenses. — Where property has been replevied from under a levy by virtue of an execution, and on trial there has been a finding for the defendant on the issue of title to the property, and a judgment of return has been rendered, the plaintiff cannot afterward defend a suit on the bond, for a failure to deliver the prop-

dered upon the plaintiff's failure to make out a title, and that under the circumstances proof of title in the replevin plaintiff tended to impeach that judgment and call in question its propriety in a collateral manner.

In Harmon *v.* Collins, 2 Penne. (Del.) 36, 45 Atl. 541, an action on the replevin bond for failure to prosecute the replevin suit with effect, a nonsuit having been entered therein, it was held that the defendant in the action on the bond was properly permitted to show that he was the owner of the property in controversy when it was replevied.

In Illinois a statute (ch. 119, § 26) provides that when the merits of the case have not been determined in the trial of the action in which the bond was given, the defendant in the action upon the replevin bond may plead that fact and his title to the property in dispute. In Hanchett *v.* Gardner, 138 Ill. 571, 28 N. E. 788, *affirming* 37 Ill. App. 79, the defendant in the action of replevin after the evidence had been submitted to the court sitting as a jury elected to take a nonsuit and judgment was entered against him for costs, and a return of the property awarded. It was held that by submitting to a nonsuit in the replevin suit the plaintiff therein withdrew the cause from the consideration of the court and the merits of the case were not determined in the replevin action, and that the plaintiff therein might when sued on the replevin bond prove his own title to the property in mitigation of the damages to be recovered.

91. Ernst Bros. *v.* Hogue, 86 Ala. 502, 5 So. 738, where the court said: "Had the plaintiff obtained, in the detinue suit, the summary judgment against the plaintiffs therein, authorized by the statute, it would have been conclusive on the question of ownership, and on the return of the sheriff of the failure to deliver the property, the bond would have had the force and effect of a judgment upon which execution could have issued. But, when the plaintiff, by reason of not having obtained such judgment, was compelled to resort to a suit on the replevin bond as a common-law bond, the amount of recovery only extends to the legal damages caused by the breach of the bond. If the property belonged to Ernst Brothers, and the plaintiff had merely a possessory interest, he is entitled to recover the damage done to such interest by the failure to deliver the property, but not its full value. Evidence as to the ownership should have been received."

The Dismissal of a Replevin Suit for Want of Jurisdiction does not preclude the plaintiff therein when sued on the replevin bond from showing property in himself, and that the merits were not determined in the replevin suit as provided by the Illinois statute. O'Donnell *v.* Colby, 153 Ill. 324, 38 N. E. 1065, *reversing* 38 Ill. App. 196.

A surety on a replevin bond whose principal dismissed the action of replevin in which a judgment *de retorno* was entered may show in an action on the bond against him title in the plaintiff in replevin to the property in controversy in mitigation of damages. A judgment *de retorno* does not involve an adjudication of the title. Fielding *v.* Silverstein, 70 Conn. 605, 40 Atl. 454, where the court said: "Upon this question of damage the ownership of the prop-

erty, by asserting a new title to the property, acquired after the bond in replevin was given and before judgment for a return.[92]

It is no defense to an action on a replevin bond that the amount thereof was less than double the value of the property replevied, although such defect may have been cause for a dismissal of the action of replevin before trial.[93]

Where plaintiff in replevin has obtained possession of the property under his writ, neither he nor his sureties can be permitted to allege, in the defense of an action upon the bond, that no suit was pending when the bond was executed, because no writ of summons ever issued in the replevin suit.[94]

5. Damages. — A. Failure To Prosecute Action. — a. *Burden of Proof.* — The defendant in replevin may recover nominal damages for the breach of the condition of the bond to prosecute the suit to effect, even though he does not show actual damages.[95] But in order to recover more than nominal damages, he must show actual damages.[96]

b. *Measure of Damages.* — Upon a breach of the condition duly to prosecute the replevin suit, or to prosecute it with effect, the defendant in replevin may, in an action on the bond, show all the damages he has suffered from the replevin suit and the taking of the property by the replevin plaintiff.[97] And the plaintiff in the action on the bond may also show and recover the value of the property in case of its non-return.[98]

erty replevied may be material, and if so, may be proved by the defendant. . . . The defendant cannot be estopped from producing such evidence by any judgment, unless it be one rendered in an action between the same parties, wherein the fact sought to be proved, *i. e.* the title to the property, was in issue and adjudicated."

92. Carr *v.* Ellis, 37 Ind. 465.

93. Trueblood, Admr. *v.* Knox, 73 Ind. 310.

The defendant is estopped from setting up the insufficiency of the penalty of such bond as a defense, after the writ of replevin had been issued and possession of the property obtained upon it. Trueblood *v.* Knox, 73 Ind. 310.

94. Sammons *v.* Newman, 27 Ind. 508.

95. Crabbs *v.* Koontz, 69 Md. 59, 13 Atl. 591; Alderman *v.* Roesel, 52 S. C. 162, 29 S. E. 385.

96. Imel *v.* Van Deren, 8 Colo. 90, 5 Pac. 803; Jones *v.* Smith, 79 Me. 452, 10 Atl. 256.

As a matter of course it devolves upon the plaintiff in an action upon a replevin bond to establish the measure of his damages. Sopris *v.* Lilley, 2 Colo. 496.

In an action on a replevin bond, the plaintiff must prove his actual damage; if he has not been damnified in fact he can recover only nominal damages. Fielding *v.* Silverstein, 70 Conn. 605, 40 Atl. 454.

Upon the condition in a replevin bond to return the property in controversy, if return thereon shall be awarded, the rule is that in an action on the bond in the absence of evidence showing the value of the property and the value of its use since judgment was given in the replevin action nominal damages only can be allowed. Sopris *v.* Lilley, 2 Colo. 496.

97. Cox *v.* Sargent, 10 Colo. App. 1, 50 Pac. 201; Little *v.* Bliss, 55 Kan. 94, 39 Pac. 1025; Balsley *v.* Hoffman, 13 Pa. St. 603.

98. *Colorado.* — Cox *v.* Sargent, 10 Colo. App. 1, 50 Pac. 201.

When the Plaintiff in Replevin Dismissed His Action after return of the property, the defendant in replevin cannot, as plaintiff in an action on the bond, recover attorney's fees and expenses incurred in preparing his defense to the replevin suit.[99]

c. *Mitigation of Damages.* — Upon a breach of the condition to prosecute with effect, where no judgment for return was awarded, the replevin plaintiff may, in an action on the bond, mitigate the damages by showing his title to the property.[1]

B. Conditioned To Pay Damages. — The general rule is that upon the breach of a replevin bond conditioned to pay all damages which the defendant may suffer as a result of the replevin, the re-

Connecticut. — Persse *v.* Watrous, 30 Conn. 139.

Georgia. — Thomas *v.* Price, 88 Ga. 533, 15 S. E. 11.

Iowa. — Hall *v.* Smith, 10 Iowa 45.

Maine. — Pettygrove *v.* Hoyt, 11 Me. 66.

Massachusetts. — Smith *v.* Whiting, 100 Mass. 540.

Minnesota. — Clark *v.* Norton, 6 Minn. 412.

Pennsylvania. — Pittsburgh Nat. Bank *v.* Hall, 107 Pa. St. 583.

Rhode Island. — Gardner *v.* McDermott, 12 R. I. 206.

If plaintiff gives bond in a replevin suit in order to get possession of property, obligating himself to prosecute the action, and he thereafter dismisses said action, the defendant in replevin is entitled to recover the value of the property taken with interest. Kentucky Land & Immigration Co. *v.* Crabtree, 118 Ky. 395, 80 S. W. 1161.

The condition to prosecute with effect is broken when the replevin action is dismissed or the plaintiff suffers a nonsuit; and in an action on the bond the obligees therein may, on proof of a breach of that condition, recover the value of the property which the replevin plaintiff took under his writ and has failed to return. Cox *v.* Sargent, 10 Colo. App. 1, 50 Pac. 201.

In Harmon *v.* Collins, 2 Penne. (Del.) 36, 45 Atl. 541, an action on a replevin bond wherein the only breach alleged was that the plaintiff in replevin had failed to prosecute his suit to effect, a nonsuit having been entered therein, the plaintiff offered to prove the value of the property in controversy at the time the writ of replevin was issued, to which the defendant objected on the ground that the measure of damages for the breach of the bond could only be proved by the judgment obtained in the replevin suit, and that inasmuch as the replevin defendant had failed to ask for a judgment *pro retorno habendo* at the time of nonsuit, and failed to prove any damages at that time, he was estopped from proving any damages in the action on the bond other than for the costs. But it was held that the testimony was admissible.

99. Edwards *v.* Bricker, 66 Kan. 241, 71 Pac. 587.

1. Allen *v.* Woodford, 36 Conn. 143. And see *supra* notes 88, 89 and 90.

In an action on a bond given in a replevin suit which was dismissed because brought in the wrong township, the appellant cannot recover more than nominal damages if it is shown that he was not the owner of the property. Evidence to that effect is admissible in mitigation of damages. Robinson *v.* Teeter, 10 Ind. App. 698, 38 N. E. 222.

Where the defendants in an action upon a replevin bond hold a chattel mortgage upon the property involved in the replevin suit, they may prove that fact in mitigation of damages. Ruiggenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987.

Where an administrator has obtained possession of property by proceedings in replevin, he may show in mitigation of damages, in an action on the bond to recover the value of the property, that the estate of which he is the administrator, holds an unpaid mortgage upon it, unless

plevin defendant may, in action on the bond, show and recover such damages as he could have shown in the replevin action.[2]

The defendant in an action on a replevin bond may show that the plaintiff sustained no damage by reason of the replevying of the property in controversy.[3]

C. Non-Return of Property. — a. *In General.* — Where the breach of the bond consists of the non-return of the property by the replevin plaintiff, the replevin defendant is, in an action on the bond, entitled to show the value of the property as the measure of his damages.[4]

estopped by the adjudication in the replevin suit. McFadden *v.* Ross, 108 Ind. 512, 8 N. E. 161.

An answer to an action on the bond, of property in the plaintiff in an action of replevin, constitutes no defense to the action, but the fact goes in mitigation of damages. Wiseman *v.* Lynn, 39 Ind. 250.

2. Washington Ice Co. *v.* Webster, 125 U. S. 426; Gould *v.* Hayes, 71 Conn. 86, 40 Atl. 930; Thomas *v.* Spofford, 46 Me. 408; Miltemore *v.* Bottom, 66 Vt. 168, 28 Atl. 872.

In suit on replevin bond conditioned to pay such sums as might be adjudged against plaintiff in the action and the costs of the action, it is error to permit defendant to recover for loss of time and expenses incurred in defending the action with attorney's fees. Kentucky Land & Immigration Co. *v.* Crabtree, 118 Ky. 395, 80 S. W. 1161.

Where a defendant in replevin makes no claim for damages sustained by him by reason of the replevy, he may be permitted to show such damages and recover therefor in his action on the replevin bond. Quinnipiac Brew. Co. *v.* Hackbarth, 74 Conn. 392, 50 Atl. 1023.

In an action on a replevin bond the plaintiff should be permitted to prove and recover as his damages the value of his interest in the property replevied and not returned to him, together with interest thereon from the time of its seizure to the date of judgment. Gould *v.* Hayes, 71 Conn. 86, 40 Atl. 930.

In order to recover damages the defendant in replevin is not obliged to demand and prove them in that action, but he may if he so desires recover them in a subsequent action on the replevin bond. Gould *v.* Hayes, 71 Conn. 86, 40 Atl. 930.

3. Vinton *v.* Mansfield, 48 Conn. 474. In this case the bond was conditioned for the payment of all damage if the plaintiff should not recover judgment and for the return of the replevied property, and in that event to the replevin defendant. And it was held that the defendant in the action on the bond should have been permitted to prove that while the action was pending a third person from whom the replevin defendant had purchased the property with warranty of title had returned to him the purchase money to his full satisfaction and took back the title to the property, and that by order of the court such third person was substituted as defendant in the replevin action and afterwards obtained judgment in his favor. The court said that such evidence was admissible for the purpose of showing either that the plaintiff in the action on the bond had no cause of action, or that he was entitled to less damages by reason of his having received the value of the property; that to have a right to recovery on the replevin bond he must have sustained some damage from the replevying of the property, and that if he was fully satisfied in advance for any possible damage that might have resulted from a judgment against him in case he had continued his defense he certainly could not have been damnified by anything that should thereafter occur in the replevin action.

4. *United States.* — Washington Ice Co. *v.* Webster, 125 U. S. 426.

California. — Mitchum *v.* Stanton, 49 Cal. 302.

If the Replevin Defendant Has a Special Interest only in the property with right of possession, while the plaintiff is the general owner, defendant's damages should be confined to the value of that special interest.[5]

Where the Value of the Property Is Greater when its return is ordered than when taken under the writ, the replevin defendant may, in an action on the bond, show as the measure of his recovery the value of the property at the time its return was ordered.[6]

The Burden of Proving the Value of the property, in such case, is upon the plaintiff in the action on the bond.[7]

b. *Mode of Proof.* — When the value of the goods is fixed by the recital of the replevin bond, this may, it would seem, ordinarily suffice as evidence on the question of damages.[8] But where several chattels are replevied and the condition of the bond sets forth only the aggregate value, and some are returned and some are not, it is otherwise; in such case the recitals of the bond afford no information as to the value of either those returned or those retained.[9] And while some of the courts regard such recitals as against the replevin plaintiff and his sureties, as only *prima facie* evidence upon the question of value,[10] the majority of the courts hold that they are conclusive.[11] But the replevin defendant, suing on the bond, is

Connecticut. — Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928.

Indiana. — Yelton *v.* Slinkard, 85 Ind. 190; Whitney *v.* Lehmer, 26 Ind. 503.

Kentucky. — Roman *v.* Stratton, 2 Bibb 199.

Maine. — Wyman *v.* Robinson, 73 Me. 384.

New Jersey. — Lutes *v.* Alpaugh, 23 N. J. L. 165; Caldwell *v.* West, 21 N. J. L. 411; Peacock *v.* Haney, 37 N. J. L. 179.

Texas. — Talcott *v.* Rose (Tex. Civ. App.), 64 S. W. 1009.

A replevin bond being a guarantee for the delivery of the property replevied, the proper measure of damages in an action on the bond is the value of the property with interest thereon. Ward *v.* Hood, 124 Ala. 570, 27 So. 245, 82 Am. St. Rep. 205.

As between a mortgagor and mortgagee, the measure of damages in an action by the mortgagee upon a replevin bond is the amount due on the mortgage, and evidence tending to prove that that relation existed between the principal obligor and the plaintiff in replevin should be received. Perrigo Gold M. & T. Co. *v.* Grimes, 2 Colo. 651.

The defendant in an action on a replevin bond where a breach is admitted or shown may prove the real amount of the damages which the plaintiff has suffered to be less than the value of the property in controversy. Jackson *v.* Emmons, 59 Conn. 493, 22 Atl. 296.

5. Ernst Bros. *v.* Hogue, 86 Ala. 502, 5 So. 738; McFadden *v.* Ross, 108 Ind. 512; Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987.

6. Treman *v.* Morris, 9 Ill. App. 237; Leighton *v.* Brown, 98 Mass. 515.

7. Sopris *v.* Lilley, 2 Colo. 496.

8. Sopris *v.* Lilley, 2 Colo. 496; Wiseman *v.* Lynn, 39 Ind. 250.

9. Sopris *v.* Lilley, 2 Colo. 496.

10. Farson *v.* Gilbert, 85 Ill. App. 364; Gibbs *v.* Bartlett, 2 Watts & S. (Pa.) 29; McLeod Artesian Well Co *v.* Craig (Tex. Civ. App.), 43 S. W. 934.

11. Washington Ice Co. *v.* Webster, 125 U. S. 426; Cyclone Steam S. P. Co. *v.* Vulcan Iron Wks., 52 Fed. 920, 3 C. C. A. 352; Wiseman *v.* Lynn, 39 Ind. 250; McFadden *v.* Fritz, 110 Ind. 1, 10 N. E. 120; Tuck *v.* Moses, 58 Me. 461; Swift *v.* Barnes, 16 Pick. (Mass.) 194; Cap-

not bound by the recitals therein respecting the value of the property.[12]

ital Lumb. Co. *v.* Learned, 36 Or. 544, 59 Pac. 454, 78 Am. St. Rep. 792.

Compare in this connection notes 80 and 81 *supra.*

12. Washington Ice Co. *v.* Webster, 125 U. S. 426; Tuck *v.* Moses, 58 Me. 461; Thomas *v.* Spofford, 46 Me. 408.

The plaintiff in an action on a replevin bond is not bound by the value of the goods recited in the condition, that is, by an appraisement for the purpose of guiding the sheriff as to the amount of security, but is not binding upon either of the parties. West *v.* Caldwell, 23 N. J. L. 736.

REPORTS.—See Foreign Laws; Judgments; Libel and Slander; Records.

REPRESENTATIONS.—See False Pretenses; Fraud; Insurance.

REPUTATION.—See Character.

RES ADJUDICATA.—See Judgments.

RESCISSION.

I. SCOPE NOTE.

Webster defines "rescission" as an act of rescinding, abrogating, annulling, or vacating.

In Abbott's dictionary of terms and phrases, rescission is said to be the "act or state of abrogating or declaring null a contract, particularly when by one of the parties."

Rescission may be treated as including a rescission by one party on account of some fault of the other party;[1] rescission by mutual agreement of the parties,[2] and rescission by a court of equity, upon

1. Tecumseh State Bank *v.* Maddox, 4 Okla. 583, 46 Pac. 563.

"After a contract has been broken, whether by an inability to perform it or by rescinding against right or otherwise, the party not in fault may sue the other for the damages suffered, or, if the parties can be placed *in statu quo,* he may, should he prefer, return what he has received and recover, in a suit, the value of what he has paid or done. The latter remedy is termed 'rescission.'" Merrill *v.* Merrill, 103 Cal. 287, 35 Pac. 768.

2. Clark *v.* American Co., 28 Mont. 468, 72 Pac. 978.

"Whether a new agreement was substituted for an old one and thus operates as a rescission or discharge of it, must be determined by the intention of the parties, to be ascertained by their correspondence and conduct." Rogers *v.* Rogers, 139 Mass. 440, 1 N. E. 122.

"Parol evidence is admissible to prove the existence of any designed, subsequent, oral agreement to rescind or modify any such contract, grant, or disposition of property, provided that such agreement is not invalid under the Statute of Frauds, or otherwise." Stephen's Ev. § 163.

application of one party.[3] It includes any act of one of the parties, or of the parties mutually, or of a court, which has the effect of wiping out the contract, annulling it, or abrogating it, leaving the parties to be placed as nearly in *statu quo* as may be.[4] Rescission is the fact, not the right.[5] The term "rescission" should be distinguished from cancelation, which has its effect upon the writing itself;[6] from discharge of contract, which is a broader term;[7] from the avoidance of a contract by an infant,[8] and from release by impossibility.[9]

II. RESCISSION BY ONE PARTY.

1. The Right. — A party may at his option rescind a contract which has been made voidable by an act of the other party, such as substantial breach,[10] repudiation,[11] self incapacitation,[12] prevention of performance,[13] mistake without the fault of the party

3. Blake *v.* Blake, 56 Wis. 392, 14 N. W. 173; Lewis *v.* Tobias, 10 Cal. 574; Pomeroy Eq. Jur., Vol. 6, § 684; Bishop on Contracts, Larger Ed., pp. 679, 682, 707 to 713, 809 to 841.

4. Carneal *v.* May, 2 A. K. Marsh. (Ky.) 587, 12 Am. Dec. 453; Zerger *v.* Sailer, 6 Binn. (Pa.) 30; Moore *v.* Bare, 11 Iowa 198.

"It is well settled that a technical rescission of a contract has the legal effect of entitling each of the parties to be restored to the condition in which he was before the contract was made, so far as that is possible, and that no rights accrue to either party by the force of the terms of the contract." Clark *v.* American Co., 28 Mont. 468, 72 Pac. 978.

5. Rescission is a fact. The word itself may be used by contracting parties to indicate the right, but other words may be adopted to point out that course of conduct of the parties which shall constitute the fact of rescission." Seanor *v.* McLaughlin, 165 Pa. St. 150, 30 Atl. 717, 32 L. R. A. 467; *In re* Akers' Will, 74 App. Div. 461, 77 N. Y. Supp. 643.

6. Abbott's Dictionary of Terms & Phrases; "Cancel."

7. Anson on Contracts, 2nd Amer. Ed. 337.

8. Bishop on Contracts, larger edition, pp. 936 to 945.

9. Anderson *v.* May, 50 Minn. 280, 52 N. W. 530, 36 Am. St. Rep. 642, 17 L. R. A. 555; Spalding *v.* Rosa, 71 N. Y. 40, 27 Am. Rep. 7.

10. American Type Founders' Co. *v.* Packer, 130 Cal. 459, 62 Pac. 744; Peuchen *v.* Behrend, 54 App. Div. 585, 66 N. Y. Supp. 1092.

Butler, J.: "The right to rescind a contract for nonperformance is a remedy as old as the law of contract itself." Norrington *v.* Wright, 5 Fed. 768.

11. Drake *v.* Goree, 22 Ala. 409.

Finch, J: "The doctrine of these authorities is that the refusal of one party to perform his contract amounts on his part to an abandonment of it. The other party thereupon has the choice of remedies. He may stand upon his contract, refusing his assent to his adversary's attempt to rescind it, and sue for a breach, or, in a proper case, for a specific performance, or he may assent to its abandonment, and so effect the dissolution of the contract by the mutual and concurring assent of both parties." Graves *v.* White, 87 N. Y. 463.

12. Mr. Justice Bradley: "Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated, and demand whatever damage he has sustained thereby." Lovell *v.* St. Louis Mut. L. Ins. Co., 111 U. S. 264.

13. Cochran *v.* Yoho, 34 Wash. 238, 75 Pac. 815; United States *v.*

rescinding,[14] false representation,[15] fraud,[16] duress,[17] or undue influence,[18] upon giving seasonable notice[19] and returning or offering to return what he has received under the contract.[20]

2. Presumption and Burden of Proof. — No presumption arises from breach, fraud or other fault of a party, that the right to rescind arising therefrom, has been exercised.[21] The burden of proving facts justifying rescission and that rescission was accomplished is upon the party seeking to establish these facts.[22]

3. Nature and Character of Evidence. — Generally, the kind of evidence required to prove rescission by a party is not different from that necessary to prove any other fact which is to be established in law.[23] It may be direct or circumstantial, oral or written. A party seeking to rescind must give notice of his intent immediately upon learning of the facts making the contract voidable, unless peculiar circumstances exist making such notice unnecessary.[24] If,

Behan, 110 U. S. 338; Lovell *v.* St. Louis Mut. L. Ins. Co., 111 U. S. 264.

14. Calhoun *v.* Teal, 106 La. 47, 30 So. 288.

15. American Cotton Co. *v.* Collier, 30 Tex. Civ. App. 105, 69 S. W. 1021; Bostwick *v.* Mutual Life Ins. Co. 116 Wis. 392, 92 N. W. 246, 67 L. R. A. 705.

16. Anson on Contracts, 2nd Am. Ed. 212.

"Where a party is induced to his damage to enter into a contract by the false and fraudulent representations of the other party, and where such false and fraudulent representations have been relied upon as the inducing cause for entering into such contract, and where such representations are peculiarly within the knowledge of the party making them, and not mere expressions of opinion, the party so defrauded may elect whether he will stand by the contract or rescind it." Perry *v.* Rogers, 62 Neb. 898, 87 N. W. 1063.

17. Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Yeates *v.* Pryor, 11 Ark. 58; Schaeffer *v.* Sleade, 7 Blackf. (Ind.) 178.

18. Kent *v.* Quicksilver Min. Co., 78 N. Y. 159.

19. Hennessy *v.* Bacon, 137 U. S. 78.

20. Conner *v.* Henderson, 15 Mass. 319, 8 Am. Dec. 103; Jewett *v.* Petit, 4 Mich. 508; Burge *v.* Cedar Rapids & M. R., 32 Iowa 101.

21. Webber *v.* Dunn, 71 Me. 331.

22. Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70; Oaks *v.* Harrison, 24 Iowa 179.

"When a contract is valid upon its face, or taken in the light of the circumstances surrounding the parties at the time it was entered into, it appears to be valid, it is encumbent on him who attacks the contract, to show its invalidity." Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199; 37 S. E. 485, 81 Am. St. Rep. 28.

23. In an action to rescind a contract, the ground on which rescission was sought was the false representation as to certain material facts. Gilfillan, C. J.: "The appellants urged that in an action for rescission of a contract, the allegations of the plaintiff should be sustained by more full, clear, and convincing evidence than is required to establish ordinary issues, and that a mere preponderance in the evidence ought not to be held sufficient to sustain the allegations. We are not aware of any rule requiring mistake of fact or fraud to be established in such a case by more evidence than is required to prove the same facts in other cases." Martin *v.* Hill, 41 Minn. 337, 43 N. W. 337.

24. Mr. Justice Harlan: "The general rule being that, if a party means to rescind a contract because of the failure of the other party to perform it, he should give a clear notice of his intention to do so, un-

after learning of the facts entitling him to rescind, he neglects for an unreasonable length of time to give such notice, or retains possession of the property or of the benefits of the contract, and continues to deal therewith as his own, or does other acts showing a ratification of the contract, this is conclusive evidence of a waiver of the default of the other party.[25]

III. RESCISSION BY MUTUAL AGREEMENT.

1. The Right and Mode of Rescission. — The parties may by mutual agreement, for a consideration, rescind a contract in whole or in part. In rescission of executory contracts, the mutual release of rights is sufficient consideration.[26] Such consideration may be (a) express, by mutual release;[27] or, (b) implied, first, by subsequent inconsistent contract;[28] second, by other acts of the parties from which rescission may be inferred;[29] or third, by lapse of time without insisting upon the contract.[30]

2. Presumption and Burden of Proof. — The contract once established is presumed to remain in force, and the burden of proving a rescission by the parties is on him who seeks to establish the same.[31] Evidence of a subsequent contract raises a conclusive presumption of the rescission of the former contract, as far as the two are necessarily inconsistent.[32]

less the contract itself dispenses with such notice, or unless notice becomes unnecessary by reason of the conduct of the parties." Hennessy *v.* Bacon, 137 U. S. 78.

25. McLean *v.* Clapp, 141 U. S. 429.

Mr. Justice Swayne: "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract as if the mistake or fraud had not occurred." Grymes *v.* Sanders, 93 U. S. 55.

Where a party retained land and received rents, etc., after learning of fraud in the sale to him, Andrews, J., said: "But a party entitled to rescind a contract for fraud may deprive himself of this remedy by acquiescence; or, where the transaction is a sale of property, by his dealing with the property as owner, after the discovery of the fraud." Schiffer *v.* Dietz, 83 N. Y. 300.

26. Leach *v.* Keach, 7 Iowa 232.

27. Leach *v.* Keach, 7 Iowa 232.

28. Huckestein *v.* Kelley, 152 Pa. St. 631, 25 Atl. 747.

29. Chouteau *v.* Jupiter Iron Works, 94 Mo. 388, 7 S. W. 467; Rushbrook *v.* Lawrence, L. R. 5 Ch. 3, 21 L. T. 477, 39 L. J. Ch. 93.

30. Gibson *v.* Donnelly, 13 N. Y. Supp. 808, 37 N. Y. St. 500.

31. Webber *v.* Dunn, 71 Me. 331; Oaks *v.* Harrison, 24 Iowa 179.

Shope, J: "The law presumes that all men are fair and honest; that their dealings are in good faith and without intention to disturb, cheat, hinder, delay or defraud others, and if any transaction, called in question is equally capable of two constructions, one that is fair and honest, and the other that is dishonest, there the law is, that the transaction questioned is presumed to be honest and fair." Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70.

32. Stow *v.* Russell, 36 Ill. 18;

3. Nature and Character of Evidence. — Rescission by mutual agreement may be proved by evidence of express rescission, or by circumstances.[33] The usual rule of preponderance of evidence prevails. Where the original contract is written or required to be in writing under the statute of frauds, or is under seal, the authorities vary as to the effect of the parol evidence rule upon the evidence necessary to establish the fact of rescission. A simple contract, either written or oral, may be rescinded by the agreement of the parties, and oral evidence thereof is admissible, by the great weight of authority.[34] It is held, however, that where the contract is in writing, an executory agreement to rescind must be evidenced by writing.[35] Where the contract is required by the Statute of Frauds

Cornish *v.* Suydam, 99 Ala. 620, 13 So. 118.

Where the defendants paid the plaintiff for the exclusive right to sell its machinery in a certain territory, and later he accepted other territory in lieu of the first, *held*, the first contract was superseded and the defendants had no right under it. Farrar & Wheeler *v.* Toliver, 88 Ill. 408.

"Whether the new agreement was substituted for the old, and thus operated as a rescission or discharge of it, must be determined by the intentions of the parties to be ascertained from their correspondence and conduct." Rogers *v.* Rogers, 139 Mass. 440, 1 N. E. 122.

33. Rogers *v.* Rogers, 139 Mass. 440, 1 N. E. 122.

"There can be no doubt but a written contract may be rescinded or abandoned by parol. It is not necessary to show an express agreement to that effect, but the agreement to rescind may be inferred from the acts and declarations of the parties." Chouteau *v.* Jupiter Iron Works, 94 Mo. 388, 7 S. W. 467.

34. Rogers *v.* Rogers, 139 Mass. 440, 1 N. E. 122; Huckestein *v.* Kelley, 152 Pa. St. 631, 25 Atl. 747; Calliope *v.* Herzinger, 21 Colo. 482, 42 Pac. 668; Pecos Valley Bank *v.* Evans, 107 Fed. 654, 46 C. C. A. 534; Teal *v.* Bilby, 123 U. S. 572; Chouteau *v.* Jupiter Iron Works, 94 Mo. 388, 7 S. W. 467.

See Article "PAROL EVIDENCE," Vol. X.

"By the general rules of the common law, if there be a contract which has been reduced into writing, it is competent to the parties at any time before the breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any way to add to or subtract from, or vary, or qualify the terms of it, and thus make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement." Goss *v.* Lord Nugent, 5 Barn. & Ad. 58, 27 E. C. L. 33, 2 L. J. K. B. 127.

In an action for breach of contract where the answer set up mutual rescission, and there was conflicting evidence as to whether there was a parol agreement to rescind, it was held error to refuse an instruction to the effect that, if the jury should find that the parties made such a parol rescission, their verdict should be for the defendant. Dignan *v.* Spurr, 3 Wash. St. 309, 28 Pac. 529.

Parol evidence is admissible to prove the "existence of any designed, subsequent, oral agreement to rescind or modify any such contract, grant, or disposition of property, provided that such agreement is not invalid under the Statute of Frauds or otherwise." Stephen's Ev. 163.

35. Walker *v.* Greene, 22 Ala. 679; Rucker *v.* Harrington, 52 Mo. App. 481.

"But executory parol agreements to vary or modify the terms of a written contract are not operative

to be in writing, it has been held that a simple contract to rescind need not be in writing, for the statute does not apply to contracts to rescind;[36] but a majority of jurisdictions hold that executory contracts to rescind an agreement within the Statute of Frauds must be in writing to be admissible.[37] Where the new agreement, as made up by the new terms, or as included in the new terms and the parts of the old contract not rescinded, is one which is required by the statute to be in writing, parol evidence of its terms is not admissible to show rescission of the prior contract.[38] Evidence of a parol agreement executed, rescinding a contract under the Statute of Frauds is admissible everywhere.[39] Where the original contract is under seal, the older rule and the one still followed in many jurisdictions, is that it cannot be rescinded by parol, and verbal evidence of rescission is not admissible.[40] There are many cases hold-

to produce that effect. Executed parol agreements stand on a different ground." Adams *v.* Nichols, 19 Pick. (Mass.) 275, 31 Am. Dec. 137.

In California, the code (Civil Code of 1898) provides that a written contract cannot be varied except by writing, or by a parol agreement executed.

Benson *v.* Shotwell, 103 Cal. 163, 37 Pac. 147; Erenberg *v.* Peters, 66 Cal. 114, 4 Pac. 1091.

36. In Cummings *v.* Arnold, 3 Met. (Mass.) 486, 37 Am. Dec. 155, it was held that a written contract coming under the Statute of Frauds might be varied by a parol executory agreement as to the time and mode of payment.

37. Abell *v.* Munson, 18 Mich. 306, 100 Am. Dec. 165; Bradley *v.* Harter, 156 Ind. 499, 60 N. E. 139.

"But the better opinion is that a written contract falling within the Statute of Frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing." Swain *v.* Seamens, 9 Wall. (U. S.) 254.

Where the parties attempted by parol to vary a written contract for the sale of a large amount of iron, Danforth, J., said: "It of course, cannot be doubted that the omission to furnish iron shipped in December or January, authorized the defendants to rescind the contract. Welsh *v.* Gossler, 89 N. Y. 540. And, if the above views are correct, the verbal arrangement subsequently made related to the things sold or contracted for, and is not binding upon the defendants. To admit it would vary by parol the substance of a contract valid only because it was in writing, and this cannot be done without a violation of the statute." Hill *v.* Blake, 97 N. Y. 216.

38. In Burns *v.* Fidelity Real Estate Co., 52 Minn. 31, 53 N. W. 1017, it was held that a contract under the Statute of Frauds could not be varied by parol. In this case, the new contract was one also required to be in writing under the statute.

In Bradley *v.* Harter, 156 Ind. 499, 60 N. E. 139, and in Abell *v.* Munson, 18 Mich. 306, 100 Am. Dec. 165, it was held that an agreement for the purchase of real estate could not be varied by parol.

39. See also Goss *v.* Lord Nugent, 5 Barn. & Ad. 58, 27 E. C. L. 33; Marshall *v.* Lynn, 6 Mees. & Welsb. 109, 9 L. J. Exch. 126.

"In Reynolds *v.* B. & M. R. Co., 11 Neb. 186, 7 N. W. 737, this court held that, where the contract was within the purview of the Statute of Frauds, there must be consideration for a modification by waiving some of its requirements, or else such new agreement must be executed; but, if the terms of the new agreement have been fully carried out, the original obligation is discharged, though there was no new consideration." Bowman *v.* Wright, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580.

40. Standifer *v.* White, 9 Ala.

ing that, if a parol agreement has been made and carried out, oral evidence of the new agreement and its execution is admissible to establish the rescission of the specialty.[41] Some jurisdictions hold that a sealed contract may be rescinded by an oral executory agreement.[42]

527; Smith *v.* Lewis, 24 Conn. 624, 63 Am. Dec. 180; McMurphy *v.* Garland, 47 N. H. 316; Sherwin *v.* Rutland, 24 Vt. 347; West *v.* Blakeway, 9 Dowl. P. C. 846, 5 Jur. 630, 40 E. C. L. 598, 2 Man. & G. 729, 3 Scott (N. R.) 199.

See Article "PAROL EVIDENCE," Vol. X.

"In Loach *v.* Farnum, 90 Ill. 368, it was said by this court that it is a well settled rule of the common law that an executory contract under seal cannot be modified or varied by parol agreement, and the same doctrine has frequently been announced by this court . . . This is not a case where the parol agreement had been executed by the parties, and it does not therefore come within the exception to the rule, as stated in Worrell *v.* Forsyth, 141 Ill. 22, 30 N. E. 673." Leavitt *v.* Stern, 159 Ill. 526, 42 N. E. 869.

41. Dickerson *v.* Board of Comrs., 6 Ind. 128, 63 Am. Dec. 373; Lancaster *v.* Elliot, 55 Mo. App. 249; McCauley *v.* Keller, 130 Pa. St. 53, 18 Atl. 607, 17 Am. St. Rep. 758.

"Parties may by parol modify a written executory contract under seal, either by changing its terms, or waiving its conditions, if they have acted under it and executed it as so modified." McClay *v.* Gluck, 41 Minn. 193, 42 N. W. 875.

McCreery *v.* Day, 119 N. Y. 1, 23 N. E. 198, 16 Am. St. Rep. 793, 6 L. R. A. 503, is a leading case to the effect that a parol contract made in substitution of a prior sealed contract and fully executed, discharges the specialty.

Where a sealed agreement has been varied by parol contract fully executed, the court said: "Notwithstanding what has been said in some of the old cases, it is now recognized doctrine that the terms of a contract under seal may be varied by a subsequent parol agreement. Certainly, whatever may have been the rule at law, such is the rule in equity. Dearborn *v.* Cross, 7 Cow. (N. Y.) 48; Le Fevre *v.* Le Fevre, 4 Serg. & R. (Pa.) 241, 8 Am. Dec. 696; Fleming *v.* Gilbert, 3 Johns. (N. Y.) 528. These are cases at law. Numerous others might be cited. The rule in equity is undoubted." Canal Co. *v.* Ray, 101 U. S. 522.

42. With reference to the cancelation of a specialty by verbal agreement, the court said: "The next question is whether the court erred in their instructions to the jury; amongst other things, the court charged the jury that, 'if the plaintiff agreed to give up and cancel the aforesaid contract between him and the defendant on the verbal agreement aforesaid, and agreed to take the verbal contract of Henline to transfer the aforesaid certificate and to accept of such transfer, and the payment aforesaid, instead of the conveyance mentioned in the aforesaid second contract between the plaintiff and defendant, that would exonerate the plaintiff entirely, although the plaintiff might have no right of action against Henline on such verbal agreement.' Now, I see nothing wrong in all this. The parties had a perfect right to cancel their contracts, and, if they agreed to do it upon sufficient consideration, such agreement would be obligatory upon them." Reed *v.* McGrew, 5 Ohio 375.

In Hart *v.* Lauman, 29 Barb. (N. Y.) 410, the referee found that the defendants contracted under seal to do certain excavating on a railroad right of way. The plaintiff changed the course of the right of way, and the parties agreed on a new price, according to the new line for the road. It was held that the referee was correct in holding the second contract evidence of the rescission

IV. RESCISSION IN A COURT OF EQUITY.

1. The Jurisdiction. — Equity will grant rescission of a contract at the instance of the one party, where ground for equitable interference is shown, as in cases of mistake,[43] misrepresentation,[44] fraud,[45] some cases of substantial breach,[46] duress,[47] and undue influence.[48]

2. Presumption and Burden of Proof. — It is incumbent upon a plaintiff asking rescission to show clearly the necessity for equitable interference, and that he has restored, or offered to restore, what he has received on the agreement, for ordinarily equity will not interfere where the parties cannot be put in *statu quo;* hence, the burden is on the plaintiff to show the offer to restore what he has received, or that exceptional facts exist calling for equitable adjudication,[49]

of the first, though the second was not under seal.

In Hadden *v.* Dimick, 13 Abb. Pr. N. S. (N. Y.) 135, the defendant being bound by agreement under seal to consign to the plaintiff for sale all the goods he manufactured, but, not being bound to manufacture, refused to manufacture, unless the plaintiffs would make a different agreement with him. They consented, and made another agreement, not under seal, but failed to keep it, whereupon, the defendant sold his goods to other parties. It was held that plaintiffs had no cause of action, since the first contract was abrogated by the second, and the plaintiffs having failed to keep that, the defendant had a right to rescind.

Action To Recover Balance of Rent on a Lease Under Seal. — Allen, J.: "In reference to contracts under seal, it was formerly held, especially in England, that they could not be thus varied, but in the United States, the tendency of judicial decisions has been to apply the same rule in this respect to sealed instruments as to simple contracts." Hastings *v.* Lovejoy, 140 Mass. 261, 2 N. E. 776, 54 Am. Rep. 462.

"We are not sure but that in every conceivable case where parties are bound to one another by writing under seal, the obligors will be discharged by parol proof of facts, if sufficient in themselves to constitute a discharge." White *v.* Walker, 31 Ill. 422. But see Morrill *v.* Colehour, 82 Ill. 618; Loach *v.* Farnum, 90 Ill. 368; Leavitt *v.* Stern, 159 Ill. 526, 42 N. E. 869.

Under the Michigan statute, which makes a seal merely *prima facie* evidence of consideration, it was held that a sealed contract may be varied by a parol executory agreement. Blagborne *v.* Hunger, 101 Mich. 375, 59 N. W. 657. See Barton *v.* Gray, 57 Mich. 622, 24 N. W. 638.

43. Whelen's Appeal, 70 Pa. St. 410; Paine *v.* Upton, 87 N. Y. 327, 41 Am. Rep. 371; Bidder *v.* Carville, 101 Me. 59, 63 Atl. 303; Goodrich *v.* Lathrop, 94 Cal. 56, 29 Pac. 329, 28 Am. St. Rep. 91; Rackemann *v.* Riverbank Imp. Co., 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427; Mutual Life Ins. Co. *v.* Pearson, 114 Fed. 395.

44. Wilcox *v.* University, 32 Iowa 367; Gardner *v.* Mann, 36 Ind. App. 694, 76 N. E. 417.

45. Manning *v.* Berdan, 135 Fed. 159.

46. Board of Supervisors *v.* Walbridge, 38 Wis. 179; McClelland *v.* McClelland, 176 Ill. 83, 51 N. E. 559; Farmers' L. & T. Co. *v.* Galesburg, 133 U. S. 156.

47. Brown *v.* Pierce, 7 Wall. (U. S.) 205.

48. Meyer *v.* Fishburn, 65 Neb. 626, 91 N. W. 534; Truman *v.* Lore, 14 Ohio St. 144.

49. Mr. Justice Swayne: "A court of equity is always reluctant to rescind, unless the parties can be put back into *statu quo.* If this cannot be done, it will give such

and the party asking for rescission must show all the facts entitling him to the same.[50] Where the parties are competent, the presumption is that the transaction was fair, until facts to the contrary are shown.[51] But proof of confidential relationship between the parties raises a presumption of fraud, and thereafter, the burden is on him who seeks to uphold the contract to show that the transaction was fair and righteous.[52] If the injured party, after learning of the

relief only when the clearest and strongest equity imperatively demand it." Grymes *v.* Sanders, 93 U. S. 55.

"The petition furnishes no foundation for equity jurisdiction, and still in claiming a rescission of the contract, it prays the equity side of the court for relief. Where a petition shows a case where a perfect remedy was to be afforded at law, it cannot claim that relief which can only be awarded by a court of equity. In an appropriate case, when a court of chancery acquires jurisdiction, a contract may be canceled, but such jurisdiction cannot be acquired in a case like the present, where no fraud is charged, and in which the petition alleges a state of facts and a claim for damages which can be fully relieved at law. . . . The petition must show a right to relief beyond the mere breach of a contract, which would confer a right of action at law." Brainard *v.* Holsaple, 4 Greene (Iowa) 485.

50. Marston, J: "The bill in this case was filed to correct a mistake. It is claimed that, at the time of the agreement of April 5, 1859, referred to in the case of Ford *v.* Loomis, *supra*, page 121, a certain description of land, which was not embraced in the tax deeds to Durand but which was embraced in the deeds from Ford to Durand of November 16, 1858, was, by mistake, omitted from the deed made by Durand to complainants. In order for the complainants to obtain the relief sought, it must appear not only that there was an error on both sides, but the mistake must be admitted or distinctly proved." Ludington *v.* Ford, 33 Mich. 123.

Action for Specific Performance and Cross-Bill for Cancelation on Ground of False Representation. Referring to the defendant's bill, the court declared that "the burden of proof was upon her to make out this case." Moore *v.* Baker, 65 N. J. Eq. 104, 55 Atl. 106.

In a suit to avoid a mortgage on the ground that defendant fraudulently represented that complainant was merely signing as surety for her husband, the court said: "The mortgage on its face, showing that it was made to secure the debt due to the mortgagee Mohr, by the complainant as principal, and not as surety for her husband, which suretyship the defendant denies, the burden of proving the debt was that of her husband, and that she was his surety in the execution of the instrument, was on the complainant." Mohr *v.* Griffin, 137 Ala. 456, 34 So. 378. See also Smith *v.* Collins (Ala.), 41 So. 825.

51. Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28.

Wright, J.: "The testimony fails to sustain plaintiff's bill, and it was therefore very properly dismissed. To say the least, it is left in much doubt, whether defendant ever made the representations charged. The presumption is that the transaction was fair and honest, and as plaintiff affirms the contrary, it is his duty to sustain his allegations by sufficient proof, by such evidence as will satisfy the conscience of the chancellor." Oaks *v.* Harrison, 24 Iowa 179.

52. Waddell *v.* Lanier, 62 Ala. 347; Burke *v.* Taylor, 94 Ala. 530, 10 So. 129; Stepp *v.* Frampton, 179 Pa. St. 284, 36 Atl. 177; Whiteley *v.* Whiteley, 120 Mich. 30, 78 N. W. 1009.

Haralson, J.: "It is well settled that courts of equity, in dealing with

facts entitling him to rescission, delays for an unreasonable time to give notice of his intention to rescind,[53] or to return or offer to return the property,[54] or continues actively to treat the contract as valid and binding, or to deal with the property as his own, a conclusive presumption is raised of a waiver of the default.[55] The question as to whether mere lapse of time will amount to evidence

transactions between persons occupying fiduciary relations toward each other are not confined to cases in which there is any formal or technical relation of that character, such as guardian and ward, parent and child, attorney and client, etc., but they apply the principles to all cases in which confidence is reposed by one party in another, and the trust or confidence is accepted under circumstances which show that it was founded on intimate personal and business relations existing between the parties, which gave the one advantage or superiority over the other, and that the burden of proving that the transaction was fair and righteous is on the one receiving or acquiring the benefit." Cannon *v.* Gilmer, 135 Ala. 302, 33 So. 659.

"Certain transactions are presumed on grounds of public policy to be the result of undue influence. Such transactions are generally those occurring between persons in some relation of confidence one toward another. The presence of such relationship creates a presumption of influence, which can generally be rebutted with proof that the parties dealt as strangers at arms' length; that no unfairness was used, and that facts in the knowledge of the one in the position of influence affecting the matter, were communicated to the other. 27 Am. & Eng. Enc. of Law, 1st Ed. 457. Pomeroy in his work on Equity Jurisprudence, Vol. 2, Par. 955, says: 'Nothing can tend more to produce confusion and inaccuracy in the discussion of the subject (undue influence) than the treatment of actual undue influence and fiduciary relation as though they constituted one and the same doctrine.'" Thomas *v.* Whitney, 186 Ill. 225, 57 N. E. 808.

The grantor, seventy-six years old, feeble and suffering from a cancer, of which he died two months later, and living with his daughter in the most kindly relations, signed a deed giving to her all his property, without reading it or having the description or consideration explained to him. The daughter had acted as his agent in having the deed drawn, and he acknowledged to the conveyancer that he wanted to deed some property to her. His expression had been kindly toward his only son having the property, and he had said that it would never go out of the name D., grantor's name. After the son's death, he had no hard feelings toward the latter's children, but, when he went to live with his daughter, said he would leave his property to her, seeming to fear his son's widow would get it otherwise. *Held,* that the evidence was insufficient to overcome the presumption of undue influence and fraud arising from the confidential relations of the parties. Doyle *v.* Welch, 100 Wis. 24, 75 N. W. 400.

53. Hennessy *v.* Bacon, 137 U. S. 78; Shappirio *v.* Goldberg, 192 U. S. 232.

54. Where the plaintiff sued to recover on the ground of fraud, purchase money paid for oil property, it was held error to exclude evidence, that plaintiff had never returned or offered to return the stock received. Cobb *v.* Hatfield, 46 N. Y. 533.

55. Carlock *v.* Sweeney (Tex. Civ. App.), 82 S. W. 469; Fuller *v.* Melrose, 1 Allen (Mass.) 166; Schiffer *v.* Dietz, 83 N. Y. 300.

Land was sold under a mutual mistake as to the existence of a mining shaft thereon. After the discovery of the mistake purchaser retained possession and made no complaint for some time, but later filed a bill for rescission. Mr. Justice Swayne said: "Where a

of a waiver of default is a question of law, but whether other facts, together with lapse of time, constitute such a waiver, is a mixed question of law and fact.[56]

3. Nature and Character of Evidence. — The rescission of a contract is an extreme exercise of the power of a court of equity, and this power will be exercised only when the proof of facts justifying the rescission is clear and convincing.[57] The preponderance of evidence should be so clear as to leave no reasonable doubt.[58] A

party desires to rescind on the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continues to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred." Grymes *v.* Sanders, 93 U. S. 55.

Mr. Justice Day: "It is well settled by repeated decisions of this court that, where a party desires to rescind upon the ground of misrepresentation or fraud, he must, upon the discovery of the fraud, announce his purpose, and adhere to it. If he continues to treat the property as his own, the right of rescission is gone, and the party will be held bound by the contract." Shappirio *v.* Goldberg, 192 U. S. 232.

56. Gatling *v.* Newell, 9 Ind. 572.

57. Hunter *v.* Hopkins, 12 Mich. 227; Vary *v.* Shea, 36 Mich. 388; Atlantic Delaine Co. *v.* James, 94 U. S. 207; Insurance Co. *v.* Nelson, 103 U. S. 544; Colorado Coal Co. *v.* United States, 123 U. S. 307; Maxwell Land-Grant Case, 121 U. S. 325.

"If there is one proposition in the law regarding the rescission of contracts and the cancelation of muniments of title that is established beyond doubt or cavil, it is that the complainant must establish the essential facts of his cause of action with clearness and certainty to entitle him to relief." Files *v.* Brown, 124 Fed. 133, 58 C. C. A. 403, and cases cited.

On a cross-bill for cancelation of a mortgage, Magruder, C. J., said: "Where a party assails a transaction upon the ground of fraud, the burden of proof is upon him to show the fraud. Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70. Fraud may be proved by circumstances, but it is not thereby established unless the circumstances proved are so strong as to produce a conviction that the charge of fraud is true. Bryant *v.* Simoneau, 51 Ill. 324 . . . The proof, however, must be satisfactory. It must be so strong and cogent as to satisfy a man of sound judgment of the truth of the allegation." Mortimer *v.* McMullen, 202 Ill. 413, 67 N. E. 20.

Cross-Bill To Have a Contract Set Aside. — Bean, J.: "The evidence in this case consists principally of the testimony of Hoy and Robinson, who contradict each other as to the terms of the agreement, made in the spring of 1888, and, without further remark or comment, it is sufficient to say that we have carefully examined the testimony, briefs, and argument of counsel, and are of the opinion that plaintiffs have failed to sustain the allegations of their complaint by that clear and satisfactory testimony, necessary to avoid a written contract." Hoy *v.* Robinson, 23 Or. 47, 31 Pac. 62.

Where it was sought to set aside a deed or bill of sale without clearly alleging fraud or mistake, the court said: "A deed, or even a judgment or a decree of a court of chancery of twenty years' standing can all be set aside on the ground of fraud, but then it must be clearly alleged in the bill and supported by proof." Lenox *v.* Nortrebe, Hempst. 251, 15 Fed. Cas. No. 8,246*c*.

58. Kern *v.* Middleton (Pa.), 16 Atl. 640.

Plaintiff filed his bill to have a deed canceled and title revested in him, on the ground that the deed had to be given up by defendant to

preponderance is sufficient, but it must be clearly established.[59] The evidence must be stronger than is necessary to resist specific performance;[60] but where rescission in equity is sought upon the ground of fraud, false representation, undue influence, etc., the evidence required is not different from that necessary to establish the same facts in other cases.[61] In Pennsylvania it has been held that the uncorroborated testimony of the party asking rescission is insufficient.[62] The most frequent exercise of this power is in cases of fraud and misrepresentation, and, in such cases, all the elements of the fraud or misrepresentation must be proved, and the preponderance must be clear.[63] The degree of proof necessary is the same

plaintiff's deceased to be canceled, but was later regained by defendant and recorded. Judge Christiancy said on the question of the amount of evidence necessary: "The evidence upon the point whether the farm had been given up to the father and the trade abandoned is very conflicting, and too inconclusive, in our opinion, to furnish a safe ground for divesting the record title to real estate. To divest such title on the grounds mentioned in the bill upon parol evidence alone, the preponderance of evidence should be clear and the evidence should be so convincing as to leave no reasonable doubt upon the mind." Hunter *v.* Hopkins, 12 Mich. 227.

Cooley, C. J.: "It is said in Youell *v.* Allen, 18 Mich. 107, that the evidence of mistake in a written contract, on which the court should act in giving relief, ought to be so clear as to establish the fact beyond cavil." Vary *v.* Shea, 36 Mich. 388.

B. sued S. on notes. While the suit was pending, S. executed to his brother, E. B. S., a mortgage on certain lands. B. secured a judgment, and levied on the mortgaged land, and seeks to have the mortgage released by E. B. S. as fraudulently executed. Whipple, J.: "While the stern principles by which courts of equity are guided will be applied in all their strictness to cases of fraudulent conveyances, where the fraud is clearly established, yet we cannot presume that fraud actually exists upon slight circumstances. The proof should be so clear and conclusive as to leave no rational doubt upon the mind as to its existence." Buck *v.* Sherman, 2 Dougl. (Mich.) 176.

59. In an action to rescind a contract and set aside a conveyance of real estate on the ground of fraudulent representation, Seevers, J., said: "It must, we think, be true that, before a contract can be rescinded, the evidence must be clear and satisfactory, and preponderate in favor of the party asking the rescission. Possibly, the rule is that a mere preponderance is sufficient, but the preponderance must be made to clearly appear." Dirkson *v.* Knox, 71 Iowa 728, 30 N. W. 49.

60. "Although the cancelation of a contract is the converse of a specific performance, still it is generally agreed that to justify the cancelation requires a stronger case than to resist a specific performance" Brainard *v.* Holsaple, 4 Greene (Iowa) 485.

61. Martin *v.* Hill, 41 Minn. 337, 43 N. W. 337.

62. Juniata Bldg. & Loan Assn. *v.* Hetzel, 103 Pa. St. 507; Campbell *v.* Patterson, 95 Pa. St. 447.

63. Dirkson *v.* Knox, 71 Iowa 728, 30 N. W. 49; Waco Tap R. Co. *v.* Shirley, 45 Tex. 355; Parfitt *v.* Kings County G. & I. Co., 12 Misc. 278, 33 N. Y. Supp. 1111, 67 N. Y. St. 814; Coughlin *v.* Richmond, 77 Iowa 188, 41 N. W. 613.

Where a bill was filed by appellants seeking to have annulled and vacated a lease contract, Tyson, J., said: "The question presented by this record for our determination is one of fact. The degree of proof required to rescind or cancel a contract because of fraudulent misrepre-

as in an action for reformation of a writing.[64] The evidence of fraud, to be admissible, must be of matters connected with the contract in question, and not of collateral facts.[65] Where the contract has been executed, equity is reluctant to act, and relief will be granted only in the most extreme cases.[66]

sentation is more than mere probability of the truth of the charge of fraud, or a mere preponderance of the evidence that such charges are true. The representations themselves, and that they were falsely and fraudulently made, must be clearly established. The fraud must be distinctly alleged and clearly proved. In order to support a decree to rescind for fraud, the evidence must amount to more that a probability of the truth of the charge, or mere preponderance of the evidence that such charges are true." Smith *v.* Collins (Ala.), 41 So. 825.

Where the complainants sought to have a contract of trade rescinded on the ground of fraud and false representation, and the evidence was very conflicting, Montgomery, J., said: "Courts cannot make contracts for parties, nor rescind bargains intelligently made, where no fiduciary relation exists, except upon clear and convincing proof of fraud." Breemersch *v.* Linn, 101 Mich. 64, 59 N. W. 406.

Where an action was brought to have a settlement made by an assignee in insolvency set aside upon the ground of false representations, Mr. Justice Strong, referring to the evidence necessary for rescission in equity for misrepresentations or fraud, stated that, "Canceling an executed contract is an exercise of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, never for an alleged fraud, unless the fraud be made clearly to appear, and never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them." Atlantic Delaine Co. *v.* James, 94 U. S. 207.

64. Lavassar *v.* Washburne, 50 Wis. 200, 6 N. W. 516.

65. "In an action to obtain rescission or to recover money paid under a contract for the sale of land alleged to have been procured by false and fraudulent representations, collateral evidence is as a rule inadmissible; hence, evidence of similar representations made to a third party, in a similar but distinct transaction, cannot be admitted. This is a rule of general application in all cases in which fraud is involved, and, while there is authority for the statement that if there appears to be some connection between the fraud alleged and the other transactions, from which can be found a purpose common to all the testimony concerning same, they may become material, yet courts seem to be ever inclined to construe the rule strictly and exclude all evidence not directly involving the question at issue." 2 Warvelle, Vendors, 2nd Ed. Sec. 851.

66. Atlantic Delaine Co. *v.* James, 94 U. S. 207; Masterton *v.* Beers, 1 Sweeny (N. Y.) 406.

Action To Set Aside Contract. Smith, J.: "When, however, a contract has been executed and large amounts of money have been expended therein, and the rights of innocent parties, perchance, are imperiled, the court should and will require a stronger degree of evidence to establish the invalidity of such contracts than would be required if the action were to set aside an executory contract, where no great loss would follow." Parfitt *v.* Kings County G. & I. Co., 12 Misc. 278, 33 N. Y. Supp. 1111, 67 N. Y. St. 814.

Per curiam, "This writ of ejectment must be regarded as the equivalent of a bill in equity to rescind, and is governed by the same principles. The contract has been fully executed, the deed delivered, and the purchase money or consideration paid. In such case, it is

not sufficient to show that there was some evidence of fraud, by means of which the plaintiff was overreached in the transaction, nor is it, perhaps, a question of the weight of evidence. A chancellor will never rescind an executed contract merely because the scales incline slightly in favor of the plaintiff. The preponderance must be so great as to satisfy his conscience that the alleged fraud has been committed. The evidence to set aside a deed must be clear, precise, and indubitable." Kern *v.* Middleton (Pa.), 16 Atl. 640.

RESCUE.

I. RESCUE OF PERSON IN CUSTODY.

1. The Case for the State. — A. Rescue Must Have Been Forcible. — In an indictment charging the crime of rescue, the word "rescue" must appear, or some word equivalent thereto, and such allegation must be proved by showing that the act of rescue was committed in a forcible manner and against the will of the party who had the person rescued in custody.[1]

B. Party Rescued Must Have Been Lawfully Detained. In a prosecution for forcibly rescuing a prisoner from the custody of an officer, it is essential that the government prove that the person alleged to have been rescued was lawfully detained.[2] But

1. Rex *v.* Burridge, 3 P. Wms. (Eng.) 439.

2. State *v.* McLeod, 97 Me. 80, 53 Atl. 878; Starks *v.* State, 38 Tex. Crim. 233, 42 S. W. 397 (*dictum*). See also Tex. Penal Code 1895, §228; State *v.* Dunn, 25 N. J. L. 214 (*dictum*).

In Adams *v.* State, 121 Ga. 163, 48 S. E. 910, the court said: "From the evidence it appeared that a warrant had been issued for the arrest of Shaw, charging him with misdemeanor. The warrant was issued in Elbert county, Georgia, but alleged that the offense had been committed

where a statute makes it a penal offense for one to break into a jail for the purpose of effecting the rescue of a prisoner therein confined, and such statute does not say *legally confined*, it is not incumbent on the state to show that such prisoner was legally confined.[3]

in Hart county, Georgia. It was directed to 'any sheriff or deputy, coroner, constable, or marshal of State. Under this warrant Shaw was arrested in Clarke county and turned over to an Elbert county constable, who brought Shaw and the warrant to Elbert county. The constable carried Shaw before a magistrate in Elbert county, and Shaw gave bond to appear in Hart county to answer the charges set out in the warrant. As arresting officer, the constable approved and accepted the bond and gave Shaw his liberty. Subsequently the constable was informed that the bond was not valid, for the reason that Shaw should, under the Penal Code, §898, have been carried before a magistrate in the county in which the crime was alleged to have been committed and have there given bond. The constable thereupon determined to rearrest Shaw. He found Shaw in the back yard of the home of Adams, in Elbert county. He touched Shaw upon the shoulder and told him to consider himself under arrest, and to come with him. They went together into the front yard and found Adams sitting on the front porch. Shaw, with the constable's consent, went upon the porch and talked with Adams. The latter then asked the constable if he had a warrant for Shaw. The officer replied that he had it at his home, but not with him. In answer to a question by Adams, he stated that it was the same warrant under which Shaw had previously been arrested. Adams then stated that the warrant was 'dead,' and that Shaw could not be arrested without a new warrant. He then pushed Shaw into the house, closed the door, and by threats and offers of violence forced the officer to leave the premises. The officer did not have the warrant with him at the time, but, after consultation with an attorney, he went to his home, got the warrant, and returned with it to the residence of Adams. He showed the warrant to Adams and told him that he would have to take Shaw under it. Adams again insisted that the warrant was 'dead,' and ordered the officer off the premises. It is apparent from the language of the Penal Code §309, that a rescue is not made penal except where the person rescued is in legal custody. If the detention is illegal or unauthorized by law, then the law does not protect it by making it a crime to liberate the person in custody. . . . The offense had not been committed in the presence of the arresting officer. Shaw was not endeavoring to escape, and a warrant had actually been issued for his arrest. Under these circumstances the officer had no authority whatever to arrest Shaw, except under the warrant. Penal Code, §896. The officer was not bound to show his warrant before making the arrest; but unless he or another in the neighborhood, with whom he was acting in concert, had been in possession of the warrant and in a position to show it upon demand, the arrest was not lawful."

In Galliard *v.* Laxton, 2 Best & S. 363, 9 Cox's C. C. 127, it was held that, in a case in which a lawful arrest could not be made except under a warrant, the arresting officers were bound to have the warrant ready to be produced if required; that an arrest in such case, by police officers who did not have the warrant in their possession at the time, was illegal, although the warrant had previously been in the possession of one of them and was at the station-house at the time of the arrest, and although no demand was made upon the officers for the production of the warrant; and that, as the arrest was illegal, persons who took the prisoner from the officers could not properly be convicted of rescue.

3. In Starks *v.* State, 38 Tex. Crim. 233, 42 S. W. 379, the court said: "Appellant excepted to the

C. Escape Must Be Shown. — Where a party is prosecuted for breaking into a jail for the purpose of rescuing a prisoner, it must be shown that the prisoner actually got out of prison.[4]

D. Knowledge of Lawful Custody. — While the custody of a person in the hands of a public officer would imply notice that the prisoner was lawfully held, and the rescue would be at the peril of the party making it, in case the rescue is made from a private person, it must be shown that the defendant knew that the prisoner was in lawful custody.[5]

E. Not Necessary To Show Subsequent Conviction. — In a prosecution for forcibly rescuing a prisoner lawfully detained, it is not incumbent upon the state to prove the subsequent conviction of the rescued prisoner of the offense for which he was under arrest.[6]

court's charge, and also asked a number of special instructions, which the court refused to give, and reserved his bill of exceptions thereto. These bills show that the appellant insisted in the court below that it was incumbent on the state to show that he (appellant) was legally confined in said jail, and that, if it failed in this respect, the prosecution must fail. In other words, he insisted that the onus was on the state to show a legal arrest for some offense charged against city ordinances of McKinney, and a legal detention on account of such offense. We do not understand such to be a proper construction of article 227, Pen. Code 1895, under which this prosecution was instituted. Said article is as follows: 'If any person shall break into any jail for the purpose of effecting the rescue or escape of a prisoner therein confined, or for the purpose of aiding in any escape of any prisoner so confined, he shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than six years.' It will be noticed that nothing is said in this article making it an offense for a person to aid in the escape of a prisoner legally or lawfully confined in jail. . . . It is plain in its terms, and it authorizes a conviction of any person who shall break into jail for the purpose of effecting the rescue or escape of a prisoner therein confined; that is, of any prisoner therein confined, regardless of whether his arrest was legal or illegal. If he is a prisoner, and confined in jail, no person is authorized to break into jail for the purpose of rescuing him. The object of the statute appears to be the protection of the jails of the country against being broken into in order to effect the escape or rescue of the persons therein confined, irrespective of the legality or illegality of their detention. No doubt, the lawmakers, having in mind that the courts were open to those who were unlawfully imprisoned or confined in jail, and desiring to preserve the integrity of our jails for the safekeeping of all prisoners, as well as to enforce respect for law, enacted this statute, making it a penal offense for breaking into any jail to effect the rescue or escape of a prisoner, the gravamen of the offense being the breaking into the jail."

4. Hawk, P. C., bk. 2, c. 18, §12; Hillian *v.* State, 50 Ark. 523, 8 S. W. 834.

5. State *v.* Hilton, 26 Mo. 199.

6. In State *v.* McLeod, 97 Me. 80, 53 Atl. 878, the court said: "The respondent was indicted under R. S., c. 122, §16, for forcibly rescuing a prisoner lawfully detained for a criminal offense. The prisoner, alleged to have been rescued, had been arrested by a deputy sheriff, without a warrant, for the offense of being found intoxicated in a public place. The defendant's counsel, claiming that the government had not shown that the prisoner was lawfully detained for a criminal offense, seasonably requested that the following instruction be given to the jury: 'When an officer arrests a person

In a prosecution for aiding a prisoner to escape, if the record of the conviction of the person aided is set forth, having been produced by the proper officer, no evidence is admissible to contradict that record.[7]

F. Identity of Prisoner. — In a prosecution for jail breaking and rescue, identity of defendant may be shown by circumstantial evidence.[8]

G. Corroborating Evidence When Essential. — Where a party is indicted for the rescue of prisoners lawfully confined in jail, the testimony of an accomplice is in some jurisdictions at least not sufficient to convict such party in the absence of corroborating evidence tending to connect the party referred to with the commission of the offense.[9]

for an alleged offense not amounting to a felony, that is, a misdemeanor, without any warrant, before a person can be convicted of forcibly rescuing the prisoner from said arrest, the government must show that the person thus arrested has been convicted, because if the person thus arrested is afterwards on his trial for said alleged offense acquitted, it would show conclusively that the alleged offense had not been committed.' The respondent's first exception is to the refusal of the presiding justice to give this instruction. The requested instruction was properly refused. . . . If such prisoner was found by the deputy sheriff violating any law of the state, it was his duty to arrest and detain him until a warrant could be obtained. R. S., c. 133, §4; Palmer *v.* Maine Central Railroad Co., 92 Me. 399. Any competent evidence showing that this prisoner had been found by the deputy sheriff who arrested him, violating any law of the state was sufficient, and it was not necessary to show his subsequent conviction of the offense for which he had been arrested."

7. Rex *v.* Shaw, 1 Russ & Ry. (Eng.) 526.

8. In Williams *v.* State, 24 Tex. App. 17, 5 S. W. 655, the prisoner was implicated with others in rescue. He, with his companions, at night, broke into a jail. They were confronted by the jailer. The latter was threatened with fire arms and compelled to open the prison cells. The court said: "After releasing the prisoners, they took them with the jailer out of town to a thicket, and there they got their horses and buggy, and left with Henry Williams, whose rescue they were effecting, and turned the other prisoners and the jailer loose. It was night, and so dark that the jailer could not see the parties, or any of them, so as to identify them; but, before they left, he went up to shake hands with Henry Williams, and found that the prisoner was mounted on a roan horse, and he also saw a white or gray horse in the crowd. That night, or next morning early, the sheriff, with a *posse,* started in pursuit, and, striking a trail, they followed it for many miles, until the fleeing parties separated and took different directions. The *posse* from this point followed one of the trails. They trailed the buggy, and followed it until they came upon John Williams and George Dennis at a deserted ranch, and one of the horses they had with them was a roan horse. They arrested and brought them back to town. As before stated, this evidence was legitimate, as going to prove the identity of the parties who had committed the crime."

9. In Hillian *v.* State, 50 Ark. 523, 8 S. W. 834, appellants had been indicted for the rescue of prisoners confined in jail. They were convicted mainly on the evidence of the witness Stephens, who was a prisoner confined with the aforesaid prisoners at the time of the rescue. Stephens was present at the time of the transaction and aided the rescuers in committing the crime alleged. There was no other direct testimony con-

2. The Defense. — A. Illegality of Mittimus. — Where a defendant is charged with the offense of taking from the custody of an officer a prisoner legally committed to his charge, it will avail the defendant nothing to show that the mittimus was defective which the officer was to deliver to a jailer, together with the prisoner.[10]

B. Informality in Complaint or Sentence. — An informality in a complaint or in a sentence orally pronounced is no defense to one who has forcibly aided a prisoner to escape, such prisoner having been held on a valid warrant.[11]

necting them with the offense. The court said: "On the trial they requested the court to give the following declaration in charge to the jury: 'An accomplice is one who aids, assists or participates in the commission of an unlawful act; and if you find from the testimony that Stephens, the prosecuting witness, took part and aided in the escape of Eli Voncannon and Harvey Hillian on the night of their escape, then he is an accomplice, and before you can convict you must find that the prosecuting witness is corroborated by other testimony as to the connection of the defendant with the offence charged.' The court refused to so charge and gave no instruction on the subject covered by the request. The defendants excepted and asked a new trial upon this among other grounds. Our statute provides that a conviction cannot be had in a prosecution for felony upon the testimony of an accompice unless corroborated by other evidence tending to connect the defendant with the commission of the offence. Mansf. Dig., §2259." *Held,* that it was the duty of the court, to instruct the jury substantially as requested.

10. In State *v.* Armistead, 106 N. C. 639, 10 S. E. 872, which was an action for assaulting an officer and rescuing a prisoner from his custody, an officer conveying a prisoner to jail was set upon by the three defendants, who pulled the prisoner out of the buggy in which the officer was conveying him, cut the rope with which he was tied, and set him at liberty. It was contended that the mittimus which the officer was to deliver to the jailer was defective and that therefore the prisoner was not lawfully in custody. The court said: "Freeman was a duly appointed officer, charged by order of the court with the duty of taking to jail a prisoner legally sentenced thereto. Like any other officer, under such circumstances, if the *mittimus* were defective, he was responsible for the safe-keeping of Allen till relieved by the jailer, or by further order of the court amending the *mittimus,* or otherwise. Had he wilfully or negligently permitted Allen to escape while in his charge he would have been criminally liable. State *v.* Garrell, 82 N. C., 580. And any one forcibly and violently taking him out of the custody of such special officer is liable for an escape. Even were this not so, the defendants are liable, under this indictment, for the assault. They had no right to take the prisoner from Freeman in so violent and forcible a manner."

11. Com. *v.* Morihan, 4 Allen (Mass.) 585. In this action it seemed that a party had been formerly arrested by an officer upon a warrant and brought before a trial justice. He had been tried, found guilty and sentence had been orally pronounced upon him. The defendant in this action had, at the close of such former trial, untied a horse attached to a sleigh and tethered near the magistrate's house at which the trial had been held. Thereupon the prisoner had rushed out of the house, got into the sleigh with the defendant and they drove off together. Defendant, as a defense, contends that the complaint was informal and the sentence void. The court said: "The supposed informality in the complaint, and in the sentence as orally announced, but under which no commitment had taken place, if it exists, furnishes no justifi-

C. Illegality of Arrest. — The illegality of the arrest of the prisoner rescued from a jail cannot be interposed by the party prosecuted for rescue where the statute under which such prosecution was made provides, in substance, that any person who shall break into a jail for the purpose of effecting the rescue of a prisoner therein confined shall be punished, and nothing is said to the necessity of showing the legality of such confinement.[12]

D. Warrant Issued by Single Magistrate. — It is held to be no defense in a prosecution for rescue, that the warrant under which the prisoner rescued was arrested had been granted by a single magistrate and not by the court.[13]

II. GOODS DISTRAINED, OR TAKEN IN EXECUTION.

1. The State's Case. — Where a party is charged with taking from the custody of an officer personal property which such officer has in charge under process of law, it is not necessary to show that such process was rendered under a legal judgment; it is sufficient to prove the validity on its face of the process under which the officer claims to have the property in charge.[14]

In a prosecution for rescuing goods, it is held to be necessary for the government to show that the party from whom the goods are alleged to have been rescued, was actually in possession and that he himself was compelled to give up such possession.[15] Al-

cation to the defendant for aiding and assisting Reagan to escape from the custody of the constable. Objections of that character are to be taken in some other form than by a forcible escape from the custody of the officer. Further, the warrant under which the party was arrested and detained was unexceptionable in its form."

12. In Starks *v.* State, 38 Tex. Crim. 233, 42 S. W. 379, the court after using the language as quoted in note *ante* continued: "We accordingly hold that it was unnecessary on the part of the court to charge as he did with reference to the authority of the city marshal to make the arrest of Tom Finley, and his authority to detain him as a prisoner. If the proof showed that Burks was city marshal of McKinney, and that, as such, he arrested Tom Finley, on account of a real or presumed offense against the city of McKinney, this was all that was necessary; and it is immaterial whether he arrested him with or without a writ, or with or without a complaint having previously been made against him, or if he arrested him for an assumed offense, which occurred in his presence, but failed to take him forthwith before the mayor or recorder, and make complaint against him. For an illegal arrest the marshal might be amenable in a civil or criminal action, but the illegality of the arrest would not justify or authorize any person or number of persons to interfere after the prisoner had been lodged in jail, and rescue such prisoner by an assault upon the jail and breaking into the same."

13. Rex *v.* Stokes, 5 Car. & P. 148, 24 E. C. L. 249.

14. State *v.* Cassidy, 4 S. D. 58, 54 N. W. 928.

15. In State *v.* Barrett, 42 N. H. 466, the court said: "At common law, a rescue is defined as the taking away and setting at liberty against law, a distress, taken for rent, or services, or damages feasant. 1 Russ. on Crimes 410; 2 Ch. Cr. Law; Rex *v.* Bradshaw, 7 Car. & P. 233. To constitute this offense

though it is held not to be necessary on the part of the government to show that the rescuer committed a breach of the peace.[16]

And it is likewise necessary in a prosecution for an attempt to rescue chattels, to show that the officer from whom the rescue was attempted was in possession.[17]

2. The Defense. — Where chattels are illegally levied upon and seized by public officials for taxes or on execution, and are afterwards rescued by the parties from whom they were seized, the fact that such chattels were illegally seized is a good defense in a prosecution for rescue against the parties rescuing the same;[18] but if a rescue under these circumstances is accomplished by a breach of the peace, the parties rescuing are guilty of trespass.[19]

Ignorance of Lawful Custody. — Where chattels are in lawful custody and a defendant is indicted for an attempt to rescue such chattels, ignorance of lawful custody is a good defense on the part

under our statutes, it must appear that the property was wrongfully taken from the party who had at the time the actual legal custody of it."

In Queen *v.* Noonan, 10 Ir. Rep. C. L. 505, a bailiff, under a sheriff's warrant, addressed to him alone, and not to him and his assistants, seized goods in execution, left them in charge of keepers and went away. It was *held*, that the defendant, who was a son of the party from whom the goods were seized, could not be convicted of having by threats and violence compelled the *bailiff* to abandon the seizure, on the ground that the evidence showed the rescue to have been accomplished not against the bailiff, but against his assistants.

16. Rex *v.* Beauchamp, 5 L. J. (O. S.) M. C. 66.

17. United States *v.* Buck, 4 Phila. 161, 24 Fed. Cas. No. 14,680.

18. Queen *v.* Pigott, 1 Ir. C. L. 471.

In Finn *v.* Com., 6 Pa. St. 460, a constable levied upon and seized a horse belonging to the deefendant in this action, which was a prosecution for rescuing said horse from the custody of the constable. The defense set up was that the seizure was illegal. The court said: "In this case, it appears by the indictment itself, that the power of the execution was spent before the day of the levy; and that the writ, though retained by the constable beyond the return-day, had died in his hands. It was as much defunct as it would have been had it been returned, in pursuance of the constable's duty, to the justice from whom it emanated. The levy was made, therefore, without semblance of authority; and the constable was bound to know it, because he was bound to know his duty. It is very possible that mistakes of fact, in seizing the property of a stranger, in place of the property of the debtor, would excuse the sheriff or constable, so far as to protect him from an indictment, and even to make it criminal to resist him; but respectable authority is to be found, by which even that has been denied. But on the principle that *moliter manus imposuit* is a plea to an action for a trespass to the person, and that proof of it is a defence to indictment for a breach of the peace, it certainly would not be criminal to resist him committing a wilful trespass, provided unnecessary force were not applied. In this indictment it appears that the authority for the seizure derived from the exigence of the writ had expired; and that the defendants did no more than temperately exercise the common-law right of recaption."

19. Finn *v.* Com., 6 Pa. St. 460.

of the defendant. But knowledge of lawful custody may be inferred from attending circumstances.[20]

20. In United States *v.* Buck, 4 Phila. 161, 24 Fed. Cas. No. 14,680, Buck was indicted for an attempt to rescue from the custody of a marshal a fugitive slave. The court said: "The defendant is not thus guilty unless he thus acted knowingly and wilfully. He however cannot allege ignorance of law as an excuse. No man can ever allege this excuse. Every person is bound, and is presumed, to know the law. Otherwise the pretense or excuse of ignorance of it would be urged in every case. The only ignorance that can be alleged in excuse is ignorance of the fact which renders an act unlawful. In this case, the only excuse which could be admitted under this head is that of ignorance that the fugitive was in lawful custody. The question of such ignorance in cases under the fugitive slave laws has usually arisen where an alleged fugitive was in the hands of the claimant, or his agent; that is to say, in the hands of private persons not officers of the law. The circuit court of the United States for the Ohio district have decided many such cases, particularly under the act of 1793. In two cases that court used words which I will quote: 'To bring an individual within the statute, he must have knowledge that the colored persons are fugitives from labor, or, he must act under such circumstances as show that he might have had such knowledge by exercising ordinary prudence.' Giltner *v.* Gorham, 4 McLean 402, 10 Fed. Cas. No. 5,453; Weimer *v.* Sloane, 6 McLean 259, 29 Fed. Cas. No. 17,363. Without stating any rule in this precise form of words, I instruct you that if the defendant, from circumstances within his observation or means of immediate inquiry, might readily have known the truth, a belief of his actual knowledge of it may be reasonably deduced. In cases of mere private custody of an alleged fugitive, the application of such a rule, may, according to varying circumstances, be difficult or easy. But there seldom can be difficulty where the custody is that of an official person. The true character of such a custody if not apparent or known, may usually be ascertained without any difficulty by a person desirous of knowing the truth. In this case, the place, the persons and the circumstances, indicated that the custody was both lawful and official."

RESEMBLANCE.—See Bastardy; Rape.

RES GESTAE.

I. SCOPE OF ARTICLE.

This article deals generally with the various uses which have been made of the term *res gestae*, with their limitations and distinctions, and with their application in so far as not discussed in particular articles.[1]

II. HISTORY, DEFINITION, AND USES OF TERM.

1. Generally. — The term *res gestae* has been in common use in the law of evidence for a century past and appears to have been used prior to that. The extended application of the term, however, is a quite modern development of the law of evidence.[2]

2. Definition. — It is impossible to frame a definition of the term *res gestae* which will adequately cover all of the various and different uses to which it is put.[3] General statements as to what it in-

1. See the following articles: "Abortion," Vol. I; "Admissions," Vol. I; "Adverse Possession," Vol. I; "Alienation of Affections," Vol. I; "Arson," Vol. I; "Assault and Battery," Vol. I; "Carriers," Vol. II; "Conspiracy," Vol. III; "Contracts," Vol. III; "Domicil," Vol. IV; "Duress," Vol. IV; "Gifts," Vol. VI; "Guaranty," Vol. VI; "Homicide," Vol. VI; "Incest," Vol. VII; "Injuries to Person," Vol. VII; "Insurance," Vol. VII; "Intent," Vol. VII; "Intoxicating Liquors," Vol. VII; "Landlord and Tenant," Vol. VIII; "Larceny," Vol. VIII; "Mental and Physical States," Vol. VIII; "Mines and Minerals," Vol. VIII; "Negligence," Vol. VIII; "Paupers," Vol. IX; "Payment," Vol. IX; "Perjury," Vol. IX; "Principal and Agent," Vol. X; "Principal and Surety," Vol. X; "Rape," Vol. X; "Receiving Stolen Goods," Vol. X; "Robbery," Vol. XI; "Similar Transactions," Vol. XI; "Title."

2. See Aveson *v.* Kinnaird, 6 East (Eng.) 188.

In the American Law Review, XV, 5. 81, Professor Thayer discusses the origin of the term *res gestae* and the history of its use and development as applied to the law of evidence; after noticing the cases in which it was first used and how it was later taken up by other authorities and text writers, he says: "If it be true, as it seems to be, that the phrase first came into use in evidence near the end of the last century, one would like to know what started the use of it just then. That is a matter for conjecture rather than opinion. It would seem probable that it was called into use mainly on account of its 'convenient obscurity.' . . . The law of hearsay at that time was quite unsettled; lawyers and judges seem to have caught at the term *res gestae* . . which was a foreign term, a little vague in its application, and yet in some applications of it precise; they seem to have caught at this expression as one that gave them relief at a pinch. They could not, in the stress of business, stop to analyze minutely; this valuable phrase did for them what the limbo of theologians did for them, what a 'catch-all' does for a busy housekeeper or an untidy one,—some things belonged there, other things might for purposes of present convenience be put there. We have seen that the singular form of phrase soon began to give place to the plural; this made it considerably more convenient; whatever multiplied its ambiguity, multiplied its capacity; it was a larger 'catch-all.' To be sure, this was a dangerous way of finding relief, and judges, text-writers, and students have found themselves sadly embarrassed by the growing and intolerable vagueness of the expression."

3. Mitchum *v.* State, 11 Ga. 615.

cludes have, however, been made.[4] In some cases a distinction has been drawn between the facts in issue and those which merely accompany and give character to the former.[5] Some courts seem to

See Beaver *v.* Taylor, 1 Wall. (U. S.) 637; Haynes *v.* Rutter, 24 Pick. (Mass.) 242; Williams *v.* Southern Pac. Co., 133 Cal. 550, 65 Pac. 1100; Carter *v.* Buchannon, 3 Ga. 513.

"No inflexible rule has ever been, and probably one never can be adopted as to what is a part of the *res gestae*. It must be determined largely in each case by the peculiar facts and circumstances incident thereto, but it may be stated as a fixed rule that included in the *res gestae* are the facts which so illustrate and characterize the principal facts as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect." Chicago & E. R. Co. *v.* Cummings (Ind. App.), 53 N. E. 1026.

4. See State *v.* Robinson, 52 La. Ann. 541, 27 So. 129; United States *v.* King, 34 Fed. 302; Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26; Carr *v.* State, 43 Ark. 99.

In Chicago & E. R. Co. *v.* Cummings (Ind. App.), 53 N. E. 1026, the court quotes from Wharton: "The *res gestae* may therefore be defined as those circumstances which are the undesigned incidents of a particular litigated act, which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander. They may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense,—that they are a part of the immediate preparations for, or emanations of, such act, and are not traduced by the calculated policy of the actors." This statement is frequently quoted. See Little Rock Traction & Elec. Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

In Mitchum *v.* State, 11 Ga. 615, the court, through Nisbet, J., says: "The idea of the *res gestae* presupposes a main fact. With this preliminary remark, I answer that the *res gestae* mean the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. I do not claim that this definition is perfect, for I know that the *res gestae* are different in different cases. No definition could be found so comprehensive as to embreace all cases; hence it is left to the sound discretion of the courts what they shall admit to the jury along with the main fact, as parts of the *res gestae*. But perhaps this definition embraces as nearly all that is meant in legal parlance by that phrase as any other that can be drawn from the books. One peculiarity of the main fact or transaction ought to be noted, and that is that it is not necessarily limited as to time—it may be a length of time in the action. The time of course depends upon the character of the transaction; it is however, well settled, that the acts of the party, or the facts or circumstances, or declarations which are sought to be admitted in evidence are not admissible, unless they grow out of the principal transaction, illustrate its character and are contemporary with it."

"The facts, circumstances, or declarations which grow out of the principal fact in question, which are contemporaneous with it, and serve to illustrate, qualify, or explain it, constitute the *res gestae*." Gillam *v.* Sigman, 29 Cal. 637.

"The term *res gestae* means things done in and about and as part of the transaction out of which the litigation in hand grew, and on which transaction the litigation in question is based." Collins *v.* State, 46 Neb. 37, 64 N. W. 432.

5. "*Res gestae* are defined generally as the facts surrounding or acompanying a transaction or occurrence which is the subject of legal

consider the difficulty to be one not in definition but of application.[6]

3. Various Different Uses and Applications of Term Res Gestae. This term because of its "convenient indefiniteness" has been applied to numerous distinct kinds of evidence admissible upon wholly different grounds and whose only similarity is that in some way the facts involved constitute part of a transaction in question or are connected with it in some way.[7] Hence the word *res gestae* cannot be said to describe or apply to any particular principle of evidence. The principles underlying the kinds of evidence to which it has been applied were already recognized before the term *res gestae* was applied to them,[8] though the use of this term has sometimes caused new limitations to be placed upon the class of facts which may come within a particular principle.[9]

4. Resulting Conflict and Confusion. — As a result of thus classing several distinct principles under one general and indefinite term there is much conflict and confusion in the cases, both in laying down the rules governing the subject and in applying them to the facts. In passing upon the admissibility of statements which are admissible, if at all, only as spontaneous declarations, courts lay down rules which are applicable to verbal acts,[10] and vice versa,[11]

investigation. They are not themselves the facts which constitute the transaction or occurrence itself, but such as attend and give character to it." Steinhofel *v.* Chicago, M. & St. P. R. Co., 92 Wis. 123, 65 N. W. 852. See also Eagon *v.* Eagon, 60 Kan. 697, 57 Pac. 942; Carter *v.* Buchanon, 3 Ga. 513; State *v.* Anderson, 10 Or. 448.

6. Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26 ("the courts do not differ materially as to what the doctrine of *res gestae* is, but they are hopelessly variant in its application"); Williams *v.* Southern Pac. Co., 133 Cal. 550, 65 Pac. 1100.

7. See *infra*, II, 5.

8. The admissibility of spontaneous exclamations as a real exception to the hearsay rule was recognized in Thompson *v.* Trevanion, Skin. (Eng.) 402, decided in 1693, though the term *res gestae* was not applied to them until long after in Aveson *v.* Kinnaird, 6 East (Eng.) 188, decided in 1805.

9. See *infra*, II, 4.

10. Bumgardner *v.* Southern R. Co., 132 N. C. 438, 43 S. E. 948.

The confusion which exists in the minds of the courts dealing with *res gestae* is exemplified in Waldele *v.* New York Cent. & H. R. R. Co., 95 N. Y. 274, 47 Am. Rep. 41, where Earl, J., in discussing the rules governing *res gestae* quotes from cases, some of which involve merely verbal acts, and others, spontaneous declarations forming an exception to the hearsay rule without recognizing any distinction between them. He also quotes from cases where the only question was whether the declarations of an agent were binding upon his principal.

In Murray *v.* Boston & M. R., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, the court in discussing the "somewhat obscure doctrine of *res gestae*," remarks that it "is often resorted to, apparently more on account of its convenient indefiniteness than for its scientific precision."

11. See Marler *v.* Texas & P. R. Co., 52 La. Ann. 727, 27 So. 176; Mayes *v.* State, 64 Miss. 329, 1 So. 733.

The manner in which verbal acts are confused with spontaneous statements is illustrated in Downer *v.* Strafford, 47 Vt. 579, where the court in passing upon the admissibility of statements as to the cause of an accident in which the declarant had just participated, says: "His statement was a narrative of a past

and in dealing with declarations indicating mental condition and purpose frequently impose limitations which are only applicable to verbal acts or spontaneous statements.[12] And the limitations of the *res gestae* rule are sometimes applied to statements of physical condition and suffering.[13]

5. Particular Applications of Term in General. — The matters to which the term *res gestae* have been applied may be divided generally into, first, facts and circumstances, second, statements or declarations, both forming part of or in some way connected with the transaction in question. In the first case the use of the term is merely another way of saying that the evidence must be relevant and not too remote.[14] The second case covers a wider field and embraces in general two classes of statements or declarations,[15] first,

transaction and not a material part of a present one. Such statements are not admissible because they are made about matters so recent that the witnesses can not have forgotten, nor have had time to concoct the statement, but only because they are material parts of a transaction then going on, or would qualify or modify something then being done." See also State *v.* Carlton, 48 Vt. 636.

Where the question at issue was whether the plaintiff had been bitten by the defendant's dog or was injured in another manner, the statement of the plaintiff made to her mother within five minutes from the time she was injured and as she entered her parent's house crying, that the defendant's dog had bitten her, was held not admissible as part of the *res gestae*. "Proof of the fact that she was crying, or complaining of pain, would have been admissible to show that she was then suffering, but not her statement of the cause of the pain. To render such a declaration admissible as a part of the *res gestae*, it must characterize or explain some material act or occurrence which it accompanies. The *res gestae*, the occurrence, which was material, was the act by which the plaintiff was injured." McCarrick *v.* Kealey, 70 Conn. 642, 40 Atl. 603.

12. Chicago & E. I. R. Co. *v.* Chancellor, 165 Ill. 438, 46 N. E. 269. See Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348, and articles "Homicide," Vol. VI, p. 663, "Intent," Vol. VII.

13. See article "Mental and Physical State," Vol. VIII.

In an action by the wife of a deceased police officer to secure a pension, where it is claimed that the deceased was killed in the performance of his duties, the statement of the deceased as to the nature of his injuries made some minutes after the time he was alleged to have received them was held no part of the *res gestae* and properly excluded. Murphy *v.* Board of Police Pension Fund Comrs., 2 Cal. App. 468, 83 Pac. 577.

14. See *infra*, "Relevant Facts and Circumstances."

15. Declarations are not competent as part of the *res gestae* unless there is a principal fact established by other evidence. "Declarations admitted as part of the *res gestae* may be divided into three classes. The first is where they constitute a part of the transaction itself which is sought to be proved. The second is where they tend to qualify, explain or characterize the acts which they accompany. The third is where the declarations are made at the time of the transaction but relate solely to the acts and conduct of others. The text books and decided cases justify the admission of all these declarations on the same ground as being part of the *res gestae*. But it is apparent that logically and on principle, the admission of declarations of the third class must stand on a different ground from that which supports the admission of the other two classes"

those which are admissible merely as relevant facts or circumstances without regard to their truth or falsity, second, those which involve the hearsay rule because they are used testimonially to prove the facts stated in them. The latter form well recognized exceptions to the hearsay rule and embrace what may be called spontaneous exclamations[16] and statements of mental or physical condition.[17] In the former are included, first, statements which are directly in issue because they constitute the transaction in question;[18] second, statements which accompany and characterize some relevant act by showing the intent or motive of the actor, and which are sometimes called verbal acts;[19] third, statements of an agent or servant as evidence against his principal or master;[20] fourth, statements of one co-conspirator as evidence against another.[21] Besides these there are numerous cases admitting statements as *res gestae*, but which cannot be classified because they involve no general principle.

III. SPONTANEOUS STATEMENTS.

1. Generally. — One of the most legitimate applications of the term *res gestae* is that class of evidence which may be designated as spontaneous statements. The principle involved in the admission of this class of evidence was recognized in an early case,[22] but the term *res gestae* was not applied to it till much later;[23] since then there has been an extended application of it.

2. Verbal Acts Distinguished From Spontaneous Statements. Statements which are competent merely because they accompany and form part of a relevant act which they characterize are not used testimonially and hence do not violate the hearsay rule, nor form a real exception thereto; they are admissible as facts in themselves.[24] Those statements, however, which are the immediate spontaneous result of the main transaction in issue and are admitted because their spontaneity is deemed a sufficient guarantee of their trust-

since they are pure hearsay and are admissible only "upon the great improbability that the spontaneous utterance of the instant should be false. However, such declarations being received in evidence as part of the *res gestae* they must be subject to the same rules as apply to other declarations forming part of the *res gestae*." Patterson *v.* Hochster, 38 App. Div. 398, 56 N. Y. Supp. 467.

16. See *infra*, III.
17. See *infra*, VI, VII.
18. See *infra*, IV, 3.
19. See *infra*, IV, 6.
20. See *infra*, VIII.
21. See article "CONSPIRACY," Vol. III, and State *v.* McCahill, 72 Iowa 111, 33 N. W. 599.
22. Thompson *v.* Trevanion, Skin. (Eng.) 402.
23. Aveson *v.* Kinnaird, 6 East (Eng.) 188.
24. Where the plaintiff claimed as elements of damage from an alleged nuisance that two of her boarders left her, conversations between them and the plaintiff at the time they left showing the reason for their action were held admissible as part of the *res gestae* of their act because calculated to explain the nature thereof, but not as proof of the facts stated. Hoffman *v.* Edison Elec. Illum. Co., 87 App. Div. 371, 84 N. Y. Supp. 437.

worthiness are used as testimonial statements and form a real exception to the hearsay rule for that reason.[25]

This distinction, however, is frequently lost sight of by the courts, and the limitations which govern in the one case are improperly applied to the other.[26]

3. Nature and Limitations of Doctrine. — A. GENERALLY. Those unsworn and otherwise hearsay statements which are the spontaneous result and accompaniment of a particular transaction in question are said to be part of the *res gestae*, and competent evidence of the facts stated or inferentially contained in them.[27] The statements included within this rule range from those which are purely declaratory to those which are not statements of fact at all but merely exclamations or commands,[28] and from those which are precisely coincident with the main event to those which are separated from it by a considerable interval of time.[29]

25. Patterson *v.* Hochster, 38 App. Div. 398, 56 N. Y. Supp. 467; Marler *v.* Texas & P. R. Co., 52 La. Ann. 727, 27 So. 176.

26. See *supra*, II, 4.

The court in Marler *v.* Texas & P. R. Co., 52 La. Ann. 727, 27 So. 176, *quoting* from Mayes *v.* State, 64 Miss. 329, 1 So. 733, says: "In many cases what were manifestly completed and finished acts have been by a sort of construction treated as incomplete and unfinished, and the statement thus held to be a verbal act incorporated with and a part of the thing done. . . . It is not enough that the statement will throw light upon the transaction under investigation, nor that it was made so soon after the occurrence as to exclude the presumption that it has been fabricated, nor that it was made under such circumstances as to compel the conviction of its truth. The true inquiry, according to all the writers, is whether the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part or is merely a history, or part of a history, of a completed past affair. In the one case, it is competent; in the other, it is not. We are not to be understood as attempting to lay down any rule for what, under all circumstances, is the limit of the existence of the principal fact which may be explained by contemporaneous declarations. In some cases, the *res gestae* may extend over weeks or months; in others, they are limited to hours or to minutes or to seconds."

27. In United States *v.* King, 34 Fed. 302, Lacombe, J., in charging the jury, says: "There is a principle in the law of evidence which is known as '*res gestae*;' that is, the declarations of an individual made at the moment of a particular occurrence, when the circumstances are such that we may assume that his mind is controlled by the event, may be received in evidence, because they are supposed to be expressions involuntarily forced out of him by the particular event, and thus have an element of truthfulness they might otherwise not have."

"The declarations of the individual made at the moment of a particular occurrence where the circumstances are such that we may assume that his mind is controlled by the event are received in evidence as part of the *res gestae* because they are supposed to be involuntarily forced out of him by the particular event and thus have an element of truthfulness which they might not otherwise have. They must be undesigned declarations incident to a particular litigated act, and illustrative of such act." Jack *v.* Mutual Reserve Fund L. Assn., 113 Fed. 49, 51 C. C. A. 36.

28. See *infra*, III, 3, C, o.

29. See *infra*, III, 4, C, b, and III, 4, D, c.

B. Basis of Rule. — a. *Generally.* — The real basis of the rule is the trustworthiness of the statement[30] and the necessity of resorting to it to get a complete and accurate view of the event as it actually occurred, though the latter feature is not often adverted to or considered.[31] This evidence is of a hearsay character and would be incompetent for that reason unless there exists some acceptable substitute for the usual tests of an oath and cross-examination. The courts find this substitute in the circumstances under which the statements are made; they are admissible because they are spontaneous undesigned incidents of a transaction which would not be complete or perfectly understood without them.[32] Their admissi-

30. State *v.* Wagner, 61 Me. 195. In Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18, Bleckley, C. J., says: "There must be no fair opportunity for the will of the speaker to mould or modify them. His will must have become and remain dormant, so far as any deliberation in concocting matter for speech or selecting words is concerned. Moreover, his speech, besides being in the present time of the transaction, must be in the presence of it in respect to space. He must be on or near the scene of action or of some material part of the action. His declaration must be the utterance of human nature, of the *genus homo,* rather than of the individual. Only an oath can guarantee individual veracity. But spontaneous impulse may be sufficient sanction for the speech of man as such,—man, distinguished from this or that particular man. True, the verbal deliverance in each instance is that of an individual person. But if the state of his mind be such that his individuality is for the time being suppressed and silenced so that he utters the voice of humanity rather than of himself, what he says is regarded by the law as in some degree trustworthy."

31. See Hupfer *v.* National Dist. Co., 119 Wis. 417, 96 N. W. 809, and *infra,* III, 3, B, b.

32. Hupfer *v.* National Dist. Co., 119 Wis. 417, 96 N. W. 809; Kenney *v.* State (Tex. Crim.), 79 S. W. 817, 65 L. R. A. 316.

Declarations to be admissible as *res gestae* "must grow out of the main fact—they must serve to illustrate it and they must be made contemporaneously with it. When these things are true of declarations, they are provable, not as the testimony of the declarant, but as partaking of the nature of facts. They derive their credibility not from his veracity, but from their relation to the transaction out of which they spring. Made at the same time with the main fact—evoked by it without premeditation, and for that reason explanatory of the mind and purpose of the actor as it is involved in that fact, they are presumed to be as veritable—as reliable as the fact itself, and would derive no enhancement of their credibility from the oath of the declarant. Such I take to be the philosophy of the *res gestae,* so far as constituted of declarations. The weight which they are to receive at the hands of the jury, will depend upon the closeness and fullness of their relation to the transaction out of which they spring; their proximity in point of time to it, and the strength of the light which they shed upon it." Mitchum *v.* State, 11 Ga. 615.

Murray *v.* Boston & M. R., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, in which Walker, J., says: "If the declaration was merely a narrative of a past event, the evidence of it would be inadmissible, upon the ground that ordinarily hearsay evidence is not received in proof of the truth of an assertion. . . . But when the declaration of one not a sworn witness upon the trial is something more than mere narrative—when its probative force is derived in part, at least, from sources other than the credibility of the declarant—an opportunity is afforded for the

bility is not dependent at all upon the veracity of the declarant because he is not regarded as a witness but as merely the passive instrument through which the event itself speaks.[33]

b. *Necessity.* — (1.) Generally. — The necessity of resorting to this kind of evidence is one of the reasons for making it an exception to the hearsay rule. This necessity, however, is one which inheres in the nature of the evidence itself and is not dependent upon the existence or non-existence of other evidence to the same effect in a particular case. The *res gestae* declaration constitutes one of

argument that it does not fall within the strict rule against hearsay evidence, or that it constitutes an exception to the rule. It is then possible to say that the declaration, while verbally a mere narrative, is something more, and may be, for that reason, of such probative force as to be admissible as evidence upon a material issue. It may be so connected with other controverted facts as to be itself a fact or circumstance naturally growing out of, and in some sense attested by, them. The verbal statement of a person made under some circumstances may be a part of the actual occurrence, and be entitled to as much weight as evidence as any other part of the transaction. . . . In cases of this character it is important to ascertain what, if any, relevancy the declaration has—in other words, what it tends to prove; for unless its natural effect is to prove or explain a point in issue or a controverted fact, it is not admissible." And further along in the opinion the court says: "When instead of attendant physical facts and circumstances, the evidence consists of a declaration, made by a person at the time of the event or transaction which is under investigation, its admission depends upon a similar principle. If its materiality or relevancy is conceded, the question whether it is a part of the *res gestae* arises; that is, whether it occurred in such intimate connection with the event in issue as to constitute it in a reasonable and proper sense a part therof. If it does, it is, in its probative bearing, superior to mere hearsay remarks and may, for that reason, be admissible. 'Its connection with the act gives the declaration greater importance than what is due to the mere assertion of a fact by a stranger, or a declaration by the party himself at another time. It is a part of the transaction, and may be given in evidence in the same manner as any other fact.' Hadley *v.* Carter, 8 N. H. 40, 43." And again: "The seriousness of the injury, the character of the accident, and the surrounding physical circumstances and results of the occurrence, attending the declaration as well as the principal fact, are necessary matters for consideration in the determination of the question of the admissibility of the declaration. When a person receives a sudden injury, it is natural for him, if in the possession of his faculties, to state at once how it happened. Metaphorically, it may be said, the act speaks through him and discloses its character. It is as if it were a part of the act itself. This view of the common experience of mankind shows that, if the declaration has that character, it possesses an important element of reliability and significance which is foreign to narrative remarks made so long after the event as to derive directly no probative force from it, and that it should be admitted like any other material fact or evidentiary detail. If this principle of evidence may be difficult of application in practice, its soundness is not thereby weakened. A discriminating observance of it will promote the successful discovery of truth, which, without its aid, is often involved in great obscurity."

33. Mitchum *v.* State, 11 Ga. 615; Murray *v.* Boston & M. R., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495.

"Declarations should derive credit, not from the declarant, but from

the incidents of the transaction which it accompanies and is therefore essential to a perfect understanding of the principal occurrence;[34] no other evidence is a complete substitute for it, not even the testimony of the declarant himself.[35]

(2.) Absence of Other Evidence. — The mere absence of other evidence to prove the fact shown by the declaration does not alone render it admissible as part of the *res gestae*.[36] But the inability of the declarant to testify because dead has been held a circumstance proper to be considered in a close case.[37]

c. *Probability of Truth of Declaration.* — The mere fact that there is a very strong probability that declarations are true does not make them admissible as part of the *res gestae*,[38] and this is true even of dying declarations in civil cases.[39]

d. *Principles Involved in Dying Declarations and Res Gestae Distinguished.* — In some cases the *res gestae* principle is distinguished from the principle involved in the admission of dying declarations. In the latter the apprehension of immediate death takes the place of the oath, while in the former it is the spontaneity of the statement and the fact that it is the transaction itself speaking which renders the declaration admissible. In one the declarant is regarded as a witness and his declarations testimony whose truth is guaranteed by the effect on the mind of the declarant of the realization of approaching death; in the other the declarant is not looked upon as a witness but as merely the instrument through which the transaction voices itself.[40]

Hence, the predicate necessary to the introduction of dying declarations is not required in the case of *res gestae* statements.[41]

their connection with the principal fact of which complaint is made." Alsever *v.* Minneapolis & St. L. R. Co., 115 Iowa 338, 88 N. W. 841.

34. Hupfer *v.* National Dist. Co., 119 Wis. 417, 96 N. W. 809.

35. Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 15; Galena & C. U. R. Co. *v.* Fay, 16 Ill. 558. See *infra*, III. 3, H.

36. Spatz *v.* Lyons, 55 Barb. (N. Y.) 476. But see Goodwin *v.* Harrison, 1 Root (Conn.) 80.

37. "That fact, in itself, would not render evidence of such declarations admissible; but it is undoubtedly proper to be taken into account by the trial court in the exercise of its discretion as to the admission of such evidence." Pledger *v.* Chicago, B. & Q. R. Co., 69 Neb. 456, 95 N. W. 1057.

38. Waldele *v.* New York Cent. & H. R. R. Co., 95 N. Y. 274, 47 Am. Rep. 41.

"The admissibility of unsworn declarations in evidence, as part of the *res gestae*, does not rest upon the theory that there is a great probability that they may be true; for, though these declarations are frequently made under such circumstances as to entitle them to implicit confidence, yet they do not answer the requirements of the law, that testimony against a party shall be given under the test and sanction of a solemn oath, and that he should have had an opportunity of cross-examination." Marler *v.* Texas & P. R. Co., 52 La. Ann. 727, 27 So. 176.

39. Kenney *v.* State (Tex. Crim.), 79 S. W. 817, 65 L. R. A. 316, and see *infra*, III. 3, D, b, (8).

40. Kenney *v.* State (Tex. Crim.), 79 S. W. 817, 65 L. R. A. 316.

41. Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745 (statement of deceased in a homicide trial).

C. Particular Limitations and Matters Affecting Application of Rule. — a. *Generally.* — Owing to the dissimilar character of the various sorts of evidence to which the term *res gestae* has been applied a great deal of confusion has resulted in the statement of the limitations which govern the admission of what have been termed spontaneous exclamations. The rules relating to verbal acts, declarations of mental and physical condition and other kinds of so called *res gestae* have been applied to this evidence which is admissible for wholly different reasons.[42] Furthermore, the desire of courts to extend the rule in particular cases or to obviate the rigor of the hearsay rule has also led to considerable conflict and confusion.[43]

b. *Modern Tendency.* — The modern tendency with respect to what may be admissible as *res gestae* is inclined to be more liberal[44]

42. See *supra,* II, 4.

43. See Sullivan *v.* Oregon R. & Nav. Co., 12 Or. 392, 7 Pac. 508; Marler *v.* Texas & P. R. Co., 52 La. Ann. 727, 27 So. 176.

44. "The tendency of recent adjudications is to extend rather than to narrow the doctrine" of *res gestae.* Jack *v.* Mutual Reserve Fund L. Assn., 113 Fed. 49, 51 C. C. A. 36, *quoting* from Insurance Co. *v.* Mosley, 8 Wall. (U. S.) 397. To the same effect State *v.* Harris, 45 La. Ann. 842, 13 So. 199, 40 Am. St. Rep. 259.

"It is not always easy to determine when declarations having relation to an act done, and professing to explain or acount for such act, are admissible as part of the *res gestae.* There is great contrariety in the decisions upon the subject; but the tendency of recent decisions is to extend and liberalize the principle of admission, and declarations and statements are now by many recent decisions of high authority, admissible that would formerly have been excluded." Washington & G. R. Co. *v.* McLane, 11 App. D. C. 220.

In an action on an insurance policy where plaintiff claimed that the insured died from injuries received in a fall down stairs, the wife and son of the insured testified that during the night the insured went down stairs; that on his return he showed symptoms of being seriously injured and said that he had fallen down the back stairs, had hit the back part of his head and almost killed himself. This declaration was held admissible as part of the *res gestae.* The court after stating that the general rule that the declarations must be contemporaneous with the main fact is "by no means of universal application," says: "Here the principal fact is the bodily injury. The *res gestae* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The *res gestae* are the declarations tending to show the reality of its existence, and its extent and character. The tendency of recent adjudications is to extend rather than to narrow, the scope of the doctrine. Rightly guarded in its practical application, th re is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority. We think it was properly applied in the court below. In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned. Unlike much other evidence, equally cogent for all the purposes of moral conviction, they have the sanction of the law as well as of reason. The want of this concurrence in the law is often deeply to be regretted. The weight

than the early rule which was quite closely confined to those declarations occurring during the actual continuance of the main event.[45] However, even in those jurisdictions where the courts have been most liberal there have been expressions indicating that if the question were a new one a stricter rule would be laid down.[46] And other courts have said that the evidence is liable to abuse and the rule should not be extended.[47]

c. *Existence of Principal Fact or Transaction.* — **(1.) Generally.** The term *res gestae* itself presupposes the existence of a main or principal fact or transaction of which the declaration is a part, or an incident; and the basis of the doctrine is that the declaration is

of this reflection, in reference to the case under consideration, is increased by the fact, that what was said could not be received as 'dying declarations,' although the person who made them was dead, and hence, could not be called as a witness." Insurance Co. *v.* Mosley, 8 Wall. (U. S.) 397. But see dissenting opinion.

In an action by a passenger on a railway for injuries received in an accident, the declaration of the engineer as to the speed at which the train was going at the time of the accident, made between ten minutes and half an hour after it occurred, was held improperly admitted as part of the *res gestae* since it was a mere narration of a past occurrence. Vicksburg & M. R. *v.* O'Brien, 119 U. S. 99. But see the dissenting opinion of four judges holding that this declaration was a part of the *res gestae*, having been made in sight of the wrecked train in the presence of the injured parties and while the engineer was surrounded by excited passengers. Field, J., says: "The modern doctrine has relaxed the ancient rule that declarations to be admissible as part of the *res gestae* must be strictly contemporaneous with the main transaction. It now allows evidence of them when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it. . . . What time may elapse between the happening of the event in respect to which the declaration is made and the time of the declaration and yet the declaration be admissible must depend upon the character of the transaction itself. An accident happening to a railway train by which a car was wrecked would naturally lead to a great deal of excitement among the passengers on the train, and the character and cause of the accident would be the subject of explanation for a considerable time afterwards to persons connected with the train. The admissibility of a declaration in connection with evidence of the principal fact, as said by Greenleaf, must be determined by the judge according to the degree of its relation to that fact and in the exercise of a sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description."

45. See Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761; Rex. *v.* Bedingfield, 14 Cox C. C. 341.

46. The Texas courts, in civil cases at least, have intimated that the liberal rule followed there is hard to reconcile with the principles of evidence, and were the question an open one they might be inclined to adopt the narrow rule. Texas & P. R. Co. *v.* Robertson, 82 Tex. 657, 17 S. W. 1041, 27 Am. St. Rep. 929; International & G. N. R. Co. *v.* Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902.

47. "Sound public policy requires that the established rule as to this class of evidence should be strictly adhered to and not extended. It is a species of evidence liable to abuse." State *v.* Maddox, 92 Me. 348, 42 Atl. 788.

trustworthy and admissible because it forms an undesigned or spontaneous part of the transaction in question.[48]

(2.) Statement Accompanying Fact Not in Issue. — The *res gestae* rule, in so far as it is concerned with spontaneous statements testimonially used,[49] seems to countenance the admission of only those statements which spring out of and accompany the principal fact or transaction in issue.[50] In one case at least, however, the rule has been extended to spontaneous statements accompanying an act which was only collaterally involved and not in issue.[51]

(3.) Connection With Main Transaction. — The declaration or statement must be connected with the main transaction in issue in such a way as to be a part of it or grow immediately out of it.[52]

48. Patterson *v.* Hochster, 38 App. Div. 398, 56 N. Y. Supp. 467; Alsever *v.* Minneapolis & St. L. R. Co., 115 Iowa 338, 88 N. W. 841; Carter *v.* Buchanon, 3 Ga. 513; Mitchum *v.* State, 11 Ga. 615; Lauder *v.* People, 104 Ill. 248.

Where the fact in issue is the residence of a pauper, his declaration as to his then place of residence is not admissible as *res gestae*. The only fact which the declaration could characterize was the fact of residence, and this being the only fact in issue would have to be assumed. Derby *v.* Salem, 30 Vt. 722.

49. This class of statements should be distinguished from those which accompany and characterize some relevant act or fact but are not used testimonially and consequently do not involve an application of, or exception to, the hearsay rule. See *supra*, II, 3; III, 2.

50. See *supra*, III, 3, C, c, (1).

51. On a prosecution for rape, two witnesses who were near by and witnessed the perpetration of the offense, testified that they saw and readily recognized the accused near the scene of the assault on the next day thereafter, and that one called the attention of the other to the accused, exclaiming, "There goes the man!" and that the other replied, "Yes, there he goes." The defendant objected to the witnesses repeating their exclamations at the time, but the same was held admissible as part of the *res gestae* of the fact of recognition. "The true test of the admissibility of such testimony is, that the act, declaration or exclamation must be so intimately interwoven with the principal fact or event which it characterizes as to be regarded a part of the transaction itself, and also to clearly negative any premeditation or purpose to manufacture testimony." Lander *v.* People, 104 Ill. 248. See also State *v.* Robinson, 12 Wash. 491, 41 Pac. 884.

52. *Alabama.* — Fonville *v.* State, 91 Ala. 39, 8 So. 688.

Colorado. — Union Casualty Co. *v.* Mondy, 18 Colo. App. 395, 71 Pac. 677.

Georgia. — Carter *v.* Buchanon, 3 Ga. 513.

Maine. — State *v.* Maddox, 92 Me. 348, 42 Atl. 788.

Massachusetts. — Com. *v.* Hackett, 2 Allen 136.

Maryland. — Wright *v.* State, 88 Md. 705, 41 Atl. 1060.

Missouri. — Leahey *v.* Cass Ave. R. Co., 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300; Larker *v.* St. Louis, I. M. & S. R. Co., 126 Mo. 143, 28 S. W. 866, 47 Am. St. Rep. 646, 26 L. R. A. 843.

Nebraska. — Horst *v.* Lewis, 71 Neb. 365, 103 N. W. 460.

New York. — Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636.

Oklahoma. — Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

Oregon. — State *v.* Smith, 43 Or. 109, 71 Pac. 973.

Rhode Island. — State *v.* Epstein, 25 R. I. 131, 55 Atl. 204.

Texas. — Dennison & P. S. R. Co. *v.* Foster, 28 Tex. Civ. App. 578, 68 S. W. 299.

Utah. — Leach *v.* Oregon Short Line R. Co., 29 Utah 285, 81 Pac. 90.

Wisconsin. — Tiborsky *v.* Chicago,

(4.) Must Explain or Characterize Principal Transaction. — The declaration must explain or characterize in some way the main transaction of which it is a part.[53]

M. & St. P. R. Co., 124 Wis. 243, 102 N. W. 549.

The declarations must not only be contemporaneous with the main fact, but "must be so clearly allied to it as in contemplation of law to be a part of the act itself." State *v.* Hendricks, 172 Mo. 654, 73 S. W. 194.

Declarations should derive credit, not from the declarant, but from their connection with the principal fact of which the complaint is made. There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it. The grounds upon which such statements have been received are generally concurred in. The difficulty has been in drawing a line with respect to lapse of time after, and the necessary connection with, the main act. The true rule is that all declarations or exclamations uttered by the parties to a transaction which are contemporaneous with and accompany it, or which are made under such circumstances as will raise a reasonable presumption that they are the spontaneous utteranes of thoughts created by or springing out of the transaction itself, or so soon thereafter as to exclude the presumption that they are the result of premeditation or design and which are calculated to throw light on the motives and intention of the parties are admissible in evidence as part of the *res gestae*. Alsever *v.* Minneapolis & St. L. R. Co., 115 Iowa 338, 88 N. W. 841, *quoting* from Wilson *v.* Southern Pac. Co., 13 Utah 352, 44 Pac. 1040, 57 Am. St. Rep. 766.

53. *Alabama.* — Domingus *v.* State, 94 Ala. 9, 11 So. 190.

Arkansas. — Little Rock Tract. Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

California. — People *v.* Wyman, 15 Cal. 70.

Georgia. — Goodman *v.* State, 122 Ga. 111, 49 S. E. 922.

Indiana. — Chicago & E. R. Co. *v.* Cummings (Ind. App.), 53 N. E. 1026.

Maine. — Barnes *v.* Rumford, 96 Me. 315, 52 Atl. 844.

Minnesota. — Reem *v.* St. Paul City R. Co., 77 Minn. 503, 80 N. W. 638, 778.

Mississippi. — Scaggs *v.* State, 8 Smed. & M. 722.

Montana. — Poindexter & Orr Live Stock Co. *v.* Oregon Short Line R. Co., 33 Mont. 338, 83 Pac. 886.

Nebraska. — Horst *v.* Lewis, 71 Neb. 365, 103 N. W. 460.

New York. — Waldele *v.* New York Cent. & H. R. R. Co., 95 N. Y. 274, 47 Am. Rep. 41.

North Carolina. — Bumgardner *v.* Southern R. Co., 132 N. C. 438, 43 S. E. 948.

Oklahoma. — Regnier *v.* Territory, 15 Okla. 652, 82 Pac. 509.

Oregon. — State *v.* Garrand, 5 Or. 217.

Tennessee. — Nelson *v.* State, 2 Swan 237.

Texas. — Gulf, C. & S. F. R. Co. *v.* York, 74 Tex. 364, 12 S. W. 68.

Utah. — Leach *v.* Oregon Short Line R. Co., 29 Utah 285, 81 Pac. 90.

Vermont. — State *v.* Davidson, 30 Vt. 377; Downer *v.* Strafford, 47 Vt. 579.

Wyoming. — Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761.

To render declarations made by a party after the commission of an act which is the subject of inquiry admissible in evidence as part of the *res gestae*, they must have grown out of and been so intimately connected and contemporaneous with such act as to illustrate its character, affording a mirror which involuntarily reflects the cause, motive, or effect of the particular action. State *v.* Smith, 43 Or. 109, 71 Pac. 973.

In an action against a street-car company for injuries caused by being pushed off from a crowded car, the statement of the conductor to a passenger who called out to him to stop, "Never mind, lady; never mind. Just give me your fare" was held improperly admitted because not

d. *Must Be Spontaneous.* — One essential limitation on this class of evidence, universally acquiesced in, is that it must be spontaneous and unpremeditated.[54]

e. *Length of Elapsed Time.* — **(1.) Generally.** — As to what length of time, if any, may elapse between the happening of the main transaction and the declaration without depriving the latter of its character of *res gestae*, the cases are in irreconcilable conflict. They may be divided, however, in a general way into three classes,[55] first, those following the strict rule requiring the declaration and

part of the *res gestae*. "Although the statement may have been contemporaneous in point of time it did not illustrate, explain or characterize the transaction in any degree, the only issues being, did defendant permit the car to be overcrowded, and was the plaintiff's injury the result of the overcrowding?" Reem *v.* St. Paul City R. Co., 77 Minn. 503, 80 N. W. 638, 778.

54. *Alabama.* — Burton *v.* State, 118 Ala. 109, 23 So. 729.

California. — Heckel *v.* Southern Pac. Co., 123 Cal. 441, 56 Pac. 56.

Colorado. — Union Casuality Co. *v.* Mondy, 18 Colo. App. 395, 71 Pac. 677.

Delaware. — Di Prisco *v.* Wilmington City R. Co., 4 Pen. 527, 57 Atl. 906.

Georgia. — Goodman *v.* State, 122 Ga. 111, 49 S. E. 922; Augusta & S. R. Co. *v.* Randall, 79 Ga. 304, 4 S. E. 674; Taylor *v.* State, 120 Ga. 857, 48 S. E. 361.

Iowa. — State *v.* Jones, 64 Iowa 349, 17 N. W. 911.

Louisiana. — State *v.* Blanchard, 108 La. 110, 32 So. 397; Marler *v.* Texas & P. R. Co., 52 La. Ann. 727, 27 So. 176; State *v.* Foley, 113 La. 52, 36 So. 885.

Maryland. — Wright *v.* State, 88 Md. 705, 41 Atl. 1060.

Mississippi. — Scaggs *v.* State, 8 Smed & M. 722.

Montana. — Poindexter & Orr Live Stock Co. *v.* Oregon Short Line R. Co., 33 Mont. 338, 83 Pac. 886.

Nebraska. — Sullivan *v.* State, 58 Neb. 796, 79 N. W. 721; City of Friend *v.* Burleigh, 53 Neb. 674, 74 N. W. 50.

New Jersey. — Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118.

New York. — Scheir *v.* Quirin, 77 App. Div. 624, 78 N. Y. Supp. 956.

Oregon. — State *v.* Garrand, 5 Or. 217.

South Carolina. — State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384; Williams *v.* Southern R., 68 S. C. 369, 47 S. E. 706.

Texas. — Jackson *v.* State (Tex. Crim.), 24 S. W. 896; De Walt *v.* Houston E. & W. T. R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534; Reddick *v.* State (Tex. Crim.), 47 S. W. 993.

Utah. — People *v.* Kessler, 13 Utah 69, 44 Pac. 97; Leach *v.* Oregon Short Line R. Co., 29 Utah 285, 81 Pac. 90.

To except a statement from the rule which excludes hearsay, it must not be merely contemporaneous with the act, but also free from all suspicion of device or afterthought. Futch *v.* State, 90 Ga. 472, 16 S. E. 102.

55. In Murray *v.* Boston & M. R., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, the court distinguishes between the strict rule enforced in some jurisdictions requiring the statement to be contemporaneous with the principal fact and the very liberal rule in other jurisdictions and the intermediate rule which "seems to be the more rational view" that statements are admissible where it appears that they were uttered after so brief an interval and in such connection with the principal transaction as to form a legitimate part of it, and to receive credit and support as one of the *circumstances* which accompany and *illustrate the main fact. Following* Com. *v.* Hackett, 2 Allen (Mass.) 136.

principal fact to be actually coincident;[56] second, those which permit a brief interval of time to intervene;[57] third, those which follow a very liberal rule admitting declarations as *res gestae* although a considerable time has elapsed and the declarant may have left the scene of the principal transaction.[58]

(2.) Must Be Contemporaneous. — (A.) GENERALLY. — It is frequently said that declarations to be admissible as part of the *res gestae* must be contemporaneous with the main event or transaction.[59] This

56. Mayes *v.* State, 64 Miss. 329, 1 So. 733, 60 Am. Rep. 681. See Parker *v.* State, 136 Ind. 284, 35 N. E. 1105.

In Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118, a prosecution for homicide, the declarations of the deceased as to who assaulted him, made soon after the assault, were held no part of the *res gestae*. "The *res gestae* were finished, and the wounded man merely described the past transaction. If he could make such description ten minutes after the occurrence, he could do so ten hours afterwards. Nor does it seem that immediate declarations would be more reliable than those that should be made at a later period; for while the latter, in some cases, might afford time and opportunity for fabrication, it is certain the former might be adulterated by reason of the vindictive passion unavoidably awakened by the strife or accident, and which would have had no chance of becoming appeased. All such statements, whether proximate or remote, are untrustworthy in the extreme."

57. Murray *v.* Boston & M. R., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495.

58. Kenney *v.* State (Tex. Crim.), 79 S. W. 817, 65 L. R. A. 316; Lewis *v.* State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720; State *v.* Murphy, 16 R. I. 528, 17 Atl. 998.

Where it appeared that after the infliction of the mortal wound deceased left the place of difficulty to go to his saloon, sixty or seventy yards distant, and after going half way met a party and told him to go for a doctor, at the same time giving him his keys to the saloon, which the witness took and opened the saloon and took deceased in and laid him upon a blanket, when deceased fainted and remained unconscious some minutes, and upon regaining consciousness and after his wounds were dressed, some thirty to sixty minutes after the difficulty, made a statement with regard to the difficulty, narrative in form and in the past tense, which he also prefaced with some remarks about his occupation as saloon keeper, it was held that this statement was admissible as part of the *res gestae*. The rule in Texas is held to be liberal in the admission of testimony as *res gestae*. Freeman *v.* State, 40 Tex. Crim. 545, 46 S. W. 641, 51 S. W. 230.

59. *California.* — Williams *v.* Southern Pac. Co., 133 Cal. 550, 65 Pac. 1100; Heckle *v.* Southern Pac. Co., 123 Cal. 441, 56 Pac. 56; People *v.* Wyman, 15 Cal. 70.

Georgia. — Goodman *v.* State, 122 Ga. 111, 49 S. E. 922; Cherry *v.* McCall, 23 Ga. 193.

Indiana. — See Shoecraft *v.* State, 137 Ind. 433, 36 N. E. 113.

Louisiana. — Marler *v.* Texas & P. R. Co., 52 La. Ann. 727, 27 So. 176.

Massachusetts. — Lane *v.* Bryant, 9 Gray 245, 69 Am. Dec. 282.

Missouri. — State *v.* Ware, 62 Mo. 597.

Montana. — Poindexter & Orr Live Stock Co. *v.* Oregon Short Line R. Co., 33 Mont. 338, 83 Pac. 886.

New York. — Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636.

North Carolina. — Bumgardner *v.* Southern R. Co., 132 N. C. 438, 43 S. E. 948.

Oklahoma. — Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

Oregon. — State *v.* Garrand, 5 Or. 217.

Wisconsin. — Bliss *v.* State, 117 Wis. 596, 94 N. W. 325; Steinhofel

rule seems to be the result of confusing verbal acts with spontaneous statements and applying to the latter rules more applicable to the former. As explained by the courts the word contemporaneous is not taken literally, at least in most jurisdictions.[60]

(B.) DURATION OF PRINCIPAL TRANSACTION. — The duration of the principal transaction depends of course upon its character and what acts or facts are regarded as part of it.[61] In cases of personal in-

v. Chicago, M. & St. P. R. Co., 92 Wis. 123, 65 N. W. 852.

"Acts and declarations to be admissible as *res gestae* must be substantially contemporaneous with the main fact and so closely connected with it as to illustrate its character." State *v.* Stallings, 142 Ala. 112, 38 So. 261; Fonville *v.* State, 91 Ala. 39, 8 So. 688.

60. See the discussion of this matter in subsequent sections of this article.

"The requirement of the rule farther is, that the declarations be *contemporaneous* with the transaction. Now, where the books say — when this court has said — that the declarations must be contemporaneous with the act, or when they or this court say that the declarations must be made *at the time* of the act; it is not to be understood that we or the books assert that declarations are never to be admitted unless their utterance is exactly coincident in point of time with the act. Declarations, in the legal sense of the word, may be *contemporaneous* with the act when they precede or follow the act; and when they are to be admitted and when rejected, if not coincident with the act, is a question for judicial discretion, of embarrassing nicety — one which must depend upon the application of the principle upon which the rule is founded, and which I have endeavored to state, to the circumstances of each case. If the declarations appear to spring out of the transaction — if they elucidate it, if they are involuntary and spontaneous, and if they are made *at a time so near to it*, as reasonably to preclude the idea of deliberate design, then they are to be regarded as contemporaneous." Mitchum *v.* State, 11 Ga. 615; State *v.* Garrand, 5 Or. 217.

"To make the declarations of a party injured part of *res gestae*, they must be contemporaneous with the crime; it is not indispensable that they should be precisely concurrent in point of time; if they spring out of and elucidate the transaction, and are voluntary and spontaneous, and made so near the time as reasonably to preclude the idea of deliberate design, they may be regarded as contemporaneous." State *v.* Ah Loi, 5 Nev. 99.

"Declarations to be admissible as part of the *res gestae* must be contemporaneous with the main fact, though not necessarily precisely concurrent in point of time. If they spring out of the transaction elucidated and are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are then regarded as contemporaneous." State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384, *following* State *v.* Belcher, 13 S. C. 459; Hupfer *v.* National Dist. Co., 119 Wis. 417, 96 N. W. 809.

Although the general rule is that declarations to form part of the *res gestae* must be contemporaneous, or nearly so, with the main event, yet where there are connecting circumstances between such event and the declaration, the latter though made some time afterwards may form part of the *res gestae;* and it is sufficient that there is such connection between them that the subsequent declaration may be regarded not as a historical narrative but as a verbal act forming part of the transaction. Shaefer *v.* Missouri Pac. R. Co., 98 Mo. App. 445, 72 S. W. 154.

61. In an action on a life insurance policy, the declarations of the insured made fifteen minutes or half an hour after the fatal injury while he was walking away from the scene thereof were held no part

jury the main event is sometimes regarded as continuing after the

of the *res gestae* because the principal transaction was at an end. "As was said by our brother Mitchell in Com. *v.* Werntz, 161 Pa. St. 591, 29 Atl. 272, 'No fixed measure of time or distance from the main occurrence can be established as a rule to determine what shall be part of the *res gestae*. Each case must necessarily depend on its own circumstances. . . .' In the present case the main fact inquired about was a fall, which, if it occurred, must have been almost instantaneous. It would be hard to suggest an instance in which the main fact would occur more quickly and the event be sooner ended. . . . If the offer had been to prove an exclamation or a cry uttered during the act of falling, or an explanation made immediately upon rising, and before sufficient time had elapsed to permit the possibility of deliberation or design, then the offer would have been within the rule." Keefer *v.* Pacific Mut. L. Ins. Co., 201 Pa. St. 448, 51 Atl. 366.

In an action for unlawfully evicting plaintiff from a street car for alleged non-payment of fare, where it appeared that the conductor upon being convinced that the fare had been paid permitted the plaintiff to again board the car, it was held that the conversation between the plaintiff and the conductor in respect to paying his fare while riding on the car at the time and immediately after he was ejected and just after he got on the car again was properly admitted on behalf of the plaintiff as part of the *res gestae*. "The *res gestae* commenced when he paid his fare and did not terminate until he returned to the car and was allowed by the conductor to ride peaceably. Within the authorities it included what the conductor said just after the plaintiff stepped back into the car." Robinson *v.* Superior Rapid-Transit R. Co., 94 Wis. 345, 68 N. W. 961, *distinguishing* Grisim *v.* Milwaukee City R. Co., 84 Wis. 10, 54 N. W. 104; Ehrlinger *v.* Douglas, 81 Wis. 59, 50 N. W. 1011.

On a prosecution for conveying instruments into jail for the purpose of aiding prisoners to escape, statements made by one of the prisoners to the sheriff at the time the latter discovered the attempt to escape, that the instruments had been furnished by the defendant, were held not part of the *res gestae* but mere hearsay, since the *res gestae* in this case consisted of the introduction of the instruments into the jail and not their subsequent use. The court states the rule thus: "Declarations or statements made by a party when they form part of the *res gestae* of the transaction involved having a tendency to elucidate it, made without premeditation or artifice, or without regard to consequences, are admissible. . . But such declarations are not admissible if they are merely narrative of past occurrences." Burton *v.* State, 118 Ala. 109, 23 So. 729.

On a prosecution for burglary, the incidents of the pursuit and capture of the defendants after the alleged burglary were held properly admitted as part of the *res gestae*. The evidence included a description of the incidents of the pursuit, the interchange of shots between the parties, the seizure of teams by the defendants to aid them in their flight, the killing of one of the alleged burglars and the final surrender, the whole constituting "one unbroken series of transactions so closely connected and related that they were clearly part of the *res gestae*." State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.

On a trial for procuring an abortion, it appeared that deceased in company with accused left her residence, in his buggy, and was absent several hours; that he brought her back and she came into the house; that prisoner did not come in. In answer to inquiries from her stepmother she stated what had been done to her by the doctor at his office, and how he did it, and exhibited certain medicine which she said the doctor gave her, and stated what he told her as to taking it

mere happening of the injury until the injured party has been rescued or removed from the place of injury.[62]

(C.) TIME NOT THE GOVERNING FACTOR. — (a.) *Generally.* — Time is not the real governing factor in the determination, but is only important in determining whether the statement is spontaneous and intimately connected with the main transaction.[63]

The Shortness of the Intervening Time does not alone make a statement part of the *res gestae.*[64]

when her pains came on. *Held*, the thing done or *res gestae* was at the doctor's office, and it is clear that its narration by the deceased was not part of that thing, a mere narrative of a past transaction. People *v.* Davis, 56 N. Y. 95.

62. See Heckle *v.* Southern Pac. Co., 123 Cal. 441, 56 Pac. 56; Little Rock, M. R. & T. R. Co. *v.* Leverett, 48 Ark. 333, 3 S. W. 50.

In an action for wrongful death where it appeared that the deceased's fatal injuries were caused by his being washed from a platform by the contents of a bursted distilling tank, the statement of a fellow employe that he had knowledge of the defective condition of the tank, made within five or ten minutes of the bursting of the tank while he was rescuing the deceased from the scalding liquid, was held competent as part of the *res gestae* since the transaction in question was not simply the bursting of the tank, but also the sweeping away of the decedent, his struggles and his rescue and care at the place of the injury. Hupfer *v.* National Dist. Co., 119 Wis. 417, 96 N. W. 809.

63. State *v.* Murphy, 16 R. I. 528, 17 Atl. 998; Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761. See also Washington & G. R. Co. *v.* McLane, 11 App. D. C. 220; Hall *v.* State, 48 Ga. 607; Chicago & E. I. R. Co. *v.* Chancellor, 165 Ill. 438, 46 N. E. 269; Lambright *v.* State, 34 Fla. 564, 16 So. 582, Com. *v.* Hackett, 2 Allen (Mass.) 136. See *infra*, III, D, b, (13).

"What the law distrusts is not after-speech but afterthought." Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

The interval of time after the main fact is not of itself of controlling importance though entitled to weighty consideration in determining what are *res gestae.* Barker *v.* St. Louis, I. M. & S. R. Co., 126 Mo. 143, 28 S. W. 866, 47 Am. St. Rep. 646, 26 L. R. A. 843.

Although it has been said that the declaration must be contemporaneous with the main transaction, concurrence in point of time while always material is not absolutely essential. Rouch *v.* G. W. R. Co., 1 Q. B. 51, per Lord Denman.

"The mere question of the lapse of time is not controlling. The real test is, were the declarations a part of the occurrence to which they relate, or were they a mere narrative concerning something which had fully taken place?" Western & A. R. Co. *v.* Beason, 112 Ga. 553, 37 S. E. 863.

In determining whether declarations are part of the *res gestae* there is no arbitrary time limit. Sullivan *v.* State, 58 Neb. 796, 79 N. W. 721.

No inflexible rule can be adopted as to the lapse of time. Each case must depend upon its own facts and circumstances, but the act or declaration must be so connected with the transaction as to be part of it, and it should clearly appear that such statements are not the result of premeditation. Wright *v.* State, 88 Md. 705, 41 Atl. 1060.

64. See Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118; Jones *v.* State, 71 Ind. 66 (statement of deceased as to who shot him, made a few minutes after the shooting); Chicago & E. I. R. Co. *v.* Chancellor, 165 Ill. 438, 46 N. E. 269; Union Casualty Co. *v.* Mondy, 18 Colo. App. 395, 71 Pac. 677; Butler *v.* Manhattan R. Co., 143 N. Y. 417,

(b.) *Coincidence With Main Transaction Unnecessary.* — A declaration to be part of the *res gestae* need not necessarily be coincident with the main transaction; it is sufficient that the two are so nearly connected that the declaration can be said to be a spontaneous expression prompted by and relating to the main event.[65] It has, however,

38 N. E. 454, 42 Am. St. Rep. 738, 26 L. R. A. 46.

That which occurs before or after the act in question is not part of the *res gestae*, although the interval of separation is very brief. Pennsylvania Co. *v.* McCaffrey, 173 Ill. 169, 50 N. E. 713.

On a prosecution for homicide, the statement of the defendant after returning to his house from the scene of the homicide, "that he had tried to care for his wife, but that she had forced him to do what he had done," although made within half a minute after the fatal act, was held properly excluded because not part of the *res gestae*. "While time is an important element to consider in determining what sayings constitute part of the *res gestae* of any transaction, yet it is by no means the only thing to be considered." Thornton *v.* State, 107 Ga. 683, 33 S. E. 673.

On a prosecution for assault and battery, the declarations of the assaulted person as to the circumstances of the alleged assault made to his wife within a minute or two after the assault, but not until the affair had fully terminated and the husband had returned from the street to his home, were held not part of the *res gestae* and therefore improperly admitted as such. Declarations are not to be deemed part of the *res gestae* simply because of the brief period intervening between the occurrence and the making of the declarations where the main transaction was at an end before the declarations were made. To render them admissible they must be so intimately interwoven with the principal fact or event which they characterize as to be regarded as part of the transaction itself. State *v.* Maddox, 92 Me. 348, 42 Atl. 788.

65. *Arkansas.* — Carr *v.* State, 43 Ark. 99.

Florida. — See Lambright *v.* State, 34 Fla. 564, 16 So. 582.

Georgia. — Taylor *v.* State, 120 Ga. 857, 48 S. E. 361.

Iowa. — Fish *v.* Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995; McMurrin *v.* Rigby, 80 Iowa 322, 45 N. W. 877; State *v.* Jones, 64 Iowa 349, 17 N. W. 911.

Kentucky. — Louisville & N. R. Co. *v.* Foley, 94 Ky. 220, 21 S. W. 866.

Louisiana. — State *v.* Thomas, 30 La. Ann. 600.

Maryland. — Mayor Etc. of Baltimore *v.* Lobe, 90 Md. 310, 45 Atl. 192.

Massachusetts. — See Com. *v.* Hackett, 2 Allen 136.

Minnesota. — State *v.* Horan, 32 Minn. 394, 20 N. W. 905, 50 Am. Rep. 583.

Missouri. — Leahey *v.* Cass Ave. R. Co., 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300; Gotwald *v.* St. Louis Transit Co., 102 Mo. App. 492, 77 S. W. 125; State *v.* Lockett, 168 Mo. 480, 68 S. W. 563; Shaefer *v.* Missouri Pac. R. Co., 98 Mo. App. 445, 72 S. W. 154.

Nebraska. — City of Lexington *v.* Fleharty, 104 N. W. 1056; Missouri Pac. R. Co. *v.* Baier, 37 Neb. 235, 55 N. W. 913.

New Hampshire. — Murray *v.* Boston M. R., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495.

Oklahoma. — Regnier *v.* Territory, 15 Okla. 652, 82 Pac. 509.

South Carolina. — Williams *v.* Southern R., 68 S. C. 369, 47 S. E. 706.

Texas. — Gulf, C. & S. F. R. Co. *v.* Willoughby (Tex. Civ. App.), 81 S. W. 829; Craig *v.* State, 30 Tex. App. 619, 18 S. W. 297.

Utah. — Leach *v.* Oregon Short Line R. Co., 29 Utah 285, 81 Pac. 90.

Virginia. — Hill *v.* Com., 2 Gratt. 595.

The assured's declarations as to the cause of his injury, made im-

mediately thereafter, are competent on behalf of his beneficiaries as part of the *res gestae*. "The declaration offered in evidence must be either contemporaneous with the principal fact or its natural and spontaneous outgrowth. It must be instinctive, unmeditated utterance of the party while the impression produced by the event has full possession of the mind. The connection between the statement and the fact must be such that the one is the evident interpreter of the other. Their relation to each other must be that of immediate cause and effect. When the two are thus connected, it does not matter that there is an appreciable lapse of time between them. Notwithstanding such lapse, the one is a continuation of the other, and both are parts of one transaction. But if there is a severance of the connection, if the transaction, so far as the person speaking is concerned, is at an end before the declaration is made — the two are distinct, independent of each other, and it is immaterial how minute the interval which separates them." Union Casuality Co. *v.* Mondy, 18 Colo. App. 395, 71 Pac. 677, *quoting* from T. & H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. App. 348, 38. Pac. 608.

It is not necessary that the declarations should be concurrent; it is sufficient that they are made so soon after the main event as to preclude all appearance of design. State *v.* Foley, 113 La. 52, 36 So. 885, *following* State *v.* Thomas, 30 La. Ann. 600; State *v.* Revells, 34 La. Ann. 381, 44 Am. Rep. 436, *approving* State *v.* Molisse, 38 La. Ann. 381, 58 Am. Rep. 181 (in which the statement was made ten minutes after the fatal shot) "only to the extent that it may serve as analogy to the case in hand," but *citing* State *v.* Harris, 45 La. Ann. 842, 40 Am. St. Rep. 259, as holding that where there are connecting circumstances the declarations may, even when made some time afterward, form part of the *res gestae*.

In Little Rock Tract. & Elec. Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7, the court quotes from Carr *v.* State, 43 Ark. 99, as follows: "Nor need any such declarations be strictly coincident as to time, if they are generated by an excited feeling which extends without break or let down from the moment of the event they illustrate. But they must stand in immediate casual relation to the act, and become part either of the action immediately preceding it or of the action which it immediately precedes."

A statement to constitute a part of the *res gestae* must have been spontaneous and within a period of time so closely connected with the transaction that there has been no opportunity for subsequent reflection. Di Prisco *v.* Wilmington City R. Co., 4 Pen. (Del.) 527, 57 Atl. 906.

Declarations to be a part of the *res gestae* are not required to be precisely concurrent in point of time with the principal fact. If they spring out of the principal transaction, if they tend to explain it, are voluntary and spontaneous, and are made at a time so near it as to preclude the idea of deliberate design, then they are to be regarded as contemporaneous and admissible. People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 49; State *v.* Garrand, 5 Or. 217.

"As was said by this court in Lewis *v.* State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720, which has been followed: 'In order to constitute declarations a part of the *res gestae*, it is not necessary that they were precisely coincident in point of time with the principal fact; but, if they spring out of the principal fact, were voluntary and spontaneous, and made at a time so near as to preclude the idea of deliberate design, they may be regarded as contemporaneous, and are admissible in evidence.'" Kenney *v.* State (Tex. Crim.), 79 S. W. 817, 65 L. R. A. 316.

To the same effect, Foster *v.* State, 8 Tex. App. 248; Tovney *v.* State, *id* 452; Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153; Irby *v.* State, 25 Tex. App. 203, 7 S. W. 705; Castillo *v.* State, 31 Tex. Crim. 145, 19 S. W. 892, 37 Am. St. Rep. 794.

A declaration to be admissible as part of the *res gestae* need not necessarily be coincident in point of

been held to the contrary on the ground that the declaration must be a verbal act constituting a part of the main transaction.[66]

The Intervening Circumstances must show a connection between the main transaction and the subsequent statement.[67]

(D.) WHERE LENGTH OF INTERVENING TIME NOT SHOWN. — It is sometimes held that where the length of time intervening between the main fact and the statement in question is not shown, the latter cannot be admitted as *res gestae*;[68] a showing that the statement was made "immediately" after the main occurrence has been held not sufficiently definite.[69] Where, however, it was clear that no very

time with the fact proved. But such fact and the declaration concerning it must be so closely connected that the declaration in the ordinary course of affairs can be regarded as the spontaneous explanation of the fact. City of Friend *v.* Burleigh, 53 Neb. 674, 74 N. W. 50; Union Pac. R. Co. *v.* Elliott, 54 Neb. 299, 74 N. W. 627; Sullivan *v.* State, 58 Neb. 796, 79 N. W. 721.

66. "It is improper to admit statements as being part of the *res gestae* on the ground that such statement will throw light upon the transaction, or that it was made so soon after the occurrence as to exclude the presumption that it has been fabricated, or that it was made under such circumstances as to compel the conviction of its truth. But the true rule for admission is that the statement is a verbal act, illustrating, explaining or interpreting other parts of transaction of which it is a part." Mayes *v.* State, 64 Miss. 329, 1 So. 733, 60 Am. Rep. 681.

67. Ford *v.* State, 40 Tex. Crim. 280, 50 S. W. 350.

The statement of the deceased as to who shot him, made four, five or ten minutes after the shooting, was held not part of the *res gestae* in the absence of any showing as to what transpired between the shooting and the time when the statements were made so as to show that the circumstances and statements were all the product of and a part of the difficulty itself. Vickery *v.* State, 50 Fla. 144, 38 So. 907.

68. Butler *v.* South Carolina & G. Exten. R. Co., 130 N. C. 15, 40 S. E. 770; Brown *v.* State, 38 Tex. Crim. 597, 44 S. W. 176. See Norfolk & W. R. Co. *v.* Gesswine, 144 Fed. 56, 75 C. C. A. 214; East Tennessee, V. & G. R. *v.* Maloy, 77 Ga. 237, 2 S. E. 941; Cahn *v.* State, 27 Tex. App. 709, 11 S. W. 723; State *v.* Pugh, 16 Mont. 343, 40 Pac. 861; Territory *v.* Armijo, 7 N. M. 428, 37 Pac. 1113; Sims *v.* Macon & W. R. Co., 28 Ga. 93. But see Soloman *v.* Powell, 18 Ga. 635.

The statement of the defendant, accused of homicide, are not admissible as part of the *res gestae* where it does not appear how long after the homicide they were made. Dodson *v.* State, 44 Tex. Crim. 200, 70 S. W. 969.

A statement by the deceased to her brother twelve hours before her death, while showing her bruises to him in answer to his question, What are you crying about? "that defendant had beaten her," is inadmissible as part of the *res gestae* where it does not appear from the evidence what length of time had elapsed after bruises were received before statement was made. It is not a spontaneous utterance, but was drawn out by questions, and the fact of its connection with defendant depended for its proof solely upon that narration. Territory *v.* Armijo, 7 N. M. 428, 37 Pac. 1113.

69. The declarations must be shown to be so clearly connected with the transaction under investigation in point of time as to be free from any suspicion of device or afterthought. A showing that they were made immediately thereafter is not sufficient. "The word 'immediately' is a relative term. It may mean a minute, an hour, a day, or a week, according to the circumstances of the case or other periods

great length of time had elapsed and the other circumstances negatived premeditation the statement has been admitted as part of the *res gestae*.[70]

f. *Narrative of Past Transaction.* — **(1.) Generally.** — A rule which is stated more frequently than any other relating to this subject is that a merely narrative statement of a past transaction is not admissible as part of the *res gestae*.[71] This is based on the ground that such statements are not spontaneous.

of time which the witness has in mind when speaking." Pool *v.* Warren County, 123 Ga. 205, 51 S. E. 328.

70. Southern R. Co. *v.* Brown, 126 Ga. 1, 54 S. E. 911; Heckle *v.* Southern Pac. Co., 123 Cal. 441, 56 Pac. 56.

71. *United States.* — Vicksburg & M. R. Co. *v.* O'Brien, 119 U. S. 99.

Alabama. — Memphis & C. R. Co. *v.* Womack, 84 Ala. 149, 4 So. 618; Burton *v.* State, 118 Ala. 109, 23 So. 729.

Arkansas. — Fordyce *v.* McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296; Little Rock Tract. & Elec. Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

California. — Heckle *v.* Southern Pac. Co., 123 Cal. 441, 56 Pac. 56; People *v.* Ah Lee, 60 Cal. 85; People *v.* Wasson, 65 Cal. 538, 4 Pac. 555; People *v.* Wong Ark, 96 Cal. 125, 30 Pac. 1115.

Colorado. — Graves *v.* People, 18 Colo. 170, 32 Pac. 63.

Connecticut. — Rockwell *v.* Taylor, 41 Conn. 55; Haywood *v.* Hamm, 77 Conn. 158, 58 Atl. 695.

Florida. — Lambright *v.* State, 34 Fla. 564, 16 So. 582.

Georgia. — Futch *v.* State, 90 Ga. 472, 16 S. E. 102; Western & A. R. Co. *v.* Beason, 112 Ga. 553, 37 S. E. 863; Sullivan *v.* State, 101 Ga. 800, 28 S. E. 16; White *v.* Southern R. Co., 123 Ga. 353, 51 S. E. 411; Savannah, F. & W. R. Co. *v.* Holland, 9 S. E. 1040.

Idaho. — People *v.* Dewey, 2 Idaho 83, 6 Pac. 103.

Illinois. — Comfort *v.* People, 54 Ill. 404; Chicago & N. W. R. Co. *v.* Howard, 6 Ill. App. 569; Hellmuth *v.* Katschke, 35 Ill. App. 21; Globe Acc. Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. 563; Springfield Consol. R. Co. *v.* Puntenney, 101 Ill. App. 95; Chicago West Div. R. Co. *v.* Becher, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144; Elguth *v.* Grueszka, 57 Ill. App. 193.

Indiana. — Citizens' St. R. Co. *v.* Stoddard, 10 Ind. App. 278, 37 N. E. 723; Doles *v.* State, 97 Ind. 555; Jones *v.* State, 71 Ind. 66; Hall *v.* State, 132 Ind. 317, 31 N. E. 536.

Iowa. — Murray *v.* Cane, 26 Iowa 271.

Kansas. — State *v.* Montgomery, 8 Kan. 351; Tennis *v.* Rapid-Transit R. Co., 45 Kan. 503, 25 Pac. 876. See State *v.* Pomeroy, 25 Kan. 349.

Louisiana. — Duperrier *v.* Dautrive, 12 La. Ann. 664; State *v.* Charles, 111 La. 933, 36 So. 29; State *v.* Harris, 45 La. Ann. 842, 13 So. 199; State *v.* Oliver, 39 La. Ann. 470, 2 So. 194.

Maine. — Barnes *v.* Rumford, 96 Me. 315, 52 Atl. 844.

Maryland. — Hays *v.* State, 40 Md. 633.

Massachusetts. — Eastman *v.* Boston & M. R., 165 Mass. 342, 43 N. E. 115; Haynes *v.* Rutter, 24 Pick. 242.

Michigan. — White *v.* City of Marquette, 140 Mich. 310, 103 N. W. 698; Dompier *v.* Lewis, 131 Mich. 144, 91 N. W. 152; Merkle *v.* Bennington, 58 Mich. 156, 24 N. W. 776, 55 Am. Rep. 666.

Minnesota. — Keller *v.* Sioux City & St. P. R. Co., 27 Minn. 178, 6 N. W. 486.

Mississippi. — King *v.* State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681.

Missouri. — Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26; Koenig *v.* Union Depot R. Co., 173 Mo. 698, 73 S. W. 637.

Montana. — State *v.* Pugh, 16 Mont. 343, 40 Pac. 861.

Nevada. — State *v.* Daugherty, 17 Nev. 376, 30 Pac. 1074.

(2.) Narrative Statement Immediately Following Fact. — In spite of this oft repeated rule, a statement may be narrative in form and yet so clearly connected with the main event as to be regarded as part of it and admissible as a spontaneous declaration.[72] In fact the dec-

New Jersey. — Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118; Blackman *v.* West Jersey & S. R. Co., 68 N. J. L. 1, 52 Atl. 370.

New York. — People *v.* Davis, 56 N. Y. 95; Maine *v.* People, 9 Hun 113; Waldele *v.* New York Cent. & H. R. R. Co., 95 N. Y. 274, 47 Am. Rep. 41; Sherman *v.* Delaware, L. & W. R. Co., 106 N. Y. 542, 13 N. E. 616.

North Carolina. — Bumgardner *v.* Southern R. Co., 122 N. C. 438, 43 S. E. 948; Simon *v.* Manning, 99 N. C. 327, 6 S. E. 101.

Ohio. — Forrest *v.* State, 21 Ohio St. 641.

Oklahoma. — Smith *v.* Territory, 11 Okla 669, 69 Pac. 805.

Pennsylvania. — Briggs *v.* East Broad Top R. & C. Co., 206 Pa. St. 564, 56 Atl. 36.

Rhode Island. — Chapman *v.* Pendleton, 26 R. I. 573, 59 Atl. 928.

South Carolina. — State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384; *citing* State *v.* Taylor, 56 S. C. 360, 34 S. E. 939.

Vermont. — Downer *v.* Strafford, 47 Vt. 579; State *v.* Carlton, 48 Vt. 636.

Wisconsin. — Steinhofel *v.* Chicago, M. & St. P. R. Co., 92 Wis. 123, 65 N. W. 852; Bliss *v.* State, 117 Wis. 596, 94 N. W. 325; Mutcha *v.* Pierce, 49 Wis. 231, 5 N. W. 486.

In Waldele *v.* New York Cent. & H. R. R. Co., 95 N. Y. 274, 47 Am. Rep. 41, *reversing* 29 Hun (N. Y.) 35, it appeared that the plaintiff's interest, an educated deaf-mute, was found lying on the defendant's track badly bruised and mangled shortly after the passage of a train which had been immediately followed by a lone engine. Plaintiff's theory was that his intestate after waiting for the train to pass had stepped upon the track in front of the engine following. The deceased when found was removed to the sidewalk near by and about thirty minutes after the accident made a statement by signs to the effect that he had waited for the long train to go by and had been struck by the engine which followed it. This statement was held improperly admitted because not part of the *res gestae.* "The claim that the declarations can be treated as part of the *res gestae* is not supported by authority in this state. The *res gestae,* speaking generally, was the accident. These declarations were no part of that — were not made at the same time, or so nearly contemporaneous with it as to characterize it, or throw any light upon it. They are purely narrative, giving an account of a transaction not partly past, but wholly past and completed. They depend for their truth wholly upon the accuracy and reliability of the deceased, and the veracity of the witness who testified to them." The court comments extensively upon the cases and their lack of harmony and approves the rule laid down in numerous cases cited to the effect that to make declarations admissible as *res gestae* they must not be mere narratives of a past occurrence, but must have been made as a part of the main transaction and so characterize that transaction as to form a part of it.

72. *England.* — Thompson *v.* Trevanion, Skin. 402; Rex *v.* Foster, 6 Carr. & P. 325, 25 E. C. L. 421.

United States. — Insurance Co. *v.* Mosley, 8 Wall. 397; Peirce *v.* Van Dusen, 78 Fed. 693, 24 C. C. A. 280; North America Acc. Assn. *v.* Woodson, 64 Fed. 689, 24 U. S. App. 364, 12 C. C. A. 392.

Alabama. — Starks *v.* State, 137 Ala. 9, 34 So. 687.

Arkansas. — Little Rock R. & Elec. Co. *v.* Newman, 77 Ark. 599, 92 S. W. 864.

Colorado. — Union Casualty Co. *v.* Mondy, 18 Colo. App. 395, 71 Pac. 677.

Delaware. — Di Prisco *v.* Wilmington City R. Co., 4 Pen. 527, 57 Atl. 906.

District of Columbia. — Patterson *v.* Ocean Acc. & G. Corp., 25 App. D. C. 46.

Georgia. — Ferguson *v.* Columbus & Rome R., 75 Ga. 637; Monday *v.* State, 32 Ga. 672, 77 Am. Dec. 314.

Idaho. — State *v.* Wilmbusse, 8 Idaho 608, 70 Pac. 849.

Illinois. — Muren Coal & Ice Co. *v.* Howell, 217 Ill. 190, 75 N. E. 469.

Iowa. — Sutcliffe *v.* Iowa State Traveling Men's Assn., 119 Iowa 220, 93 N. W. 90; Alsever *v.* Minneapolis & St. L. R. Co., 115 Iowa 338, 88 N. W. 841; Fish *v.* Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995.

Kentucky. — Louisville & N. R. Co. *v.* Foley, 94 Ky. 220, 21 S. W. 866; Brown *v.* Louisville R. Co., 21 Ky. L. Rep. 995, 53 S. W. 1041.

Louisiana. — State *v.* Maxey, 107 La. 799, 32 So. 206.

Massachusetts. — Com. *v.* M'Pike, 3 Cush. 181, 50 Am. Dec. 727.

Minnesota. — State *v.* Williams, 96 Minn. 351, 105 N. W. 265.

Missouri. — Shaefer *v.* Missouri Pac. R. Co., 98 Mo. App. 445, 72 S. W. 154; Stevens *v.* Walpole, 76 Mo. App. 213; State *v.* Martin, 124 Mo. 514, 28 S. W. 12; Entwhistle *v.* Feighner, 60 Mo. 214.

Nebraska. — Missouri Pac. R. Co. *v.* Baier, 37 Neb. 235, 55 N. W. 913; Collins *v.* State, 46 Neb. 37, 64 N. W. 432.

Pennsylvania. — Coll *v.* Easton Transit Co., 180 Pa. St. 618, 37 Atl. 89.

Rhode Island. — State *v.* Epstein, 25 R. I. 131, 55 Atl. 204.

Texas. — Galveston, H. & S. A. R. Co. *v.* Davis, 27 Tex. Civ. App. 279; 65 S. W. 217; City of Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519.

Virginia. — Andrews *v.* Com., 100 Va. 801, 40 S. E. 935.

Washington. — Lambert *v.* La Conner Trad. & Transp. Co., 30 Wash. 346, 70 Pac. 960; Dixon *v.* Northern Pac. R. Co., 37 Wash. 310, 79 Pac. 943.

Wisconsin. — Johnson *v.* St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048.

The fact that a statement is narrative in form does not deprive it of its character as *res gestae* if it springs spontaneously out of the principal fact, is directly connected with it and is illustrative and explanatory of it. Regnier *v.* Territory, 15 Okla. 652, 82 Pac. 509; Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761.

The fact that the language of a declaration is narrative in form and refers to past events is not alone sufficient to condemn it as hearsay. Sullivan *v.* State, 58 Neb. 796, 79 N. W. 721.

"If the statement is mere narration, wholly unconnected with the principal fact, it is inadmissible. Upon the other hand if it springs spontaneously out of the principal fact, is in direct connection with it, the declaration should be admitted, although it may be narrative in form, and although it may be separated from the principal fact by a lapse of time more or less considerable." Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761.

In an action for wrongful death, the issue being whether the planks upon which the defendant was found caused him to stumble and fall under the car, his statement made within two minutes after the accident while he was lying between the planks groaning with pain, "I fell over these old planks," was held admissible as part of the *res gestae*. "It is in effect conceded that if, while the car wheels were passing over Baker's legs, he had exclaimed, 'I fell over these old planks,' that statement would have been admissible as a part of the *res gestae;* but it is claimed that, although made within two minutes after the actual infliction of the injury, while he was lying between the planks, groaning on account of the pain, and while no substantial change had occurred in the attendant circumstances, it is not admissible, because the accident was then a past event, and the statement a mere narrative. But this technical refinement is not based upon a reasonable view of the principle involved. No satisfactory reason is assigned for the distinction suggested. If the statement of

a party made while a serious injury is being inflicted upon him is regarded as an evidentiary fact throwing light upon the manner of the occurrence, why does not the same statement, made immediately after the principal event, as an intimately connected and natural result or detail thereof, in the presence of all the physical facts of the accident, constitute an equally admissible part of the proof? Why may it not be as much a part of the *res gestae* as the fact that the declarant is found at the same time lying in a place and position indicating the manner of the accident? His position as well as his declaration may be to some extent subject to his volition. If the very short period of two minutes after a man's legs have been severed from his body in a railroad accident prevents his declaration then made from being deemed a part of the transaction, it is difficult to understand why his position, which may be as much subject to his intelligent control during that brief and trying interval of time as his power of verbal communication, should be regarded as a competent evidentiary fact explaining the manner of the accident. The fact is that both his declaration and his position may be, under the circumstances, credible and admissible evidence, for very similar reasons; and that to exclude the evidence in the one case, because it may be fabricated, would furnish a reason for its exclusion in the other. The possibility of its being unreliable would seem to relate to the weight, rather than to the admissibility of the evidence. That the doctrine of exact coincidence in such cases is not followed in this state is plainly indicated in Caverno *v.* Jones, 61 N. H. 623, 624." Murray *v.* Boston & M. R., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495.

In an action for personal injuries where it appeared that plaintiff fell from a train and was run over, a witness testified that he heard the train pass and the plaintiff's cry for help, that he got up and dressed and went to the plaintiff's assistance, about one hundred and fifty or two hundred yards away, and that no other person had yet arrived. The statement of the plaintiff that a brakeman had knocked him off the train, made to the witness immediately upon his arrival and while the plaintiff was crying out in his misery, was held admissible as part of the *res gestae*. The court says: "Were the declarations of plaintiff admissible as a part of the *res gestae?* All declarations or exclamations uttered by the parties to a transaction, and which are contemporaneous with and accompany it, and are calculated to throw light upon the motives and intention of the parties to it, are clearly admissible as parts of the *res gestae*. Very respectable authorities restrict the doctrine of *res gestae* within the limits indicated by the foregoing definition, and exclude all declarations which are a narrative of past occurrences. This is a convenient and salutary rule, and probably the more logical one; and if it were an open question in this state we should hesitate long before adopting another. Another rule, applied in many of the American courts at least, is to admit as parts of the *res gestae* not only such declarations as accompany the transaction, but also such as are made under such circumstances as will raise a reasonable presumption that they are the spontaneous utterance of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design. (Citing numerous cases). In most of the cases cited the declarations admitted were the relation of past occurrences. This line of decision has been followed in this court (Galveston *v.* Barbour, 62 Texas 172), and in view of the great array of authority in support of that ruling we deem it best to adhere to it in this case." International & G. N. R. Co. *v.* Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902.

The statement of the person poisoned by a lunch given him shortly previous, made while eating the lunch, that it was given him by the accused, held competent on trial for the homicide as part of the *res*

larations which have been admitted have most frequently been narrative in form. The important consideration is not the form of the words but the circumstances under which they were uttered.[73] Some courts, however, seem to hold strictly that narrative statements are not admissible.[74]

(3.) Narrative Statement Made as Part of Transaction. — Although a statement was made during the course of a transaction, if it was merely a narrative of a distinct past and completed transaction it is not admissible testimonially as part of the *res gestae*,[75] though it

gestae. State *v.* Thompson, 132 Mo. 301, 34 S. W. 31.

73. Com. *v.* Hackett, 2 Allen (Mass.) 136.

74. See People *v.* Wong Ark., 96 Cal. 125, 30 Pac. 1115 (*overruling* People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 49); Williams *v.* Southern Pac. Co., 133 Cal. 550, 65 Pac. 1100; Heckle *v.* Southern Pac. Co., 123 Cal. 441, 56 Pac. 56; Elguth *v.* Grueszka, 57 Ill. App. 193. See also Dompier *v.* Lewis, 131 Mich. 144, 91 N. W. 152; Blackman *v.* West Jersey & S. R. Co., 68 N. J. L. 1, 52 Atl. 370. But see People *v.* Wong Ah Foo, 69 Cal. 180, 52 Atl. 375.

"Sound public policy requires that the established rule as to this class of evidence should be strictly adhered to, and not extended. It is a species of evidence liable to abuse; and when, as in this case, the party making the declaration is a witness at the trial, testifying to the facts, his declarations made at any time, however short, after the occurrence has ended, in regard to the occurrence itself, is mere narrative, and should not have the force of corroborative evidence, unless they are strictly and unquestionably a part of the *res gestae*. They are not so in this instance." State *v.* Maddox, 92 Me. 348, 42 Atl. 788.

Where deceased, immediately after being shot in his drug store, ran up stairs, and falling into his wife's arms exclaimed: "My God, I am shot; those colored fellows that were in there when you were there are the ones that shot me," the declaration as to who shot him is not admissible as part of the *res gestae*, his assailant not being present, because a mere narrative of a past event; but the declaration when he met his wife that he was shot, is competent, because explanatory of his then condition. Parker *v.* State, 136 Ind. 284, 35 N. E. 1105.

75. In an action for unlawfully ejecting plaintiff from defendant's street-car where the conductor justified his act at the time on the ground that the plaintiff's transfer was too old, a declaration made by one of the passengers at the time of the altercation that he had seen the plaintiff get off one car and on to another immediately without waiting was held a part of the *res gestae* because a mere narrative, though the court recognized that the fact that such a statement was made to the conductor properly proved would have been competent to charge him with notice. Woods *v.* Buffalo R. Co., 35 App. Div. 203, 54 N. Y. Supp. 735.

Where the husband of deceased and a doctor had been indicted for producing an abortion, upon the trial of the doctor the defense offered to show by the physician that while he was delivering her, the deceased said to the physician that her husband had been trying to deliver her and had failed, in order to show the effect this might have had. *Held*, not part of the *res gestae*, but a narrative of a past transaction. Maine *v.* People, 9 Hun (N. Y.) 113.

The declaration of the engineer, although made almost immediately after the explosion, that he had stopped twice after he started with engine, to plug the same to prevent an explosion, and that he got off the engine as soon as he stopped, looking for it to explode, is not admissible as it related to facts not

may be competent as a fact tending to establish a material issue.[76] This rule, however, must be distinguished from the one applying the term *res gestae* in another sense where the narrative statement is made during the act in question and is regarded as part of it and for that reason a competent circumstance.[77]

(4.) Declaration Relating to Past Transaction. — The mere fact that a declaration relates to a past transaction does not make it a narrative statement if it is spontaneous and tends to characterize the main occurrence which it accompanies and springs out of.[78]

g. *Presence of Person Against Whom Statement Is Offered.* The fact that the statement was not made in the presence of the person against whom it is offered as evidence, or his privies, does not render it incompetent,[79] and this is true even in a criminal prosecu-

otherwise connected with transaction than as a narrative of preceding facts occurring before explosion. H. & T. C. R. Co. *v.* Hicks, 2 Posey Unrep. Cas. (Tex.) 437.

"A narrative even if given during the occurrence is inadmissible." Williams *v.* Southern Pac. Co., 133 Cal. 550, 65 Pac. 1100; Heckle *v.* Southern Pac. Co., 123 Cal. 441, 56 Pac. 56.

76. Woods *v.* Buffalo R. Co., 35 App. Div. 203, 54 N. Y. Supp. 735, preceding note.

77. See *infra*, IV.

On a prosecution for rape, statements made by the defendant to the prosecution at the time of the commission of the alleged offense with reference to his illicit relations with another woman were held properly admitted as part of the *res gestae*, being part of the very transaction in question. State *v.* Bebb, 125 Iowa 494, 101 N. W. 189.

78. In an action for damages due to alleged unreasonable delay in the delivery of cattle due to overloading the cars, a declaration of the conductor that his train was overloaded made at the time it stalled on a grade was held admissible as part of the *res gestae*, although objected to as relating merely to a past transaction, namely, the overloading of the train, and not to an act then being performed by the conductor. "In a sense this is true, but the same may be said of many declarations clearly admissible as *res gestae*. It is this that gives them value, causing them to be offered in evidence. Being spontaneous expressions of truth, the declarations attending and forming a part of a transaction made the subject of investigation determine its character by connecting it with some previous act or motive. The objection that the declaration related to and tended to prove the act of overloading the train, which had already taken place, was not, therefore, itself sufficient to exclude the testimony. The question is, was the declaration so made as to render it a part of the transaction termed the stalling of the train, or was it a mere recitation of the previous act of overloading? We are of opinion it was the former. One in charge of a train or other means of conveyance could hardly remain silent when compelled to stop on the way because of his inability to draw the load. His first thought would be, 'What is the matter?' He could hardly keep from declaring the cause of the trouble as he understood it. The declaration complained of was, therefore, presumptively spontaneous." Missouri, K. & T. R. Co. *v.* Stanfield Bros. (Tex. Civ. App.), 90 S. W. 517.

79. Lewis *v.* Burns, 106 Cal. 381, 39 Pac. 778 (*citing* Scott *v.* Berkshire County Sav. Bank, 140 Mass. 157, 2 N. E. 925; Lewars *v.* Weaver, 121 Pa. St. 268, 15 Atl. 514; Collins *v.* State, 46 Neb. 37, 64 N. W. 432 (declarations of injured person in action against person causing injury); Gandy *v.* Humphries, 35 Ala. 617.

tion where the statement is offered as evidence against the accused.[80]

h. *In Favor of Person Making Statement or His Principal.* Since the statement is admitted not as an admission but as testimonial evidence, it is competent in favor of, as well as against, the person making it or his principal,[81] thus in actions for injury to person or property, the *res gestae* statements of the person through whose alleged negligence the injury was inflicted, are admissible, though they tend to exonerate him.[82] So in a criminal prosecution, the accused may show in his own behalf such of his declarations as formed part of the *res gestae*.[83]

i. *Competency of Declarant as a Witness.* — **(1.) Generally.**

The statements and conversations of a person accompanying the act and showing the motive and purpose with which it was done are admissible although not occurring in the presence of the person against whom they are used, or his privies. Baxter *v.* Abbott, 7 Gray (Mass.) 71.

80. Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823; State *v.* Ripley, 32 Wash. 182, 72 Pac. 1036; Shotwell *v.* Com., 24 Ky. L. Rep. 255, 68 S. W. 403; State *v.* Trusty, 1 Penn. (Del.) 319, 40 Atl. 766; Com. *v.* Hackett, 2 Allen (Mass.) 136; State *v.* Murphy, 16 R. I. 528, 17 Atl. 998. But see Stevison *v.* State (Tex. Crim.), 89 S. W. 1072, ("the declarations of bystanders not within the knowledge of defendant at the time of being made are not and cannot be made *res gestae*"); Baker *v.* State, 45 Tex. Crim. 392, 77 S. W. 618; *Ex parte* Kennedy (Tex. Crim.), 57 S. W. 648; Binns *v.* State, 57 Ind. 46, 26 Am. Rep. 48. See People *v.* Wong Ah Foo, 69 Cal. 180, 10 Pac. 375.

81. Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348; Allen *v.* Duncan, 11 Pick. (Mass.) 308; Bateson *v.* State, 46 Tex. Crim. 34, 80 S. W. 88; Teel *v.* State (Tex. Crim.), 69 S. W. 531; Gulf C. & S. F. R. Co. *v.* Milner, 28 Tex. Civ. App. 86, 66 S. W. 574.

82. Evidence that the motorman of a car remarked at time of killing a hog, for which the railway company was sued, "that hog jumped on track right in front of car," was properly admitted as part of *res gestae*. Little Rock R. & Elec. Co. *v.* Newman, 77 Ark. 599, 92 S. W. 864.

83. Mitchum *v.* State, 11 Ga. 615; Thomas *v.* State, 27 Ga. 287; State *v.* Rollins, 113 N. C. 722, 18 S. E. 394; Foster *v.* State, 8 Tex. App. 248; State *v.* Thomas, 30 La. Ann. 600. See Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153.

Where it appeared that during the course of the difficulty the defendant shot the deceased in the arm, the latter drew a knife and pursued the defendant to his own door where the deceased slipped and fell and the defendant entered and locked the door behind him, the action of the defendant immediately thereafter in showing the occupants of the house that he had another cartridge in his pistol, and his statement "I could have turned around when C. fell and put the gun right to his head and killed him, but I did not want to be no murderer, and I would not shoot him with the last load" was held competent as part of the *res gestae*. "The rule does not always hold that declarations are to be rejected solely on the ground of being self-serving. If part and parcel of the *res gestae* they are competent and therefore admissible, whether against or in favor of the interest of the declarant. Self-serving statements are usually made after the main fact has transpired, but this alone will not cause their rejection if such statements are so connected with the main act as to elucidate the animus of such act and to show that such statements were the natural concomitants of, and

The competency of the declarant is not an essential prerequisite to proof of his declarations as part of the *res gestae*.[84]

There is a distinction in this respect between *res gestae* declarations and dying declarations; the latter are regarded as testimony, and the declarant as a witness, whose veracity is guaranteed by the solemnity of the occasion and consciousness of impending death; the former are regarded rather as incidents of the transaction in issue in which the declarant acts not as a witness but merely as the unthinking instrument through which the transaction itself speaks, and are therefore admissible without regard to whether the declarant possesses the qualifications of a witness.[85]

emanations from, such main and controverted act." State *v.* Lockett, 168 Mo. 480, 68 S. W. 563.

84. Wilson *v.* State (Tex. Crim.), 90 S. W. 312, *holding* that the declarations of the deceased forming part of the *res gestae* were not objectionable on the ground that he was not conscious and of sane mind at the time the declarations were made. The court cites Kenney *v.* State (Tex. Crim.), 79 S. W. 817, 65 L. R. A. 316. But see Duperrier *v.* Dautrive, 12 La. Ann. 664.

Where declarations form part of the things done, they are admissible in evidence, whether the person by whom they were made is or is not a competent witness. Kenney *v.* Phillipy, 91 Ind. 511.

On a prosecution for assault, the statement of the person assaulted otherwise competent as part of the *res gestae* is not inadmissible merely because the declarant was a convicted felon and therefore not a competent witness. Flores *v.* State (Tex. Crim.), 79 S. W. 808.

In assault to rape, the declarations of the child immediately after she came out of the house where she was assaulted, describing the assault and naming the accused, is admissible as *res gestae*, though she was incompetent as a witness, not being capable of understanding the obligation of an oath. Croomes *v.* State, 40 Tex. Crim. 672, 51 S. W. 924, 53 S. W. 882.

On a prosecution for rape, the fact that the child alleged to have been assaulted was too young to be a competent witness was held no reason for rejecting its declarations as part of the *res gestae*. Thomas *v.* State (Tex. Crim.), 84 S. W. 823, *citing* Kenney *v.* State (Tex. Crim.), 79 S. W. 817, 65 L. R. A. 316, in which the child was three and a half years old.

85. In Kenney *v.* State (Tex. Crim.), 79 S. W. 817, 65 L. R. A. 316, a prosecution for rape on a child three and a half years old, it was held that the declarations of the child otherwise competent as *res gestae* were not rendered inadmissible because she was too young to be a competent witness. The court follows the rule in Croomes *v.* State, 40 Tex. Crim. 672, 51 S. W. 924, 53 S. W. 882, and after distinguishing the case of Smith *v.* State, 41 Tex. 352 and the English authorities therein cited, says: "We are therefore driven to the reason of the rule, and to our own authorities on analogous questions. We are aware that the general doctrine is that during declarations of a witness who is incompetent as a witness, from infancy or other cause, cannot be proven. And the principle announced by these authorities has been cited in support of the view that *res gestae* coming from an incompetent witness cannot be shown. But it should not be forgotten that the principle with regard to dying declarations and their admission is predicated on the idea that the declarant makes the statement under the sense of approaching death, and with the recognition of the obligations of an oath. In other words, the solemnity of the situation is considered to be, so far as the declarant is concerned, tanamount to the oath. . . . The admission of *res gestae* evidence is upon another

(2.) Declarations of Spouse. — The declarations of one spouse when part of the *res gestae* are competent evidence against the other even

proposition; that is, it is not the witness speaking, as in the case of dying declarations, but it is the transaction voicing itself. As was said in Yeatman et al. *v.* Hart, 6 Humph. 375, 'When declarations are admitted as *res gestae,* it is upon the ground that the party making them could be a witness, but they are verbal acts connected with the transaction and calculated to illustrate its character.' To the same effect, see Rogers *v.* Crain, 30 Tex. 288. Both of those cases authorize the introduction of the declarations of a slave as a part of the *res gestae,* though such slave could not be a competent witness. And it has been held in this state that the declarations of a wife, where they were a part of the *res gestae,* could be used against the husband, although our statute provides that they cannot be witnesses against each other. Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749. And in Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153, it was held that, although the declarant was under arrest at the time the statement was made, and no warning had been given, still, if the declaration was a part of the *res gestae,* it was admissible, notwithstanding our statute with reference to confessions while under arrest. See Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823. And in Neeley *v.* State (Tex. Cr. App.), 56 S. W. 625, the doctrine was announced that the declarations of a convict, although he was not competent to testify, could be proven as a part of the *res gestae.* In Cook's Case, *supra,* the court announced the doctrine that the rule as to *res gestae* overrides all other rules known to the law governing the admissibility of testimony. So far as we are advised, all the cases, except the Smith Case, *supra,* indorse this view. We do not understand the case of Long *v.* State, 10 Tex. App. 186, to contravene this doctrine, because that was an attempt to prove the declaration of a convicted felon as against a third party; that is, appellant was not a party to the transaction. Nor does Holst *v.* State, 23 Tex. App. 1, 3 S. W. 757, 59 Am. Rep. 770, contravene the principle, because that was clearly a case in which an effort was made to prove a statement, no part of the *res gestae,* made long subsequent to the transaction. . . . It does not occur to us that there would be any difficulty in determining a question of this character, if *res gestae* was confined to the immediate transaction, for who would dispute the proposition that if the child, in the first instance, had been heard by its mother, during the transaction, to scream and cry out, 'Oh, George, you are killing me!' that this evidence would be admissible against appellant, as a part of the transaction voicing itself through the instrumentality of the child, although it could not testify to the fact, because it did not understand the nature and obligation of an oath? The difficulty arises from the latitude our decisions have given to *res gestae but we must remember* that the principles governing *res gestae* must be the same. *Res gestae* is not a witness. It cannot be summoned as a witness, nor sworn as a witness, nor put under the rule as a witness, nor punished for contempt or perjury as a witness. But it is a fact — an integral part of the transaction, occurring *dum fervet opus* — and, as a fact, it can be testified to by any competent witness who may have heard it, just as such witness may testify as to any other fact which transpires during the transaction, and which is and was a part thereof. We therefore hold, as stated before, that the testimony here presented was *res gestae* (Berry *v.* State (Tex. Cr. App.), 72 S. W. 170; City of Galveston *v.* Barbour, 62 Tex. 175, 50 Am. Rep. 519), and that, being a part and parcel of the transaction, notwithstanding the child was not competent as a witness, the court did not err in permitting the mother of the child to testify as to declarations of the child immediately after the transaction."

where the declarant would not be a competent witness against his spouse.[86]

j. *Identity of Declarant Undisclosed.* — (1.) Generally. — The fact that it does not appear who made a statement which is a part of the *res gestae* does not require its exclusion.[87]

(2.) Inability of Witness to Identify Declarant. — The inability of the witness to identify the person whom he heard make the statements forming part of the *res gestae* does not render his testimony incompetent.[88]

k. *Inconsistency of Declarations.* — The fact that the offered declaration is apparently inconsistent with another made at about the same time does not render it inadmissible unless the inconsistency is such as to negative spontaneity.[89]

l. *Opinion or Conclusion.* — The fact that the statement is wholly or partially the opinion or conclusion of the declarant does not of

86. Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749.

Statements of the wife of defendant on trial for murder of his child, made in his presence immediately after the discovery of its death, and at the house where it occurred, regarding the manner of such death, which statements were necessary to a full understanding of what was said by the accused, are admissible in evidence as part of the *res gestae* and not an encroachment upon the statute prohibiting the wife from testifying against the husband, the wife not being sworn in the case. People *v.* Foley, 64 Mich. 148, 31 N. W. 94.

87. Johnson *v.* St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048. This was an action for personal injuries received in a fall alleged to have been caused by a hoisting hook striking plaintiff. The exclamation, "the hook hit him," made immediately after the accident by some one whose identity was not disclosed was held part of the *res gestae*.

88. Testimony of witness that he saw a man go to the prostrate body of the deceased and heard him say to those near by, "I am going to hell anyway, but I want you boys to come back and see that he had a knife," although witness did not recognize defendant as speaker, is admissible as part of the *res gestae*. The fact that witness did not know defendant when he saw him and did not recognize his voice did not disqualify him to tell what he heard and saw of the *res gestae*, when it was afterwards shown that defendant did go to dead body and utter similar words. State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315.

89. Immediately after the homicide while defendant was passing the store of J. and E. with pistol in hand, being the second door to saloon where shooting occurred, defendant was asked by J. what he was doing with the pistol, and J. testified that he said he killed deceased to "save his own life." E. testified that he heard the defendant's statement to J. and that the statement was that he killed the deceased to save himself or protect himself. The defense proposed to prove by one W. that three or four minutes after the homicide, the defendant, in reply to witness's question, said that he killed deceased to protect his wife and child. It appears that deceased had attempted the virtue of defendant's wife. Upon objection to statements made to W., offered by defense, held admissible, and that the fact that they were inconsistent cannot be made the test of their admissibility, when closely connected with the main transaction; and that the purport of the testimony is not of such a character as to render the declaration so far inconsistent as to destroy its

necessity render it inadmissible if it is part of the *res gestae*,[90] especially where the statement though on its face it might be a conclusion is made as a statement of fact.[91] Statements otherwise part of the *res gestae* have, however, been excluded on this ground.[92]

spontaneity. Harrison *v.* State, 20 Tex. App. 387, 54 Am. Rep. 529.

90. See People *v.* Swenson, 49 Cal. 388.

In an action for personal injuries caused by the negligence of a fellow-servant, whose removal the plaintiff had requested and whom the plaintiff had promised to discharge, the declaration of the plaintiff immediately after his injury that it would not have occurred if such fellow-servant had been discharged was held part of the *res gestae*, being an involuntary statement made without deliberation. Cross Lake Logging Co. *v.* Joyce, 83 Fed. 989, 28 C. C. A. 250. See also McMahon *v.* State, 46 Tex. Crim. 540, 81 S. W. 296.

On a prosecution for homicide, a statement by the deceased shortly after the infliction of the injury, that the defendant had shot him without provocation or cause, has been held admissible as part of the *res gestae*. State *v.* Foley, 113 La. 52, 36 So. 885; Shotwell *v.* Com., 24 Ky. L. Rep. 255, 68 S. W. 403; Norfleet *v.* Com., 17 Ky. L. Rep. 1137, 33 S. W. 938; State *v.* Henderson, 24 Or. 100, 32 Pac. 1030. See further, article "Homicide," Vol. VI. p. 619, n. 75. So also statements of the deceased to the effect that he himself was the party at fault. See article "Homicide," Vol. VI, p. 619, n. 76.

Witness who was just outside the house when the shooting occurred, immediately upon hearing the shot ran into the house and saw accused running away as she entered, and upon going into a room found deceased lying on a bed groaning. Deceased then told her that accused shot him. She asked why, and deceased replied, "for forty cents." This conversation was held admissible as *res gestae*. Fuller *v.* State (Tex. Crim.), 48 S. W. 183.

91. Jack *v.* Mutual Reserve Fund L. Assn., 113 Fed. 49, 51 C. C. A. 36, in which the statement of one suffering from poisoning, that a certain person had a doctor to poison him, was held not open to the objection that it was a mere expression of opinion since it was stated as a fact.

92. See Lane *v.* Bryant, 9 Gray (Mass.) 245, 69 Am. Dec. 282; State *v.* Ramsey, 48 La. Ann. 1407, 20 So. 904; Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18; Richmond & D. R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577; Monroe *v.* State, 5 Ga. 85; Benjamin *v.* State (Ala.), 41 So. 739; Hughes' Admr. *v.* Louisville & N. R. Co., 104 Ky. 774, 48 S. W. 671; Carr *v.* State, 76 Ga. 592; Allen *v.* State, 111 Ala. 80, 20 So. 490; State *v.* Ramsey, 48 La. Ann. 1407, 20 So. 904. See *infra*, III, 3, E, h.

In an action for personal injuries caused by attempting to pass through a freight train which was blocking a path, the statement of the brakeman by whose permission the plaintiff had attempted to pass, "You are not to blame for this," made to the plaintiff two minutes after the accident, was held properly excluded even conceding it to be part of the *res gestae* since it was a mere conclusion and not a fact. Scott *v.* St. Louis, K. & N. W. R. Co., 112 Iowa 54, 83 N. W. 818.

Impression of Bystander inadmissible. — Carr *v.* State, 76 Ga. 592.

On trial for murder of one of two persons shot at same time, it is not permissible to show that the other stated to a third person a short time after the shooting that the defendant did the killing, "but would not have done it if he had been in his right mind," as such a statement was not one of fact constituting part of the *res gestae*, but a mere expression of opinion. Beck *v.* State, 76 Ga. 452.

In an action against a railway company for the death of a section hand who was struck by an iron bar thrown by a moving train, a statement of deceased that a co-employe left the bar too near the track though a part of the *res gestae*

m. *Relevancy of Statement.* — Where such statements are offered as *res gestae* not as facts in themselves relevant as verbal acts but merely as a means of proving the fact stated, it would seem an essential prerequisite to the admissibility of the statement that the fact contained in it must appear to be relevant and material, regardless of the manner in which it is to be proved.[93] Some courts, however, seem to hold that a statement forming part of the *res gestae* may be shown regardless of its intrinsic relevancy, merely as a fact attending the main occurrence,[94] in which cases of course the relevancy of the fact stated is not material,[95] though it would seem that the declaration as a fact must tend in some way to explain the principal transaction.[96]

n. *Admissibility on Other Grounds.* — The fact that a statement may be admissible on other grounds does not affect its competency as *res gestae*.[97]

o. *Mere Exclamations Not Containing Statement of Fact.* — It is not necessary that the declaration be a statement of fact to be ad-

being immediately after the injury, was a conclusion as to the negligence of a co-employe and inadmissible. Dunn *v.* Chicago R. I. & P. R. Co., 130 Iowa 580, 107 N. W. 616.

93. See Murray *v.* Boston & M. R., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495; Sullivan *v.* State, 101 Ga. 800, 29 S. E. 16; Com. *v.* Chance, 174 Mass. 245, 251, 54 N. E. 551, 75 Am. St. Rep. 306.

94. Where the appellant claimed that a witness had been improperly prevented from answering a question as to a declaration claimed to be part of the *res gestae*, the court after holding the declaration to be a part of the *res gestae* said in answer to the objection that the record did not disclose the purpose of the question nor show that the answer would have been material, "if it was part of the *res gestae*, as we think it was, the plaintiff was entitled to have it before the jury for what it was worth. The surrounding circumstances constituting part of the *res gestae* may always be shown to the jury along with the principal fact." Harmes *v.* Chicago & N. W. R. Co., 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69, *citing* 1 Greenl. Ev. § 108.

95. On a prosecution for homicide, committed during a journey which the prosecution claimed the defendant had enticed the deceased into for the express purpose of killing him, a conversation between the defendant and the deceased while engaged in preparing for the journey and relating thereto was held properly admitted as part of the *res gestae*, although the particular remarks in question had no apparent significance. State *v.* Lucey, 24 Mont. 295, 61 Pac. 994.

96. See *supra*, III, 3, C, c, (4.) 216.

The statement of the deceased as he fell from the fatal wound, "Oh Lord! my poor wife and children," was held competent as part of the *res gestae* even if of doubtful admissibility, as it tended to show the condition of the mind or the motive of the deceased at the time he was shot. The statement was objected to on the ground that the words did not tend to illustrate any issue in the case, or shed any light on the frame of mind of the deceased. The court recognizes the rule that the statement or act must be spontaneous, contemporaneous, and serve to qualify or explain the principal act or transaction. Goodman *v.* State, 122 Ga. 111, 49 S. E. 922.

97. The mere fact that declaration would be admissible as impeaching testimony of the person making it, subject to be limited in its effect by charge of court, would not affect its admissibility as *res gestae*. De Walt *v.* Houston E. & W. T. R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534.

missible; a mere exclamation may constitute part of the *res gestae* under this branch of the rule, although it does not directly state a fact.[98]

p. *Competency Cannot Be Established by Statement Itself.* — The competency of a statement as part of the *res gestae* must be made to appear otherwise than by the statement itself, that is, it cannot be used testimonially to prove its own competency.[99]

D. Discretion of Court. — a. *Generally.* — Owing to the nature of the evidence and the principles governing its admission, no rule can be devised which will always determine in a particular case what is *res gestae*;[1] some declarations are clearly admissible and others are as clearly not *res gestae*, but between these extremes is a field in which the trial court must exercise a sound judicial discretion in applying the general principles.[2]

98. Caddell *v.* State, 136 Ala. 9, 34 So. 191; Atlanta Consol. St. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191; United States *v.* Schneider, 21 D. C. 381 (outbursts of grief by sister of person killed by defendant); Goodman *v.* State, 122 Ga. 111, 49 S. E. 922; Brownell *v.* Pacific R. Co., 47 Mo. 239. See Jeffries *v.* State, 9 Tex. App. 598. But see Wilson *v.* State (Tex. Crim.), 90 S. W. 312.

99. On a prosecution for homicide where the unsworn statements of the deceased are sought to be introduced as part of the *res gestae*, the facts showing they are such must be established by the testimony of competent witnesses. Neither the statements themselves nor any part of them can be used to show their admissibility as *res gestae*. State *v.* Williams, 108 La. 222, 32 So. 402.

1. Each Case Must Be Considered by Itself.

District of Columbia. — Washington & G. R. Co. *v.* McLane, 11 App. D. C. 220.

Georgia. — Hall *v.* State, 48 Ga. 607.

Indiana. — Chicago & E. R. Co. *v.* Cummings (Ind. App.), 53 N. E. 1026.

Iowa. — State *v.* Driscoll, 72 Iowa 583, 34 N. W. 428.

Louisiana. — State *v.* Blanchard, 108 La. 110, 32 So. 397.

Maryland. — Wright *v.* State, 88 Md. 705, 41 Atl. 1060.

Michigan. — White *v.* City of Marquette, 140 Mich. 310, 103 N. W. 698.

Missouri. — State *v.* Lockett, 168 Mo. 480, 68 S. W. 563.

Nebraska. — Collins *v.* State, 46 Neb. 37, 64 N. W. 432.

Pennsylvania. — Keefer *v.* Pacific Mut. L. Ins. Co., 201 Pa. St. 448, 51 Atl. 366; Com. *v.* Werntz, 161 Pa. St. 591, 29 Atl. 272.

South Carolina. — State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384. See Rathrock *v.* Cedar Rapids, 128 Iowa 252, 103 N. W. 475; Johnson *v.* State (Wis.), 108 N. W. 55; Snowden *v.* United States, 2 App. D. C. 89.

2. Delaware, L. & W. R. Co. *v.* Ashley, 67 Fed. 209, 14 C. C. A. 368, 28 U. S. App. 375; State *v.* Ah Loi, 5 Nev. 99; People *v.* Callaghan, 4 Utah 49, 6 Pac. 49; Carter *v.* Buchannon, 3 Ga. 513; State *v.* Driscoll, 72 Iowa 583, 34 N. W. 428; Com. *v.* M'Pike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727 (But see Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36). See Murray *v.* Boston & M. R., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495; Omaha & R. V. R. Co. *v.* Chollette, 41 Neb. 578, 59 N. W. 921.

No hard and fast rule can be laid down which will apply to every case, but each case must be considered in connection with the circumstances surrounding it. In view of the attempts which have been made by the courts to determine these cases on precedent, a learned writer has urged that the question should always be left as one of discretion with the trial judge. White *v.* City of Marquette, 140 Mich. 310, 103 N. W. 698.

"When the declarations are not precisely concurrent with the transaction, a delicate and complex question is presented to the trial judge, in determining their admissibility, and each case must be decided upon its own circumstances. In the nature of the case, there can be no hard and fast rule as to the precise time near an occurrence within which declarations explanatory thereof must be made, in order to be admissible. The general rule is that the declarations must be substantially contemporaneous with the litigated transaction, and be the instinctive, spontaneous utterances of the mind while under the active, immediate influences of the transaction; the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations. . . . Questions of this kind must be very largely left to the sound judicial discretion of the trial judge, who is compelled to view all the circumstances in reaching his conclusion, and this court will not reverse his ruling unless it clearly appears from undisputed circumstances in evidence that the testimony ought to have been admitted or rejected, as the case may be." State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384, *followed* in State *v.* Lindsey, 68 S. C. 276, 47 S. E. 389.

In an action for personal injuries received by the plaintiff when ejected from defendant's train, plaintiff offered in evidence as part of the *res gestae* his own declarations made within a minute after the accident to persons who hastened to where he was lying in response to their inquiry "Were you on that train?" His reply was, "Yes, and the brakeman pushed me off, and I believe my foot is cut off." The exclusion of this evidence was held no error. The court says: "The trial court must be permitted to exercise its discretion, very largely, in determining whether the declarations were made under such circumstances as to permit the inference that they were genuine expressions. . . . The discretion of the presiding judge in such cases, however, must not be understood as an absolute discretion, to be exercised arbitrarily, but as a legal discretion, the abuse of which would constitute reversible error. . . . The question presented in this case is whether the exclusion of declarations in question was an abuse of discretion. . . . It is urged, however, that, suffering as he was from a frightful injury at the time he made the declaration, it is unlikely he would concoct a self-serving declaration. Whether he would be likely or unlikely to concoct such a declaration would depend largely on his moral habits, the acuteness and readiness of his mental faculties, his fortitude, and the intensity of his bodily pain, which would not necessarily be in direct ratio to the seriousness of the injury. Of such matters, the trial court, with the party before it as a witness, was the best judge, and, in the light of all the circumstances shown by the record, we do not think it can be said, as a matter of law, that the exclusion of the testimony as to his declarations, made shortly after the accident, was an abuse of discretion. He was permitted to tell his story under oath, and there was no pressing necessity for the admission of his unsworn statement. We have not overlooked the case of Mo. Pac. R. Co. *v.* Baier (Neb.) 55 N. W. 913, wherein the declarations of an injured party remote, perhaps, in point of time, as those under consideration, were admitted in evidence as part of the *res gestae*. We can only say of that case, as we have said of this, that whether such declarations should have been admitted rested largely in the discretion of the trial court, and, having been admitted, this court held that the circumstances under which they were made warranted their admission. Besides, in that case, the injured party died shortly after the injury, and could not be produced as a witness on the trial. That fact, in itself, would not render evidence of such declarations admissible; but it is undoubtedly proper to be taken into account by the trial court in the exercise of its discretion as to the admission of such evidence." Pledger *v.* Chicago, B. & Q. R. Co., 69 Neb. 456, 95 N. W. 1057.

What does and what does not form

b. *Considerations Affecting Determination.* — **(1.) Generally.** In determining whether a declaration is spontaneous and whether too much time has elapsed between it and the main transaction for it to be regarded as part of the *res gestae,* the court must consider all the circumstances surrounding the declarant which influence his mental condition.[3]

(2.) Nature of Statement. — The nature of the statement itself must be considered in determining whether it is spontaneous or the result of deliberation.[4]

part of the *res gestae,* as regards any particular occasion, is often not clearly ascertainable. Though the principle governing the matter has definite boundaries, but whether any particular circumstance falls within such boundaries . . . is a question of competency, the decision of which on appeal is to be treated as a verity unless manifestly wrong. Johnson *v.* State (Wis.), 108 N. W. 55.

3. In determining whether declaration was made spontaneously, all of the circumstances surrounding the declarant which might influence his mental condition must be considered. Mitchum *v.* State, 11 Ga. 615; White *v.* City of Marquette, 140 Mich. 310, 103 N. W. 698; Leahey *v.* Cass Ave. R. Co., 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300; Louisville, N. A. & C. R. Co. *v.* Buck, 116 Ind. 566, 19 N. E. 453. See Bliss *v.* State, 117 Wis. 596, 94 N. W. 325; McLeod *v.* Ginther's Admr., 80 Ky. 399.

See the dissenting opinion of four justices in Vicksburg & M. R. Co. *v.* O'Brien, 119 U. S. 99, holding that the engineer's statement as to how fast his train was running, made between ten minutes and half an hour after the accident and while surrounded by excited passengers, was admissible as *res gestae* because the excitement among the passengers and other parties to such an accident would continue for a considerable length of time.

The declaration of a boy fourteen years of age mortally injured in a street railway accident, as to the cause of his injury, made while lying between the tracks from five to ten minutes ofter the occurrence and in response to a question by his mother, were held admissible as part of the *res gestae* in an action by his administrator. "The declarations made by the deceased at the place of the accident were made so recently after the injuries received, and under such distressing circumstances as to preclude the idea of design or deliberation, and would seem to be but the natural expression of the impression made upon his mind by the actual occurrence. The age and suffering of the boy, and all the surrounding circumstances, utterly exclude all idea of calculation or ability to manufacture evidence for ulterior purposes. We think the declarations were clearly admissible." But declarations made by the boy while in an ambulance on the way to the hospital, in answer to questions by the officer in charge of the ambulance, were held inadmissible, being mere narratives of a past occurrence. Washington & G. R. Co. *v.* McLane, 11 App. D. C. 220.

Time and Place of Declaration. Statements made by the defendant two minutes after the shooting and after he had gone two or three hundred feet from the scene thereof were held not part of the *res gestae.* "These circumstances of time and place do not alone necessarily prevent a declaration from being part of the *res gestae,* but they are factors with other circumstances in determining whether the declarations were the spontaneous utterances of the mind under the immediate influence of the transaction." State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384.

4. Bliss *v.* State, 117 Wis. 596, 94 N. W. 325; Guild *v.* Pringle, 130 Fed. 419, 64 C. C. A. 621, in which the declaration being apparently "an apt and reasoned reply to a question" was excluded.

The fact that the statement was in

(3.) **Manner in Which Made.** — (A.) GENERALLY. — The manner in which the statement was made, whether it appears to have been made with deliberation, or spontaneously, is a circumstance to be considered.[5]

(B.) DECLARATION BY SIGNS. — (a.) *Generally.* — The fact that the declaration or statement was made by means of signs does not affect its competency.[6]

(b.) *Pointing Out Location.* — The act of an eye-witness in pointing out the scene of an injury immediately or very soon thereafter has been held part of the *res gestae* on the issue of where the injury occurred, and as such competent evidence of that fact.[7]

(C.) WHISPERED DECLARATION. — The fact that a statement was whispered or spoken in a suppressed voice tends to show that it is not spontaneous and may therefore warrant its exclusion.[8] The

the nature of an excuse for past misconduct is not alone sufficient to warrant its exclusion. Alsever *v.* Minneapolis & St. L. R. Co., 115 Iowa 338, 88 N. W. 841.

Where it appeared that the deceased was shot from ambush, and shortly after the shooting said to his brother, "Do you know who did this?" and the brother said, "One of them was W. R." and the deceased replied, "Yes, and the other was J. L.," it was held that this conversation was not part of the *res gestae*. In point of time there was no objection to the conversation, but it was not of a character to indicate that it was a spontaneous statement by the deceased but was rather a question by him showing that he was seeking information rather than giving expression to what naturally and irresistibly arose in his mind. Regnier *v.* Territory, 15 Okla. 652, 82 Pac. 509.

5. See Western & A. R. Co., *v.* Beason, 112 Ga. 553, 37 S. E. 863; Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227; Brown *v.* State, 38 Tex. Crim. 597, 44 S. W. 176; Bradbery *v.* State, 22 Tex. App. 273, 2 S. W. 592; People *v.* Kessler, 13 Utah 69, 44 Pac. 97; Forrest *v.* State, 21 Ohio St. 641; Castillo *v.* State, 31 Tex. Crim. 145, 19 S. W. 892, 37 Am. St. Rep. 794.

On a prosecution for attempted rape, it appeared that the prosecutrix upon coming from the room where the alleged assault occurred was crying and attempted to tell her aunt, but the latter stopped her and took her down stairs. The prosecutrix was crying because she was afraid her aunt would whip her. The statements then made by the prosecutrix as to the circumstances of the alleged assault were held not part of the *res gestae* because evidently not spontaneous. "It is evident that fear entered very largely into the girl's statements, and the whole affair excludes spontaneity." Carter *v.* State, 44 Tex. Crim. 312, 70 S. W. 971.

6. Waldele *v.* New York & H. R. R. Co., 29 Hun (N. Y.) 35 (declaration by means of hands, using deaf-mute alphabet); State *v.* Maxey, 107 La. 799, 32 So. 206.

7. Where an eye-witness of an accident was testifying as to the scene thereof many years after the event and had stated that a few minutes after the accident he had pointed out the place to another person, it was held proper to permit the latter to locate the place thus pointed out to her; the act of the eye-witness in pointing out the location being part of the *res gestae*. Reed *v.* Madison, 85 Wis. 667, 56 N. W. 182. See also Karr *v.* Chicago, R. I. & P. R. Co., 87 Iowa 298, 54 N. W. 144.

8. Where witness testified that on the night of the homicide he was in a house about twenty-five or thirty steps distant from the point where deceased was shot and that he heard the report of a gun and cries of distress, it is not allowable for him to testify further that within a minute

circumstances may be such, however, that whispering indicates fear and excitement and therefore spontaneity.[9]

(D.) WRITTEN DECLARATIONS. — A statement or declaration although written after the main event may nevertheless be competent as part of the *res gestae* where the circumstances show that it was spontaneous and unpremeditated.[10]

(E.) STATEMENT MADE TO BE USED AS EVIDENCE. — Where an injured person immediately after his injury requests the presence of witnesses for the purpose of making a statement as to the cause of the injury, the statement though made within five minutes thereafter is not competent as *res gestae* because it is made deliberately and not under such circumstances as to make it spontaneous.[11]

after the shooting another person ran into the house and whispered to him that accused had shot the deceased. "The statement was made immediately after the shooting, the manner in which it was made was indicative of afterthought rather than a spontaneous exclamation prompted wholly by the excitement of the instant, the sudden expression of a perception before reflection had intervened. Where there is thought of the manner there may be thought of the matter. If the speaker was prompted by natural impulses only, there was no need for lowering the voice." The Code provides that language must be free from all suspicion of device or afterthought, as well as contemporaneous. Futch *v.* State, 90 Ga. 472, 16 S. E. 102.

9. Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746. *Compare* Carter *v.* State, 44 Tex. Crim. 312, 70 S. W. 971.

10. State *v.* Morrison, 64 Kan. 669, 68 Pac. 48. This was a prosecution for homicide. The statement of the deceased to the effect that the defendant had killed her, written by her within from three to five minutes after the assault when her throat and windpipe were cut and she was speechless, was held admissible as part of the *res gestae* since it appeared to have been spontaneous and not the result of premeditation or design. "It was the first expression after the cutting, and was so closely connected with it and so spontaneous that it may be fairly regarded as *res gestae.* Under the circumstances, the interval of time which elapsed between the cutting and the writing of the words is not an objection to its admission, nor does it place it among past occurrences or isolated utterances. 'If declarations of a past occurrence are made under such circumstances as will raise the reasonable presumption that they are the spontaneous utterances of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation and design, they will be admissible as part of the *res gestae.*'"

11. Atchison, T. & S. F. R. Co. *v.* Logan, 65 Kan. 748, 70 Pac. 878. In this case it appeared that the injured person, a railway switchman, immediately after being removed from under the cars which had run over him requested the foreman in charge of the train to call some one as he wanted to make a statement. The foreman called the engineer and upon the arrival of the latter, within five minutes after the accident, the switchman made a statement in response to a question by the engineer as to what he had to say. In holding this statement to be no part of the *res gestae* the court says: "The element of spontaneity is the controlling feature in the adjudged cases, holding declarations made immediately after an injury of this kind to be admissible. Lapse of time is important only as effecting the spontaneity of the words uttered. An ejaculation, an intuitive explanation of a hurt, generated by feeling of excitement, are properly included within the *res gestae;* but a statement made after apparent deliberation, in-

(4.) Nature of Connection With Main Fact. — (A.) Generally. — The nature and strength of the connection between the main act and the declaration must be considered as well as the time and place.[12]

(B.) Removal From Scene or Place of Main Transaction. — The fact that the declarant has left or been removed from the place where the main transaction occurred seems to be regarded as a circumstance of some importance in some cases where a declaration or statement has been held inadmissible.[13] Statements have frequently been held

dicative of ruminating delay on the part of the narrator over the matter narrated, removes what is said into the category of self-serving declarations, which are inadmissible. . . . The desire that more than one person should hear his explanation of the cause of his injury, and holding it back until two were present, showed a calculating mind; a preliminary pondering over the subject; a reflective, thoughtful purpose to make testimony, favorable to himself, postponed with method until the number of witnesses desired could attest his words. There was wholly lacking in the circumstances of the declaration that which showed an 'utterance of human nature rather than the individual.' . . . The fact of Logan's death shortly after the statement was made can not affect the competency of the testimony."

12. Puls *v.* Grand Lodge A. O. U. W., 13 N. D. 559, 102 N. W. 165, holding admissible declarations of one suffering from poison as to what medicine he had taken some hours before. "Closeness in point of time and place to the act is material, but not the only test to be applied in determining whether a declaration is part of the *res gestae*. It is obvious that the competency of the evidence cannot be tested by a clock or a foot rule."

13. See the following cases:

Arkansas. — Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572, 82 S. W. 245; Williams *v.* State, 66 Ark. 264, 50 S. W. 517; Blair *v.* State, 69 Ark. 558, 64 S. W. 948; Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168, 24 S. W. 106.

Delaware. — State *v.* Frazier, 1 Houst. Cr. Cas. 176.

Georgia. — Poole *v.* East Tennessee R. Co., 92 Ga. 337, 17 S. E. 267; Roach *v.* Western & A. R. Co., 93 Ga. 785, 21 S. E. 67; Thornton *v.* State, 107 Ga. 683, 33 S. E. 673; Newsom *v.* Georgia R., 66 Ga. 57.

Illinois. — Chicago & E. I. R. Co. *v.* Chancellor, 165 Ill. 438, 46 N. E. 269; Chicago & N. W. R. Co. *v.* Howard, 6 Ill. App. 569.

Indiana. — Cleveland, C. & St. L. R. Co. *v.* Sloan, 11 Ind. App. 401, 39 N. E. 174; Shoecraft *v.* State, 137 Ind. 433, 36 N. E. 113.

Iowa. — Armil *v.* Chicago, B. & Q. R. Co., 70 Iowa 130, 30 N. W. 42.

Kentucky. — Davis *v.* Com., 25 Ky. L. Rep. 1426, 77 S. W. 1101.

Louisiana. — State *v.* Charles, 111 La. 933, 36 So. 29.

Maine. — State *v.* Maddox, 92 Me. 348, 42 Atl. 788.

Michigan. — Merkle *v.* Bennington, 58 Mich. 156, 24 N. W. 776, 55 Am. Rep. 666; People *v.* O'Brien, 92 Mich. 17, 52 N. W. 84.

Missouri. — Leahey *v.* Cass Ave. R. Co., 97 Mo. 165, 10 S. W. 58; 10 Am. St. Rep. 300; State *v.* Rider, 90 Mo. 54, 1 S. W. 825; State *v.* Hendricks, 172 Mo. 654, 73 S. W. 194.

New Jersey. — Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118.

New York. — Lahey *v.* Ottman & Co., 73 Hun 61, 25 N. Y. Supp. 897.

Oklahoma. — Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

Oregon. — State *v.* McCann, 43 Or. 155, 72 Pac. 137.

South Carolina. — State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384; State *v.* Taylor, 56 S. C. 360, 34 S. E. 939.

Texas. — Martin *v.* State (Tex. Crim.), 82 S. W. 657.

Utah. — People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

Wisconsin. — Hall *v.* American Masonic Acc. Assn., 86 Wis. 518, 57 N. W. 366. But see White *v.* City of Marquette, 140 Mich. 310, 103 N. W. 698, in which the court while ex-

to be part of the *res gestae*, however, notwithstanding this fact,[14] especially in cases of a declaration by an injured person as to the cause of his injuries.[15]

cluding the declaration says: "The mere fact that the statement was made at a distance from the place of the accident is of itself not material." And see Com. *v.* Werntz, 161 Pa. St. 591, 29 Atl. 272, for a similar statement.

In an action against a railroad company for injuries sustained by a passenger while alighting from a train, the plaintiff's declarations as to the cause of his injuries made immediately after the train had passed and while he still lay upon the platform where he had fallen were held admissible as part of the *res gestae*. Pennsylvania R. Co. *v.* Lyons, 129 Pa. St. 113, 18 Atl. 759, 15 Am. St. Rep. 701, *distinguishing* Ogden *v.* Pennsylvania R. Co., 44 Leg. Int. (Pa.) 133, on the ground that in that case the injured party had been removed from the place where he was found.

"It has been stated to be an important, though not necessarily a controlling, circumstance connected with the declarations, that they should have been made at the place of occurrence of the principal act. Prideaux *v.* Mineral Point, 43 Wis. 513; Mutcha *v.* Pierce, 49 Wis. 231, 5 N. W. 486." Marler *v.* Texas & P. R. Co., 52 La. Ann. 727, 27 So. 176.

14. *Georgia.* — Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838.

Louisiana. — State *v.* Robinson, 52 La. Ann. 541, 27 So. 129.

Minnesota. — State *v.* Horan, 32 Minn. 394, 20 N. W. 905, 50 Am. Rep. 583.

Texas. — Craven *v.* State (Tex. Crim.), 90 S. W. 311; Berry *v.* State, 44 Tex. Crim. 395, 72 S. W. 170; Beckham *v.* State (Tex. Crim.), 69 S. W. 534; Farris *v.* State (Tex. Crim.), 56 S. W. 336; McKinney *v.* State, 40 Tex. Crim. 372, 50 S. W. 708; Pool *v.* State (Tex. Crim.), 23 S. W. 891.

Wyoming. — Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761.

15. Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838; State *v.* Horan, 32 Minn. 394, 20 N. W. 905, 50 Am. Rep. 583; Moore *v.* State, 31 Tex. Crim. 234, 20 S. W. 563.

In an action for wrongful death, it appeared that the deceased when injured had walked some fifty or sixty feet outside the building where he was injured immediately after his injury, and had been followed by a fellow-worker, who found him sitting with his face on his hands, pale, and apparently in pain. The conversation which immediately ensued as to the cause of the accident was held admissible as part of the *res gestae*. "The conversation sought to be elicited was held with the main actor in the accident, a very few minutes after the fatal stroke, practically on the scene of the accident, and is so clearly and closely connected with the main fact as to impress the mind with the idea that it sprung spontaneously from it without design or premeditation." Christianson *v.* Pioneer Furn. Co., 92 Wis. 649, 66 N. W. 699.

The deceased's statement as to who shot him, made while being pursued from the scene of the shooting by the defendant, was held competent as part of the *res gestae*. State *v* Carter, 106 La. 407, 30 So. 895.

The witness, a police surgeon, who saw part at least of the occurrence, testified that while he was at the door outside of the shed in which the fight took place, he heard a voice inside, which he recognized as that of deceased, saying: "The coon did it;" that when deceased was brought out of the shed, he repeated the same thing; that the witness followed him to the barber shop where he was carried, on the other side of the street and across a lot, and there dressed his wounds. Witness was then asked whether deceased, while lying on the floor of the shop, had made the same or similar declarations. This was excluded as too remote. The court holding the exclusion error, said: "The interval of time from the stabbing and the dis-

(5.) Response to Inquiry or Question. — The fact that the statement or declaration was made in response to an inquiry or question indicates that it was not entirely spontaneous, and this fact alone, or at least in connection with other circumstances, has been held sufficient to require the exclusion of the statement when offered as part of the *res gestae*.[16] On the other hand, however, the other circumstances may sufficiently show the statement to have been spontaneous in spite of the fact that it was a response to a question.[17] Especially

tance of the barber shop from the shed, are not material. It is apparent they were not great, and continuity of events not broken. The declarations were by the party best informed and most interested and at a time and place, to a person and under circumstances which effectually exclude the presumptions that they were the result of premeditation and design." Cain *v.* Werntz, 161 Pa. St. 591, 29 Atl. 272.

16. See the following cases:

United States. — Guild *v.* Pringle, 130 Fed. 419, 64 C. C. A. 621.

Alabama. — Richmond & D. R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577; Louisville & N. R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176.

Arkansas. — Williams *v.* State, 66 Ark. 264, 50 S. W. 517; Ft. Smith Oil Co. *v.* Slaver, 58 Ark. 168, 24 S. W. 106; St. Louis, I. M. & S. R. Co. *v.* Kelley, 61 Ark. 52, 31 S. W. 884.

California. — Luman *v.* Golden Ancient Min. Co., 140 Cal. 700, 74 Pac. 307; Durkee *v.* Central Pac. R. Co., 69 Cal. 533, 11 Pac. 130, 58 Am. Rep. 562.

Colorado. — Herren *v.* People, 28 Colo. 23, 62 Pac. 833; Graves *v.* People, 18 Colo. 170, 32 Pac. 63.

Illinois. — Chicago West Div. R. Co. *v.* Becker, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144.

Louisiana. — State *v.* Charles, 111 La. 933, 36 So. 29.

New Jersey. — Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118.

New Mexico. — Territory *v.* Armijo, 7 N. M. 428, 37 Pac. 1113.

New York. — Lahey *v.* Ottman & Co., 73 Hun 61, 25 N. Y. Supp. 897; Martin *v.* New York, N. H. & H. R. Co., 103 N. Y. 626, 9 N. E. 505.

Ohio. — Forrest *v.* State, 21 Ohio St. 641.

Texas. — Bradbery *v.* State, 22 Tex. App. 273, 2 S. W. 592; Reddick *v.* State (Tex. Crim.), 47 S. W. 993; Stagner *v.* State, 9 Tex. App. 440; Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745; Railway Co. *v.* Crowder, 70 Tex. 222, 7 S. W. 709.

Virginia. — Jones *v.* Com., 86 Va. 740, 10 S. E. 1004.

Wisconsin. — Hall *v.* American Masonic Acc. Assn., 86 Wis. 518, 57 N. W. 366.

17. *Arkansas.* — Little Rock M. R. & T. Co. *v.* Leverett, 48 Ark. 333, 3 S. W. 50.

District of Columbia. — Washington & G. R. Co. *v.* McLane, 11 App. D. C. 220.

Georgia. — Southern R. Co. *v.* Brown, 126 Ga. 1, 54 S. E. 911.

Iowa. — Fish *v.* Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995; Alsever *v.* Minneapolis & St. L. R. Co., 115 Iowa 338, 88 N. W. 841; Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227.

Kentucky. — Louisville & N. R. Co. *v.* Shaw's Admr., 21 Ky. L. Rep. 1041, 53 S. W. 1048.

Louisiana. — State *v.* Robinson, 52 La. Ann. 541, 27 So. 129.

Michigan. — People *v.* Simpson, 48 Mich. 474, 12 N. W. 662; People *v.* Brown, 53 Mich. 531, 19 N. W. 172.

Mississippi. — Head *v.* State, 44 Miss. 731.

Pennsylvania. — Elkins, Bly & Co. *v.* McKean, 79 Pa. St. 493.

Texas. — Farris *v.* State (Tex. Crim.), 56 S. W. 336; Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471; Gautier *v.* State (Tex. Crim.), 21 S. W. 255 (accused's statement in response to arresting officer's question); Craven *v.* State (Tex. Crim.), 90 S. W. 311; Berry *v.* State, 44 Tex. Crim. 395, 72 S. W. 170; Chapman *v.* State, 43 Tex. Crim. 328, 65 S. W. 1098; Drake *v.* State, 29 Tex. App. 265, 15 S. W. 225.

is this true where the statement is inculpatory or against interest.[18]

(6.) Declarations in Course of Conversation. — The fact that the statements claimed to be admissible testimonially as part of the *res gestae* were made in the course of conversation with a third person not a party to the transaction does not of necessity indicate that the statement was premeditated and therefore not part of the *res gestae*.[19]

Virginia. — Bowles *v.* Com., 103 Va. 816, 48 S. E. 527.

Washington. — Dixon *v.* Northern Pac. R. Co., 37 Wash. 310, 79 Pac. 943. See Hooker *v.* Chicago, M. & St. P. R. Co., 76 Wis. 542, 44 N. W. 1085; City of Lexington *v.* Fleharty (Neb.), 104 N. W. 1056; De Walt *v.* Houston E. & W. T. R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534.

The mere fact that the statement was made in response to a question does not deprive it of its character as *res gestae* if otherwise competent under this rule. Murray *v.* Boston & M. R., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, *citing* Fish *v.* Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995; Crookham *v.* State, 5 W. Va. 510.

Deceased was walking on the street when stabbed by the defendant, and he then called for the police and said he was "fainting," "gone," "catch me." He was carried into a saloon, and a witness ran for a doctor and returned without delay, and an officer who had arrived by the time the witness had returned asked deceased "who did it," and the latter answered "two niggers, one a little yellow fellow." *Held* that such statement was part of the *res gestae*. State *v.* Martin, 124 Mo. 514, 28 S. W. 12.

In Rex *v.* Foster, 6 Car. & P. 325, 25 E. C. L. 421, a prosecution for manslaughter, caused by running a carriage over the deceased, a statement made by him in response to a question as to what was the matter, by a person who came up immediately but did not see the accident, was held admissible as the best possible testimony to show what had knocked the deceased down.

In Sutcliffe *v.* Iowa State Traveling Men's Assn., 119 Iowa 220, 93 N. W. 90, an action on an insurance policy, the beneficiary claimed that the insured shot himself, and offered as proof thereof his replies to inquiries by both herself and his mother and sister as to who shot him, made immediately after the shooting. These statements were held competent as part of the *res gestae* being spontaneous utterances springing out of the transaction itself.

In an action for injuries received while alighting from a street car, evidence that the plaintiff answered yes to the question whether she was hurt, asked by the witness upon reaching her immediately after she fell, is competent as part of the *res gestae*. Springfield Consol. R. Co. *v.* Hoeffner, 175 Ill. 634, 51 N. E. 884.

On a prosecution for rape, the fact that the subsequent statements of the assaulted child were made in response to questions by her mother was held not sufficient to deprive them of their spontaneous character, and they were therefore held admissible as *res gestae*. Thomas *v.* State (Tex. Crim.), 84 S. W. 823.

Declarations by Signs in Response to Inquiries. — The statement of a wounded person as to who had shot him, made about two minutes after the shooting and to a person whom he met while running from the scene of the shooting, was held admissible as part of the *res gestae*, though the statement was made wholly by signs in response to inquiries as to whether particular persons had done the shooting. State *v.* Maxey, 107 La. 799, 32 So. 206.

18. Head *v.* State, 44 Miss. 731.

19. Christianson *v.* Pioneer Furn. Co., 92 Wis. 649, 66 N. W. 699; Waldele *v.* New York Cent. & H. R. R. Co., 29 Hun (N. Y.) 35; Pratt *v.* State (Tex. Crim.), 96 S. W. 8; Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153.

The statement of the deceased as to who shot him, made in a conversation with the witness immediately

(7.) **Mental and Physical Condition of Declarant.** — (A.) GENERALLY. The mental and physical condition of the declarant at the time of the declaration is a very important consideration in determining whether too great an interval of time has elapsed between the main transaction and the statement, since there must not only be time but also opportunity for deliberation.[20] If the declarant was suffering physical pain or was still under great mental stress as a result of the principal transaction at the time the statement was made it might be a part of the *res gestae*, although a considerable interval of time had elapsed, the question being, of course, whether his condition had rendered premeditation impossible or improbable.

after the shooting and while the deceased was lying on the ground where he fell, was held admissible as part of the *res gestae*. Franklin *v.* State (Tex. Crim.), 88 S. W. 357.

In an action for wrongful death by the representative of one of the defendant's servants who was run over and killed by defendant's engine which was backing slowly up to a coal chute where the deceased was working, the testimony of another of the defendant's servants as to a conversation between himself, the engineer and the deceased as to the cause of the accident, held within five minutes thereafter, was held admissible as part of the *res gestae*. The objection was particularly urged to a statement by the deceased, "I do not see why you did not see me," and the reply of the engineer, "I was monkeying with my ticket." The deceased was suffering great pain at the time. "The circumstances under which these statements were made clearly show there was no intention to misrepresent the truth of the occurrence. The statements were *res gestae* and were admissible." Missouri, K. & T. R. Co. *v.* Jones, 35 Tex. Civ. App. 584, 80 S. W. 852, *citing* San Antonio & A. P. R. Co. *v.* Gray, 95 Tex. 424, 67 S. W. 763.

20. Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838 (statement half hour after injury held competent). See the following:

United States. — Delaware, L. & W. R. Co. *v.* Ashley, 67 Fed. 209, 14 C. C. A. 368, 28 U. S. App. 375.

Delaware. — Chielinsky *v.* Hoopes & Townsend Co., 1 Marv. 273, 40 Atl. 1127.

District of Columbia. — Washington & G. R. Co. *v.* McLane, 11 App. D. C. 220.

Indiana. — Louisville, E. & St. L. R. Co. *v.* Berry, 2 Ind. App. 427, 28 N. E. 714; Louisville, N. A. & C. R. Co. *v.* Buck, 116 Ind. 566, 19 N. E. 453.

Kentucky. — Louisville & N. R. Co. *v.* Shaw's Admr., 21 Ky. L. Rep. 1041, 53 S. W. 1048.

Nebraska. — Pledger *v.* Chicago, B. & Q. R. Co., 69 Neb. 456, 95 N. W. 1057.

Nevada. — State *v.* Ah Loi, 5 Nev. 99.

Texas. — Berry *v.* State, 44 Tex. Crim. 395, 72 S. W. 170; Pool *v.* State (Tex. Crim), 23 S. W. 891; Moore *v.* State (Tex. Crim.), 96 S. W. 321; Craven *v.* State (Tex. Crim.), 90 S. W. 311; Missouri, K. & T. R. Co. *v.* Jones, 35 Tex. Civ. App. 584, 80 S. W. 852; City of Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519; Castillo *v.* State, 31 Tex. Crim. 145, 19 S. W. 892, 37 Am. St. Rep. 794.

Virginia. — Kirby *v.* Com., 77 Va. 681, 46 Am. Rep. 747. But see McCarrick *v.* Kealy, 70 Conn. 642, 40 Atl. 603; Martin *v.* State (Tex. Crim.), 82 S. W. 657.

In an action on a life insurance policy where it appeared that the deceased was run over by a train and both arms so badly crushed as to render amputation necessary, a statement of the deceased as to the manner in which the accident occurred, made about an hour afterwards, was held admissible as part of the *res gestae*. "The ordinary rule is that a statement of this kind must have been made so recently that it would leave no room for collusion or premeditated self-serving. But no time

can be arbitrarily fixed; it depending so largely upon the circumstances of each individual case. In Dixon *v.* Northern Pacific Railway Co., 37 Wash. 310, 79 Pac. 793, 68 L. R. A. 895, we held that fifteen minutes was not so long a time as would exclude the testimony, and in Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111, that testimony given within three hours after a railroad accident had occurred could be admitted as *res gestae*. In this case, considering the facts that the man's associates had left him, that he was so mangled and crushed that an amputation of his arms was necessary, and that he died within thirty-six hours of the accident, it would be a violent presumption to indulge that the statement was made for a self-serving purpose; and we think that the refusal of testimony under such circumstances would tend to work an injustice by excluding testimony which would have a tendency to throw light on a transaction which would otherwise be obscure for want of evidence." Starr *v.* Aetna L. Ins. Co., 41 Wash. 199, 83 Pac. 113.

In an action for injuries sustained by the plaintiff at the time he was unlawfully ejected from the defendant's train by its brakeman, the statement of the plaintiff as to how he had been injured made in response to questions by witnesses who had run to his assistance upon hearing his cries for help and made while the plaintiff was crying and holding up his arm which had been run over by the train, was held competent as part of the *res gestae* although the statement was made five or ten minutes after the accident. "It was a spontaneous impulsive statement of fact while the boy was suffering intense and excruciating pain and under the excitement of the accident where the natural prompting would be to speak the truth. Dixon *v.* Northern Pac. R. Co., 37 Wash. 310, 79 Pac. 943, *citing* Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.

Fifteen Minutes After, while speaker was groaning with pain, though he had moved from the scene of the accident. International & G. N. R. Co. *v.* Smith (Tex.), 14 S. W. 642.

An Hour and a Half After. — On a prosecution for homicide where it appeared that death resulted from severe burns alleged to have been caused by the defendant, statements of the deceased as to how he received his burns and who his assailants were, made in response to questions an hour and a half after the burns were received and after he had been removed to the hospital, were held competent as part of the *res gestae* since the deceased was suffering great agony at the time and there had been no break in his suffering up to that point; but a second conversation held with him an hour later was held to be not competent as *res gestae*, although he was still suffering extreme agony, since it had none of the elements of instinctiveness and spontaneity. Chapman *v.* State, 43 Tex. Crim. 328, 65 S. W. 1098, *following* Freeman *v.* State, 40 Tex. Crim. 545, 46 S. W. 641, 51 S. W. 230. See also Lewis *v.* State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720, where similar statements were admitted under similar circumstances.

Where the plaintiff in a personal injury action was injured by falling into an open excavation in the night time, his statement in answer to a direct and leading question that there was no light placed at the hole, made some ten minutes after his fall, was held improperly admitted as part of the *res gestae*. It was held that under the circumstances the declaration was not spontaneous and unpremeditated, apparently being "an apt and reasoned reply to a question. He was clearly not in such pain as to be incapable of reasoning, reflecting, and, if he thought fit, making a possibly untrue and self-serving declaration. . . . We do not base our conclusion on the mere fact that there had been a sufficient interval of time between the injury and the declaration to allow premeditation. To exclude a declaration which might otherwise be a part of the *res gestae*, there must have been not only time for the manufacture of self-serving evidence, but also opportunity otherwise. If, in a case of personal

The mere fact, however, that the statement was made soon after the infliction of the injury and while the speaker was suffering great pain, does not make it part of the *res gestae*.[21]

(B.) At Time of Declaration. — The fact that the declarant's mind was not clear at the time because of his injuries or his intoxication does not render inadmissible his statement otherwise competent.[22]

(C.) In Interval Between Main Fact and Statement. — Where the declarant was rendered unconscious during the principal occurrence, his statements immediately upon regaining consciousness may be spontaneous and therefore regarded as part of the *res gestae* though a considerable length of time has elapsed.[23] And the intervening

injury, the declarant has been in such great pain as to be incapable of reasoning and recollecting, his statement made after even a very considerable interval of time may be fully as spontaneous and unpremeditated as if made at the very moment of the injury." Guild *v.* Pringle, 130 Fed. 419. 64 C. C. A. 621.

On a prosecution for homicide alleged to have been caused by an attempted abortion, the declarations of the deceased as to her pregnant condition made to the defendant, a physician, at the time the deceased was introduced to him for the alleged purpose of securing relief, were held competent as part of the *res gestae*, although made several days prior to her death. State *v.* Alcorn, 7 Idaho 599, 64 Pac. 1014.

Excitement or Fright of Declarant. — Griffin *v.* State, 40 Tex. Crim. 312, 50 S. W. 366 (exculpatory declaration of person charged with homicide, made five or ten minutes after the fatal act, and while much excited and frightened).

21. In an action for the wrongful death of a railway brakeman who had been thrown to the ground and run over by his train, the deceased's statements as to where he had been riding and explaining the manner in which he was thrown to the ground and injured, made within a few minutes after the accident, were held improperly admitted as part of the *res gestae*, although they were made while he was suffering great pain. "The statements appear to have been made deliberately and connectedly and were a mere narrative of a past occurrence. In determining whether declarations should be received as part of the *res gestae* of an occurrence, the mere question of the lapse of time is not controlling. The real test is were the declarations a part of the occurrence to which they relate, or were they a mere narrative concerning something which had fully taken place and had therefore become a thing of the past." Western & A. R. Co. *v.* Beason, 112 Ga. 533, 37 S. E. 863.

22. Johnson *v.* State, 65 Ga. 94.

On a prosecution for robbery where it appeared that the prosecuting witness who had been drinking liquor freely was knocked senseless and robbed, his statements made immediately upon regaining consciousness a few minutes after the robbery were held competent as part of the *res gestae*, although made in the absence of the defendant. "The weight to be attached to them because of his mental condition was for the jury to determine in connection with other evidence bearing upon his condition." State *v.* Ripley, 32 Wash. 182, 72 Pac. 1036.

23. Hill *v.* Com., 2 Gratt. (Va.) 595; Johnson *v.* State, 65 Ga. 94.

In an action for wrongful death, the statements of the deceased made an hour after leaving the scene of the injury and elicited by questions are not part of the *res gestae*, but are a mere narrative of a past event, at least where it appears that the declarant was not unconscious during the interval. "One of the incidents of the case under consideration, which in some measure makes it less easy of solution, is the claimed unconsciousness of decedent, during the period of time which elapsed between the injury and the statement relied upon.

unconsciousness is a factor to be considered in any event in determining whether a subsequent statement is part of the *res gestae*.[24] So where the injured person, because of his injuries, is unable to speak until some little time after their infliction his statement as to how they were caused, made as soon as he could speak, has been held admissible.[25]

(8.) Death of Declarant. — (A.) GENERALLY. — The death of the declarant is not a prerequisite to the admissibility of his *res gestae* statements.[26] Nor does the fact that the declarant dies very soon after making his statement affect its competency if it is not otherwise part of the *res gestae*.[27] It has been held, however, that the death of the declarant and the consequent inability to produce his testimony is a circumstance properly considered by the court in ex-

The mere fact that the statement was made at a distance from the place of the accident is of itself not material, but the length of time intervening before the statement was made, and the condition of decedent during that period, and the circumstances under which the statement was made, all taken together, are of vital importance. Some authorities hold that voluntary, spontaneous statements made immediately after a period of unconsciousness, even at a distance from the place of accident, may be received as part of the *res gestae*. 24 Enc. of Law (2d Ed.) p. 795, and cases cited. The undisputed testimony shows that decedent was not unconscious during this entire time." White *v.* City of Marquette, 140 Mich. 310, 103 N. W. 698.

In an action for injuries received during a runaway, alleged to have been caused by the negligent whistling of the defendant's locomotive, the plaintiff's declaration, "Thank God, my children are saved, though I am killed," made immediately after she regained consciousness and in response to a question as to her condition was held admissible as part of the *res gestae*. About twenty minutes had elapsed between the accident and the declaration. Ft Worth & D. C. R. Co. *v.* Partin, 33 Tex. Civ. App. 173, 76 S. W. 236.

Where it appeared that the defendant in a prosecution for homicide had attempted by the use of morphine to kill herself and her children, for whose murder she was on trial, her statement made on regaining consciousness and while efforts were being made to revive the children, that she had given them morphine, was held competent as part of the *res gestae*. People *v.* Quimby, 134 Mich. 625, 96 N. W. 1061.

Where the nature of the injury sustained in a railway accident is such as to occasion immediate unconsciousness, deceased being unconscious when found a few minutes after the accident, the statement of deceased voluntarily made immediately upon regaining consciousness, several hours after accident, as to cause of acident, is admissible, as part of *res gestae*. Missouri K. & T. R. *v.* Moore, 24 Tex. Civ. App. 489, 59 S. W. 282.

24. Freeman *v.* State, 40 Tex. Crim. 545, 46 S. W. 641, 51 S. W. 230. See Brownell *v.* Pacific R. Co., 47 Mo. 239; Collins *v.* State, 46 Neb. 37, 64 N. W. 432.

25. Irby *v.* State, 25 Tex. App. 203, 7 S. W. 705 (statement of deceased, in prosecution for homicide, made fifteen or twenty minutes after the shooting); Fuller *v.* State, 28 Tex. App. 465, 13 S. W. 750 (same—half hour after).

26. Ferguson *v.* Columbus & Rome R., 75 Ga. 637.

27. Atchison, T. & S. F. R. Co. *v.* Logan, 65 Kan. 748, 70 Pac. 878. But see Starr *v.* Aetna L. Ins. Co., 41 Wash. 199, 83 Pac. 113.

ercising its discretion as to the admission of his declarations as *res gestae*.[28]

(B.) Dying Declarations. — While a dying declaration is not competent as such in a civil case,[29] the fact that a declaration was made under the sense of impending death may be an important factor in determining its admissibility as *res gestae* in a civil action.[30]

(9.) Availability of Other Evidence. — (A.) When Declarant Is a Witness. — The fact that the declarant is also a witness at the trial seems to have been a circumstance considered in some cases in holding declarations no part of the *res gestae*.[31]

(B.) Testimony to Same Effect Does Not Cure Error in Excluding. Where a statement forms part of the *res gestae* and is competent as such, the fact that the declarant is permitted to testify to the same facts does not cure the error in excluding the statement when offered by the defendant in a criminal prosecution.[32]

(C.) Absence of Eye-Witnesses. — The fact that there were no eyewitnesses to the act in question is a circumstance which has been considered in some cases.[33]

(10.) Age of Declarant. — The fact that the declarant was a child, is a circumstance which tends to negative premeditation.[34]

28. Pledger *v.* Chicago, B. & Q. R. Co., 69 Neb. 456, 95 N. W. 1057. But see Central R. & Bkg. Co. *v.* Kelly, 58 Ga. 107.

29. See article "Dying Declarations," Vol. IV. See Taylor *v.* State, 120 Ga. 857, 48 S. E. 361.

30. Jack *v.* Mutual Reserve Fund L. Assn., 113 Fed. 49, 51 C. C. A. 36; Johnson *v.* State, 102 Ala. 1, 16 So. 99. See McLeod *v.* Ginther's Admr., 80 Ky. 399; Benson *v.* State, 38 Tex. Crim. 487, 43 S. W. 527; Kirby *v.* Com., 77 Va. 681, 46 Am. Rep. 747. But see Marler *v.* Texas & P. R. Co., 52 La. Ann. 727, 27 So. 176.

31. State *v.* Maddox, 92 Me. 348, 42 Atl. 788. See also State *v.* Oliver, 39 La. Ann. 470, 2 So. 194 (availability of declarant's testimony).

That the deceased had been sworn as a witness on the commitment trial would not *per se* exclude any sayings of her's which were a part of the *res gestae*. Stevenson *v.* State, 69 Ga. 68.

32. Griffin *v.* State, 40 Tex. Crim. 312, 50 S. W. 366. *Contra*— O'Shields *v.* State, 55 Ga. 696.

33. There were no eye-witnesses to the homicide. Testimony of witness that about five or ten minutes after the last shot had been fired witness went to defendant's ice factory some seventy yards distant and there found the defendant, who said: "I am sorry I was compelled to do what I have done. I was sleeping in the factory when I heard the noise of breaking dishes in the house. I got up and went towards my house and heard deceased say he would kill me, and he was coming towards me with what I thought was a gun in his hands, and saying 'I will kill the d—— s—— of a b——,' and I fired on him twice. I do not know whether I have killed him or not. I will go down to M's with you, and then go to surrender myself to the sheriff," which he did. Held admissible as *res gestae* in view of the fact that there were no eyewitnesses, and the testimony of M. as to defendant's and witness's presence at his house where defendant said he was going, where witness related the story as told by accused, besides a failure to explain just what he did explain would have been an inculpatory fact, and the circumstances demanded an explanation. Brunet *v.* State, 12 Tex. App. 521.

34. Castillo *v.* State, 31 Tex. Crim. 145, 19 S. W. 892, 37 Am. St. Rep. 794. See Washington & G. R. Co. *v.* McLane, 11 App. D. C. 220,

(11.) Statements Made at Same Time. — Although two statements are made by a person at practically the same time, one may be competent as part of the *res gestae* and the other not.[35]

(12.) Repetition of Statement. — Where the statement is a mere repetition of what has already been said shortly previous, it may not be admissible as *res gestae* although it might have been so considered, had no prior statement been made.[36]

(13.) The Real Test is whether the declaration, considering all the circumstances, was spontaneously made without premeditation under pressure of the main transaction and can therefore be regarded as trustworthy.[37]

and article "RAPE." But see McCarrick *v.* Kealy, 70 Conn. 642, 40 Atl. 603.

35. On a prosecution for homicide, the statement of the deceased, "What a pity! What a pity! They killed me for nothing" made after he had gone about two hundred feet from the scene of the difficulty to a drug store, and within fifteen or twenty minutes after the fatal injury was inflicted was held admissible as part of the *res gestae;* but a statement made at the same time, "What will become of my poor wife and children" was held not admissible. Wilson *v.* State (Tex. Crim.), 90 S. W. 312.

36. Where the defendant had already made a statement as to how deceased came to his death, his second statement within a few minutes after the killing as to how the difficulty occurred is not competent as part of the *res gestae.* Fitzgerald *v.* Com., 9 Ky. L. Rep. 664, 6 S. W. 152.

37. *United States.*—Guild *v.* Pringle, 130 Fed. 419, 64 C. C. A. 621.

District of Columbia. — Washington & G. R. Co. *v.* McLane, 11 App. D. C. 220.

Georgia. — Ferguson *v.* Columbus & Rome, 75 Ga. 637; Augusta Factory *v.* Barnes, 72 Ga. 217; Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

Illinois. — Chicago & E. I. R. Co. *v.* Chancellor, 165 Ill. 438, 46 N. E. 269; See Muren Coal & Ice Co. *v.* Howell, 217 Ill. 190, 75 N. E. 469.

Iowa. — Fish *v.* Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995; State *v.* Jones, 64 Iowa 349, 17 N. W. 911; Rothrock *v.* Cedar Rapids, 128 Iowa 252, 103 N. W. 475; Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227.

Louisiana. — State *v.* Foley, 113 La. 52, 36 So. 885; State *v.* Maxey, 107 La. 799, 32 So. 206; Marler *v.* Texas & P. R. Co., 52 La. Ann. 727, 27 So. 176.

Missouri. — State *v.* Lockett, 168 Mo. 480, 68 S. W. 563.

South Carolina. — Williams *v.* Southern R., 68 S. C. 369, 47 S. E. 706; State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384.

Texas. — Berry *v.* State, 44 Tex. Crim. 395, 72 S. W. 170; Chapman *v.* State, 43 Tex. Crim. 328, 65 S. W. 1098.

Washington. — Starr *v.* Aetna L. Ins. Co., 11 Wash. 199, 83 Pac. 113; Dixon *v.* Northern Pac. R. Co., 37 Wash. 310, 79 Pac. 943.

Wisconsin. — Christianson *v.* Pioneer Furniture Co., 92 Wis. 649, 66 N. W. 699.

Wyoming. — Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761.

See also the following:

United States. — Cross Lake Logging Co. *v.* Joyce, 83 Fed. 989, 28 C. C. A. 250; Pierce *v.* Van Dusen, 78 Fed. 693, 24 C. C. A. 280; United States *v.* King, 34 Fed. 302.

Arkansas. — Carr *v.* State, 43 Ark. 99; Little Rock M. R. & T. Co., *v.* Leverett, 48 Ark. 333, 3 S. W. 50.

California. — Williams *v.* Southern Pac. Co., 133 Cal. 550, 65 Pac. 1100; People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 49.

Colorado. — Herren *v.* People, 28 Colo. 23, 62 Pac. 833.

Delaware. — Di Prisco *v.* Wilmington City R. Co., 4 Pen. 527, 57 Atl. 906.

Florida. — Lambright *v.* State, 34 Florida 564, 16 So. 582.

Iowa. — Hutcheis *v.* Cedar Rapids & M. C. R. Co., 128 Iowa 279, 103 N. W. 779.

Kentucky. — Lexington St. R. Co. *v.* Strader, 28 Ky. L. Rep. 157, 89 S. W. 158.

Louisiana. — State *v.* Robinson, 52 La. Ann. 541, 27 So. 129.

Minnesota. — State *v.* Williams, 96 Minn. 351, 105 N. W. 265; State *v.* Horan, 32 Minn. 394, 20 N. W. 905, 50 Am. Rep. 583.

Missouri. — Lealiey *v.* Cass Ave. R. Co., 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300; Gotwald *v.* St. Louis Transit Co., 102 Mo. App. 492, 77 S. W. 125.

Nebraska. — Collins *v.* State, 46 Neb. 37, 64 N. W. 432; City of Friend *v.* Burleigh, 53 Neb. 674, 74 N. W. 50; Union Pac. R. Co. *v.* Elliott, 54 Neb. 299, 74 N. W. 627.

Nevada. — State *v.* Ah Loi, 5 Nev. 99.

New York. — Scheir *v.* Quirin, 77 App. Div. 624, 78 N. Y. Supp. 956; Kennedy *v.* Rochester City & B. R. Co., 130 N. Y. 654, 29 N. E. 141.

Pennsylvania. — Keefer *v.* Pacific Mut. L. Ins. Co., 201 Pa. St. 448, 51 Atl. 366.

Rhode Island. — State *v.* Murphy, 16 R. I. 528, 17 Atl. 998.

Texas. — Missouri, K. & T. R. Co. *v.* Jones, 35 Tex. Civ. App. 584, 80 S. W. 852; Moore *v.* State (Tex. Crim.), 96 S. W. 321.

Virginia. — Andrews *v.* Com., 100 Va. 801, 40 S. E. 935.

Washington. — Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.

Wisconsin. — Bliss *v.* State, 117 Wis. 596, 94 N. W. 325.

"The real test is, whether the principal act and the declarations sought to be considered as part of the *res gestae* are separable from each other by such a lapse of time as to render it probable that the parties are speaking from designing purposes rather than instinctive impulse." Chicago & E. I. R. Co. *v.* Chancellor, 165 Ill. 438, 46 N. E. 269.

The true reason for the admission of a declaration made subsequent to the occurrence to which it relates would seem to be that it is shown to be an utterance instinctively made as the result of impulses produced by the occurrence to which it related and under circumstances showing it not to be the result of premeditation or design. DeWalt *v.* Houston E. & W. T. R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534.

It is indispensable that the words claimed to be *res gestae* should be or appear to be spontaneous, "and it is for this reason alone that they are required to be speedy. There must be no fair opportunity for the will of the speaker to mold or modify them. His will must have become and remained dormant, so far as any deliberation in concocting matter for speech or selecting words is concerned." Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 776, 12 S. E. 18, 27.

Declarations to be admissible as *res gestae* "must be the natural emanations or promptings of the act or occurrence in question, and although not exactly concurrent in point of time, yet if they were voluntarily and spontaneously made, and so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as reasonably to exclude the idea of design or deliberation, such declarations are admissible as part of the *res gestae.*" Washington & G. R. Co. *v.* McLane, 11 App. D. C. 220.

The statements of the deceased to the witness as to the cause and particulars of the difficulty with defendant, made within two minutes after the fatal shooting and while the deceased was fleeing from the defendant, were held improperly excluded since they form part of the *res gestae.* The question whether such statements constituted part of the *res gestae* "depends upon whether the circumstances are such as that it may with reasonable certainty be affirmed that the declarations were *produced* by and *instinctive* upon the occurrences to which they relate rather than a retrospective *narration* of them. If they are the ebullition of a state of mind engendered by what happened and not mere statement of the facts as held in memory of a past transaction—if they were made so soon after the difficulty as

E. STATEMENTS OF THIRD PERSONS. — a. *Generally.* — It is not essential that statements or exclamations to be admissible as *res gestae* should have been made by parties to the action; the declarations of third persons if made spontaneously, forming part of and tending to explain the principal transaction are considered equally a part of the *res gestae.*[38]

There must, however, in any case be a sufficient showing that the statement was made as a part of the transaction and under such circumstances that its spontaneity is assured.[39]

that, under the particular circumstances transpiring between the difficulty and the declarations, it is reasonably clear that they sprang out of the transaction and stand in relation of unpremeditated result thereto, the idea of deliberate design in making them being fairly precluded, and tend to elucidate the difficulty—they are to be regarded as contemporaneous with the main transaction and as a part of it within the rule as to *res gestae.*" Nelson *v.* State, 130 Ala. 83, 30 So. 728.

The statements of the defendant shortly after the struggle in which the deceased was shot and after the latter had been removed, and during an attack upon the defendant by the deceased's wife were held not competent as part of the *res gestae* since they were not made under the immediate influence of the preceding difficulty. "In order that anything said after an event should be considered part of it within the meaning of the law of *res gestae* the speaker must be supposed to have been prompted to speak solely by the excitement of the event; in other words, it must have been the event speaking through him." State *v.* Gianfala, 113 La. 463, 37 So. 30.

38. Leach *v.* Oregon Short Line R. Co., 29 Utah 285, 81 Pac. 90; Gulf, C. & S. F. R. Co. *v.* Tullis (Tex. Civ. App.), 91 S. W. 317; State *v.* Kaiser, 124 Mo. 651, 28 S. W. 182; Gulf, C. & S. F. R. Co. *v.* Moore, 69 Tex. 157, 6 S. W. 631.

In an action on a life policy upon the issue whether accused died by his own hand, the landlord of the house where accused stopped testified that upon hearing the report of a pistol he called his wife's attention to it, immediately arose and at once went into the hall, without stopping to dress, and upon reaching the door of a room next to his (occupied by one B.) he met B. coming out seemingly excited, saying something about the man having shot himself. The landlord passed into the room, found assured sitting upright in bed, part of his clothing off, with eyes open, with fresh blood over heart, a pistol lying beside the bed, and upon being approached assured was found dead. This was not room assigned to assured but to B. It was proved at trial that N. was then dead and that no one was present at the time when the pistol was fired, unless B. was then present. *Held,* that the declaration of B. was part of *res gestae* upon the principle of Insurance Co. *v.* Mosley, 8 Wall. (U. S.) 397. Newton *v.* Mutual Ben. L. Ins. Co., 2 Dill. 154, 18 Fed. Cas. No. 10,191 (*reversed* in 89 U. S. 32, but not on the *res gestae* question).

39. Carr *v.* State, 76 Ga. 592; Marsh *v.* South Carolina R. Co., 56 Ga. 274; Metropolitan R. Co. *v.* Collins, 1 App. D. C. 383; Dixon *v.* Northern Pac. R. Co., 37 Wash. 310, 79 Pac. 943; Elder *v.* State, 69 Ark. 648, 65 S. W. 938; Eddy *v.* Lowry (Tex. Civ. App.), 24 S. W. 1076. See State *v.* Riley 42 La. Ann. 995, 8 So. 469.

Statements of Passengers. — In action for damages for being put off the train, where the conductor was present and witnessed what occurred, evidence that the passengers requested the conductor to remove plaintiff and their opinions expressed, were not competent as exclamations of bystanders. The passengers had no control of conductor, nor was he bound to accede to their request, but the existence of facts essential under the plea and under the statute constituted his sole justification. Nash-

b. *Participants.* — (1.) Generally. — Declarations of persons not parties who participate in some way in the transaction, even though not directly actors therein, if such declarations spring spontaneously therefrom and tend to explain such transaction are admissible as part of the *res gestae*.[10]

ville, C. & St. L. R. *v.* Moore (Ala.), 41 So. 984.

Testimony of witness that immediately after the shooting he started to the spot where the shooting occurred, a few feet away, and when he reached the place some one said: "Little Jack Kennedy (defendant) shot him, and there he goes." *Held*, that remarks of this character by a bystander are not *res gestae* but hearsay. *Ex parte* Kennedy (Tex. Crim.), 57 S. W. 648.

Where a witness had testified that an engineer did not ring a bell at a particular point, it was held improper to permit him, in answer to the question whether his attention was called to the fact at the time, to state that it was talked about at the time that no bell or whistle was sounded or that he heard some one say that the bell was not rung, the statements of such other persons being mere hearsay. Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 99.

In Wright *v.* State, 88 Md. 705, 41 Atl. 1060, a prosecution for homicide, the declaration of an eye-witness of the homicide made within five minutes after the shooting, but after the witness had time to get over his "scare and excitement" and to think the matter over, was held not admissible as *res gestae*.

In an action by a miner for personal injuries received while at work at the bottom of a shaft, the statements of his fellow-servant and of the superintendent as to how the accident occurred, made in response to the plaintiff's inquiries after he reached the top of the shaft ten minutes after the injury, were held no part of the *res gestae*. Luman *v.* Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307.

40. See Flynn *v.* State, 43 Ark. 289; Omaha & R. V. R. Co. *v.* Chollette, 41 Neb. 578, 59 N. W. 921; Colley *v.* Com., 11 Ky. L. Rep. 346, 12 S. W. 132; State *v.* Corcoran, 38 La. Ann. 949.

Where defendant was arrested at night under the window of a "room occupied by two young women," where one of the panes of glass had been broken out, the exclamation of one of them on running to her father in an adjoining room, "that she saw some one at the window," who caused the immediate arrest of defendant, is admissible as part of the *res gestae*. Dismukes *v.* State, 83 Ala. 287, 3 So. 671.

Immediately preceding the discharge of the pistol by the accused, the prosecuting witness, who was the assaulted party, ordered his daughter, the wife of the accused, to leave the room, to which she replied, "No pa; if I do John will shoot you." *held*, that what the wife said to her father, as well as her screams and call for help, were all parts of the transaction, in the nature of verbal acts illustrating the feelings, motives and acts of the principal actors, of whom the wife was one. Jeffries *v.* State, 9 Tex. App. 598.

Statements of Driver of Vehicle Three Minutes After. — Declarations made at the scene of the accident by the driver of the vehicle in which deceased was riding when struck by railway, to the witness who was the first person to get to deceased after the injury, having been but a short distance off and witnessed the collision, and only two or three minutes having elapsed when he got there, "that deceased advised him to cross ahead of the train," were held to be admissible as *res gestae*. Louisville & N. R. Co. *v.* Molloy's Admx., 28 Ky. L. Rep. 1113, 91 S. W. 685.

On a prosecution for larceny, the prosecutor testified that he had stepped to the back part of his premises, leaving the store in charge of a child, when he heard the child exclaim: "You are being robbed!" and thereupon he rushed into the store and saw the accused running out. *Held*, that the exclamation of

(2.) Fellow-Servants or Companions of Injured Person. — This rule applies to the statements of a fellow-servant or a companion of the injured person,[41] in a trial involving the injury. Thus in a criminal prosecution based on an assault, the statements of others injured at the same time may be part of the *res gestae*.[42]

c. *Third Person Not Present.* — The declaration of a third person not present at the scene of the principal occurrence has been held no part of the *res gestae*, although occasioned by the sounds of

child was part of *res gestae*, as the child was a participant in the event related by witness, as well as the witness who heard it and the defendant, who ran out of the store; and the acts are inseparably connected with and explanatory of each other and together constitute the transaction. State *v.* Moore, 38 La. Ann. 66.

41. O'Donnel's Admr. *v.* Louisville Elec. L. Co., 21 Ky. L. Rep. 1362. 55 S. W. 202.

In an action for wrongful death it appeared that the deceased, a brakeman on defendant's railway, was knocked from the top of a train by an overhanging bridge, the exclamation of the conductor made immediately after the accident to another of defendant's servants, "My God! Go back and see if you can find Leach. The bridge knocked him off" was held properly admitted as part of the *res gestae*. "While there is no fixed and settled rule by which the admissibility of acts done or declarations made in relation to a transaction, under the doctrine of *res gestae*, shall be determined, yet the great weight of authority holds that the declarations or acts sought to be introduced in evidence as part of the *res gestae* must be connected with or grow out of the main or principal transaction which is the subject-matter of the litigation, and must tend to elucidate and explain such transaction." Leach *v.* Oregon Short Line R. Co., 29 Utah 285. 81 Pac. 90.

In an action for personal injuries received by falling through a hatch cover into the hold of a vessel, the statements of the persons assisting in removing the plaintiff from the hold, some of them made immediately after and some within a few minutes after the accident, were held admissible as part of the *res gestae* to show that the accident was caused by the plaintiff's and not the defendant's negligence. "What was said just after the hatch cover gave way by those present was a concomitant of the accident and seems to have grown directly out of it as a natural incident. What was said very shortly after by those who had participated in uncovering the hold was so nearly contemporaneous with the accident as to belong to the same class of evidence." Westall *v.* Osborne, 115 Fed. 282, 53 C. C. A. 74. But see The Saranac, 132 Fed. 936.

Where it appeared that one of the deck hands was drowned while crossing a plank leading from the floor of the boat to the wheel where they were ordered to go to perform a duty, exclamations of one of the men in the hearing of the officer commanding the men to hurry up, "Look out, that plank is cracked," were held admissible as part of the *res gestae*. Louisville & C. Packet Co. *v.* Samuels, 22 Ky. L. Rep. 979, 59 S. W. 3.

42. Where the murdered woman's husband and a stranger sleeping in the same room were also shot at about the same time, and there was an attempt to burn the house by fire started in another room, the state was allowed to prove that soon after the shooting the husband addressed a person in the room where the fire was, thus: "Henry, you d — n son of a b — h, you are going to burn us all up," Henry being the Christian name of the defendant, who had been recognized at the same time, as shown by the testimony of the stranger. *Held*, declaration to be part of the *res gestae*. State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590. See State *v.* Wagner, 61 Me. 178.

such occurrence and relating thereto.[43] It has been held that such statements are not admissible because not heard by the participants, though this apparently is a misconception of the grounds on which the admission of spontaneous exclamations is based.[44]

43. In an action for personal injuries where the alleged negligence was the unnecessary blowing of a locomotive whistle, the statement of one who heard the whistle, that "it was brutish the way they whistled," made to her husband at the time of the whistling, was held no part of the *res gestae*, the declarant not being present at the scene of the accident and not having seen the train. "We must consider the situation of the witness and her location as to the scene and surroundings of the main litigated act. She was a square and a half away from the place of the accident. She did not know of it until some time after it occurred. She did not know that the decedent was in the mill yard, or that there was any peril in his situation. She was in the quiet and calm of her own home, in the presence of her husband. She was not surrounded by any circumstances to excite her mind or arouse her emotions. She had no possible connection with the main fact to be litigated. She was not a bystander, and, so far as the litigated facts are concerned, was an entire stranger, except she heard the sound of the whistle. These are not the declarations of a person present, nor were they made in the heat of the emergency. They had nothing to do in illustrating the nature, cause, or extent of the wrong done. What the witness said to her husband in the quiet of their home could not have been a part of the *res gestae*, and we must so hold." Chicago & E. R. Co. *v.* Cummings (Ind. App.), 53 N. E. 1026.

In an action for wrongful death caused by a street railway accident, a witness testified that he had seen the accident from a nearby window, it was held that his statement made to his wife while he was looking out of the window, "Oh! I have seen a woman, thrown from a car" was no part of the *res gestae* of the action since it was not calculated to elucidate or explain the character and quality of the act which produced the accident, and its only tendency was to corroborate the testimony of the witness that he saw the accident. "To constitute evidence part of the *res gestae* it must be connected with the subject-matter under investigation. The subject-matter of the present action was the accident and how it occurred and the responsibility therefor. Declarations and exclamations of persons not present at the place where it occurred and who did no act which contributed to the accident are no part of the *res gestae* as they are in nowise connected with the occurrence itself." Ehrhard *v.* Metropolitan St. R. Co., 69 App. Div. 124, 74 N. Y. Supp. 551.

Contra. — Declarations of persons in a house at some distance from the scene upon hearing the shot fired were held admissible as part of the *res gestae*. State *v.* Sexton, 147 Mo. 89, 48 S. W. 452.

44. Where it appeared that the deceased was killed in an altercation in which he and his companions were armed with pistols, while the defendant and his supporters were armed with rifles and shotguns, and it was claimed by defendant that the deceased's party fired the first shot, a witness testified that he was three quarters of a mile from the scene of the killing, that he heard the shots and knew from the sound that the first shot came from a pistol, and that immediately upon hearing the first report he made the statement that somebody was trying his pistol. This latter statement was held no part of the *res gestae*. "Even if it was put upon the ground that he was a bystander it would be inadmissible because remarks of bystanders not heard by the participants in the difficulty are not *res gestae*." Baker *v.* State, 45 Tex. Crim. 392, 77 S. W. 618 (*citing Ex*

d. *Statements of Bystanders.* — The courts are not entirely agreed as to whether and under what circumstances the statements and exclamations of bystanders are competent as part of the *res gestae* of the transaction in question. Some courts are inclined to hold that only the statements of actual participants are admissible.[45] Others

parte Kennedy (Tex. Crim.), 57 S. W. 638; Felder *v.* State, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777; Willis *v.* State (Tex. Crim.), 22 S. W. 969).

45. Flynn *v.* State, 43 Ark. 289; Bradshaw *v.* Com., 73 Ky. 576; Kaelin *v.* Com., 84 Ky. 354, 1 S. W. 594 (exclamation of a bystander "hang him"). See Holt *v.* State, 9 Tex. App. 571, and article "Homicide," Vol. VI, p. 622. But see Colley *v.* Com., 11 Ky. L. Rep. 346, 12 S. W. 132.

The exclamations of bystanders at the time of the commission of an assault, although alleged to characterize the act in issue, are not admissible as *res gestae*, at least as a general rule. "We think the current of our jurisprudence, notwithstanding expressions in some cases, exhibiting peculiar features, indicating a contrary tendency is against the admissibility of the testimony sought to be introduced in this case." State *v.* Bellard, 50 La. Ann. 594, 23 So. 504. See State *v.* Riley, 42 La. Ann. 995, 8 So. 469.

The statement of a witness present at the shooting, made upon passing from the room where the shooting occurred to an adjoining room and in response to an inquiry by persons there, "What is the matter back there?" that the defendant had shot the deceased for nothing, was held improperly admitted as part of the *res gestae* because it was the statement of an observer and not a participant, which, as a general rule, is inadmissible, and becuse it was a mere narration of the speaker's opinion. State *v.* Ramsey, 48 La. Ann. 1407, 20 So. 904.

Statements of a mere bystander to the motorman in charge of the car which caused the injuries in question, made after the car stopped and the motorman had alighted immediately after the accident, were held improperly admitted because not part of the *res gestae* since the declarant "was nothing more than a mere bystander or looker-on at the time he made the remarks or declarations in question. This court, in the Whittaker Case, 160 Ind. 125, 66 N. E. 433, in reviewing the admissibility of the evidence as there involved, said: 'Utterances and exclamations of participants, or of persons acting in concert, made immediately before or after or in the execution of an act, which go to illustrate the character and quality of the act, are usually admissible on the ground that they are a part of the *res gestae*, and provable like any other fact that elucidates the issue. The rule, however, seems to be exclusive that, to render the expression or declaration of another admissible, the party making it must have been so related to the occurrence as to make his declaration a part of it. The test seems to be that, to render the utterance or declaration of another admissible, it must flow from one of the actors, or from one sustaining some relation to the transaction, and be so intimately connected with the litigated act as to be the act speaking of itself through the witness speaking the words of another employed concerning the act.'" Indianapolis St. R. Co. *v.* Taylor, 164 Ind. 155, 72 N. E. 1045.

Where the plaintiff was injured in a collision with the defendant's street car and claimed that the motorman after striking the plaintiff's wagon wilfully kept pushing the wagon ahead of the car until it struck a pillar, the statement of a witness who testified to having seen the car pushing the wagon along, made to the motorman at the time, "Why don't you stop the car?" was held no part of the *res gestae* and therefore improperly admitted. "The witness did no act which contributed to the accident and was in nowise

hold that the statements or exclamations of a mere bystander or onlooker may constitute part of the *res gestae* if they otherwise conform to the rules governing this class of testimony.[46]

e. *Coincidence in Time and Place Insufficient.* — The mere fact that the declaration of a third person is coincident in point of time with the main transaction does not make it part of the *res gestae;* it must also be of such a nature as to form part of the transaction.[47]

associated with its happening, but was a mere spectator. His declarations or exclamations constituted no part of the *res gestae.*" Kuperschmidt *v.* Metropolitan St. R. Co., 47 Misc. 352, 94 N. Y. Supp. 17, *following* Ehrhard *v.* Metropolitan St. R. Co., 69 App. Div. 124, 74 N. Y. Supp. 551, which is a case where the declarant was only constructively present by seeing the transaction from his window.

46. United States *v.* Schneider, 21 D. C. 381; State *v.* Walker, 78 Mo. 380; Harrill *v.* South Carolina & G. Exten. R. Co., 132 N. C. 655, 44 S. E. 109; State *v.* Biggerstaff, 17 Mont. 510, 43 Pac. 709; State *v.* Duncan, 116 Mo. 288, 22 S. W. 699. See State *v.* Elkins, 101 Mo. 344, 14 S. W. 116; Seawell *v.* Carolina Cent. R. Co., 133 N. C. 515, 45 S. E. 850; Atlanta Consol. St. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191, and article "HOMICIDE," Vol. VI, p. 622.

In an action against a surgeon for negligence and unskilfulness in treating a dislocation as a fracture, it was shown that if the defendant's diagnosis was correct a grating sound would have been heard on a manipulation of the limb. It was held that the remark of a person standing by at the time of the examination indicating that he heard such grating sound should have been admitted as a part of the *res gestae.* "The remarks made on such an occasion are not statements of a past transaction, but of one actually taking place at the time they were being made. Such remarks are likely to call the attention of others present to the sounds heard, and to correctly determine the nature and character of them and how they are caused, or from whence they proceed." Hitchcock *v.* Burgett, 38 Mich. 501, *citing* Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 99.

47. Dixon *v.* Northern Pac. R. Co., 37 Wash. 310, 79 Pac. 943. See City of Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884.

Where the plaintiff claimed damages for injuries to her person caused by closing of a gate upon her as she was attempting to enter one of the defendant's cars, an insulting remark of the guard in charge of the gate in response to her exclamation of pain was held no part of the *res gestae.* "The only circumstances upon which it can be claimed to have been part of the *res gestae* was its connection in point of time with the transaction under investigation, viz., the alleged injury from the closing of the gate. While proximity in point of time with the act causing the injury is in every case of this kind essential to make what was said by a third person, competent evidence against another as part of the *res gestae,* that alone is insufficient, unless what was said may be considered part of the principal fact, and so a part of the act itself. But as in this case the act was complete before the remark of the brakeman was made, although closely connected with it in point of time, and was not one naturally accompanying the act, or calculated to unfold its character or quality, it was not admissible as *res gestae.* It was as independent of the principal fact, and as incompetent as evidence as though the act and the remark had been much further separated in point of time. *Res gestae* in a case like this implies substantial coincidence in time, but if declarations of third persons are not in their nature a part of the fact, they are not admissible in evidence, however closely related in point of time." Butler *v.* Manhattan R. Co., 143 N. Y. 417, 38 N. E. 454, 42 Am. St. Rep. 738, 26 L. R.

f. *Subsequent Statements.* — (1.) Generally. — The rule that a statement to be part of the *res gestae* must be contemporaneous with the main transaction of course applies to the statements of third persons,[48] and the courts are inclined to exclude such statements when not practically coincident therewith.[49]

(2.) Mere Narrative. — The general rule that merely narrative statements of a past transaction are not part of the *res gestae* is strictly applied to the statements of a third party or bystander.[50]

A. 46, *reversing* 4 Misc. 401, 24 N. Y. Supp. 142.

In an action against a dentist for negligence in extracting plaintiff's tooth, whereby his jawbone was fractured, the declaration of a bystander that he would not suffer what plaintiff was suffering for all the city of Dallas, made while plaintiff's tooth was being extracted, is not admissible as part of *res gestae*, being wholly disconnected with transaction under investigation, though contemporaneous in time. Wilkins *v.* Ferrell, 10 Tex. Civ. App. 231, 30 S. W. 450.

48. *Alabama.* — Hall *v.* State, 86 Ala. 11, 5 So. 491; Dean *v.* State, 105 Ala. 21, 17 So. 28.

District of Columbia. — Metropolitan R. Co. *v.* Collins, 1 App. D. C. 383.

Georgia. — Central R. & Bkg. Co. *v.* Kelly, 58 Ga. 107.

Maine. — Battles *v.* Batchelder, 39 Me. 19.

Massachusetts. — See Com. *v.* James, 99 Mass. 438.

Michigan. — Edwards *v.* Foote, 129 Mich. 121, 88 N. W. 404.

Minnesota. — State *v.* Gallehugh, 89 Minn. 212, 94 N. W. 723.

Missouri. — State *v.* Elkins, 101 Mo. 344, 14 S. W. 116; Senn *v.* Southern R. Co., 108 Mo. 142, 18 S. W. 1007.

Texas. — De Walt *v.* Houston E. & W. T. R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534; Crow *v.* State (Tex. Crim.), 21 S. W. 543; Missouri Pac. R. Co., *v.* Ivy, 71 Tex. 409, 9 S. W. 346; Gulf, C. & S. F. R. Co. *v.* Moore, 69 Tex. 157, 6 S. W. 631.

In an action for killing a section hand of a railway, testimony of a witness that he saw the train and that he talked about "its running fast," when not shown to have been contemporaneous with the passing of the train was not *res gestae* and inadmissible as hearsay. Norfolk & W. R. Co. *v.* Gesswine, 144 Fed. 56, 75 C. C. A. 214.

49. See Springfield Consol. R. Co. *v.* Puntenney, 101 Ill. App. 95; City of Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884.

Testimony of witness that he heard a little girl exclaim, after deceased had been killed, "Mr. L. (meaning the deceased) had a knife in his hand," is no part of the *res gestae*. If made while deceased was approaching and before the fatal shot it would perhaps not have been hearsay. After the fight was over it could not be *res gestae*. State *v.* Brown, 64 Mo. 367.

Evidence that after deceased had been cut and while defendant was walking rapidly away the people around hallooed: "Police! police! murder! murder! police! police!" as they pursued defendant, was held inadmissible as being made after the difficulty was over, and at most was but the expression of an opinion. Benjamin *v.* State (Ala.), 41 So. 739.

In an action for personal injuries caused by falling down a hatchway, the declaration of the mate of the vessel that "these hatch covers never do fit anyway," made ten minutes after the accident while the plaintiff was being assisted out of the hold, were held no part of the *res gestae* and not admissible against the defendant. The Saranac 132 Fed. 936.

50. In an action by a brakeman of a freight train to recover for injuries caused by being thrown from the train in a collision between two sections thereof which had parted and come together again, the statement of the person who reached the plaintiff a minute and a half or two

(3.) Statements Not in Hearing of Parties. — It has been held that declarations of bystanders not made in the hearing of the parties are not admissible as *res gestae*,[51] which ruling is a manifest confusion of the *res gestae* principle with that governing implied admissions,[52] or the relevancy of statements which were heard by the parties and perhaps influenced their conduct.[53]

g. *Preceding Statements.* — Statements by third persons immediately preceding the principal act if spontaneously made in contemplation thereof may form part of the *res gestae*.[54]

h. *Conclusion of Speaker.* — Where the statement was the mere opinion or conclusion of the speaker it would seem to be inadmissible as *res gestae*.[55]

minutes after the train had passed, or when the caboose was a little over a hundred feet away, was held no part of the *res gestae*. The statement was "that train was parted when it passed me about two car lengths and I thought it was going to hit," and was clearly a narrative of a past occurrence. Bumgardner *v.* Southern R. Co., 132 N. C. 438, 43 S. E. 948.

Declaration of Antecedent and Independent Fact. — In an action to recover the value of a dog killed by the defendant, the declaration of the defendant's wife, just before the killing, that the dog had snapped at her, was held no part of the *res gestae* being a mere statement of an antecedent and independent fact, and not a part of the transaction in question, which was the shooting of the dog. "This testimony was mere hearsay, and therefore inadmissible. Had the dog bitten the wife, and were this an action by her to recover damages therefor, probably what she said on coming out of the house would have been a part of the *res gestae*, and might have been shown. But in this case the essential fact is the shooting of the dog; and the alleged attempt of the dog to bite is an antecedent and independent fact, which must be proved by legal evidence before it can be made available as a justification for the subsequent act of shooting committed by the husband, who was not present when the attempt was made to bite the wife. Had the defendant, immediately after the shooting, said, 'This dog attacked me, and I killed him,' that would probably be part of the *res gestae*. But we are aware of no rule of evidence which stamps that character upon a statement, made by a third person to the defendant, of an antecedent fact or circumstance, so that proof that the statement was thus made becomes competent evidence to prove the truth of the statement." Ehrlinger *v.* Douglas, 81 Wis. 59, 50 N. W. 1011.

51. On a prosecution for homicide, the testimony of a witness that immediately upon hearing the shooting which occurred some two hundred feet away he ran to his back door and there met the defendant's wife who was very much excited and stated that the defendant had shot the deceased because the latter made certain accusations against him, was held not part of the *res gestae*. "The declarations of bystanders not within the knowledge of the defendant at the time of being made are not and cannot be made *res gestae*. If these declarations had been made in the presence of defendant the state might justly have insisted upon its admission because it called for a reply from defendant." Stevison *v.* State (Tex. Crim.), 89 S. W. 1072. See also Felder *v.* State, 23 Tex. App. 477, 5 S. W. 145.

52. See articles "ADMISSIONS," Vol. I, and "HOMICIDE," Vol. VI, p. 665.

53. See Felder *v.* State, 23 Tex. App. 477, 5 S. W. 145; also *infra*, IV, 7, E, a.

54. State *v.* Biggerstaff, 17 Mont. 510, 43 Pac. 709; Shirley *v.* State, 144 Ala. 35, 40 So. 269. See also State *v.* Wagner, 61 Me. 178.

55. De Walt *v.* Houston E. & W. T. R. Co., 22 Tex. Civ. App. 403,

i. *Declarant Unidentified.* — The fact that the declarant was not and cannot be identified is no ground for excluding a declaration made during the occurrence.[56]

j. *Declarations Which Are Not Admissible Testimonially.* — Declarations made by third persons during the transaction may be of such a nature and made under such circumstances that they tend to explain the acts of the parties, in which case they are said to be part of the *res gestae.* They are admissible, not testimonially as evidence of the facts directly or inferentially stated, but merely as relevant circumstances.[57]

k. *Implied Admissions.* — Statements of a bystander or third person in the presence of an actor are sometimes spoken of as *res gestae*

55 S. W. 534; State *v.* Ramsey, 48 La. Ann. 1407. 20 So. 904. See Indianapolis St. R. Co. *v.* Whitaker, 160 Ind. 125. 66 N. E. 433; Kaelin *v.* Com., 84 Ky. 354. 1 S. W. 594. See *supra,* III, 3, C, 1. But see Shirley *v.* State, 144 Ala. 35. 40 So. 269.

A statement by the conductor just after the brakeman fell, that "the bridge got him" is inadmissible as part of the *res gestae,* being a mere statement of opinion, not a statement that he saw him knocked off the train. The conductor testified that he did see deceased fall. Hughes' Admr. *v.* L. & N. R. Co., 104 Ky. 774, 48 S. W. 671.

What a disinterested bystander who witnessed the conflict going on between the defendant and the party assailed may say during the heat of the engagement is not evidence, especially when the declaration amounts to nothing more than the declarant's opinion as to defendant's motive or purpose for engaging in and prosecuting the fight. Such a declaration from such a source in such a case is no part of the *res gestae.* Therefore a witness cannot testify that he heard a young man standing by remark that it was his impression that the defendant was not trying to hurt the prosecutor. The party himself would not be permitted to testify to his impressions on the stand. Carr *v.* State, 76 Ga. 592.

A third person's statement as deceased started to return to the place where defendant was, and where he had a few moments before grossly insulted defendant, that "Hell's going to be to pay" is a mere expression of opinion and inadmissible. Allen *v.* State, 111 Ala. 80, 20 So. 490.

56. In an action for personal injuries, plaintiff claimed that the fall by which he was injured was occasioned by his being struck by a hoisting hook. A witness testified that upon seeing the plaintiff fall he started up a ladder and hallooed to the foreman to telephone for a doctor, and heard some one say "the hook hit him." This exclamation was held to be admissible as part of the *res gestae* of the accident. Johnson *v.* St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048. But see *Ex parte* Kennedy (Tex. Crim.), 57 S. W. 648. See Morton *v.* State, 91 Tenn. 437, 19 S. W. 225.

57. See *infra,* IV, 7, E, more fully, and Felder *v* State, 23 Tex. App. 477, 5 S. W. 145; Werner *v.* Com., 80 Ky. 387 (*distinguishing* Bradshaw *v.* Com., 10 Bush (Ky.) 576); Stroud *v.* Com., 14 Ky. L. Rep. 179, 19 S. W. 976.

In an action for assault it appeared that while the plaintiff had the defendant down on the ground the plaintiff struck him, the request of one of the bystanders that the plaintif get off from the defendant and let him alone although not competent to prove the truth of anything implied by it was held admissible as part of the transaction. "It was heard by both of them and as an occurrence closely connected with and perhaps affecting conduct, the nature of which was the substance of the issue. We think it might well be put in evidence as a part of

though not really such under the rule relating to spontaneous statements, the real ground of admissibility being as implied admissions.[58]

1. *Particular Instances and Illustrations.* — **(1.) Generally.** Statements of third persons have been held admissible in numerous instances as part of the *res gestae* on the general principles governing this subject.[59]

(2.) Railway Injuries. — In actions for injuries received in collision with railway cars, or as a passenger or employe on a railway, the statements of persons not parties to the action may form part of the *res gestae*.[60] The declaration of a railway employe such as a con-

the controversy which was under investigation by the court. It was at least an accessory of it and a kind of sidelight without which the picture would be incomplete." Hartnett *v.* McMahan, 168 Mass. 3, 46 N. E. 392.

58. Wood *v.* State, 92 Ind. 269. See Chicago, R. I. & P. R. Co. *v.* Bell, Admr., 70 Ill. 102; O'Mara *v.* Com., 75 Pa. St. 424.

Where it appears that the transaction had not fully closed and there was no perceptible interval between the shooting and the statement of the bystander, but the transaction is a continuous one, the accused being still a prominent actor in the affair, statements of a bystander in the presence of accused, that "those present had better go in the kitchen as defendant might shoot somebody else, made in defendant's presence, are *res gestae*." Surber *v.* State, 99 Ind. 71.

59. In an action for injuries received at the hands of a mob while the plaintiff was a passenger on the defendant's railway, the action of the mob consisting in throwing eggs, and abuse and insults, the testimony of a witness that a minute after one of the defendant's employes threw an egg at the plaintiff, he, the witness, "hollered" and told the plaintiff about it, was held competent because the statement was part of the *res gestae*, being made before the egg throwing and abuse were over. Seawell *v.* Carolina Cent. R. Co., 133 N. C. 515, 45 S. E. 850.

On a prosecution for a double homicide, the outbursts of grief of the deceased's sister, who was one of the group in which the double homicide was committed, over the bodies still before her, and her cries and exclamations to those around her, are as much a part of the main fact—a natural and necessary concomitant of it as anything that could be said by another person than the one fatally wounded. "The spontaneous exclamations of bystanders, witnessing a tragedy, are as much the natural result and incident of it as those of the participants." United States *v.* Schneider, 21 D. C. 381.

The moment after a shot was fired resulting in death, defendant's right hand fell to his side and he struck out with his left at deceased, when a bystander exclaimed, "Don't strike him, for you have shot him now." *Held*, such exclamation was part of the *res gestae;* that it was called out by and was illustrative of the affray while still in progress. State *v.* Walker, 78 Mo. 380.

Upon the question whether a wound in the back from which death may have resulted was made by accused or another, where the homicide was committed in the dark in the midst of a crowd, a bystander's declaration immediately after the rencounter, that he, the bystander, cut the accused in the back with the knife, when accused had no such cut, but deceased had, is admissible for all purposes as part of the *res gestae*, the fight occurring in a crowd at night, and the evidence being conflicting. Flanegan *v.* State, 64 Ga. 52.

60. Gulf, C. & S. F. R. Co. *v.* Tullis (Tex. Civ. App.), 91 S. W. 317 (injury from steam emitted by locomotive—statement of man on the engine).

Where it appeared that the plaintiff's intestate, an engineer, was killed while attempting to cross a bridge

ductor,[61] brakeman,[62] or engineer,[63] may be competent though he be in no way responsible for the accident. The statement must, however, be spontaneous, must accompany and spring directly out of the accident.[64] Thus the statement of the driver of the vehicle which collided with the train though immediately following the collision has been held incompetent.[65]

and trestle over a stream, the exclamation of a bystander as the engine reached the trestle work after passing over the water, "Jake (the engineer) is safe" was held properly admitted as part of the *res gestae*. The instant after the exclamation the trestle gave way and the engine was pulled back into the water killing the engineer. It appeared that the engine had been flagged and the bridge carefully examined before attempting to cross. The exclamation tended to show the dangerous condition of the bridge, the peril of the crossing and the effect of the effort to cross had on the bystanders, and was clearly a part of the *res gestae*. Harrill *v.* South Carolina & G. Extension R. Co., 132 N. C. 655, 44 S. E. 109.

In an action for injuries resulting from a collision, evidence that just prior to the collision the people were screaming for the motorman to stop was held properly admitted because such statements of bystanders were competent as part of the *res gestae*. Atlanta Consol. St. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191. But see Marsh *v.* South Carolina R. Co., 56 Ga. 274; Indianapolis St. R. Co. *v.* Whitaker, 160 Ind. 125, 66 N. E. 433; Indianapolis St. R. Co. *v.* Taylor, 164 Ind. 155, 72 N. E. 1045; Kuperschmidt *v.* Metropolitan St. R. Co., 47 Misc. 352, 94 N. Y. Supp. 17.

Remarks of a fellow-passenger to the witness, as to the speed of a train, made while it is moving, are admissible when that fact is in issue. M. P. R. Co. & I. & G. N. R. Co. *v.* Collier, 62 Tex. 318.

61. Leach *v.* Oregon Short Line R. Co., 29 Utah 285, 81 Pac. 90. See *infra*, "Statements of Agent or Servant."

A declaration of the conductor immediately after the accident as to what transpired during the derailment of the train and his direction to the injured person to jump off are admissible as part of the *res gestae*. But his statements as to the condition of the track were not part of the occurrence. Houston, E. & W. T. R. Co. *v.* Norris (Tex. Civ. App.), 41 S. W. 708.

62. Omaha & R. V. R. Co. *v.* Cholette, 41 Neb. 578, 59 N. W. 921 (exclamation of brakeman as train lurched and threw plaintiff off). See *infra*, "Statements of Agent or Servant."

The declaration of a brakeman who was nearest deceased whose duty it was to couple the cars at that point, in the presence of deceased at the point where he fell, and within five minutes after the accident, in answer to question from bystander, that he knew deceased had been there coupling cars but thought he had gone away, was held admissible as part of the *res gestae*. De Walt *v.* Houston E. & W. R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534.

63. Durkee *v.* Central Pac. R. Co. (Cal.), 9 Pac. 99. See *infra*, "Statements of Agents or Servant."

64. Metropolitan R. Co. *v.* Collins, 1 App. D. C. 383; Pittsburgh, C. & St. L. R. Co. *v.* Wright, 80 Ind. 182; Louisville & N. R. Co. *v.* Webb, 99 Ky. 332, 35 S. W. 1117; Senn *v.* Southern R. Co., 108 Mo. 142, 18 S. W. 1007; Central R. & Bkg. Co. *v.* Kelly, 58 Ga. 107; Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 99. See Chicago, R. I. & P. R. Co. *v.* Bell, Admr., 70 Ill. 102; De Walt *v.* Houston E. & W. T. R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534; Nashville, C. & St. L. R. Co. *v.* Moore (Ala.), 41 So. 984; City of Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884.

65. In an action for injuries received in a collision between a street car and a buggy, the conversation of the driver of the buggy after the accident is not part of the *res gestae*.

(3.) Assault. — On a prosecution for a criminal assault, the exclamations and statements of persons other than the immediate parties, if spontaneously made at the time, and as an incident of the transaction, may form part of the *res gestae*.[66]

(4.) Homicide. — In some jurisdictions the statements of third persons at the scene of the homicide are, under proper circumstances, regarded as part of the *res gestae* in a prosecution therefor.[67] In

Edwards *v.* Foote, 129 Mich. 121, 88 N. W. 404.

In an action for personal injuries resulting from a collision between a cab in which plaintiff was riding and the defendant's train, a conversation between the cab driver and a witness within a minute after the accident was held properly excluded because no part of the *res gestae*, since the conversation was a mere narrative and not a part of the transaction. Springfield Consol. R. Co. *v.* Puntenney, 101 Ill. App. 95.

But in Louisville & N. R. Co. *v.* Molloy's Admx., 28 Ky. L. Rep. 1113, 91 S. W. 685, the driver's statement to the first person arriving at the scene, two or three minutes after the accident, was held admissible.

66. Testimony of the wife of the person assaulted, that her daughter, who was present when she looked out of the door and saw the parties who did the shooting, exclaimed, "Look, there is Uncle Isaac and Jesse going to shoot us," is competent as part of the *res gestae*. Shirley *v.* State, 144 Ala. 35, 40 So. 269.

The statement of the father of the assaulted girl made to the defendant at the time of the assault are competent on behalf of the defendant as part of the *res gestae*. Merritt *v.* State, 107 Ga. 675, 34 S. E. 361.

On a prosecution for shooting at another with intent to kill, the exclamations of the wife and daughter of the assaulted person immediately succeeding the shooting were held competent as part of the *res gestae*. Collins *v.* Com., 24 Ky. L. Rep. 884, 70 S. W. 187.

A disinterested bystander's mere expression of opinion as to the character of the struggle is not admissible as *res gestae*. Carr *v.* State, 76 Ga. 592.

67. See article "Homicide," Vol. VI, p. 621, *et seq.* and the following:

State *v.* Biggerstaff, 17 Mont. 510, 43 Pac. 709; United States *v.* Schneider, 21 D. C. 381; State *v.* Elkins, 101 Mo. 344, 14 S. W. 116; State *v.* Desroches, 48 La. Ann. 428, 19 So. 250.

A bystander's remark, immediately following the homicide, to an officer, that: "There is the man that did it," is part of the *res gestae*, on trial of the person so designated. State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

A witness was asked when the deceased was cut and replied: "I couldn't tell; I did not know it until D. said he knew M. (the defendant) had the knife." What D. said as related by the witness was objected to. The remark appeared to have been made while the fight was going on. *Held*, that the remark was an occurrence taking place during the fight and designated the point at which witness found out that the cutting had been done; besides a part of *res gestae*. Barrow *v.* State, 80 Ga. 191, 5 S. E. 64. See also Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823.

The exclamation of a bystander immediately after the killing, "hold him" or "kill him," made to an officer in the defendant's presence, was held competent as part of the *res gestae* of the defendant's attempted flight. Caddell *v.* State, 136 Ala. 9, 34 So. 191.

Where it appeared that the defendant while grappling with and attempting to shoot the husband shot the latter's wife a statement made by a bystander immediately after requesting the defendant not to hit the husband as he had already killed the wife was held competent. Hall *v.* State, 130 Ala. 45, 30 So. 422.

On a prosecution for homicide the exclamation of the defendant's mother made as the defendant turned toward her after striking the fatal

some jurisdictions the speaker must be connected with the act as a participant or in some way other than as a mere onlooker.[68] The declarations must, however, be a spontaneous part of the transaction.[69]

F. PRECEDING DECLARATIONS. — Statements or declarations may be part of the *res gestae,* although made prior to the principal act, if they are the spontaneous product of the acts or events immediately culminating in the main act.[70]

G. CODE OR STATUTE PROVISIONS. — In some jurisdictions there are statutes governing the subject of *res gestae.*[71]

blow, "Now, see what you have done" was held admissible as part of the *res gestae.* People *v.* McArron, 121 Mich. 1, 79 N. W. 944.

Where on a prosecution for homicide it appeared that the defendant and deceased had quarreled over a woman, who was present at the killing, her statement immediately after the fatal act, calling upon a person in an adjoining house to come out that the accused had knocked the deceased on the head, was held admissible as part of the *res gestae.* McUin *v.* United States, 17 App. D. C. 323.

In a prosecution for homicide, the statement of one whom the defendant mortally shot at the same time he killed the deceased, made two or three minutes after the fatal shooting to a person who had gone to her assistance, to the effect that the defendant had shot her son and then shot her, was held admissible as part of the *res gestae,* being a natural and instinctive declaration made in close connection with the shooting and under circumstances precluding any suspicion of fabrication. State *v.* Williams, 96 Minn. 351, 105 N. W. 265, *citing* O'Connor *v.* Chicago, M. & St. P. R. Co., 27 Minn. 166, 6 N. W. 481, 38 Am. Rep. 288; State *v.* Horan, 32 Minn. 394, 20 N. W. 905, 50 Am. Rep. 583; Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823.

68. See article "HOMICIDE," Vol. VI, p. 622; Holt *v.* State, 9 Tex. App. 571; Com. *v.* James, 99 Mass. 438; Bradshaw *v.* Com., 73 Ky. 576; Colley *v.* Com., 11 Ky. L. Rep. 346, 12 S. W. 132; State *v.* Riley, 42 La. Ann. 995, 8 So. 469; State *v.* Oliver, 39 La. Ann. 470, 2 So. 194. But see State *v.* Corcoran, 38 La. Ann. 949; State *v.* Moore, 38 La. Ann. 66.

69. Dean *v.* State, 105 Ala. 21, 17 So. 28; Wright *v.* State, 88 Md. 705, 41 Atl. 1060; State *v.* Elkins, 101 Mo. 344, 14 S. W. 116; State *v.* Estoup, 39 La. Ann. 219, 1 So. 448.

The statement of the defendant's wife who witnessed the homicide, made shortly afterwards to the police, to the effect that the victim of the homicide had a knife in his hand which she had seen during the transaction, was held no part of the *res gestae.* State *v.* Gallehugh, 89 Minn. 212, 94 N. W. 723.

70. Louisville & C. Packett Co. *v.* Samuels, 22 Ky. L. Rep. 979, 59 S. W. 3; Means *v.* Carolina Cent. R. Co., 124 N. C. 574, 32 S. E. 960, 45 L. R. A. 164; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746. See also Means *v.* State, 10 Tex. App. 16, 38 Am. Rep. 640.

Where the defendant had left the house at which the killing afterwards took place and had returned to the front door, evidence that the deceased and other witnesses who saw the defendant coming exclaimed: "There he comes with a gun," is admissible as part of the *res gestae.* State *v.* Biggerstaff, 17 Mont. 510, 43 Pac. 709. To the same effect Monroe *v.* State, 5 Ga. 85, excluding, however, the defendant's expression of opinion that the deceased intended to kill him. But see State *v.* Carey, 56 Kan. 84, 42 Pac. 371.

71. Augusta & S. R. Co. *v.* Randall, 79 Ga. 304, 4 S. E. 674; Futch *v.* State, 90 Ga. 472, 16 S. E. 102; Cal. C. C. P. § 1850.

A statute providing that "declarations acompanying an act, or so nearly connected therewith in time as

H. Weight as Evidence. — This class of evidence is entitled to great weight, not only because it is impossible for a witness afterwards to give as clear an account of the impression upon his mind as could be gained from his spontaneous exclamation, but also because the latter, being his instinctive unpremeditated statement, would be less subject to any bias or prejudice which he might have, to say nothing of a possible wilful misrepresentation.[72] The weight to which such declarations are entitled in a particular instance depends on their character and the closeness of their relation to the main transaction.[73]

4. Nature of Transaction and Form of Action. — A. Generally. The nature of the transaction and the form of the action in which the question arises have an influence in determining the length of time within which statements may be regarded as *res gestae*. Thus in cases of homicide the courts are much more liberal than in other actions, such as for personal injuries.[74]

B. In Poisoning Cases. — In poisoning cases where the manner and circumstances of the giving or taking of the poison are in issue, the statements of the person poisoned made during his sufferings are regarded as part of the *res gestae*, although much time may have elapsed since the giving or taking.[75]

to be free from all suspicion of device or afterthought, are admissible in evidence as part of the *res gestae*, introduces no new rule, but frankly recognizes in its letter the full breadth of the temporal element in the rule which it found existing in opinion in Mitchum *v.* State, 11 Ga. 615. What the law distrusts is not afterspeech but afterthought. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

72. **Better Than Direct Testimony.** — See Galena & C. U. R. Co. *v.* Fay, 16 Ill. 558, where Scates, C. J., says: "It is impossible for a witness to convey such scenes to the mind and their effect and influence upon it;" and also Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 15, where it is said that such statements are "more convincing than the testimony of the persons themselves some time after the occurrence."

73. Mitchum *v.* State, 11 Ga. 615.

74. See State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136, and the succeeding sections of this article dealing with this subject; also particular articles where the principles of *res gestae* have been applied.

75. In an action on an insurance policy it appeared that the insured while alone was taken suddenly ill and died within less than twenty-four hours. It was conceded that death was due to poison, the dispute being as to the nature of the poison. The statement of the insured, made while suffering from pain, that he had taken some horse medicine, was held competent as part of the *res gestae* on the ground that the circumstances were such as to absolutely preclude the idea that the statement was untrue or premeditated. "It was called forth and was immediately connected with the action of the poison within him. We think the statement was part of the *res gestae*. The fact that the fatal drink may have been taken some hours before is not controlling. The nature and strength of the connection between the act and the declaration must be looked to, as well as the connection in point of time and place. Closeness in point of time and place to the act is material, but not the only test to be applied in determining whether a declaration is part of the *res gestae*. It is obvious that the competency of the evidence cannot be tested by a clock or a foot rule." Puls *v.* Grand Lodge A. O. U. W., 13 N. D. 559, 102 N. W. 165.

Where poison has been given to a person and afterwards taken by him in ignorance of its true character, his statements as to who are the guilty parties, made while suffering from the effects of the poison, are part of the *res gestae*.[76]

Such statements, however, unless they are mere statements of mental or physical condition,[77] are amenable to the general rules governing the admission of spontaneous statements.[78]

C. Civil Actions Involving Injury to or Death of Speaker. a. *Generally*. — In civil actions where the issue is the cause and circumstances of an injury to a particular person or his death from certain injuries, the unpremeditated statement of such person as to cause and circumstances of his injury made so near the main trans-

quoting extensively from Insurance Co. *v.* Mosley, 75 U. S. 397, and stating that "although that decision has been the object of much adverse criticism by able jurists, we are convinced that it is sound in principle, is in accord with common sense, and has become the prevailing rule."

76. In an action on an insurance policy by the assignee of the insured, on the issue of whether the plaintiff was an accessory to the poisoning of the insured the latter's declaration that a certain doctor had killed him with a capsule which he gave the insured that night, and that the plaintiff had insured his life and hired the doctor to kill him, made while the insured was suffering with convulsions shortly preceding his death, the imminence of which he was conscious, was held admissible as part of the *res gestae*. It appeared that the doctor in question had been convicted of murdering the insured but that the plaintiff had been tried and acquitted. The fact that some time had elapsed between the declaration and the handing of the poison to the insured by the doctor in the afternoon was held no objection to the admissibility of the declaration, nor was the objection that part of the statement that plaintiff had hired the doctor to kill the insured was a mere expression of opinion tenable, the statement being made as a fact. And the question whether the declarant had the requisite knowledge being for the jury. Jack *v.* Mutual Reserve Fund L. Assn., 113 Fed. 49, 51 C. C. A. 36.

A statement made by the deceased while in pain shortly after taking a headache powder given her by the defendant, that she had taken the medicine given her by the defendant and that it was killing her, was held competent as part of the *res gestae* on a prosecution for homicide. Nordan *v.* State, 143 Ala. 13, 39 So. 406.

A statement of deceased *in articulo mortis*, and in presence of accused, that accused killed her with poison in whiskey given shortly previous is admissible as *res gestae* as well as for other reasons. Puryear *v.* Com., 83 Va. 51, 1 S. E. 512.

On a prosecution for murder caused by poison contained in a lunch claimed to have been handed deceased by defendant, statements by deceased to a person who partook of the lunch with him, made while eating it, as to how and from whom he received it, are competent as a part of the *res gestae*. State *v.* Thompson, 132 Mo. 301, 34 S. W. 31. But see Hall *v.* State, 132 Ind. 317, 31 N. E. 536.

77. See *infra*, VI and VII, and article "Mental and Physical State," Vol. VIII.

78. See Hall *v.* State, 132 Ind. 317, 31 N. E. 536.

On prosecution for poisoning, it appears that witness and deceased had made a toddy from the contents of a bottle alleged to have been sent deceased by accused. After lingering several days, witness recovered. Witness was permitted to testify to the following conversation which occurred the day after taking the alleged poison: "I asked her (deceased) if she supposed the B's could have sent the stuff? She said

action as to be part of it, form part of the *res gestae* and are admissible as such.[79] The injured person's statement of what he was doing at the time he was hurt may be admissible.[80]

b. *Length of Intervening Time.* — As to the length of time which may intervene between the statement and the infliction of the injury, no rule can be formulated, but each case depends largely upon its own circumstances.[81] Statements as to the cause or circumstances of the injury made immediately or a very few moments after its occurrence, are ordinarily regarded as of the *res gestae*.[82] While

no. Do you think that Dr. G. (the defendant) could have sent it? And she did not answer me." *Held*, that this conversation and other statements of deceased on the day after taking the contents of the bottle, casting suspicion on the defendant, are not admissible as part of the *res gestae*, being narrative and for other reasons incompetent. Graves *v.* People, 18 Colo. 170, 32 Pac. 63.

79. See cases cited in notes following, and:

United States. — North American Acc. Ins Co. *v.* Woodson, 64 Fed. 689, 12 C. C. A. 392, 24 U. S. App. 364; Travelers' Protective Assn. *v.* West, 102 Fed. 226, 42 C. C. A. 284; Insurance Co. *v.* Mosley, 8 Wall. 397.

Georgia. — Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838; Southern R. *v.* Brown, 126 Ga. 1, 54 S. E. 911.

Missouri. — Leahey *v.* Cass Ave. R. Co., 97 Mo. 165, 10 S. W. 58.

New York. — Scheir *v.* Quirin, 77 App. Div. 623, 78 N. Y. Supp. 956.

Texas. — Texas & Pac. R. Co. *v.* Hall, 83 Tex. 675, 19 S. W. 121; City of Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519; Missouri Pac. R. Co. *v.* Bond, 2 Tex. Civ. App. 104, 21 S. W. 58.

Wisconsin. — Hall *v.* American Masonic Acc. Assn., 86 Wis. 518, 57 N. W. 366 (the statement of the insured as he lay upon the ground where he fell, or as he was getting up, to the effect that he had got a bad fall, was held part of the *res gestae*).

80. Texas & Pac. R. Co. *v.* Hall, 83 Tex. 675, 19 S. W. 121. See Starks *v.* State, 137 Ala. 9, 34 So. 687.

81. Rothrock *v.* Cedar Rapids, 128 Iowa 252, 103 N. W. 475.

In an action for injuries received by the plaintiff while riding in a caboose of one of defendant's freight trains, the declaration of the plaintiff "they told me to lay down here and it would be all right; and it was not all right," made soon after the collision and while the plaintiff was lying in the caboose suffering great agony from burns he had received, was held admissible as part of the *res gestae*. "In the nature of things there cannot be a sharply defined line between what is and what is not permissible as part of the *res gestae*. In this debatable region a margin must be left for the exercise of the sound discretion of the trial judge." Delaware, L. & W. R. Co. *v.* Ashley, 67 Fed. 209, 14 C. C. A. 368, 28 U. S. App. 375.

82. *England.* — Thompson *v.* Trevanion, Skin. 402; Rex *v.* Foster, 6 Car & P. 325, 25 E. C. L. 421.

United States. — Cross Lake Logging Co. *v.* Joyce, 83 Fed. 989, 28 C. C. A. 250.

Arkansas. — Little Rock, M. R. & T. Co. *v.* Leverett, 48 Ark. 333, 3 S. W. 50; Union Casualty Co. *v.* Mondy, 18 Colo. App. 395, 71 Pac. 677.

Delaware. — Chielinsky *v.* Hoopes & Townsend Co., 1 Marv. 273, 40 Atl. 1127.

Illinois. — Muren Coal & Ice Co. *v.* Howell, 217 Ill. 190, 75 N. E. 469.

Indiana. — Louisville, N. A. & C. R. Co. *v.* Buck, Admr., 116 Ind. 566, 19 N. E. 453.

Michigan — Herrick *v.* Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333; Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622.

Missouri. — Entwhistle *v.* Feighner, 60 Mo. 214; (the facts are scant in this case — the above being all); Brownell *v.* Pacific R. Co., 47

those made a considerable time thereafter are generally deemed inadmissible.[83]

Mo. 239; Stevens *v.* Walpole, 76 Mo. App. 213.

Nebraska. — City of Lexington *v.* Fleharty, 104 N. Y. 1056.

New York. — Patterson *v.* Hochster, 38 App. Div. 398, 56 N. Y. Supp. 467; Scheir *v.* Quirin, 77 App. Div. 624, 78 N. Y. Supp. 956, *distinguishing* Waldele *v.* New York Cent. & H. R. R. Co., 95 N. Y. 274, 47 Am. Rep. 41.

Pennsylvania. — Pennsylvania R. Co. *v.* Lyons, 129 Pa. St. 113, 18 Atl. 759, 15 Am. St. Rep. 701; Elkins, Bly & Co. *v.* McKean, 79 Pa. St. 493, (*citing* Tompkins *v.* Saltmarsh, 14 Serg. & R. 275); Deardorf *v.* Hildebrand, 2 Rawle 226; Cattison *v.* Cattison, 22 Pa. St. 275.

Texas. — Galveston, H. & S. A. R. Co. *v.* Davis, 27 Tex. Civ. App. 279, 65 S. W. 217; City of Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519; Texas & Pac. R. Co. *v.* Hall, 83 Tex. 675, 19 S. W. 121; Gulf, C. & S. F. R. Co. *v.* Willoughby (Tex. Civ. App.), 81 S. W. 829.

Washington. — Piper *v.* City of Spokane, 22 Wash. 147, 60 Pac. 138.

Wisconsin. — Christianson *v.* Pioneer Furn. Co., 92 Wis. 649, 66 N. W. 699. (Shortly after, while apparently in pain); Hall *v.* American Masonic Acc. Assn., 86 Wis. 518, 57 N. W. 366.

In Hutcheis *v.* Cedar Rapids & M. C. R. Co., 128 Iowa 279, 103 N. W. 779, it appeared that the plaintiff was injured by a fall while attempting to alight from the defendant's cars because the step which was folded up while the car crossed a bridge had not been let down again. The plaintiff's exclamation immediately after she fell, "Yes, let the step down after I fall," was held competent as part of the *res gestae*, being made immediately after the accident with reference to the cause of the fall and without opportunity for premeditation.

In Leahey *v.* Cass Ave. R. Co., 97 Mo. 165, 10 S. W. 58, the declarations of a deceased child as to the manner in which he was hurt, made at the scene of the accident and while surrounded by the persons who witnessed the calamity were held admissible as part of the *res gestae;* but what the child said after being carried sixty to seventy-five feet and laid on a cot and from five to twenty-five minutes after the accident, was held no part of the *res gestae.*

In an action on an insurance policy insuring deceased against injury or death caused by external violence and accident where it was claimed that the death of the insured was caused by injuries received in a fall from a ladder, the testimony of a witness who heard the sound of the accident and immediately after saw the insured on the ground, and that the latter told him he had fallen from the ladder, and a few minutes afterwards said that he had fallen on his neck and shoulders, was held admissible, the declarations being part of the *res gestae.* North American Acc. Ins. Co. *v.* Woodson, 64 Fed. 689, 24 U. S. App. 364, 12 C. C. A. 392, *citing* Insurance Co. *v.* Mosley, 8 Wall. (U. S.) 397.

Statement Exonerating Defendant. Declarations of person injured, at the moment of the accident, that she blamed no one but herself, are admissible as part of the *res gestae.* De Mahy *v.* Morgan's L. & T. R. Co., 45 La. Am. 1329, 14 So. 61.

83. *United States.* — National Masonic Acc. Assn. *v.* Shryock, 73 Fed. 774, 36 U. S. App. 658, 20 C. C. A. 3; Travelers' Protective Assn. *v.* West, 102 Fed. 226, 42 C. C. A. 284.

Arkansas. — Fordyce *v.* McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296.

Georgia. — Savannah, F. & W. R. Co. *v.* Holland, 9 S. E. 1040; Augusta & S. R. Co. *v.* Randall, 79 Ga. 304, 4 S. E. 674.

Illinois. — Globe Acc. Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. 563.

Louisiana. — Marler *v.* Texas & P. R. Co., 52 La. Ann. 727, 27 So. 176.

Missouri. — Leahey *v.* Cass Ave.

In numerous cases where the statement has been admitted, the time does not appear except as it is measured by the events,[84] as

R. Co., 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300.

Nebraska. — City of Friend *v.* Burleigh, 53 Neb. 674, 74 N. W. 50.

New York. — Spatz *v.* Lyons, 55 Barb. 476.

Pennsylvania. — Bradford City *v.* Downs, 126 Pa. St. 622, 17 Atl. 884; Keefer *v.* Pacific Mut. L. Ins. Co., 201 Pa. St. 448, 51 Atl. 366.

Texas. — McCowen *v.* Gulf, C. & S. F. R. Co. (Tex. Civ. App.), 73 S. W. 46.

Where the plaintiff claimed that his injuries were caused by defects in a bridge over which he attempted to cross, his statement as to the condition of the bridge made after he had been removed from the scene of the accident to a nearby house and a physcian had been called in, was held no part of the *res gestae* but a mere narrative of a past transaction. They were not strictly or even substantially contemporaneous, and hence could not be regarded as spontaneous. "After such a lapse of time as appeared in this case the declarations cannot with any propriety be considered part of the *res gestae* any more than if made the next day or the next year." The plaintiff "had been removed from the scene of the injury; the surroundings were all changed; the time for exclamation or outcry was passed, and nothing for the present remained to be done but to care for the injured man, leaving investigation into the cause of injury to some more favorable time in the future. The statements made . . . to his physician were proper enough as between man and man, but they had no legal value and were therefore erroneously admitted." Merkle *v.* Bennington, 58 Mich. 156, 24 N. W. 776, 55 Am. Rep. 666, *distinguishing* Insurance Co. *v.* Mosley, 8 Wall. (U. S.) 397; Jordan *v.* Com., 25 Gratt. (Va.) 943; Waldele *v.* New York Cent. & H. R. R. Co., 29 Hun (N. Y.) 35.

84. Insurance Co. *v.* Mosley, 8 Wall. (U. S.) 397; Travelers' Protective Assn. *v.* West, 102 Fed. 226, 42 C. C. A. 284 (*holding* that Insurance Co. *v.* Mosley, 8 Wall. (U. S.) 397, has not been overruled by Vicksburg & M. R. Co *v.* O'Brien, 119 U. S. 99. But to the contrary on this proposition see National Masonic Acc. Assn. *v.* Shryock, 73 Fed. 774, 20 C. C. A. 3, 36 U. S. App. 658; Houston, E. & W. F. R. Co. *v.* Weaver (Tex. Civ. App.), 41 S. W. 846; Little Rock M. R. & T. R. Co. *v.* Leverett, 48 Ark. 333, 3 S. W. 50.

Where an engine washer who was directed to go under the boiler of an engine to tighten boiler plugs was scalded to death while engaged in the work, held, that his declarations after having crawled out from under the engine, and being assisted to a chair in response to questions as to how the accident happened and while suffering intense pain and greatly excited, that "I am a dead man, but nobody is to blame; I turned the plug the wrong way and it came out," is admissible as part of *res gestae*. Louisville & E. R. Co. *v.* Berry, 2 Ind. App. 427, 28 N. E. 714.

The statement of an injured child as he was being taken from under the car which had run over him, "I saved this leg and I tried to save this other one but could not" was held competent as part of the *res gestae*. Di Prisco *v.* Wilmington City R. Co., 4 Pen. (Del.) 527, 57 Atl. 906.

In an action on an insurance policy on the issue of the cause of death, the declarations of the decedent, an osteopathic physician, that he had strained his back while treating a patient and was suffering great pain, made to the witness as he came out of the treatment room and within half an hour after commencing such treatment, was held admissible as part of the *res gestae*. They "were properly admitted as tending to show not only that he was then suffering severe bodily pain, but also that he had sustained an accidental strain in the treatment of a patient They come clearly within the rule

where the statement was made to one who had run a short distance to the assistance of the injured person.[85] In other cases where the exact time did not appear, but where the statement did not immediately follow the event, it has been excluded.[86] In some cases statements very shortly after the injury have been excluded.[87]

of competency, as part of the *res gestae*, that was announced by the supreme court of the United States in Travelers' Ins. Co. *v.* Mosley, 8 Wall. 397, 404, 405." Patterson *v.* Ocean Acc. & G. Corp., 25 App. D. C. 46.

In an action for injuries caused by a fall into an unguarded excavation it appeared that the plaintiff after extricating himself returned to the mill in which he had been working and sat down in a chair where he was soon after discovered by an employe of the mill, his hat and coat covered with dirt and a frightened look on his face. In response to the inquiry as to what was the matter he replied that he had fallen into an excavation and was hurt. This statement was held properly admitted for the plaintiff as part of the *res gestae* although objected to as a mere narrative, the rule being that declarations to be admissible must be so near the principal transaction in point of time as to appear to be spontaneous and unpremeditated and to afford a reliable explanation of the principal transaction. Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227.

85. District of Columbia *v.* Dietrich, 23 App. D. C. 577, *following* Washington & G. R. Co. *v.* McLane, 11 App. D. C. 220; Southern R. Co. *v.* Brown, 126 Ga. 1, 54 S. E. 911; Williams *v.* Southern R., 68 S. C. 369, 47 S. E. 706; Missouri Pac. R. Co. *v.* Baier, 37 Neb. 235, 55 N. W. 913; Muren Coal & Ice Co. *v.* Howell, 217 Ill. 190, 75 N. E. 469; Ferguson *v.* Columbus & Rome R., 75 Ga. 637.

86. Newsom *v.* Georgia R., 66 Ga. 57; Duperrier *v.* Dautrive, 12 La. Ann. 664; Poole *v.* East Tennessee, V. & G. R. Co., 92 Ga. 337, 17 S. E. 267; Louisville & N. R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176; Chicago & N. W. R. Co. *v.* Howard, 6 Ill. App. 569.

87. Dompier *v.* Lewis, 131 Mich. 144, 91 N. W. 152; Boyd *v.* West Chicago St. R. Co., 112 Ill. App. 50. See Texas & N. O. R. Co. *v.* Crowder, 70 Tex. 222, 7 S. W. 709.

Where the plaintiff's injuries were caused by a fall down defendant's stairway, plaintiff's statements made to her daughter immediately after the fall, as soon as the daughter reached her at the foot of the stairway, were held not admissible because not part of the *res gestae*. Potter *v.* Cave, 123 Iowa 98, 98 N. W. 569.

In an action for damages for ejecting plaintiff from a car, the request of the plaintiff to a witness to take care of him, made after he had been ejected, was held not part of the *res gestae*. Moore *v.* Nashville, C. & St. L. R., 137 Ala. 495, 34 So. 617.

In an action for wrongful death where it was claimed that the intestate was thrown from a street car and run over, his statement in response to a question as to what was the matter, that the conductor threw him off the car, made after he had got up and walked to the sidewalk and sat down, was held improperly admitted since it was not a part of the *res gestae*. The declaration was merely narrative and not contemporaneous with the injury. Chicago West Div. R. Co. *v.* Becker, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144, *reversing* 30 Ill. App. 200.

In an action for injuries received by falling or being precipitated into a ditch, when in the act of landing from a car, what the party said immediately afterward, and while being helped out of the ditch, as to the cause of the accident, is not admissible as part of *res gestae*, but a mere account of a past transaction. Cleveland, C. & C. R. Co. *v.* Mara, 26 Ohio St. 185.

In an action for wrongful death, the statement of the decedent made

Statements one minute after the infliction of the injury have been held admissible,[88] as have statements two minutes after;[89] statements made a few minutes after the injury have been held admissible in some cases[90] and inadmissible in others,[91] and the same is true of statements made within five minutes after,[92] statements ten

after he had been taken to a drug store one or two blocks away and in response to a question by a policeman was held no part of the *res gestae*, too much time having intervened to permit it to be deemed spontaneous, and also because the statement was made in response to a question. Lahey *v.* Ottman & Co., 73 Hun 61, 25 N. Y. Supp. 897.

In an action by an administrator for the wrongful death of his intestate while in the employ of the defendant railway company, it appeared that the deceased after he had been taken from under the car by which he had been injured and while he was being conveyed to the switch house by his fellow employes, was asked how the accident happened. His response was held no part of the *res gestae*. Martin *v.* New York, N. H. & H. R. Co., 103 N. Y. 626, 9 N. E. 505, *following* Waldele *v.* New York Cent. & H. R. R. Co., 95 N. Y. 274.

Deceased was killed by being caught under a car, witness was thirty yards off and saw the accident; deceased saw him and called for help. Witness ran up to deceased, while he was still under car, and exclaimed, "What in the world?" Deceased replied, "The hand-hold let me down," held, not *res gestae*. The exclamation of witness was in effect an inquiry as to how it happened, made after deceased called for help, and the reply of deceased was more a response than a further assertion or demonstration of the main fact manifesting itself in the declaration. Louisville & Nashville R. Co. *v.* Pearson, Admr., 97 Ala. 211, 12 So. 176.

88. Missouri, K. & T. R. Co. *v.* Schilling, 32 Tex. Civ. App. 417, 75 S. W. 64.

Having been injured in a fall from street car, her declarations made in close proximity to the place where she fell and within a minute after she had fallen, upon being assisted in regaining her feet, "that her fall was caused by the driver starting the car while she was alighting therefrom," is admissible as part of *res gestae*. Brown *v.* Louisville R. Co., 21 Ky. L. Rep. 995, 53 S. W. 1041.

89. Louisville, N. A. & C. R. Co. *v.* Buck, 116 Ind. 566, 19 N. E. 453; Fish *v.* Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995; Sullivan *v.* Salt Lake City, 13 Utah 122, 44 Pac. 1039.

90. Gulf, C. & S. F. R. Co. *v.* Wiloughby (Tex. Civ. App.), 81 S. W. 829; North American Acc. Ins. Co. *v.* Woodson, 64 Fed. 689, 12 C. C. A. 392, 24 U. S. App. 364.

91. O. & M. R. Co. *v.* Cullison, 40 Ill. App. 67.

92. Inadmissible. — Richmond & D. R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577. See also Missouri, K. & T. R. Co. *v.* Tarwater, 33 Tex. Civ. App. 116, 75 S. W. 937.

In an action for personal injuries it appeared that the plaintiff, a freight conductor for the defendant, after unsetting a brake of a coal car caught his foot in an unblocked guard rail and was run over by the car. His statement as to how the accident happened, made to the witness who had run up immediately and not more than five minutes after the accident, while the plaintiff was lying on the ground, was held no part of the *res gestae*, being merely a narrative of what had happened. Eastman *v.* Boston & M. R., 165 Mass. 342, 43 N. E. 115; *citing* Lane *v.* Bryant, 9 Gray (Mass.) 245; Com. *v.* Hackett, 2 Allen (Mass.) 136; Com. *v.* McLaughlin, 5 Allen (Mass.) 507; Williamson *v.* Cambridge R. Co., 144 Mass. 148, 10 N. E. 700.

Admissible. — Where deceased was found near the railroad track within five minutes after a train passed, and apparently in great pain, his reply then made to an inquiry that he

minutes after have been excluded,[93] as have those fifteen,[94] and twenty minutes after,[95] though one made fifteen minutes after, while the speaker was in great pain, has been admitted.[96]

Statements made thirty minutes after have been admitted[97] in some cases and excluded in others;[98] one made forty-five minutes

had been kicked off the train is admissible as part of the *res gestae*. Louisville & N. R. Co. *v.* Shaw, Admr., 21 Ky. L. Rep. 1041, 53 S. W. 1048.

93. Cleveland, C., C. & St. L. R. Co. *v.* Sloan, 11 Ind. App. 401, 39 N. E. 174.

Declarations of boy about ten minutes after the accident, in conversation with the physician in the ambulance while being conveyed to the hospital, as to how the accident happened, are not admissible as part of *res gestae*. Citizens St. R. Co. *v.* Stoddard, 10 Ind. App. 278, 37 N. E. 723.

94. Keefer *v.* Pacific Mut. L. Ins. Co., 201 Pa. St. 448, 51 Atl. 366.

95. Roach *v.* Western & A. R. Co., 93 Ga. 785, 21 S. E. 67.

96. Where plaintiff was injured in alighting from a train on a dark night by falling in a pile of wood, his statement to a person who assisted him to a storehouse, made after arriving there and fifteen minutes after the accident, but while he was still uttering groans and exclamations of pain, that the conductor made him get off where he fell, was held admissible as part of *res gestae*. International & G. N. R. Co. *v.* Smith (Tex.), 14 S. W. 642.

97. Half Hour After. — Admissible. — In an action for wrongful death, the declarations of the deceased made within half an hour after she received the injury from which she was suffering at the time the declarations were made are competent as part of the *res gestae* of the injury as explanatory of her then condition and to connect such condition with the injury which caused it. The declarations were made so soon after and under such circumstances that they clearly appear to be spontaneous and unpremeditated. "It is difficult to state any precise rule in accordance with which the admissibility of such declarations can be definitely determined for all cases." Rothrock *v.* Cedar Rapids, 128 Iowa 252, 103 N. W. 475, *holding* that the inconsistent conclusion in Armil *v.* Chicago, B. & Q. R. Co., 70 Iowa 130, 30 N. W. 42, has not been followed in later decisions.

Where a young factory girl had received painful and fatal injuries in the machinery, her statement of the circumstances immediately preceding and resulting in the injury made to her father a half hour afterwards and after she had been taken home, was held part of the *res gestae*. The fact "that the statement was made at a different place than at which the injury occurred, and after a lapse of some short time, if there were nothing else connected with it, would hardly afford a plausible ground for its rejection; but considering the circumstances, the terrible suffering the child was then and had been enduring from the frightful injury that had so recently occurred, we think a case was presented where a judge should have paused long before rejecting it." Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838. But see Augusta & S. R. Co. *v.* Randall, 79 Ga. 304, 4 S. E. 674.

98. White *v.* Southern R. Co., 123 Ga. 353, 51 S. E. 411; Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168, 24 S. W. 106; Steinhofel *v.* Chicago, M. & St. P. R. Co., 92 Wis. 123, 65 N. W. 852; Armil *v.* Chicago, B. & Q. R. Co., 70 Iowa 130, 30 N. W. 42.

In Waldele *v.* New York Cent. & H. R. R. Co., 95 N. Y. 274, 47 Am. Rep. 41, *reversing* 29 Hun 35, the statement of a deaf-mute as to the circumstances of the injury, made by signs some thirty minutes after he had been mangled by a train and while lying on the sidewalk nearby, where he had been placed, was held a mere narrative and not admissible.

after has been deemed incompetent,[99] while statements made as long as an hour,[1] or three hours[2] after, have been held to be part of the *res gestae*.

c. *Preceding Statements.* — Statements of the injured person immediately preceding his injury and forming part of the transaction may be admissible as part of the *res gestae*.[3]

D. Criminal Prosecutions. — a. *For or Against Accused.* Declarations which are part of the *res gestae* are equally admissible for or against the accused.[4]

b. *Declarations of Accused.* — **(1.) Generally.** — The declarations or statements of the accused in a criminal prosecution, made during the commission of the act or immediately thereafter, may be admissible as *res gestae*.[5] But where any considerable length of time has intervened, the declaration is not competent under this principle.[6]

(2.) Distinguished From Confession. — (A.) Generally. — Where the statement of the defendant in a criminal prosecution forms part of the *res gestae* of the alleged offense, it is competent against him without any showing that it was voluntary, even though it may amount to a confession;[7] and a confession, though made under such

99. Statements by an injured person made three quarters of an hour after the injury form no part of the *res gestae*. Gowen *v.* Bush, 76 Fed. 349, 22 C. C. A. 196.

1. **Admissible.** — Harriman *v.* Stowe, 57 Mo. 93.

One Hour After. — Injured person's statement while suffering from the crushing of both arms, made one hour after the accident, held admissible. It appeared that he died within thirty-six hours. Starr *v.* Aetna L. Ins. Co., 41 Wash. 199, 83 Pac. 113.

2. **Three Hours After.** — Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.

3. See *supra*, III, 3, F.

In an action for killing plaintiff's intestate by reason of the defendant's negligence in failing to have a conductor for the train on which the deceased was a brakeman, the latter's statement as he was hurrying from a coach at the rear end of the train to the engine in front, "Get out of my way; I want to get to Mr. Hall (the engineer) to give him these tickets before the train gets too fast" was held competent as part of the *res gestae*, being contemporaneous with the main transaction and spontoneous. It appeared that the deceased was killed while returning from the engine. Means *v.* Carolina Cent. R. Co., 124 N. C. 574, 32 S. E. 960. 45 L. R. A. 164.

4. Kraner *v.* State, 61 Miss. 158.

5. Williams *v.* State (Ala.), 41 So. 992; Mitchum *v.* State, 11 Ga. 615.

The remark of the accused to the person beaten, "If I had known you were a one-legged man, I would not have struck you", made as soon as the blow was given, was part of the *res gestae* tending to reduce the punishment to be imposed. Riddle *v.* State, 49 Ala. 389.

Robbery. — Statements made immediately after its occurrence, by accused, held admissible as *res gestae*. Driscoll *v.* People, 47 Mich. 413, 11 N. W. 221.

6. People *v.* Dice, 120 Cal. 189, 52 Pac. 477; Foster *v.* State, 4 Tex. App. 246; Bodine *v.* State, 129 Ala. 106, 29 So. 926.

Statement of defendant, charged with stealing hogs, made after the theft while the hogs were gathered in his pen, is inadmissible. Blount *v.* State (Tex. Crim.), 28 S. W. 950.

7. Allen *v.* State, 60 Ala. 19; Head *v.* State, 44 Miss. 731.

Declarations of defendant while at the scene of the killing with his pistol in his hand and in the presence of deceased, were a part of the *res*

circumstances as not to be competent as a confession, if it is part of the *res gestae*, is nevertheless admissible.[8]

On the other hand, a confession, though made shortly after the homicide, if not part of the *res gestae*, is only admissible after a proper preliminary showing.[9]

(B.) As Independent Evidence of Corpus Delicti. — The distinction between a confession or admission as such and a declaration forming part of the *res gestae*, though also amounting to a confession, is shown by the fact that the latter has been held to be independent evidence of the *corpus delicti* corroborating the defendant's confession.[10]

(3.) On Prosecution for Homicide. — (A.) Preceding the Homicide. The spontaneous statements of the accused immediately preceding the fatal difficulty and caused by the events culminating in the homicide, may constitute part of the *res gestae*.[11]

(B.) Statements During and Subsequent. — (a.) *Generally.* — State-

gestae and were, therefore, competent without preliminary proof showing his declarations to be voluntary. Williams *v.* State (Ala.), 41 So. 992. See also Sullivan *v.* State, 58 Neb. 796, 79 N. W. 721.

On a prosecution for homicide, the defendant's statement made within a few minutes after the fatal shot to the officer who had arrested him and while defendant was still excited from the occurrence, that he was not aware that he had killed the deceased, was held admissible as part of the *res gestae* although not competent as a confession. Johnson *v.* State, 46 Tex. Crim. 291, 81 S. W. 945.

8. Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153 (confession made under arrest and, therefore, incompetent, held admissible as part of the *res gestae*); Gantier *v.* State (Tex. Crim.), 21 S. W. 255. See Miller *v.* State, 31 Tex. Crim. 609, 21 S. W. 925, 37 Am. St. Rep. 836.

9. A statement made by the accused five minutes after the shooting in response to information that he had killed the deceased, to the effect that he had done what he always intended to do and was ready to die, was held incompetent as part of the *res gestae* or as a confession, there being no predicate for its use on the latter ground. State *v.* Stallings, 142 Ala. 112, 38 So. 261. But see Plant *v.* State, 140 Ala. 52, 37 So. 159; State *v.* Smith, 125 Mo. 2, 28 S. W. 181.

10. Sullivan *v.* State, 58 Neb. 796, 79 N. W. 721. This was a prosecution for homicide. It appeared that the defendant after procuring a revolver in a saloon went about fifty feet, shot the deceased, ran back to the saloon, threw the revolver on the floor and exclaimed, "My God! I have killed T. K. my best friend," then hurried back to the dying man, raised his head and again declared that he had shot his best friend and that he would be hanged. These declarations were held to be parts of the *res gestae* and competent independent evidence of the homicidal act entirely apart from the circumstance that they were admissions against interest. The question involved in this case was the sufficiency of the corroboration of the defendant's confession to prove the *corpus delicti*.

11. See article "Homicide," Vol. VI, p. 615, n. 65.

The defendant's statement as he saw the deceased approaching immediately prior to the fatal act, "Yonder comes Mac with his yauger," is admissible as part of the *res gestae*, but the further statement, "He intends to shoot me," is not. Monroe *v.* State, 5 Ga. 85. See also State *v.* Biggerstaff, 17 Mont. 510, 43 Pac. 709.

A declaration by the defendant, to a bystander, expressing his fears, "There are those fellows, they will get me," made about three minutes

ments made during the continuance of the fatal difficulty are part of the *res gestae*,[12] as are those spontaneously made immediately after.[13]

What length of time between the fatal act and the declaration will render it incompetent, depends somewhat upon the circumstances of the case and whether they are such as to deprive the statement of its spontaneity and its intimate connection with the act.[14] A considerable lapse of time ordinarily renders the statement incompetent,[15] even though it is made in connection with an exhibition of the wounds received during the difficulty.[16]

The accused's statements as to the circumstances of the homicide made very shortly afterwards, have been excluded in some cases.[17]

before the homicide, was held inadmissible as part of *res gestae*, because neither of the persons alluded to made any hostile demonstrations at that time, and no trouble had occurred that day. It was merely a self-serving declaration. State *v.* Carey, 56 Kan. 84, 42 Pac. 371.

12. State *v.* Rollins, 113 N. C. 722, 18 S. E. 394. See article "Homicide," Vol. VI, p. 620, n. 77.

13. Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097. See article "Homicide," Vol. VI, p. 620.

14. Bradberry *v.* State, 22 Tex. App. 273, 2 S. W. 592; Jones *v.* State, 22 Tex. App. 324, 3 S. W. 230. See Forrest *v.* State, 21 Ohio St. 641.

In State *v.* Blanchard, 108 La. 110, 32 So. 397, defendant's response to an inquiry as to the cause of his bloody condition, made after he had walked a block from the scene of the homicide, was held no part of the *res gestae* because not part of a continuing transaction nor made under circumstances guaranteeing its truth. "There is no inflexible rule. It has been decided that the facts of each case are to be considered as to whether or not they fall within the rule. There is no question that the declarations must be made recently after the act and before sufficient time has elapsed to enable the party to conceive some narrative that may go toward helping him in his defense."

15. *Alabama.* — Steele *v.* State, 61 Ala. 213.

Georgia. — Everett *v.* State, 62 Ga. 65.

Kentucky. — Jackson *v.* Com., 18 Ky. L. Rep. 670, 37 S. W. 847.

Louisiana. — See State *v.* Rutledge, 37 La. Ann. 378.

Mississippi. — Scaggs *v.* State, 8 Smed. & M. 722.

Missouri. — State *v.* Cavin (Mo.), 97 S. W. 572.

New Mexico. — Territory *v.* Yarberry, 2 N. M. 391.

South Carolina. — State *v.* Talbert, 41 S. C. 526, 19 S. E. 852.

Texas. — Cockerell *v.* State, 32 Tex. Crim. 585, 25 S. W. 421; Stephens *v.* State, 20 Tex. App. 255; Jackson *v.* State (Tex. Crim.), 24 S. W. 896. See People *v.* Wyman, 15 Cal. 70.

A question asked by the defendant of the deceased some little time after the shooting as to how she was shot, is not part of the *res gestae*. State *v.* Punshon, 133 Mo. 44, 34 S. W. 25.

Several Hours After. — Smotherman *v.* State (Tex. Crim.), 74 S. W. 540; Brittain *v.* State (Tex. Crim.), 85 S. W. 278; Evans *v.* State, 58 Ark. 47, 22 S. W. 1026.

16. State *v.* Johnson, 35 La. Ann. 968.

17. State *v.* Pugh, 16 Mont. 343, 40 Pac. 861; King *v.* State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681 (a little more than a minute after); Doles *v.* State, 97 Ind. 555. See Forrest *v.* State, 21 Ohio St. 641; Nelson *v.* State, 2 Swan (Tenn.) 237; Turner *v.* State, 89 Tenn. 547, 15 S. W. 838.

Defendant's declaration a few moments after he shot another and fled from the scene of the shooting,

Statements a few minutes after have been admitted in some cases[18] and excluded in others,[19] as have those made within five minutes.[20] Statements made ten or fifteen[21] minutes after have been excluded, while one made ten[22] and even twenty minutes[23] after has been admitted.

(b.) *Time Not Shown.* — When the length of intervening time is not made to appear, the statement will be excluded.[24]

(c.) *After Leaving Scene of Act.* — The fact that the statement of the accused was made after he had left the scene of his act, renders it inadmissible as *res gestae* in some courts,[25] and it is always a cir-

that it was done "accidentally or unintentionally" by him, is not admissible as part of the *res gestae*. State *v.* Seymour, 1 Houst. Cr. Cas. (Del.) 508.

18. Little *v.* Com., 25 Gratt. (Va.) 921; Pratt *v.* State (Tex. Crim.), 96 S. W. 8; Mitchum *v.* State, 11 Ga. 615 (one or two minutes after); Beckham *v.* State (Tex. Crim.), 69 S. W. 534. *following* Freeman *v.* State, 40 Tex. Crim. 545, 46 S. W. 641, 51 S. W. 230.

Declarations of defendant from one to three minutes after the shooting that he shot at *W. C.*, the son, and not *J. C.*, the father, is admissible as part of the *res gestae*. Thomas *v.* State, 27 Ga. 287.

19. State *v.* Rider, 95 Mo. 474, 8 S. W. 723; Pitts *v.* State, 140 Ala. 70, 37 So. 101; Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

In Wright *v.* State, 88 Md. 705, 41 Atl. 1060, the statements of the accused charged with homicide made some minutes after the fatal shooting and after he had had time for reflection were held not part of the *res gestae* and not admissible as such.

20. Admissible. — Bateson *v.* State, 46 Tex. Crim. 34, 80 S. W. 88; Craven *v.* State (Tex. Crim.), 90 S. W. 311.

"Where it appeared . . . that within five or ten minutes after defendant had struck the fatal blow with a beer glass, he, being much excited and frightened, stated to the first persons he mentioned the matter to after leaving the house and going some thirty feet, 'I hope I haven't hurt him much. I did not think the glass was heavy enough to knock him down. I just wanted to keep him from kicking me any more.'" This statement was held admissible as *res gestae*. Griffin *v.* State, 40 Tex. Crim. 312, 50 S. W. 366.

Inadmissible. — Little *v.* State, 87 Miss. 512, 40 So. 165; Davis *v.* Com., 25 Ky. L. Rep. 1426, 77 S. W. 1101; State *v.* Davis, 104 Tenn. 501, 58 S. W. 122.

21. Brown *v.* State, 38 Tex. Crim. 597, 44 S. W. 176 (ten or fifteen minutes after); Ford *v.* State, 40 Tex. Crim. 280, 50 S. W. 350 (ten minutes after); Hull *v.* State, 48 Ga. 607 (ten or twelve minutes after).

22. Craig *v.* State, 30 Tex. App. 619, 18 S. W. 297.

23. Stagner *v.* State, 9 Tex. App. 440.

24. Kennedy *v.* State, 85 Ala. 326, 5 So. 300. See *supra*, III. 3, C, e, (2.), (D.), and Cahn *v.* State, 27 Tex. App. 709, 11 S. W. 723; Cockerell *v.* State, 32 Tex. Crim. 585, 25 S. W. 421.

25. Blair *v.* State, 69 Ark. 558, 64 S. W. 948.

Statements made by the defendant on reaching the house of the witness a quarter of a mile from the place of the shooting, and where the defendant had gone immediately after the shooting, are not competent as part of the *res gestae*. "It is not disputed that this was several minutes after the shooting . . . and after the defendant had walked a quarter of a mile to the home of the witness. The difficulty had ended; the declarations sought to be introduced were separate in point of time and place from the shooting." Pitts *v.* State, 140 Ala. 70, 37 So. 101; *citing* Harkness *v.* State, 129 Ala. 71, 30 So. 73; Nelson *v.* State, 130 Ala. 83, 30 So. 728.

cumstance tending to show opportunity for reflection.[26] In some jurisdictions, however, this circumstance alone does not render a declaration incompetent as part of the *res gestae*.[27]

(d.) *Statements on Arrest.* — Statements by the accused on his arrest a considerable time after the homicidal act, are not part of the *res gestae*, as that term is applied to spontaneous statements used testimonially,[28] though it may in some cases be regarded as a relevant circumstance and called *res gestae*.[29]

The defendant's statements to the officer to whom he surrenders himself some time after the fatal act, are not part of the *res gestae*;[30] if, however, the arrest and statement follow immediately[31] or very soon[32] after the homicide, the statement may be regarded as spontaneous.

(e.) *Narrative Declarations.* — Merely narrative declarations of the defendant are no part of the *res gestae*.[33]

On a prosecution for homicide, statements of the defendant made after he had left the scene of the homicide were held no part of the *res gestae*, although made within five minutes after the killing. Davis *v.* Com., 25 Ky. L. Rep. 1426, 77 S. W. 1101.

26. See Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805; State *v.* Rider, 95 Mo. 474, 8 S. W. 723; People *v.* Callaghan, 4 Utah 49, 6 Pac. 49; Lynch *v.* State, 24 Tex. App. 350, 6 S. W. 190, 5 Am. St. Rep. 888; Nelson *v.* State, 2 Swan (Tenn.) 237.

27. Craven *v.* State (Tex. Crim.), 90 S. W. 311; Pratt *v.* State (Tex. Crim.), 96 S. W. 8; Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153.

In Scott *v.* State, 46 Tex. Crim. 536, 81 S. W. 294, a prosecution for homicide which occurred while the defendant, an officer, was arresting other persons, it appeared that the defendant had taken the persons arrested to the jail some distance away and while there another officer came in and instructed the jailer to hold the defendant as he had killed a man. The reply of the defendant that if he had killed any one it was wholly unintentional, that his pistol went off accidentally and he did not know that the ball had hit any one, was held improperly excluded, being part of the *res gestae* although made some ten or fifteen minutes after the killing.

28. State *v.* Moore, 104 N. C. 743, 10 S. E. 183; Hall *v.* State, 48 Ga. 607.

29. What defendant said or did on his arrest is a part of the *res gestae* of the homicide. Darter *v.* State, 39 Tex. Crim. 40, 44 S. W. 850.

30. State *v.* Smith, 43 Or. 109, 71 Pac. 973; Pharr *v.* State, 9 Tex. App. 129; State *v.* Nocton, 121 Mo. 537, 26 S. W. 551; Beckham *v.* State (Tex. Crim.), 69 S. W. 534; Fuller *v.* State (Tex. Crim.), 95 S. W. 541; Rutherford *v.* Com., 13 Bush (Ky.) 608. But see Nelson *v.* State (Tex. Crim.), 58 S. W. 107.

31. Where the evidence was conflicting whether or not the deceased when shot by the defendant had a knife in his hand and was advancing with it on defendant, the defense offered to prove that the defendant, on being arrested, within less than a minute after he shot deceased, exclaimed, "I would shoot any man who was trying to cut my throat." *Held*, that declaration was admissible as *res gestae*, as it came spontaneously at the very time of the act, before time for deliberation or to manufacture the story. Foster *v.* State, 8 Tex. App. 248. But see State *v.* Pugh, 16 Mont. 343, 40 Pac. 861.

32. Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153; Gantier *v.* State (Tex. Crim.), 21 S. W. 255 (three minutes after homicide).

33. Sullivan *v.* State, 101 Ga. 800, 29 S. E. 16; King *v.* State, 65 Miss.

(f.) *In Behalf of Accused.* — The accused may introduce in evidence his own declarations, forming part of the *res gestae* of the homicide.[34]

c. *Statements of Assaulted Person.* — **(1.) Generally.** — In prosecutions or actions involving an assault, the statements of the assaulted person bearing upon the circumstances of the assault and made during its continuance may be competent testimonially as part of the *res gestae.*[35] So his statement as to the occurrence made immediately after it, is admissible.[36] These rules apply to prosecu-

576, 5 So. 97, 7 Am. St. Rep. 681; State *v.* Pugh, 16 Mont. 343, 40 Pac. 861. See Doles *v.* State, 97 Ind. 555; Fuller *v.* State (Tex. Crim.), 95 S. W. 541.

34. Scott *v.* State, 46 Tex. Crim. 536, 81 S. W. 294. See also Bradberry *v.* State, 22 Tex. App. 273, 2 S. W. 592; Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153. See *supra,* III, 3, C, h.

On a prosecution for homicide, statements made by the defendant to his father within six minutes after the shooting, as to the circumstances thereof, were held admissible in his behalf as *res gestae.* The statements were made as the defendant came up to his father's gate greatly excited, his horses running at breakneck speed, and in reply to an inquiry by the father as to what was the matter. Craven *v.* State (Tex. Crim.), 90 S. W. 311.

In Bateson *v.* State, 46 Tex. Crim. 34, 80 S. W. 88, a prosecution for homicide, declarations of the defendant five or six minutes after the fatal difficulty, to the effect that he was afraid that he had cut the deceased bad, that he did not aim to do it, and asked some one to go for a doctor, that he would pay for it, and requesting that he be allowed to go and see his wife and children, were held admissible as part of the *res gestae* in his own behalf.

Witness for defense offered to testify that defendant said to him, when he ran to the scene of the homicide, arriving there between the third and fourth shots, and while several men present were struggling with each other, "Catch hold of this man, he has tried to kill me." *Held,* admissible as part of *res gestae.* State *v.* Rollins, 113 N. C. 722, 18 S. E. 394.

To Show Accidental Shooting. Where the defendant charged with homicide claimed accidental shooting, his statements made immediately after the shot was fired, tending to indicate an accidental discharge of the pistol, were held admissible as part of the *res gestae.* Teel *v.* State (Tex. Crim.), 69 S. W. 531. But see Brown *v.* State, 38 Tex. Crim. 597, 44 S. W. 176; State *v.* Seymour, 1 Houst. Cr. Cas. (Del.) 508.

35. Declarations by person assaulted to persons coming to his assistance made in defendant's presence and during the difficulty, that defendant had a pistol, is part of the *res gestae.* Simmons *v.* State (Ala.), 40 So. 660.

On a prosecution for robbery, the exclamation of the prosecuting witness at the time of the alleged robbery, "They are robbing me" was held admissible as part of the *res gestae.* People *v.* Piggott, 126 Cal. 509, 59 Pac. 31.

36. State *v.* Epstein, 25 R. I. 131, 55 Atl. 204; Pool *v.* State (Tex. Crim.), 23 S. W. 891; State *v.* Driscoll, 72 Iowa 583, 34 N. W. 428; Monday *v.* State, 32 Ga. 672, 77 Am. Dec. 314.

During Flight. — What is said by the assaulted person in his flight under the apprehension of immediate danger, is admissible as *res gestae.* Flynn *v.* State, 43 Ark. 289.

The declaration of a person as to how or by whom he was wounded, made immediately after the wounding, is admissible as *res gestae* if voluntarily or spontaneously made at a time so near the act as reasonably

tions for robbery,[37] assault with intent to murder,[38] and rape.[39]

(2.) Subsequent Statements. — As to the length of time which may elapse between the assault and the statements of the assaulted person without rendering them incompetent, the cases are not in harmony, some requiring the statement and the action to be practically contemporaneous,[40] others allowing a more or less considerable interval to intervene.[41]

to preclude all idea of design. State *v.* Maxey, 107 La. 799, 32 So. 206.

On a prosecution for felonious shooting, it appeared that the prosecuting witness upon being shot in the night time while in front of his house had immediately cried out that the defendant had shot him, and that he made the same statement to his brother-in-law as soon as the latter reached him after running some four hundred yards. These statements were held to be spontaneous and therefore part of the *res gestae*. Andrews *v.* Com., 100 Va. 801, 40 S. E. 935.

Admission of Fault by Prosecuting Witness. — A statement by the prosecuting witness made to the accused immediately after the assault, that he, the prosecutor, was to blame, is admissible as part of the *res gestae*. People *v.* Swenson, 49 Cal. 388.

37. Lambert *v.* People, 29 Mich. 71; State *v.* Murphy, 16 R. I. 528, 17 Atl. 998.

On a prosecution for robbery, the statements of the assaulted person as to the circumstances thereof made almost immediately after the alleged offense and after the assaulted person had run up to the witness, are admissible as part of the *res gestae*. State *v.* Smith, 26 Wash. 354, 67 Pac. 70.

A statement made by the prosecuting witness, "that she had been robbed" a very few minutes after the crime was committed and whilst she was still weeping because of the loss of the money taken from her, is admissible as part of the *res gestae*. State *v.* Ah Loi, 5 Nev. 99. But see Shoecraft *v.* State, 137 Ind. 433, 36 N. E. 113.

Exclamation of Prosecutor That He Was Robbed, and asking "which way those parties went" made while defendants were running away, is admissible as part of the *res gestae*. Bow *v.* People, 160 Ill. 438, 43 N. E. 593.

Complaint Made to Policeman. Lampkin *v.* State, 87 Ga. 516, 13 S. E. 523; Driscoll *v.* People, 47 Mich. 413, 11 N. W. 221; State *v.* Horan, 32 Minn. 394, 20 N. W. 905, 50 Am. Rep. 583. But see Haynes *v.* Com., 28 Gratt (Va.) 942.

38. On a prosecution for assault with intent to murder, the wounded person's declaration to the effect that he was shot, made immediately after the firing of the pistol, is a part of the *res gestae*. Gaines *v.* State, 108 Ga. 772, 33 S. E. 632.

39. McMurrin *v.* Rigby, 80 Iowa 322, 45 N. W. 877; People *v.* Flynn, 96 Mich. 276, 55 N. W. 834; McMath *v.* State, 55 Ga. 303. See article "RAPE," Vol. X.

40. State *v.* Daugherty, 17 Nev. 376, 30 Pac. 1074; State *v.* Davidson, 30 Vt. 377; Haynes *v.* Com., 28 Gratt. (Va.) 942.

In an Action for Assault and Battery, testimony of a witness "that at his door seventy-five feet away, he saw the plaintiff with blood dripping from her nose and lips and asked her what was the matter, to which she replied, pointing to the defendant, 'that peddler, he struck me severely.'" is admissible, as declarations which are narrative of what has happened, however recently, are not *res gestae*. Elguth *v.* Grueszka, 57 Ill. App. 193.

41. Statement Made to Officer. The complaining witness was waylaid, knocked down and robbed in a public street at night. The assailant then fled, and the witness immediately gave the alarm, returned to his house near by, and a few minutes later, on arrival of police officer, described to him the appearance of the persons who made the assault. After the details of the assault and robbery had appeared in evidence, it was

But statements made so long after an assault that they cannot be regarded as spontaneous and part of one transaction, are not admissible.[42]

(3.) Rape. — The ordinary rule as to the time within which a declaration must be made to be a part of the *res gestae* is liberally extended in some jurisdictions when applied to the complaints or statements of the prosecutrix on a prosecution for rape.[43] Complaints made one or two days after the event have been received in some cases.[44]

held that the statements of the injured party made to an officer, under the circumstances, were sufficiently connected with the principal event to be the natural outgrowth of it and free from the suspicion of plan or afterthought. State *v.* Horan, 32 Minn. 394, 20 N. W. 905, 50 Am. Rep. 583. See State *v.* Murphy, 16 R. I. 528, 17 Atl. 998. But see State *v.* Pomeroy, 25 Kan. 349.

42. Green *v.* State, 74 Ga. 373; Pool *v.* State (Tex. Crim.), 23 S. W. 891; King *v.* King, 42 Mo. App. 454; Jones *v.* Com., 86 Va. 740, 10 S. E. 1004; State *v.* Pomeroy, 25 Kan. 349 (three to five minutes after, to persons who ran to his assistance).

After Leaving Scene of Assault. State *v.* McCann, 43 Or. 155, 72 Pac. 137; Shoecraft *v.* State, 137 Ind. 433, 36 N. E. 1113 (after walking two blocks).

On a prosecution for assault, statements of the assaulted person although made while she was crying and bleeding from her wounds are not part of the *res gestae* of the assault where not made until she had walked a mile from the scene of the assault. Martin *v.* State (Tex. Crim.), 82 S. W. 657.

43. People *v.* Gage, 62 Mich. 271, 28 N. W. 835. See Chambless *v.* State (Tex. Crim.), 94 S. W. 220; Berry *v.* State, 44 Tex. Crim. 395, 72 S. W. 170; Castillo *v.* State, 31 Tex. Crim. 145, 19 S. W. 892, 37 Am. St. Rep. 794 (statement of assaulted child over half an hour after, while suffering severely — being apparently spontaneous).

In cases of rape and abuse of female children, the principle of what is called the *res gestae* will of necessity be extended beyond the limits that obtain generally in civil cases. No inflexible rule as to the length of time between act charged against accused and the declaration of complaining party can be laid down as established to bring declaration within the principle of *res gestae*. Snowden *v.* United States, 2 App. D. C. 89.

On a prosecution for rape, the statements of the assaulted child, who was about six years old, as to the circumstances of the alleged assault, made to the child's mother in response to questions by the latter some twenty minutes after the occurrence were held competent as *res gestae* although objected to on the ground that too great a time had elapsed since the transaction. "It does not occur to us that the length of time (twenty minutes) would exclude this testimony as not being part of the *res gestae*. A number of cases in this state have admitted this character of testimony where the time was greater than is here shown." Thomas *v.* State (Tex. Crim.), 84 S. W. 823, in which it appeared, however, that the statements were made under the excitement of the previous assault and were therefore spontaneous.

44. Where it appeared that rape was committed upon the daughter during a medical examination by a physician called by her mother, who was excused from the room during the examination, it was further shown that the second day after the offense the mother was prompted by the shamefaced appearance of the girl to ask what was the matter. This fact and the complaint made by the daughter were held competent evidence as part of the *res gestae*. People *v.* Brown, 53 Mich. 531, 19 N. W. 172.

Where, however, such a complaint or statement appears not to have been spontaneous, it will be excluded.[45]

A Distinction must be observed in this class of cases between the fact that a complaint was made and the statements contained therein, the latter being admissible as testimonial statements only under the *res gestae* principle, while the former may be independently relevant.[46]

(4.) Statements of Deceased in Homicide Trial.—(A.) GENERALLY. In determining what statements of the deceased[47] are admissible on a prosecution for homicide, no hard and fast rules can be laid down[48]

45. The statements of the prosecutrix made fifteen minutes after the attempted assault upon her and after she had left the scene of the assault, and not made spontaneously but in response to a question, were held no part of the *res gestae*. Williams *v.* State, 66 Ark. 264, 50 S. W. 517.

Next Day.—McGee *v.* State, 21 Tex. App. 670, 2 S. W. 890; Brown *v.* State, 127 Wis. 193, 106 N. W. 536.

46. Lacy *v.* State, 45 Ala. 80. See Johnson *v.* State, 21 Tex. App. 368, 17 S. W. 252; Castillo *v.* State, 31 Tex. Crim. 145, 19 S. W. 892, 37 Am. St. Rep. 794.

In this state evidence of complaint of rape is not received merely as corroboration of the statement of the prosecutrix, but as part of the *res gestae*, when made immediately after the outrage complained of, and it would seem that not only the fact that complaint was made, but the complaint itself is admissible. The lapse of time after the commission of rape before complaint is made is not the test of the admissibility of the evidence of such complaint, but may be considered as affecting its weight; and when not made promptly, the delay calls for explanation before the court will admit such testimony. People *v.* Gage, 62 Mich. 271, 28 N. W. 835.

47. See article "HOMICIDE," Vol. VI, p. 616.

48. The declarations of the deceased as to the cause of his injury, though made out of the presence of the accused and under such circumstances as not to be admissible as a dying declaration, is nevertheless competent as part of the *res gestae*, and if made so near the time of the infliction of the injury and under such circumstances as to raise the presumption that it is an unpremeditated explanation thereof. "Whether the declarations of a person since deceased, is competent evidence as being part of the *res gestae* of some transaction occurring in the life of said deceased, in any case, must be determined from the facts and circumstances surrounding the case on trial. The term *res gestae* means things done in and about, and as part of, the transaction, out of which the litigation in hand grew, and on which transaction said litigation is based." Collins *v.* State, 46 Neb. 37, 64 N. W. 432.

On a prosecution for homicide where it appeared that the deceased died from burns caused by the defendant's throwing a lamp at her and setting her clothing afire, the statement of the deceased, "See what he has done now! Struck me with a lamp," made to one who came in a few moments after the lamp was thrown while the deceased was sitting in a corner of the room next to that in which the defendant was, and after the flames upon the deceased's person had been fully extinguished, was held properly admitted as part of the *res gestae*. "It is not always easy to determine when remarks of parties are to be considered as part of the *res gestae*. The general principle is well understood that exclamations made contemporaneously with the main fact under investigation, and which evidently spring therefrom, and are calculated to throw light upon its nature, are always considered a part of the transaction itself, while that which is merely narrative in its nature, occurring after the main transaction is closed, cannot be con-

except the general rules governing this class of evidence.[49] His statements during the fatal difficulty as to the injuries he has received are admissible.[50]

(B.) PRECEDING STATEMENTS. — The statements of the deceased immediately preceding the fatal encounter, if spontaneous, caused by anticipation of it and tending to explain it, are admissible testimonially as part of the *res gestae*.[51] But statements, although very shortly prior, if not caused by and forming a part of the transaction following, are not admissible.[52]

sidered a part of the transaction, but must be considered as simply hearsay; but the line between the two classes is sometimes very shadowy and hard to draw. The remark of the deceased in the present case, while it has some of the elements of a narrative, was plainly very closely connected with the main fact, both as to time and place. The witness arrived on the scene within a very few moments after the breaking of the lamp; fire was still smoldering in the curtain and in some of the clothing in the kitchen; both actors were practically on the spot; there had hardly been time for premeditation or the making up of a story; the remark itself is in the nature of an exclamation, and bears some, at least, of the marks of a spontaneous utterance, springing from the excitement of the moment. Under the rule established in the cases cited, we think it was rightly admitted in evidence as a part of the *res gestae*." Bliss *v.* State, 117 Wis. 596, 94 N. W. 325.

49. See *supra*, III, 3.

50. State *v.* Henderson, 24 Or. 100, 32 Pac. 1030. See article "HOMICIDE," Vol. VI.

51. State *v.* Biggerstaff, 17 Mont. 510, 43 Pac. 709.

The statement of the deceased made just before she was shot and tending to prove that she recognized the person about to kill her as the defendant, was held properly admitted as part of the *res gestae*. Trulock *v.* State, 70 Ark. 558, 69 S. W. 677. See also State *v.* Wagner, 61 Me. 178.

A statement made by the deceased as he and the defendant grappled, "You need not put your hand in your pocket. I am not afraid of anything you have in your pocket," was held properly admitted as part of the *res gestae*. Bankhead *v.* State, 124 Ala. 14, 26 So. 979.

Preparatory to and just before the assassination of deceased, he was taken by a party of men in the night time out of his father's house, but was allowed to return under surveillance and put on his boots, when being asked by his mother who the men were, he, with exhibitions of terror, told her in a whisper who three of them were, two of the three being defendants on trial and the third party jointly indicted with them. The declaration was held to be part of the *res gestae* and competent to prove the facts stated in it. Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746.

Evidence that the deceased, while sitting in a church and after gazing out of a window, told a companion that the accused was outside and fixing to kill him (the deceased), and immediately stepped to the door, where he was fired upon and instantly killed, is clearly *res gestae*. Means *v.* State, 10 Tex. App. 16, 38 Am. Rep. 640.

52. Domingus *v.* State, 94 Ala. 9, 11 So. 190. See also article "HOMICIDE," Vol. VI.

But in Washington *v.* State, 19 Tex. App. 521, 53 Am. Rep. 387, a witness testified that on the evening of the homicide he met the deceased who told him that the accused wanted to see the witness the next day. The witness signified his intention of going to defendant's house that same evening, whereupon the deceased told him that the defendant would not be at home because he had just seen him going down the slough with a shot gun. Immediately after this conversation the deceased started in the direction

(C.) Subsequent to Infliction of Fatal Injury. — (a.) *Generally.* Statements of the deceased immediately, or almost immediately, after the infliction of the fatal injury and relating thereto, are ordinarily admissible as part of the *res gestae* because they are spontaneous.[53] On the other hand, those made a considerable time thereafter, are generally not admissible because they are regarded premeditated and not part of the transaction.[54] In their application of the general rules some courts are inclined to be liberal[55] and others

of the slough, and within three or four minutes witness heard a shot in that direction, and upon going there found the deceased who had been shot with several buckshot. The previous statements of the deceased as to the whereabouts of the defendant were held admissible as tending to show that the latter was at or near the place of the homicide and had an opportunity and the means of killing the deceased at the time and in the manner the killing was shown to have occurred.

53. *Alabama.* — Smith *v.* State, 40 So. 959; Stevens *v.* State, 138 Ala. 71, 35 So. 122.

Arizona. — Sheehy *v.* Territory, 80 Pac. 356.

California. — People *v.* Wong Ah Foo, 69 Cal. 180, 10 Pac. 375; People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 49 (*disapproved* in 96 Cal. 125, 30 Pac. 115).

Florida. — Marlow *v.* State, 49 Fla. 7, 38 So. 653.

Idaho. — State *v.* Gilbert, 8 Idaho 346, 69 Pac. 62; State *v.* Wilmbusse, 8 Idaho 608, 70 Pac. 849.

Indiana. — Green *v.* State, 154 Ind. 655, 57 N. E. 637.

Kentucky. — Howard *v.* Com., 24 Ky. L. Rep. 950, 70 S. W. 295; Hughes *v.* Com., 19 Ky. L. Rep. 497, 41 S. W. 294; Shotwell *v.* Com., 24 Ky. L. Rep. 255, 68 S. W. 403; Morfleet *v.* Com., 17 Ky. L. Rep. 1137, 33 S. W. 938.

Louisiana. — State *v.* Sadler, 51 La. Ann. 1397, 26 So. 390; State *v.* Euzebe, 42 La. Ann. 727, 7 So. 784.

Massachusetts. — Com. *v.* Hackett, 2 Allen 136.

Michigan. — People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Pennsylvania. — Com. *v.* Van Horn, 188 Pa. St. 143, 41 Atl. 469.

Texas. — Bejarano *v.* State, 6 Tex. App. 265; Moore *v.* State (Tex. Crim.), 96 S. W. 321.

Utah. — People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

Immediately after the infliction of the stab, deceased ran from the room where the defendant was to the room occupied by witness in the same house, in the story above that of the defendant, and there knocked at the door crying murder. On being let in, the deceased requested a physician to be called, saying that she was killed. Witness saw the blood issuing in profusion from the wound. It was held that the declaration of deceased that "I (the defendant) had stabbed her," was admissible. Can *v.* M'Pike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727; Bradberry *v.* State, 22 Tex. App. 273, 2 S. W. 592.

54. State *v.* Dominique, 30 Mo. 585; People *v.* Wasson, 65 Cal. 538, 4 Pac. 555; Lambright *v.* State, 34 Fla. 564, 16 So. 582. See State *v.* Gilbert, 8 Idaho 346, 69 Pac. 62; People *v.* Kessler, 13 Utah 69, 44 Pac. 97.

Threats made by deceased a considerable time after, constitute no part of the *res gestae.* Caw *v.* People, 3 Neb. 357.

The statement of the deceased to her physician detailing the cause of the injuries from which death ensued, made some time after the occurrence, are not admissible in evidence against the accused as part of *res gestae.* State *v.* Belcher, 13 S. C. 459.

55. Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471; Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750; Moore *v.* State, 31 Tex. Crim. 234, 20 S. W. 563.

On a prosecution for homicide, the declaration of the deceased to the effect that the defendant had shot

strict;[56] the particular circumstances of each case must be looked to.

(b.) *Particular Instances.* — In some instances statements have been admitted where the length of time which had elapsed did not appear except through the events intervening,[57] as where the statement was

him but did not intend to was held admissible as part of the *res gestae,* although made in response to an inquiry an hour after the shooting and after the deceased had been removed from the scene thereof, on the ground that the circumstances effectually negatived deliberation or any ulterior motive. "The question is confessed to be one of much difficulty, and the cases are very numerous, and not very harmonious. The early rule was very strict that the declaration must be precisely contemporaneous with the main transaction charged as an offense. Later, it has been held that the element of time is not always material, that no general rule can be stated, but that each case must stand upon its own facts. But it seems to be generally held, if the statement is mere narration, wholly unconnected with the principal fact, it is inadmissible. Upon the other hand, if it springs spontaneously out of the principal fact, is in direct connection with it, and is illustrative and explanatory of it, the declaration should be admitted, although it may be narrative in form, and although it may be separated from the principal fact by a lapse of time more or less considerable." Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761.

In State *v.* Murphy, 16 R. I. 528, 17 Atl. 998, it appeared that immediately after the assault, deceased had called a person from across the street, then sank back into a chair exhausted and bleeding. He stated that he had been robbed and assaulted by two men whom he described. Then he sent this person for another, to whom he related the same story on his arrival some fifteen minutes after the assault. Both these statements were held competent as *res gestae.* The court said in effect that the admissibility of such statements is not controlled by the fact of intervening time but by the real and illustrative connection between them and the act committed. Of this connection the intervening time is a factor. Declarations shown by common experience to be the instinctive result from an act, are part of the act, even if made five or fifteen minutes after the act. State *v.* Murphy, 16 R. I. 528, 17 Atl. 998.

56. Parker *v.* State, 136 Ind. 284, 35 N. E. 1105 (exclamation as to who shot him made by deceased after running upstairs and while falling into his wife's arms, held incompetent).

In State *v.* Carlton, 48 Vt. 636, a statement of the deceased as to where the defendant shot him, made about two minutes after the affray and about eleven rods from the scene thereof and in the absence of the defendant, was held no part of the *res gestae.* "It is frequently difficult to determine when, and under what circumstances, matter offered as evidence is admissible as part of the *res gestae.* But it is well settled in this state, that to make such matter admissible, it must have been concurrent with the act or transaction in issue and a part of it, and that a narrative of a transaction completed and finished when the narrative is given, though made while fresh in memory, and so soon after that the party had not time, probably, to imagine or concoct a false account, is inadmissible." The court quotes from the opinion of Ch. J. Redfield in State *v.* Davidson, 30 Vt. 377, to the effect that the subsequent declarations of a party, injured when no one is present, are not evidence to show the manner in which the injury occurred however nearly contemporaneous with the occurrence.

57. Witness testified that about five minutes after the shooting he took the deceased in his wagon, and drove him to his (deceased's) residence, three quarters of a mile from the store where the difficulty occurred. *Held,* statement by deceased to witness as to the difficulty after their arrival at the house is admissible as *res gestae,* there being

made to persons who had hurriedly come a short distance to the assistance of the injured party.[58]

Statements made a comparatively short time after the occurrence have been excluded in some cases because they appeared to be mere narratives lacking the element of spontaneity.[59]

Statements made a few minutes after the infliction of the injury have been held to be competent in some cases[60] and incompetent in others,[61] and the same is true of statements made within two minutes.[62] Statements as to the nature and circumstances of the injury made within five minutes have been admitted as *res gestae*;[63]

nothing to indicate that statements were not spontaneous. McKinney *v.* State, 40 Tex. Crim. 372, 50 S. W. 708.

Deceased was shot a few feet in front of store. Upon being shot he crawled into the store immediately, and told the proprietor that T. (the accused) had shot him. *Held*, that declaration was admissible as part of *res gestae*. State *v.* Talbert, 41 S. C. 526, 19 S. E. 852.

58. Stevenson *v.* State, 69 Ga. 68; People *v.* Simpson, 48 Mich. 474, 12 N. W. 662; Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745; State *v.* Arnold, 47 S. C. 9, 24 S. E. 926; King *v.* State, 34 Tex. Crim. 228, 29 S. W. 1086.

59. State *v.* Pugh, 16 Mont. 343, 40 Pac. 861; Jones *v.* State, 71 Ind. 66; People *v.* Wong Ark, 96 Cal. 125, 30 Pac. 1115; People *v.* O'Brien, 92 Mich. 17, 52 N. W. 84.

Evidence of deceased's wife, that after he had gone two hundred yards from the place where he was shot and called her, and she had gone to him, travelling one hundred yards, he said to her, "Oh hun, he has killed me" or "hun, he has shot me," is not admissible as part of *res gestae*. State *v.* Rider, 90 Mo. 54, 1 S. W. 825.

On a prosecution for homicide, statements of the deceased as to the circumstances of the assault made after he struggled to his feet and walked a little ways to his house were held no part of the *res gestae*. "Facts to be admissible on the ground that they form part of the *res gestae* must not only be such occurrences as are contemporaneous with the main fact, but must be so closely allied to it as in contemplation of law to be a part of the act itself." The statement in this case was purely narrative. State *v.* Hendricks, 172 Mo. 654, 73 S. W. 194.

60. The statement of the deceased as to what he had said to the defendant, made in response to an inquiry by the first person to reach him a few minutes after the fatal shot, was held properly admitted as part of the *res gestae*, being so connected with the shooting as to constitute a part of it. Bowles *v.* Com., 103 Va. 816, 48 S. E. 527.

61. Jones *v.* State, 71 Ind. 66; Williams *v.* State, 130 Ala. 107, 30 So. 484. Kraner *v.* State, 61 Miss. 158.

Evidence as to what the injured person said to his wife and others when they first reached him, a few minutes after he was wounded, as to who shot him, in absence of accused, is not part of *res gestae*. Lloyd *v.* State, 70 Miss. 251, 11 So. 689.

62. Admissible. — Kirby *v.* Com., 77 Va. 681, 46 Am. Rep. 747; Drake *v.* State, 29 Tex. App. 265, 15 S. W. 725.

Inadmissible. — State *v.* Carlton, 48 Vt. 636.

63. Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468; Farris *v.* State (Tex. Crim.), 56 S. W. 336; Mitchell *v.* State, 71 Ga. 128.

Where the deceased's clothing had been set on fire by the act of the defendant, either wilful or negligent, the statement of the deceased as to how the injury was inflicted, made five minutes after the flames were extinguished, was held competent as part of the *res gestae* although objected to as made too long after the main occurrence and not in the pres-

those ten minutes after have been excluded in some cases;[64] while those made fifteen or twenty minutes after have been excluded in some cases[65] and admitted in others.[66] Such declarations a half hour subsequent have been held inadmissible,[67] while those an hour[68] and even an hour and a half[69] after have been admitted in some cases. Statements two,[70] two and a half,[71] and six hours[72] after the injury have been excluded.

(c.) *Intervening Unconsciousness or Speechlessness.* — Where upon receiving the fatal wound the deceased became unconscious[73] or

ence of the defendant. State *v.* Trusty, 1 Pen. (Del.) 319, 40 Atl. 766.

64. State *v.* Whitt, 113 N. C. 716, 18 S. E. 715; State *v.* Estoup, 39 La. Ann. 219, 1 So. 448, *distinguishing* State *v.* Molisse, 38 La. Ann. 381, 58 Am. Rep. 181.

The statement of the deceased as to who shot him, made in response to inquiries after he had been taken to a physcian three or four hundred yards from the scene of the shooting and nine or ten minutes thereafter, was held not part of the *res gestae,* being nothing more than a relation of past events. State *v.* Charles, 111 La. 933, 36 So. 29. But see State *v.* Molisse, 38 La. Ann. 381, 58 Am. Rep. 181.

65. State *v.* Birkes (Mo.), 97 S. W. 578 (statement to physician); Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118.

66. Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471; Benson *v.* State, 38 Tex. Crim. 487, 43 S. W. 527; Chalk *v.* State, 35 Tex. Crim. 116, 32 S. W. 534.

Twenty Minutes After. — Stagner *v.* State, 9 Tex. App. 440.

67. Mayfield *v.* State, 101 Tenn. 673, 49 S. W. 742; People *v.* Dewey, 2 Idaho 83, 6 Pac. 103 (half or three quarters of an hour after); State *v.* Frazier, 1 Houst. Cr. Cas. (Del.) 176 (twenty-five or thirty minutes after).

The statements of the deceased accusing the defendant of shooting him, made half an hour after the shooting when defendant was arrested and brought before the deceased for identification, were held not part of the *res gestae* and incompetent. Brown *v.* State, 78 Miss. 637, 29 So. 519.

68. Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761.

Before the killing deceased got a gun and went down the street swearing he would kill the defendant. His wife, another woman and the owner of the gun, took the gun from him, and a half hour afterwards he was shot, and about fifteen minutes thereafter he said to the two women in the presence of another, "If you had not taken that gun from me it would have been different," and again made same remark to the owner of the gun about an hour after the shooting, when he came to his side. These statements were made while deceased was lying on the floor near where he fell, while the heat of passion was yet on, and the circumstances connected with death uppermost in his mind. Besides they were voluntary, spontaneous and uninfluenced by persuasion, suggestion or other consideration. *Held,* admissible as *res gestae.* State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136.

69. Chapman *v.* State, 43 Tex. Crim. 328, 65 S. W. 1098. See also Lewis *v.* State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720, and *supra,* III, 3, D, b, (7.), (A.).

70. Reddick *v.* State (Tex. Crim.), 47 S. W. 993; State *v.* Taylor, 56 S. C. 360, 34 S. E. 939; Herren *v.* People, 28 Colo. 23, 62 Pac. 833.

71. Collins *v.* State, 46 Neb. 37, 64 N. W. 432.

72. Bowles *v.* Com., 103 Va. 816, 48 S. E. 527.

73. See *supra,* III, 3, D, b, (7.), (C.).

Where it appears that after being stabbed the deceased immediately fell unconscious and remained in-

speechless,[74] his statements as to the circumstances of the injury, made immediately upon regaining his senses or speech, are competent as part of the *res gestae*.

(d.) *Made in Absence of Accused.* — A declaration otherwise competent as part of the *res gestae* of a homicide is not inadmissible on a prosecution therefor, although it was made in the absence of the defendant.[75]

(D.) CONTENTS OF STATEMENT. — The statement may be a mere exclamation or question,[76] or it may be a narrative of the circumstances under which the act was committed,[77] or a mere statement of the fact of injury.[78]

IV. RELEVANT FACTS AND CIRCUMSTANCES.

1. Generally. — The term *res gestae* is frequently used in a general and indefinite way to cover relevant facts and circumstances, which, in a sense, form part of the principal transaction.[79] When

sensible for about ten minutes, when he revived so as to be able to speak, his declaration that defendant called him out and stabbed him in the heart was held admissible as part of the *res gestea*, since there was no time for fabrication. Hill *v.* Com., 2 Gratt. (Va.) 595.

74. See *supra*, III, 3, D, b, (7), (C.).

75. Com. *v.* Hackett, 2 Allen (Mass.) 136; Collins *v.* State, 46 Neb. 37, 64 N. W. 432. See People *v.* Wong Ah Foo, 69 Cal. 180, 10 Pac. 375. But see Binns *v.* State, 57 Ind. 46, 26 Am. Rep. 48.

In Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823, it appeared that the deceased's brother was shot and wounded by the defendant at the time the deceased was killed. The declaration of the brother made within a minute after the homicide and after the defendant had left the scene thereof and while the declarant was following the alleged accomplice of the defendant who was under arrest, was held competent as part of the *res gestae*.

76. Mitchell *v.* State, 71 Ga. 128; Moore *v.* State (Tex. Crim.), 96 S. W. 321.

77. See cases *supra*, IV, D, c, (4), (C.). But see *supra*, III, 3, C, f, for cases holding that a narrative statement is not admissible.

Statements made by the deceased to witnesses who came up immediately after the shooting, telling what he was doing and what he heard immediately preceding the shooting, are competent as part of the *res gestae* since they are incident to what was done and shed light on the main fact. Starks *v.* State, 137 Ala. 9, 34 So. 687.

78. Smith *v.* State (Ala.), 40 So. 958; Stevens *v.* State, 138 Ala. 71, 35 So. 122; Sheehy *v.* Territory (Ariz.), 80 Pac. 356; Marlow *v.* State, 49 Fla. 7, 38 So. 653; State *v.* Gilbert, 8 Idaho 346, 69 Pac. 62; Howard *v.* Com., 24 Ky., L. Rep. 950, 70 S. W. 295; Bejarano *v.* State, 6 Tex. App. 265.

79. Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36; Beaver *v.* Taylor, 1 Wall. (U. S.) 637; Williams *v.* Southern Pac. Co., 133 Cal. 550, 65 Pac. 1100; Carter *v.* Buchannon, 3 Ga. 513; Hupfer *v.* National Dist. Co., 119 Wis. 417, 96 N. W. 809; Carr *v.* State, 43 Ark. 99.

"Res Gestae is matter incidental to a main fact and explanatory of it. It is made up of acts and words which are so closely connected with the main fact as to really constitute a part of it, and without a knowledge of which the main fact might not be properly understood." Eagon *v.* Eagon, 60 Kan. 697, 57 Pac. 942.

All of the acts and circumstances which constitute part of the whole transaction in issue are admissible

so used the term merely denotes a series of events so closely connected either in time and place by way of cause and effect that a knowledge of them all is necessary or desirable in order to correctly determine the nature of the transaction which they constitute or accompany.[80] They may consist of acts[81] or declarations, and the latter may be by the actors or participants[82] or by third parties.[83] They may be either directly in issue because forming integral parts of the transaction itself,[84] or merely accompanying sidelights helping to explain the facts in issue.[85]

2. Limits of Res Gestae. — As to what are the limits of the *res gestae,* as the term is here used, no rule can be formulated but each case must be governed largely by its own circumstances.[86] This is true because of the nature of the matter covered by the term and

as *res gestae.* Klein *v.* Hoffheimer, 132 U. S. 367.

In an action for alienating a husband's affections and causing a separation between him and the plaintiff, evidence of the husband's intimacy with the defendant two years prior to the separation was held admissible as part of the *res gestae* of the transaction, where it appeared that the intimacy had continued down to the day of the separation. Linck *v.* Vorhauer, 104 Mo. App. 368, 79 S. W. 478.

Sending Telegram. — A declaration of the plaintiff at the time of sending a telegraph message explaining to the person receiving it and to the manager of the local office the importance of the message and the necessity of promptness in its transmission and delivery, is admissible as part of *res gestae,* in action for omission to send message promptly. Pope *v.* W. U. Telegraph Co., 14 Ill. App. 531.

80. See Davids *v.* People, 192 Ill. 176, 61 N. E. 537.

81. See the succeeding sections of this article under IV, 7.

82. See succeeding sections of this article under IV.

83. See *infra,* IV, 7, E.

84. See *infra,* IV, 3.

85. See *infra,* IV, 7.

86. Carter *v.* Buchannon, 3 Ga. 513; Hall *v.* State, 48 Ga. 607.

There are no limits of time in which the *res gestae* can be arbitrarily confined. They vary with each particular case. State *v.* Lockett, 168 Mo. 480, 68 S. W. 563; Starr *v.* Aetna L. Ins. Co., 41 Wash. 199, 83 Pac. 113.

"In determining questions about the *res gestae,* it is error to undertake to test them by a definition or rule. For what is the *res gestae* of a given transaction must depend upon its own peculiarities of character and circumstances. Courts must be allowed some latitude in this matter." Mitchum *v.* State, 11 Ga. 615.

"Every case has its own peculiar distinctive *res gestae;* and to determine, in any particular case, whether or not there is properly any main fact, and what declarations, facts, and circumstances belong to it, as forming the *res gestae,* is often very difficult, requiring very careful consideration and nice discrimination." Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36.

Where a principal fact is admissible in evidence upon an issue in the case, other facts which so illustrate and characterize the main fact as to constitute the whole one transaction and render proof of them necessary to exhibit the main fact in its true light and give it its proper effect are admissible as part of the *res gestae.* "It is perhaps not possible to lay down any general rule as to what is part of the *res gestae* which will be decisive of the question in every case in which it may be presented. . . . The judicial mind will always be compelled frequently to apply the general principle and deduce the proper conclusion." Beaver *v.* Taylor, 1 Wall. (U. S.) 637.

the differing circumstances of every case. To come within the rule, however, the fact shown must have been part of the transaction in issue.[87]

3. Facts in Issue. — A. GENERALLY. — The statements and acts constituting the fact or facts in issue may of course be shown as part of the *res gestae*.[88]

A transaction cannot be considered as ended so long as the parties thereto remain together and anything according to the usual course of business remains to be done in regard to it, and until thus ended whatever may be said by the parties concerning it will be considered as part of the *res gestae*. Fifield *v.* Richardson, 34 Vt. 410.

Under indictment for carrying a slave out of the county, the beginning of the offense is the commencement of the carrying, and the end of it is the crossing of the county line; and all that is done from the beginning to the end, and all that is said, is admissible as part of *res gestae*. Drumright *v.* State, 29 Ga. 430.

87. Beaver *v.* Taylor, 1 Wall. (U. S.) 637; Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636; Fitter *v.* Iowa Tel. Co., 129 Iowa 610, 106 N. W. 7.

"It is often a difficult question to decide what declarations may or may not be admitted in evidence as part of the *res gestae;* but the test seems to be as laid down in 1 Stark. on Evid. 47. 'If the declaration has no tendency to illustrate the question, except as a mere abstract statement, detached from any particular fact in dispute, and depending for its effect entirely on the credit of the person making the declaration, it is not admissible. But if any importance can be attached to it, as a circumstance deriving a degree of credit from its connection with the circumstances of the case, independently of any credit to be attached to the speaker or writer, then the declaration is admissible.' Thus, if the declaration is in itself a fact in the transaction, or is made by a party while doing an act, and serves to explain it, it is to be received in evidence as part of the *res gestae*. But a recital of past transactions is not admissible, although it may have some relation to the act which the person may be doing at the time when he makes the declaration." Haynes *v.* Rutter, 24 Pick. (Mass.) 242.

"In determining what constitutes the *res gestae* we have repeatedly quoted approvingly from Wharton on Evidence as follows: 'The *res gestae* may be defined as those circumstances which are the automatic and undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist, as we will see, of sayings and doings of any one absorbed in the event, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they must be the automatic and necessary incidents of the litigated act; necessary in this sense: that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculated policy of the actors. They are the act talking for itself; not what people say when talking about the act. In other words, they must stand in immediate causal relation to the act — a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act.' 1 Whart. Ev. (3d Ed.) § 259." Little Rock Tract. & Elec. Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

88. See Potts *v.* Everhart, 26 Pa. St. 493; State *v.* Huntly, 25 N. C. (3 Ired L.) 418, 40 Am. Dec. 516; Long-Bell Lumb. Co. *v.* Thomas, 1 Ind. Ter. 225, 40 S. W. 773; Ellis *v.* Guggenheim, 20 Pa. St. 287.

B. Statements and Acts Constituting Conduct in Question. Where the conduct of a person on a particular occasion is in issue, his acts and statements constituting his conduct at that time are part of the *res gestae* and admissible as such,[89] as, for example, in actions

What was said and done between the parties at the time of the delivery of a bottle claimed to be intoxicating liquor is part of the *res gestae* and admissible as such on a prosecution for selling intoxicating liquor. Patrick *v.* State, 45 Tex. Crim. 587, 78 S. W. 947.

Conversations between the parties to a transaction occurring during its continuance and tending to show its nature are part of the *res gestae* and are original evidence not to prove the truth of the facts stated, but to show the conversations themselves as facts. Bank *v.* Kennedy, 17 Wall. (U. S.) 19. See Brumfield *v.* Potter & S. Mfg. Co., 4 Misc. 194, 23 N. Y. Supp. 1025.

When an attachment is sued out against a tenant's crop, on the ground that he is about to remove it without paying the rent, and he afterwards sues on the bond for damages, it is permissible for him to prove, as a part of the *res gestae*, that by the terms of his contemplated sale, the purchaser was to pay the rent before removing the cotton. Masterson *v.* Phinizy, 56 Ala. 336.

Where the alleged negligence was the failure of the defendant to have its depot properly heated for waiting passengers, and the question in issue was whether the defendant's station agent had built a fire at the time in question, the testimony of a witness that he heard the agent tell a boy to go to a car and get some coal, and saw him give the boy a key to unlock the car, was held admissible because such instructions were part of the *res gestae*. "As a part of the *res gestae*, it was admissible for the agent to testify that he had the coal on a box car, that he gave the key to some one, and that such person went to the box car and got the coal and made the fire. That is, he could not only state the fact that he, or some one else, made a fire, but he could tell circumstantially, just when and how it was made." And if another person had personal knowledge of these things he could testify to them also. St. Louis, S. W. R. Co. *v.* Patterson (Tex. Civ. App.), 73 S. W. 987.

In an action for injuries resulting from an accident on a railroad, evidence of the speed of the train and as to whether a bell was rung or a whistle blown or any warning of the approach of the train given is admissible as part of the *res gestae*. Chicago & G. T. R. Co. *v.* Kinnare, 76 Ill. App. 394.

In an action against the commissioner of patents for refusing to give copies of papers in his office where the application was made through a third person, letters of both parties to this third person are admissible as part of the *res gestae*. Boyden *v.* Burke, 14 How. (U. S.) 575.

89. Tenney *v.* Evans, 14 N. H. 343, 40 Am. Dec. 194.

In attachment brought on ground that defendant absconds, when the defendant's manner of leaving a place is introduced to show that he was absconding, his sayings at the time of leaving, as to where he was going, are a part of *res gestae* — part of the manner of leaving. Oliver *v.* Wilson, 29 La. 642.

In an action by a passenger against a steamboat company for injuries received on defendant's steamboat from the discharge of a gun by disorderly soldiers whom defendant had taken on board and who had overpowered their sentinels, the reports of an inferior officer to his superior made during the disturbance on deck, his statement as to his fears, the latter's order for him to return to his duty, and the inferior's subsequent exclamation to his superior, "For God's sake come up; a man has been shot!" were held properly admitted as part of the *res gestae* not having been offered to prove the truth of the facts stated, but merely to show the conduct of the officers during the disturbance, the fact that notice of

where negligence is alleged as the basis of the cause of action.[90]

Thus in an action against a bailee for alleged negligence, he may show as part of the *res gestae* his own statements and actions during the period in question indicating the care exercised by him.[91]

its progress was communicated, the time it continued, and the degree of alarm it was calculated to excite. Norwich Transp. Co. *v.* Flint, 13 Wall. (U. S.) 3.

In a tort action against a city for obstructing and digging up the plaintiff's way by excavating and carrying away gravel, plaintiff was permitted over objection to show the acts of surveyors of highways and of persons acting under their direction in making excavations in plaintiff's way by digging and carrying away gravel for repairing highways. This was held no error. "The manner in which the wrong was done, by whom and under what claim were things so closely connected with the main fact as to be admissible as part of the *res gestae*." Willey *v.* Portsmouth, 64 N. H. 214, 9 Atl. 220.

The conversation between the person bringing grain to the mill to be ground, and the agent of the owner, who, under the owner's direction, refuses to receive the grain, is competent evidence as part of the *res gestae*, in a suit against the owner under the statute, for such refusal. Merrill *v.* Cahill, 8 Mich. 55.

Where the defendant in an action on a note relies on a discharge in bankruptcy and the plaintiff attempts to avoid the discharge by showing that the defendant concealed part of his property, the defendant may give in evidence the statements which he made to his counsel who assisted him in making an inventory of his property rights and credits, respecting the property alleged to have been concealed, and the advice of his counsel that such property ought not to be inserted in the inventory. "We think the evidence was rightly admitted not as declarations merely, but as facts and part of the *res gestae*." Robinson *v.* Wadsworth, 8 Metc. (Mass.) 67.

90. In an action against a railway company by one of its engineers for injuries received in a collision alleged to be due to the negligence of the train dispatcher, it appeared that the collision occurred during an irregularity in the running of the plaintiff's train and that the plaintiff had informed a telegraph operator of his mishap and instructed him to hold the train with which he later collided. The telegraphic correspondence between this operator and the train dispatcher regarding the matter was held properly admitted as part of the *res gestae* as bearing upon the questions whether the plaintiff had exercised due care and whether the train dispatcher had been negligent. Deverson *v.* Eastern R. Co., 58 N. H. 129.

91. In an action against a voluntary bailee for the loss of goods by carelessness and negligence, he may give in evidence his own acts and declarations immediately before and after the loss to repel the charge. Tompkins *v.* Saltmarsh, 14 Serg. & R. (Pa.) 275.

In an action for injury to a horse hired by the defendant from the plaintiff caused by alleged ill usage during a drive, a conversation between the defendant and his companion as to the appearance and condition of the horse which tended to show that the defendant was acting considerately and exercised due care, was held properly admitted for this purpose. Pinney *v.* Cahill, 48 Mich. 584, 12 N. W. 862.

Immediately After Loss. — In an action against a voluntary bailee for the loss of money by carelessness and negligence, the defendant may give in evidence, to repel the charge, his declarations to the witness, "that he had lost money and he wished the witness to go and look in the stables and from thence down the river for the money, as he could not leave the stage alone as he had mail." Defendant seemed much excited and disturbed. His statements as well as his actions were admissible to repel the charge, though they occurred im-

So also in actions or prosecutions for fraud,[92] or false pretenses,[93] the statements and acts of the parties constituting the alleged fraud are part of the *res gestae*.

4. Statements as Mere Incidents of Transaction. — Statements whether by the actors or by spectators may be admissible merely as incidents of the transaction in issue, even though they are not competent testimonially to prove the truth of any fact contained in them. They show the circumstances under which the act was done.[94]

mediately after the loss. McNabb *v.* Lockhart & Thomas, 18 Ga. 495.

92. Fraud. — On the question of fraud in the sale of property, the acts and declarations of the actors, while engaged in bringing about the sale and accomplishing the avowed object of it, are competent, as they were a constituent part of and gave character to the transaction of sale. Crary *v.* Sprague, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110.

93. False Pretenses. — What was said and done between the prosecutor and defendant when they had met in relation to the transaction, is admissible as part of the *res gestae* in prosecution for false pretenses in selling worthless stock. Lawrence *v.* State, 103 Md. 17, 63 Atl. 96.

94. In an action for injuries resulting from the frightening of plaintiff's horse, evidence of the words spoken by the driver in the effort to control the runaway is admissible as part of the *res gestae*. The runaway was alleged to have been caused by an electric shock received by the horse from the rails of the defendant's railway. The words used were, "He has got a shock, Sam. Catch hold." "The claim is that the affair in question had ended before the words were spoken; that it ended with the frightening of the horse, however caused. The contrary seems too plain to need argument. The management of the horse, the conduct of both men (one of them the servant of the other), were involved in the affair. . . . The ejaculation was part of what occurred, and explained what might otherwise have defeated a recovery by one or both plaintiffs. It did not prove that the horse had received a shock, but only that Cooper said so. As was said by Chancellor Zabriskie in a case decided by this court where words spoken by a bystander in an affray were held admissible in evidence, 'The proof is only proof of the fact that the words were spoken, and not of the truth of anything as stated in them.' Castner *v.* Sliker, 33 N. J. Law, 507." Trenton Pass. R. Co. *v.* Cooper, 60 N. J. L. 219, 37 Atl. 730.

Where there was evidence tending to show that the defendant was assaulted by the injured person and several others, what was said by the persons at the time of assault, illustrative of its object, and the motive which prompted it, was part of *res gestae*, and should have been admissible in evidence. People *v.* Roach, 17 Cal. 297.

Assault and Battery. — Civil Action. — All that was said of the parties during the altercation is admissible as *res gestae*. Baker *v.* Gausin, 76 Ind. 317.

Where the deceased was shot while pursuing the defendant, crying "Police! Thief!" these declarations form part of the *res gestae*. State *v.* Laster, 71 N. J. L. 586, 60 Atl. 361.

In an action for assault, evidence as to the wordy quarrel of which the alleged assault formed part is admissible as part of the *res gestae*, or as tending to explain the conduct of the parties to the controversy. Hannabalson *v.* Sessions, 116 Iowa 457, 90 N. W. 93.

On a prosecution for homicide where it appeared that the defendant immediately preceding the fatal difficulty challenged the deceased to get out of his wagon, the latter's reply was held admissible as part of the *res gestae*, although there was no evidence to show that the defendant heard it. State *v.* Bone, 114 Iowa 537, 87 N. W. 507.

5. Not Admissible Testimonially. — Such statements are not admissible testimonially to prove the fact stated,[95] unless they also conform to the rules governing that class of *res gestae*, but are merely relevant as facts regardless of the truth or falsity of any of the statements contained in them.

6. Verbal Acts. — A. GENERALLY. — The term *res gestae* is frequently applied to statements or declarations which are competent as verbal acts, that is, because they tend to characterize a particular act or transaction, or show the intention with which it was done.[96]

The principle here involved is altogether different from that involved in what have been termed in this article "Spontaneous Ex-

On a prosecution for homicide, the fact that the defendant at the commencement of the affair which resulted in the homicide ordered the deceased to throw up his hands, stating that he was a peace officer, was held part of the *res gestae*. People *v.* Lee, 1 Cal. App. 169, 81 Pac. 969.

95. Bank *v.* Kennedy, 17 Wall. (U. S.) 19; State *v.* Horton, 33 La. Ann. 289; Appleton *v.* State, 61 Ark. 590, 33 S. W. 1066; Moses *v.* Katzenberger, 84 Ala. 95, 4 So. 237. See Bevis *v.* Baltimore & O. R. Co., 26 Mo. App. 19; Norwich Transp. Co. *v.* Flint, 13 Wall. (U. S.) 3; Williams *v.* Williams, 20 Colo. 51, 37 Pac. 614; Werner *v.* Com., 80 Ky. 387.

Where the husband sued for the value of a dog killed by him, claimed that he was justified because the dog had bitten his wife, her statement of this fact to him just before his act, while perhaps relevant to show the absence of malice, was held incompetent to prove the truth of the fact stated because it was a statement of an antecedent independent fact and hence not part of the *res gestae*. Ehrlinger *v.* Douglas, 81 Wis. 59, 50 N. W. 1011.

96. "When the act of a party may be given in evidence, his declarations, made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations, as a part of the transaction, and the tendency of the contemporary declarations, as a part of the transaction, to explain the particular fact, distinguish this class of declarations from mere hearsay. Such a declaration derives credit and importance, as forming a part of the transaction itself, and is included in the surrounding circumstances, which may always be given in evidence to the jury with the principal fact. There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it. The *res gestae* are different in different cases; and it is not, perhaps, possible to frame any definition which would embrace all the various cases, which may arise in practice. It is for the judicial mind to determine, upon such principles and tests as are established by the law of evidence, what facts and circumstances, in particular cases, come within the import of the terms. In general, the *res gestae* mean those declarations, and those surrounding facts and circumstances, which grow out of the main transaction, and have those relations to it which have been above described. The main transaction is not necessarily confined to a particular point of time, but may extend over a longer or shorter period, according to the nature and character of the transaction. Thus, where a debtor leaves his house to avoid his creditors, which is an act of bankruptcy, and goes abroad, and continues abroad, the act of bankruptcy continues during the continuance abroad for this purpose. So declarations, to be admissible, must be con-

clamations."[97] However, the use of the same term to designate both has led to some confusion in the limitations which govern them respectively.[98] The statements here in question are not used testimonially, and hence the hearsay rule has no application to them.[99]

B. THE GENERAL RULE is that where an act becomes material to the issues and its nature is in anywise equivocal, then any declarations or statements which immediately accompany and characterize such act are competent as part of the *res gestae*.[1] This rule applies

temporaneous with the main fact or transaction; but it is impracticable to fix, by any general rule, any exact instant of time, so as to preclude debate and conflict of opinion in regard to this particular point." Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36.

97. See *supra*, III, 2.

98. See *supra*, II, 4, and III, 2.

99. See *supra*, III, 2.

In Sears *v.* Hayt, 37 Conn. 406, the issue was whether a right of way by prescription existed over a certain piece of land. It was held that the declaration of the owner while plowing the land, that a party claiming the right of way had no such right but only used the same by the owner's permission, was admissible as part of the *res gestae* not to prove the truth of the assertion, but as showing that the act of plowing was the assertion of a right inconsistent with the alleged right of way.

1. *United States.* — Pittsburgh Plate Glass Co. *v.* Kerlin Bros. Co., 122 Fed. 414, 58 C. C. A. 648.

Alabama. — Hooper *v.* Edwards, 20 Ala. 528.

Arkansas. — Little Rock Tract. Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

California. — Tait *v.* Hall, 71 Cal. 149, 12 Pac. 391; Lewis *v.* Burns, 106 Cal. 381, 39 Pac. 778.

Connecticut. — Wooden *v.* Cowles, 11 Conn. 292; Deming *v.* Carrington, 12 Conn. 1, 30 Am. Dec. 591 (declarations characterizing possession of real estate); Russell *v.* Frisbie, 19 Conn. 205. See also Ladd *v.* Abel, 18 Conn. 513; Noyes *v.* Ward, 19 Conn. 250.

District of Columbia. — United States *v.* Nardello, 4 Mack. 503.

Georgia. — Mitchum *v.* State, 11 Ga. 615; Monroe *v.* State, 5 Ga. 85.

Illinois. — Lander *v.* People, 104 Ill. 248; Lambe *v.* Manning, 171 Ill. 612, 49 N. E. 509.

Indiana. — Fox *v.* Cox, 19 Ind. App. 61, 50 N. E. 92.

Iowa. — Golden *v.* Vyse, 115 Iowa 726, 87 N. W. 691 (*holding* admissible statements accompanying the delivery of a note).

Massachusetts. — Lund *v.* Tyngsborough, 9 Cush. 36; Deveney *v.* Baxter, 157 Mass. 9, 31 N. E. 690.

Missouri. — See State *v.* Gabriel, 88 Mo. 631.

New Hampshire. — Plumer *v.* French, 22 N. H. 450; Tucker *v.* Peaslee, 36 N. H. 167; Sessions *v.* Little, 9 N. H. 271.

Vermont. — Elkins *v.* Hamilton, 20 Vt. 627; Eddy *v.* Davis, 34 Vt. 209.

"Where it is necessary to inquire into the nature of a particular act and the intention of the person who did the act, what the person said at the time of doing it is admissible evidence for the purpose of showing its true character, and this is the meaning of the expression *part of the res gestae*. Cook *v.* Swan, 5 Conn. 140.

Accompanying Affixing Chattel to Realty. — The intention of the owner in affixing machinery to land being a material factor in determining whether such machinery is a fixture, the contemporaneous declarations of such owner that he did not own the machinery are competent as part of the *res gestae*. Nelson *v.* Howison (Ala.), 25 So. 211.

A statement of a miner as to his purpose in digging a shaft, made at the time he commenced work, was held a verbal act forming part of the *res gestae* and admissible as such. Draper *v.* Douglass, 23 Cal. 347.

In breach of promise, where plaintiff's acts of preparation of marriage are admissible as evidence of her acceptance of defendant's promise to marry, her statements at the time,

not only in civil but also in criminal cases.[2] But where the character of the act is fixed by other independent facts and the actor's in-

explanatory of such acts of preparation, are likewise admissible as part of the *res gestae*. Wetmore *v.* Mell, 1 Ohio St. 26, 59 Am. Dec. 607; Wilcox *v.* Green, 23 Barb. (N. Y.) 639.

Accompanying Deposit in Bank. Where the question at issue was whether a party intended to create an irrevocable trust by depositing money in a bank in his own name for another person, his statements to the bank officer at the time of opening the acount is competent as part of the *res gestae* since it characterized the act and illustrated the intention with which it was done. Lee *v.* Kennedy, 25 Misc. 140, 54 N. Y. Supp. 155.

In an action for injury to cattle resulting from alleged negligence and delay in transportation, a conversation between the plaintiff and the defendant's conductor while the latter was in charge of the train, wherein the conductor in response to the plaintiff's question, "Why don't you get over the road?" said "I can't get anywhere with this dummy. They should have known better than to send it out this kind of weather" was held admissible as part of the *res gestae*. "The statement of the conductor was made in the midst of the act complained of reflecting light upon its quality and character, and under the general rule was part of the *res gestae*." Northern Pac. R. Co. *v.* Kempton, 138 Fed. 992, 71 C. C. A. 246, *citing* Sisson *v.* Cleveland & T. R. Co., 14 Mich. 489, 90 Am. Dec. 252; New Jersey Steamboat Co. *v.* Brockett 121 U. S. 637, 649; Peirce *v.* Van Dusen, 78 Fed. 693, 706, 24 C. C. A. 280; St. Louis, I. M. & S. R. Co. *v.* Greenthal, 77 Fed. 150, 23 C. C. A. 100.

Where in a suit for infringement of a patent it became material to show how many caps had been made with the machine for a particular firm, the declarations of the defendant's boss at the time he distributed the work and supplied the material, showing to whom the materials belonged and for whom the caps were to be made, were held admissible as part of the *res gestae*, as were also the tags on the different lots indicating to whom the lots belonged. They "fall within the category of verbal facts." Marks *v.* Fox, 18 Fed. 713.

During Journey. — Where murder was committed while the deceased and the prisoner were journeying together, statements of the deceased while engaged in the journey, "as to where they came from and where they were going," though not made in presence of accused, is admissible as part of the *res gestae*. State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753. See *infra*, VII, 5.

Accompanying Assault. — Statements of person charged with assault accompanying his act. Beckwith *v.* Mollohan, 2 W. Va. 477.

Accompanying Writing of Letter and explaining its object. Duvall *v.* Medtart, 4 Har. & J. (Md.) 14.

Statement of Officer Accompanying Levy. — What was said by a constable at the time of making a levy, as to the fact of the levy, is admissible as part of the *res gestae*. Grandy *v.* McPherson, 52 N. C. (7 Jones L.) 347.

2. Where it appeared that the defendant killed the deceased while the latter was quarreling with defendant's father, the defendant's statement to the witness as he started toward the quarreling parties, that he was going to get some money changed to pay a debt due the witness, was held competent as part of the *res gestae* of his act. "Whenever evidence of an act is in itself competent and admissible as a material fact in the case and is so admitted, the declarations accompanying and characterizing such act become and form part of the *res gestae* of the act and as such are competent and admissible in evidence as being explanatory of the act." Campbell *v.* State, 133 Ala. 81, 31 So. 802.

On a prosecution for homicide where it appeared that immediately preceding the killing a note from the accused was delivered to the defendant by one of the latter's children,

tention or motive is not material, his accompanying statements showing his motive are not admissible as part of the *res gestae*.[3]

Death of Declarant. — The admissibility of the statement is not dependent on the death of the speaker.[4]

C. THERE MUST BE AN ACT WHICH STATEMENT CHARACTERIZES. — a. *Generally.* — To render a statement admissible as a verbal act under this rule, there must be a relevant and material act which it accompanies and characterizes.[5]

b. *Must Be Contemporaneous With and Accompany Act.* **(1.) Generally.** — To be competent as a verbal act, the statement must be contemporaneous with and accompany the act or transaction which it characterizes or explains.[6]

evidence as to what was said by the child at the time he delivered the note was held improperly excluded because part of the *res gestae* of that act. Upton *v.* State (Tex. Crim.), 88 S. W. 212.

3. Statements Accompanying Wrongful Attachment. — In action on attachment bond for wrongfully suing out an attachment, the remarks of defendant at the time of suing out the writ, are not admissible as part of the *res gestae*, to show defendant's motives. "How can he by his words give character to his acts, the propriety or impropriety of which depends upon facts that have transpired, and exist independent of anything that he can say or do. A man who is about to commit a wrong cannot by words spoken, when he is about to do the act, qualify or avoid the consequences." The *res gestae* of this case was the absence of cause for suing out the attachment and the knowledge of defendant substantially a negative proposition. The defendant could say nothing that could give it character or qualify in his favor the true force of facts and make evidence in his favor. Shuck *v.* Vanderventer, 4 Greene (Iowa) 264.

4. Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543.

5. Carter *v.* Buchannon, 3 Ga. 513; Tamplin *v.* Still's Admr., 77 Ala. 374; Bangor *v.* Brunswick, 27 Me. 351.

On the issue of whether certain hay had been attached by an officer as stated in his return where there was no evidence apart from the return of any act done by him, testimony that he was seen working on a fence near the debtor's house and barn, and that he told the witness he had attached the hay and was watching it, was held properly rejected, the declaration being no part of the *res gestae* being unaccompanied by any act tending to show an attachment. Merrill *v.* Sawyer, 8 Pick. (Mass.) 397.

6. *United States.* — Mutual Life Ins. Co. *v.* Logan, 87 Fed. 637, 31 C. C. A. 172.

Alabama. — Chamblee *v.* State, 78 Ala. 466.

California. — Whitney *v.* Durkin, 48 Cal. 462.

Connecticut. — Enos *v.* Tuttle, 3 Conn. 247.

Georgia. — Mitchum *v.* State, 11 Ga. 615.

Kentucky. — Terrell *v.* Com., 13 Bush 246.

Massachusetts. — Lund *v.* Tyngsborough, 9 Cush. 36.

Michigan. — Dawson's Admr. *v.* Hall, 2 Mich. 390.

Mississippi. — Newcomb *v.* State, 37 Miss. 383.

New York. — Bailey *v.* Wakeman, 2 Denio 220; Osborn *v.* Robbins, 37 Barb. 481; Tilson *v.* Terwilliger, 56 N. Y. 273.

Pennsylvania. — Grim *v.* Bonnell, 78 Pa. St. 152.

Tennessee. — Brown *v.* Lusk, 4 Yerg. 210.

Vermont. — Barnum *v.* Hackett, 35 Vt. 77.

Entry on Land. — The declarations of a party entering upon land for the purpose of making a survey thereof, respecting his intentions in regard to the property and the purpose for which the survey was being

(2.) Length of Time Covered by Res Gestae. — The *res gestae* cannot be confined to any particular length of time since the transaction, of which statement in question is part, may be of such a nature as to extend over a long period of time. This question is necessarily dependent upon the nature and circumstances of the particular case.[7]

(3.) Narrative of Past Transaction. — A statement which is merely narrative of a past and completed transaction is not part of the *res gestae* as this term is used under the verbal act rule,[8] but it may be

made, are admissible as part of the *res gestae* to show that the entry was with the intent to take possession of the land. Such declarations are regarded as verbal acts, indicating a present purpose and intention. Stephens *v.* McCloy, 36 Iowa 659.

7. The *res gestae* in case of verbal acts may extend over weeks and months, or it may be limited to minutes or seconds. Mayes *v.* State, 64 Miss. 329, 1 So. 733; Marler *v.* Texas & P. R. Co., 52 La. Ann. 727, 27 So. 176.

"While it is said that the declarations must be contemporaneous with the main fact, no rule can be formulated by which to determine how near in point of time they must be. No two cases are exactly alike, and the determination of this question is always inseparable from the circumstances of the case at bar. The transaction in question may be such that the *res gestae* would extend over a day or a week or a month." Jack *v.* Mutual Reserve Fund L. Assn., 113 Fed. 49, 51 C. C. A. 36; Rawson *v.* Haigh, 2 Bing. (Eng.) 99; Insurance Co. *v.* Mosley, 8 Wall. (U. S.) 397, 407.

In an action for damages caused by a fire alleged to have been negligently set on the defendant's right of way by its section master, the latter's declarations as to the origin of the fire, made while the fire was raging, were held competent as part of the *res gestae* and not a narration of a past and completed event. "To confine the admissibility of such declarations to any one point of time in the course of the transaction being inquired about would be to ordinarily exclude often, not to say always, many pieces of evidence which would shed light on the whole affair, and which were parts of one entire event." Mobile & O. R. Co. *v.* Stinson, 74 Miss. 453, 21 So. 14, 522, *approving* Mayes *v.* State, 64 Miss. 329, 1 So. 733, and Railroad Co. *v.* Jones, 73 Miss. 229, 19 So. 91.

In Rawson *v.* Haigh, 2 Bing. (Eng.) 99, the court in speaking of verbal acts as *res gestae* and the rule that they must be contemporaneous with the main transaction, says: "It is impossible to tie down to time the rule as to the declarations. We must judge from all the circumstances of the case. We need not go the length of saying that a declaration made a month after the fact, would itself be admissible. But if, as in the present case, there are connecting circumstances, it may even at that time form a part of the whole *res gestae*."

8. *Arkansas.* — Clinton *v.* Estes, 20 Ark. 216, 225 ("but the declaration may properly refer to a past event as the true reason of the present conduct.").

Connecticut.—McCarrick *v.* Kealy, 70 Conn. 642, 40 Atl. 603; Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514.

Louisiana. — Marler *v.* Texas R. Co., 52 La. Ann. 727, 27 So. 176.

Massachusetts. — Haynes *v.* Rutter, 24 Pick. 242.

Mississippi. — Mayes *v.* State, 64 Miss. 320, 1 So. 733.

Missouri. — Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26.

New York. — Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636; Austin *v.* Bartlett, 178 N. Y. 310, 70 N. E. 855.

In an action of trover by an administrator where the defense was a gift by the intestate of the articles in question, the reason assigned by the defendant for refusing to return

narrative in form and still be of the *res gestae* if it refers to and explains the transaction then going on.[9] The mere fact, however, that such a statement has some relation to the act which it accompanies does not make it a part of the act.[10]

c. *Must Characterize As Well As Accompany the Act.* — The statement must not only accompany an act but also tend to characterize or explain it.[11]

The mere fact that a statement accompanies an act does not make it part of the *res gestae* of that act if it does not characterize the act itself.[12]

them on the demand of the plaintiff, namely, that they had been given him, was held no part of the *res gestae*, being a narrative of a past transaction. The *res gestae* or main transaction was the alleged conversion. "Doubtless, some confusion has arisen in decisions, in regard to what declarations are admissible as a part of the *res gestae*, by not always carefully considering and determining the exact transaction done, or performed, which the declaration accompanied, and whether the declaration properly related to and qualified that transaction, or narrated an account of an antecedent transaction. When the declaration accompanies and qualifies, or characterizes, the transaction then being performed, it is clearly admissible as a part thereof; but so far as it is a narration of a past and completed transaction, it is inadmissible." Ross *v.* White, 60 Vt. 558, 15 Atl. 184.

9. See *supra*, III, C, f, and *infra*, IV, 6, E, *et seq.*

10. Haynes *v.* Rutter, 24 Pick. (Mass.) 242.

11. *United States.* — Mutual Life Ins. Co. *v.* Logan, 87 Fed. 637, 31 C. C. A. 172. See United States *v.* Angell, 11 Fed. 34.

Connecticut. — Enos *v.* Tuttle, 3 Conn. 247; Rockwell *v.* Taylor, 41 Conn. 55.

Georgia. — Mitchum *v.* State, 11 Ga. 615.

Maine. — McLeod *v.* Johnson, 96 Me. 271, 52 Atl. 760.

Michigan. — Tolbert *v.* Burke, 89 Mich. 132, 50 N. W. 803.

New Hampshire. — Plumer *v.* French, 22 N. H. 450; Morrill *v.* Foster, 32 N. H. 358; Carlton *v.* Patterson, 29 N. H. 580.

New York. — Tilson *v.* Terwilliger, 56 N. Y. 273.

Pennsylvania. — Grim *v.* Bonnell, 78 Pa. St. 152.

Where the defendant delivered several bales of cotton to the plaintiff to be applied to the payment of a debt, and contended that two of the bales were "prize cotton," for which the plaintiff agreed to allow him more than the amount of the credit actually entered therefor, defendant's declaration to a third person while hauling the bales for delivery to the plaintiff, that they were his "prize cotton," is not part of *res gestae*, nor admissible for defendant. Declarations of party offered in his own interest as *res gestae*, must characterize a material act; they must tend to throw light upon or give color to something being done, the doing of which is a relevant fact in the case. Powell *v.* Henry, 96 Ala. 412, 11 So. 311.

The mere fact that a declaration has some relation to the act which it acompanies does not make it part of the *res gestae* if it is merely a narrative statement. Haynes *v.* Rutter, 24 Pick. (Mass.) 242.

12. Barber's Admr. *v.* Bennett, 62 Vt. 50, 19 Atl. 978; Mueller's Estate, 159 Pa. St. 590, 28 Atl. 491. This was an action against an estate to recover money alleged to have been loaned to the decedent. It appeared that the money had been paid by the plaintiff to an employe of a trust company in settlement of the purchase price of a house bought by the decedent. The plaintiff's statement at the time he paid the money that it was a loan to the decedent to assist him in buying the house, not made in the presence of

d. *Act Must Be One in Issue or Relevant to Issue.* — A statement or declaration is not admissible as *res gestae* merely because it accompanies an act, but the act which it accompanies and explains must be the one which is being litigated,[13] or must be otherwise relevant to the issue.[14]

e. *Negative Act.* — The act which the declaration qualifies or characterizes may be a negative one.[15]

the decedent, was held no part of the *res gestae* since it had no necessary connection with the settlement of the business then being transacted.

In Ford *v.* Haskell, 32 Conn. 489, it appeared that the declarant while purchasing an article of clothing stated that she was doing it for the plaintiff in fulfillment of her contract with him in relation to carrying on her farm. She also stated the terms of the contract in detail. The first part of this statement explaining her act was held part of the *res gestae*, but the remainder as to the terms of the contract not being a further explanation of the act but in reference to matters entirely disconnected therewith was held no part of the *res gestae*.

13. State *v.* Kelly, 77 Conn. 266, 58 Atl. 705; State *v.* Bradnack, 69 Conn. 212, 37 Atl. 492; Howard *v.* Upton, 9 Hun (N. Y.) 434.

14. Brookfield *v.* Warren, 128 Mass. 287; Kingsford *v.* Hood, 105 Mass. 495; Corinth *v.* Lincoln, 34 Me. 310; Tomkies *v.* Reynolds, 17 Ala. 109.

Where a fact which the declaration tends to characterize is not relevant or material, the declaration is not admissible as part of the *res gestae*. Patton *v.* Ferguson, 18 N. H. 528.

On a prosecution of the defendant for the murder of his wife by poison where it had been shown that he had purchased strychnine shortly before her death, and he testified that such purchase was made at the suggestion of his wife, to kill rats which infested their hencoops, it was held that her declarations or exclamations upon two occasions when she and the defendant found dead chickens, "Well, we must get strychnine, some strychnine for them rats," and "Look, at my two lovely chickens" were mere hearsay and not competent as *res gestae* since they did not characterize the acts of finding, and even if they did neither of these acts was a litigated one. "The relevant facts were the presence in the coop of the dead chickens, together with the indications of the manner of their death. Neither the finding nor the manner of it possess any significance except as it was the means of disclosing these facts. No exception to the act of finding could therefore, under the circumstances claimed to be shown, be an explanation of an act having in any aspect of it any bearing upon any issue of fact in the case." State *v.* Kelly, 77 Conn. 266, 58 Atl. 705.

In an action for damages for commission of hired slave, wife of one of the witnesses declared, when in the act of going to the plaintiff's house, that she was going to see a negro woman delivered of a child; and when she returned, she declared that the woman had given birth to a child, *held*, that the acts of going to and returning from plaintiff's house which they are supposed to qualify and explain, being immaterial and irrelevant, such declarations cannot become evidence. Declarations of third persons, explanatory of a contemporaneous act, are not admissible evidence as *res gestae*, unless the act which they explain is itself relevant and material. Fail & Miles *v.* McArthur, 31 Ala. 26.

15. Hersom *v.* Henderson, 23 N. H. 498. This was an action on a warranty on the soundness of a horse. Plaintiff claimed that the horse was subject to fits. It appeared that after the purchase he kept the horse in a stable unused because, as he claimed, it was subject to fits. The plaintiff's directions to the stableman not to hire out the horse because it was subject to fits was held admissible as part

D. In Favor of Person Making Statement. — Since verbal acts are admitted as relevant circumstances characterizing an act, they are admissible as well for as against the party making them.[16]

E. Accompanying Delivery. — a. *Generally.* — Statements accompanying and in any way characterizing an act of delivery, are admissible as part of the *res gestae,*[17] but a statement which is merely descriptive of the thing delivered without qualifying the act is mere

of the *res gestae.* "There is nothing in the case indicating that the facts testified to by him took place after the controversy arose, as is intimated in the argument, and therefore we shall not so consider it. . . . It is extremely difficult, if not impossible, to lay down any exact rule that shall govern this class of questions. It was said in Sessions *v.* Little, 9 N. H. Rep., 271, that if evidence of an act done by a party be admissible, his declaration, made at the time, and tending to elucidate or give a character to the act, and which may derive credit from the act itself, will be also admissible, as part of the *res gestae.* We are not disposed to extend the rule there laid down, but after some hesitancy we have thought that this evidence might come within the principle there explained. The plaintiffs kept the animal in the stable, although wanted for use. This was an act negative in its character, but within the meaning of the term, as used in this connection; and it was competent for the plaintiffs to show that such was the fact. The declaration, made at the time, tended to elucidate and give character to the act, and derived credit from it. The act then being admissible, the declaration was also, as part of the *res gestae.*"

16. Plumer *v.* French, 22 N. H. 450; Stevens *v.* Miles, 142 Mass. 571, 8 N. E. 426; Russell *v.* Frisbie, 19 Conn. 205; Campbell *v.* State, 133 Ala. 81, 31 So. 802; Renshaw *v.* Dignan, 128 Iowa 722, 105 N. W. 209; Walker *v.* Steele, 121 Ind. 436, 22 N. E. 142; Monroe *v.* State, 5 Ga. 85.

A party may as a part of the *res gestae* prove his own declarations made at the time of an act done, illustrative of his intention or of the motive which actuated him. Thus a person's declaration of dissent or opposition to an entry made on his land is admissible in his behalf in determining whether the entry was made against his will. Croff *v.* Ballinger, 18 Ill. 200, 65 Am. Dec. 735.

17. Evans *v.* Howell, 84 N. C. 460; Frome *v.* Dennis, 45 N. J. L. 515; Upton *v.* State (Tex. Crim.), 88 S. W. 212; Rembert *v.* Brown, 14 Ala. 360; Allen *v.* Leyfried, 43 Wis. 414; Colt *v.* La Due, 54 Mo. 486; Fellman *v.* Smith, 20 Tex. 99. See State *v.* Gabriel, 88 Mo. 631; Adams *v.* Lathan, 14 Rich. Eq. (S. C.) 304. But see Merchants' Bank *v.* Berthold, 45 Mo. 527.

Where plaintiff claims title to attached property, his statement asserting title thereto made to the sheriff on delivery of the property to him under an execution, was held admissible under the *res gestae.* Yarborough *v.* Moss, 9 Ala. 382.

Declarations of a donor at the time of the delivery of property to the trustee pursuant to the provisions of a deed, are admissible as part of *res gestae,* showing the actual delivery of its object. Hale *v.* Stone, 14 Ala. 803.

Will. — Statements made by a party producing and delivering a will to another person accounting for his possession of it and the reason of its production, are admissible as part of the *res gestae,* being verbal statements explanatory of the physical act. Dolan *v.* Meehan (Tex. Civ. App.), 80 S. W. 99.

Where notes are deposited with an attorney, statements as to the purpose for which they are deposited, made at the time and by the person depositing them, are verbal acts within the meaning of the rule, and not hearsay. Smith *v.* Boatman Sav. Bank, 1 Tex. Civ. App. 115, 20 S. W. 1119.

hearsay,[18] as are statements prior[19] or subsequent[20] to the delivery.

b. *Accompanying Delivery of Deed.* — The statements of the party delivering a deed, accompanying his act, form part of the *res gestae* thereof.[21]

F. Acceptance. — On the issue of whether a proffered instrument was accepted, the accompanying statements of the parties form part of the *res gestae*.[22]

G. Demand and Refusal. — Statements of the parties accompanying and characterizing a demand and refusal are part of the *res gestae* thereof.[23]

H. Payment. — Statements accompanying the act of payment and tending to characterize such act made by either party thereto form part of the *res gestae* thereof.[24] This rule applies to state-

18. Where a creditor taking cotton in payment of a debt agreed to allow an extra amount for a part represented as "prize cotton," the debtor's statement to a third person during the delivery that this was his prize cotton was held no part of the *res gestae* because not characterizing the act. Powell *v.* Henry & Co., 96 Ala. 412, 11 So. 311.

A statement as to the consideration and origin of the note made by the payee when delivering it to another is a mere narrative of a past event and inadmissible as part of the *res gestae* attending such delivery. Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514.

19. Stallings, Admr. *v.* Hinson, 49 Ala. 92.

20. Heft *v.* Masden, 21 Ky. L. Rep. 390, 51 S. W. 574; Mutual L. Ins. Co. *v.* Logan, 87 Fed. 637, 31 C. C. A. 172.

21. Roberts *v.* Preston, 100 N. C. 243, 6 S. E. 574. See articles "Delivery" and "Deeds."

Declarations of a party, made at the time she handed a deed to her husband to deliver as her agent to the grantee, with respect to the terms upon which he was to deliver the deed, are admissible as part of *res gestae*. Harper *v.* Dail & Bro., 92 N. C. 394.

On the issue of whether or not a deed has been delivered, the declarations of the grantee at the time the deed was handed to him showing his purpose or intent are competent in his own behalf as part of the *res gestae*, although the grantor was not present. Renshaw *v.* Digman, 128 Iowa 722, 105 N. W. 209.

22. Smith *v.* T. M. Richardson Lumb. Co., 92 Tex. 448, 49 S. W. 574.

Where the issue was whether the defendant had accepted a lease, his declarations accompanying the act of taking and reading the lease at the time of the alleged acceptance were held admissible in his behalf as part of the *res gestae*. Stevens *v.* Miles, 142 Mass. 571, 8 N. E. 426.

23. Webster *v.* Cannann, 40 Mo. 156. See Lampley *v.* Scott, 24 Miss. 528.

In an action in trover, all that passed at the time of demand, relative to the matter and what the defendant said by way of excuse, being part of the *res gestae* attending the demand, is evidence for as well as against him. Gracie *v.* Robinson, 14 Ark. 438. See Walrod *v.* Ball, 9 Barb. (N. Y.) 271.

24. Rigg *v.* Cook, 9 Ill. 336; Gay *v.* Gay, 5 Allen (Mass.) 157. See Edwards *v.* Edwards, 39 Pa. St. 369, and article "Payment," Vol. IX, p. 728, n. 38.

Where a father pays his son's debt, statements which he made to third persons when he pays, that he would keep the notes given by the son to show that he had received that much out of the estate, are admissible as *res gestae* in suit for partition between his children. West *v.* Beck, 95 Iowa 520, 64 N. W. 599.

Entries made by the person receiving the payment. — See Henry *v.* Bounds (Tex. Civ. App.), 46 S. W. 120.

Where the payor in the presence

ments of the party paying showing on what the payment is to be applied,[25] or for whom it was made.[26] But a statement that the payment was made in pursuance of a former agreement,[27] or out of the private funds of the party paying,[28] is not competent against one who was not present when the statement was made. And statements made prior[29] or subsequent[30] to the payment are not part of the *res gestae* thereof.

Where it is claimed that payment was made at a certain time, and place, it is competent to show as a part of the *res gestae,* what was there said and done.[31]

I. GIFT. — Declarations of the donor accompanying a gift are competent as part of the *res gestae* where the character and effect of the transaction are in issue.[32] His subsequent statements, however, are not *res gestae*[33] unless they accompany and qualify his

of the payee's agent, who was receiving the money, borrowed money from another to make up a deficiency, what he said at the time in the presence of the agent is admissible as part of the *res gestae,* as a circumstance tending to show the payment. Planters' Bank *v.* Massey, 2 Heisk. (Tenn.) 360.

25. Bank of Woodstock *v.* Clark, 25 Vt. 308; Richardson *v.* Sternburg, 65 Ill. 272; Hood *v.* A. French & Co., 37 Fla. 117, 19 So. 165.

Statements made by persons, on liability due to county at the time of so paying, as to the account on which payment is made, are parts of the *res gestae,* and not hearsay. Shelley *v.* Lash, 14 Minn. 498.

26. Harrison *v.* Harrison, Admr., 9 Ala. 73.

27. Selvin *v.* Wallace, 64 Hun 288, 19 N. Y. Supp. 87.

28. In an action by an administrator to recover money paid by his intestate on behalf of the defendant, where the defendant claimed that the money belonged to him and was paid by the intestate merely as his agent, the statements of the intestate while paying the money that it was furnished from his own resources was held part of the *res gestae.* The *res gestae* or thing being done was the payment of the money for the benefit of the defendant. The declarations of the intestate as the defendant's agent would only be admissible to show the purpose for which the money was paid. His statement that he himself was furnishing the money related not to the business which he was to transact as the defendant's agent, but to another and distinct transaction between himself and the defendant. Barber's Admr. *v.* Bennett, 62 Vt. 50, 19 Atl. 978.

29. Gorham *v.* Auerswald, 53 Mo. App. 131.

30. Dwyer *v.* Bassett, 1 Tex. Civ. App. 513, 21 S. W. 621.

31. Thorp *v.* Goewey, Admr., 85 Ill. 611.

32. Bragg *v.* Massie's Admr., 38 Ala. 89, 79 Am. Dec. 82; Olds *v.* Powell, 7 Ala. 652, 42 Am. Dec. 605. See article, "GIFTS," Vol. VI.

A recital in a will made by the donor at the time of the gift to his daughter, though of no efficacy as a muniment of title, is relevant testimony as tending to show the gift, and is admissible as part of the *res gestae.* Jennings *v.* Blocker's Admr., 25 Ala. 415.

Agency. — The father's statement accompanying a gift, that he made it on his own behalf and not on behalf of his wife, is competent as part of the *res gestae* where the question in issue is whether he was acting as the wife's agent. Johnson *v.* Cole, 178 N. Y. 364, 70 N. E. 873.

33. Blalock *v.* Miland, 87 Ga. 573, 13 S. E. 551.

Declarations of the donor made on the evening of the same day on which the alleged gift was made, but after it was made, going to show that there was a gift, and the manner

possession of the property claimed as a gift;[34] neither are his previous statements.[35]

J. Abandonment. — On the question of abandonment, statements of the actor accompanying and characterizing the act alleged to be an abandonment, are admissible as *res gestae*.[36]

K. Dedication. — The declarations of the actor accompanying an act claimed to be a dedication are part of the *res gestae* of the act.[37]

L. Domicil. — On the issue of domicil, the statements of the person in question while traveling or preparing to leave his place of residence, and relating to his purpose or intention are part of the *res gestae*.[38] Such statements must accompany an act, however, to be of the *res gestae*.[39]

M. Location of Boundaries. — The statements of the owners of land accompanying the marking or the removal of boundaries, are competent as *res gestae*, on the issue of the correct location of the boundary line.[40]

N. Accompanying Possession. — a. *Generally*. — Whenever the fact of possession is relevant to the issues, the declarations accompanying and characterizing the same are competent as part of the

of it, are not admissible as part of the *res gestae*. Carter *v.* Buchannon, 3 Ga. 513.

34. Hansell *v.* Bryan, 19 Ga. 167; Rollins *v.* Strout, 6 Nev. 150.

35. Olds *v.* Powell, 7 Ala. 652, 42 Am. Dec. 605.

36. See article "Abandonment," Vol. I, and Kercheval *v.* Ambler, 4 Dana (Ky.) 166.

Where the defendant, in action of trespass *quare clausum fregit*, set up his occupancy of that portion of premises upon which trespass was alleged to be committed, in showing an abandonment of such occupancy by the defendants having moved off the fencing, etc., the declarations of the defendant at the time of removing said fence is admissible as part of *res gestae*. Welch *v.* Louis, 31 Ill. 446.

37. See article "Dedication," and Proctor *v.* Lewistown, 25 Ill. 139; Spencer *v.* New York & N. E. R. Co., 62 Conn. 242, 25 Atl. 350; Quick *v.* Cotman, 124 Iowa 102, 99 N. W. 301.

38. See article "Domicil." Vol. IV, and Austin *v.* Swank, 9 Ind. 109; Corville *v.* Brighton, 39 Me. 333.

Where the domicil of a party is in issue, his declarations while going from one state to another characterizing his act and showing his intention are admissible as part of the *res gestae*. Matzenbaugh *v.* People, 194 Ill. 108, 62 N. E. 546.

39. City of Bangor *v.* Brewer, 47 Me. 97; Bradford *v.* Haggerthy, 11 Ala. 698.

40. See article "Boundaries," Vol. II.

Where the location of a certain boundary line was in issue, which it appeared was formerly marked by a stake and stones, and it was contended that the corner of a wall subsequently built had been placed upon the exact spot occupied by the stake and stones, a conversation occurring between the owners of the adjoining land at the time one of them was building the wall, to the effect that although one boundary mark was being removed another one, the wall, was being put in place, was held competent as part of the *res gestae*, although the declarants were still alive. "Accompanying an act relative and material, independently of what was said, and serving to elucidate and give it a character, no reason is perceived why these remarks might not properly be considered as a part of the *res gestae*." Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543.

res gestae of the act of possession.[41] This rule applies to both possession of land[42] and chattels.[43] Such statements are not competent testimonially to prove the facts stated in them, but are merely relevant facts characterizing the act of the declarant.[44]

Declarations as to the source of the title claimed are not admissible because they are merely a hearsay narrative of a past transaction.[45]

b. *Accompanying Acquirement of Possession.* — Statements ac-

41. Sweet *v.* Wright & Spencer, 57 Iowa 510; Vincent *v.* State, 74 Ala. 274. See Frank *v.* Thompson, 105 Ala. 211, 16 So. 634; Hood *v.* Hood, 2 Grant Cas. (Pa.) 229; Radford *v.* State, 33 Tex. Crim. 520, 27 S. W. 143 (accused's explanation of possession of key fitting door of deceased's room). But see Kahlenbeck *v.* State, 119 Ind. 118, 21 N. E. 460.

42. O'Connell *v.* Cox, 179 Mass. 250, 60 N. E. 580; David *v.* David's Admr., 66 Ala. 139; Bivings *v.* Gosnell, 141 N. C. 341, 53 S. E. 861; State *v.* Emory, 51 N. C. (6 Jones L.) 133.

Declarations of an owner while in possession of land explanatory of his intention in leaving a certain strip of land open held admissible in behalf of a person claiming under such owner as part of the *res gestae*. Quinn *v.* Eagleston, 108 Ill. 248.

Where the owner of land has executed an instrument purporting on its face to be an absolute conveyance of land but retains possession of the land thus conveyed, the transaction is equivocal and his declarations, in connection with such possession, are admissible to show both the character of his possession and of the transaction, even though not made in the presence of the person claiming under such conveyance and adversely to his right of possession. Robbins *v.* Spencer, 140 Ind. 483, 38 N. E. 522.

43. Wiggins *v.* Foster, 8 Kan. App. 579, 55 Pac. 350; Durham *v.* Shannon, 116 Ind. 403, 19 N. E. 190; Wright *v.* Smith, 66 Ala. 514; Bunch *v.* Bridgers, 101 N. C. 58, 7 S. E. 584; Wakeman *v.* Bailey, 2 Hill (N. Y.) 279; Faulcon *v.* Johnston, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737; Wainbold *v.* Vick, 50 Wis. 456, 7 N. W. 438.

In an action of trover for the value of a horse which the plaintiff stated had been given her by her husband, on the issue of ownership it was held proper for the plaintiff to show that after the alleged gift she went to the stable where the horse was kept, gave directions respecting its keeping and afterwards controlled it. These facts were admissible as *res gestae* and as tending to show that possession was delivered. Davis *v.* Zimmerman, 40 Mich. 24.

Statements of a third person in possession of property in a suit for conversion, as to the grounds upon which such possession was obtained, are competent evidence when material because part of the *res gestae*. McDonald *v.* Bayha, 93 Minn 139, 100 N. W. 679.

44. In an action of trespass for taking horses, the sale of which to the plaintiff was claimed by the defendant to be fraudulent as against creditors, the declarations of the plaintiff after the sale directing his son to take the horses to a certain stable and have them kept at his expense, his statement to the stable keeper the next day, that he owned the horses by virtue of a bill of sale and would pay for their keeping, was held admissible "not as proof of the facts alleged, but as part of the *res gestae*" tending to rebut the claim that the horses remained in the possession of the son, who was the vendor. Boyden *v.* Moore, 11 Pick. (Mass.) 362.

45. Vincent *v.* State, 74 Ala. 274; Murray *v.* Cone, 26 Iowa, 276; Gano *v.* McCarthy's Admr., 79 Ky. 409. See article "TITLE."

Declarations of a party in possession detailing the nature of the agreement under which possession is held are not admissible, being a

companying the acquirement of possession are admissible as part of the *res gestae* if they tend to characterize the act.[46]

c. *On Parting With Possession.* — Statements accompanying and characterizing the act of parting with possession form part of the *res gestae* thereof.[47] But declarations as to the boundaries of the land being sold are not within this rule.[48]

d. *Explaining Possession of Stolen Goods.* — The statements of one accused of larceny, made while in possession of the goods and explanatory of that possession, are sometimes said to be admissible as part of the *res gestae*.[49] The courts, however, are not entirely agreed as to the competency of this evidence and those admitting it do so usually upon principles unconnected with *res gestae*.[50]

mere narrative of a past occurrence. Sweet *v.* Wright, 57 Iowa 510, 10 N. W. 870.

On a prosecution for robbery committed on a city street where the defendant claimed it was committed by another, the declarations of the latter upon displaying money after the robbery, that he had touched a man on the street for it, were held not part of the *res gestae* of his possession of the money characterizing such possession because they were merely narrative, stating the origin of the possession. "While declarations are received showing the nature of the right claimed, statements as to the manner in which that right was acquired are excluded." State *v.* Totten, 72 Vt. 73, 47 Atl. 105.

46. Rowley *v.* Hughes, 40 Ill. 71; Stephens *v.* McCloy, 36 Iowa 659; Davis *v.* Spooner, 3 Pick. (Mass.) 284; Resch *v.* Senn, 28 Wis. 286.

In action of forcible entry and detainer brought by lessee of a tract of land, declarations made by him at the time of his entry on the improved portion thereof under his lease, and before any dispute had arisen in relation thereto, that he claimed possession of the entire tract, is admissible in his behalf as part of *res gestae*. Hardisty *v.* Glenn, 32 Ill. 62.

Receiving Stolen Goods. — In prosecution for receiving stolen goods, in accounting for the possession of the goods received or purchased in absence of defendant by an agent, what was said to such agent by the seller in respect to the title or ownership, at the time of agent's purchase, is part of *res gestae*. O'Connell *v.* State, 55 Ga. 296. See article "RECEIVING STOLEN GOODS," Vol. X.

47. Declarations of mortgagor, while removing mortgaged property, "that he was going to send it to a particular person," are admissible as part of the *res gestae* of parting with possession, and as the evidence showed delivery of possession, it is evidence against the person to whom sent, in suit against him by mortgagor for conversion. Sanders *v.* Knox, 57 Ala. 433.

48. Declarations accompanying the act of parting with the title and possession of land, as to the boundaries thereof, are not within the rule that declarations accompanying the act of possession and explanatory thereof, if made in good faith, are admissible as part of the *res gestae*. Lampe *v.* Kennedy, 60 Wis 110, 18 N. W. 730.

49. *Georgia.* — Lovett *v.* State, 80 Ga. 255, 4 S. E. 912; Walker *v.* State, 28 Ga. 254.

Oklahoma. — Smith *v.* Territory, 14 Okla. 162, 77 Pac. 187; Mitchell *v.* Territory, 7 Okla. 527, 54 Pac. 782.

Texas. — Cameron *v.* State, 44 Tex. 652 (possession and acts of ownership at the time of the declaration must be proved otherwise than by the declaration itself); Shackelford *v.* State, 43 Tex. 138; Darnell *v.* State, 43 Tex. 147; Phillips *v.* State, 19 Tex. App. 158; Childress *v.* State, 10 Tex. App. 698; Hampton *v.* State, 5 Tex. App. 463; See article "LARCENY," Vol. VIII, p. 108.

50. See article "LARCENY," Vol. VIII.

O. Complaints Made By Third Persons of Conditions in Question. — Where the condition of premises is in question, the complaints regarding the same, made by tenants or prospective tenants accompanying their departure or refusal to occupy the premises, have been held to be part of the *res gestae.*[51]

7. Conditions and Circumstances Surrounding Act or Transaction in Question. — A. Generally. — The circumstances immediately surrounding the act or transaction in question and the conditions immediately preceding and following it may, ordinarily, be shown as part of the *res gestae,*[52] unless some other rule of exclusion, such

51. Hoffman *v.* Edison Elec. Illum. Co., 87 App. Div. 371, 84 N. Y. Supp. 437. See Stewart *v.* Lanier House Co., 75 Ga. 582; Kearney *v.* Farrell, 28 Conn. 317. But see Woolsey *v.* Morss, 19 Hun (N. Y.) 273; and *contra* Wesson *v.* Washburn Iron Co., 13 Allen (Mass.) 95, 90 Am. Dec. 181.

In an action by an adjoining owner against an elevated railroad for depreciation of his property, evidence that the plaintiff was compelled to reduce his rents after the construction of the railway in order to retain his tenants being properly admitted, it was held that the refusal of a tenant to remain unless the reduction was made and his reasons for such refusal all communicated to the landlord when the actual reduction was made characterized the act and was really a part of it, and hence could be proved as part of the *res gestae* under the general principle that when an act or transaction is itself admissible, statements or declarations of the party at the time calculated to explain and elucidate the character and quality of the act and so connected with it as to constitute one transaction and to derive credit from the act itself are admissible as part of the *res gestae.* Hine *v.* New York El. R. Co., 149 N. Y. 154, 43 N. E. 414.

52. *United States.* — Beaver *v.* Taylor, 1 Wall. 637.

Alabama. — Wallace *v.* North Alabama Tract Co., 40 So. 89.

California. — People *v.* Majors, 65 Cal. 138, 3 Pac. 597.

Indiana. — Gallaher *v.* State, 101 Ind. 411.

Kansas. — Ott *v.* Cunningham, 9 Kan. App. 886, 58 Pac. 126.

Kentucky. — See Fletcher *v.* Com., 29 Ky. L. Rep. 955, 96 S. W. 855.

Louisiana. — State *v.* Domingues, 32 La. Ann. 428.

Missouri. — State *v.* Gabriel, 88 Mo. 631.

New Hampshire. — Simonds *v.* Clapp, 16 N. H. 222.

New York. — Casey *v.* New York Cent. & H. R. R., 6 Abb. N. C. 104, *affirmed* in 78 N. Y. 518.

South Carolina. — State *v.* Belcher, 13 S. C. 459. See also article "Homicide," Vol. VI, pp. 607, 610, *et seq.*

On a prosecution for selling liquor to a minor where the defendant claimed that he did not know the buyer to be a minor, the fact that the other persons who drank with the buyer at the time were also minors was held competent as part of the *res gestae.* Gray *v.* State, 44 Tex. Crim. 470, 72 S. W. 169.

Where the plaintiff was injured by a switch engine while crossing the defendant's tracks on a bicycle, the movements of a passenger train which the passenger was trying to avoid at the time of her injury were held competent as part of the *res gestae,* although the train was not the immediate cause of the injury. Louisville & N. R. Co. *v.* Stewart, 128 Ala. 313, 29 So. 562.

In an action against a decedent's estate for work done under contract with the decedent, it is admissible as part of the *res gestae* to show that the executor oversaw the work. McKeown *v.* Harvey, 40 Mich. 226.

The fact that the defendant in making the slanderous statement, which forms the basis of the action for slander, was gesticulating and very rough is admissible as part of

as the one excluding parol evidence, would be thereby violated.[53]

The Intoxication of the principal actor in the transaction at the time it occurred may be shown, both in a civil[54] and criminal[55] action.

B. PRECEDING CIRCUMSTANCES. — Circumstances which precede the act in question and form part of the same transaction are said to be part of the *res gestae* and admissible as such.[56] Such circum-

the *res gestae*. Hereford *v.* Combs, 126 Ala. 369, 28 So. 582.

On a prosecution for robbery of a purse on a street car where there was some evidence that the defendant had passed the purse to a co-defendant who had dropped it on the platform, the fact that the purse was found on the car platform was held competent as part of the *res gestae*. People *v.* Piggott, 126 Cal. 509, 59 Pac. 31.

On trial for homicide, the conditions in which the body and clothing of deceased were when found is properly admissible in evidence as part of *res gestae*. People *v.* Majors, 65 Cal. 138, 3 Pac. 597.

Though under the statute force is not [illegible] an element of rape, the use of force by the accused is admissible evidence as part of *res gestae*. State *v.* Falsetta (Wash.), 36 Pac. 168.

53. See article "PAROL EVIDENCE," Vol. IX.

54. In an action for the loss of an eye caused by the explosion of a giant firecracker at a circus which the plaintiff was attending, the fact that the plaintiff was intoxicated at the time was held competent as part of the *res gestae*. Herrick *v.* Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333.

55. On a prosecution for rudely displaying a pistol in a public place, the fact that defendant was at the time drunk and boisterous is admissible as part of the *res gestae*, even conceding that it would constitute a separate offense. Garner *v.* State (Tex. Crim.), 64 S. W. 1044.

56. Viberg *v.* State, 138 Ala. 100, 35 So. 53; People *v.* Hughes, 116 Mich. 80, 74 N. W. 309; Stiles *v.* State, 57 Ga. 183; Cox *v.* State, 64 Ga. 374, 37 Am. Rep. 76.

Evidence of the facial expression and demeanor of the defendant at a prayer meeting two hours before the homicide although objected to as not part of the *res gestae* because too remote, was held a competent circumstance indicating the state of his mind and intention. Hainsworth *v.* State, 136 Ala. 13, 34 So. 203.

Where deceased was killed by being run over by a train, evidence that during the same night at a nearby station he was shoved and kicked from the first section of said train, is admissible as part of the *res gestae*, being a part of the history of the case. Knoxville, C. G. & L. R. Co. *v.* Wyrick, 99 Tenn. 500, 42 S. W. 434.

On a prosecution for assault with intent to murder a person who had interfered to prevent injury to a third person whom defendant was assaulting, evidence of the altercation between the defendant and such third person shortly previous was held admissible as part of the *res gestae*, although the prosecuting witness was not present thereat. Thomas *v.* State, 44 Tex. Crim. 344, 72 S. W. 178.

In an action for slander, evidence of an altercation out of which the slanderous words grew was held admissible as part of the *res gestae* bearing upon the question of malice. Provost *v.* Brueck, 110 Mich. 136, 67 N. W. 1114.

On a prosecution for the careless use of firearms, evidence that just prior to the careless shooting in issue the defendant had pointed the gun at another person present was held admissible as part of the *res gestae* tending to show that there was no malice. People *v.* Dudley, 131 Mich. 261, 90 N. W. 1058.

On a prosecution for robbery, the series of events leading up to the robbery and without reference to which an intelligible statement of the facts constituting the alleged robbery could not have been made, were held

stances, however, must be of such a character and so near in point of time and circumstance to form incidents in the main transaction.[57]

C. Circumstances Immediately Following. — Acts, circumstance and statements immediately following the main transaction and forming a part or continuation thereof, are admissible as *res gestae*.[58]

properly admitted in evidence although they began some hours previous to the robbery and included an assault and battery by the defendant on the prosecuting witness. People *v.* Linares, 142 Cal. 17, 75 Pac. 308.

In an action for wrongful death it appeared that the deceased was shot and killed by the defendant, an officer, while deceased was running away from an encounter with two men who had shortly previous thereto insulted his wife, it appeared that immediately after the insult the wife met her husband and told him of it and he soon after engaged in a difficulty with the persons guilty of the insult. The circumstances of the insult and the scuffle which followed were held competent as part of the *res gestae*. Petrie *v.* Cartwright, 114 Ky. 103, 24 Ky. L. Rep. 903, 70 S. W. 297, 59 L. R. A. 720.

57. Carson *v.* Singleton, 23 Ky. L. Rep. 1626, 65 S. W. 821; Jones *v.* State (Tex. Crim.), 83 S. W. 198; State *v.* Shafer, 22 Mont. 17, 55 Pac. 526; Shelton *v.* State, 73 Ala. 5; State *v.* Thomas, 111 La. 804, 35 So. 914; Cook *v.* State, 134 Ala. 137, 32 So. 696.

In an action against several joint defendants for assault and battery where it appeared that the defendant was one of a crowd which had assaulted the plaintiff, the declarations of persons in the crowd before they arrived at plaintiff's house, while on their way thither, were held not admissible on behalf of the defendants as part of the *res gestae*. Stone *v.* Segur, 11 Allen (Mass.) 568, *distinguishing* Lord George Gordon's Case, 21 How. St. Trial, 539, where the cries and exclamations of the mob in which the defendant took part, and which were made in his presence, were admitted as evidence to inculpate him, being strictly *res gestae* and competent to show the nature and character of the act in which the defendant participated.

Where it appeared that prior to the assault a heated discussion took place between defendant and those present at the house, the assaulted person not being present, evidence as to conversations taking place at the house were not part of *res gestae*. State *v.* Kapelino (S. D.), 108 N. W. 335.

58. In an action for personal injuries caused by the breaking of a derrick guy rope, it was held proper as part of the *res gestae* to permit a witness to state that immediately after the acident the rope was tied together and put in use again. Nugent *v.* Breuchard, 91 Hun 12, 36 N. Y. Supp. 102.

The fact that the plaintiff cried all afternoon after receiving the injuries sued on was held competent as part of the *res gestae* in connection with other evidence as to his actual injuries. Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489, 37 So. 166.

Evidence of the finding of the prosecutrix in a prosecution for rape, after she had broken away from her assailant or had run about two hundred yards, is admissible as *res gestae*. Turman *v.* State (Tex. Crim.), 95 S. W. 533. So the defendant's pursuit of the prosecutrix immediately after an attempted assault and the ensuing difficulty between them may be shown as part of the *res gestae*. People *v.* Yslas, 27 Cal. 630.

Where a prosecutrix in rape case testifies that the defendant after ravishing her, tied her to a tree and left her, evidence of others that shortly after the crime was alleged to have been committed, she went to them to untie her hands, is admissible as part of the *res gestae*. Brown *v.* State, 72 Miss. 997, 17 So. 278.

On a prosecution for assault with a knife, evidence that after the knife

D. Statements of Parties. — The statements of the parties made during the course and as a part of the transaction in question, are of the *res gestae* and admissible to show its character.[59] So the statements of an injured person made during the transaction in

had been knocked from defendant's hand during the fight, he seized a gun, is admissible as part of the *res gestae*. Weaver *v.* State, 24 Tex. 387.

On a prosecution for assault and battery, a statement made by the defendant immediately after the battery in response to a remark by the injured person's son that he wanted to get a doctor for his father, that he, the defendant, was doctor enough for the injured person, was held admissible as part of the *res gestae*. Moody *v.* State, 120 Ga. 868, 48 S. E. 340.

In an action for forcible expulsion from a train by defendant's brakeman a conversation between plaintiff and the offending brakeman immediately following the expulsion, serving to explain its character, is admissible as part of the *res gestae*. Bass *v.* Chicago & N. W. R. Co., 42 Wis. 654, 24 Am. Rep. 437.

On the trial of a boy for stealing a pocket book, the testimony of an officer that he saw the father of the accused searching him immediately after the theft and take from him what appeared to be a gold piece, and put the same in his pocket, is part of the *res gestae*. People *v.* Long, 44 Mich. 296, 6 N. W. 673.

Complaint to Officer. — A prosecuting witness, on trial for burglary, may state as part of the *res gestae*, that she gave the alarm and told the police the direction she thought the burglar had taken in leaving the house. State *v.* Moore, 117 Mo. 395, 22 S. W. 1086.

59. *Georgia.* — Columbus & West. R. Co. *v.* Kennedy, 78 Ga. 646, 3 S. E. 267.

Kentucky. — See Ferrell *v.* Com., 15 Ky. L. Rep. 321, 23 S. W. 344.

Louisiana. — State *v.* Gessner, 44 La. Ann. 93, 10 So. 404.

Massachusetts. — Blood *v.* Rideout, 13 Metc. 237.

New Hampshire.—Banfield *v.* Parker, 36 N. H. 353; Hall *v.* Young, 37 N. H. 134; Carter *v.* Beals, 44 N. H. 408; Atherton *v.* Tilton, 44 N. H. 452.

New York. — Fox *v.* Parker, 44 Barb. 541; Supervisors *v.* Bristol, 99 N. Y. 316, 1 N. E. 878.

Ohio. — Stitt *v.* Wilson, Wright 505.

Pennsylvania. — Sergeant *v.* Ingersoll, 15 Pa. St. 343.

Texas. — See Phillips *v.* State, 19 Tex. App. 158.

Vermont. — Marsh *v.* Davis, 24 Vt. 363.

In an action for breach of contract of employment it appeared that the plaintiff had been employed under one contract by two companies, one of which was the defendant. On the issue of whether a letter sent by the president of both companies to the plaintiff constituted a discharge by both, the plaintiff's reply thereto was held admissible as part of the *res gestae*. Schaub *v.* Welded-Barrel Co., 125 Mich. 591, 84 N. W. 1095.

In an action for lathing and plastering defendant's house where the latter claimed that the work was done for a third person with whom he had a general contract covering this work, evidence on the part of the plaintiff of a conversation with defendant at the time the contract sued upon is alleged to have been made in which the plaintiff said that such third person already owed him for other work and that he would not have anything to do with him, was held admissible as part of the *res gestae*. Evans *v.* Montgomery, 95 Mich. 497, 55 N. W. 362.

In Allen *v.* Duncan, 11 Pick. (Mass.) 308, plaintiff was seeking to recover money paid him for goods furnished to the defendant by one Gray on the responsibility of the plaintiff. The defendant contended that the goods were furnished on the responsibility not of the plaintiff alone but of the plaintiff and his partner. Gray testified that he understood that the plaintiff and his partner were both responsible and had

which he was injured form part of the *res gestae* in an action based thereon.[60]

E. Acts and Declarations of Third Persons. — a. *Generally.* The acts and declarations of third persons constituting a part of the transaction are admissible as part of the *res gestae.*[61] A knowledge of them may be necessary to a complete understanding of the con-

so charged them on his books, but that subsequently when he spoke to the plaintiff about the matter the latter informed him that his partner had nothing to do with it. This latter statement of the plaintiff was held admissible as part of the *res gestae* although objected to as a mere hearsay declaration. "It is difficult to lay down any precise general rule, as to the cases in which declarations are admissible, as part of the *res gestae,* and when they must be rejected as the mere assertions of the party. . . . It was undoubtedly competent for Allen to declare, at the time of making the contract, whether he did it on the one or the other account, and such declaration would have been conclusive. Of course, therefore, he might give such declaration in evidence, though his own, as *res gestae.* Was it too late to do this when the money became due, and before payment? We think not. The business was still open and in progress. It seems by the evidence, that the bill was then presented, and then Allen first knew that the goods were charged to himself and Watson, and not to himself alone. He then immediately corrected the error, and told Gray that Watson had nothing to do with the matter. This was in effect an act done, a direction to Gray to correct his erroneous entry, to make out the acount to Allen alone." And that this was done accordingly, is rendered probable from the fact that Allen afterwards paid it, by a settlement in which Watson had no concern. It is also of some weight in the consideration, that this declaration was made in the ordinary course of business, before any question or controversy arose which would render the fact material to himself, and that it was apparently against his interest, as it went to charge himself alone, instead of charging himself and another. It is also to be taken in connection with the fact, and the money was actually paid conformably to this declaration by the plaintiff alone. It was therefore admissible as part of the *res gestae.*

60. A statement made by deceased to his wife when the switch was being turned off, stating that there was no danger, that a sufficient current could not get in the house, in response to her statement asking him to be careful, in action for death caused by current from wire used in lighting the house, was held to constitute part of the *res gestae.* Witmer *v.* Buffalo & N. F. Elec. L. & P. Co., 112 App. Div. 698, 98 N. Y. Supp. 781.

61. State *v.* Horton, 33 La. Ann. 289; Kleiber *v.* People's R. Co., 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613; Griffin *v.* Cleghorn, Herring & Co., 63 Ga. 384; Robertson *v.* Smith, 18 Ala. 220; Stovall *v.* Farmers & Merchants Bank, 8 Smed & M. (Miss.) 305, 47 Am. Dec. 85.

Where the intent of a party to a sale is in issue, his statements connected with the transaction are admissible as *res gestae,* though he is not a party to the suit. Bates *v.* Ableman, 13 Wis. 721.

In an action for wrongful death caused by a collision betweeen decedent's buggy and defendant's train, it was held competent to show as part of the *res gestae* and as bearing upon the sufficiency of the deceased's caution what occurred at the time of the accident, including the acts of the deceased's companion. Proper *v.* Lake Shore & M. S. R. Co., 136 Mich. 352, 99 N. W. 283.

On a prosecution for felonious assault, the acts of a third person who took part in the assault are admissible as part of the *res gestae.* Everything that was done at the time of the difficulty, including who did it and what they said, constitutes a part

duct of the parties.[62] Thus on a prosecution for a crime involving an assault, the acts and declarations of bystanders which may have influenced the conduct of the parties or tend to explain the same,

of the *res gestae*. State *v.* Thornhill, 177 Mo. 691, 76 S. W. 948. This is true even though there is no evidence of a common design. Blount *v.* State, 49 Ala. 381.

In an action for injuries caused by an insult offered to the plaintiff by defendant's servant while the plaintiff was waiting for a train in defendant's depot, the exclamation of one of plaintiff's children, "Mamma, let's get out of here," made during the course of the insulting conduct, was held admissible as part of the *res gestae*. Gulf, C. & S. F. R. Co. *v.* Luther (Tex. Civ. App.), 90 S. W. 44.

On a prosecution for illegal sale of liquor, where the sale was made in the evening, the prosecuting witness testified that it was his impression that the accused sold him the liquor, such impression being gained wholly from what the bystanders said at the time of the sale. It was held that while the witness was improperly allowed to give his impression, the conclusion being a matter for the jury under the circumstances, the statements of the bystanders were admissible as part of the *res gestae*. People *v.* Stanley, 101 Mich. 93, 59 N. W. 498.

At Public Sale. — See *infra*, IV, 7, I, f.

Must Be Connected With and Characterize Transaction. — To justify the declarations of third parties to be admitted as part of *res gestae*, they must be so connected with the transaction as to characterize or explain it. State *v.* Mickler (N. J. L.), 64 Atl. 148.

62. Gillam *v.* Sigman, 29 Cal. 638; Appleton *v.* State, 61 Ark. 590, 33 S. W. 1066; Baker *v.* Gausin, 76 Ind. 317; Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749; Werner *v.* Com., 80 Ky. 387; Stroud *v.* Com., 14 Ky. L. Rep. 179, 19 S. W. 976.

"The declarations of a third person, made to and in the presence of parties engaged in a controversy, at the time of doing of an act by one of them, that becomes the subject of an action, may not only be well calculated, but essential, to explain the motives, conduct, and acts of the parties. There is no distinction in principle between such a declaration, and one made at the same time by one of the parties." Such declarations are part of the *res gestae*. Gillam *v.* Sigman, 29 Cal. 638.

In an action for injuries to an infant between ten and eleven years of age, it appeared that he was a passenger on a caboose attached to a freight train and was injured while attempting to alight from the train as it slowly passed his station. He had been told that the train would stop at the station, but not informed that it would first pass and then back up. In his fear that he would be carried past his destination he followed another passenger to the platform. The latter's reply to the plaintiff's question as to whether the train would stop, that he thought it was not going to stop, was held admissible as part of the *res gestae*. "This was said in immediate connection with the plaintiff's act in attempting to get off the train and was explanatory of his motives and mental condition at the time, and by all authority a part of the *res gestae*. . . . This evidence was not admitted for the purpose of charging the defendant with liability for what this stranger said at the time, but was admitted only as a part of the *res gestae*, and was therefore proper." Hemmingway *v.* Chicago, M. & St. P. R. Co., 72 Wis. 42, 37 N. W. 804, 7 Am. St. Rep. 823.

On a prosecution for homicide the statements of the person on whose behalf the defendant intervened, made by such person as he approached the deceased, were held competent as part of the *res gestae*, although not heard by the defendant. Wood *v.* State, 128 Ala. 27, 29 So. 557.

Acts and Statements of Bystanders as Relevant Facts. — On a prosecution for assault with intent to commit murder, it was held that the defendant should have been permitted

form part of the *res gestae* of the alleged crime.[63] The same rule applies when the assault is made the basis of a civil action.[64] So in a personal injury action the statements of bystanders constituting the information on which the plaintiff acted, are admissible as part of the *res gestae* to explain his conduct.[65] So also they may be admissible to show notice to the defendant.[66]

b. *Particulars of Statement.* — Sometimes the fact that such statements were made may be shown and the particulars thereof excluded because not relevant.[67]

c. *Conduct and Exclamations of Other Passengers.* — In an action by a passenger against a carrier for personal injuries, the conduct and exclamations of the other passengers caused by the occurrence

to show the actions of the people surrounding him at the time of his alleged assault and the declarations made by them at that time as part of the *res gestae*. "Whenever it becomes important to show upon the trial of a cause the correctness of any fact or event it is competent and proper also to show any accompanying act, declaration or exclamation which relates to or is explanatory of such fact or event. Such acts, declarations or exclamations are known to the law as *res gestae*." Davids *v.* People, 192 Ill. 176, 61 N. E. 537, where, however, these facts were relevant as bearing upon the apprehension under which the defendant did the act.

63. Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749; Maher *v.* People, 10 Mich. 212, 10 Am. Dec. 781, (information as to wife's adultery with deceased).

Homicide. — Where defendant claims that he fought in defense of himself, his mother-in-law and sister against the assaults of prosecutor and wife, testimony of witness present that some one in crowd exclaimed during the encounter: "Kill him! don't let that nigger get back to the bottom. Kill him!" though the witness is unable to name the person who made the declaration, is admissible as part of *res gestae*, and as tending to explain defendant's danger and situation. Morton *v.* State, 91 Tenn. 437, 19 S. W. 225.

In Baysinger *v.* Territory, 15 Okla. 386, 82 Pac. 728, which was a prosecution for homicide, it appeared that the defendant and deceased were members of a thrashing crew, and that in a scuffle shortly previous to the fatal shooting deceased had cut the defendant, and that shortly after the defendant had demanded to know why the deceased had cut him. The warning of a bystander, although not in the defendant's presence, that the deceased had better keep his eyes open as the defendant was going to hurt him was held competent as part of the *res gestae*, the shooting occurring within a minute or two after.

64. Baker *v.* Gausin, 76 Ind. 317; Castner *v.* Sliker, 33 N. J. L. 95.

65. See Railway Co. *v.* Herrick, 49 Ohio St. 25, 29 N. E. 1052; Austin & N. W. R. Co. *v.* Duty (Tex. Civ. App.), 28 S. W. 463, and article "Railroads," Vol. X.

66. As tending to establish actual knowledge on part of conductor of brakeman's dangerous situation, what was said by a person on the car in the presence of conductor and their acts within the scope of his observations at time plaintiff was in danger, and with reference to such danger, may be taken into consideration by the jury as part of the *res gestae*. Dale *v.* Colfax Consol. Coal Co. (Iowa), 107 N. W. 1096.

67. In an action by a passenger for injuries received in a railway collision, the fact that there were exclamations, outcries or screams by other passengers may be shown as a part of the *res gestae*, but the particulars of what they said cannot be shown when not material to any issue in the case. Louisville & N. R. Co. *v.* Carothers, 23 Ky. L. Rep. 1673, 66 S. W. 385, modifying the opinion in Louisville & N. R. Co. *v.* Simpson, 111 Ky. L. Rep. 754, 64 S. W. 733.

which resulted in the plaintiff's injury, form a part of the *res gestae* and may be shown as such.[68] Thus where the injury was caused by jumping from the car under immediate apprehension of a graver danger, the actions and exclamations of other passengers at the same time form part of the *res gestae*.[69]

F. Acts and Statements Characterizing a Relation. Where the nature of the relation existing between two or more parties is in issue, their acts and statements during the time in question may be admissible as part of the *res gestae*.[70]

Complaint of Rape. — Sometimes the fact that complaint was made may be shown, but the particulars are excluded. See article "Rape," Vol. X.

68. Ft. Worth & D. C. R. Co. *v.* Stingle, 2 Wills. Civ. Cas. Ct. App. (Tex.) § 704.

Where a plaintiff, a passenger on defendant's car, was injured by a fixture projecting from the side of the track, evidence as to the confusion produced amongst the other passengers by the noise of the collision between the car and the fixture was held properly admitted as part of the *res gestae*. "We think the plaintiff had a right to prove all the circumstances attending the accident as a part of the *res gestae*." Hallahan *v.* New York, L. E. & W. R. Co., 102 N. Y. 194, 6 N. E. 287.

The conduct and exclamations of passengers in the cars, at time of the accident, but not in the presence of injured, is admissible as part of *res gestae*, to show how the circumstances and apparent danger impressed every one, and to some extent explain plaintiff's conduct, and vindicate it from undue alarm. "It is impossible for a witness to convey such scenes to the mind, and their effect and influence upon it." Galena & Chicago U. R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323.

69. Chretien *v.* New Orleans Rys. Co., 113 La. 761, 37 So. 716; Holman *v.* Union St. R. Co., 114 Mich. 208, 72 N. W. 202.

Evidence of the acts of passengers and of their outcries and those of bystanders, are admissible as part of the *res gestae* as showing that plaintiff was actuated by reasonable apprehension in jumping from the car. Kleiber *v.* People's R. Co., 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613.

70. Where the question in issue was whether a lawful marriage existed between two persons who lived as husband and wife, a letter in the alleged husband's handwriting but signed by the woman alone as his wife were held admissible as part of the *res gestae*, being their joint act occurring during the cohabitation. Badger *v.* Badger, 88 N. Y. 546, 42 Am. Rep. 263.

Where the relations existing between two parties is in issue and the question is whether it is that of landlord and tenant or master and servant, the declarations of either relating to the matter and made during the time in question are competent evidence as part of the *res gestae*. "The relation of the parties being of doubtful interpretation, the character in which they really stood might be proved by the declarations of either, made at the time, as to the relations existing between them." Postens *v.* Postens, 3 Watts & S. (Pa.) 127.

Where the issue was whether a man and woman who had cohabited for several years and had several children and then separated by agreement were legally married, and their acts and declarations during the time of cohabitation had been shown, a notice appearing in a newspaper shortly after the separation signed with the name of the alleged husband and warning all persons against giving credit to the woman on his account although not shown to have been authorized by him was held admissible as part of the *res gestae*, "although they had parted a short time before the publication, yet it followed so immediately afterwards that it must be regarded as a part of the *res gestae* and as one of the circumstances connected with the sepa-

G. Other Similar Acts and Transactions. — a. *Generally.* Other similar acts and transactions forming part of the transaction in question are admissible as part of the *res gestae.*[71]

b. *Of Negligence.* — Other acts of negligence besides the one charged which form part of the same transaction may be shown as part of the *res gestae.*[72]

c. *Injury to Others in Same Transaction.* — The fact that other persons besides the one complaining were injured in the same transaction is competent as *res gestae* in an action based on the injury.[73]

d. *Other Crimes.* — (1.) **Generally.** — As a part of the circumstances attending the commission of the crime in question it is competent to show the commission of other crimes of the same or a different character, at the same time as the one charged[74] or immedi-

ration and previous cohabitation." Jewell's Lessee *v.* Jewell, 1 How. (U. S.) 219, 232.

In an action for the specific performance of a contract alleged to have been made by defendant's intestate to give a child's share of his estate to one whom he received into his family and treated as an adopted child, the declarations of the deceased as to the relation between himself and such person were held admissible as part of the *res gestae* on the ground that the *res gestae* extended over the entire period of years between the time of the alleged contract and the death of the deceased. Burns *v.* Smith, 21 Mont. 251, 53 Pac. 742. *Contra,* Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35 (*disapproving* Burns *v.* Smith).

Where it is a material subject of inquiry as to when a partnership began to transact business as such, books identified as those of the partnership and proved to have been correctly kept, offered for the purpose of showing the date of the first entries thereon, are admissible as part of the *res gestae* of the matter under investigation. Cody *v.* First Nat. Bank of Gainesville, 103 Ga. 789, 30 S. E. 281.

71. See article "Similar Transactions."

Upon the question as to an arrangement in regard to a horse which is the subject of the controversy, evidence of a similar arrangement at the time between the same parties in regard to a cow is relevant as part of the *res gestae* tending to show the entire arrangement between the parties. Lutz *v.* Yount, 61 N. C. 367.

72. Atlantic St. R. Co. *v.* Walker, 93 Ga. 462, 21 S. E. 48.

73. Fort Worth & D. C. R. Co. *v.* Stingle, 2 Wills. Civ. Cas. Ct. App. (Tex.) § 704.

In an action for the death of an engineer resulting from a collision, evidence that three other persons were killed in the same collision is competent as part of the *res gestae* tending in some measure to show the violence of the collision and that the deceased's train was running at a rapid rate of speed. Louisville & N. R. Co. *v.* Mothershed, 121 Ala. 650, 26 So. 10.

In an action for personal injuries it is competent to show as part of the *res gestae* explaining the manner in which the plaintiff was injured all that occurred, although in so doing it may appear that other persons than the plaintiff were injured. West Chicago St. R. Co. *v.* Kennelly, 170 Ill. 508, 48 N. E. 996.

74. State *v.* Vaughn, 200 Mo. 1, 98 S. W. 2; Hobbs *v.* State, 75 Ala. 1; McCall *v.* State, 14 Tex. App. 353; Davis *v.* State (Tex. Crim.), 23 S. W. 684 (prosecution for robbery—assault and rape on prosecuting witness at same time). See articles covering various sorts of crimes and also "Similar Transactions."

On a trial for unlawfully carrying a pistol, it is competent, as part of the *res gestae,* to prove that defendant exhibited and pointed his pistol at a party with whom he was quar-

ately prior[75] and subsequent[76] if they are so near in point of time and circumstance as to constitute part of one continuous transaction. They are said to be part of the *res gestae*, which simply means that they are relevant circumstances which throw some light on the principal transaction.

(2.) Defendant's Connection With Other Crime May Appear Inferentially. — Where the accused is charged with the commission of one of the crimes which all the circumstances show were committed by the same party at the same time or as a part of the same transaction, the other crime may be proved as part of the *res gestae* without further showing that it was committed by the accused.[77]

(3.) Homicide. — (A.) Killing Other Persons. — On a prosecution for homicide it is competent to show as a part of the *res gestae* that the accused killed another person at the same time as he killed the deceased.[78]

(B.) Assault Upon or Injury to Other Persons. — So it is competent to show as a part of the *res gestae* that the accused committed an assault upon or injured other persons at the time of the homicide

relling, being part of same transaction, and occurring at same time. O'Neal *v.* State, 32 Tex. Crim. 42, 22 S. W. 25.

On a trial for robbery of one woman, the state may prove that at the same time and place, and in the same transaction, the defendant ravished another woman who had no money to give him, the two women being together when attacked, defendant using his pistol in both instances to enforce his demands. Harris *v.* State, 32 Tex. Crim. 279, 22 S. W. 1037.

On a prosecution for assault with intent to murder, the testimony of the assaulted party that he was robbed of some money while defendant was beating him, is admissible as a part of the *res gestae*. Richards *v.* State, 34 Tex. Crim. 277, 30 S. W. 229.

75. Terry *v.* State, 45 Tex. Crim. 264, 76 S. W. 928.

76. Richards *v.* State, 3 Tex. App. 423.

77. People *v.* Foley, 64 Mich. 148, 31 N. W. 94; Morris *v.* State, 30 Tex. App. 95, 16 S. W. 757; Leeper *v.* State, 29 Tex. App. 63, 14 S. W. 398. See State *v.* Dooley, 89 Iowa 584, 57 N. W. 414.

On a prosecution for larceny of a lap robe, evidence that a buggy harness shown to have been with the lap robe was stolen at the same time and place is admissible as part of the *res gestae*, although it does not otherwise appear that the defendant took the harness. Thompson *v.* State (Tex. Crim.), 78 S. W. 941.

78. See Article "Homicide," Vol. VI, p. 675 *et seq.*, and the following:

Alabama. — Hammond *v.* State, 41 So. 761.

Arkansas. — Vasser *v.* State, 75 Ark. 373, 87 S. W. 635.

Iowa. — State *v.* Dooley, 89 Iowa 584, 57 N. W. 414.

Kentucky. — Green *v.* Com., 17 Ky. L. Rep. 943, 33 S. W. 100.

Missouri. — State *v.* Vaughan, 200 Mo. 1, 98 S. W. 2; State *v.* Cavin, 199 Mo. 154, 97 S. W. 573.

New York. — People *v.* Pallister, 138 N. Y. 601, 33 N. E. 741.

North Carolina. — State *v.* Adams, 138 N. C. 688, 50 S. E. 765.

Texas. — Menefee *v.* State (Tex. Crim.), 97 S. W. 486; Campos *v.* State (Tex. Crim.), 97 S. W. 100; Wilkerson *v.* State, 31 Tex. Crim. 86, 19 S. W. 903; Hargrove *v.* State, 33 Tex. Crim. 432, 26 S. W. 993; Crews *v.* State, 34 Tex. Crim. 533, 31 S. W. 373.

Virginia. — Reed *v.* Com., 98 Va. 817, 36 S. E. 399.

in question or immediately before or after, and as part of the same transaction, whether the injury was intentional or accidental.[79]

(C.) During Flight or Attempt to Escape. — Thus injuries to others during the immediate flight of the accused and his attempt to escape or avoid arrest may be shown.[80]

(D.) Circumstances of Injury to Others. — Where injury to another person forms part of the same transaction, the nature and circumstances of the injury form part of the *res gestae* and may be shown in so far as they have any bearing on the main event.[81]

79. *Alabama.* — Seams *v.* State, 84 Ala. 410, 4 So. 521; Smith *v.* State, 88 Ala. 73, 7 So. 52.

California. — People *v.* McClure, 148 Cal. 418, 83 Pac. 437.

Florida. — Killins *v.* State, 28 Fla. 313, 9 So. 711; Oliver *v.* State, 38 Fla. 46, 20 So. 803.

Iowa. — State *v.* Gainor, 84 Iowa 209, 50 N. W. 947.

Louisiana. — State *v.* Robinson, 112 La. 939, 36 So. 811.

Missouri. — State *v.* Ramsey, 82 Mo. 133.

Texas. — Denson *v.* State (Tex. Crim.), 35 S. W. 150.

The testimony of a witness that at the time of the killing he was close to the scene thereof, and when he started toward where the deceased was lying the defendant leveled a gun at him and told him to go back, was held admissible as part of the *res gestae*. Lyles *v.* State (Tex. Crim.), 86 S. W. 763.

On a prosecution for homicide, the fact that the defendant accidentally shot a child while shooting, the deceased is competent as part of the *res gestae*. Stevison *v.* State (Tex. Crim.), 89 S. W. 1072.

Evidence that some of the shot from the gun passed through a bystander's clothing is part of the *res gestae*. Hammond *v.* State (Ala.), 41 So. 761.

On a prosecution for homicide which occurred during an interchange of shots between the two opposing parties, evidence that during the shooting another one of the deceased's party was shot is admissible as part of the *res gestae*. Scott *v.* State, 46 Tex. Crim. 305, 81 S. W. 950.

It is competent to show that the defendants first attacked deceased's companion and after pursuing him returned and killed the deceased. Glory *v.* State, 13 Ark. 336.

On a prosecution for homicide, evidence that the defendant at the time he shot the deceased shot into a house where another person was, was held admissible as part of the *res gestae*. Bennett *v.* State (Tex. Crim.), 81 S. W. 30.

80. People *v.* Coughlin, 13 Utah 58, 44 Pac. 94. See article "Homicide," Vol. VI, p. 702.

Where immediately after defendant had committed a homicide he was seized by a bystander, whom he attempted to stab in order to escape, proof of the attempt to stab is admissible on the trial of the homicide. State *v.* Sanders, 76 Mo. 35.

81. Campos *v.* State (Tex. Crim.), 97 S. W. 100; State *v.* Dooley, 89 Iowa, 584, 57 N. W. 414.

On a prosecution for homicide where it appeared that as a part of the same transaction the defendant killed the son and wife of the deceased, it was held no error to permit the introduction and exhibition of the clothing of the deceased's son and wife for the purpose of determining the direction of the shots which killed them; the killing of these two persons being part of the *res gestae*. No intelligent account of the killing in question could be given without recounting the whole transaction, "so that the circumstances and conditions attending the death of any one or more of these individuals constitute part of the *res gestae* attending the death of any other." State *v.* Porter (Or.), 49 Pac. 964.

On a prosecution for homicide, the testimony of the deceased's husband

(E.) Second Assault Upon Deceased. — A second or subsequent assault upon the deceased may be shown as part of the *res gestae*.[82]

(4.) Assault. — On a prosecution for a criminal assault, other assaults or attempts committed at the same time or as part of the transaction in question are part of the *res gestae* and admissible as such.[83] So a robbery committed at the time of the assault was made may be shown.[84]

(5.) Rape — On a prosecution for rape, assaults upon other persons at the time of the main act form a part of the *res gestae*,[85] as does a contemporaneous robbery committed upon the prosecutrix or her companion.[86]

(6.) Larceny, Burglary, Robbery, Forgery, Etc. — On a prosecution for larceny, evidence of another larceny committed by the accused at the same time or as a part of the same transaction is admissible as part of the *res gestae*.[87] The same rule is also applied to prosecu-

that when he returned home he found his two children badly wounded and in a dying condition, that he followed tracks to the cotton patch where he found the deceased's dead body, was held properly admitted as the injury to and condition of the children although a distinct crime was part of the *res gestae*. State *v.* Adams, 138 N. C. 688, 50 S. E. 765. See Starr *v.* State, 160 Ind. 661, 67 N. E. 527.

On a prosecution for homicide, it was held that a witness properly permitted to exhibit a scar which he testified was the result of a wound made by the defendant during the transaction in which the deceased was killed, the scar being part of the *res gestae* and tending to show how the wound was inflicted. Alarcon *v.* State (Tex. Crim.), 90 S. W. 179.

But evidence as to what defendant said as to the killing of such other person is inadmissible. Green *v.* Com., 17 Ky. L. Rep. 943, 33 S. W. 100.

82. On a prosecution for homicide where it appeared that after the infliction of the fatal wound the decedent fled and was followed by the defendant who overtook and assaulted him again, the latter assault is competent as part of the *res gestae*. Hancock *v.* State (Tex. Crim.), 83 S. W. 696.

83. Gray *v.* State (Tex. Crim.), 86 S. W. 764; Piela *v.* People, 6 Colo. 343; People *v.* Teixeira, 123 Cal. 297, 55 Pac. 988.

An assault upon the brother of the prosecuting witness, made as a part of the assault in question, and the condition of such brother immediately thereafter is competent as part of the *res gestae*. Starr *v.* State, 160 Ind. 661, 67 N. E. 527.

On a prosecution for assault, the battery occurring at the same time may be proved as part of the *res gestae*. Davis *v.* State (Tex. Crim.), 90 S. W. 646.

84. A robbery committed at the same time as an assault with intent to kill is part of the *res gestae* on a prosecution for the latter. Denham *v.* Com., 27 Ky. L. Rep. 171, 84 S. W. 538. See also State *v.* Taylor, 118 Mo. 153, 24 S. W. 449.

85. Thompson *v.* State, 11 Tex. App. 51.

The fact that the prosecutrix called for her mother, who went to her assistance and was struck by the defendant, was held competent as part of the *res gestae* in a prosecution for rape. Oakley *v.* State, 135 Ala. 15, 33 So. 23.

86. State *v.* Taylor, 118 Mo. 153, 24 S. W. 449.

87. Lowe *v.* State, 134 Ala. 154, 32 So. 273; Davis *v.* State, 32 Tex. Crim. 377, 23 S. W. 794; Sartin *v.* State, 7 Lea (Tenn.) 679; State *v.* Labertew, 55 Kan. 674, 41 Pac. 945.

On a Prosecution for Horse Stealing, evidence that on the same night

tions for robbery,[88] and forgery.[89] So on a prosecution for burglary another theft or burglary committed at the same time may be proved.[90]

(7.) Proximity to Main Act. — Such other criminal conduct to be part of the *res gestae* must be so closely connected with the act charged as to make it part of one continuous transaction.[91] Mere closeness in point of time alone is not sufficient if the two acts were separate and distinct.[92]

H. HOMICIDE. — a. *Generally.* — All of the circumstances and incidents of the fatal act or difficulty may be shown on a prosecution for homicide, as part of the *res gestae.*[93] So also the circumstances

as the crime in question the defendant stole other horses was held admissible as part of the *res gestae,* although the theft of the other animals was not, accurately speaking, at exactly the same time and place as the theft for which the defendant was being prosecuted. Glover *v.* State (Tex. Crim.), 76 S. W. 465. See also Carter *v.* State, 23 Tex. App. 508, 5 S. W. 128; Mayfield *v.* State, 23 Tex. App. 645, 5 S. W. 161; Holmes *v.* State, 20 Tex. App. 509.

88. People *v.* Nelson, 85 Cal. 421, 24 Pac. 1006.

89. Cross *v.* People, 47 Ill. 152. See Harding *v.* State, 54 Ind. 359, and article "FORGERY."

90. Mixon *v.* State (Tex. Crim.), 31 S. W. 408; State *v.* Robinson, 35 S. C. 340, 14 S. E. 766 (breaking into another house in same neighborhood during same night); Kelley *v.* State, 31 Tex. Crim. 211, 20 S. W. 365.

On a prosecution for burglary with intent to commit larceny, evidence of a larceny committed by the defendant is admissible as part of the *res gestae,* although only an attempt to commit such crime is alleged. State *v.* Burton, 27 Wash. 528, 67 Pac. 1097.

91. See *supra,* cases cited under subdivisions of this principle.

A Full Discussion of the competency of proof of other crimes as part of the same transaction cannot be made under the head of *res gestae* because the latter term is not used in the majority of cases, and the limitations as to time associated with it are not applied. The cases are not at all in harmony on this question and will be found discussed elsewhere. See articles "HOMICIDE," Vol. VI, p. 675 *et seq.;* "INTENT," Vol. VII; "SIMILAR ACTS;" and other articles dealing with particular crimes.

92. On a prosecution for homicide, the testimony of a witness that as the defendant was going from the house where the shooting took place down an alley he took a shot at her, was held improperly admitted, this fact being no part of the *res gestae.* State *v.* Taylor, 7 Idaho 134, 61 Pac. 288.

93. State *v.* Vaughan, 200 Mo. 1, 98 S. W. 2; Williams *v.* State (Ala.), 41 So. 992.

On a prosecution for homicide, evidence that a brother of the defendant, who was jointly indicted with him, had an open knife during the fatal difficulty, and that one M. who was present at the time was cut on the knuckle, was held admissible as part of the *res gestae.* "Everything occurring contemporaneously with the main difficulty was a part of the *res gestae.*" State *v.* Woodward, 191 Mo. 617, 90 S. W. 90.

On a prosecution for homicide where it appeared that the deceased, a policeman, was killed while interfering in an attempted robbery committed by the defendant and his companions, evidence as to the circumstance of the attempted robbery was held admissible as part of the *res gestae.* People *v.* Woods, 147 Cal. 265, 81 Pac. 652.

Evidence that a homicide occurred in a bawdy house of which accused was proprietress is admissible. The acts and declarations of the participants could not be clearly understood in the absence of these facts. The

leading to or forming the basis of the action of the defendant[94] or deceased[95] are said to be of the *res gestae*.

b. *Acts and Statements of Parties* to a homicide from the beginning to the conclusion of the fatal difficulty form part of the *res gestae* and are admissible as such.[96] This rule covers the acts and declarations of others than the accused and deceased, who participated in the difficulty,[97] even though the defendant was not present

presence of deceased and others, the purchase of the beer and the indecent language used, are presented in the clearest light when viewed with reference to the fact that they transpired at a bawdy house of which accused was proprietess. Gibson *v.* State, 23 Tex. App. 414, 5 S. W. 314.

Clothes of Accused. — The clothes, having been identified as those worn by the accused at the time the crime was committed, are proper to be submitted to the jury for inspection.

"Nothing legitimately connected with the *res gestae* of the crime should be excluded, whether it tends to inculpate or exculpate the party accused." People *v.* Gonzalez, 35 N. Y. 49.

Ownership of Property. — Where the homicide was committed while deceased was in the act of injuring property, evidence of the ownership of the property though not amounting to justification is nevertheless admissible to show the condition of prisoner's mind and determining the character of the offense; it was part of the *res gestae*. People *v.* Castello, 15 Cal. 350.

Bullets taken from deceased's body. Williams *v.* Com., 85 Va. 607, 8 S. E. 470.

94. On a prosecution for homicide committed while the defendant was attempting to rescue one of his friends who had been imprisoned, evidence of the offense for which such person had been placed in jail was held admissible as part of the *res gestae* and the occasion of the attempted rescue. Kipper *v.* State, 45 Tex. Crim. 377, 77 S. W. 611.

95. Where it appeared that the deceased was a sheriff attempting to arrest the defendant, evidence that two days previous the defendant had killed another sheriff who was attempting to arrest him was held admissible as part of the *res gestae*, tending to explain the purpose of the deceased. Cortez *v.* State (Tex. Crim.), 83 S. W. 812.

96. State *v.* Tighe, 27 Mont. 327, 71 Pac. 3; Gibson *v.* State (Miss.), 16 So. 228 (statement of deceased). But see Bassham *v.* State, 38 Tex. 622. See fully article "Homicide," Vol. VI.

It appears that deceased insulted defendant at a dance, whereupon defendant went home to get his gun, returned within fifteen minutes with it and shot deceased. It was held that defendant's declaration upon going for the weapon, that he did not intend to kill deceased, but merely to make him apologize and retract the insult, was admissible as *res gestae*. Koller *v.* State, 36 Tex. Crim. 496, 38 S. W. 44.

97. Where the murder occurred in a fight between two gangs, and the deceased who took no part in fight at its commencement, shortly afterwards joined in with one of the factions, firing without regard to which was in the right, the circumstances of the fight before deceased participated were admissible in evidence. "It was all one and the same transaction, as from its commencement to its conclusion there was no cessation." Bowlin *v.* Com., 17 Ky. L. Rep. 1319, 34 S. W. 709.

In People *v.* Potter, 5 Mich. 1, 71 Am. Dec. 763, it appeared that accused and deceased met at an early hour of the evening and remained together till near midnight when the killing occurred, visiting a theatre and drinking together in the interim. The accused's statement during this time, that he had been reading the life of "Jack Rand," was held admissible as part of the *res gestae*, though objected to on the ground that its purpose was to show a disposition to commit crime. "Every

when the difficulty began and the acts and statements occurred.[98]

c. *Acts and Statements of Third Persons.* — The acts and statements of third persons present at the homicide, which form part of the transaction, are competent as part of the *res gestae*.[99]

d. *Preceding Circumstances.* — Circumstances immediately or shortly preceding the homicide, which form part of the transaction in question, are competent as part of the *res gestae*.[1] What facts

occurrence, every remark, and the whole conduct of the prisoner from the time he and the deceased came together until the consummation of the crime, are competent evidence as part of the *res gestae*, to enable the jury to determine whether any crime has been committed, as well as to inform them as to its degree."

98. Although the defendant was not present at the beginning of the difficulty, during the course of which he killed the deceased, the declarations of the parties prior to the time they were joined by the defendant are admissible as part of the *res gestae*. Shotwell *v.* Com., 24 Ky. L. Rep. 255, 68 S. W. 403.

99. Jones *v.* State (Tex. Crim.), 85 S. W. 5; Appleton *v.* State, 61 Ark. 590, 33 S. W. 1066; McKee *v.* People, 34 How. Pr. (N. Y.) 230.

Evidence as to what passed between the accused and a person who was trying to prevent the shooting at the time it took place, is admissible as part of *res gestae*. Powers *v.* People, 42 Ill. App. 427.

Evidence of the acts and exclamations of the wife of prisoner occurring at time of homicide, in the presence or hearing of the prisoner, is admissible for the prosecution. People *v.* Murphy, 45 Cal. 137.

1. *Alabama.* — Armor *v.* State, 63 Ala. 173.

Arkansas. — Pitman *v.* State, 22 Ark. 354 (preceding statements of deceased showing his *animus*).

California. — People *v.* Amaya, 134 Cal. 531, 66 Pac. 794.

Florida. — Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232 (threats by deceased).

Indiana. — Wood *v.* State, 92 Ind. 269.

Kentucky. — Burtan *v.* Com., 22 Ky. L. Rep. 1315, 60 S. W. 526.

Michigan. — Maher *v.* People, 10 Mich. 212, 10 Am. Dec. 781.

Missouri. — State *v.* Kennade, 121 Mo. 405, 26 S. W. 347.

New York. — McKee *v.* People, 34 How. Pr. 230.

Texas. — Scott *v.* State (Tex. Crim.), 93 S. W. 112. See article "Homicide." Vol. VI. p. 610.

A Controversy Between the Parties about the Catholic church shortly preceding the homicide held admissible. Ryan *v.* State, 100 Ala. 105, 14 So. 766.

On a prosecution for homicide, evidence as to what the deceased was doing shortly before the affray was held admissible as part of the *res gestae*. State *v.* Hunter, 118 Iowa 686, 92 N. W. 872.

On a prosecution for a homicide which occurred during a difficulty growing out of a previous conversation at which the deceased was present, evidence of insulting words used by the defendant in such conversation toward a woman was held admissible as part of the *res gestae*. Elmore *v.* State (Tex. Crim.), 78 S. W. 520.

On a prosecution for murder, evidence of the statement made by the deceased to a third party immediately preceding the act constituting the crime charged and bearing a causal relation thereto was held properly admitted in evidence as a part of the *res gestae* although not made in the immediate presence of the defendant, there being evidence tending to prove that he heard the statement and acted because thereof. "It is shown by the evidence to be so intimately connected with the commission of the homicidal act and to bear such a causal relation thereto as to render it a part of the principal transaction and might fairly be admitted in evidence on that ground alone." McCormick *v.* State, 66 Neb. 337, 92 N. W. 606. See Dickson *v.* State, 39 Ohio St. 73.

may be shown under this rule depends upon their nature and connection with the fatal act and the other circumstances determining their relevancy.[2] They must, however, be so recent and so closely connected with the homicide as to constitute part of the same transaction.[3]

e. *Following Circumstances.* — Circumstances and statements immediately following the homicide and forming a continuation of the transaction, are admissible as part of the *res gestae*.[4] They must,

2. For a Full Discussion of this class of evidence, see article "Homicide," Vol. VI, p. 610, *et seq.* See also State *v.* Thomas, 68 Mo. 605; State *v.* Umfried, 76 Mo. 404.

Evidence on behalf of defense, that while deceased and himself were cursing each other in front of store where the killing afterwards occurred, and while deceased had a gun and was threatening to kill him, he sent a boy on a horse a short distance for a mutual friend to come and make peace between them, and that after deceased had given up the gun to its owner and gone home with his wife, defendant had sat down to await the coming of this friend and the return of the boy, and while there for that purpose deceased came along and renewed the quarrel and killing occurred, was *held*, not part of *res gestae* as the deceased was not advised of this action. State *v.* Hudspith, 159 Mo. 178, 60 S. W. 136.

Where the murder grew out of a difficulty between two factions, it is part of the *res gestae*, going to show why deceased and defendant were present at the time and place of the killing, to prove that a short time prior thereto a member of one of the parties came to a livery stable kept by a member of the other faction and challenged one of the opposite party to come up street and have a fight. Mitchell *v.* State, 38 Tex. Crim. 170, 41 S. W. 816.

3. See People *v.* Smith, 26 Cal. 666; Kernan *v.* State, 65 Md. 253, 4 Atl. 124; State *v.* Gregor, 21 La. Ann. 473; State *v.* Baker, 30 La. Ann. 1134; Ryan *v.* State, 100 Ala. 105, 14 So. 766.

Preceding Statements of Accused. Testimony in behalf of defense, as to what defendant said prior to going to the theater, where the homicide was committed, in order to characterize his intention in going there, is too remote to be admissible as part of *res gestae*. State *v.* Ching Ling, 16 Or. 419, 18 Pac. 844. See also Newcastle *v.* State, 37 Miss. 383, and article "Homicide," Vol. VI, pp. 615, 659, 739.

4. See article "Homicide," Vol. VI.

A statement made by the defendant, accused of homicide, immediately after the killing "that he would kill that other ————" was held competent as part of the *res gestae*. Plant *v.* State, 140 Ala. 52, 37 So. 159; *citing* Seams *v.* State, 84 Ala. 410, 4 So. 521; Stitt *v.* State, 91 Ala. 10, 8 So. 669, 24 Am. St. Rep. 853.

On a prosecution for homicide, a statement made by the defendant, accused of conspiracy with the slayer, to the deceased's mother a minute or two after the killing upon meeting her near where the body lay, was held competent as part of the *res gestae*, the statement being, "Where in the h—— are you going?" Ferguson *v.* State, 141 Ala. 20, 37 So. 448.

On a prosecution for homicide committed while the deceased, an officer, was attempting to pull the defendant, a hackman, off his hack, evidence of the defendant's remark as he was seized by other persons immediately after the fatal difficulty to the effect that the deceased ought to have been killed, that he would kill any man who tried to pull him off his hack, was held admissible as part of the *res gestae*. Vann *v.* State, 45 Tex. Crim. 434, 77 S. W. 813.

On a prosecution for homicide, the interference of bystanders, their attempt to arrest the defendant immediately after the infliction of the

however, be so closely connected as to form part of the transaction.[5] It has been held that statements of third persons accompanying their examination of the scene of the killing are admissible as part of the *res gestae* of the surrounding circumstances.[6]

I. CONTRACT. — a. *Generally.* — On the issue of whether a certain transaction constituted a contract, all that was said and done on that occasion is admissible as part of the *res gestae*.[7] The action

fatal wound and his resistance with a knife and his flight, are part of the *res gestae*. State *v.* Vinso, 171 Mo. 576, 71 S. W. 1034.

Testimony of officer that when he reached the place where the killing took place, defendant ran to him and begged to be put in jail as soon as possible, to prevent being killed, and that some one ran after defendant and tried to shoot him, which the marshal prevented, is part of *res gestae*. Nelson *v.* State (Tex. Crim.), 58 S. W. 107.

On a prosecution for homicide, evidence that immediately after the killing the defendants took the personal effects of the deceased is held admissible as part of the *res gestae*. Moran *v.* Territory, 14 Okla. 544, 78 Pac. 111.

Evidence that immediately after defendant shot deceased, he started off, and a bystander said: "Call the police!" whereupon defendant snapped the rifle at bystander, but it failed to fire, was admissible as part of *res gestae*. Johnson *v.* State, 88 Ga. 203, 14 S. E. 208.

On a prosecution for homicide, a conversation between the defendant and his companion in the fatal assault, who was also fatally wounded, held immediately after the difficulty, in which such person charged the defendant with being the cause of his death and to which the defendant replied that he ought not to have gotten into it, was held admissible as part of the *res gestae*. The statement of the companion was objected to not as too remote, but because it was a mere conclusion. "This was a part of the *res gestae* of the homicide and was a conversation between two of the actors on one side in regard thereto. While it may not appear to be a recitation of any fact, yet it related to the difficulty and tends to shed light on appellant's connection therewith. Its effect may be one way or the other. . . . But its weight or use one way or the other does not render it inadmissible as in our view it was admissible as a conversation between two of the participants in the difficulty and in relation thereto, and was part of the *res gestae* of said difficulty." McMahan *v.* State, 46 Tex. Crim. 540, 81 S. W. 296.

5. See article "HOMICIDE," Vol. VI, and Teague *v.* State, 144 Ala. 42, 40 So. 312.

Evidence that soon after the shooting at the scene of the killing, upon inquiring of accused, "what was the matter," he threatened to shoot the witness, is part of *res gestae*, tending to prove wickedness and malice in the transaction that had just before taken place. State *v.* Garrand, 5 Or. 216.

6. Where it appeared that third persons made an examination of the conditions surrounding the bodies at the place of the killing shortly thereafter, what they said during the examination as to such conditions was held competent as part of the *res gestae*, "not perhaps of the act of the killing, but of the circumstances surrounding it." State *v.* Robinson, 12 Wash. 491, 41 Pac. 884 (two judges *dissenting*).

7. Black *v.* Wabash, St. L. & P. R. Co., 111 Ill. 351. See article "CONTRACTS," Vol. III.

Contract of Employment. — Where the question in issue was whether the plaintiff during the course of a visit to the defendant's office had employed the latter as his attorney in a certain case, it was held that the plaintiff might show what he said and did during the visit, as part of the *res gestae*. Danforth *v.* Streeter, 28 Vt. 490.

taken in execution of the contract is part of the *res gestae* on the issue of the terms of the contract.[8]

The statements of the parties to a contract relating thereto and made at the time the contract was entered into, are part of the *res gestae* thereof.[9] To be admissible as such, however, they must serve to illustrate or explain the contract[10] and must have been made in the presence of the other party.[11]

b. *Preliminary Negotiations.* — The conversations and statements forming part of the negotiations leading up to a contract are part of the *res gestae* thereof, and admissible as such[12] unless excluded by

8. In an action to recover the balance due on a contract for sinking a well, where the question is whether plaintiff is required to continue the work until the defendant was satisfied, or until water was found, evidence as to the return of the work or the progress made per day, is admissible as part of the *res gestae*. Bohrer *v.* Stumpff, 31 Ill. App. 139.

9. *Alabama.* — Vincent *v.* State, 74 Ala. 274; Hooper *v.* Edwards, 25 Ala. 528.

Arkansas. — Martin *v.* Tucker, 35 Ark. 279 (promissory note — statements of maker as to consideration therefor).

California. — Cross *v.* Zellerbach, 8 Pac. 714 (circumstances attending the execution of a waiver of statute of limitations).

Illinois. — Paul *v.* Berry, 78 Ill. 158.

Indiana. — Boyd *v.* Jackson, 82 Ind. 525; Orth *v.* Sharkey, 4 Ind. 642.

Massachusetts. — Stevens *v.* Miles, 142 Mass. 571, 8 N. E. 426; Blood *v.* Rideout, 13 Metc. 237.

New York. — Howard *v.* Upton, 9 Hun 434.

What passes between the parties to a certain contract before the paper is signed and which leads up to its execution is admissible as part of the *res gestae*. Glisson *v.* Paducah R. & L. Co., 27 Ky. L. Rep. 965, 87 S. W. 305.

When a company has taken the benefit of a deed made to it, the sayings of the person who procured the deed in its behalf, at the time deed was executed, "that he was acting as agent for the company" are admissible as part of *res gestae*. Chattanooga, R. & C. R. Co. *v.* Davis, 89 Ga. 708, 15 S. E. 626.

Contract With Third Person. — If a contract between one of the parties to a suit and a third person is material to the right of action, what was said by those persons at the time relevant to the contract is admissible as a part of the *res gestae*. Johnson *v.* Elliott, 26 N. H. 67.

Contract by Partnership. — Statement of Partner. — In an action to recover for goods sold to one alleged to be a partner with the other defendants, the declaration of the alleged partner at the time of the purchase that he was buying for the firm and that the plaintiff was selling to the firm, was held part of the *res gestae* of the contract actually entered into, regardless of the question of whether the existence of the partnership could be shown by the declaration of the partner. Beckwith *v.* Mace, 140 Mich. 157, 103 N. W. 559.

Contract of Suretyship. — Oldham *v.* Broom, 28 Ohio St. 41.

10. Words spoken by one of the parties to a contract at the time it was made are not competent as part of the *res gestae* unless they form part of the inducement or otherwise serve to illustrate or explain the contract. "Words spoken or acts done when the act litigated is being executed are not always *res gestae*." McLeod *v.* Johnson, 96 Me. 271, 52 Atl. 760.

11. Lee, Admr. *v.* Hester, 20 Ga. 588.

12. *Alabama.* — Marks *v.* First Nat. Bank, 79 Ala. 550, 58 Am. Rep. 620; Weaver *v.* Lapsley, 42 Ala. 601, 94 Am. Dec. 671.

Arkansas. — Walnut Ridge Merc. Co. *v.* Cohn, 96 S. W. 413.

some other rule of evidence.[13] This is especially true in the case of verbal contracts.[14]

c. *Statements Accompanying Carrying Out of Contract.* — The statement of a party to a contract at the time he is engaged in carrying it out and in relation thereto, form part of the *res gestae*.[15]

d. *Accompanying the Preparation and Making of the Instrument.* The statements of the person executing a contract or conveyance prior to its execution and while it is being prepared for execution and delivery, is a part of the *res gestae* to show his intention or motive where that is material.[16] His statement to the agent who drew the instrument has been held competent.[17]

e. *Execution of Deed or Mortgage.* — The statements of the par-

Indiana. — Ghormley *v.* Young, 71 Ind. 62.

Kentucky. — See Murray *v.* East End Imp. Co., 22 Ky. L. Rep. 1477, 60 S. W. 648.

New Hampshire. — Atherton *v.* Tilton, 44 N. H. 452.

New York. — Moore *v.* Hamilton, 48 Barb. 120; Sistare *v.* Hecksher, 63 Hun 634, 18 N. Y. Supp. 475.

Texas. — Leakey *v.* Gunter, 25 Tex. 400.

In an action for work done and materials furnished where the issue was whether a stated price had been fixed for all of the work, estimates made by the plaintiff's agent, with whom part of the negotiations were carried on by the defendant, were held admissible as independent evidence because they form a part of the transaction between the parties. Ray *v.* Isbell, 64 Conn. 307, 29 Atl. 538.

Previous Representations. — Representations made by one offering to sell property to another negotiating therefor are a part of the *res gestae* and binding upon the maker although a bargain is not concluded at the time, if afterwards as a continuation of the negotiation the person to whom they were made becomes a purchaser. Ahern *v.* Goodspeed, 72 N. Y. 108. See also Rinesmith *v.* Peoples Freight R. Co., 90 Pa. St. 262.

13. See article "PAROL EVIDENCE," Vol. IX.

14. As evidence of the real nature of a verbal contract it is proper to show all of the conversations and negotiations between the parties prior to the conclusion of the alleged contract. Owen *v.* Union Match Co., 48 Mich. 348, 12 N. W. 175. See article "CONTRACTS," and Brand *v.* Henderson, 107 Ill. 141; Eastman *v.* Bennett, 6 Wis. 232.

15. Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 285; Hooper *v.* Edwards, 25 Ala. 528.

16. Declarations of the wife, while the mortgage was being written, of her separate property, of her willingness to execute it, though not in the presence of mortgagee, are admissible as part of *res gestae*. Louden *v.* Blythe, 27 Pa. St. 22, 67 Am. Dec. 442.

17. Pearson *v.* Forsyth, 61 Ga. 537.

On an issue as to the terms and good faith of a partnership, the instructions given to the conveyancer who drew the partnership articles are admissible as part of the *res gestae*. Valton *v.* National L. F. Life Assur. Co., 17 Abb. Pr. (N. Y.) 268.

Contra. — Where the issue was which of two persons, father and son, of the same name as the grantee in a deed was the person intended therein, the declaration of the grantor as to whom the grantee was to be, made to the person who drew up the deed prior to its delivery and in the absence of the grantee, was held no part of the *res gestae* since the act which the declaration accompanied was not material and relevant to the issue. "In order to make declarations accompanying and giving character to an act admissible as part of the *res gestae*, the act itself must be admissible." Kingsford *v.* Hood, 105 Mass. 495. See

ties to a deed,[18] or mortgage,[19] at the time the instrument was executed, are admissible as part of the *res gestae*. Such statements as to the consideration on which it was founded are likewise part of the *res gestae*.[20] Where the conveyance is attacked as fraudulent, the statements of the parties accompanying the execution of the instrument form part of the *res gestae*.[21]

f. *Sale, Exchange, or Assignment.* — Statements by the parties to a sale[22] accompanying and characterizing the transaction, form part

Trimmer *v.* Trimmer, 13 Hun (N. Y.) 182; United States *v.* Mertz, 2 Watts (Pa.) 406.

18. Keat *v.* Harcourt, 33 Barb. (N. Y.) 491; Roberts *v.* Preston, 100 N. C. 243, 6 S. E. 574; Edwards *v.* Edwards, 39 Pa. St. 369; State *ex rel* Mundy *v.* Andrews, 39 W. Va. 35, 19 S. E. 385, 45 Am. St. Rep. 884; Gamble *v.* Johnson, 9 Mo. 605.

On the issue whether a conveyance was made in anticipation of immediate death, the grantor's statements at the time the conveyance was made were held competent as verbal acts. Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791.

The declarations of the grantor in a deed at the time the deed was made showing the intent and purpose with which he made it are admissible on the issue of delivery as part of the *res gestae*, although the grantee was not present at the time; but such declarations are not admissible as between the parties to it to limit the terms of the deed itself or to show that it was intended to be something different from what it purports to be. Badger *v.* Story, 16 N. H. 168.

The declarations of the grantor at the time of the execution of a deed of trust is admissible as part of the *res gestae* for the purpose of showing what he claimed at the time the deed was executed. State *ex rel.* Mundy *v.* Andrews, 39 W. Va. 35, 19 S. E. 385, 45 Am. St. Rep. 884.

Declarations made by a grantor to the subscribing witness at the time of the execution of a deed and in the presence of the grantee are admissible as part of the *res gestae*. Kent *v.* Harcourt, 33 Barb. (N. Y.) 491.

The declarations of a grantor in a conveyance of real estate, made to the notary when the deed was executed, showing the grantor's intention to defraud his creditors are admissible as part of the *res gestae* in an action to set aside the deed. Robinson *v.* Hamilton, 41 Or. 239, 69 Pac. 651. See also Wilcoxen *v.* Morgan, 2 Colo. 473.

19. Declarations made by the mortgagor at the time of executing a chattel mortgage are a part of the *res gestae*. Bushnell *v.* Wood, 85 Ill. 88.

The statements of a mortgagor at the time of making the mortgage as to what it was given to secure were held admissible as part of the *res gestae* to show his intent. Albion State Bank *v.* Knickerbocker, 125 Mich. 311, 84 N. W. 311, *citing* Moses *v.* Murgatroyd, 1 Johns. Ch. (N. Y.) 119; Bushnell *v.* Wood, 85 Ill. 88.

When the certificate of the acknowledgment of a mortgage is impeached for falsity in its averments or fraud in procuring the execution, evidence of the acts and declarations of the participants, at the time of the execution and acknowledgment, is relevant and admissible as of the *res gestae*, whether the mortgagee be present or absent. Lewars *v.* Weaver, 121 Pa. St. 268, 15 Atl. 514.

20. Kenney *v.* Phillipy, 91 Ind. 511.

21. See article "FRAUDULENT CONVEYANCES," Vol. VI, and *infra* IV, 7, j, b; also Sanborn *v.* Lang, 41 Md. 107; Potter *v.* McDowell, 31 Mo. 62.

22. Heflin *v.* Slay, 78 Ala. 180; Black *v.* Thornton, 30 Ga. 361; Griffith *v.* Judge, 49 Mo. 536; Elliott *v.* Stoddard, 98 Mass. 145; Fellman *v.* Smith, 20 Tex. 99; Dale *v.* Gower, 24 Me. 563; Brooks *v.* Jameson, 55 Mo. 505 (representations of agent who made the sale); Phillips *v.* State, 19 Tex. App. 158. See Grif-

of the *res gestae* thereof; and the same is true of an exchange[23] or assignment.[24]

Public Sale. — The declarations of bystanders at a public sale is admissible as part of the *res gestae* where their attitude toward the sale is in question.[25]

g. *Loan.* — The statements of the borrower[26] or lender[27] accompanying and characterizing the transaction of loan, are part of the *res gestae* thereof, as are those statements made as a part of the preliminary negotiations.[28]

h. *Suretyship and Guaranty.* — In an action against a surety or guarantor, the statements of the principal are not ordinarily admissible against the former unless they form part of the *res gestae*.[29] Statements, however, which form part of the *res gestae* are admissible.[30]

fith *v.* Judge, 49 Mo. 536 (sheriff's sale), and also *infra*, IV, 7, K. But see Harmon *v.* State, 3 Tex. App. 51.

Declarations made by a deputy sheriff, to affect a sale on the ground that they are a part of *res gestae*, must appear to have been made at time of sale. Miles *v.* Knott, 12 Gill & J. (Md.) 442.

23. Cook *v.* Pinkerton, 81 Ga. 89, 7 S. E. 171, 12 Am. St. Rep. 297.

24. Where an assignment is assailed as a fraud upon the insolvent laws, the declarations of the parties to it, made at the time, showing that it was only executed after urgent persuasion on the part of the creditor, are admissible as part of *res gestae*, to explain the motives and circumstances surrounding the assignment. Powles *v.* Dilley, 9 Gill (Md.) 222.

25. Declarations of bystanders at sheriff's sale which showed that the purchaser's professions had affected the bidding, is admissible as part of the *res gestae*, upon the question of fraud. Haines *v.* Stauffer, 13 Pa. St. 541, 53 Am. Dec. 493; Stewart *v.* Severance, 43 Mo. 322, 97 Am. Dec. 392. See also Griffith *v.* Judge, 49 Mo. 536.

26. Clayton *v.* Tucker, 20 Ga. 452.

27. Mayes *v.* Power, 79 Ga. 631, 4 S. E. 681.

Subsequent Statements. — Where, immediately after a negotiation for the loan of money, the lender goes into an adjoining room, the borrower not being present, states to a third person the terms of the transaction, such declarations constitute no part of *res gestae*, and are incompetent evidence to establish the defense of usury. Smith *v.* Webb, 1 Barb. (N. Y.) 230.

28. In an action by the lender, to recover the sum loaned, it is not erroneous for the referee to receive in evidence representations made at the time of the negotiation for the loan, although not counted on. They are a part of the *res gestae*, and therefore competent; but, not being alleged in the complaint, they cannot be the basis of a recovery. Nelson *v.* Hyde, 66 Barb. (N. Y.) 59.

29. See articles "GUARANTY" AND "SURETYSHIP." Declarations of a principal in order to be admissible against his surety must ordinarily be a part of the *res gestae*, the bond being to answer for his conduct; only his declarations accompanying his acts while engaged in the business covered by the bond are admissible. Knott *v.* Peterson, 125 Iowa 404, 101 N. W. 173. See also State *v.* Houston, 78 Ala. 576, 56 Am. Rep. 59.

30. Page *v.* Krekey, 63 Hun 629, 17 N. Y. Supp. 764; Eichhold *v.* Tiffany, 21 Misc. 627, 48 N. Y. Supp. 70.

In an action on a bond made by an agent to the plaintiff insurance company conditioned for the faithful performance of his duties as its agent, the reports made by him to the company of business done and moneys received by him as such agent in the regular course of his business are a part of the *res gestae* and admissible

J. Torts. — a. *Generally.* — In an action of tort, what was said by the tortfeasor at the time he did the act in question tending to characterize his action is part of the *res gestae*.[31]

Accompanying Taking of Another's Property. — Statements accompanying the taking of another's property, are part of the *res gestae* whether the taking is the basis of a civil[32] or criminal action.[33]

b. *Fraud and Fraudulent Conveyances.* — In an action based on fraud or a fraudulent conveyance, the acts and statements of the participants in the transaction during the period of its consummation and relating to the matter in question are part of the *res gestae*.[34]

in evidence against his sureties. Capital Fire Ins. Co. *v.* Watson, 76 Minn. 387, 79 N. W. 601.

Where a collector is furnished with regularly numbered printed receipts, and it is his duty to note on stubs corresponding to number of receipt the name of person and the amount paid by him, said stubs being turned in to cashier each day, *held,* in action against sureties on collector's bond, that the stubs and receipts were admissible as part of *res gestae,* as admissions of money received by collector. Singer Mfg. Co. *v.* Coon, 9 Misc. 465, 30 N. Y. Supp. 232, 61 N. Y. St. 124.

31. See particular articles covering tort actions.

In an action for wrongful death it appeared that the defendant's foreman negligently threw a block of wood so that it fell down a shaft where the deceased was working and struck him upon the head. The statement of the foreman, in response to a caution, that if the deceased wanted to work there he would have to learn to dodge, made as he threw the block, was held admissible as part of the *res gestae.* Strode *v.* Conkey, 105 Mo. App. 12, 78 S. W. 678.

In an action against a railway for wilful injuries inflicted by defendant's brakeman within the scope of his employment, on the question as to whether assault was justified or palliated by plaintiff's own conduct, everything that was said and done by and between the parties, just before and up to the time when he was ejected and forced to leave the car, is admissible as *res gestae.* Alabama S. R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303.

32. Resch *v.* Senn, 28 Wis. 286.

Where the conversion of property is sought to be established by proof of the defendant's acts, his words accompanying such acts are as much a part of the *res gestae* as his acts, and are admissible in evidence. Dunbar *v.* McGill, 69 Mich. 297, 37 N. W. 285.

In an action for trespass for taking plaintiff's mule, a statement made by the defendant at the time he took the mule, that he could not find a certain brand on it, was held competent for the plaintiff as part of the *res gestae* of the act of taking. Carter *v.* Fulgham, 134 Ala. 238, 32 So. 684.

33. On a prosecution for theft of money found by the defendant, where it appeared that he had taken the money to his wife as soon as he found it, his instructions to her to hold the money until he could interview the officers of the law and find a proper owner as well as secure any possible reward, were held competent as part of the *res gestae* of his act and to show his intention. Martin *v.* State, 44 Tex. Crim. 538, 72 S. W. 386.

34. See articles "Fraud" and "Fraudulent. Conveyances," and York County Bank *v.* Carter, 38 Pa. St. 446, 80 Am. Dec. 494; Sistare *v.* Hecksher, 63 Hun 634, 18 N. Y. Supp. 475; Kenyon *v.* Ashbridge, 35 Pa. St. 157; Haskett *v.* Auhl, 3 Kan. App. 744, 45 Pac. 608; Bolds *v.* Woods, 9 Ind. App. 657, 36 N. E. 933; Mariguy *v.* Union Bank, 5 Rob. (La.) 354; Small *v.* Williams, 87 Ga. 681, 13 S. E. 589.

Where a sale of property is charged to be fraudulent as against creditors, the declarations of the vendor present at the time the property

c. *False Imprisonment.* — In an action for false imprisonment, the circumstances attending the arrest and the statements of the parties forming part of the transaction, are admissible as *res gestae.*[35]

d. *Duress and Undue Influence.* — Where duress[36] or undue influence[37] is alleged, the statements and conduct of the parties to the transaction during the period when the alleged misconduct occurred, forms part of the *res gestae* and is admissible as such.

K. Ownership of Property and Character of Ownership. In determining the question of title to or ownership of property, the statements of the parties to the transaction by which the title was affected, made during the course of the transaction and relating thereto, are part of the *res gestae* and admissible as such.[38] State-

is moved by his vendees, showing the object of the removal and made before the latter was completed, were held admissible as part of the *res gestae.* Eppinger *v.* Scott, 112 Cal. 369, 44 Pac. 723.

Where a conveyance to a wife is attacked as fraudulent, her statement that her money paid for the land and demanding its conveyance to her, made on the day of the transfer, form part of the *res gestae.* Mitchell *v.* Colglazier, 106 Ind. 464, 7 N. E. 199.

When the certificate of the acknowledgment of a mortgage is impeached for falsity in its averments or fraud in procuring the execution, evidence of the acts and declarations of the participants, at the time of the execution and acknowledgment, is relevant and admissible as of the *res gestae,* whether the mortgagee be present or absent. Lewars *v.* Weaver, 121 Pa. St. 268, 15 Atl. 514.

35. Rogers *v.* Wilson, 1 Minor (Ala.) 107, 12 Am. Dec. 61. See also State *v.* Ragsdale, 59 Mo. App. 590.

The circumstances attending the arrest and imprisonment forming the basis of the suit, including an offer by the person arrested to the arresting constable to give bail, are admissible as part of *res gestae.* Thorpe *v* Wray, 68 Ga. 359.

The officer's statement to the plaintiff, at the time of making the arrest that defendant had accused him of stealing, is admissible as part of *res gestae.* Rich *v.* McInerny, 103 Ala. 345, 15 So. 663.

36. Central Bank *v.* Copeland, 18 Md. 305. See article "Duress," Vol. IV.

Where the defense is made to a suit on a promissory note that it was given in compromise of a criminal complaint against the maker's son-in-law and was procured through the entreaties of the daughter, whose fears had been played upon by the plaintiff for that purpose, it is competent to show what she said to her father to induce him to give the note, this being part of the transaction. Snyder *v.* Willey, 33 Mich. 483.

37. See articles "Undue Influence," and "Wills;" Davidson *v.* Davidson (Neb.), 96 N. W. 409.

On the issue of whether a certain person exercised undue influence over a testatrix, a witness may state what effect the presence of such person had upon the testatrix when he came into the room where she was and what the testatrix then said. These things are part of the *res gestae.* Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

The objections of a wife to acknowledging a mortgage claimed to have been executed through the husband's duress and undue influence, made in the presence of the notary during the preparation of the instrument and immediately preceding the acknowledgment, were held part of the *res gestae.* Londen *v.* Blythe, 16 Pa. St. 532, 55 Am. Dec. 527.

38. Cook *v.* Pinkerton, 81 Ga. 89, 7 S. E. 171, 12 Am. St. Rep. 297 (exchange); Woodwell & Co. *v.* Brown & Kirkpatrick, 44 Pa. St. 121; Rees *v.* Livingston, 41 Pa. St. 113; Fox. *v.* Cox, 19 Ind. App. 61, 50 N.

ments not part of the transaction are not of the *res gestae*.[39] A bill[40] or bill of lading[41] accompanying a transfer is part of the *res gestae* thereof.

Statements of the purchaser accompanying the purchase and showing the capacity in which he bought, are part of the *res gestae*,[42] but his statements thereafter are not.[43]

So statements of the seller accompanying and forming part of the sale, as to the capacity in which he was selling, are part of the *res gestae*.[44]

L. Letters, Telegrams and Documents Forming Part of Res Gestae. — Letters[45] forming part of the transaction in question,

E. 92. See Black *v.* Thornton, 30 Ga. 361; Burk *v.* Hoover, 3 Pen. & W. (Pa.) 292.

Declarations accompanying and forming part of a transaction of sale are admissible on the issue of the title passed by such sale. Elliot *v.* Stoddard, 98 Mass. 145.

Where both parties to a replevin suit claim title by reason of alleged transfers from the same person, the statements of one of the parties made during the course of the alleged transfer to him and constituting a part thereof are competent in his own behalf, the rule being that where an act is competent so also are the declarations of the persons engaged in its performance and constituting a part of the thing done. Fox *v.* Cox, 19 Ind. App. 61, 50 N. E. 92.

Sale or Mortgage. — Evidence of what occurred at the time of the making of the bill of sale, is admissible on question of whether said instrument was an absolute transfer of title or a chattel mortgage, being a part of *res gestae*. Woodworth *v.* Hodgson, 59 Hun 616, 12 N. Y. Supp. 424, judgment *affirmed* 129 N. Y. 669, 30 N. E. 65.

39. Thomas *v.* Kinsey, 8 Ga. 421; McAdams *v.* Beard & Henderson, 34 Ala. 478; Hoover *v.* Cary, 86 Iowa 494, 53 N. W. 415. See Webb *v.* Kelly, 37 Ala. 333. Borland *v.* Mayo, 8 Ala. 104. Greene *v.* Harriman, 14 Me. 32.

The statements of a former owner of goods to the effect that he had sold out to a certain person are not admissible as *res gestae* where it does not appear how soon after the sale they were made. Lumm *v.* Howells, 27 Utah 80, 74 Pac. 432.

40. Luse *v.* Jones, 39 N. J. L. 707 (bills accompanying purchase of furniture); Jaro *v.* Holstein, 73 S. C. 111, 52 S. E. 870 (bill accompanying purchase of liquor seized as contraband).

41. Where the owner or officer of a boat delivers a bill of lading contemporaneously with the delivery of goods, being a declaration accompanying an act, it is part of the transaction, and is evidence of ownership in the person, whose property the goods are stated to be in the bill of lading, in action to recover the value of goods shipped. Jordan *v.* Wilson, 25 Pa. St. 390.

42. Brush *v.* Blanchard, 19 Ill. 31; Berry *v.* Hardman, 12 Ala. 604. See *supra*, IV, 7, I, f.

43. Smitha *v.* Cureton, 31 Ala. 652.

44. Declarations of agent, at the time of sale of personal property, that the property was sold by him for and as the agent of another, is a part of the sale itself and admissible. Gilson *v.* Wood, 20 Ill. 38. See *supra*, IV, 7, I, f.

45. *United States.* — Wilkes *v.* Dinsman, 7 How. 89; Emma Silv. Min. Co. *v.* Park, 14 Blatchf. 411, 8 Fed. Cas. No. 4,467.

Alabama. — Cleveland Woolen Mills *v.* Sibert, 81 Ala. 140, 1 So. 773.

Illinois. — Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948.

Kentucky. — Murray *v.* East End Imp. Co., 22 Ky. L. Rep. 1477, 60 S. W. 648.

Maryland. — Burckmyer *v.* Whiteford, 6 Gill 1; Oelrichs *v.* Ford, 21 Md. 489.

Massachusetts. — New England

are admissible as part of the *res gestae;* and the same is true of telegrams[46] and documents.[47]

M. Memoranda, Receipts and Certificates Made During Transaction. — A memorandum of a contract, made by the parties thereto during the making of the contract, is part of the *res gestae* thereof,[48] and this is true though such memorandum is signed by

Marine Ins. Co. *v.* De Wolf, 8 Pick. 56.

New York. — Foster *v.* Newbrough, 66 Barb. 545; Badger *v.* Badger, 88 N. Y. 546, 42 Am. Rep. 263; Winters *v.* Judd, 59 Hun 32, 12 N. Y. Supp. 411.

Pennsylvania. — Hannis *v.* Hazlett, 54 Pa. St. 133.

Vermont. — May *v.* Brownell, 3 Vt. 463.

In an action for purchase price of goods, affidavits enclosed in letters written by the plaintiff to defendant canceling the sale, are admissible on same principle that conversation between the parties would have been, which embodies the same averments, not as evidence of facts stated in affidavits, which could only be proved by witnesses themselves, but as part of the *res gestae*, which is the correspondence. Moses *v.* Katzenberger, 84 Ala. 95, 4 So. 237.

In an action for divorce on the ground of extreme cruelty, where the cause of the difficulty admitted to have taken place between the parties is disputed, the husband who swears that the cause was the reading by him to his wife of certain unsigned letters found in her possession, may read the letters as part of the *res gestae* even though their contents tend to prove improper conduct not charged in the bill. Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669, *affirming* 37 Ill. App. 219.

On a prosecution for homicide, the evidence having established that the deceased was living in the town of B. and that she left there for R. on the 12th, assigning as her reasons for leaving, the contents of a letter then exhibited and read, and that on the 14th she was found dead in R. under circumstances indicating she had been murdered, the letter was held admissible for the prosecution as part of the *res gestae*. So also a note addressed on the 13th in deceased's handwriting, from the room occupied by her in hotel at R., to the accused, under circumstances showing that it was written by deceased to the accused in answer to a note addressed to the occupant of that room, was held part of the *res gestae*. Cluverius *v.* Com., 81 Va. 787.

46. Chrisman *v.* Carney, 33 Ark. 316.

47. See Wildey *v.* Bonney, 31 Miss. 644; Salmon's Admr. *v.* Davis, 29 Mo. 176.

In an action for damages for fraud, a mortgage given as a part of the fraudulent scheme is part of the *res gestae*. Daniels *v.* Dayton, 49 Mich. 137, 13 N. W. 392.

Where in a suit upon the alleged promise of the defendants to pay the plaintiffs a debt due them from a third party it appears that an order was given to the plaintiffs by the defendants upon a fourth party at the time the promise was made for the amount of the debt, the order is admissible as a part of the *res gestae*, being part of the transaction which would not be understood without its introduction. Bond *v.* McMahon, 94 Mich. 557, 54 N. W. 281.

Genuine papers of the same kind as the one alleged to be forged, which were presented with it, and taken from the accused at the same time, are part of *res gestae*. Manaway *v.* State, 44 Ala. 375.

48. Bigelow *v.* Hall, 91 N. Y. 145; Rogers *v.* Krumrei, 143 Mich. 15, 106 N. W. 279; Ewing *v.* Bailey, 36 Ill. App. 191 (made by one party and read to the other); Humphrey *v.* Chilcat Canning Co., 20 Or. 209, 25 Pac. 389.

In an action involving the settlement of accounts, a paper containing figuring done by one of the parties when they were trying to settle was

neither party.[49] Receipts given at the time delivery is made are part of the *res gestae*.[50]

Memoranda made without the knowledge of the other party to the transaction are not of the *res gestae*.[51] It has, however, been held that entries made by one party at the time of the transaction are competent as part of the *res gestae*.[52]

Certificate. — A certificate made by an officer at the time he per-

held properly admitted as part of the *res gestae*. Bennett *v.* Smith, 40 Mich. 211.

Stub of Check Book. — Where the managing partner of a firm borrowed of another a certain sum of money, directing the check to be made payable "to currency," and afterwards the firm was dissolved, in an action of assignment to recover the amount, upon the question of whether the money was lent to the firm, it was held that the stub of the check written by the bookkeeper who wrote the check is admissible as part of the *res gestae*. Stark *v.* Corey, 45 Ill. 431.

49. Humphrey *v.* Chilcat Canning Co., 20 Or. 209, 25 Pac. 389; Watson *v.* Winston (Tex. Civ. App.), 43 S. W. 852 (unsigned order embracing terms of sale of goods).

50. **Duplicate Receipts** for cargo, given at the time of the lading of the vessel by the receiving officer, who entered them in the cargo book, which was lost, are part of the *res gestae*, and upon identifying the handwriting of the officer, are admissible to prove the receipts of the number of cases specified in them, but not their contents. Sturm *v.* Atlantic Mut. Ins. Co., 6 Jones & S. (N. Y.) 281. But see Keykendall *v.* Greer, 3 Coldw. (Tenn.) 463.

Receipt Given by Third Person. A. purchased a mule from B., and the mule was afterwards taken by a government detective (as property belonging to the government) who gave him a receipt or statement showing the fact. *Held*, in a suit by B. against A. to recover the value of the mule, that the receipt was not part of the *res gestae*, as B. was not a party to the receipt which was not a part of the contract in suit. Keykendall *v.* Greer, 3 Coldw. (Tenn.), 463.

51. Gans *v.* Wormser, 83 App. Div. 505, 82 N. Y. Supp. 441. But see Jaro *v.* Holstein, 73 S. C. 111, 52 S. E. 870.

Where a person who is watching a railway depot to discover a violation of a statute requiring the posting of trains makes a memorandum as to what the blackboard disclosed, such memorandum is not part of the *res gestae*, on a prosecution for the violation of the statute. Southern R. Co. *v.* State, 165 Ind. 613, 75 N. E. 272.

52. Oelrichs *v.* Ford, 21 Md. 489. See also Chicago & N. W. R. Co. *v.* Ingersoll, 65 Ill. 399.

In Place *v.* Baugher, 159 Ind. 232, 64 N. E. 852, it appeared that as saw logs were delivered to the purchaser at his saw mill the measurements were entered by the purchaser upon a piece of smooth plank and on the same day transcribed to his general books of account. The purchaser testified that these book entries were correct, although he had no independent recollection. It was held that the entries were competent to show the number of feet of sound timber as part of the *res gestae*, independent of the rule governing the use of a party's account books. "They were the *res gestae* — a part of the transaction of the delivery and measurement of the logs, — and the admission of the evidence under the circumstances was not that which was merely exhibited by the books wholly unexplained."

Contra. — Entries are not admissible as part of the *res gestae* even though made at the time of a given transaction by one of the parties in his own books when made without the knowledge of the other party. Linden *v.* Thieriot, 96 App. Div. 256, 89 N. Y. Supp. 273.

formed the act in question, has been held competent as part of the *res gestae* of that act.[53]

V. ADMISSIONS DISTINGUISHED FROM RES GESTAE.

Courts sometimes apply the term *res gestae* in determining the competency of statements where only the principles governing admissions, express[54] or implied,[55] are involved, and sometimes the limitations of the latter have been applied in determining what constitutes the *res gestae*.[56] An admission may or may not be part of the *res gestae*.[57]

VI. STATEMENTS AS TO PRESENT PHYSICAL CONDITION.

The statements of a person as to his present physical condition, as for instance, whether he is suffering pain and where and of what nature, when competent to prove the speaker's condition, are frequently spoken of as part of the *res gestae* and their admissibility

53. See Mann *v.* Best, 62 Mo. 491 (certificate by sheriff); State *v.* Mims, 26 Minn. 183, 2 N. W. 494, 683.

Marriage Certificate Is Part of Res Gestae of Ceremony. — In prosecution for fornication and adultery, upon the issue whether the prosecuting witness and defendant were married in a foreign country, a certificate by the officiating rabbi, attesting the marriage and certified by the signature and official seal of the minister of such foreign country, though inadmissible as a record or an independent declaration of the rabbi, is made competent evidence, even in criminal prosecutions, by the testimony of the witness that it was given to her at the time of marriage, while the certificate thus given may tend to support the testimony of the witness to the fact of marriage, it is competent only as a part of *res gestae*, being a declaration made in the presence of defendant and accompanying the act of solemnizing the rite, if it did not constitute a part of the ceremony. It is true that the criminal act charged was the second marriage, but evidence of words and acts accompanying and reflecting light on any transaction which becomes material in the progress of a trial, is admissible as *res gestae*. It would have been competent for the witness to repeat all that was said by the rabbi in celebrating the rite. It was equally admissible to show his declaration, oral or written, in the presence of both, that they were lawfully married, as an immediate result of what was done. State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449.

Officer's Return on process. See Haskins *v.* Haskins, 67 Ill. 446.

54. Statement of person injured in an accident, made at the moment of the accident, — "He was sorry; that it was carelessness on his part; he did not think of himself," is admissible against him as part of *res gestae*, tending to establish his negligence. Courtney *v.* Baker, 2 Jones & S. (N. Y.) 529.

55. Statements made during the continuance of a transaction, in the presence of the person against whom they are offered, are some times said to be admissible as part of the *res gestae* when the real ground is that they are implied admissions. See Surber *v.* State, 99 Ind. 68; O'Mara *v.* Com., 75 Pa. St. 424; Hester *v.* Com., 85 Pa. St. 139.

56. See *infra* III, 3, E, f, (3.).

57. See City of Friend *v.* Burleigh, 53 Neb. 674, 74 N. W. 50; Mutcha *v.* Pierce, 49 Wis. 231, 5 N. W. 486, 35 Am. Rep. 776.

On a prosecution for homicide, the declaration of the defendant immediately after the affray, in the pres-

treated as a branch of the *res gestae* principle.[58] Such statements, however, are admitted under an entirely separate and distinct principle which is elsewhere treated.[59]

VII. STATEMENTS INDICATING MENTAL CONDITION OR PURPOSE.

1. Generally. — Another class of evidence which is frequently confused with and treated under the *res gestae* principle is declarations or statements showing a present mental condition or purpose.[60] Such statements are admissible, not because they accompany and qualify an act, nor because they are spontaneous statements forming part of the main transaction, but merely as circumstantial evidence

ence of the spectators, "I have fixed one of you and would just as soon fix three or four more of you as not," is no part of the *res gestae* and not admissible as such, but is admissible as a confession and as tending to show ill-will. State *v.* Smith, 125 Mo. 2, 28 S. W. 181.

58. See articles "Injuries to Persons," Vol. VII, "Mental and Physical States," Vol. VIII, and Birmingham R., Light & P. Co. *v.* Enslen, 144 Ala. 343, 39 So. 74. Oliver *v.* Columbia, N. & L. R. Co., 65 S. C. 1, 43 S. E. 307. Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389. Texas Cent. R. Co. *v.* Powell (Tex. Civ. App.), 86 S. W. 21.

Complaints of pain by an injured person made after walking and riding a long distance to her home are no part of the *res gestae*. "Unless such complaints form part of the *res gestae* they cannot be admitted; and if they are so far detached from the occurrence as to admit of deliberate design and be the product of a calculating policy on the part of the actors, then they cannot be regarded as a part of the *res gestae*." Kennedy *v.* Rochester City & B. R. Co., 130 N. Y. 654, 29 N. E. 141, *reversing* 51 Hun 183, 7 N. Y. Supp. 221.

Expressions of pain and suffering to be admissible need only be concomitant or *res gestae* with the pain or suffering, and need not be *res gestae* with the original injury. St. Louis, S. W. R. Co. *v.* Haynes (Tex. Civ. App.), 86 S. W. 934.

Where upon the question of identification of deceased the peculiarity of a tooth in the roof of her mouth becomes material, her declarations about it when there could have been no *lis motam* are admissible as *res gestae*. Edmonds *v.* State, 34 Ark. 720.

59. See articles "Mental and Physical States," Vol. VIII and "Injuries to Persons," Vol. VII; State *v.* Davidson, 30 Vt. 377, 73 Am. Dec. 312; Hawks *v.* Chester, 70 Vt. 271, 40 Atl. 727.

The statements of a patient to his physician respecting his condition and symptoms at the time of seeking medical aid are admissible under a well settled exception to the hearsay rule. They do not belong to the class of declarations and expressions admissible as *res gestae* and should not be confounded with them. Delaware, L. & W. R. Co. *v.* Roalefs, 70 Fed. 21, 28 U. S. App. 569, 16 C. C. A. 601.

In an action for personal injuries the plaintiff's complaints of pain and suffering made after the accident are not admissible as part of the *res gestae*, but because they show the plaintiff's condition. Crippen *v.* Des Moines (Iowa), 78 N. W. 688; Blair *v.* Madison County, 81 Iowa 313, 46 N. W. 1093; State *v.* Davidson, 30 Vt. 377, 73 Am. Dec. 312; Hancock County *v.* Leggett (Ind.), 18 N. E. 53.

60. See articles, "Intent," Vol. VII; "Mental and Physical States," Vol. VIII; "Homicide," Vol. VI, p. 663, p. 747.

or relevant facts tending to show the mental condition or purpose of the declarant.[61] Many courts, however, hold that such declara-

61. See article "Homicide," Vol. VI, p. 664, n. 13, p. 748, n. 56.

In State *v.* Hayward, 62 Minn. 474, 65 N. W. 63, a prosecution for homicide, the statement of the deceased two hours before her murder, to the effect that she had a business engagement with the defendant, was held admissible on the ground that it tended to characterize her subsequent act and departure and was therefore a verbal act. Ch. J. Start in a concurring opinion differs from the rest of the court as to the ground upon which this evidence was admissible, holding that it was not a verbal act because it did not accompany and characterize any relevant act and was therefore not a part of the *res gestae,* but that it was original evidence to prove the intention of the deceased, *citing* Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 255.

In Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235, a prosecution for homicide, evidence that the deceased on the day preceding her death stated that she was going to drown herself was offered by the defendant and excluded. The defense on appeal conceded that the statement was not a part of the *res gestae,* nor did it accompany or characterize any relevant act of the deceased, but contended that the evidence was admissible to show the state of mind of the deceased and her intention as a material fact tending to corroborate its theory of suicide. The court by Field, Ch. J., in sustaining the contention of the defense and distinguishing the *res gestae* principle from the principle involved in this case, says: "The fundamental proposition is that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or body, and some act or speech; and that proof of either or all of these, for the sole purpose of showing the existing state of mind or intention, may be inferred. . . . The only obvious distinction between speech and conduct is that speech is often not only an indication of the existing state of mind of the speaker, but a statement of a fact external to the mind, and as evidence of that is clearly hearsay. There is, of course, danger that a jury may not always observe this distinction, but that has not availed to exclude testimony which is admissible for one purpose and not admissible for another, to which there is danger the jury may apply it. . . . It may also be thought that speech is a less trustworthy indication of what is really in the mind of the speaker than acts or appearance, but this, if it be so, also affects the weight of the evidence. Certainly, to confine the evidence to acts, appearance, or speech which is wholly involuntary, would be impracticable and unreasonable, for almost every expression of thought or feeling can be simulated; and although evidence of the conscious declarations of a person as indications of his state of mind has in it some of the elements of hearsay, yet it closely resembles evidence of the natural expressions of feeling, which has always been regarded in the law not as hearsay, but as original evidence. — 1 Greenl. Ev. § 102, 5th ed.; and when the person making these declarations is dead, such evidence is often not only the best, but the only evidence of what was in his mind at the time. On principle, therefore, we think it clear that when evidence of the declarations of a person is introduced solely for the purpose of showing what the state of mind or intention of that person was at the time the declarations were made, the declarations are to be regarded as acts from which the state of mind or intention may be inferred in the same manner as from the appearance of the person, or his behavior, or his actions generally. In the present case the declaration, evidence of which was offered, contained nothing in the nature of narrative, and was significant only as showing the state of mind or intention of the deceased.

tions are admissible only as part of the *res gestae*[62] or as verbal acts,[63] and, therefore, must be more or less immediately connected with a relevant act.

2. Statements Showing Mental Suffering. — On the issue of mental suffering the declarations or exclamations of the alleged sufferer at the time in question indicating the state of his mind, are admissible.[64] The term "*res gestae*" has been applied to this class of evidence.[65]

3. Declarations of Purpose or Motive Accompanying Act Charged as Crime. — A. Of Defendant. — The defendant in a criminal prosecution may prove his statements accompanying the act charged as a crime and showing the motive or purpose of such act where it is relevant.[66] Such statements are sometimes spoken of as *res gestae,* but are really competent not as testimonial evidence of the facts stated but merely as facts or circumstances tending to show

. . . It is not necessary, in the present case, to determine what limitations, if any, in practice must be put upon the admission of this kind of evidence, because all the limitations exist which have ever been suggested as necessary. The person making the declaration, if one was made, is dead. He had an opportunity to commit suicide, and it was competent for the jury to find that she had a motive to commit it; and the declaration if made, was made under the circumstances which exclude any suspicion of an intention to make evidence to be used at the trial."

"A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party." Mutual L. Ins. Co. *v.* Hillmon, 145 U. S. 285.

62. See article "Homicide," Vol. VI, p. 663, n. 11, and Chicago & E. I. R. Co. *v.* Chancellor, 165 Ill. 438, 46 N. E. 269.

The declarations of an assured tending to show his intention to commit suicide are not competent against the assignee of a policy unless they are part of the *res gestae;* and where such statements are completely separated from the final act by a lapse of time they are not part of the *res gestae.* Ross-Lewin *v.* Germania L. Ins. Co., 20 Colo. App. 262, 78 Pac. 305.

63. See article "Homicide," Vol. VI, p. 664, n. 12, p. 748, n. 57.

64. See articles "Mental and Physical States," Vol. VIII, "Injuries to Persons," Vol. VII.

65. Exclamations of plaintiff, in action against telegraph company for failure to deliver telegram to her, that her son had been mortally wounded, on her arrival after her son's death, and in presence of his dead body, "Oh, that I could have seen him before he died," is admissible as part of *res gestae* to show injured feeling. Western Union Tel. Co. *v.* Davis, 24 Tex. Civ. App. 427, 59 S. W. 46.

66. Pike *v.* State, 35 Ala. 419. See Garber *v.* State, 4 Coldw. (Tenn.) 161; Wilson *v.* State, 33 Ark. 557, 34 Am. Rep. 52, and article "Homicide," Vol. VI, p. 739.

In trial for theft, it was shown that the defendant shot the animals in his own cornfield, and that their hides were found in his smoke-house. Declarations of the defendant at the

the mental condition of declarant and the nature of the transaction in question.[67]

B. Of Injured Party. — The statements of the injured or assaulted party made during or immediately preceding the act in question and tending to show his mental condition and purpose, are admissible as part of the *res gestae*.[68]

4. Alienation of Affection and Enticement. — In determining whether a particular person's affections have been alienated or whether he has been enticed away from his home, his declarations

time he shot the cattle,—"That he had driven them off as often as he intended, and that he was not raising a crop for other people's cattle to destroy," are admissible as *res gestae* on question of intent, tending to show whether he intended to steal them or their hides, or whether his intention was to kill them for trespassing on his crops. M. C. Phiel *v.* State, 9 Tex. App. 164. See also Beckwith *v.* Mollohan, 2 W. Va. 477.

Passing Counterfeit Bills. — McCartney *v.* State, 3 Ind. 353, 56 Am. Dec. 510.

67. In prosecution for murder that W, the father of accused, met him in the entry just at the moment accused discharged his pistol through the sidelight, in answer to question, "What, if anything, did you hear or find," asked by defense, he said: "At that time they were rattling the door, and when I got to the entry door, I met F, (the accused) there and they were trying at that time to get into the door and F. seemed to be frightened, and put my arm on him and he was all of a tremble, and Frank spoke and—" At this point state objected as to what respondent said and declaration excluded. *Held*, it became important to ascertain the circumstances, why the shot was fired; in what condition of mind the respondent was at the time he shot; whether the act was deliberate, or under circumstances reducing offence to manslaughter. Declaration should be admissible as part of *res gestae*. If declaration is made by party while doing an act, the nature, object and motive, of which is the subject of inquiry, and seems to explain it, then such declaration is admissible in evidence and it is in this class of cases rule receives its broadest application. What is said at the time of an act affords a legitimate means of ascertaining the character of the act, and as part of circumstances to be given in evidence with principal fact. Such declarations are admissible, not to prove their own truth, but to show the attitude of parties and transaction in all its aspects. State *v.* Walker, 77 Me. 488, 1 Atl. 357.

68. See article "Homicide," Vol. VI, pp. 616, 663.

In prosecution for murder, it appeared that deceased and one R. were sitting in front of a store, when defendant's wife passed, and made some remark which induced the deceased to follow her; that he overtook and was walking with her, when defendant came up and engaged in an affray with deceased wherin the fatal stab was given. R. was permitted to testify that the woman had passed. He asked deceased if he knew her, and he said he did not, but was going to see what she wanted,—would not go far, and would be back; whereupon he followed her. *Held*, that this was admissible as a part of the transaction which led to the killing. It explained to some extent deceased's reason for being with the woman when the affray occurred, and was so far a part of *res gestae* as to be competent. State *v.* Peffers, 80 Iowa 580, 46 N. W. 662.

Evidence that just before the killing deceased started to go to a blacksmith shop, stating at the time that he was going there to get or draw water, is admissible as *res gestae* of his act, and not liable to objection that statement was made in absence of defendant, since it is not shown that he was pursuing or seeking an

during the period in question showing his mental condition during that period are admissible as part of the *res gestae*.[69]

5. Statements Accompanying Arrival and Departure or Preparation Therefor. — A. GENERALLY. — The statements of a person as to his purpose and destination made on his departure or during his preparations therefor are sometimes said to be admissible as part of the *res gestae* where the issue is whether he went to the place specified, and in what manner and for what purpose.[70] The same has been said as to similar declarations made on arrival.[71] Such

encounter with defendant, or that he went to said shop for other than an innocent purpose. Merritt *v.* State, 39 Tex. Crim. 70, 45 S. W. 21.

69. In an action for enticing away plaintiff's wife, the declarations of the wife within a few days after the marriage, expressing her wishes in relation to living with the plaintiff as his wife, where the question is whether the defendant prevented the return of the wife to her husband during that period; and in connection with other circumstances tending to prove that she was not there under constraint, are admissible as part of *res gestae*. Bennett *v.* Smith, 21 Barb. (N. Y.) 439. See also Williams *v.* Williams, 20 Colo. 51, 37 Pac. 614.

Enticement of Servant. — Servant's declarations at the time of leaving, showing reasons, held competent as part of the *res gestae*. Hadley *v.* Carter, 8 N. H. 40.

70. Ordway *v.* Sanders, 58 N. H. 132. See Chicago & E. I. R. Co. *v.* Chancellor, 165 Ill. 438, 46 N. E. 269; Borgess *v.* Clark, 3 Ind. 250; Brady *v.* Parker, 67 Ga. 636; Autauga County *v.* Davis, 32 Ala. 703; Baltimore & O. R. Co. *v.* State, 81 Md. 371, 32 Atl. 201.

Where suit was brought against an individual for enticing away the servant of another, evidence of the declarations of the servant at the time of leaving were held admissible to show that he had left of his own accord and for reasons of his own; the declarations made by him at the time of leaving being part of the *res gestae*. Hadley *v.* Carter, 8 N. H. 40.

In an action for medical services, the declarations of the physician on leaving home, taking medicines with him, as to the place to which he was going, and the purpose of his visit, are admissible as part of *res gestae*. Autauga County *v.* Davis, 32 Ala. 703.

In an action against the owners of a dam for injuries caused by its breaking where the plaintiff contended that there was negligence in the care and management of the dam, it was held proper for the defendants in rebuttal in connection with evidence of their visits to and care in respect of the dam to show as part of the *res gestae* their declarations on various occasions when leaving home in the direction of the dam, to the effect that they were going to it. "The declarations of the defendants and their purposes and intentions in doing acts in connection with the dam were competent as *res gestae* on the question of the care of the dam." Inhabitants of Shrewsbury *v.* Smith, 12 Cush. (Mass.) 177.

Previous to Departure Not Admissible. — Where property which is ordinarily exempt is levied upon on the ground that the owner is about to leave the state, in action by the owner against the officer for the wrongful conversion of property, the owner's declaration two or three days before starting on a journey, that he intended to leave the state, is not admissible as part of *res gestae* to his deposition. Tubbs *v.* Garrison, 68 Iowa 44, 25 N. W. 921.

71. In an action by a father against a husband for necessaries furnished the wife, the declaration of the wife as to why she returned to her father's house, made to her father's family on the day after her return, were held no part of the *res gestae* of the act of leaving her husband, though similar declarations made on the day of her return were admitted. Johnson *v.* Sherwin, 3

declarations are admissible in favor of the party making them.[72]

Where the domicil of a person is in question, his statements as to his intention made on his removal from one place to another, are admissible.[73]

The same rule is applied in the determination of whether the declarant had become a passenger of the defendant carrier.[74]

B. HOMICIDE. — On a prosecution for homicide the statement of the deceased at the time of his departure for the scene of the homicide or to meet the defendant have been held competent as part of the *res gestae*.[75] The same rule has been applied to similar statements of the defendant showing his purpose.[76]

Gray (Mass.) 374. See Snover *v.* Blair, 25 N. J. L. 94.

72. Declarations by defendant, three miles from place of killing, when in the act of starting, armed in search or pursuit of the party killed, "that he intended merely to chastise said party with his fists for insulting his mother, and not to shoot him except in self-defense," are admissible for what they are worth as part of the *res gestae*. Irvine *v.* State, 104 Tenn. 132, 56 S. W. 845, *approving* Sawyer *v.* State, 15 La. 694.

73. See articles "DOMICIL," Vol. IV, and "PAUPERS," Vol. IX.

Domicil. — On the question as to the residence of a pauper, his declarations as to his intention, made at the time he removed from one town to another, would be admissible as *res gestae;* but his declarations on his return would not be. Inhabitants of Salem *v.* Lynn, 13 Metc. (Mass.) 544.

Where the question of domicil is in issue, the declarations of the person in question stating his intention of moving, made prior to his removal when he was giving notice to the owner of the house of his intention to remove, were held admissible as part of the *res gestae*. "This giving notice of his intended removal is to be considered an act which he might prove in any case in which it became material; and, if so, all that he said explanatory of his intention in relation to his removal seems to us to be admissible in evidence." Kilburn *v.* Bennett, 3 Metc. (Mass.) 199, *citing* Thorndike *v.* Boston, 1 Metc. (Mass.) 242.

74. Railway Co. *v.* Herrick, 49 Ohio St. 25, 29 N. E. 1052; Preston *v.* Hannibal & St. J. R. Co., 132 Mo. 111, 33 S. W. 783.

75. *Alabama.* — Harris *v.* State, 96 Ala. 24, 11 So. 255; Martin *v.* State, 77 Ala. 1.

District of Columbia. — United States *v.* Nardello, 4 Mackey 503.

Iowa. — State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753.

Tennessee. — Kirby *v.* State, 7 Yerg. 259.

Vermont. — State *v.* Howard, 32 Vt. 380.

Virginia. — Tilley *v.* Com., 89 Va. 136, 15 S. E. 526.

Wisconsin. — State *v.* Dickinson, 41 Wis. 299 (purpose to procure an abortion). See article "HOMICIDE," Vol. VI, p. 663.

Where it appeared that the defendant and deceased were living together as husband and wife; that deceased was jealous of his attentions to another woman and had quarreled with him about the latter; that on the night of the homicide she left her house, saying as she went: "There are two persons down the alley. I think it is Harp (defendant) and his sweetheart. I will go and see;" that she went but never returned; that the next day she was found murdered near where she expected to find defendant. *Held*, that the statements were admissible as part of the *res gestae* which is the transaction which began in her leaving the house in search of defendant and culminated in her assassination where she expected to find him. Thomas *v.* State, 67 Ga. 460.

76. See more fully article "HOMICIDE," Vol. VI, p. 739.

Though there is some ground for

C. Of Deserting Husband or Wife. — In actions based on desertion by a spouse or inducing one spouse to leave the other, the declarations of the one deserting as to the purpose or cause of his action, made on his departure, form part of the *res gestae*,[77] as do similar statements made immediately on arrival at the destination.[78] But the statements must be made practically contemporaneous with the act.[79]

D. Real Principle Involved. — The real principle involved in the admission of this class of evidence is not that of *res gestae*, although many courts so treat it. Such statements are competent, if at all, as expressions of mental condition and purpose, but have been confused with verbal acts and *res gestae* to such an extent that in many jurisdictions the limitations of the last two principles have been firmly fixed upon them so that they are required to accompany some act.[80]

suspecting the motives of a person who starts out of his house with a loaded pistol, and proceeds directly to a fatal encounter with an enemy, in any statement he may make to his wife showing that he is bound on an innocent errand; but where such statement is strictly contemporaneous with the act, and explanatory of it, though not entitled to much weight, it is neverthless part of *res gestae*. State *v.* Cross, 68 Iowa 180, 26 N. W. 62.

The testimony of a witness that accused and one S. were at her house and left there going in the direction of where deceased was killed, that on leaving her house a few moments before the killing S. said in the presence of his companion, the accused, that they were going to arrest deceased for desertion from the army by orders of the provost-marshal, is a part of the *res gestae* and admissible on behalf of the defense. Garber *v.* State, 4 Coldw. (Tenn.) 161.

77. Odom *v.* Odom, 36 Ga. 286 (though the other spouse be not present); Fulton *v.* Fulton, 36 Miss. 517.

In an action for enticing away the plaintiff's wife, the declarations of the wife made immediately before and at the time she left the husband, of his cruel treatment of her, are competent evidence for the defendant as part of the *res gestae*. "When an act is done to which it is necessary to ascribe a motive it is always considered that what is said at the time from whence the motive may be collected is part of the *res gestae*. Gilchrist *v.* Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469.

In an action for alienating the affections of the plaintiff's wife by causing her to abandon and refuse to live with the plaintiff, the defendant may show what the wife said in leaving her husband's house and while on her way to where the defendant was, some eight miles distant, and what she said to the defendant upon arriving there when defendant advised her to return to her husband, since all of these statements are part of the *res gestae*. The declarations were concurrent with a part of the act complained of. Rudd *v.* Rounds, 64 Vt. 432, 25 Atl. 438.

78. See Hanna *v.* Hanna, 3 Tex. Civ. App., 51, 21 S. W. 720; McGowen *v.* McGowen, 52 Tex. 657.

In an action by a husband for divorce on ground of wilful desertion, the statement of the wife on the night of her flight and immediately after it, upon reaching witness' house, as to the cause of her flight, asking his assistance, is admissible in her behalf as part of the *res gestae*. Cattison *v.* Cattison, 22 Pa. St. 275. But see Huth *v.* Huth, 10 Tex. Civ. App. 184, 30 S. W. 240.

79. Kidder *v.* Lovell, 14 Pa. St. 214; Snover *v.* Blair, 25 N. J. L. 94.

80. For a collection and discussion of this class of evidence, see the articles "Intent," Vol. VII, and

VIII. STATEMENTS OF AGENT OR SERVANT.

1. Generally. — Numerous cases involve the admission of the statements or declarations of the agent or servant of one of the parties in the transaction in issue as part of the *res gestae.*

There are four possible principles which may govern this class of evidence and upon which its competency may depend: The question may be 1st, is it an admission binding on the principal;[81] 2nd, is it an integral part of the transaction itself;[82] 3rd, is it a relevant circumstance because it either tends to characterize the agent's conduct during the transaction or otherwise indicates the nature of the transaction;[83] 4th, is it a spontaneous statement connected with the main event, and, therefore, part of the *res gestae* as that term is applied to spontaneous statements.[84] By an indiscriminate use of the term *res gestae* to cover all these different principles and a failure to distinguish which ones are really involved in the particular case, the courts have rendered any logical analysis of all their decisions impossible.

2. Actions to Charge Principal or Master. — A. GENERALLY. The general rule is that an agent's statement, to be admissible against his principal, must be a part of what is called the *res gestae,* using this term to cover the immediate incidents of the transaction which forms the subject of the action, and this rule applies both in contract and tort cases.[85]

"HOMICIDE," Vol. VI, p. 663 *et seq.*, p. 747.

81. See articles "ADMISSIONS," Vol. I, "PRINCIPAL AND AGENT," Vol. X, and Electric R. Co. of Savannah *v.* Carson, 98 Ga. 652, 27 S. E. 156.

82. See Chicago & E. I. R. Co. *v.* Holland, 122 Ill. 461, 13 N. E. 145; Hannawalt *v.* Equitable Life Assur. Soc., 102 Iowa 667, 72 N. W. 284.

83. Whitaker *v.* Eight Ave. R. Co., 51 N. Y. 295; Harrison *v.* Tulane, 3 Ala. 534; Homan *v.* Boyce, 15 Neb. 545, 19 N. W. 590.

84. Vicksburg & M. R. Co. *v.* O'Brien, 119 U. S. 99.

85. See article "PRINCIPAL AND AGENT," Vol. X, and following cases:

United States. — Wabash Western R. *v.* Brow, 65 Fed. 941, 13 C. C. A. 222, 31 U. S. App. 192; Marande *v.* Texas & P. R. Co., 124 Fed. 42, 59 C. C. A. 562; Barreda *v.* Silsbee, 21 How. 146.

Alabama. — LaFayette R. Co. *v.* Tucker, 124 Ala. 514, 27 So. 447; Tanner's Exr. *v.* Louisville & N. R. Co., 60 Ala. 621.

Colorado. — Thompson *v.* Commercial Union Assur. Co., 20 Colo. App. 331, 78 Pac. 1073.

Connecticut.—Haywood *v.* Hamm, 77 Conn. 158, 58 Atl. 695.

California. — Herman Waldeck & Co. *v.* Pacific Coast S. S. Co., 2 Cal. App. 167, 83 Pac. 158; Quint *v.* Dimond, 147 Cal. 707, 82 Pac. 310.

Illinois. — Hoffman *v.* Chicago Title & Trust Co., 198 Ill. 452, 64 N. E. 1027; Druecker *v.* Sandusky Portland Cement Co., 93 Ill. App. 406; Delaware & H. Canal Co. *v.* Mitchell, 92 Ill. App. 577; Jenks *v.* Burr, 56 Ill. 450; Prussian Nat. Ins. Co. *v.* Empire Catering Co., 113 Ill. App. 67.

Iowa. — Norman *v.* Chicago & N. W. R. Co., 110 Iowa 283, 81 N. W. 597.

Kentucky. — Southern R. Co. *v.* Thurman, 28 Ky. L. Rep. 699, 90 S. W. 240; Illinois Cent. R. Co. *v.* Houchins, 28 Ky. L. Rep. 499, 89 S. W. 530, 1 L. R. A. 375; Standard Life & Acc. Co. *v.* Holloway, 24 Ky. L. Rep. 1856, 72 S. W. 796.

Minnesota. — O'Brien *v.* North-

In actions to charge a master or principal with the negligence of a servant or agent, some courts are inclined to adhere to the strict rule limiting the *res gestae* to the time during which the injury was actually inflicted, and excluding as hearsay any statements of the servants or agents of the defendant, though made immediately be-

western Imp. & Boom Co., 82 Minn. 136, 84 N. W. 735.

Maryland. — Mayor, etc., of Baltimore *v.* Lobe, 90 Md. 310, 45 Atl. 192; Franklin Bank *v.* Steam Nav. Co., 11 Gill & J. 28.

North Carolina. — Hamrick *v.* Western Union Tel. Co., 140 N. C. 151, 52 S. E. 232; Summerrow *v.* Baruch, 128 N. C. 202, 38 S. E. 861; McEntyre *v.* Levi Cotton Mills Co., 132 N. C. 598, 44 S. E. 109.

Nebraska. — Clancy *v.* Barker, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446.

New York. — DeSoucey *v.* Manhattan R. Co., 15 N. Y. Supp. 108, 39 N. Y. St. 79.

South Dakota. — Wheaton *v.* Liverpool & London & G. Ins. Co., 104 N. W. 850; Auby *v.* Rathbun, 11 S. D. 474, 78 N. W. 952.

Texas. — Missouri Pac. R. Co. *v.* Ivy, 71 Tex. 409, 9 S. W. 346.

Utah. — Moyle *v.* Congregational Soc., 16 Utah 69, 50 Pac. 806.

Vermont. — Stiles *v.* Danville, 42 Vt. 282; Terrill *v.* Tillison, 75 Vt. 193, 54 Atl. 187.

Wisconsin. — Zenter *v.* Oshkosh Gas Light Co., 126 Wis. 196, 105 N. W. 911.

"It is true that the *acknowledgments* of the agent can never be evidence against his principal. He has no authority to bind his principal by admissions. His declarations are only received when they are a part of the *res gestae* and because, being a part of the transaction, they are necessary to a proper understanding of it. Subsequent declarations are mere hearsay. . . . But this rule does not confine the declaration to the point of time when the contract of sale is completed. It embraces acts done, after the bargain is closed, in preparing the necessary evidence of the sale and giving instructions for that purpose, in the delivery of the property, and other acts necessary to complete the transfer. It also looks back to the preparations for the sale; and includes all the preliminary negotiations such as making offers and proposals, and returning answers to them when made by the other party. And, whatever is done in exposing the property to sale, by auction or otherwise, in advertising it when necessary, in directions to the auctioneer when an auction is resorted to, in the employment of servants, to exhibit the property and to make all the usual and proper arrangements for the sale, is incidental to the power to sell, and comes within the rule." Woods *v.* Clark, 24 Pick. (Mass.) 35.

In an action to recover for injuries received in a collision between a train and a hand car on which the plaintiff was riding with the section foreman's consent, a conversation after the accident between the section master and the conductor of the train was held no part of the *res gestae*. Willis *v.* Atlantic & D. R. Co., 120 N. C. 508, 26 S. E. 784.

The statements of a railway employe while investigating the cause of the derailment of a car which injured the plaintiff are not a part of the *res gestae* of the accident and are not admissible as such. Electric R. Co. of Savannah *v.* Carson, 98 Ga. 652, 27 S. E. 156. But see Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.

In Whitaker *v.* Eighth Ave. R. Co., 51 N. Y. 205, where the plaintiff was run into by one of the defendant's cars and thrown into an excavation by the side of the track, to show that the act was wilful plaintiff was permitted to prove as part of the *res gestae* that immediately after the car passed the driver was heard cursing and damning the plaintiff, saying let him fall in and be killed. This was held error as the declaration was made after the car had passed and the injury was done.

The declaration of an employe of

fore or after the infliction of injury.[86] And there seems to be a general tendency to narrow the limits of the *res gestae* in this class of actions.[87]

However, any declarations or statements of an agent or servant participating in the transaction in question, is competent when forming part of the *res gestae*,[88] and some courts are inclined to be more

the defendant railway, in action for personal injuries, made as the witness was about to lift up the injured person immediately after the accident, "Let her alone; she is dead as hell," was held no part of the *res gestae*, irrelevant, and prejudicial to defendant. San Antonio & A. P. R. Co. *v.* Belt (Tex. Civ. App.), 46 S. W. 374.

Statements by Operator of Elevator. — Lissak *v.* Crocker Estate Co., 119 Cal. 442, 51 Pac. 688; T. H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. App. 348, 38 Pac. 608.

86. The rule has always been more strictly observed in cases where the declarations of the agents or employes of a defendant have been sought to be introduced against him. These, when admitted, have been made very shortly after the transaction, with evidence of wreck and danger immediately around and amid the excitement of trying scenes. Metropolitan R. Co. *v.* Collins, 1 App. D. C. 383.

In an action against a railroad, testimony of witness that after deceased was struck and after train was stopped, two of the trainmen whom he took to be the fireman and the engineer, came up and one of them said to the other: "If you had stopped the train when I told you, you would not have killed him," and that the other replied: "It cannot be helped now, it is too late," is inadmissible as part of *res gestae*. While there may be circumstances which would warrant a less vigorous application of the principle of *res gestae* where the declaration is those of persons injured, as to the cause of, or to the persons who inflicted the injuries, a strict adherence to principle is the better course when it is sought to charge a master for the acts of his servant. Adams *v.* Hannibal & St. J. R. Co., 74 Mo. 553, 41 Am. Rep. 333.

Declarations of one of the trainmen of train running over deceased, upon stoppage of train immediately after accident, "We have run over a man and killed him dead as hell," is not admissible for plaintiff as part of *res gestae*. It was not connected with the main fact, but a heartless narrative of a past transaction. Memphis & C. R. Co. *v.* Womack, 84 Ala. 149, 4 So. 618.

87. See the discussion and cases following.

88. See cases cited *supra*, VIII, 2, A, and *infra*, the succeeding sections of this article, and also Young *v.* Seaboard Air-Line R. Co., 75 S. C. 190, 55 S. E. 225.

In an action for personal injuries caused by a falling cliff near which the plaintiff was at work for the defendant, it appeared that the plaintiff had not been warned of the danger. An exclamation of the roadmaster under whom the plaintiff was working, "My God! I expected that," made immediately after the cliff fell, was held admissible as part of the *res gestae* since it was unpremeditated and differed entirely from a deliberate admission made after the event. Elledge *v.* National City & O. R. Co., 100 Cal. 282, 34 Pac. 720, 852, 38 Am. St. Rep. 290.

In an action by a minor for damage occasioned by breathing gas in a coal mine, it appeared that as the plaintiff was escaping from the entrance to the shaft where he had breathed the gas the superintendent of the mine said, "Don't go yet. We are changing the air, and can change it back again the way it was in three minutes." This statement was held competent for the plaintiff as part of the *res gestae* since it related to what had just been and was then being done, concerned the supply of air and had a direct bearing on the condition of the mine then and when the accident happened.

liberal than are others in the admission of this class of statements.[89]

B. Statements Used Testimonially. — Such statements, when made under the proper circumstances, may be used testimonially as evidence of the facts stated in them,[90] but in such case they are sub-

"It may well be regarded as so connected with the plaintiff's injury as to be a part of the same transaction." Mosgrove *v.* Zimbleman Coal Co., 110 Iowa 169, 81 N. W. 227.

In an Action for Failing To Deliver a Telegram promptly, the declarations of the defendant's agent at the time he delivered the message were held part of the *res gestae*. Western Union Tel. Co. *v.* Getto-McClung Boot & Shoe Co., 9 Kan. App. 863, 61 Pac. 504.

Injury From Fire Negligently Set. — In an action for damage caused by fire alleged to have been communicated by fire set out on the defendant's right of way, the statement of the defendant's servant in charge of the fire made while he was putting it out, to the effect that he had set out the fire to burn the grass on the right of way and that it got away from him, was held properly admitted as part of the *res gestae*. Ohio & Mississippi R. Co. *v.* Porter, 92 Ill. 437. See also Paraffine Oil Co. *v.* Berry (Tex. Civ. App.), 93 S. W. 1089; Mobile & O. R. Co. *v.* Stimson, 74 Miss. 453, 21 So. 14, 522; Railroad Co. *v.* Jones, 73 Miss. 229, 19 So. 91 (made the second day after setting the fire).

89. See Homan *v.* Boyce, 15 Neb. 545, 19 N. W. 590.

Declarations of the car inspector ten minutes after the injury and after plaintiff had been carried to the depot near, "that he had been troubled with coupling of the two cars in question before train started from the yard," are admissible as part of *res gestae*, as they were evidently made as the mere result or consequence of feelings or motives co-existent with the injury and without time or incentive for calculation as to effect or influence it would have on the rights of the parties. Louisville & N. R. Co. *v.* Foley, 94 Ky. 220, 21 S. W. 866.

In an action against a railroad company for injuries received in an accident occasioned by the alleged negligence of the defendant in using defective wheels on its cars, the statements of the general superintendent of the road, made at the scene of the wreck three hours after its occurrence, and while he was examining the wheels, to the effect that if the company used any more such wheels he would quit working for it, and that he could not be putting new wheels under the cars all the time, were held admissible as part of the *res gestae*. These declarations though not strictly contemporaneous with the main transaction were not a narration of a past event, but were so nearly contemporaneous and made under such circumstances as to exclude the idea of design or deliberation. Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111. But see Electric R. Co. of Savannah *v.* Carson, 98 Ga. 652, 27 S. E. 156.

The statements of the foreman of the defendant mining company in an action for injuries to an employe, as to what caused the accident, made in good faith immediately after the injury, while he was directing another employe to fix the appliance which caused the injury, are admissible as part of *res gestae*. New York & C. M. S. & Co. *v.* Rogers, 11 Colo. 6, 16 Pac. 719.

Action Against Carrier for Lost Goods. — Where a portion of certain goods shipped by plaintiff had been lost by defendant railroad company, letters from defendant's freight agent, made while they were endeavoring to find the property, having reference to the act in which they were then engaged, reciting that they had been unable to locate the mentioned portion of goods, shipped by plaintiff, are admissible as *res gestae*. Union Pac. R. Co. *v.* Hepner, 3 Colo. App. 313, 33 Pac. 72.

90. Pierce *v.* Van Dusen, 78 Fed. 693, 24 C. C. A. 280. See Ensley *v.* Detroit United R. Co. 134 Mich. 195, 96 N. W. 34; Union Pac. R. Co. *v.* Elliott, 54 Neb. 299, 74 N. W. 627; Lexington St. R. Co. *v.* Stra-

ject to the rules and limitations governing this class of *res gestae*.[91]

C. As Relevant Circumstances. — The statement of an agent may be competent as a relevant circumstance forming part of the *res gestae*, though not competent testimonially to prove the fact stated.[92]

D. Narrative Statements Subsequently Made. — The general rule is that a narrative statement made subsequent to the main transaction, is not part of the *res gestae*.[93]

E. Statement in Nature of Excuse. — The fact that the statement is in the nature of an excuse for the declarant's conduct im-

der, 28 Ky. L. Rep. 157, 89 S. W. 158; Gulf, C. & S. F. R. Co. *v.* Milner, 28 Tex. Civ. App. 86, 66 S. W. 574.

In Coll *v.* Easton Transit Co., 180 Pa. St. 618, 37 Atl. 89, an action for wrongful death in which it appeared that the deceased was run over and killed by defendant's car through the alleged negligence of the motorman in failing to stop after seeing the deceased lying on the track, the declaration of the defendant's lineman immediately after the accident, that he had run ahead to pull the deceased off the track and did not have time to do it, was held part of the *res gestae* and improperly excluded. "To make his declaration admissible as part of the *res gestae*, it was not necessary that Dalton should have been in the employ of the company for the purpose of running its cars, or for any purpose. His acts were a part of the occurrence, and they could have been proved if done by an entire stranger. His declarations made at the time explained the nature of his acts and the acts of others, which together made up the whole occurrence under investigation."

91. The declaration of the engineer made five to ten minutes after accident, "that it was the fault of brakeman and that if he had done his duty and signaled, the accident would not have happened," are mere matters of opinion rather than *res gestae*, and under the facts stated, were premeditated rather than spontaneous. De Walt *v.* Houston E. & W. T. R. Co., 22 Tex. Civ. App. 403, 55 S W. 534.

92. In an action against a railroad for injuries sustained by being forcibly ejected from train by defendant's brakeman, testimony of plaintiff that, at the time of being removed from train, "he told the brakeman that he wanted to pay him and that brakeman told him to get off and that he had orders to put him off," is admissible as part of *res gestae*, but not competent to show brakeman's authority to put him off. Marion *v.* Chicago, R. I. & P. R. Co., 64 Iowa, 568, 21 N. W. 86 (rehearing denied 66 Iowa, 585, 34 N. W. 39).

93. See *supra*, VII, 2, A, and following cases:

United States. — Vicksburg & M. R. Co. *v.* O'Brien, 119 U. S. 99; The Maurice, 135 Fed. 516, 68 C. C. A. 228.

Alabama. — Memphis & C. R. Co. *v.* Womack, 84 Ala. 149, 4 So. 618.

California. — Durkee *v.* Central Pac. R. Co., 69 Cal. 533, 11 Pac. 130, 58 Am. Rep. 562 (five minutes after).

Illinois. — Hellmuth *v.* Katschke, 35 Ill. App. 21; Chicago & Alton R. Co. *v.* Fietsam, 19 Ill. App. 55.

Kansas. — Tennis *v.* Rapid Transit R. Co., 45 Kan. 503, 25 Pac. 876.

Missouri. — Koenig *v.* Union Depot R. Co., 173 Mo. 698, 73 S. W. 637; Ruschenberg *v.* Southern Elec. R. Co., 161 Mo. 70, 61 S. W. 626.

Montana. — Poindexter & Orr Live Stock Co. *v.* Oregon Short Line R. Co, 33 Mont. 338, 83 Pac. 886.

New Jersey. — Blackman *v.* West Jersey & S. R. Co., 68 N. J. L. 1, 52 Atl. 370.

New York. — Sherman *v.* Delaware, L. & W. R. Co., 106 N. Y. 542, 13 N. E. 616.

Rhode Island. — Havens *v.* Rhode

mediately preceding, is not alone sufficient to require its exclusion.[94]

F. Preceding Declarations. — The statements of the agent or servant preceding the main act or transaction in question may[95] or may not[96] form part of the *res gestae,* depending upon whether they form part of the transaction.

Island Suburban R. Co., 26 R. I. 48, 58 Atl. 247.

94. See Springfield Con. R. Co. *v.* Welsch, 155 Ill. 511, 40 N. E. 1034; Keyser *v.* Chicago & G. T. R. Co., 66 Mich. 390, 33 N. W. 867; Missouri, K. & T. R. Co. *v.* Vance (Tex. Civ. App.), 41 S. W. 167.

In an action for personal injuries it appeared that the plaintiff, a little girl, had been so frightened by the blowing off of steam from the defendant's locomotive that she fell and broke her leg. The declaration of the engineer made within a minute after the accident and after he had gone to the assistance of the child, that he was only having a little fun with the children; that he had no idea of hurting them but was just going to have a little sport with them, was held admissible for the plaintiff as part of the *res gestae.* "So immediately connected was the engineer's remark as to how it all happened with what preceded, that it was an explanatory exclamation, not merely an excuse or account of what had been done. The inquiry to which it was a response did not necessarily interrupt the connection. Indeed, the authorities put little stress on the circumstance. It is proper to be considered, however, in ascertaining the connection with the main fact, but not controlling. Neither can it make any difference that the statement was made by an employe or agent, rather than the principal or injured person. Declarations are received, as already pointed out, not on the credit or relation of declarant, but because forming part of the transaction; and it is immaterial by whom, if by some person whose conduct or condition, about which the statement is made, can be proven. Coll *v.* Transit Co. (Pa.) 37 Atl. 89. Nor is the fact that the statement was in the nature of an excuse enough alone to warrant its exclusion. The books indicate that many, if not most, of the declarations admitted as part of the *res gestae,* are of this character. If in the nature of an excuse, however, the fact is important in determining whether the statement was spontaneous and unpremeditated, or a mere opinion or conclusion based on a completed transaction. The declarations, if made by the engineer, were but the natural expressions of one so engaged, upon the discovery of the result of his diversion, and were so immediately connected in point of time and circumstance with what he had done as to exclude the probability of meditation, and, as we think, were properly received in evidence as a part of the *res gestae.*" Alsever *v.* Minneapolis & St. L. R. Co., 115 Iowa 338, 88 N. W. 841.

95. Chicago City R. Co. *v.* McDonough, 221 Ill. 69, 77 N. E. 577 (motorman's remark in answer to a bystander's attempt to warn him of impending collision: "Get to hell out of there or I will run over you," held admissible as *res gestae;* Chicago & E. R. Co. *v.* Holland, 122 Ill. 461, 13 N. E. 145, (conductor's statement shortly prior to collision showing what precautions he had taken). See Texas & P. R. Co. *v.* Lester, 75 Tex. 56, 12 S. W. 955 (report of track walker half hour before accident).

Where the plaintiff, a passenger on defendant's road, was injured in consequence of a car running off the track through the alleged negligence of the section gang engaged in fixing the track at the point of the wreck, the declaration of the foreman of the gang employed in relaying ties at that point, that there was sufficient time to relay them before the arrival of the next train, was held admissible against the defendant as part of the *res gestae.* Matteson *v.* New York Cent. R. Co., 62 Barb. (N. Y.) 364.

96. Gardner *v.* Detroit St. R. Co., 99 Mich. 182, 58 N. W. 49 (conversa-

G. STATEMENT OF ENGINEER. — In actions based on injuries directly[97] and indirectly[98] caused by the defendant's engine or train, the statements of the engineer, when part of the *res gestae,* are admissible. Whether they are regarded as the *res gestae,* depends upon the time intervening, the nature of the statement and the circumstances under which it was made.[99] Statements explanatory

tion between motorman and conductor preceding the injury); Taylor *v.* New York Cent. & H. R. R. Co., 63 App. Div. 586, 71 N. Y. Supp. 884.

The declarations of an engineer as to the defective condition of his engine, made prior to the accident which is the basis of the claim for damages, are not part of the *res gestae* in such an action. Louisville & N. R. Co. *v.* Stewart, 56 Fed. 808, 9 U. S. App. 564, 6 C. C. A. 147.

97. O'Connor *v.* Chicago, M. & St. P. R. Co., 27 Minn. 166, 6 N. W. 481 (statement indicating when he first saw the injured horses on the track, made to conductor immediately after train stopped, held admissible, being apparently caused solely by the occurrence); Union Pac. R. Co. *v.* Elliott, 54 Neb. 299, 74 N. W. 627, *distinguishing* H. Gale S. Co. *v.* Laughlin, 31 Neb. 103, 47 N. W. 638; Gulf, C. & S. F. R. Co. *v.* Compton, 75 Tex. 667, 13 S. W. 667 (preceding the wreck—declarant not positively identified as the engineer).

In an action for negligently running over and killing an infant while on the defendant's track, the statement of the engineer in response to a question as to what he had been doing, that they had "whistled enough for them," made as soon as he stopped the train after the accident, was held admissible as part of the *res gestae.* "Whatever the jury might understand was meant by the expression we are satisfied that it occurred near enough to the accident itself to be a part of the *res gestae* and admissible." Hooker *v.* Chicago, M. & St. P. R. Co., 76 Wis. 542, 44 N. W. 1085, *citing* Felt *v.* Amidon, 43 Wis. 467.

98. Alsever *v.* Minneapolis & St. L. R. Co., 115 Iowa 338, 88 N. W. 841 (where child, frightened by blowing off steam, fell and broke her leg).

Where the plaintiff was injured in a runaway alleged to have been caused by the blowing of defendant's locomotive whistle at a crossing, the engineer's statement when his attention was called to the runaway by the fireman that he had not seen the plaintiff before he blew the whistle, was held admissible as part of the *res gestae.* Gulf, C. & S. F. R. Co. *v.* Milner, 28 Tex. Civ. App. 86, 66 S. W. 574.

99. See O'Connor *v.* Chicago, M. & St. P. R. Co., 27 Minn. 166, 6 N. W. 481; Vicksburg & M. R. Co. *v.* O'Brien, 119 U. S. 99, and dissenting opinion therein; Gulf, C. & S. F. R. Co. *v.* York, 74 Tex. 364, 12 S. W. 68 (threatening declarations showing ill-will but not illustrative of the accident excluded, though the intervening time was not sufficient to have required their exclusion).

In an action for injuries received in a collision at a crossing between plaintiff's wagon and defendant's train, the declaration of the engineer was held admissible as part of the *res gestae* to show his negligence. "It was made at the time of the accident, in view of goods strewn along the road by the breaking of the boxes; and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself." Hanover R. Co. *v.* Coyle, 55 Pa. St. 396.

Where the engineer had stopped and backed up his engine to where the injured brakeman lay moaning his expression of opinion that if his engine had been repaired the night before, as he had directed, the injury would not have occurred, was held no part of the *res gestae.* Ohio

of the accident made within a few minutes after and during the excitement attending an accident, have been held admissible.[1] Similar statements made five minutes after the accident have been excluded,[2] and generally those made a considerable time after the injury was inflicted, are not admissible,[3] tho a lapse of fifteen minutes has been held insufficient to require the exclusion of an explanatory statement.[4]

H. Statement of Motorman, Gripman, or Driver of Street Car. — In actions for injuries inflicted by street cars, the statements of the motorman, gripman, or driver, as the case may be, made during the accident and forming part of the transaction, are competent

& M. R. Co. *v.* Stein, 133 Ind. 243, 31 N. E. 180.

In Casey *v.* New York Cent. & H. R. R. Co., 78 N. Y. 518, as amplified in Waldele *v.* New York Cent. & H. R. R. Co., 95 N. Y. 274, 47 Am. Rep. 41, it appeared that the plaintiff's intestate, a child, had been run over and killed by defendant's engine. A police officer who came up immediately after the accident and found the child under the wheels was permitted to state what the engineer in charge of the engine said and did in extricating the body of the child from the wheels of the car. This evidence was held competent as part of the *res gestae*.

Where the plaintiff was injured by defendant's steam railway, a statement by the engineer in charge of the railway to the flagman, "Where were you at the time this occurred?" made about two minutes after the accident, was held no part of the *res gestae*. Hall *v.* Uvalde Asphalt Pav. Co., 92 N. Y. Supp. 46.

1. International & G. N. R. Co. *v.* Bryant (Tex. Civ. App.), 54 S. W. 364 (statement that he would have killed plaintiff if he had not applied the air); Durkee *v.* Central Pac. R. Co. (Cal.), 9 Pac. 99. But see Williams *v.* Southern Pac. Co., 133 Cal. 550, 65 Pac. 1100.

The declarations of the defendant's engineer made a few minutes after running over and killing a child at a crossing, as to how the accident happened, was held improperly excluded since it was part of the *res gestae*. "The conversation between the witness and the engineer occurred immediately after the accident. The declaration of the engineer had or might have had a tendency to explain how it happened. It surely grew out of that transaction, and served to illustrate its character." Hermes *v.* Chicago & N. W. R. Co., 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69.

In an action for injuries to an infant who, while on defendant's track, was thrown therefrom by an engine, the statement of the engineer in explanation of his failure to stop, that when he first saw the child he thought it was a pig, made as soon as he got off the engine and picked up the child, was held part of the *res gestae*. Keyser *v.* Chicago & G. T. R. Co., 66 Mich. 390, 33 N. W. 867.

2. Durkee *v.* Central Pac. R. Co., 69 Cal. 533, 11 Pac. 130, 58 Am. Rep. 562 (statement in response to a question); Tennis *v.* Rapid-Transit R. Co., 45 Kan. 503, 25 Pac. 876.

3. Weinkle *v.* Brunswick & W. R. Co., 107 Ga. 367, 33 S. E. 471; Southerland *v.* Wilmington & W. R. Co., 106 N. C. 100, 11 S. E. 189; Hawker *v.* Baltimore & O. R. Co., 15 W. Va. 628, 36 Am. Rep. 825.

4. In action for personal injuries, declarations of engineer fifteen or twenty minutes after the collision, when all of the parties were upon the ground, after an examination had been made by the engineer into the cause of the collision, to the effect that he could not stop his train because the brakes of the cars would not work as the air between the tender and the baggage car had been cut off, are admissible as part of *res gestae*. The physical act then being considered was the collision, the cause of it would follow as the next

as part of the *res gestae*.[5] This rule is also extended to those statements bearing upon the cause or circumstances of the accident made immediately thereafter,[6] or soon after while the body of the injured person was still under the car,[7] or while it was in charge of the defendant's servants.[8] Where, however, the events immediately attending the accident have ceased and some little time elapsed before the statement is made, it is not admissible,[9] and a motorman's statement almost immediately following has been excluded.[10] Pre-

subject to be considered. Missouri, K. & T. R. Co. *v.* Vance (Tex. Civ. App.), 41 S. W. 167.

5. In an action for personal injuries received in a collision between plaintiff's wagon and defendant's cable car, the statement of the gripman made while the car and wagon were in actual collision, "God damn you! Get out of the way" was held admissible as part of the *res gestae*. Lightcap *v.* Philadelphia Traction Co., 60 Fed. 212.

6. In an action for killing plaintiff's cow by a car on defendant's electric railway, the statement of the motorman as he got out of the car immediately after the collision, "There, that is running without a headlight" was held properly admitted as part of the *res gestae*. Ensley *v.* Detroit United R., 134 Mich. 195, 96 N. W. 34, *distinguishing* Dompier *v.* Lewis, 131 Mich, 144, 91 N. W. 152.

In Lexington St. R. Co. *v.* Strader, 28 Ky. L. Rep. 157, 89 S. W. 158, declaration of the motorman that the gong and brake were out of repair and for that reason he could not stop or ring the bell, made immediately after the collision as he came up to the plaintiffs who were being taken from the street where they had fallen were held admissible as part of the *res gestae*, being made within a few seconds after the accident and before he had time to concoct or manufacture the false statement. The court cites McLeod *v.* Ginther's Admr., 80 Ky. 399; Louisville & N. R. Co. *v.* Foley, 94 Ky. 220, 21 S. W. 866.

7. Quincy H. R. & C. Co. *v.* Gnuse, 137 Ill. 264, 27 N. W. 190; Springfield Con. R. Co. *v.* Welsch, 155 Ill. 511, 40 N. E. 1034. (Statement that he could not stop because he couldn't reverse the motor.)

In an action for killing a child, the motorman's statement while the car was still on the body, "I saw the child but thought I could pass it," or "this is a terrible thing. I saw the child but thought I could run past it" is admissible as part of the *res gestae*. Sample *v.* Consolidated Light & R. Co., 50 W. Va. 472, 40 S. E. 597, 694.

8. In Coll *v.* Easton Transit Co., 180 Pa. St. 618, 37 Atl. 89, an action for wrongful death, it appeared that the deceased was run over and killed while lying upon defendant's track. The statement of the motorman that he could have stopped the car in time but he supposed the man would have been removed before he reached him made within two minutes after the occurrence of the accident and while the motorman and other employes of the company were in charge of the body of the injured person was held improperly excluded upon the objection that it was too remote to be part of the *res gestae*. "The declaration of the motorman, of which proof was offered, was separated in time two minutes only from the infliction of the injuries. It emanated from the act. It was unconsciously associated with, and stood in immediate causal relation to it. The occurrence had not yet ended. He was not speaking as the narrator of a past event, but as a participant in an uncompleted one."

9. Street R. Co. *v.* Howard, 102 Tenn. 474, 52 S. W. 864; Ruschenberg *v.* Southern Elec. R. Co., 161 Mo. 70, 61 S. W. 626; Little Rock Tract. & Elect. Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

10. In an action for injuries received in a street railway collision, the statement of the motorman almost immediately after the accident, "I couldn't help it, I lost con-

ceding statements may[11] or may not[12] be part of the *res gestae.*

I. Statement of Conductor of Train. — The statements of the conductor of a train, forming part of the *res gestae,* are admissible.[13] His statements explanatory of or relating to the cause and circumstances of the accident in question and made immediately thereafter during the excitement incident thereto, are regarded as part of the *res gestae.*[14] But statements, though made soon after the accident, are not admissible, as part of the *res gestae* where they are not an integral part of the transaction.[15] Statements shortly preceding may[16] or may not[17] constitute part of the transaction or *res gestae;* those a considerable time thereafter are not admissible.[18]

J. Statement of Conductor of Street Car. — Where the action involves injuries caused by a street car, the conductor's state-

trol" was held a mere narrative and not part of the *res gestae.* Norris *v.* Interurban St. R. Co., 90 N. Y. Supp. 460.

In an action for negligently killing a child by running a street car over it, the statement of the motorman made immediately after he had stopped his car and come back to the scene of the injury and in response to the question "Are you blind to run over a child like that?" the answer being "I didn't see the child. I was looking at the car coming east" was held no part of the *res gestae,* being a mere narrative of a past event. Koenig *v.* Union Depot R. Co., 173 Mo. 698, 73 S. W. 637.

11. Chicago City R. Co. *v.* McDonough, 221 Ill. 69, 77 N. E. 577.

12. Gardner *v.* Detroit St. R. Co., 99 Mich. 182, 58 N. W. 49.

13. Leach *v.* Oregon Short L. R. Co., 29 Utah 285, 81 Pac. 90; Houston, E. & W. T. R. Co. *v.* Norris (Tex. Civ. App.), 41 S. W. 708.

Declarations of the conductor of a delayed train relative to the cause of the delay, made during the course thereof, are part of *res gestae.* Cunningham *v.* Wabash R. Co., 79 Mo. App. 524.

14. McLeod *v.* Ginthers, Admr., 80 Ky. 399; Kansas City Southern R. Co. *v.* Moles, 121 Fed. 351, 58 C. C. A. 29.

Where the plaintiff, a servant of the defendant, had his hand crushed between two cars through the alleged negligence of the defendant's conductor in switching a car on to the track where the plaintiff was working, the statement of the conductor in explanation of his conduct, made to the plaintiff in answer to an inquiry by him after he had extricated his hand and was walking toward the conductor, and within a minute after the accident, was held admissible as part of the *res gestae.* "The infliction of the injury and his explanation of his conduct were so close together that they may be said to have occurred at the same time. His declarations, therefore, were in no proper sense a mere narrative of past occurrences, but were part of the occasion out of which plaintiff's cause of action arose. They serve to disclose the nature and quality of the acts in question and were made under circumstances precluding the possibility of premeditation, design or deliberation on the part of the conductor." Peirce *v.* Van Dusen, 78 Fed. 693, 24 C. C. A. 280.

15. Earley's Admr. *v.* Louisville, H. & St. L. R. Co., 24 Ky. L. Rep. 1807, 72 S. W. 348; Nelson *v.* Georgia, C. & N. R., 68 S. C. 462, 47 S. E. 722; Alabama G. S. R. Co. *v.* Hawk, 72 Ala. 112, 47 Am. Rep. 403; Chesapeake & O. R. Co. *v.* Reeves, 11 Ky. L. Rep. 14, 11 S. W. 464; Jammison *v.* Chesapeake & O. R. Co., 92 Va. 327, 23 S. E. 758.

16. Chicago & E. R. R. Co. *v.* Holland, 122 Ill. 461, 13 N. E. 145.

17. Taylor *v.* New York Cent. & H. R. R. Co., 63 App. Div. 586, 71 N. Y. Supp. 884.

18. Norfolk & C. R. Co. *v.* Suf-

ments made during the course of the transaction in which the injury was received constitute a part of the *res gestae.*[19] Subsequent narrative statements do not.[20] Statements made immediately after the accident have been admitted in some cases,[21] while in other cases similar statements have been excluded.[22]

folk Lumb. Co., 92 Va. 413, 23 S. E. 737 (one hour).

19. Where the plaintiff was injured while attempting to board the defendant's elevated train, the statement of the conductor in response to an exclamation by the person who boarded the car just ahead of the plaintiff was held improperly excluded because part of the *res gestae.* Reiten *v.* Lake St. Elev. R. Co., 85 Ill. App. 657.

20. Chicago City R. Co. *v.* White, 110 Ill. App. 23; Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26.

21. Koetter *v.* Manhattan R. Co., 13 N. Y. Supp. 458 (that he was sorry he had done it).

The words spoken by a street-car conductor at the time of an injury to a passenger alighting from his car is admissible as part of the *res gestae.* The words in this case were "It is too bad, I ought to have been there." Tri-City R. Co. *v.* Brennan, Admr., 108 Ill. App. 471.

In an action for injuries caused by a fall from a street car from which the plaintiff was preparing to get off, evidence that when the conductor's attention was called to the plaintiff's fall he replied "Let him lay there and go to hell" was held admissible as part of the *res gestae.* South Covington & C. St. R. Co. *v.* Riegler's Admr., 26 Ky. L. Rep. 666, 82 S. W. 382. But see Gotwald *v.* St. Louis Transit Co., 102 Mo. App. 492, 77 S. W. 125.

22. In an action for injuries received by the plaintiff while attempting to alight from defendant's street car and alleged to be due to the negligence of the conductor in starting the car too soon, the statement of the conductor to the plaintiff that he was sorry and that it was his fault, made immediately after she had fallen and after the conductor with several others had come to her assistance, was held no part of the *res gestae.* "The words of the conductor did not form part of that transaction, or in any manner qualify his act, or any act of the plaintiff. They were in form and substance narrative, and expressed an opinion upon a past transaction. The words, if competent as an admission, might have been evidence to show what the character of the transaction was, but they did not enter into it and give it character, any more than would the declaration of the conductor that he had not been in fault, or that the plaintiff had been." Williamson *v.* Cambridge R. Co., 144 Mass. 148, 10 N. E. 790, *citing* and *quoting* Lane *v.* Bryant, 9 Gray (Mass.) 245, 69 Am. Dec. 282.

In Blackman *v.* West Jersey & S. R. Co., 67 N. J. L. 1, 52 Atl. 370, similar statements made under the same circumstances were held not part of the *res gestae.* The rule is that the declaration to be part of the *res gestae* must be concomitant with the main fact and so connected with it as to illustrate its character. "If the words attributed to the conductor had been exclamatory and coincident with the happening of the accident they would undoubtedly have been illustrative of its character, and proof of them would have been admissible. . . . Although the time which had elapsed between the happening of the accident and the making of the declaration was very short, still the words were merely narrative of the condition which had brought it about."

In an action for personal injuries resulting from the plaintiff's being thrown from the defendant's car by its conductor, evidence of the conductor's statement, "I am not going to stop the line for a man," made very soon after the plaintiff's ejection and in response to the cries of witnesses, "Stop the car" was held incompetent because not part of the

K. Statement of Brakeman. — Subsequent merely narrative statements of a brakeman are not part of the *res gestae* of an injury caused by his train,[23] but spontaneous statements made as a part of the transaction are admissible.[24]

L. Statement of Driver of Vehicle Causing Injury. Where injuries are alleged to have been caused through the negligent driving of a vehicle, the driver's statement as to the cause and circumstances of the injury are part of the *res gestae* if made immediately after and as part of the transaction,[25] but not if a mere narrative some time after.[26]

M. In Action by Servant. — In an action by a servant or his representatives for injuries received in the course of the employment or death resulting therefrom, the statements of a fellow-servant and co-worker of the injured person, forming part of the *res gestae* of the accident, are admissible, whether the speaker was the negligent cause of the injury,[27] or not.[28]

res gestae. Gotwald *v.* St. Louis Transit Co., 102 Mo. App. 492, 77 S. W. 125.

23. Sherman *v.* Delaware, L. & W. R. Co., 106 N. Y. 542, 13 N. E. 616 (conversation with a passenger); St. Louis, M. & S. R. Co. *v.* Kelley, 61 Ark. 52, 31 S. W. 884 (same). But see De Walt *v.* Houston E. & W. T. R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534.

24. Omaha & R. V. R. Co. *v.* Chollete, 41 Neb. 578, 59 N. W. 921; Gulf. C. & S. F. R. Co. *v.* Pierce, 7 Tex. Civ. App. 597, 25 S. W. 1052 (that he had gone to sleep and left the switch open).

Where the plaintiff's hand was injured by being caught in the car door as the defendant's brakeman closed it, the latter's exclamation on opening the door and seeing the plaintiff's maimed hand was held part of the transaction and therefore competent as *res gestae*. Trumbull *v.* Donahue, 18 Colo. App. 460, 72 Pac. 684.

25. Where the plaintiff, a foot passenger, was run into and injured by a wagon driven by the defendant's servant and the latter immediately stopped his horse, came back and said he did not mean to do it, his statement was held as much a part of the *res gestae* as would have been an exclamation at the very instant the plaintiff was struck. Cleveland *v.* Newsom, 45 Mich. 62, 7 N. W. 222. See also Louisville & N. R. Co. *v.* Molloy's Admx., 28 Ky. L. Rep. 1113, 91 S. W. 685.

26. Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Barnes *v.* Rumford, 96 Me. 315, 52 Atl. 844. See also Edwards *v.* Foote, 129 Mich. 121, 88 N. W. 404; Springfield Consol. R. Co. *v.* Puntenney, 101 Ill. App. 95.

In an action for injuries caused by a collision between defendant's and plaintiff's carriages, the statement of the defendant's servant that the plaintiff was not to blame, made to the plaintiff while he was being removed from his carriage, was held improperly admitted since it was no part of the *res gestae*, being a mere expression of opinion about a past occurrence, and not accompanying the principal act or transaction. "It is no more competent because made immediately after the accident than if made a week or month afterwards." Lane *v.* Bryant, 9 Gray (Mass.) 245, 69 Am. Dec. 282.

27. Pierce *v.* Van Dusen, 78 Fed. 693, 24 C. C. A. 280; Gulf, C. & S. R. Co. *v.* Pierce, 7 Tex. Civ. App. 597, 25 S. W. 1052.

28. Where an electric lineman was killed by contact with a line wire, declaration of the foreman just at the time when deceased fell from pole is admissible as *res gestae*. O'Donnel's Admr. *v.* Louisville Electric Light Co., 21 Ky. L. Rep. 1362, 55 S. W. 202.

The statements of the master of a

Such statements, however, must be contemporaneous with and a part of the transaction.[29]

N. Assaults Upon or Ejection of Passenger. — In an action by a passenger for an assault upon or ejection of himself by defendant's train employes, the latter's abusive language used during the course of the assault or ejection is admissible as part of the *res gestae.*[30] Subsequent statements, however, are not competent as *res gestae.*[31]

ship made immediately after the accident by which the plaintiff, an employe on the ship, was injured, and relating to the cause of the accident, may be competent as part of the *res gestae.* Lambert *v.* La Conner Trad. & Transp. Co., 30 Wash. 346, 70 Pac. 960.

29. Testimony of a fellow-servant with the injured, that he came running down from the second story of the (defendant's) cooper shop, just after the barrel fell on the plaintiff, and said that he was responsible for throwing the barrel on plaintiff, is not admissible as part of *res gestae,* nothing concurrent with the injury, but a mere narrative. Hellmuth *v.* Katschke, 35 Ill. App. 21.

In an action by a seaman for injuries alleged to be due to the breaking of a defective rope, the statement of the captain "that looks pretty bad" made upon his examination of the rope after the accident, was held not admissible as part of the *res gestae* since it was not a spontaneous remark made as part of the occurrence. Silveira *v.* Iversen, 128 Cal. 187, 60 Pac. 687.

30. Profane language used by the defendant's conductor in a quarrel with plaintiff's companion which started the trouble between plaintiff and the conductor, during the course of which the assault upon plaintiff was committed by the conductor, was held material as part of the *res gestae* in an action against the railway company. Birmingham R. Light & Power Co. *v.* Mullen, 138 Ala. 614, 35 So. 701.

In an action by a passenger for damages for an assault and abuse by the defendant railway's conductor and porter, a threat by the porter to treat other passengers who had interferred in plaintiff's behalf in the same way was held part of the *res gestae.* Shaefer *v.* Missouri Pac. R. Co., 98 Mo. App. 445, 72 S. W. 154.

31. Louisville & N. R. Co. *v.* Williamson, 29 Ky. L. Rep. 1165, 96 S. W. 1130.

Plaintiff was ejected from the rear of a passenger car, by defendant's train employes, among them the conductor, who afterwards went to the other end of the car where he made a statement to a passenger "That he ought to have broken his (plaintiff's) neck." By a divided court the statement was held not a part of *res gestae.*

The interval of time after the main fact, is not of itself, of controlling importance, though entitled to weighty consideration in determining what are *res gestae.* The conversation of witness with conductor had no connection with the scene out of which the alleged cause of action arises, nor was the statement in any way connected with the scene as a circumstance of it. Mere thoughts or feelings, engendered by a particular occurrence or fact, do not of themselves form a sufficient connecting link between the fact and the subsequent talk of an eye-witness, to make that talk a part of the *res gestae* of the fact. Barker *v.* St. Louis I. M. & S. R. Co., 126 Mo. 143, 28 S. W. 866, 47 Am. St. Rep. 646, 26 L. R. A. 843.

RESIDENCE.—See Domicil.

RES INTER ALIOS ACTA.—See Relevancy; Similar Transactions.

RES IPSA LOQUITUR.—See Negligence.

RESISTING OFFICER.—See Obstructing Justice.

RES JUDICATA.—See Judgments.

RESPONDENTIA.—See Admiralty; Ships and Shipping.

RESTRAINT OF TRADE.

I. PRESUMPTION AND BURDEN OF PROOF.

1. As to Validity of Contract in Restraint of Trade. — A. In General. — A contract in restraint of trade is in legal presumption void; and such presumption can be rebutted only by showing that it was entered into for good reasons, and the burden of showing the facts rendering the contract valid rests upon the party seeking to enforce it.[1]

1. *England.* — Horner *v.* Graves, 7 Bing. 735; Mitchel *v.* Reynolds, 1 P. Wm. 181, 24 Eng. Reprint 347; Mallan *v.* May, 11 Mees. & Welsb. 652.

Ind. — Bowser *v.* Bliss, 7 Blackf. 344, 43 Am. Dec. 93; Cleveland, C., C. & I. R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754.

B. Where the Contract on Its Face Shows That It Is Reasonable, and the defendant seeks to avoid it by some extrinsic matter which renders it illegal the burden is upon him to establish its illegality.[2]

C. Under Sherman Anti-Trust Law of United States it is immaterial whether the restriction is reasonable and fair or whether it has actually resulted in increasing the price of the commodity.[3]

New York. — Ross *v.* Sadgbeer, 21 Wend. 166; Weller *v.* Hersee, 10 Hun 431.

Ohio. — Hoffman *v.* Brooks, 11 Wkly. L. Bul. 258.

Wisconsin. — Kellogg *v.* Larkin, 3 Pinney 123.

A combination between common carriers to prevent competition is *prima facie* illegal. The burden is on the carrier to remove this presumption, and until it is removed the agreement goes down before the presumption, and is held within the condemnation directed against all contracts violative of public policy. Chicago, I. & L. R. Co. *v.* Southern Indiana R. Co. (Ind. App.), 70 N. E. 843.

"It has sometimes been said by text writers, and even by courts, that all contracts in restraint of trade . . . are to be presumed void, until it be shown, not only that there was an adequate consideration, but that the circumstances under which the contract was made were such as to render the restraint reasonable. But the rule to be drawn from a careful analysis of the adjudged cases and the reasons upon which they are founded, does not seem to us to involve any such presumption in the accurate or legal sense of the term, and may be more correctly stated to be, that all contracts in restraint of trade are void, if considered only in the *abstract*, and without reference to the situation or objects of the parties or other circumstances under or with reference to which they were made; and this, though the pecuniary consideration paid may have been sufficient to support the contract in any other aspect, or any ordinary contract for a legal purpose; or even though it may be sufficient in value to compensate the restraint imposed." Hubbard *v.* Miller, 27 Mich. 15, 15 Am. Rep. 153.

2. Mallan *v.* May, 11 Mees & Welsb. (Eng.) 652; Haynes *v.* Doman, 80 L. T. N. S. 569; Merriman *v.* Cover, Drayton & Leonard, 104 Va. 428, 51 S. E. 817. See United States *v.* Trans-Missouri Freight Assn., 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73, *reversed* in 166 U. S. 290.

The initial case enunciating the principle with reference to contracts in restraint of trade is Mitchel *v.* Reynolds, 1 P. Wm. 181, 24 Eng. Reprint 347, where the rule is laid down to be that in all restraint of trade where nothing more appears, the law presumes them bad; but if the circumstances are set forth, the presumption is excluded, and the court is to judge of these circumstances, and determine accordingly; and if upon them it appears to be just and reasonable, the agreement ought to be maintained.

Partial Restraint. — A count in partial restraint of trade is void unless there is some good ground or reason to support it independent of mere pecuniary consideration, and ordinarily a declaration on such contract should show such ground or reason by express averment, but such averment is not necessary where contract is set forth in the declaration at length and contract itself discloses a valid and proper ground or reason to support it. Kellogg *v.* Larkin, 3 Pinney (Wis.) 123.

3. United States *v.* Coal Dealers' Assn., 85 Fed. 252.

An agreement in partial restraint of trade which is reasonable and supported by a valuable consideration is valid (Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. [U. S.] 64, 72; Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 62), and where stipulations are divisible

2. Intent. — A. In General. — Where the object of the combination is in restraint of trade it is immaterial that there is no bad motive, or that its object is the reduction of price of commodity.[4] If the practice of the members of a club had the effect of maintaining fixed rates for a commodity, it constituted them a trust no matter whether the members intended it to have that effect or not.[5]

Sherman Anti-Trust Law. — An intent to violate the provisions of the Sherman anti-trust law of June 2, 1890, need not be proved where the necessary effect of the agreement is to restrain interstate commerce.[6]

B. Where a Question of Fact Is Involved. — Where the laws treat restrictively of the rights and powers of corporations in general, absolutely prohibiting the combination and consolidation of certain ones, and as to other combinations making specific provisions, it is held that to bring a combination within the provision of such laws, there must be shown a specific intent or necessary tendency to accomplish the prohibited result of regulation of price or production.[7]

3. Agreement to Refrain From Trade Is Not Implied in Sale of Good-will. — Although it has been held that there is an implied covenant in a contract of sale of a business, that the vendor will not interfere with the enjoyment of what he has sold,[8] the great weight of authority is that there is no agreement to abstain from the trade by the sale of the business and good-will.[9]

II. MODE OF PROOF.

1. Legality of Agreement. — The legality of agreement is determined by provisions and character of contract and not by what

the court will not hold agreement void altogether, but will give effect to valid portion (Illinois Trust & Sav. Bk. *v.* Arkansas City, 76 Fed. 271, 22 C. C. A. 599; American Strawboard Co. *v.* Haldeman Paper Co., 83 Fed. 619, 27 C. C. A. 634.)

4. San Antonio Gas Co. *v.* State, 22 Tex. Civ. App. 118, 54 S. W. 289.

5. State *ex rel.* Crow *v.* Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363.

Suppression of Competition in Bidding. — Where bidders for public work form a combination and put in the highest bid merely for appearance the agreement is in violation of public policy irrespective of its actual effect. McMullen *v.* Hoffman, 174 U. S. 639.

6. United States *v.* Trans-Missouri Freight Assn., 166 U. S. 290.

7. MacGinniss *v.* Boston Min. Co., 29 Mont. 428, 75 Pac. 89.

8. Dwight *v.* Hamilton, 113 Mass. 175.

9. Shackle *v.* Baker, 14 Ves. (Eng.) 468; Churton *v.* Douglas, Johns. Eng. Ch. 174, 28 L. J. N. S. Eq. 841; Hall's Appeal, 60 Pa. St. 458, 100 Am. Dec. 584.

No contract in restraint of trade is implied from the mere sale of the good-will of a business. Beard *v.* Dennis, 6 Ind. 206, 63 Am. Dec. 380.

Sale of a trade with the good-will does not prevent the vendor's setting up again a similar trade, without express contract, or fraud, by representing it as a continuation of the

the parties did or attempted to do thereunder;[10] and in determining whether a written contract is in restraint of trade, and in violation of anti-trust laws, it is competent to show the circumstances attending the making of the contract, the object in view, and the construction placed upon it by the parties, as evidenced by their dealings under it.[11]

2. Existence of Combination or Monopoly may be as conclusively proved by facts and circumstances as by direct evidence.[12]

3. Production of Books. — Under statute providing that courts may require the production of any books in possession of party bearing on merits of suit, in action for violation of anti-trust law, the court is empowered to compel the production of corporation's stock-books when the same are material.[13]

old trade, or by contract encouraging others to involve themselves in the confidence that he would not trade again. Cruttwell *v.* Lye, 17 Ves. Eq. (Eng.) 335.

10. See *supra,* notes 5, 6, 7 and 8. Luhrig Coal Co. *v.* Jones & Adams Co., 141 Fed. 617, 72 C. C. A. 311.

11. Detroit Salt Co. *v.* National Salt Co., 134 Mich. 103, 96 N. W. 1, (rehearing refused); *citing* Gregory *v.* Wendell, 39 Mich. 337, 33 Am. Rep. 390; *s. c.*, 40 Mich 432; Rumsey *v.* Berry, 65 Me. 570; Richardson *v.* Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457.

12. State *ex rel.* Crow *v.* Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363.

Rules and By-Laws Not Conclusive Evidence. — The question whether there is any combination in restraint of trade or combination to monopolize any part of trade or commerce on part of defendant association is to be determined, not alone from what appears from the face of its preamble, rules and by-laws, but from the entire situation, and the practical workings and result of the defendant's method of doing business, as disclosed by the testimony in the case. United States *v.* Hopkins, 82 Fed. 529.

Official Proclamations, Newspaper Reports and the Like as a Matter of History. — In support of a bill for injunction against a combination in restraint of trade interstate commerce, the official proclamations of the various government officers, and also newspaper reports supported by affidavits containing manifestoes and declarations of respondents, may be offered in evidence as a matter of history by complainant. United States *v.* Workingmen's A. C. 54 Fed. 994, 26 L. R. A. 158.

Where four corporations conspire to apply to city council for an extension of their rights and privileges and franchises theretofore granted to them and then existing in said corporation, to the end that all the interest of all said corporations might be pooled, united, combined and consolidated in one management, and for one purpose to control production and price of a commodity, it is *held,* that the obtaining the passage of the ordinance was a step, the culminating one in the progress of the conspiracy, and it is relevant and material to prove the passage of the ordinance and its contents. As the proof indicated that the passage of the ordinance was necessary to the consummation of the conspiracy, the ordinance when passed became the culminating link in the chain of acts which rendered complete the combination in restraint of trade. The acceptance of the ordinance is admissible as a vital circumstance tending to establish the allegation that conspiracy had been formed to procure passage of ordinance that would render possible the accomplishment of the design in restraint of trade. San Antonio Gas. Co. *v.* State, 22 Tex. Civ. App. 118, 54 S. W. 289.

13. State *ex rel.* Hadley *v.* Stand-

III. REASONABLENESS OF RESTRAINT AS QUESTION FOR JURY.

1. In General. — The question whether the restrictions imposed by a covenant not to carry on a particular business are reasonably necessary for the protection of plaintiff's business, is not a question for the jury, but one for the court.[14]

2. Where Specific Intent or Necessary Tendency to Regulate Price Must Be Shown, the nature of the arrangement is a question of fact to be determined from evidence, or from vice inherent in combination itself.[15]

IV. SUFFICIENCY OF EVIDENCE.

That an agreement is in restraint of trade should be established by clear and satisfactory evidence.[16]

ard Oil Co., 194 Mo. 124, 91 S. W. 1062.

14. Dowden *v.* Pook (1904), 1 K. B. Div. 45, 73 K. B. 38.

The reasonableness of an agreement in restraint of trade depends on its true construction and legal effect, and is consequently a question for the court. Hanes *v.* Doman, 80 L. T. N. S. 569.

Though a contract is not illegal on its face, if all the evidence is consistent only with an unlawful purpose on the part of all the parties, the question of its illegality should not be submitted to jury. Detroit Salt Co. *v.* National Salt Co., 134 Mich. 103, 96 N. W. 1.

15. MacGinniss *v.* Boston Min. Co., 29 Mont. 428, 75 Pac. 89.

16. Hall's Appeal, 60 Pa. St. 458, 100 Am. Dec. 584; Merriman *v.* Cover, Drayton & Leonard, 104 Va. 428, 51 S. E. 817.

RETURN.—See Certificates; Judgments; Service.

REVENUE STAMPS.—See Stamp Acts.

REVIEW.—See Habeas Corpus; Judgments; New Trial; Reference.

REWARDS.

I. PRESUMPTION AND BURDEN OF PROOF.

1. Offer and Acceptance of Reward. — A. In General. — To entitle a person claiming a reward to recover in an action therefor, he must prove the offer of such reward, and the acceptance thereof and performance of the services by him.[1]

B. Notice of Acceptance. — Where a reward is offered for the doing of a certain act with no restrictions to the offer, and no additional requirements upon the claimant of the offered bounty, one who performs the act with a view of obtaining the reward need not give notice of that fact to the person making the offer as a condition precedent to recovery of reward.[2]

1. Franklin *v.* Heiser, 6 Blatchf. (U. S.) 426; Shuey *v.* United States, 92 U. S. 73; Amis *v.* Conner, 43 Ark. 337; Lee *v.* Trustees, 7 Dana (Ky.) 29; Besse *v.* Dyer, 9 Allen (Mass.) 151, 85 Am. Dec. 747; Howland *v.* Lounds, 51 N. Y. 604, 10 Am. Rep. 654.

2. Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

Where a person expends money on the faith of a promise of reward made at a public meeting, it is not necessary that he should give promisor notice that he has done so in order to maintain an action on the promise. Wilson *v.* McClure, 50 Ill. 366.

A son over age and working for himself made the plaintiff's house his

C. KNOWLEDGE OF OFFER. — As to whether or not the claimant to the reward must have knowledge of the offer at the time of rendering the services, the courts are divided; some holding that to entitle plaintiff to recover a reward for apprehending a criminal, he must prove that in consideration of the reward offered he pursued and apprehended him;[3] others holding that he is entitled to the reward offered, even if at the time of performance of the services he was not aware that it had been offered.[4]

home; he was taken sick, and whilst living with plaintiff the father declared that whoever would take care of his son should be well paid; this was communicated to plaintiff, who continued to take care of his son; the plaintiff demanded payment from the father who promised to pay; *held,* that this was sufficient for the jury to infer acceptance of the offer by plaintiff. Patton *v.* Hassinger, 69 Pa. St. 311.

A compliance with a proposition, especially where no notice of acceptance is required, is most significant evidence of acceptance. Patton *v.* Hassinger, 69 Pa. St. 311.

3. Knowledge of Reward Essential. — Hewitt *v.* Anderson, 56 Cal. 476, 38 Am. Rep. 65; Marvin *v.* Treat, 37 Conn. 96, 9 Am. Rep. 307; Lee *v.* Trustees, 7 Dana (Ky.) 29. See *contra,* The Auditor *v.* Ballard, 9 Bush (Ky.) 572, 15 Am. Rep. 728; Coffey *v.* Com., 18 Ky. 646, 37 S. W. 575.

The rule relative to contracts applies to rewards that an offer cannot become a contract unless acted upon and assented to; hence one giving information before a reward is offered which leads to the arrest of a criminal for whose arrest and conviction a reward is afterwards offered, is not entitled to the reward, although in addition thereto he was active in assisting the prosecuting officers and in procuring evidence in the hope of securing such reward. Fitch *v.* Snedaker, 38 N. Y. 248, 97 Am. Dec. 791.

The right to recover a reward arises out of contractual relations which exist between the person offering the reward, and the claimant, which is implied by law by reason of the offer on the one hand and performance of the service on the other; the reason of the rule being that the services of claimant are rendered in consequence of the offered reward, from which an implied promise is raised on the part of the person offering the reward to pay him the amount thereof by reason of the performance by him of such services, and no such promise can be implied unless he knew at the time of performance of services that the reward had been offered, and in consideration thereof and with a view to earning the same, rendered services specified in the offer. Williams *v.* West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; *citing* Howland *v.* Lounds, 51 N. Y. 604, 10 Am. Rep. 654; Stamper *v.* Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296.

Plaintiff recovered a horse and wagon that had been stolen from defendant and notified him by telegraph, and on his arrival delivered them to him. Upon leaving he handed plaintiff some money, saying, "Here is something for your services." Plaintiff did not look at the money until defendant was gone, when he found it to be $2.00. The defendant had in fact on the morning of this day offered $50 reward for recovery of the property, but plaintiff did not know this at the time. *Held,* that plaintiff had accepted the $2.00 in satisfaction of his services and could not recover the reward. Marvin *v.* Treat, 37 Conn. 96, 9 Am. Rep. 307.

4. Knowledge of Reward Not Necessary. — Williams *v.* Carwardine, 4 Barn. & Ad. 621, 24 E. C. L. 126; Drummond *v.* United States, 35 Ct. Cl. 356; Dawkins *v.* Sappington, 26 Ind. 199.

In an action for a reward offered for the return of lost goods, by a party who has performed the pre-

2. Motives and Intent of Claimant. — The motives of the person in performing the services called for in the reward cannot be inquired into.[5] It has, however, been held that after disclaiming an intention to claim a reward he cannot recover the same.[6]

3. Performance By Plaintiff. — In order to claim the offered reward, plaintiff must show that he gave the first desired information;[7] but where he procures the arrest of a party for whom a reward is offered, it is not necessary to show that he made the formal arrest.[8]

scribed conditions of it, by finding and returning them to owner, he will be entitled to the reward although he did not know at the time he returned them that any reward had been offered for them. Eagle *v.* Smith, 4 Houst. (Del.) 293.

The fact that plaintiff had arrested the burglar a day before a reward was offered by the governor, did not bar his right to the reward. Coffey *v.* Com., 18 Ky. 646, 37 S. W. 575.

"If the offer was made in good faith, why should the state inquire whether appellee knew that it had been made? Would the benefit to the state be diminished by a discovery of the fact that the appellee, instead of acting from mercenary motives, had been actuated solely by a desire to prevent the escape of a fugitive and to bring a felon to trial? And is it not well that all may know that whoever in the community has it in his power to prevent the final escape of a fugitive from justice, and does prevent it, not only performs a virtuous service, but will entitle himself to such reward as may be offered therefor?" The Auditor *v.* Ballard, 9 Bush (Ky.) 572, 15 Am. Rep. 728.

5. Drummond *v.* United States, 35 Ct. Cl. 356.

Claimant can recover though led to give the requisite information by other motives. Williams *v.* Carwardine, 4 Barn. & Ad. 621, 24 E. C. L. 126.

The fact that the lost property, for the return of which a reward is offered, is returned by an agent or lawyer of finder, who refuses to disclose name of client, and who makes threats if full reward is not paid, does not entitle payer to recover back the reward. Grady *v.* Crook, 2 Abb. N. C. (N. Y.) 53, *affirmed* 72 N. Y. 612.

6. If plaintiff did not do the acts, upon which he bases his right to recover, with the intention of claiming the reward in the event of accomplishing what would entitle him to it, he cannot recover it. We are aware of no case in which it has been held that a party after disclaiming an intention to claim a reward, could recover it. Hewitt *v.* Anderson, 56 Cal. 476, 38 Am. Rep. 65.

7. It is competent to prove by witness that he had previously given the defendant information received from another as to guilty parties. Rollins *v.* Clement, 25 S. C. 601.

Evidence that the information given defendant, for which recovery is claimed, was in his possession before and was not new to him, is competent. Higgins *v.* Lessig, 49 Ill. App. 459.

First Effective Information. — It is not necessary that person giving information should be the first or only person giving information, provided he was the first to give the effective information which led to the arrest and conviction. Brown *v.* Bradlee, 156 Mass. 28, 30 N. E. 85, 32 Am. St. Rep. 430, 15 L. R. A. 509.

In an action by three persons to recover a reward for apprehension and delivery of property, it is necessary that all the plaintiffs should have been originally concerned in securing and returning the property to owner. In order to establish a valid claim for their services they were required to prove that it was through their agency the return of the property was secured, but that might have been perfected by each performing a part. Goldsborough *v.* Cradie, 28 Md. 477.

8. Swanton *v.* Ost, 74 Ill. App. 281.

4. Guilt of Offender. — That the person arrested is the guilty party must be shown by plaintiff in action for recovery of reward where it is denied in answer;[9] and where the reward includes the conviction of the party a final conviction is necessary, and the fact that an appeal is pending from a judgment of conviction is sufficient to defeat the claim.[10]

II. MODE OF PROOF.

1. Record Evidence. — A. Of Reward. — Under code providing that acts of the chief executive are proved by records of state department, a copy of a proclamation of the governor offering a reward for the arrest of a person, certified by the secretary of state, is admissible in lieu of the original proclamation.[11]

B. As Evidence of Conviction. — While the record of the court trying the case against the offender has been held to be only evidence of the conviction, but not to show that person convicted was the criminal,[12] the weight of authority seems to be that the record is both evidence of the conviction and that the person convicted is the offender.[13]

To entitle plaintiff to the reward, so far as the arrest is concerned, it is not essential that he should personally and alone make the arrest, but he is entitled to assistance of arresting officers of county and to have a *posse comitatus* summoned if necessary to the capture of the culprit. The essential fact is causing the arrest. Stone *v.* Wickliffe, 106 Ky. 252, 50 S. W. 44.

9. Amis *v.* Conner, 43 Ark. 337.

Under a reward offered for detection of a thief, it is held that if the alleged thief had been acquitted or released, or if the charge made against him was unfounded, it was incumbent upon defendant to show that fact to rebut the presumption arising from the proof of such arrest of the thief at the instigation of the plaintiff. Brennan *v.* Haff, 1 Hilt. (N. Y.) 151.

10. Stone *v.* Wickliffe, 106 Ky. 252, 50 S. W. 44.

An order arresting judgment, and discharging the prisoner, does not set aside a verdict in a criminal case; such a verdict is, nevertheless, a conviction within the meaning of a contract to pay the reward for conviction of the person guilty of the offense in question. Buckley *v.* Schwartz, 83 Wis. 304, 53 N. W. 511.

Where the government offers a reward for information which shall lead to the conviction of persons illegally operating distilleries, the conditions of offer will be deemed complied with if there be a verdict of guilty followed by a motion of the district attorney to suspend judgment on payment of all costs by prisoner. The informer's obligation ends with the verdict, and he is not responsible for subsequent acts, or inaction, of the district attorney. Williams *v.* United States, 12 Ct. Cl. 192.

11. Burke *v.* Wells, Fargo & Co., 34 Cal. 60.

12. Borough of York *v.* Forscht, 23 Pa. St. 391; Brown *v.* Bradlee, 156 Mass. 28, 30 N. E. 85, 32 Am. St. Rep. 430, 15 L. R. A. 509.

Where a railroad company offers a reward for the conviction of one charged with the violation of law by placing obstructions on the track, a conviction of the violation of the law is admissible as evidence of the fact that the offense has been committed, and that person convicted was the real offender. Arkansaw S. W. Ry. *v.* Dickinson, 78 Ark. 483, 95 S. W. 802.

13. McPeek *v.* Western Union Tel. Co., 107 Iowa 356, 78 N. W. 63; 92 Am. St. Rep. 362, 43 L. R. A. 214.

C. Unrevoked Proclamation as Evidence That Person Is Still a Fugitive. — In mandamus against the state auditor, to compel the issue of a warrant for the amount of reward offered by the governor for the apprehension of a fugitive from justice, the fact that at the time of the arrest the proclamation offering the reward was unrevoked, is not conclusive proof of the fact that the person arrested was at the time a fugitive.[14]

2. Performance By Plaintiff. — Res Gestae. — Where it is alleged that plaintiff was but the servant of another, to show that he was acting in his own behalf, plaintiff may give in evidence his own acts and declarations, beginning with his purpose of making the arrest, down to the time that the prisoner was delivered to the defendant.[15]

III. SUFFICIENCY OF EVIDENCE.

To entitle plaintiff to the reward offered, he must show the services to have been performed in substantial compliance with the terms of the offer.[16] If the reward is offered for the arrest and conviction of a criminal, or for the arrest and recovery of money

14. State *ex rel.* Lindley *v.* Auditor, 61 Mo. 263.

15. "The plaintiff founds his right to maintain this suit upon an act of his own. He must prove that he arrested the man, and carried and delivered him to the defendant's custody, or placed him within the defendant's control, according to the reasonable meaning of the terms of the advertisement. . . . It was not the act of a moment. It consisted of a long series of consecutive acts, from the moment that he set forward . . . to make the arrest till the transaction was brought to a close by the surrender of his prisoner. As many of these subordinate acts as are necessary to complete the proof of the principal one, he is clearly at liberty to prove. But in the course of its prosecution, and intermingled with the constituent parts of the principal act, are various conversations with others, some of which have a tendency to impart to his proceedings the appearance of being directed by another party, and to give him the character of a mere agent or servant of that party in the transaction; and it becomes a material question whether such proceedings were so directed, and whether he was acting throughout, or at any stage of the business in fact, in subordination to another, at his expense and risk, and for his benefit, or on his own behalf entirely. . . . These various declarations and consultations were comtemporaneous with the principal act, which commenced with the beginning of the plaintiff's purpose of making the arrest, and continued through the various stages of progress to the time that the prisoner was delivered to the defendant. The whole should be regarded as one transaction, and it is no matter in what particular stage of it the acts referred to were done." Simonds *v.* Clapp, 16 N. H. 222.

16. *United States.*— Williams *v.* United States, 12 Ct. Cl. 192.

California. — Van Horn *v.* Ricks Water Co., 115 Cal. 448, 47 Pac. 361.

Connecticut. — *In re* Kelly, 39 Conn. 159.

Kansas. — Stone *v.* Dysert, 20 Kan. 123.

Kentucky. — Stone *v.* Wickliffe, 106 Ky. 252, 50 S. W. 44.

Louisiana. — Cornelson *v.* Sun Mut. Ins. Co., 7 La. Ann. 345.

Maryland. — Goldsborough *v.* Cradie, 28 Md. 477.

Mississippi. — Martin *v.* Copiah Co., 71 Miss. 407, 15 So. 73.

New Jersey. — Furman *v.* Parke, 21 N. J. L. 310.

stolen, both the arrest and conviction, or the arrest and recovery, of money stolen, are conditions precedent.[17] When the offer is for delivery of a fugitive at a certain place, the reward cannot be earned by the delivery at another place,[18] and a reward for the

South Carolina. — Clanton *v.* Young, 11 Rich. L. 546.

Texas. — Adair *v.* Cooper, 25 Tex. 548.

17. A reward for arrest and conviction is not earned by merely furnishing some information leading to the arrest and conviction of the criminal. (Williams *v.* West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278), but a reward for recovery of property and detection of thief is complied with by furnishing information by which with reasonable diligence the owners are enabled to recover property and detection of thief. (Besse *v.* Dyer, 9 Allen (Mass.) 151, 85 Am. Dec. 747.)

Where a liberal reward is offered for information leading to the arrest of a fugitive, and a specific sum for his arrest, the giving of the information entitles plaintiff to the liberal reward only. Shuey *v.* United States, 92 U. S. 73.

A reward offered for the recovery, or information leading to the recovery of property lost, is not complied with by giving information as to whereabouts of property which does not in fact lead to the recovery of the property. Howland *v.* Lounds, 51 N. Y. 604, 10 Am. Rep. 654.

Where plaintiff was promised a certain sum if he would tell who took the property of which the defendant was robbed, and plaintiff told defendant that C. got it, but it turned out that C. had an accomplice D. with whom he shared the money, it was held that the consideration of the promise was substantially performed. Gilkey *v.* Bailey, 2 Harr. (Del.) 359.

Where H. made a written agreement with F. that in case F. would recover certain bonds fraudulently obtained from H. he would pay $3000, and the police notified H. that bonds had been recovered, and were subject to his order and they did not pass through the hands of F., *held* in a suit brought by F. against H., to recover the $3000, that it was incumbent on F. in order to prove that he recovered the bonds within the meaning of the agreement, to show that police recovered bonds through information furnished by him, and that it was not enough to show that he sent communication on subject to police. Franklin *v.* Heiser, 6 Blatchf. (U. S.) 426.

Where defendant offered a reward for the detection of the thief who stole his horse, plaintiff told him D. was the thief and gave him some information tending to sustain the charge, and the defendant had D. arrested therefor. This was *held* sufficient to sustain a recovery for the amount of reward without showing D.'s conviction on the charge. Brennan *v.* Haff, 1 Hilt. (N. Y.) 151.

Where by law a civil officer is entitled to a reward for arresting and prosecuting to punishment, such officer is entitled to the reward if he has offender bound over to court, where, upon evidence furnished by the officer, he was indicted and afterwards pleaded guilty without trial and was sentenced to fine and imprisonment. Porterfield *v.* State, 92 Tenn. 289, 221 S. W. 519.

One who gives such information to a sheriff as enables him to capture an escaped prisoner, even if he goes with sheriff and assists as one of the posse, is not entitled to reward for the capture and delivery of prisoner to jail. Joniata County *v.* McDonald, 122 Pa. St. 115, 15 Atl. 696.

18. A reward offered for the arrest and delivery to the sheriff of a certain county of a person accused of crime, cannot be recovered by parties who have merely accompanied such sheriff to another county where he received the prisoner from custody of the sheriff of such county, by whom he had been previously arrested. Adair *v.* Cooper, 25 Tex. 548.

A delivery to jail is not complied with by delivery to magistrate, who delivered to constable, in whose cus-

capture of two is not earned by the capture of one.[19] A conviction of crime of less degree and entirely different from that for which the reward is offered does not entitle plaintiff to recover.[20]

tody he remained until he was tried and acquitted a few days afterwards. Clanton *v.* Young, 11 Rich L. (S. C.) 546.

19. A reward offered for the arrest and conviction of any person implicated in the murder of four persons is not earned by conviction of a person for murder of one of them. Furman *v.* Parke, 21 N. J. L. 310.

The mere giving of information to an officer which leads to the arrest of person subsequently convicted does not comply with a reward offered for each of the parties convicted of a stated crime. McClaughrey *v.* King, 135 Fed. 195.

20. Cornelson *v.* Sun Mut. Ins. Co., 7 La. Ann. 345.

RIGHT OF WAY.—See Eminent Domain.

RIOT AND UNLAWFUL ASSEMBLY.

CROSS-REFERENCES:

Disturbing Assemblies;
Disorderly Conduct.

I. PRELIMINARY STATEMENT.

Riot and unlawful assembly are sometimes made one and the same offense by statute or code, and the common-law offense has been more or less altered and qualified by statutory enactments, so the treatment of the subject herein is in view thereof and subject to such statutory regulations.

II. RIOT.

Distinction Between Riot and Unlawful Assembly. — If the parties assemble in a tumultuous manner and actually execute their purpose with violence, it is riot; but if they merely meet upon a purpose, which, if executed, would make them riotous, and having done

nothing, they separate without carrying out their purpose into effect, it is an unlawful assembly.[1]

1. Presumptions and Burden of Proof. — A. In General. a. *Common-Law Rule.* — Where the common-law rule obtains, the burden rests upon the prosecution to prove the unlawful assembly, and the unlawful act done or attempted.[2]

b. *Statutory Qualifications.* — Under statutes qualifying the common-law rule, the unlawful assembly need not be proved; but if the persons assembled proceed to do an unlawful act, whether it is in fulfilment of an unlawful purpose or not, they are guilty of the offense.[3]

B. Number of Persons. — The joint action of three or more persons is required in some jurisdictions,[4] while in others two or more is sufficient to constitute a riot.[5]

1. Rex *v.* Birt, 5 Car. & P. 154, 24 E. C. L. 252, 4 Black. Comm. 146.

An unlawful assembly is when parties come together with an intent to execute an unlawful act. It is a riot when they move forward to the execution of the design, and a riot when they engage in the execution of it with force and violence, to the terror of the people. People *v.* Judson, 11 Daly (N. Y.) 1.

2. Com. *v.* Gibney, 2 Allen (Mass.) 150; Coney *v.* State, 113 Ga. 1060, 39 S. E. 425; Turner *v.* State, 120 Ga. 850, 48 S. E. 312.

A Riot Is a Compound Offense, so there must not only be an unlawful assembly, but also an unlawful act to be done. Blackwell *v.* State, 30 Tex. App. 672; Reg. *v.* Soley, 2 Salk. (Eng.) 593, 672.

An unlawful assembly is a necessary element of a riot. State *v.* Hughes, 72 N. C. 25.

It must be shown that the defendants assembled to disturb the peace, and being so assembled, did such and such an unlawful act. United States *v.* Fenwick, 4 Cranch C. C. 675, 25 Fed. Cas. No. 15,086.

If the assembly was lawful, as upon summons to assist an officer in execution of lawful process, the subsequent illegal conduct of the persons so assembled, will not make them riotous. State *v.* Stalcup, 23 N. C. 30, 35 Am. Dec. 732.

3. People *v.* Judson, 11 Daly (N. Y.) 1; State *v.* Cribs, Add. (Pa.) 277; State *v.* Blair, 13 Rich. L. (S. C.) 93.

Proof that the defendants being assembled, did an unlawful act, is sufficient. State *v.* Boies, 34 Me. 235.

Under Illinois code, it is not necessary that there should have been an unlawful assemblage, though it was otherwise at common law. Dougherty *v.* People, 5 Ill. 179.

If persons who have lawfully assembled afterwards commit acts of violence in a tumultuous manner, they are guilty of riot. Com. *v.* Runnels, 10 Mass. 518, 6 Am. Dec. 148; Kiphart *v.* State, 42 Ind. 273.

4. *England.* — Rex *v.* Heaps, 2 Salk. 593; Reg. *v.* Soley, 2 Salk. 593.

Indiana. — Hardeback *v.* State, 20 Ind. 459; Turpin *v.* State, 4 Blackf. 72.

Massachusetts. — Com. *v.* Gibney, 2 Allen 150.

Missouri. — State *v.* Kuhlmann, 5 Mo. App. 587.

New York. — People *v.* White, 55 Barb. 606.

Oklahoma. — Simmons *v.* Territory, 11 Okla. 574, 69 Pac. 787.

Pennsylvania. — Com. *v.* Edwards, 1 Ashm. 46.

South Carolina. — State *v.* O'Donald, 1 McCord 532, 10 Am. Dec. 691.

Tennessee. — State *v.* Allison, 3 Yerg. 428.

Texas. — Blackwell *v.* State, 30 Tex. App. 672.

5. *Georgia.* — Coney *v.* State, 113 Ga. 1060, 39 S. E. 425; Stafford *v.* State, 93 Ga. 207, 19 S. E. 50; Dixon *v.* State, 105 Ga. 787, 31 S. E. 750; Prince *v.* State, 30 Ga. 27.

Participation. — It is not necessary to convict the defendants of a riot that they should all have been participating in the act; it is sufficient if they are present and aid, encourage or promote it by words, signs or other acts.[6]

C. Intent or Common Purpose to do the act complained of must be shown by prosecution, either at time of their assembling or afterwards.[7]

Illinois. — Dougherty *v.* People, 5 Ill. 179; Bell *v.* Mallory, 61 Ill. 167; Logg *v.* People, 92 Ill. 598.

Indiana. — Hardeback *v.* State, 10 Ind. 459.

Iowa. — Scott *v.* United States, 1 Morris 142.

Utah. — People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.

Wisconsin. — Aron *v.* City of Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733.

6. State *v.* Mizis (Or.), 85 Pac. 611; United States *v.* Fenwick, 4 Cranch C. C. 675, 25 Fed. Cas. No. 15,086; Green *v.* State, 109 Ga. 536, 35 S. E. 97; Reg. *v.* Sharpe, 3 Cox C. C. (Eng.) 288; State *v.* Straw, 33 Me. 554.

To constitute a person a rioter, it is not necessary that he should be actually engaged in the riot; it is sufficient that he is present, giving countenance, support or acquiescence. Williams *v.* State, 9 Mo. 270.

The acts of one are the acts of all. Bell *v.* Mallory, 61 Ill. 167.

Mere Presence Is Not Sufficient. It is not a presumption of law that every one present at a riot, and not actually aiding in the suppression of riot, is guilty unless he proves his non-interference. State *v.* McBride, 19 Mo. 239.

Persons are not liable merely because they were present and among the mob, even though they had the power of preventing it, unless they in some way encouraged the riot. Reg. *v.* Atkinson, 11 Cox C. C. (Eng.) 330.

Subsequent Appearance on Scene. If a person at some distance during the riot comes up immediately afterwards and does violence upon the same object, he is not guilty of riot. Sloan *v.* State, 9 Ind. 565.

Where one joins others who are already engaged in riot, he is likewise guilty of riot. State *v.* Brazil, Rice (S. C.) 257.

7. Aron *v.* City of Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733; Stafford *v.* State, 93 Ga. 207, 19 S. E. 50; Prince *v.* State, 30 Ga. 27; Dixon *v.* State, 105 Ga. 787, 31 S. E. 750; State *v.* Kempf, 26 Mo. 429.

There must not only be common intent on part of persons to do an unlawful act of violence or some other act in a violent and turbulent manner, but also concert of action in furtherance of such intent. This does not mean, however, that there must necessarily have been a previous plot or conspiracy on part of rioters. Jemley *v.* State, 121 Ga. 346, 49 S. E. 292.

Where acts of defendant do not appear to have been committed in concert with any other person, or as a result of a conspiracy, a conviction is unauthorized. Turner *v.* State, 120 Ga. 850, 48 S. E. 312.

At Time of Meeting. — The unlawful intention, in some jurisdictions, especially those where previous unlawful assembly need not be shown, may be formed after a lawful assembly. United States *v.* McFarland, 1 Cranch C. C. 140, 26 Fed. Cases, No. 15, 674. State *v.* Cole, 2 McCord (S. C.) 1.

There must be concert of action, but it may exist in the execution of the act. It is not necessary that the parties should deliberate beforehand, or interchange views with each other before entering into the execution of their design. People *v.* Judson, 11 Daly (N. Y.) 1.

Where two persons are struck while attempting to separate two others, each being struck by one of the combatants, both combatants acting together, this is *prima facie*

2. Mode of Proof. — A. Presumptive Evidence of Common Purpose. — Positive proof of the common purpose or intent of the rioters is not essential, but the same may be inferred from the circumstances of the act committed.[8]

B. Other Similar Acts. — Evidence of other riotous acts by the defendant at a different place and at a different time, is not admissible, unless it is first shown that the various acts were all parts of one continuous transaction.[9]

C. Circumstances Admissible. — All facts and circumstances tending to show the character of the assemblage, and of its acts, are admissible.[10]

D. Res Gestae. — To show the effect of the riotous acts upon the minds and feelings of the residents, proof may be offered of the declarations of such residents, while the act of the defendants was being done and performed.[11]

E. Testimony of Accomplice. — Testimony of one of the rioters is competent against the others, but his uncorroborated evidence is insufficient to sustain a conviction.[12]

proof of riot on the part of the combatants. Logg *v.* People, 92 Ill. 598.

8. State *v.* Mizis (Or.), 85 Pac. 611 (rehearing *refused* 86 Pac. 361); State *v.* Kempf, 26 Mo. 429; United States *v.* McFarland, 1 Cranch C. C. 140, 26 Fed. Cas. No. 15,674.

The intent is proved in this offense as in every other case, by proving facts from which the jury may fairly presume it. Com. *v.* Gibney, 2 Allen (Mass.) 150.

The jury may infer a previous intent and agreement to do the act from the doing of the act itself, accompanied by declarations of an intent to do it and mutually to assist each other in doing it; and, in the absence of all contradictory evidence, they ought so to infer. United States *v.* Stockwell, 4 Cranch C. C. 671, 27 Fed. Cas. No. 16,405.

Members of Some Secret Society. Testimony to show that the defendants were all members of the same secret society, where it appears that the assault grew out of a matter originating in the society, is competent. State *v.* Johnson, 43 S. C. 123, 20 S. E. 988.

9. Evidence of riotous assemblages in previous years is not admissible, either for the purpose of rebutting a defense that this assemblage was of a peaceful character, by comparing it with former assemblages, or by giving character in the first instance to the assemblage in question. State *v.* Renton, 15 N. H. 169; Com. *v.* Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705.

Disposition to Commit the Offense Charged on part of rioter cannot be shown. State *v.* Renton, 15 N. H. 169.

10. Fear and Fright of Residents. Evidence of the effect upon the minds and the feelings of the residents as to fear for security of life or property occasioned by the unlawful acts, is admissible as to tending to show a breach of the public peace. People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.

Missiles Found on Premises. Sacks of rocks and other missiles, shown by witnesses to have been picked up around the house the morning after the alleged riot, are admissible in evidence. Evidence that at the time of the alleged riotous conduct the wife of prosecutor was so badly frightened that she fainted is admissible. Johnson *v.* State, 124 Ga. 656, 52 S. E. 880.

11. People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.

12. Holman *v.* State, 40 Tex. Crim. 628, 51 S. W. 379.

3. Defense. — A. INTENTIONS IN MEETING. — Witnesses for defendants were not allowed to give evidence of their intentions in meeting, they having testified that they were of the party concerned in the riot.[13]

B. TESTIMONY OF ACCOMPLICE. — The defendant who is first tried may offer the others as witnesses.[14]

III. UNLAWFUL ASSEMBLY.

Substance and Mode of Proof. — The intent with which persons assemble together is the vital part of the charge;[15] and in it consists the very essence of the offense, and this intent can generally only be proved by a consideration of the time, place and circumstances of such assembling.[16]

13. United States *v.* Dunn, 1 C. C. 165, 25 Fed. Cas. No. 15,007.

14. Sloan *v.* State, 9 Ind. 565.

15. Dutcher *v.* State, 16 Neb. 30, 19 N. W. 612.

Under statute providing that whenever three or more persons assembled attempt or threaten any act tending toward a breach of the peace or any injury to person or property, such an assembly is unlawful. A meeting where speeches denounce the police officers and threaten with death those who had enforced the law against anarchists and call upon those assembled to resist the authorities, is an unlawful assembly. People *v.* Most, 55 Hun 609, 8 N. Y. Supp. 625, *affirmed* 128 N. Y. 108, 27 N. E. 970, 26 Am. St. Rep. 458.

An assembly of persons attended with circumstances calculated to excite alarm is an unlawful assembly. Reg. *v.* Neale, 9 Car. & P. 431, 38 E. C. L. 176.

On trial for an unlawful assembly, which, the accomplice testimony showed, consisted of an assembly or meeting for the purpose of running Mexican laborers out of the neighborhood, and to post notices on the premises of certain persons employing Mexicans, at which meeting the defendant was present, *held*, the bare fact that "Whitecap notices" were posted, without any evidence as to the identity of the parties posting them, is not sufficient corroboration of the accomplice testimony as to the object and purpose of the assembly. Holman *v.* State, 40 Tex. Crim. 628, 51 S. W. 379.

An assembly may be unlawful whether or not there is subsequent commission of riot or other unlawful act. Rex. *v.* Birt, 5 Car. & P. 154, 24 E. C. L. 252; Rex. *v.* Woolcock, 5 Car. & P. 516, 24 E. C. L. 434; Reg. *v.* McNaughten, 14 Cox C. C. (Eng.) 576.

16. Dutcher *v.* State, 16 Neb. 30, 19 N. W. 612.

RIPARIAN RIGHTS.—See Waters and Watercourses.

RIVERS.—See Waters and Watercourses.

ROADS.—See Highways.

ROBBERY.

By A. P. Rittenhouse.

I. BURDEN OF PROOF AND PRESUMPTIONS.

1. Burden on the State. — On a trial for robbery, the burden is on the state to prove the necessary elements of the crime, and the guilt of the defendant, beyond all reasonable doubt.[1]

2. Various Presumptions. — The presumption of guilt arising from the recent possession of stolen property, applies in robbery as well as in larceny.[2] It is presumed that the victim of a robbery is

1. *United States.* — Glover *v.* United States, 147 Fed. 426, 77 C. C. A. 450.

Kentucky. — Glass *v.* Com., 6 Bush 436.

Missouri. — State *v.* Graves, 185 Mo. 713, 84 S. W. 904; State *v.* Adair, 160 Mo. 391, 61 S. W. 187.

Ohio. — Morgan *v.* State, 48 Ohio St. 371, 27 N. E. 710.

Oklahoma. — Axhelm *v.* United States, 9 Okla. 321, 60 Pac. 98.

Texas. — Walker *v.* State (Tex. Crim.), 96 S. W. 35; Ford *v.* State, 41 Tex. Crim. 1, 51 S. W. 935, 53 S. W. 869.

Vermont. — State *v.* Totten, 72 Vt. 73, 47 Atl. 105.

Virginia. — Thompson *v.* Com., 88 Va. 45, 13 S. E. 304.

On a trial for robbery the state is not required to prove the defendant's guilt beyond all doubt, but beyond all reasonable doubt, not a mere speculation or possibility. Thompson *v.* State, 106 Ala. 67, 17 So. 512.

Burden Never Shifts to Defendant. On a trial for robbery where the defence is alibi, the burden of proof that the defendant was present at the time and place alleged is on the prosecution, and never shifts to the defendant. Glover *v.* United States, 147 Fed. 426, 77 C. C. A. 450.

2. State *v.* Wasson, 126 Iowa 320, 101 N. W. 1125; State *v.* Balch, 136 Mo. 103, 37 S. W. 808.

Where the evidence shows that the property taken by the robbery is found in possession of the defendant the next morning after it was taken, and the defendant's explanations of such possession are contradictory, it affords a strong presumption of defendant's guilt. State *v.* Harris, 97 Iowa 407, 66 N. W. 728.

Upon a trial for robbery, it is competent for the state to bring before the jury as fruits of the robbery, a lot of money which was shown to have been buried on the premises of one of the defendants;

the owner of the money or property taken, by reason of his possession of it.[3] The law presumes a felonious intent from a violent taking of property.[4] Fear is presumed where the evidence shows a just ground for it.[5]

II. THE CORPUS DELICTI.

1. Facts To Be Proved. — To establish the crime of robbery, the evidence must show that personal property of the victim was taken from his person, against his will by force and violence, or by putting him in fear, with felonious intent.[6]

2. Taking From the Person. — To prove robbery the evidence must show that the victim's property was taken directly from his person, or in his presence, and from under his immediate personal control.[7]

and where it had been located by the testimony of an accomplice, and identified by him. Thompson *v.* State, 35 Tex. Crim. 511, 34 S. W. 629.

3. People *v.* Oldham, 111 Cal. 648, 44 Pac. 312; Howard *v.* People, 193 Ill. 615, 61 N. C. 1016; Bow *v.* People, 160 Ill. 438, 43 N. E. 593; State *v.* Howard, 30 Mont. 518, 77 Pac. 50.

Proof of possession of the property by the person robbed at the time of the commission of the robbery is sufficient evidence of ownership in him. State *v.* Montgomery, 181 Mo. 19, 29, 79 S. W. 693, 67 L. R. A. 343.

The person from whom money or property is taken by robbery, is presumed by law to be the owner thereof by reason of his possession. Brooks *v.* People, 49 N. Y. 436, 10 Am. Rep. 398.

4. On a trial for robbery, when the fact of violence and the fact of taking have been proved, the law presumes a felonious intent. Howard *v.* People, 193 Ill. 615, 61 N. E. 1016.

5. Actual fear need not be strictly proved. If it be shown that the taking was done under such circumstances as would be likely to cause in the mind of a man of ordinary experience such apprehension of danger to his person as to induce him to part with his property, fear will be presumed. Long *v.* State, 12 Ga. 293.

6. The Queen *v.* Edwards, 1 Cox C. C. (Eng.) 32, Rex *v.* Gnosil, 1 Carr. & P. 304, 11 E. C. L. 400; Stewards' Case, 2 East P. C. (Eng.) 702; Plunket Horner's Case, 2 East P. C. (Eng.) 703; James Lapier's Case, 2 East P. C. (Eng.) 708; State *v.* Graves, 185 Mo. 713, 84 S. W. 904; State *v.* Adair, 160 Mo. 391, 61 S. W. 187.

Degree of Force and Fear. — The evidence must show that the power of the owner to retain possession of the property taken was overcome by the robber, either by actual violence physically applied, or by putting him in such fear as to overcome his will. Hall *v.* People, 171 Ill. 540, 49 N. E. 495.

Insufficient Facts. — In Rex *v.* Fallows, 5 Car. & P. (Eng.) 508, 24 E. C. L. 431, the evidence showed that the prosecutor had a bundle in his own personal custody at a beer house; that when he came out he gave it to his brother who was with him to carry it for him, and while they were on the road, the prisoners assaulted the prosecutor whereupon his brother laid down the bundle in the road and ran to his assistance, and one of the prisoners then took up the bundle and made off with it. This was held insufficient to establish robbery, but sufficient to prove simple larceny.

7. *Alabama.* — Thomas *v.* State, 91 Ala. 34, 9 So. 81.

Arkansas. — Young *v.* State, 50 Ark. 501, 8 S. W. 828; Clary *v.* State, 33 Ark. 561.

Georgia. — Crawford *v.* State, 90

3. Against Owner's Consent. — To establish the fact of robbery, it must appear from the evidence, that the property was taken against the consent of the owner.[8]

Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242.

Illinois. — O'Donnell *v.* People, 224 Ill. 218, 79 N. E. 639; Burke *v.* People, 148 Ill. 70, 35 N. E. 376.

Kentucky. — Glass *v.* Com., 6 Bush 436.

Missouri. — State *v.* Lawler, 130 Mo. 366, 32 S. W. 979, 51 Am. St. Rep. 575.

Nebraska. — Hill *v.* State, 42 Neb. 503, 60 N. W. 916; Stevens *v.* State, 19 Neb. 647, 28 N. W. 304.

New York. — Brooks *v.* People, 49 N. Y. 436, 10 Am. Rep. 398.

Tennessee. — Crews & Crenshaw, *v.* State, 3 Coldw. 350.

To constitute robbery, the evidence must show that the taking was from the person, not necessarily from actual contact with the body, but from under the personal protection of the injured person. The person offended against must have either the manucaption of the property, or it must at least be in his presence, and under his direct physical personal control. Hill *v.* State (Ala.), 40 So. 654.

In a case of robbery it is not necessary to prove that the property was actually taken from the person of the owner, but it is sufficient to show that it was taken in his presence. In Clements *v.* State, 84 Ga. 660, 11 S. E. 505, 20 Am. St. Rep. 385, evidence showed that the prosecutor was in his smoke-house within fifteen steps of the dwelling house from which the property was taken. He was found by the defendants in this smokehouse, and was prevented by threats and intimidation from leaving the smokehouse and going into his dwelling house, and he was so kept in the smokehouse long enough to enable some of the defendants to enter the dwelling house and take the property charged to have been stolen.

In State *v.* Lamb, 141 Mo. 298, 42 S. W. 827, the indictment charged robbery from the person of one Peterson. The evidence showed that the accused and another person suddenly entered the saloon of Peterson, and the accused said to Peterson, "We want your money and we want it d — d quick," at the same time both leveled revolvers at Peterson's head, whereupon he, being alarmed, said, "Go back and help yourselves," and while the other robber kept his pistol leveled at Peterson's head, the accused went behind the bar, and took the money from the till. *Held,* that there was no variance between the indictment and the proof.

Upon a trial for robbery it is not necessary for the state to show that the property taken was actually taken from the person of the complaining witness; it is sufficient if it be shown that the property was in his presence, and under his immediate control, and he was put in fear by the defendant, and while the property was so in his presence and under his immediate control, and he laboring under such fear, the property was taken by the defendant. Turner *v.* State, 1 Ohio St. 422.

8. Crawford *v.* State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242; Hall *v.* People, 171 Ill. 540, 49 N. E. 495; Com. *v.* Clifford, 8 Cush. (Mass.) 215; State *v.* Graves, 185 Mo. 713, 84 S. W. 904; State *v.* Adair, 160 Mo. 391, 61 S. W. 187; Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460; Williams *v.* State, 37 Tex. Crim. 147, 38 S. W. 999.

In a prosecution for robbery it is not essential that the owner of the property taken should testify in so many words that he did not consent to the taking, but if his evidence as a whole reveals that no consent was obtained from him, and that the taking was wrongful and felonious, the requirements of the law are satisfied. Trimble *v.* State, 61 Neb. 604, 85 N. W. 844.

In Tones *v.* State (Tex. Crim), 88 S. W. 217, the evidence showed that the prosecuting witness believ-

4. Manner of Taking. — To warrant a conviction for robbery, the evidence must show that the taking of the property from the owner, was accomplished either by physical force, or by putting him in fear.[9]

A. Nature and Extent of Force. — As a general rule, where robbery is charged to have been committed by force, the evidence must show a degree of force greater than that which was merely necessary to transfer the property from the possession of the victim, to that of the robber.[10] The rule has been held to be otherwise

ing there were robbers in a certain town, went there at night with marked money in his pockets for the purpose of detecting them, and acted in a drunken manner on the streets, and was arrested for drunkenness by two police officers, who took him to jail, held him up against the wall, held his arms up and searched him, and took the marked money from his pockets, and kept it for their own use. *Held,* that this showed that the money was taken from the prosecutor without his consent.

9. *Georgia.* — Smith *v.* State, 117 Ga. 320, 43 S. E. 736, 97 Am. St. Rep. 165.

Illinois. — O'Donnell *v.* People, 224 Ill. 218, 225, 79 N. E. 639; Steward *v.* People, 224 Ill. 434, 443, 79 N. E. 636; Hall *v.* People, 171 Ill. 540, 49 N. E. 495; Burke *v.* People, 148 Ill. 70, 35 N. E. 376.

Indiana. — Shinn *v.* State, 64 Ind. 13, 31 Am. Rep. 110; Brennon *v.* State, 25 Ind. 403.

Iowa. — State *v.* Miller, 83 Iowa 291, 49 N. W. 90.

Kentucky. — Com. *v.* Titsworth, 98 S. W. 1028; Jones *v.* Com., 115 Ky. 592, 74 S. W. 263, 103 Am. St. Rep. 340; Blanton *v.* Com., 22 Ky. L. Rep. 515, 58 S. W. 422; Jones *v.* Com., 22 Ky. L. Rep. 388, 57 S. W. 472; Williams Com., 20 Ky. L. Rep. 1850, 50 S. W. 240; Jones *v.* Com., 112 Ky. 689, 66 S. W. 633, 99 Am. St. Rep. 330, 57 L. R. A. 432.

Massachusetts. — Com. *v.* Cahill, 12 Allen 540.

Missouri. — State *v.* Lawler, 130 Mo. 366, 32 S. W. 979, 51 Am. St. Rep. 575.

Montana. — State *v.* Rodgers, 21 Mont. 143, 53 Pac. 97.

New Jersey. — State *v.* Donahue, 59 Atl. 12.

North Carolina. — State *v.* John, 50 N. C. (5 Jones L.) 163, 69 Am. Dec. 777.

Pennsylvania. — Com. *v.* Snelling, 4 Binn. 379.

Tennessee. — Crews & Crenshaw *v.* State, 3 Coldw. 350.

Texas. — Gallagher *v.* State, 34 Tex. Crim. 306, 30 S. W. 557; Pendy *v.* State, 34 Tex. Crim. 643, 31 S. W. 647; Johnson *v.* State, 35 Tex. Crim. 140, 32 S. W. 537.

Absence of Force and Fear. — The charge of robbery cannot be sustained by evidence that the defendants participated in a search of premises and seizures made under a warrant which is technically insufficient, and that they acted in excess of the authority which the warrant gave. *In re* Lewis, 83 Fed. 159.

10. *England.* — The Queen *v.* Edwards, 1 Cox C. C. 32; Morris Case, 1 Leach 335.

Alabama. — Jackson & Dean *v.* State, 69 Ala. 249.

Arkansas. — Bowlin *v.* State, 72 Ark. 530, 81 S. W. 838; Routt *v.* State, 61 Ark. 594, 34 S. W. 262.

Florida. — Colby *v.* State, 35 So. 139.

Georgia. — Morris *v.* State, 125 Ga. 36, 53 S. E. 564.

Indiana. — Brennon *v.* State, 25 Ind. 403; Seymour *v.* State, 15 Ind. 288.

Kansas. — State *v.* Alexander, 66 Kan. 726, 72 Pac. 227.

Massachusetts. — Com. *v.* Ordway, 12 Cush. 270.

Missouri. — State *v.* Sommers, 12 Mo. App. 374.

North Carolina. — State *v.* John, 50 N. C. (5 Jones L.) 163, 69 Am. Dec. 777.

in Iowa;[11] also in Georgia; in the latter state by reason of a statute.[12]

Ohio. — Hanson *v.* State, 43 Ohio St. 376, 1 N. E. 136.

Texas. — Johnson *v.* State, 35 Tex. Crim. 140, 32 S. W. 537.

Evidence showing the nature and extent of the violence inflicted upon the person of the prosecutor by the robber is admissible. Brown *v.* State, 120 Ala. 342, 25 So. 182.

Sudden Snatching. — On a trial for robbery, if the evidence shows a mere taking unawares, or a sudden snatching of a thing from another, it may not establish robbery, but if the evidence further shows that the snatching was accompanied with violence, or such demonstrations or threats as to create a reasonable apprehension of bodily injury or created resistance however slight, the offence is established. Evans *v.* State, 80 Ala. 4.

In Snyder *v.* Com., 21 Ky. L. Rep. 1538, 55 S. W. 679, it was held that while to pick one's pocket without the use of some force or violence, or putting in fear, is not robbery, yet if the evidence shows that the victim was pushed or shoved about by the pickpocket, or his associates, for the purpose of diverting his attention, and the crime is then accomplished, it is robbery, even if the victim is at the time unaware of his loss.

In Perry *v.* Com., 27 Ky. L. Rep. 512, 85 S. W. 732, the evidence showed that J. S. Crowder was walking along a street in Maysville, Kentucky, with one or two companions, and that the accused and another joined them, and while thus moving along, the accused snatched from the person of Crowder, his watch which was in his pocket, and attached to his clothing by a chain; that the watch was pulled from the fob, and then with sufficient force to break the chain, it was taken from the person of its owner. *Held,* to show sufficient force to constitute robbery.

In State *v.* McCune, 5 R. I. 60, 70 Am. Dec. 176, the evidence showed that the prisoner was walking in a public street with a stranger by night, with the expressed purpose of guiding the stranger to a livery stable, when suddenly the prisoner seized the watch of the stranger which was attached to a silk ribbon guard half an inch wide about his neck, and exclaiming "Damn you, I will have your watch," broke the watch guard, leaving part of it about the stranger's neck and fled with the watch, pursued by the stranger. *Held,* to constitute robbery, the court saying: "The expressed determination at the time of the felonious intent, accompanied by the degree of force requisite to carry the intent into effect, makes this a clear case of a taking by open violence, as distinguished from a secret taking, or a mere snatching by surprise from the hand of another."

Injury to Person. — If the evidence shows that any injury was done to the person of the party robbed, it will be sufficient. In James Lapier's Case, 2 East P. C. (Eng.) 708, the evidence showed that the prisoner had torn the earring of a woman from her ear as she came out of an opera house, and that thereby her ear was lacerated. This was held sufficient proof of force to warrant a conviction for robbery.

On a trial for robbery the complaining witness testified, "The handbag was taken with such force that it bruised my arm, and that it was lame for several days." *Held,* that sufficient force was shown to constitute robbery. Klein *v.* People, 113 Ill. 596.

11. State *v.* Carr, 43 Iowa 418.

12. Hickey *v.* State, 125 Ga. 145, 53 S. E. 1026.

In Georgia, by Statute Acts 1903, p. 43, robbery may be committed by sudden snatching, taking or carrying away any money, goods, chattels, or anything of value from the owner or person in possession or control thereof, without the consent of the owner or person in possession or control thereof. Under this law it was held that no force is necessary to be proved beyond the effort of the robber to transfer the property taken from the owner to his own posses-

B. Time of the Violence. — The evidence must show that the force was used at or prior to the taking of the property.[13]

C. Fear of Bodily Injury. — To warrant a conviction for robbery by putting in fear of bodily injury, the evidence must show such circumstances of terror or intimidation — such threatening by word, jesture or manner—as in common experience are likely to create an apprehension of danger in the mind of a person of ordinary courage, and induce him to part with his property, for the safety of his person.[14]

sion. Pride *v.* State, 125 Ga. 750, 54 S. E. 686.

13. *Alabama.* — Thomas *v.* State, 91 Ala. 34. 9 So. 81; James *v.* State, 53 Ala. 380, 388.

Arkansas. — Clary *v.* State, 33 Ark. 561; Routt *v.* State, 61 Ark. 594, 34 S. W. 262.

Indiana. — Shinn *v.* State, 64 Ind. 13, 31 Am. Rep. 110.

Kentucky. — Jones *v.* Com., 115 Ky. 592, 74 S. W. 263, 103 Am. St. Rep. 340.

Missouri. — State *v.* Willis, 16 Mo. App. 553.

North Carolina. — State *v.* John, 50 N. C. (5 Jones L.) 163, 69 Am. Dec. 777.

Where it is charged that the robbery was accomplished by violence to the person, it is not necessary to prove that the violence preceded the taking of the property; it is sufficient if it appear that the violence and the taking were contemporaneous. State *v.* Miller, 53 Kan. 324, 36 Pac. 751.

14. Simons *v.* State (Fla.), 25 So. 881; Jones *v.* Com., 115 Ky. 592, 74 S. W. 263, 103 Am. St. Rep. 340; State *v.* Howerton, 58 Mo. 581; Tones *v.* State (Tex. Crim.), 88 S. W. 217.

Upon an indictment for a robbery it is always competent to show the effect of the assault upon the person assaulted. Com. *v.* Flynn, 165 Mass. 153, 42 N. E. 562.

Where the robbery is charged to have been accomplished by putting in fear, the evidence must show menace of a kind that would excite reasonable apprehension of danger in a person of ordinary courage. Davis *v.* Com., 21 Ky. L. Rep. 1295, 54 S. W. 959.

Upon a trial for robbery by which a satchel containing money was taken, the prosecuting witness after detailing the circumstances of the occurrence, stated that he gave up the satchel because he believed the robbers would shoot him if he did not. *Held*, that this was competent evidence, the court saying: "Whilst it is conceded that, as a general rule, witnesses must speak as to facts, and cannot be permitted to give their beliefs or opinions, yet it is not perceived that coming as it did and in connection with the facts testified to, there was any material error in admitting the testimony. We are of opinion it was competent for the witness to state the effect the acts and conduct of the parties had upon him at the time." Dill *v.* State, 6 Tex. App. 113.

Actual fear need not be strictly and precisely proven, for the law in *odium spoliatoris* will presume fear when there appears to be just ground for it. Long *v.* State, 12 Ga. 293.

In Hope *v.* People, 83 N. Y. 418, 425, 38 Am. Rep. 460, the defendant Hope was charged with feloniously assaulting one Louis Werckle, and robbing and taking from him a key of the value of one dollar. The evidence showed that Werckle was the janitor of a bank, and that several persons entered his room masked, while he was in bed, and throttled, suffocated and handcuffed him, and by putting a pistol to his head, compelled him to disclose the combination of the lock of the bank safe, and put him in such a state of terror as to render him incapable of resistance. That they then took the keys from a table in his presence, one of them being the key to the street door of the bank. That hav-

D. Threats of Prosecution. — Where threats of prosecution are relied on to establish the fact of putting in fear, as a constituent element of robbery, the evidence must show that the property was obtained from the owner by threatening to accuse him of an infamous crime against nature.[15]

ing thus possessed themselves of the keys, they carried them off, and never returned them. *Held,* that this evidence was ample to justify the jury in finding a felonious taking of the keys from Wreckle against his will and in his presence, by violence to his person, and by putting him in fear of immediate injury to his person, and establishes the charge of robbery.

In State *v.* Sanders (N. D.), 103 N. W. 419, the evidence showed that the defendant pointed a pistol at the complaining witness, and told him to hold up his hands while defendant's confederate took from the pockets of their victim various articles of personal property. It was claimed that this proof of assault with a pistol was inadmissible because it tended to show a robbery accomplished by force, and not by fear as alleged in the information. The court said: "There is no merit in the point. The evidence shows that the taking was accomplished by both force and fear. It is clearly no variance when the proof shows more than it was necessary to prove in order to sustain the allegations."

In Williams *v.* State (Tex. Crim.), 55 S. W. 500, the evidence showed that one Miller induced the injured party to accompany him to a certain depot, and while on the way the defendant intercepted them, and accused them of having counterfeit money, and demanded a surrender of the money; that the defendant used a six shooter in enforcing his demand and personated an officer, and that Miller and the injured party complied with this demand. *Held,* sufficient to sustain a conviction for robbery.

In McCormick *v.* State, 26 Tex. App. 678, 9 S. W. 277, the proof showed that the defendant at night, with his hat pulled down, and his collar turned up, met the injured party and summoned him to throw up his hands, stating that he was an officer of the law, and would arrest the injured party for being drunk and noisy; the latter being much alarmed threw up his hands and a roll of money was taken from his pocket by the defendant. *Held,* that this proof sustained an indictment for robbery by putting in fear.

Fear Previously Excited. — In Ashworth *v.* State, 31 Tex. Crim. 419, 20 S. W. 982, the evidence showed that the defendant was not actually present when the goods were taken from the complaining witness, but that the goods were delivered because of fear operating on the mind of the owner at the time of the delivery, and that this fear was caused by the acts, conduct, and threats of the defendant, and that the goods were received by those acting with him, in accordance with the original design of these parties and the defendant. *Held,* that the evidence was sufficient to support a conviction for robbery, the court saying: "That defendant was at a short distance from the store at the very moment the property was taken, and not actually present at the scene of the robbery, does not relieve him of the consequences of the crime; nor was it essential to his conviction that the goods should have been delivered at the time of his demand. It is sufficient if the cause produced by defendant inducing the delivery of the goods was operative upon the mind of the injured party at the time of such delivery, it being shown that defendant had not abandoned the enterprise, and was still acting with his co-conspirators."

15. *England.* — Rex *v.* Edwards, 5 Car. & P. 518, 24 E. C. L. 435.

Alabama. — Thomas *v.* State, 91 Ala. 34, 9 So. 81.

Arkansas. — Routt *v.* State, 61 Ark. 594, 34 S. W. 262.

Florida. — Simmons *v.* State, 25 So. 881.

5. Felonious Intent. — In order to prove the crime of robbery, the evidence must show that the property was taken with intent to deprive the owner of it, and without any honest claim to it on the part of the taker.[16]

Georgia. — Bussey *v.* State, 71 Ga. 100, 51 Am. Rep. 256; Long *v.* State, 12 Ga. 293.

Illinois. — Hall *v.* People, 171 Ill. 540, 49 N. E. 495.

Indiana. — Shinn *v.* State, 64 Ind. 13, 31 Am. Rep. 110.

North Carolina. — State *v.* Deal, 64 N. C. (Phil. Eq.) 270.

Evidence that money was obtained by taxing the prosecuting witness with the commission of an infamous crime against nature, and threatening to expose him to public reprobation and contempt is sufficient to prove robbery. Thompson *v.* State, 61 Neb. 210, 85 N. W. 62, 87 Am. St. Rep. 453.

In Britt *v.* State, 7 Humph. (Tenn.) 45, the prosecutor swore that he gave up the money to the prisoner, solely on the ground of prisoner's threat to prosecute him for having passed to prisoner a five dollar note which prisoner alleged was a counterfeit, and that he was not alarmed or afraid of violence at any time while with the prisoner, or apprehended bodily danger or violence to his person. *Held*, to not constitute robbery, the court saying: "It has been settled upon much consideration by the judges of England in more than one case, that threatening to prosecute an innocent man for any crime whatever, except only the *crimen innominatum*, and by the fear arising from such threat, to compel the surrender of money or property, does not amount to robbery."

In Rippetoe *v.* People, 172 Ill. 173, 50 N. E. 166, the evidence showed that the accused discovered his wife and the prosecuting witness in a compromising situation, and thereupon assaulted him and demanded that he fix the matter up; that afterwards on the same night, but unconnected with the assault, the prosecuting witness gave his promissory notes for a considerable sum, payable to the accused, to settle the matter. *Held*, that this evidence did not establish the crime of robbery.

16. *California.* — People *v.* Vice, 21 Cal. 344.

Georgia. — Crawford *v.* State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242; Long *v.* State, 12 Ga. 293, 321.

Iowa. — State *v.* Wasson, 126 Iowa 320, 101 N. W. 1125; State *v.* Hollyway, 41 Iowa 200, 20 Am. Rep. 586.

Kentucky. — Triplett *v.* Com., 28 Ky. L. Rep. 974, 91 S. W. 281; Sikes *v.* Com., 17 Ky. L. Rep. 1353, 34 S. W. 902.

Mississippi. — Woods *v.* State, 6 So. 207.

Missouri. — State *v.* Bateman, 95 S. W. 413; State *v.* Graves, 185 Mo. 713, 84 S. W. 904; State *v.* Adair, 160 Mo. 391, 61 S. W. 187; State *v.* McLain, 159 Mo. 340, 60 S. W. 736; State *v.* Woodward, 131 Mo. 369, 33 S. W. 14; State *v.* O'Connor, 105 Mo. 121, 16 S. W. 510.

Montana. — State *v.* Rodgers, 21 Mont. 143, 53 Pac. 97; State *v.* Oliver, 20 Mont. 318, 50 Pac. 1018.

Nebraska. — Stevens *v.* State, 19 Neb. 647, 28 N. W. 304.

North Carolina. — State *v.* Sowls, 61 N. C. (Phil. L.) 151.

North Dakota.—Axhelm *v.* United States, 9 Okla. 321, 60 Pac. 98.

Pennsylvania. — Com. *v.* White, 133 Pa. St. 182, 19 Atl. 350, 19 Am. St. Rep. 628; Com. *v.* Snelling, 4 Binn. 379.

Utah. — People *v.* Hughes, 11 Utah 100, 39 Pac. 492.

There can be no robbery without an intent to steal. The *animus furandi* is as much involved in the commission of robbery as in the commission of a larceny, and hence it is as necessary to be alleged and proven in the one case as in the other. Sledge *v.* State, 99 Ga. 648, 26 S. E. 756.

In State *v.* Carroll, 160 Mo. 368, 60 S. W. 1087, the evidence showed that one Sheehy went to a saloon and stayed an hour or so drinking and shaking dice for drinks till his

III. THE PROPERTY TAKEN.

1. Description and Value. — It is necessary in a trial for robbery for the evidence to show that the property taken was of the kind alleged in the indictment,[17] and that it was of some value, but no specific value need be proved.[18]

bill for the same amounted to sixty cents, which he refused to pay, and was ordered out by the bartender. After he went out the barkeeper said to the defendant, who was the porter in the saloon, "Go and get old man Sheehy, he owes me sixty cents," and thereupon the defendant and the bartender went out and seized Sheehy and scuffled with him and took from his person two dollars, when an officer came up and arrested the bartender and the defendant, both of whom broke loose from the officer and ran, when passing an alley; and defendant was recaptured after being shot. *Held*, sufficient to warrant a verdict of guilty against the defendant, that the felonious intent was established.

In Brown *v.* State, 28 Ark. 126, the evidence showed that the defendant took the property in a violent manner, but in the presence of others and under a claim of ownership. *Held*, to fall far short of proof of robbery.

17. Coffelt *v.* State, 27 Tex. App. 608, 11 S. W. 639, 11 Am. St. Rep. 205.

In State *v.* Helvin, 65 Iowa 289, 21 N. W. 645, the defendant was charged with having robbed one, Wagner, of certain gold coins and silver coins. The prosecuting witness testified that he was robbed of $245, in gold, mostly twenty dollar gold pieces, but partly in ten and five dollar pieces. He also testified that he was robbed of $45, or $50 in silver dollars. This evidence was held sufficient, the court saying: "The fair meaning of the testimony is, that the witness was robbed of gold and silver coins of the denomination and value above mentioned."

Where the subject of the robbery charged is money, the charge is supported by proof that it was the ordinary circulating medium of the country, called greenbacks, that was taken. State *v.* Carr, 43 Iowa 418.

An information charging the taking of a lady's gold watch and chain is supported by evidence which shows that the watch taken was a lady's gold filled case watch. In such a case the variance between the allegation and the proof is wholly unimportant. State *v.* Alexander, 66 Kan. 726, 72 Pac. 227.

In State *v.* Ready, 44 Kan. 697, 700, 26 Pac. 58, the defendant was charged with robbing the prosecuting witness of "thirty-five dollars lawful money of the United States." At the trial the prosecuting witness testified that the money taken from him consisted of three $10 bills, and $5 in silver. *Held*, that one was the equivalent of the other, and there was no variance between the pleading and the proof.

Where an information charges that a number of articles was taken by the robbery, it is not necessary to prove the taking of all of them; proof of the taking of any of them is sufficient. State *v.* Sanders (N. D.), 103 N. W. 419.

18. Rex *v.* Bingley, 5 Car. & P. 602, 24 E. C. L. 474; Clary *v.* State, 33 Ark. 561; McDow *v.* State, 110 Ga. 293, 34 S. E. 1019; Burke *v.* People, 148 Ill. 70, 35 N. E. 376; Com. *v.* Cahill, 12 Allen (Mass.) 540.

It must be proved that some property was taken, but the value of it is immaterial. No specific pecuniary value need be proven. James *v.* State, 53 Ala. 380.

It is not necessary to prove that the property taken by the robbery had any specific pecuniary value; if the evidence shows that it is not worthless, that it is not wholly unfit for use, or that the owner kept and preserved it as of value to him, it is sufficient to show it to be the subject of robbery. Jackson *v.* State, 69 Ala. 249.

In McCarty *v.* State, 127 Ind. 223, 26 N. E. 665, the defendant was charged with robbing the prosecuting

2. Ownership. — Evidence that the complaining witness was the apparent owner, and in possession of property taken from him by robbery, is sufficient proof of ownership.[19] If ownership be alleged in a third person it must be proven.[20]

IV. THE RES GESTAE.

1. General Rule. — In a prosecution for robbery, everything said and done by the prosecuting witness and the accused, at the time when the alleged offense took place, is competent evidence as being a part of the *res gestae*.[21]

witness of ten dollars in money. The proof was that it was ten dollars in money. *Held*, that no proof was necessary as to its value, money being the measure of values.

19. State *v.* Hobgood, 46 La. Ann. 855, 15 So. 406; Williams *v.* State, 37 Tex. Crim. 147, 38 S. W. 999.

In People *v.* Oldham, 111 Cal. 648, 44 Pac. 312, the defendant was charged with robbing Wells, Fargo & Co., a corporation, of boxes containing about $1000. The evidence showed that the money was in the hands of one Hart, as the agent and servant of Wells, Fargo & Co., and that he as such agent and servant gave it into the possession of a stage driver to be carried by him to certain points on the road, and while so in transit it was taken. It was claimed that this did not show the ownership of the money to have been in Wells, Fargo & Co. *Held*, that this contention was not well founded, the court saying: "The lawful possession of the money by Hart was the possession of Wells, Fargo & Co., and likewise the actual lawful possession of it by the driver of the stage, was the possession of the company."

Where a defendant is charged with robbery by the taking of a certain sum of money belonging to the prosecuting witness, evidence that part of the money taken belonged to him is sufficient proof of title to sustain a conviction. State *v.* Smith, 40 Wash. 615, 82 Pac. 918.

20. Where an indictment for robbery charges that the property taken from the person of the prosecutor in fact belonged to a third person, it is essential that the case should prove the fact as charged, and a failure to do this constitutes a fatal variance between the *allegata* and the *probata*. Staples *v.* State, 114 Ga. 256, 40 S. E. 264.

21. People *v.* Piggott, 126 Cal. 509, 59 Pac. 31; People *v.* Nelson, 85 Cal. 421, 24 Pac. 1006; Tracey *v.* State, 46 Neb. 361, 64 N. W. 1069.

In People *v.* Linares, 142 Cal. 17, 75 Pac. 308, the evidence showed that the following occurrences took place before the particular moment of the alleged robbery. The complaining witness with three other men went in a wagon to a saloon where the defendant then was, and had dinner there. The complaining witness in paying for his dinner, or in treating the crowd, exhibited a purse containing a considerable amount of money in gold coin and the defendant put his hand on the purse and said: "Look at that damn Jew, how much money he has got." Soon afterwards the complaining witness put some articles in his wagon and started away but soon came back, and the parties in the saloon took some things from his wagon and put them back in the saloon, and the defendant scuffled with the complaining witness and struck him violently, causing blood to flow freely, and then complaining witness again started away in his wagon, but was followed by the defendant on horseback for nearly a half mile when he was overtaken, and compelled by the defendant at the point of a pistol to turn his team and return to the saloon where defendant tied the horses to a hitching post in front of the saloon. At this time the alleged robbery was accomplished by the defendant

2. Subsequent Declarations of the Victim. — Exclamations and declarations of the person robbed, in reference to the occurrence, made immediately after it took place, and so connected with it as to be the natural outgrowth of it, are admissible in evidence as part of the *res gestae*.[22] But when there is nothing to show that

knocking the complaining witness down helpless in the wagon, and taking his purse and money. *Held*, that said ocurrences constituted a series of events occurring so shortly before the very moment of the alleged robbery, and leading so continuously up to it that they were admissible as part of the transaction.

In State *v.* Howard, 30 Mont. 518, 77 Pac. 50, the evidence showed that the defendant, together with one Cole, had entered into a conspiracy to hold up the Northern Pacific train near Homestake in Silver Bow county, and that accordingly they stopped the train about a mile from Homestake, and attempted to blow open the safe in the baggage car. While they were proceeding in furtherance of this conspiracy the defendant after having intimidated Bell, a mail clerk, by the use of a revolver, reached into Bell's pocket, and took therefrom the sum of 75 cents. The taking of the 75 cents was the particular crime charged against the defendant. At the trial the state was permitted to show the details of the entire transaction, commencing with the formation of the conspiracy, and following it out until the train was again allowed to go upon its way. This evidence was held to be clearly admissible.

On a trial for robbery of a woman, *held*, that it was competent for the state to prove that at the same time and place, and in the same transaction, the defendant ravished another woman who had no money to give him, the two women being together when attacked, and defendant using his pistol in both instances to enforce his demands. Harris *v.* State, 32 Tex. Crim. 279, 22 S. W. 1037.

In Davis *v.* State (Tex. Crim.), 23 S. W. 684, the court admitted evidence showing that the defendant slapped the assaulted party, choked her down and committed rape upon her, and that immediately upon the completion of rape he forcibly took fourteen dollars from her. *Held*, admissible, the court saying: "The testimony was *res gestae*, and so closely connected and interwoven with the robbery that, if excluded, an intelligent relation of the facts establishing such robbery could not be made."

Upon a trial for robbery the declarations of the defendant made a quarter of a mile distant from the scene of the robbery, and ten minutes after its occurrence, was held inadmissible as not being a part of the *res gestae*. Jones *v.* Com., 86 Va. 740, 10 S. E. 1004.

Where the state introduces evidence of the acts of the defendant and relies upon them for conviction, it cannot have his declarations made at the same time, in explanation of such acts excluded from the consideration of the jury. Hamilton *v.* State, 36 Ind. 280, 10 Am. Rep. 22.

22. Bow *v.* People, 160 Ill. 438, 43 N. E. 593; People *v.* Murphy, 56 Mich. 546, 23 N. W. 215; Driscoll *v.* People, 47 Mich. 413, 11 N. W. 221; State *v.* Horan, 32 Minn. 394, 20 N. W. 905, 50 Am. Rep. 583.

In State *v.* Ah Loi, 5 Nev. 99, it was shown that a few minutes after the crime was committed the prosecuting witness, whilst she was still weeping because of the loss of the money taken from her, stated that she had been robbed. *Held*, that this statement was admissible as part of the *res gestae*. The court said: "Undoubtedly such statements should be received with great caution, and only when they are made so recently after the injury is received, and under such circumstances as to place it beyond all doubt that they are not made from design, or for the purpose of manufacturing evidence."

On a trial for robbery committed at a hotel it was held competent for the state to prove by the prosecutor that he hurried down from the hotel and met a policeman on the street

the declarations of the prosecuting witness constitute anything more than a mere narrative of the alleged offense, they are not admissible.[23]

3. Declarations of Third Persons. — Upon a trial for robbery, declarations of persons other than the defendant and the victim of the alleged crime, are generally not admissible.[24] But if such dec-

to whom he made complaint that he had been robbed, and by the policeman, that the prosecutor came down to him on the street and said that he had been robbed at the hotel, that a certain named person had taken his money, and that the accused had been present. It appeared by the evidence that all this took place immediately after the criminal act charged, and as a natural and probable consequence therefrom; it was admissible as part of the *res gestae*." Lampkin *v.* State, 87 Ga. 510, 13 S. E. 523.

In Lambert *v.* People, 29 Mich. 71, the prosecutor testified to being knocked down and robbed, and other witnesses who came up immediately were allowed to testify that he then told them he had been robbed. According to the testimony it all occurred within three minutes of the time when the offense was committed. *Held,* that such immediate complaint must be regarded as part of the *res gestae.*

In State *v.* Ripley, 32 Wash. 182, 72 Pac. 1036, it was held that statements made immediately on recovering consciousness, by one who had been knocked down and robbed, were admissible as part of the *res gestae,* although made in the absence of the accused, and by one who had been drinking just prior to the blow, the weight of such evidence being for the jury to determine.

23. Johnson *v.* State, 59 Ala. 37; People *v.* Ehring, 65 Cal. 135, 3 Pac. 606; People *v.* McCrea, 32 Cal. 98.

Declarations of the victim of an alleged robbery made after the occurrence, and not constituting part of the *res gestae,* are not competent evidence against a defendant charged with robbery. Moses *v.* State, 88 Ala. 78, 7 So. 101, 16 Am. St. Rep. 21.

Declarations of a prosecuting witness that he had been robbed of his watch and money by three persons, one of whom was the accused, made after the transaction, and about two city blocks distant from it, and in the absence of the accused, do not constitute part of the *res gestae* and are not admissible in evidence. Shoecraft *v.* State, 137 Ind. 433, 36 N. E. 1113.

In Com. *v.* Fagan, 108 Mass. 471, it was not denied on the trial that the robbery had been committed. The only matter in controversy was the question whether the defendants were sufficiently identified as the robbers. The person who had been robbed was permitted to testify that he gave to the police officers a description of the persons who assaulted him; and the officers were also permitted to testify in substance, that by means of that description they recognized the defendants as the assailants. *Held,* that this evidence was incompetent.

24. The declarations of a person jointly indicted with the accused, but awarded a separate trial, made before the commission of the crime, are not admissible in evidence against the accused where there is no evidence tending to show a conspiracy between them. Walls *v.* State, 125 Ind. 400, 25 N. E. 457.

The declarations of a third person tending to show that he committed the robbery with which defendant is charged are inadmissible. State *v.* Totten, 72 Vt. 73, 47 Atl. 105.

Co-Conspirator. — In People *v.* Oldham, 111 Cal. 648, 44 Pac. 312, it appeared that one George Hilton was the active participant in the robbery charged against the defendant. Hilton was arrested seven days after the robbery was committed and the officer who arrested him testified at the trial of Oldham to statements made by Hilton when arrested, pertaining to the commission of the offense, and Oldham's connection therewith. Another witness testified

larations are made in the presence of the defendant, and naturally call upon him to respond, they may be given in evidence with his response, or the fact of his silence.[25]

V. IDENTITY OF THE DEFENDANT.

1. Confessions of Guilt. — On a trial for robbery, a confession of the accused that he committed the crime, if shown to be free and voluntary, and not made under the influence of threats, intimidations, promises or inducements of any kind, is admissible, but not otherwise.[26]

2. Incriminating Conduct. — Acts and declarations of the de-

to statements made by Hilton while in jail after his arrest and in the absence of the defendant, which amounted to a confession of guilt, involving the defendant. All this evidence was held erroneously admitted, the court saying: "Evidence of the statements of a co-conspirator, made during the life of the conspiracy, are admissible against the other conspirator, but after the crime has been committed the conspiracy is an accomplished fact. It is a thing of the past, and such statements of a co-conspirator stand in no different relation to the law and are no more admissible against a defendant than though he were a total stranger to the whole transaction; for they are the purest hearsay."

25. Statements of third parties made in the presence of a defendant charged with robbery, if they are of such a nature as would naturally call for some action or reply, from a person situated like the defendant, are admissible together with his reply thereto, or the fact of his silence. People *v.* McCrea, 32 Cal. 98.

26. *Alabama.* — Brown *v.* State, 120 Ala. 342, 25 So. 182; Johnson *v.* State, 59 Ala. 37.

Arkansas. — Young *v.* State, 50 Ark. 501, 8 S. W. 828; Ford *v.* State, 34 Ark. 649.

California. — People *v.* Oliveria, 127 Cal. 376, 59 Pac. 772.

Louisiana. — State *v.* Hamilton, 42 La. Ann. 1204, 8 So. 304.

New York. — People *v.* Mackinder, 80 Hun 40, 29 N. Y. Supp. 842.

North Carolina. — State *v.* Cowan, 29 N. C. (7 Ired. L.) 239.

Texas. — Fields *v.* State, 41 Tex. 25.

On a trial for robbery, the confessions of the accused if shown to have been made in the absence of all threats or promises, of all inducements to avow or disavow complicity in the offense charged, are admissible as evidence. The fact that such confessions are made while the accused is in prison to an officer having authority, may affect their weight, but not their admissibility. Jackson *v.* State, 69 Ala. 249.

In State *v.* Stebbins, 188 Mo. 387, 397, 87 S. W. 460, the defendant after being arrested was taken to the office of the prosecuting attorney where he dictated a confession of the robbery which was there reduced to writing and signed by him. Upon the trial he testified that he was induced to make the statement or confession on acount of statements of the prosecuting attorney that he would only be prosecuted for drunkenness and fighting, and that if he would tell the truth about it, he would get off for a fine of $7.50. The confession was admitted in evidence. This being assigned as error, the court said: "*Prima facie* the confession was admissible, and unless it was shown to have been obtained by promises of clemency, should have been received in evidence. . . . We are satisfied that ruling was correct. Otherwise it matters not how clear it might appear to the trial court that no improper inducements were held out to obtain the confession; all that would be necessary to exclude it, would be for the defendant to take the stand, and

fendant after the commission of a robbery, not amounting to a confession of guilt, but tending to connect him with the crime charged, may be given in evidence.[27]

testify that he was induced to make it through fear, or hope of clemency held out to him."

In Delaney *v.* State (Tex. Crim.), 90 S. W. 642, the deputy sheriff who arrested the accused testified as follows: "While defendant and I were going towards the county jail he made a statement to me. I warned him. I told him any statement he might make could be used against him in evidence. Defendant did not say anything immediately after that. We talked on a little way and he then said to me, 'Is not there any way we can square this?' I said: 'No, I don't think there is.' He says: 'I would like to square it with you.' I says: 'You can't do it.' He says: 'Well, its pretty dark. I might get away from you, and nobody would know anything about it.' I said: 'If you try it, I will break your leg for you.'" *Held*, that the defendant had been duly warned and that this testimony was admissible, the court saying: "The effort of appellant to escape by standing in with the officer is a criminative fact, and the statement as detailed above, shows very conclusively that this was his purpose in having the conversation with the officer."

On a trial for robbery, the testimony of the defendant given before his arrest at the examining trial of his confederates, where he testified voluntarily, is admissible against him. Armstrong *v.* State, 34 Tex. Crim. 248, 30 S. W. 235.

An extra-judicial confession not corroborated by independent evidence of the *corpus delicti* will not support an indictment for robbery. Johnson *v.* State, 59 Ala. 37.

Extorted Confession.—In Miller *v.* People, 39 Ill. 457, the evidence showed that one of the prisoners named Francis was taken from his home about midnight by a body of armed and disguised men to a neighboring wood, and there hung upon a tree by the neck, and that when taken down he confessed that he and the other prisoners had committed the robbery charged, and detailed the circumstances thereof. This confession was admitted by the trial court. *Held*, to be error, the court saying: "The rule has been long settled in our law, that, while a free and voluntary confession of guilt is of the highest order of evidence, one extorted is never received, unlike the laws of the polished and learned Romans, the cruel provisions of which allowed criminals and even witnesses in some cases, to be put to torture, for the purpose of forcing a confession, ours, in most commendable contrast, are fashioned in a spirit more just and humane."

27. People *v.* Kelly, 146 Cal. 119, 79 Pac. 846; People *v.* Stack, 41 App. Div. 548, 58 N. Y. Supp. 691; Armstrong *v.* State, 34 Tex. Crim. 248, 30 S. W. 235.

In Williams *v.* State, 123 Ala. 39, 26 So. 521, Thomas Williams and another were charged with robbery, by means of which $13.25 in money, and a pocket knife worth $1.10 were taken. A letter written by Williams a few days after the alleged robbery contained the following language, viz: "We got hold of about fifteen dollars. Do not tell any one about us. My name is Joe Johnson. Back my letters in that name. Yours truly, Thomas Williams." This letter was held to be competent evidence.

In People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390, the defendant was charged with committing robbery in San Francisco. Evidence was introduced showing that when he was arrested shortly after the commission of the offense, the defendant was apparently hiding in the city of Oakland, away from his place of residence; that he was in disguise, and passing under an assumed name, and denied his identity to the arresting officer; that among the articles found upon his person were several newspaper clippings containing accounts of the robbery, and a recently purchased railroad ticket from Oakland to Mojave. *Held*, to have been properly admitted, the court saying:

It is also competent for the state to introduce evidence of acts and declarations of the defendant prior to the commission of the crime, if they appear to have been done and made in furtherance thereof.[28] But evidence of another robbery distinct and separate

"Such evidence is always admitted as having a tendency greater or less, according to the circumstances, to establish guilt."

In State *v.* Alexander, 184 Mo. 266, 275, 83 S. W. 753, the state introduced evidence tending to show that the defendant exercised improper influences over the complaining witness to prevent him from testifying, or to change his testimony, such as paying for his dinner at the time of the preliminary examination, or his railroad fare, or threatening him if he testified against him. *Held,* competent evidence although it might tend to prove that the defendant was guilty of crimes other than the one charged.

In Griffin *v.* State (Tex. Crim.), 20 S. W. 552, the defendant testified in his own behalf, and on cross-examination it was elicited from him that while in charge of the officer he inquired the cause of his arrest, and upon being informed that it was "for robbing a Chinaman," he stated to the officer,—"the next almond-eyed . . . I rob, I will kill him and get him out of the way." *Held,* competent.

28. People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390; People *v.* Kelly, 146 Cal. 119, 79 Pac. 846.

In People *v.* Zimmerman (Cal. App.) 84 Pac. 446, the defendant was charged with robbing a bank messenger of gold and silver coin. During the trial a witness testified that several months before the robbery, he and the defendant and another person entered into an agreement to rob said bank messenger, and in pursuance thereof they had made four unsuccessful attempts to do so, and that afterwards and about three months prior to the robbery, he, the witness, was arrested and put in jail, and thereafter he knew nothing further of defendant's conduct, or of the actual robbery of the messenger. This evidence was held competent, the court saying: "That the witness was by his own admission a co-conspirator and that after taking part in four unsuccessful attempts to do the thing they had agreed to do, he was arrested and placed in jail, are facts which affect his credibility, and the weight to be given to his evidence, but the evidence was not inadmissible for that reason. We are of the opinion that the evidence was admissible. . . . The fact that the evidence tended to show that the defendant had committed other crimes did not make the evidence inadmissible when such other crimes were committed in furtherance of, and in attempting to commit the very crime which the defendant finally committed."

In Keating *v.* State, 67 Neb. 560, 93 N. W. 980, the robbery was committed by the perpetrator calling the complaining witness, who was an elevator man, to the door of his residence shortly after dark, and under the pretense that the party had a load of grain at his elevator, induced the complaining witness to acompany him as though going to the elevator, and when a short distance from his home, he was struck over the head with a bag of sand or shot, knocked down and dragged a short distance from the road, where by threats to shoot, he was compelled to give up all the money he had on his person. The state was permitted to prove that several months before the commission of the offense the defendant, in conversation with witness, explained to him how elevator men could be sand-bagged and held up and their money taken from them, saying that they certainly carried quite a sum of money. *Held,* admissible as having a legitimate and material bearing on the issues to be tried and determined by the jury.

Where the janitor of a bank was robbed of a key to the bank, evidence that for upwards of two years preceding, a conspiracy between several persons had been on foot to rob the bank, and that the defendant had been connected with said persons in

from that charged, is not only not relevant but is highly prejudicial.[29]

3. Appearance and Condition. — It is competent for the state to introduce evidence showing the appearance and condition of the defendant, including his financial condition immediately after the commission of the robbery charged.[30]

4. Fruits of the Crime. — A. Possession of Defendant. — Articles of property taken by means of the robbery, and found recently

the scheme, was held admissible. Hope *v.* People, 83 N. Y. 418, 429, 38 Am. Rep. 460.

29. In People *v.* Romano, 84 App. Div. 318, 82 N. Y. Supp. 740, it appeared that the crime charged was committed by throwing snuff in the eyes of the complainant at the time of the robbery. The prosecution, for the purpose of establishing the identity of the defendant, offered proof to show that about three weeks prior to the commission of the offense the defendant committed another robbery at the same place, upon another person by the use of the same means. This testimony was objected to, and the court overruled the objection and admitted the evidence upon the ground, as stated by the court, "as showing a similar offense done in a similar manner, within a reasonable time." *Held,* error, the court saying: "It is clear that the testimony which was given under this ruling showed a distinct independent crime, committed upon another individual at another time. It is an elementary principle of law that the commission of a distinct and independent crime cannot be used as evidence for the purpose of convicting the defendant of another crime, unless such proof tends to establish certain facts essential to a conviction which are recognized as furnishing exceptions to the general rule."

30. People *v.* Oliveria, 127 Cal. 380, 59 Pac. 772; People *v.* Ward, 77 Cal. 113, 19 Pac. 373; People *v.* Mackinder, 80 Hun 40, 29 N. Y. Supp. 842; Bollen *v.* State (Tex. Crim.), 86 S. W. 1025.

Financial Condition. — In People *v.* Sullivan, 144 Cal. 471, 77 Pac. 1000, one Devor, a dealer in clothing, testified for the prosecution, that on the day before the robbery the defendant came to his store and asked him if he couldn't give him an old pair of pants, that the defendant then had ragged clothes on, that his coat was kind of shabby, and his pants were really gone. Witness further testified that the day after the robbery the defendant came to his store dressed in a new suit of clothes and said to an employe of witness: "Come on Bill, let's have something," and witness said: "why yesterday you were begging for a pair of pants, and today you got money," and defendant then said: "I got all kinds of money," and he pulled out a twenty-dollar gold piece and said: "I have got all kinds of money." *Held,* that this testimony was admissible.

Appearance. — In State *v.* Jones, 153 Mo. 457, 55 S. W. 80, it appeared in evidence that in a scuffle with two robbers the prosecuting witness bit one of them on the calf of the left leg, and the next morning the robbers were tracked to the home of the defendant's father and there the defendant was arrested, and taken to jail. While he was in jail the sheriff and a doctor examined his leg without any objection on his part, and on the trial they testified to the appearance of his leg, and gave their opinion that certain bruises and discolorations thereon, were the result of a human bite. *Held,* properly admitted.

A defendant was charged as an accomplice to a robbery, and it was shown that he was in debt, and that the purpose of the robbery was to obtain money, and that after the robbery, defendant received part of the money. *Held,* competent for the state to prove that an execution against defendant was in the hands of the sheriff prior to the robbery, such evidence tending to show his financial condition, and also his motive for participating in the robbery.

thereafter in the possession or under the control of the defendant, are admissible in evidence.[31]

B. Possession of Co-Defendant. — And such articles are admissible when found recently after the robbery in the possession of a co-defendant.[32]

C. Possession of Third Person. — They are also adimssible if found recently after the robbery in the possession of a third person who is shown to be closely connected with the defendant.[33]

Armstrong *v.* State, 34 Tex. Crim. 248, 30 S. W. 235.

31. *California.* — People *v.* Castile (Cal. App.), 86 Pac. 745; People *v.* Piggott, 126 Cal. 509, 59 Pac. 31.

Iowa. — State *v.* Wasson, 126 Iowa 320, 101 N. W. 1125; State *v.* Harris, 97 Iowa 407, 66 N. W. 728.

Missouri. — State *v.* Finn, 98 S. W. 9; State *v.* Wyatt, 124 Mo. 537, 27 S. W. 1096; State *v.* Balch, 136 Mo. 103, 37 S. W. 808.

Tennessee. — Allen *v.* State, 12 Lea (Tenn.) 424.

In State *v.* Hyatt, 179 Mo. 344, 78 S. W. 601, the evidence showed that one Webb was, on the night of the 7th day of January, at a saloon owned by the defendant and one Hildebrant, both of whom were there; that Webb left the saloon and after going a short distance from it was robbed of his watch and his money; that defendant and Hildebrant were arrested the same night, and the saloon was closed, Hildebrant locking the door and putting the key in his pocket. The saloon remained locked till the 12th day of February, when an officer took a lantern and made a search in the cellar of the saloon where he found Webb's watch in a pile of dirt and debris under some steps leading up to a trap door behind the bar. All this evidence was held to be clearly admissible.

32. Possession in One of Several Defendants — In People *v.* Whitson, 43 Mich. 419, 5 N. W. 454, Whitson was charged jointly with one McMartin and one Maher, with robbing John Guilman of money, partly in silver, and partly in bills. Whitson was tried separately, and the testimony as to the commission of the offense was direct and positive. A police officer was allowed to testify that he found the bills in question in McMartin's cell at the police station where McMartin was locked up. This was objected to because Whitson, being separately tried, could not be proven guilty by any conduct of his co-defendants. The testimony was held competent, the court saying: "Inasmuch as the offense charged and proved was committed by the three acting together, it was competent to trace out the fruits of the robbery to any of them. The money identified was sworn to have been taken by force from Guilman by an assault from all three, and tracing this money to any of them, was, if not necessary, at least very pertinent."

Two persons were charged with having jointly committed a robbery. Upon the separate trial of one of them it was shown that they acted together in flight. *Held,* that it was competent for the state to prove the money taken from the other, although they were arrested at different times. Allen *v.* State, 12 Lea (Tenn.) 424.

33. In Clay *v.* State, 122 Ga. 136, 50 S. E. 56, the evidence showed that one Matilda Glover and the accused were on very intimate terms; that she kept a restaurant, and he was in and about there nearly all the time when he was in the city, and that when she would get drunk and have to be taken home, the accused took charge of the restaurant for her, and would close it up at night. The prosecuting witness testified that the accused took a watch from his person on a certain night. The evidence showed that the accused was found at the restaurant of the Glover woman the next morning. Against objection, evidence was admitted that on that morning the Glover

D. Other Articles. — Articles other than those charged to have been taken in the robbery, but shown to have been taken at the same time, and found recently thereafter in possession of the defendant, are admissible.[34]

5. Implements of the Crime. — Tools and implements used in the commission of the robbery, and found in the possession or under the control of the defendant, are admissible in evidence.[35]

6. Footprints Near Place of Robbery. — Evidence of footprints found at or near the place of a robbery soon after the commission

woman was found in possession of the watch. *Held*, properly admitted, the court saying: "This was a circumstance which the jury might properly consider, it tending to corroborate the testimony of the prosecutor that he had been robbed by Sherman Clay."

On a trial for robbery, evidence that the property claimed to have been taken from the prosecuting witness was found in a bawdy house where the defendants were arrested on the night of the alleged robbery, is admissible. State *v.* Wyatt, 124 Mo. 537, 27 S. W. 1096.

34. On a trial for robbery, it is competent for the state to introduce evidence with reference to personal property of the complaining witness, taken from him by the robbers, and found in defendant's possession afterwards, notwithstanding such property was not specified in the information. People *v.* Castile (Cal. App.), 86 Pac 745.

In People *v.* Kerm, 8 Utah 268, 30 Pac. 988, the defendant was charged with having robbed William Wood, Jr., in his own house, of a bag of gold and silver. Upon the trial the court admitted evidence that when the defendant was arrested on the day following the robbery, there was found on his person a watch belonging to one Hodgert, and which Hodgert testified was taken from his room in the house of William Wood, Jr., on the night of the robbery. *Held*, admissible as tending to show that the defendant was at the house of Wood on the night of the robbery.

35. People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390; State *v.* Gordon, 115 La. Ann. 571, 39 So. 625; State *v.* Finn (Mo.), 98 S. W. 9.

In State *v.* Minot, 79 Minn. 118, 81 N. W. 753, the defendant in connection with five others was charged with robbery by holding up a railroad train, attempting to break the express safe, and robbing the conductor of twenty dollars. The court received in evidence all the articles found by the officers in the possession of the six men when they were arrested the next day after the alleged robbery, consisting of revolvers and various tools and implements such as files, drills, punches, ratchets, saws and explosives which were shown to be suitable for picking door locks, etc. *Held*, that this evidence was admissible, the court saying:

"While the specific crime charged in the indictment was robbery by taking $20 from the person of the conductor Bruce, yet these tools and the revolvers formed one of the links in the chain of circumstances tending to fix the guilt upon the defendants. The whole transaction surrounding the hold-up, the attempt to open the car and the safe, formed a part of the *res gestae*. The tools and articles found upon the defendants were such as might have been used in accomplishing such purpose as was attempted. The same parties who held up the train, opened the car, and attempted to open the safe, took the the money from Bruce."

In State *v.* Balch, 136 Mo. 103, 37 S. W. 808, the evidence tended to show that the accused forcibly took the watch of the prosecuting witness by personating a police officer. Evidence that the accused had in his possession at the time of his arrest the watch of the prosecuting witness, and also a revolver and policeman's billy, was held competent to

of it, which tends to show that the defendant was there, is admissible.[36]

7. Character and Habits of Defendant. — On a trial for robbery, it is not competent for the state to prove the evil character or bad habits of the defendant.[37] But this has been held otherwise in Missouri.[38]

Evidence that the defendant has committed other robberies is inadmissible unless it tends to connect the defendant with the one charged.[39]

8. Circumstantial Evidence. — On a trial for robbery, evidence of circumstances which tend to throw light upon the facts of the alleged crime is admissible.[40]

corroborate the testimony of the prosecuting witness.

36. Clark *v.* State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817.

Horse's Tracks. — In Crumes *v.* State, 28 Tex. App. 516, 13 S. W. 868, 19 Am. St. Rep. 853, the evidence for the state showed that on the night when the robbery was committed a horse had been tied near the place of the robbery, and its tracks traced down a road which ran between two wire fence enclosures, and at one place the tracks showed that the horse ran into the wire fence, from which several horsehairs were taken. Persons long familiar with defendant's noted horse called "Wilson" testified that in their opinion, the hairs taken from the fence were the hairs of said horse. This testimony was held competent.

Defendant's Tracks. — Upon a trial for robbery it is competent for witnesses to state their opinions as to the correspondence of tracks found at and near the place where the alleged robbery took place, and the shoes worn by the defendant, and also the shoes worn by a person who was seen in company of the defendant on the night of the offense. Crumes *v.* State, 28 Tex. App. 516, 13 S. W. 868, 19 Am. St. Rep. 853.

37. Allen *v.* United States, 115 Fed. 3, 52 C. C. A. 597; People *v.* Lynch, 122 Cal. 501, 55 Pac. 248.

In Williams *v.* Com., 20 Ky. L. Rep. 1850, 50 S. W. 240, the trial court permitted the prosecution to prove by witnesses as evidence in chief, before the accused offered to testify in his own behalf, that after his arrest, he said that he had just come from the Nashville penitentiary — been out about two weeks. *Held*, reversible error, the court saying: "Clearly it could not have been admitted to invalidate his evidence, because he had not testified, and it was not proper to show his bad character before he testified, and even then, it could not be shown in this way. We know of no rule of law or evidence under which this evidence as to his statements of having been in prison, would be competent."

38. In a trial for robbery the record of the defendant's former convictions of felonies and imprisonment in state's prison is competent evidence to establish the fact that he is an habitual criminal. State *v.* Vaughan (Mo.), 97 S. W. 879.

39. People *v.* Lynch, 122 Cal. 501, 55 Pac. 248; State *v.* Spray, 174 Mo. 569, 586, 74 S. W. 846.

Proof of another offense may be given where it is connected with the specific offense charged in such a manner that proof of the commission of the collateral offense has a legal and logical tendency to establish some fact necessary to be established in proving the specific offense. State *v.* Fallon, 2 N. D. 510, 52 N. W. 318.

40. People *v.* Sullivan, 144 Cal. 471, 77 Pac. 1000; People *v.* Lawrence, 143 Cal. 148, 76 Pac. 893, 68 L. R. A. 193; People *v.* Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080; People *v.* McCrea, 32 Cal. 98; State *v.* Finn (Mo.), 98 S. W. 9.

Evidence that an hour or two be-

VI. SUFFICIENCY OF EVIDENCE.

1. Force or Fear. — To establish robbery it is not necessary for the state to prove that the property was taken by means of both force and putting in fear; proof of either is sufficient.[41]

2. Degree of Force or Fear. — On a trial for robbery the state is required to prove only the degree of force or fear sufficient to overcome resistance on the part of the person robbed, and which induced him to part unwillingly with his property.[42]

fore the alleged robbery took place the prosecutor had in his possession money of the description and value charged to have been taken from his person is admissible as tending to prove the material fact that the prosecutor had such money at the time of the alleged robbery, and confirmatory of his testimony. Bradley *v.* State, 103 Ala. 29, 15 So. 640.

In People *v.* Wallin, 55 Mich. 497, 22 N. W. 15, the fact of the robbery was not disputed. The question on the trial was a question of identity of the accused. A witness for the people was permitted to testify that on the next morning after the robbery occurred the prosecuting witness pointed out the accused to him, and said he was one of the parties who robbed him. *Held,* that this was no evidence of Wallin's guilt, but was properly admitted as a circumstance attending the search for the guilty parties and the arrest.

To warrant a conviction for robbery upon circumstantial evidence, the circumstances when taken together must be of so conclusive a nature as to show beyond a reasonable doubt that the accused and no other person committed the offense. Walbridge *v.* State, 13 Neb. 236, 13 N. W. 209.

Proof of Acquiescence in the Crime. In State *v.* O'Keefe, 23 Nev. 127, 43 Pac. 918, 62 Am. St. Rep. 768, it was shown that Lees and McDonald were during the daytime in the front portion of a house occupied by McDonald when a party of boys, among whom was the defendant, invaded the premises, separated the men by driving McDonald to the rear and detaining him there while the others robbed Lees of a sum of money. It was not definitely shown that the defendant participated in the robbery other than that he came with the robbers, and left when they left, was present at the robbery, and apparently acquiesced therein. *Held,* sufficient to justify the jury in finding defendant guilty of robbery.

41. Burns *v.* State (Tex. Crim.), 70 S. W. 24.

Where the indictment or information charges the defendant with having committed the robbery by an assault and by violence and by putting the complaining witness in fear of life and bodily injury, if either of these allegations be proven, the offense is established. Tones *v.* State (Tex. Crim.), 88 S. W. 217.

42. Blanton *v.* Com., 22 Ky. L. Rep. 515, 58 S. W. 422; State *v.* Broderick, 59 Mo. 318; Mahoney *v.* People, 3 Hun (N. Y.) 202; Wheeler *v.* Com., 86 Va. 658, 10 S. E. 924; State *v.* Parsons (Wash.), 87 Pac. 349.

In Pickerel *v.* Com., 17 Ky. L. Rep. 120, 30 S. W. 617, the indictment charged that the offense was committed by the accused and others in unlawfully, forcibly, willfully and feloniously taking from the premises of, and in the presence of Smith, against his will, certain property by putting him in fear of immediate injury to his person. It was proven by witnesses for the commonwealth that Smith was held by the accused and another; that he was shot and assaulted with a pistol in the hands of one of the party. It was insisted that this evidence was incompetent in view of the charge in the indictment that the robbery was committed by putting Smith in fear. The court said: "We think the court did not err in admitting this evidence. They could have put him in

VII. ASSAULT WITH INTENT TO ROB.

1. Assault and Intent. — To establish the crime of assault with intent to rob, the evidence must not only prove that an assault was committed, but it must establish such other facts as show that the intent of the accused in making the assault was robbery.[43]

fear, in various ways. They could have pointed pistols or guns at him, or threatened to assault him with a deadly weapon, threatened to drown or hang him, and in many other ways put him in fear. He could be put in fear by being assaulted, beaten, or mangled."

In State *v.* Kennedy, 154 Mo. 268, 283, 55 S. W. 293, the evidence showed that a railroad passenger train was held up at a small flag station by armed men, and the through safe of an express company in one of its cars was robbed of its contents; that the robbers and their fellows in the crime, forcibly entered the car, and by exhibiting a gun, and making threats, compelled the express messenger to leave the end of the car and stand on its platform, and while guarded there, the robbers cut the train in two and moved the forward portion away about a quarter of a mile, and there in the presence of the messenger, blew open the safe in the car with dynamite, and took therefrom about $1000, and then departed. *Held,* that this evidence showed a continuous series of acts, all contributing to, and culminatory in the complete crime of robbery, and in contemplation of law it was a taking by violence and force.

In Williams *v.* State, 51 Neb. 711, 71 N. W. 729, the evidence showed that the three defendants conspired to unlawfully extort money from the prosecuting witness, pursuant to which, one of them falsely pretending to be an officer, took the prosecutor into custody for an alleged misdemeanor, and demanded money, at the same time taking hold of the prosecutor by the collar; whereupon the latter took out of his pocket, and delivered to his assailants the sum of $20, being at the time so frightened that he did not realize what he was doing. *Held,* sufficient to sustain a conviction for robbery, by putting in fear.

43. Phillips *v.* State, 36 Ark. 282; Turley *v.* People, 188 Ill. 628, 59 N. E. 506; Garrity *v.* People, 70 Ill. 83.

In State *v.* Roberts, 67 Kan. 631, 73 Pac. 905, the defendant was charged with the statutory crime of assault with intent to commit robbery (§ 2026 Gen. Stat. 1901). It appeared in the testimony that Roberts drew a pistol, and placing it against the neck of the prosecuting witness ordered him to hold up his hands. He then took the prosecutor's watch, which he afterwards returned, saying that it was not watches he was looking for, but that he was searching for counterfeit money. The prosecuting witness had $20 in currency in one of his pockets which was not discovered by the defendant. *Held,* that under this testimony a jury or a court would be justified in concluding that the acts of the defendant amounted to no more than an attempt to rob. The court said: "If the assault and guilty intent are shown, it becomes immaterial whether the actual robbery failed because the victim had no property on his person, or under his control."

Upon a trial for assault with intent to rob, the evidence showed that the prosecutor and his companion were going from Gladys to Beaumont about dark, and that the accused came up with them, and walked with them a short distance, and after some general conversation with them, he suddenly stepped out in front of them, threw his gun in their faces, and said: "Halt, throw up your hands." Both fled, and accused fired his gun in the direction of prosecutor's companion. *Held,* that these facts established the specific intent to rob. Long *v.* State (Tex. Crim.), 83 S. W. 384.

Variance. — In State *v.* Fallon, 2

2. Identity of Defendant. — Testimony as to footprints found near the scene of the attempted robbery, corresponding with shoes worn by defendant, is admissible to prove his identity.[44]

3. Other Assaults. — Evidence of other assaults to rob is not admissible.[45]

VIII. DEFENSIVE EVIDENCE.

1. Reputation of Defendant. — It is always proper for the defense to introduce evidence of the good character of a defendant charged with robbery.[46] But evidence of the good charcter of a person jointly indicted with the defendant is not admissible in his favor.[47]

2. Absence of Felonious Intent. — To constitute robbery, there must be proof of felonious intent. Evidence tending to show that there was no felonious intent on the part of the accused in taking the property is admissible.[48]

N. D. 510, 52 N. W. 318, the information charged the defendant with assault with intent to rob, by shooting a loaded pistol at and against the party assaulted. The evidence showed that the assault was committed by thrusting the pistol in the face of the assaulted party and demanding his money, and that afterwards the pistol was discharged to facilitate the escape of the defendant. *Held*, to be a fatal variance between the proof and the allegations.

44. Upon a trial for assault with intent to rob, several witnesses testified that the defendant and one Rice were together in the near vicinity of the assault on the evening when the same was charged to have been committed. There was evidence that the tracks of two persons were found near the place of the alleged assault, one being a number 9 and the other a number 7 shoe; and the track on the ground made by the number 7 shoe was shown to leave a peculiar mark, indicating that it had been made by a shoe with a hole or indention in the sole of it. The defendant was shown to have worn a No. 9 shoe, and Rice a No. 7 shoe, and when Rice was arrested and his shoes examined, the sole of one of them was found to have a worn place or indention corresponding with the peculiarity in the track as found on the ground. *Held*, that this was a circumstance tending to show that Rice was one of the parties present at the time the assault was committed, and as tending to corroborate the positive testimony of the prosecuting witness as to the identity of the defendant, and the commission of the crime. Angley *v.* State, 35 Tex. Crim. 427, 34 S. W. 116.

45. "Upon the trial of a person charged with assault with intent to rob, it is not competent for the state in aid of the prosecution to prove other assaults committed by the defendant whether with or without like intent." Coble *v.* State, 31 Ohio St. 100.

46. State *v.* Totten, 72 Vt. 73, 47 Atl. 105.

47. In Walls *v.* State, 125 Ind. 400, 25 N. E. 457, Walls and Belcher were jointly indicted for robbery. They were awarded separate trials. Upon the trial of Walls he sought to introduce evidence that Belcher, his alleged accomplice, was at the time of the alleged robbery a person of good character for honesty. *Held*, that the trial court properly refused to admit such evidence.

48. Long *v.* State, 12 Ga. 293; State *v.* Hollyway, 41 Iowa 200, 20 Am. Rep. 586; Triplett *v.* Com., 28 Ky. L. Rep. 974, 91 S. W. 281.

In People *v.* Hughes, 11 Utah 100, 39 Pac. 492, the evidence showed that the defendant while in an intoxicated condition went to a saloon and lost a large sum of money at

3. Alibi. — The defense of alibi need not be proved by a defendant charged with robbery; if his evidence raises a reasonable doubt of presence at the robbery it is sufficient.[49]

a game called "Mexican Monte," conducted by one Nichols; that thereupon at the point of a revolver he took $53 from the card table and in the presence of Nichols, and immediately thereafter took $105 from the person of Nichols. The defense was that if defendant took the money at all, he had a right to do so under a claim of ownership because it had been won from him by an unlawful card game. The defendant testified in his own behalf, and the court refused to allow him to answer the following question: "Did you at the time honestly believe that the money was yours, and that you had a right to take it?" *Held*, error, the court saying: "We think it was competent for the defendant to testify what his intent, belief, and motive were at the time of the alleged robbery."

Bona Fide Claim of Right. — If the evidence shows that the property was taken under a *bona fide* claim of right, and with the purpose of applying it to the payment of a debt, owing from the prosecuting witness to the accused, the *animus furandi* is lacking, and it does not constitute robbery; but it is otherwise if the claim of right be shown to be a mere pretense. Crawford *v.* State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242.

Re-Delivery of Property, No Defense. — Where it appears that robbery was committed by the defendant, proof that he delivered the property taken to the owner after holding it but a short time, does not constitute a defense. McGinty *v.* State, 97 Ga. 368, 23 S. E. 831.

49. Glover *v.* United States, 147 Fed. 426, 77 C. C. A. 450; Miller *v.* People, 39 Ill. 457. But see Article "ALIBI."

In McNamara *v.* People, 24 Colo. 61, 48 Pac. 541, the court said: "In order to avail himself of the defence of alibi, it is not incumbent on the accused to establish that he was not present at the commission of the crime, or that he was in some other place. If the evidence is sufficient to raise a reasonable doubt in the minds of the jury as to whether he was or was not present at the commission of the crime, he is entitled to an acquittal."

SAILORS.—See Admiralty; Ships and Shipping.

SALES.

By Chas. E. Hogg.

I. CONTRACT OF SALE.

1. Evidence Relating to It. — A. GENERALLY. — As a sale is but one form of contract,[1] the evidence necessary to establish a sale is not materially different from that required in other matters of contract.[2]

B. EVIDENCE MUST ESTABLISH ALL ESSENTIAL ELEMENTS. That the evidence may be sufficient to show the consummation of a contract of sale, it must establish all the essential elements necessary to the creation of a sale.[3]

1. *United States.* — City of Ft. Scott *v.* Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437.

Illinois. — Higbie *v.* Rust, 211 Ill. 333, 71 N. E. 1010, 103 Am. St. Rep. 204.

Maine. — Cummings *v.* Gilman, 90 Me. 524, 38 Atl. 538.

Pennsylvania. — Huthmacher *v.* Harris, 38 Pa. St. 491, 80 Am. Dec. 502; Bigley *v.* Risher, 63 Pa. St. 152, 155.

Texas. — Johnson *v.* State (Tex. Crim.), 55 S. W. 968.

Wisconsin. — Losse *v.* Peoria Cordage Co., 116 Wis. 129, 92 N. W. 559; Hoffman *v.* Maffioli, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427.

In Losse *v.* Peoria Cordage Co., 116 Wis. 129, 92 N. W. 559, an action to recover damages for breach of an alleged contract of sale of binding twine, it was held proper to direct a verdict for the defendant inasmuch as the evidence showed that neither quantity, quality nor price of the twine was ever definitely agreed upon.

Mutuality. — In Higbie *v.* Rust, 211 Ill. 333, 71 N. E. 1010, 103 Am. St. Rep. 204, it was held that where the evidence shows no consideration for the promise of one party to furnish or sell so much of the commodity as the other may want, except the promise of the other to take and pay for so much of the commodity as he may want, and that there is no agreement that he shall want any quantity whatever, and the evidence shows no method by which it can be determined, the contract is void for lack of mutuality.

2. Curtis *v.* McCune (Neb.), 94 N. W. 984; Moon *v.* Hawks, 2 Aik. (Vt.) 390, 16 Am. Dec. 725; Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Smith *v.* Bryan, 5 Md. 141, 59 Am. Dec. 104; Black *v.* Webb, 20 Ohio 304, 55 Am. Dec. 456.

3. Columbus, H. V. & T. R. Co. *v.* Gaffney, 65 Ohio St. 104, 61 N. E. 152; McCarthy *v.* City of New York, 90 N. Y. 1; Gates *v.* Nelles, 62 Mich. 444, 29 N. W. 73; Whiteford *v.* Hitchcock, 74 Mich. 208, 41 N. W. 898; Topliff *v.* McKendree, 88 Mich. 148, 50 N. W. 109.

In Kesler *v.* Cheadle, 12 Okla. 489, 72 Pac. 367, the action was for the price of coal sold to the defendants, and the question was whether the plaintiff had contracted with the defendants or whether they were only guarantors. On this it was contended by the defendants that the books of the plaintiff showed that the only liability on the part of the defendants was that of guarantors, and in support of this contention it was shown that the books of plaintiff contained the following entry: "Palace Laundry Company guaranteed by Kesler & Dodson," but the bookkeeper, who was called as a witness on behalf of the plaintiff, testified that the entry in the books merely signified that the coal was delivered to the Palace Laundry Company and not to whom it was charged. The court held that the fact that the coal was charged on the books and delivered to the Palace Laundry Company was competent evidence to show that the sale was made to it and upon its credit, but that it was not conclusive evidence and was open to explanation, citing in support of this position, Larson *v.* Jensen, 53 Mich. 427, 19 N. W. 130; Lance *v.* Pearce, 101 Ind. 595,

C. Distinctions To Be Observed. — In applying the law of evidence to the subject of sales there are certain distinctions, between this and other forms of contract, that must not be overlooked.[4]

D. Illustrations. — a. *Sale and Agreement to Sell.* — As there is a wide difference between a sale and a mere executory agreement to sell,[5] the evidence showing the former must not be confounded with that which is required to establish the latter.[6]

b. *Sale Not To Be Confounded with Agency to Sell.* — Nor must the matter of sale be confounded with evidence which only shows a mere agency to buy,[7] or agency to sell.[8]

c. *Sale To Be Distinguished From Bailment or Barter.* — So in

1 N. E. 184; Ruggles *v.* Gatton, 50 Ill. 412; Foster *v.* Persch, 68 N. Y. 400; Champion *v.* Doty, 31 Wis. 190.

And on the necessity of establishing the contract the court gave the following instruction: "The burden is on the plaintiff to prove by a preponderance of the evidence that the defendants agreed and promised to become individually and personally liable for the coal to be ordered by the laundry company, that he sold and delivered the coal on the credit of the defendants, and on their personal liability, and that no part of the credit was given to the laundry company, and that the coal has not been paid for, before he can recover."

When letters and telegrams constitute an offer and acceptance of a proposition complete in its terms, they are evidence of a binding contract, although there is an understanding that the agreement shall be expressed in a formal writing, and one of the parties afterwards refuses to sign such an agreement without material modifications. Sanders *v.* Pottlitzer, 144 N. Y. 209, 39 N. E. 75, 43 Am. St. Rep. 757, 29 L. R. A. 431.

4. Lucas *v.* County Recorder (Neb.), 106 N. W. 217; Labaree *v.* Klosterman, 33 Neb. 150, 167, 49 N. W. 1102, 1106.

5. Kerr *v.* Henderson, 62 N. J. L. 724, 42 Atl. 1073; Parker *v.* Pettit, 43 N. J. L. 512; Leonard *v.* Cox, 64 Mo. 32; Millhiser *v.* Erdman, 98 N. C. 292, 3 S. E. 521, 2 Am. St. Rep. 334; Freight Co. *v.* Stanard, 44 Mo. 71, 100 Am. Dec. 255; Cleveland *v.* Williams, 29 Tex. 204, 74 Am. Dec. 274; Fairbanks *v.* Richardson Drug Co., 42 Mo. App. 262.

6. Parsons *v.* Woodward, 22 N. J. L. 196.

Criterion Distinguishing Sale From Agreement To Sell. — The evidentiary criterion distinguishing a sale from an agreement to sell is that in the former the title or property passes while in the latter it does not. Blackwood *v.* Cutting Pack. Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199.

Articles To Be Produced. — If the evidence discloses a contract by which the first party agrees to sell and deliver hops of a certain quality, of the crop to be grown five years after the contract was made, and the second party agrees to receive and pay for the same, this does not constitute a sale but only an agreement to sell and purchase at a future time and, therefore, the only remedy of the party proposing to sell is by an action for damages for the breach of said agreement. Star Brewery Co. *v.* Horst, 120 Fed. 246, 58 C. C. A. 362. See in this connection, Pope *v.* Allis, 115 U. S. 363, 371.

7. Field *v.* Banker, 22 Super. Ct. (N. Y.) 467; Keystone Watch-Case Co. *v.* Fourth St. Nat. Bank, 194 Pa. St. 535, 45 Atl. 328; Wright *v.* Calhoun, 19 Tex. 412; Hatch *v.* McBrien, 83 Mich. 159, 47 N. W. 214; Whitney *v.* Beckford, 105 Mass. 267.

8. *Colorado.* — Cannon Coal Co. *v.* Taggart, 1 Colo. App. 60, 27 Pac. 238.

Illinois. — First Nat. Bank *v.* Schween, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174; Lenz *v.* Harrison, 148 Ill. 598, 36 N. E. 567.

Iowa. — Williams *v.* Davis, 47 Iowa 363; Norton *v.* Melick, 97 Iowa 564, 66 N. W. 780.

determining whether the proof constitutes a sale, we must always discriminate between evidence which shows a sale, and that which only establishes a mere bailment.[9] The same rule applies in de-

Kentucky. — Com. *v.* Parlin & Orendorff Co., 118 Ky. 168, 26 Ky. L. Rep. 58, 80 S. W. 791.

Louisiana. — Dunn *v.* Calderwood, 23 La. Ann. 642.

Maine. — Gray *v.* Millay, 61 Me. 327.

Massachusetts. — Eldridge *v.* Benson, 7 Cush. 483.

Michigan. — Snook *v.* Davis, 6 Mich. 155.

Minnesota. — St. Paul Harvester Co. *v.* Nicolin, 36 Minn. 232, 30 N. W. 763.

Missouri. — Banister *v.* Weber Gas & Gasoline Engine Co., 82 Mo. App. 528.

Contract of Sale and Not of Agency To Sell. — Where a contract shows the transfer of the title to the goods by an agreement called "Special Selling Factor Appointment," in which consignee is required to pay for the goods within sixty days, whether sold or not, at an amount fixed in advance, with certain allowances for carting, storing, insuring, and selling whether the goods are crated, stored, insured, or sold, or not, without requiring the consignee to make any accounting of sales or to keep the proceeds thereof separate, but giving him all the advantage and risk of the advancement or decline of prices, it is sufficient to establish the contract as one of sale and not that of a mere agency to sell. Arbuckle *v.* Kirkpatrick, 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285.

9. *United States.* — *In re* Columbus Buggy Co., 143 Fed. 859, 74 C. C. A. 611; Union Stock Yards & Transit Co. *v.* Western Land & Cattle Co., 59 Fed. 49, 7 C. C. A. 660; *In re* Galt, 120 Fed. 64, 56 C. C. A. 470; *In re* Wells, 140 Fed. 752; *In re* Heckathorn, 144 Fed. 499.

Connecticut. — Bulkley *v.* Andrews, 39 Conn. 70.

Georgia. — O'Donnell *v.* Wing & Son, 121 Ga. 717, 49 S. E. 720.

Illinois. — McCrory *v.* Hamilton, 39 Ill. App. 490; Fleet *v.* Hertz, 89 Ill. App. 564.

Indiana. — Cruikshank *v.* Henry, 6 Blackf. 19; Wolf *v.* Esteb, 7 Ind. 448.

Maine. — Moore *v.* Holland, 39 Me. 307; Fyre *v.* Burdick, 67 Me. 408.

Michigan. — Ledyard *v.* Hibbard, 48 Mich. 421, 12 N. W. 637, 42 Am. Rep. 474.

Missouri. — Coquard *v.* Wernse, 100 Mo. 137, 13 S. W. 341.

New York. — Wescott *v.* Tilton, 8 N. Y. Super. Ct. 53; Seymour *v.* Brown, 19 Johns. 44; Mallory *v.* Willis, 4 N. Y. 76; Sattler *v.* Hallock, 160 N. Y. 291, 54 N. E. 667, 73 Am. St. Rep. 686, 46 L. R. A. 679.

Ohio. — Johnson *v.* Miller, 16 Ohio 431; Keber *v.* Sanders, 5 Ohio Dec. 20.

Oregon. — Savage *v.* Salem Mills Co., 85 Pac. 69.

Pennsylvania. — Henry *v.* Patterson, 57 Pa. St. 346; Lippincott *v.* Scott, 198 Pa. St. 283, 47 Atl. 1115, 82 Am. St. Rep. 801; Stiles *v.* Seaton, 200 Pa. St. 114, 49 Atl. 774.

Utah. — Rich *v.* Utah Commercial & Sav. Bank, 30 Utah 334, 84 Pac. 1105.

Vermont. — Brown *v.* Hitchcock, 28 Vt. 452.

Virginia. — Slaughter *v.* Green, 1 Rand. 3, 10 Am. Dec. 488.

Criterion Determining Whether Transaction Is a Sale. — If it appears from the evidence that the relation of debtor and creditor has been created between the parties to the transaction, this is one of the chief tests determining it to be a sale. Fleet *v.* Hertz, 201 Ill. 594, 66 N. E. 858, 94 Am. St. Rep. 193, *citing* Chickering *v.* Bastress, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309; Peoria Mfg. Co. *v.* Lyons, 153 Ill. 427, 38 N. E. 661.

Evidentiary Test of a Bailment. The authorities are agreed that when the identical thing delivered, though it may be altered in form, is to be returned, the transaction is one of bailment and not of sale; but if the obligation to return the specific thing does not exist, and the receiver is at liberty to return another of equal

termining whether the evidence shows a sale or a mere barter.[10]

d. *Classes of Sales—Express and Implied—Absolute and Conditional.* — As sales may be either express[11] or implied,[12] it will not

value, this transfers the title and the transaction is a sale. Mallory *v.* Willis, 4 N. Y. 76; Grier *v.* Stout, 2 Ill. App. 602; Baker *v.* Priebe, 59 Neb. 597, 81 N. W. 609; Hurd *v.* West, 7 Cow. (N. Y.) 752; Smith *v.* Clark, 21 Wend. (N. Y.) 83, 34 Am. Dec. 213; Carpenter *v.* Griffin, 9 Paige (N. Y.) 310, 37 Am. Dec. 396; Marsh *v.* Titus, 3 Hun (N. Y.) 550; Reherd *v.* Clem, 86 Va. 374, 10 S. E. 504.

"A receipt given by defendants to plaintiff's intestate for wheat delivered was ambiguous as to whether a sale or a bailment was intended by the parties. *Held*, in an action for the price of the wheat, that it was error for the court to limit the jury to the terms of the receipt for its interpretation, and to refuse a charge, there being evidence to support the hypothetical case, that if plaintiff's intestate delivered the wheat to defendants under a contract that they should pay for it at the market price whenever the intestate should name the time, and that defendants had the right to use the wheat as they thought proper, then there was a sale, and not a bailment. Where there is no evidence that the wheat was to be returned to plaintiff's intestate either in kind or identity, but defendants' own testimony shows that they received and commingled it with their other wheat, ground it as their own, sold the flour, and never, during the 18 months which elapsed between its delivery and the burning of defendants' mill, tendered either the wheat itself, or in kind, or flour, to plaintiff's intestate, nor after the fire tendered him any of the wheat, which was taken from the mill, and sold by defendants as their own, nor any of the proceeds of the sale, and the receipt itself shows that the delivery of the wheat was on a contract of sale which transferred the property therein to defendants, leaving nothing ambulatory but the price, which was to be paid at the market rates, when the seller should fix the day, a verdict for the plaintiff not commensurate with the amount he is entitled to, on the theory of a sale, is unwarranted, and ground for a new trial." Reherd *v.* Clem, 86 Va. 374, 10 S. E. 504.

On the question whether the delivery was a bailment or a sale, the unsigned receipts and papers favored the theory of a bailment, as did the testimony of two witnesses and the circumstances surrounding the case. *Held*, a bailment and not a sale. Dean *v.* Lammers, 63 Wis. 331, 23 N. W. 892.

10. Guerreiro *v.* Peile, 3 Barn. & Ald. (Eng.) 616, 617; Cooper *v.* State, 37 Ark. 412, 418; Coker *v.* State, 91 Ala. 92, 8 So. 874, 875; Meyer *v.* Rousseau, 47 Ark. 460, 2 S. W. 112, 113; *Ex parte* Beaty, 21 Tex. App. 426, 1 S. W. 451, 452; Massey *v.* State, 74 Ind. 368, 369.

11. George Delker Co. *v.* Hess Spring & Axle Co., 138 Fed. 647, 71 C. C. A. 97; Olcese *v.* Mobile Fruit & Trad. Co., 211 Ill. 539, 71 N. E. 1084.

12. *Alabama.* — Stoudenmire *v.* Harper, 81 Ala. 242, 1 So. 857.

Connecticut. — Downs *v.* Marsh, 29 Conn. 409.

Iowa — Carney *v.* Cook, 80 Iowa 747, 45 N. W. 919.

Louisiana. — Boyd *v.* Heine, 41 La. Ann. 393, 6 So. 714.

Missouri. — W. W. Kendall Boot & Shoe Co. *v.* Bain, 46 Mo. App. 581.

Montana. —Smith *v.* Perham, 33 Mont. 309, 83 Pac. 492.

Nebraska. — Teetzel *v.* Davidson Bros. Marble Co., 104 N. W. 1068; Neidig *v.* Cole, 13 Neb. 39, 13 N. W. 18.

New York. — Shields *v.* Pettie, 4 N. Y. 122.

Ohio. — Butler *v.* Moses, 43 Ohio St. 166, 1 N. E. 316.

Pennsylvania. — Indiana Mfg. Co. *v.* Hayes, 155 Pa. St. 160, 26 Atl. 6.

South Carolina. — Bours *v.* Watson, 1 Mill, Const. 393.

be inferred that there is any difference in their legal effect. Their only difference consists in the evidence essential to create either the one or the other of these classes.[13] If the evidence shows that the seller has parted with all his rights in the property, precluding any assertion of ownership to it under any circumstances, the sale is

Texas. — Masterson *v.* Heitmann & Co. (Tex. Civ. App.), 87 S. W. 227.

Vermont. — Waterman *v.* Stimpson, 24 Vt. 508.

West Virginia. — Bartholomae *v.* Paull, 18 W. Va. 771; Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015.

In Carney *v.* Cook, 80 Iowa 747, 45 N. W. 919, a suit to foreclose a mechanic's lien, the evidence showed that one of the defendants had entered into a contract with the other to do certain work on the latter's house and contracted with the plaintiffs for the necessary materials; that after part of the materials had been delivered the plaintiffs asked the owner of the house who would pay for the materials, to which he replied that he would pay for them and intended to do, and would pay for whatever materials were delivered at the house. It was held that the evidence was sufficient to establish an implied contract of purchase by the owner of the house and an agreement to pay for the materials, not as surety but as principal.

In the absence of an express agreement between an employer and an employe as to the price at which the latter might take goods from the store, evidence of the dealings between them prior and subsequent, under similar agreements, is admissible as bearing upon the question of their intention and understanding in the particular transaction. Stoudenmire *v.* Harper, 81 Ala. 242, 1 So. 857.

Proof of the Mere Delivery of Goods by one person to another is not of itself sufficient to establish a liability for their value. The evidence must show the delivery to and acceptance by the intended purchaser under such circumstances that the law will imply a promise to pay for them. Smith *v.* Perham, 33 Mont. 309, 83 Pac. 492.

13. Columbus, H. V. & T. R. Co. *v.* Gaffney, 65 Ohio St. 104, 61 N. E. 152, where the court said: "There is some confusion in the statement of the law applicable to what are frequently called implied contracts, arising from the fact that obligations generically different have been classed as such, not because of any real analogy, but because where the procedure of the common law prevails by the adoption of a fiction in pleading — that of a promise where none in fact exists or can in reason be supposed to exist — a favorite remedy of implied assumpsit could be adopted. This was so in that large class of cases where suit is brought to recover money paid by mistake or (which) has been obtained by fraud. Ordinarily it is said the law implies a promise to repay the money when it was well understood that the promise was a mere fiction, and in most cases without any foundation whatever in fact. . . . In all these cases no true contract exists. They are by many others termed quasi contracts, a term borrowed from the civil law. . . . But contracts that are true contracts are frequently termed implied contracts, as where from the facts and circumstances a court or jury may fairly infer as a matter of fact that a contract existed between the parties explanatory of the relation existing between them. Such implied contracts are not generically different from express contracts; the difference exists simply in the mode of proof. Express contracts are proved by showing that the terms were expressly agreed on by the parties, whilst in the other case the terms are inferred as a matter of fact from the evidence offered from the circumstances surrounding the parties making it reasonable that a contract existed between them by tacit understanding." See also Hertzog *v.*

absolute;[14] but if it appears from the evidence that upon the occurrence of some event, the seller may again assert a right of ownership to the property, the sale is conditional.[15]

2. Evidence Must Show Essentials of Sale. — A. Generally. In order that the evidence adduced in proof of the alleged contract of sale may be sufficient for that purpose, it must disclose competent parties to the sale,[16] a legitimate subject-matter of sale,[17] an offer to sell,[18] and the acceptance thereof[19] and an agreed price as

Hertzog, 29 Pa. St. 465, where the court after quoting from Blackstone and observing that his language is open to criticism, clearly points out this distinction.

14. Cobb *v.* Tufts, 2 Wills. Civ. Cas. Ct. App. (Tex.), § 152; Klinck *v.* Kelly, 63 Barb. (N. Y.) 622; Kerr *v.* Lucas, 83 Mass. 279; United States *v.* Ash, 75 Fed. 651; De La Vergne Refrigerating Mach. Co. *v.* Hub Brewing Co., 175 Mass. 419, 56 N. E. 584; Still *v.* Cannon, 13 Okla. 491, 75 Pac. 284; Truax *v.* Parvis, 7 Houst. (Del.) 330, 32 Atl. 227, 228.

15. *Alabama.* — Bingham *v.* Vandegrift, 93 Ala. 283, 9 So. 280.

California. — Van Allen *v.* Francis, 123 Cal. 474, 56 Pac. 339.

Illinois. — Gilbert *v.* National Cash Register Co., 176 Ill. 288, 52 N. E. 22.

Massachusetts. — Nichols *v.* Ashton, 155 Mass. 205, 29 N. E. 519.

Michigan. — Wickes Bros. *v.* Hill, 115 Mich. 333, 73 N. W. 375.

North Carolina. — Wilcox *v.* Cherry, 123 N. C. 79, 31 S. E. 369.

Virginia. — McComb *v.* Donald, 82 Va. 903, 5 S. E. 558.

West Virginia. — McGinnis *v.* Savage, 29 W. Va. 362, 1 S. E. 746.

16. Woodburn Sarven Wheel Co. *v.* Philbrook, 76 Ind. 516; Mitchell *v.* Kingman, 22 Mass. 431; Webster *v.* Woodford, 3 Day (Conn.) 90; *In re* Columbus Buggy Co., 143 Fed. 859, 74 C. C. A. 611.

17. Shipley *v.* Reasoner, 80 Iowa 548, 45 N. W. 1077; Davis *v.* Seeley, 71 Mich. 209, 38 N. W. 901; St. Louis Fair Assn. *v.* Carmady, 151 Mo. 566, 52 S. W. 365, 74 Am. St. Rep. 571.

18. Elliott *v.* Howison (Ala.), 40 So. 1018; Crystal Case Co. *v.* Arnett (Kan.), 85 Pac. 302; Wheaton *v.* Cadillac Automobile Co., 143 Mich. 21, 106 N. W. 399; Buckberg *v.* Washburn-Crosby Co., 115 Mo. App. 701, 92 S. W. 733.

19. *United States.* — Brooks *v.* Coquard, 18 Fed. 316.

Alabama. — Gould *v.* Cates Chair Co., 41 So. 675.

Georgia. — Huggins *v.* Southeastern Lime & Cement Co., 121 Ga. 311, 48 S. E. 933.

Illinois. — Corbin *v.* Speeter, 92 Ill. App. 652.

Iowa. — Minneapolis Threshing Machine Co. *v.* Zemanek, 130 Iowa 120, 106 N. W. 512.

Kansas. — Bennett *v.* Cummings, 85 Pac. 755.

Kentucky. — Hudson *v.* Arnold, 29 Ky. L. Rep. 375, 93 S. W. 42.

Nebraska. — Jones *v.* Wattles, 66 Neb. 533, 92 N. W. 765.

New York. — Mactier *v.* Frith, 6 Wend. 103, 21 Am. Dec. 262.

North Dakota. — P. J. Bowlin Liquor Co. *v.* Beaudoin, 108 N. W. 545.

Texas. — Edgeworth *v.* Talerico (Tex. Civ. App.), 95 S. W. 677.

Wisconsin. — Abrohams *v.* Revillon Freres, 107 N. W. 656; Port Huron Engine & Thresher Co. *v.* Clements, 113 Wis. 249, 89 N. W. 160.

In Minneapolis Thresh. Mach. Co. *v.* Zemanek, 130 Iowa 120, 106 N. W. 512, it was held that proof that goods specially ordered were shipped and ready for delivery in accordance with the order and within the specified time, established a sufficient acceptance of the order to bind the purchaser. See also McCormick Harv. Mach. Co *v.* Markert, 107 Iowa 340, 78 N. W. 33.

In P. J. Bowlin Liquor Co. *v.* Beaudoin (N. D.), 108 N. W. 545, it was held that evidence showing that an order for goods was received

the consideration.[20] If the evidence be deficient in any one of these essential matters, the contract of sale is not established.[21]

B. Competent Parties. — a. *General Rule in Relation To.* That the evidence must show a competent seller and buyer is but

and transmitted to the seller by his traveling salesman, who had no actual or ostensible authority to contract for a sale but only to receive and transmit the orders of customers, was not of itself sufficient to establish a sale; that it must also be shown that the order was received and accepted by the seller.

20. *United States.* — Harper *v.* Dougherty, 11 Fed. Cas. No. 6,087; City of Ft. Scott *v.* Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437.

Louisiana. — Walker *v.* Fort, 3 La. 535; Tiernan *v.* Martin, 2 Rob. 523; Gorham *v.* Hayden, 6 Rob. 450; Fort *v.* Union Bank of Louisiana, 11 La. Ann. 708; Wise *v.* Guthrie, 11 La. Ann. 91; Kleinpeter *v.* Harrigan, 21 La. Ann. 196.

Michigan. — Foster *v.* Lumbermen's Min. Co., 68 Mich. 188, 36 N. W. 171.

New York. — Reynolds *v.* Miller, 79 Hun 113, 29 N. Y. Supp. 405.

North Carolina. — Wittkowsky *v.* Wasson, 71 N. C. 451.

Pennsylvania. — Bigley *v.* Risher, 63 Pa. St. 152.

The evidence must establish that a certain price was to be paid, or that some guide was agreed upon by which the price can be found with certainty; and where the evidence shows merely that the price was to be fixed by agreement between the parties afterwards and the parties did not afterwards agree, no sale is proved. "One element of a sale is wanting just as a different element would be if the thing were not ascertained. If in such case the thing was actually delivered and consumed the vendee would be liable, not upon the special imperfect contract, but on an implied contract to pay a reasonable price." Wittkowsky *v.* Wasson, 71 N. C. 451.

In Reynolds *v.* Miller, 79 Hun 113, 29 N. Y. Supp. 405, it was held that evidence that the property was to be inventoried, its quantity and condition then to be ascertained and a price then agreed upon, based upon the inventory, did not show a completed contract of sale.

The evidence must show that the price to be paid by the purchaser was fixed, and if the sale is for credit, that the time and terms of payment were agreed upon. Foster *v.* Lumberman's Min. Co., 68 Mich. 188, 36 N. W. 171. See also Cass *v.* Gunnison, 68 Mich. 147, 36 N. W. 45.

21. Potomac Bottling Wks. *v.* Barber & Co., 103 Md. 509, 63 Atl. 1068; Minneapolis Threshing Mach. Co. *v.* Evans, 139 Fed. 860; Elberton Hdw. Co. *v.* Hawes, 122 Ga. 858, 50 S. E. 964; Worthington *v.* Herrmann, 89 App. Div. 627, 88 N. Y. Supp. 76; Becker Co. *v.* Alvey, 27 Ky. L. Rep. 832, 86 S. W. 974; Robinson & Co. *v.* Ralph (Neb.), 103 N. W. 1044.

In Elberton Hdw. Co. *v.* Hawes, 122 Ga. 858, 50 S. E. 964, it was held that evidence of an agreement by parties to an executory contract for the sale of goods, that the price to be paid for the goods was to be fixed by valuers nominated in the agreement did not show a contract of sale if the persons appointed as valuers failed or refused to act as such.

In Potomac Bottling Wks. *v.* Barber & Co., 103 Md. 509, 63 Atl. 1068, an action to recover an alleged balance due on a sale of a quantity of eggs, the plaintiff's evidence of the contract of sale consisted of a telegram and letter, the telegram reading "Ship hundred at once and hundred Nov. 25th, eggs," and the letter in reply thereto reading "We are shipping the hundred to-day and have entered the order for the other for the 25th," and it was held that the telegram and letter alone and unaided by any extraneous circumstances evidenced no definite, express contract at all because the quantity, quality, price of the commodity and the time of payment were entirely omitted from them — that no usage or custom was relied on, or alluded to, or given in evidence.

the application of a rule which governs all classes of contracts, and is, therefore, not a principle of law peculiar to the subject of sales.[22] To establish mental incapacity to make a contract of sale, so as to relieve from the effect thereof, the evidence must disclose such a degree of mental derangement,[23] or imbecility of mind,[24] as renders the party incapable of fully comprehending the effects and consequences of his acts.[25] And the converse of the rule is true, that if the proof evinces a capability of the party to reason correctly on the ordinary affairs of life,[26] or of comprehending and understanding the consequences which usually accompany ordinary acts, his competency is sufficiently shown.[27]

b. *What Not Sufficient To Show Incompetency.* — **(1.) Insanity.** (A.) GENERALLY. — As the subject of the evidence of insanity has been considered in a former volume of this work,[28] much that is given there will apply here, so that it is only necessary to present some negative phases of the principles of evidence as controlling factors in proving the incompetency of parties to enter into contracts of sale.

22. Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Conley *v.* Nailor, 118 U. S. 127.

23. Shea *v.* Murphy, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215.

24. Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788.

25. Argo *v.* Coffin, 142 Ill. 368, 32 N. E. 679, 34 Am. St. Rep. 86; Shea *v.* Murphy, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215; Lindsey *v.* Lindsey, 50 Ill. 79, 99 Am. Dec. 489; Whitaker *v.* Hamilton, 126 N. C. 465, 35 S. E. 815.

26. Shoulters *v.* Allen, 51 Mich. 529, 16 N. W. 888, where it was held that a showing of business incapacity consisting of evidence of inability to learn to read beyond the alphabet or to count more than twenty, and of a preference for large coins over small ones regardless of their value, was largely counterbalanced by proof of industrious habits, moral living, exercise of the franchise and the occasional transaction of business in buying, selling and giving security.

27. Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383; Miller *v.* Rutledge, 82 Va. 863, 1 S. E. 202.

In the case last cited the evidence showed that the person whose two contracts it was the object of the suit to annul on the ground of mental incapacity, was illiterate and of weak intellect, delicate physical condition and indolent habits, but it utterly failed to show that he was of unsound mind and incapable of managing his own affairs.

28. **Presumption That Mental Incapacity Continues When Once Shown To Exist.** — It is a general principle of the law of evidence that where incapacity to do business is shown to exist, the presumption of law is that it continues, and the burden of proof is upon the party to show a lucid interval in order to uphold the transaction. Rogers *v.* Walker, 6 Pa. St. 371, 47 Am. Dec. 470; Case of Cochran's Will, 1 T. B. Mon. (Ky.) 264, 15 Am. Dec. 116; Hall *v.* Warren, 9 Ves. (Eng.) 605; Grabill *v.* Barr, 5 Pa. St. 441.

Evidence To Show Lucid Interval. — If it is sought to show that the transaction occurred during a lucid interval when the contracting party was competent, such fact must be clearly and satisfactorily proved. Snow *v.* Benton, 28 Ill. 306; Taylor *v.* Creswell, 45 Md. 422.

There must be more than a mere cessation of the symptoms of the disorder, to constitute a restoration to mental capacity in order to make a valid contract. Hall *v.* Warren, 9 Ves. (Eng.) 605.

The evidence is not sufficient which shows a lucid interval immediately before and immediately after the act.

(B.) Old Age. — Mere old age is not sufficient evidence to show mental incapacity.[29] It is, however, a circumstance to be considered in connection with all the other evidence in the case.[30]

(C.) Weakness of Understanding. — Evidence of mere weakness of the understanding of the party is not sufficient to establish a want of mental capacity rendering him incompetent to make a contract of sale.[31] Such weakness must amount to idiocy or insanity to make the proof sufficient to establish incompetency.[32]

(D.) Disease and Trouble. — Evidence that a party is suffering from a painful malady, even to the extent of causing him great agony, and that he has had serious domestic trouble and was much depressed and unhappy and is comparatively an old man, does not show want of capacity to dispose of property.[33]

(E.) Monomania Unconnected With Subject of Contract. — If monomania be shown, but unconnected with the subject of the contract in controversy, this is not sufficient to establish lack of mental ca-

It must be shown to be at the very time of the transaction. Harden *v.* Hays, 9 Pa. St. 151.

See also the article "Insanity," Vol. VII, p. 444 *et seq.*

29. Hiett *v.* Shull, 36 W. Va. 563, 15 S. E. 146; Smith *v.* Low, 37 N. C. (2 Ired. L. Eq.) 457; Aldrich *v.* Bailey, 132 N. Y. 85, 30 N. E. 264.

In Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383, it was held that although a party may be extremely old, his understanding, memory and mind enfeebled and weakened by age, and his actions occasionally strange and eccentric, and he may not be able to transact many affairs of life, yet if age has not rendered him imbecile so that he does not know the nature and effect of the contract, it is not invalid; if he be capable at the time of knowing the nature, character and effect of the particular act, that is sufficient to sustain it.

30. Hiett *v.* Shull, 36 W. Va. 563, 15 S. E. 146.

31. *Alabama.* — Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448.

Indiana. — Darnell *v.* Rowland, 30 Ind. 342; Yount *v.* Yount, 144 Ind. 133, 43 N. E. 136.

Michigan. — Seeley *v.* Price, 14 Mich. 541.

New York. — Jackson *v.* King, 4 Cow. 207, 15 Am. Dec. 354.

North Carolina. — Garrow *v.* Brown, Winston's Eq. 595, 86 Am. Dec. 450.

Texas. — Ellis *v.* Mathews, 19 Tex. 390, 70 Am. Dec. 353.

Virginia. — Porter *v.* Porter, 89 Va. 118, 15 S. E. 500; Miller *v.* Rutledge, 82 Va. 863, 1 S. E. 202; Greer *v.* Greers, 9 Gratt. 330.

West Virginia. — Hinshman *v.* Ballard, 7 W. Va. 152.

"Although the law does not undertake to determine the validity of the acts and contracts of men by the greater or less strength of their understanding, and mere weakness of mind does not incapacitate the party if he be not *non compos mentis*, yet weakness of understanding may be a material circumstance in establishing an inference of unfair practice or imposition. . . . And it is immaterial from what cause such weakness arises, whether it be from temporary illness, constitutional despondency, general mental imbecility, or the natural incapacity of early infancy, or the infirmity of extreme old age." Ellis *v.* Mathews, 19 Tex. 390, 70 Am. Dec. 353.

32. Hinchman *v.* Ballard, 7 W. Va. 152.

33. Beverly *v.* Walden, 20 Gratt. (Va.) 147; Porter *v.* Porter, 89 Va. 118, 15 S. E. 500; Farnsworth *v.* Noffsinger, 46 W. Va. 410, 33 S. E. 246.

pacity,[34] if it appear that he was competent to transact other business.[35]

(2.) Infant Incompetent Party. — If the evidence discloses that a party to the contract is an infant, as in other contracts, this shows incompetency on the part of the infant,[36] and the sale is voidable as to him,[37] unless it appear that the contract was a sale of necessaries.[38] If, however, it be shown that he ratified the sale after he arrived at his majority the question of his competency is eliminated.[39]

(3.) Married Woman. — As by statute in most states in the Union, a married woman may contract as a *feme sole;* this class of persons as incompetents is not here considered.

C. Legitimate Subject-Matter of Sale. — a. *Generally.* That the contract of sale may be valid so as to be enforceable between the parties, the evidence must disclose a legitimate subject-matter of contract.[40] It must not appear from the evidence that

34. Boyce *v.* Smith, 9 Gratt. (Va.) 704, 60 Am. Dec. 313.

35. Boyce *v.* Smith, 9 Gratt. (Va.) 704, 60 Am. Dec. 313.

36. United States *v.* Blakeney, 3 Gratt. (Va.) 387, 405; Gillespie *v.* Bailey, 12 W. Va. 70; Holmes *v.* Rice, 45 Mich. 142, 7 N. W. 772; Williams *v.* Brown, 34 Me. 594; Kingman *v.* Perkins, 105 Mass. 111; Badger *v.* Phinney, 15 Mass. 359, 363, 8 Am. Dec. 105, 108.

37. Riley *v.* Mallory, 33 Conn. 201; Robinson *v.* Weeks, 56 Me. 102; House *v.* Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; McCarthy *v.* Henderson, 138 Mass. 310; Whitcomb *v.* Joslyn, 51 Vt. 79, 31 Am. Rep. 678.

38. Bradley *v.* Pratt, 2 Vt. 378; Earle *v.* Reed, 10 Met. (Mass.) 387; Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Oliver *v.* McDuffie, 28 Ga. 522; Locke *v.* Smith, 41 N. H. 346; Trainer *v.* Trumbull, 141 Mass. 527, 6 N. E. 761; Stone *v.* Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654.

How Question Whether Goods Are Necessaries Determined. — If it is sought to maintain the validity of the sale to the infant on the ground that the goods sold were necessaries, it is for the court to decide the question of fitness (Decell *v.* Lewenthal, 57 Miss. 331, 34 Am. Rep. 449), and for the jury that of the necessity of the articles. Decell *v.* Lewenthal, 57 Miss. 331, 34 Am. Rep. 449.

Burden of Proof. — The burden of proving that the goods were necessities accommodated to the situation and circumstances of the infant is upon the plaintiff. Wood *v.* Losey, 50 Mich. 475, 15 N. W. 557; Thrall *v.* Wright, 38 Vt. 494; Nicholson *v.* Wilborn, 13 Ga. 467.

39. Corey *v.* Burton, 32 Mich. 30; Cason *v.* Hubbard, 38 Miss. 35; McKamy *v.* Cooper, 81 Ga. 679, 8 S. E. 312; Fant *v.* Cathcart, 8 Ala. 725; State *v.* Rousseau, 94 N. C. 355.

40. Ruddell *v.* Landers, 25 Ark. 238, 94 Am. Dec. 719, where the defendant proved that the note sued upon was given in part payment for certain horses purchased for the express and well understood purpose of mounting certain men who had volunteered to engage in rebellion against the United States; Tatum *v.* Kelly, 25 Ark. 209, 24 Am. Dec. 709, where the defendants were permitted to prove that the note sued upon was given in payment for certain guns purchased from the plaintiff by the defendants to arm men to wage war against the United States in rebellion, which intention and purpose were well known to the plaintiff at the time of the sale. It was held in both cases that they came clearly within the principle of law that contracts contravening the law are void

the subject-matter is against the common law,[41] or that it is prohibited by statute.[42]

and that courts will never lend their aid in enforcing them; that illegal contracts are not such only as stipulate for something that is unlawful. But where the intention of one of the parties is to enable the other to violate the law, the contract is corrupted by such illegal intention and is void.

See also Lightfoot *v.* Tenant, 1 Bos. & Bull. (Eng.) 551, where the court said: "Upon the principles of the common law the consideration of every valid contract must be meritorious. The sale and delivery of goods, nay, the agreement to sell and deliver the goods, is, *prima facie,* a meritorious consideration to support a contract for the price. But the man who sold arsenic to one whom he knew intended to poison his wife with it would not be allowed to maintain an action upon his contract. The consideration of the contract, in itself good, is there tainted with turpitude which destroys the whole merit of it."

41. Fores *v.* Johnes, 4 Esp. (Eng. N. P.) 97; Poplett *v.* Stockdale, 2 Car. & P. (Eng.) 198; Stockdale *v.* Onwhyn, 7 D. & R. (Eng.) 625, 5 B. & C. 173, 2 C. & P. 163.

42. *Alabama.*—Merriman *v.* Knox, 99 Ala. 93, 11 So. 741; Clark's Cove Guano Co. *v.* Dowling, 85 Ala. 142, 4 So. 604; Steiner *v.* Ray, 84 Ala. 93, 4 So. 172, 5 Am. St. Rep. 332.

Georgia. — Kleckley *v.* Leyden, 63 Ga. 215; Conley *v.* Sims, 71 Ga. 161; Martin *v.* Upshur Guano Co., 77 Ga. 257.

Kentucky. — Wright *v.* Gardner, 98 Ky. 454, 33 S. W. 622, 35 S. W. 1116.

Massachusetts. — Levy *v.* Gowdy, 84 Mass. 320; Libby *v.* Downey, 87 Mass. 299; Smith *v.* Arnold, 106 Mass. 269; Sawyer *v.* Smith, 109 Mass. 220.

New Hampshire. — Pray *v.* Burbank, 10 N. H. 377.

South Carolina. — McConnell *v.* Kitchens, 20 S. C. 430, 47 Am. Rep. 845.

Texas. — Merryfield *v.* Willson, 14 Tex. 224, 65 Am. Dec. 117.

Contra. — Niemeyer *v.* Wright, 75 Va. 239, 40 Am. Rep. 720.

Sale of Commercial Fertilizer. In Alabama, a sale of commercial fertilizer is void if the person making the sale has not been licensed as required by statute, or if the fertilizer is not tagged as required by statute. And in Merriman *v.* Knox, 99 Ala. 93, 11 So. 741, an action on a promissory note given for the agreed price of a quantity of commercial fertilizer bought by the defendant, it was held a good defense for the defendant to show that the sale was made in Alabama by a person not licensed as the statute required, or that tags were not affixed to the packages or bags when delivered as required by law; and that if the sale was made in Alabama it made no difference whether the seller was a resident or non-resident of that state, or whether the fertilizer sold was manufactured in that state or elsewhere. See also Campbell *v.* Segars, 81 Ala. 259, 1 So. 714; Steiner *v.* Ray, 84 Ala. 93, 4 So. 172, 5 Am. St. Rep. 332; Johnson *v.* Hanover Nat. Bank, 88 Ala. 271, 6 So. 909.

In Conley *v.* Simms, 71 Ga. 161, an action on a note given for the purchase price of fertilizers. The proof was clear that the fertilizer delivered to defendant was never branded or tagged or inspected in any way according to law, but was a mixture of three different sorts of fertilizer, two of which had been inspected, and the third had not been inspected, or branded or tagged; that the bags of these three kinds had been cut in the warehouse of plaintiff's agent, and after all the sound bags which had tags on them were sold and delivered, this refuse mixture of good and bad, inspected and not inspected, branded and not branded, tagged and not tagged, was gathered up and bagged, and tags procured from persons, who were not inspectors, and attached to these bags of refuse fertilizer; and this stuff, thus never inspected or tagged ac-

b. *Proof of Illegality of Subject-Matter.* — **(1.) Generally.** — As the various matters constituting illegal subjects of contracts of sale belong rather to a general treatise on the law of sales, than to an article relating to the evidence of sales, only the general principles as to the subject can be here presented.

The evidence that the subject-matter of sale is unlawful may be made to appear from the contract itself, when offered in evidence,[43] or upon the face of the pleadings, when it then becomes a question of law for the court,[44] or it may be shown by extrinsic evidence,[45] either verbal[46] or written.[47]

(2.) When Contract in Writing. — When the contract has been reduced to writing, in which the subject-matter of the sale is set forth, from which it appears that the subject-matter is illegal, the evidence of its illegality must depend upon the written instrument,[48] and

cording to law, was put upon the defendant by delivering to a colored driver for him, with these illegally obtained and fraudulently attached symbols of a falsehood. It was held that the sale was illegal and void, and that the note could not be recovered upon even in the hands of a *bona fide* holder without notice.

Sale for Illegal Purposes. — Ohlson *v.* Wilson (Tex. Civ. App.), 71 S. W. 768. In this case the evidence showed that the box manufactured by the plaintiff was a trick faro box, especially designed for gambling purposes, the mechanism of which enabled the user to manipulate the cards in favor of the exhibitor of the game and against those who bet at said game, and all of which was known to the plaintiff. If a party manufactures and sells an article designed to his knwledge, exclusively for gambling, he cannot maintain an action for the price.

Sales of Articles Prohibited by Statute. — In Church *v.* Knowles, 101 Me. 264, 63 Atl. 1042, the action was on a promissory note given in payment of a pair of oxen sold by plaintiff to defendant. It was sought in this action to show that the cattle were diseased. It was held by the court on appeal, that if it appeared in evidence that the oxen were infected with tuberculosis at the time of the sale, the plaintiff could not recover. A statute of the state of Maine provides: "Whoever sells or disposes of any animal infected or known to have been exposed to infection, within one year after such exposure, without the knowledge and consent of the municipal officers, shall be fined not exceeding five hundred dollars or be imprisoned not exceeding one year."

43. *United States.* — Miller *v.* Ammon, 145 U. S. 421; Bank of United States *v.* Owens, 27 U. S. 527, 539; Harris *v.* Runnels, 53 U. S. 79, 84.

Alabama. — Gunter *v.* Leckey, 30 Ala. 591.

Illinois. — Penn *v.* Bornman, 102 Ill. 523.

Iowa. — Pangborn *v.* Westlake, 36 Iowa, 546, 549.

Kansas. — Alexander *v.* O'Donnell, 12 Kan. 608.

Maine. — Kennedy *v.* Cochrane, 65 Me. 594.

44. Miller *v.* Donovan, 11 Idaho 545, 83 Pac. 608.

45. Bishop *v.* American Preservers' Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317; Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511.

46. Bishop *v.* American Preservers' Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317; Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511; Isaacs *v.* Richmond, 90 Va. 30, 17 S. E. 760.

47. Bishop *v.* American Preservers' Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317; Isaacs *v.* Richmond, 90 Va. 30, 17 S. E. 760.

48. Miller *v.* Ammon, 145 U. S. 421; Penn *v.* Bornman, 102 Ill. 523; Shattuck *v.* Knight, 25 W. Va. 590;

of course, in such a case, the illegality must be shown by it.[49]

(3.) When Instrument Does Not Show Illegality. — Where the article sold is within itself a lawful subject-matter of sale, but its illegality depends upon the use to which the purchaser intends, at the time of the purchase, to apply it, parol evidence is admissible to show such fact,[50] and whether or not the seller knew of such fact,[51] and intended at the time of sale that it should be so applied.[52]

(4.) Lawful Article Intended for Illegal Purpose. — To render the subject-matter of sale invalid, so as to make it unenforceable by the seller, it is not sufficient that the evidence disclose a mere knowledge of the seller that the buyer is purchasing it to apply to an unlawful use,[53] but it must also show that the seller was to participate actively in its use,[54] or to aid in promoting the illegal purpose for which he sold the goods.[55]

Gunter *v.* Leckey, 30 Ala. 591; Peck *v.* Burr, 10 N. Y. 294.

49. Miller *v.* Ammon, 145 U. S. 421.

50. Rose *v.* Mitchell, 6 Colo. 102, 45 Am. Rep. 520; Wallace *v.* Lark, 12 S. C. 576, 32 Am. Rep. 516; Brunswick *v.* Balleau, 50 Iowa 120, 32 Am. Rep. 119.

51. Wallace *v.* Lark, 12 S. C. 576, 32 Am. Rep. 516.

52. Wallace *v.* Lark, 12 S. C. 576, 32 Am. Rep. 516; Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205.

53. *England.* — Chehey *v.* Duke, 10 Gl. & J. 10; Holman *v.* Johnson, Cowp. 341; Pellecat *v.* Angell, 2 Cromp. M. & R. 311.

United States. — Green *v.* Collins, 3 Cliff. 494.

Massachusetts. — Graves *v.* Johnson, 156 Mass. 211, 30 N. E. 818, 32 Am. St. Rep. 446, 15 L. R. A. 834; Dater *v.* Earl, 3 Gray 482; M'Intyre *v.* Parks, 3 Met. 207.

New Hampshire. — Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205.

New York. — Tracy *v.* Talmage, 14 N. Y. 162, 67 Am. Dec. 132.

Pennsylvania. — Braunn *v.* Keally, 146 Pa. St. 519, 23 Atl. 389, 28 Am. St. Rep. 811.

Texas. — Labbe *v.* Corbett, 69 Tex. 503, 6 S. W. 808; McKinney *v.* Andrews, 41 Tex. 363.

Vermont. — Tuttle *v.* Holland, 43 Vt. 542; Gaylord *v.* Soragen, 32 Vt. 110, 76 Am. Dec. 154.

54. Gaylord *v.* Soragen, 32 Vt. 110, 76 Am. Dec. 154; Aiken *v.* Blaisdell, 41 Vt. 655; Fisher *v.* Lord, 63 N. H. 514, 3 Atl. 927; Feineman *v.* Sachs, 33 Kan. 621, 7 Pac. 222, 52 Am. Rep. 547; McConihe *v.* McCann, 27 Vt. 95; Backman *v.* Wright, 27 Vt. 187; Tolman *v.* Johnson, 43 Iowa 127.

55. Waymell *v.* Reed, 5 T. R. (Eng.) 599; Gaylord *v.* Soragen, 32 Vt. 110, 76 Am. Dec. 154; Fisher *v.* Lord, 63 N. H. 514, 3 Atl. 927; Hull *v.* Ruggles, 56 N. Y. 424.

Beyond Such Bare Knowledge, the rule requires evidence that the vendor by the transaction participated in or intentionally aided in furtherance of an unlawful act. Rose *v.* Mitchell, 6 Colo. 102, 45 Am. Rep. 520; Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 255, wherein the court after reviewing all the then decided cases both in England and in this country bearing upon the question, said: "It would be wholly impracticable, as well as unwise and unjust (because restraining to an unreasonable extent the trade and commerce of the country), to require the vendor of all sorts of merchantable goods to scrutinize the plans and purposes of the purchaser with regard to the use of the commodity, and to sell only at the peril of forfeiting the price in every case where a jury might find that the seller had reason to suppose that the purchaser intended to make an improper or unlawful use of the article." And it is said in this case as a conclusion upon all the authorities reviewed that the principle pervading the whole current of the authorities is

(5.) Seller's Knowledge of Illegal Use. — In order to show the seller's knowledge of the unlawful use to which the property sold by him was to be applied, it is not sufficient to show a mere belief as to such use,[56] or facts to put him upon inquiry,[57] but it must appear that he had actual knowledge that the buyer intended to apply the property to an unlawful purpose.[58]

(6.) Evidence of Co-operation in Buyer's Purpose. — If the evidence shows conduct on the part of the seller, connected with the sale, whereby he endeavors to enable the buyer to evade the consequences of his unlawful use of the property, this is sufficient to establish the fact of the seller's aid in the promotion of the buyer's purposes to apply the property to an unlawful use.[59]

that "the validity of the plaintiff's claim to recover the price of the goods sold with knowledge that the purchaser intends to make an illegal use of them depends upon the circumstances whether or not the original vendor participated actively to a greater or less extent in the subsequent unlawful disposition of the goods, or whether the expectation of advantage to him growing out of the unlawful disposition of the goods by the purchaser entered into and constituted a part of the inducement and consideration of the original sale." And it was further said in the same case that it is one thing to furnish a person by means of a lawful sale and purchase with articles which the purchaser may and probably will apply to an improper use, and another and very different thing to incite, aid and encourage the purchaser in committing an offense against the law with or by means of the property which he may use for lawful and proper purposes. See also Green *v.* Collins, 3 Cliff. 494, 10 Fed. Cas. No. 5,755; Adams *v.* Coulliard, 102 Mass. 167; McGavock *v.* Puryear, 6 Coldw. (Tenn.) 34. *Compare* Spurgeon *v.* McElwain, 6 Ohio 442; Mosher *v.* Griffin, 51 Ill. 184.

56. Finch *v.* Mansfield, 97 Mass. 89; Lindsey *v.* Stone, 123 Mass. 332; Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205.

57. Ely *v.* Webster, 102 Mass. 304; Adams *v.* Coulliard, 102 Mass. 167; Hitchkiss *v.* Finan, 105 Mass. 86; Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205.

58. Ely *v.* Webster, 102 Mass. 304; Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205. See also Rose *v.* Mitchell, 6 Colo. 102, 45 Am. Rep. 520.

Actual Knowledge of Unlawful Use. — In the sale of an article not necessarily made for an unlawful use, as a billiard table for instance, evidence that it may be used for gambling is not sufficient to show knowledge on the part of the seller of an intended unlawful use. Where an article has a lawful use, and has no unlawful use except as a mere incident to the lawful use, the seller is not bound to presume that it will be used unlawfully and will not, therefore, be deemed to have knowledge that it will be so used. Knowledge of the unlawful intention must be distinctly proved. Brunswick *v.* Valleau, 50 Iowa 120, 32 Am. Rep. 119.

59. *Kansas.* — Feineman *v.* Sachs, 33 Kan. 621, 7 Pac. 222, 52 Am. Rep. 547.

Maine. — Banchor *v.* Mansel, 47 Me. 58.

Massachusetts. — Webster *v.* Munger, 8 Gray 584; Graves *v.* Johnson, 156 Mass. 211, 30 N. E. 818, 32 Am. St. Rep. 446, 15 L. R. A. 834; Foster *v.* Thurston, 11 Cush. 322.

New Hampshire. — Fisher *v.* Lord, 63 N. H. 514, 3 Atl. 927.

New York. — Arnot *v.* Pittston Coal Co., 68 N. Y. 558, 23 Am. Rep. 190; Materne *v.* Horwitz, 101 N. Y. 469, 5 N. E. 331.

Vermont. — Aiken *v.* Blaisdell, 41 Vt. 655.

Washington. — Standard Furniture Co. *v.* Van Alstine, 22 Wash. 670, 62 Pac. 145, 79 Am. St. Rep. 960.

Illustration. — Thus where one sells liquor to another, knowing at the time that it is for the purpose of resale contrary to law, and the seller assists the buyer in his effort to evade the law, this is sufficient evidence of co-operation on the part of the seller, to render the subject-matter of the sale unlawful.[60] So if the seller packs the goods in such a way as to enable the buyer to evade the law, the evidence of participation is sufficient.[61] So a seller who conveys property to a prostitute, knowing that she intends to put it to an immoral use, and reserves the title and the right to take possession when he may deem himself insecure, even before the maturity of the deferred payments, so aids and participates in such immoral use as to make the sale void.[62]

(7.) Sale to Public Enemy. — Whenever the evidence discloses that a party sells goods to a known public enemy, for use by such enemy, this is of itself evidence of the invalidity of the sale,[63] and it cannot be enforced.[64]

C. What Is Evidence of Lawful Subject-Matter of Sale.

(1.) Generally. — Whatever is not *per se* unlawful to sell, nor made so by the use to which it is to be applied, and has an actual or potential existence,[65] is shown to be a legitimate subject-matter of sale.[66]

(2.) Hope or Expectation Founded on Existing Right. — If the proof shows a hope or expectation of means founded upon an existing right, such hope is shown to be a legitimate subject-matter of sale.[67]

Illustrations. — Thus the evidence may show the sale of the hope

60. Foster *v.* Thurston, 11 Cush. (Mass.) 322.

61. Feineman *v.* Sachs, 33 Kan. 621, 7 Pac. 222, 52 Am. Rep. 547.

62. Standard Furniture Co. *v.* Van Alstine, 22 Wash. 670, 62 Pac. 145, 79 Am. St. Rep. 960.

See also Pearce *v.* Brooks, L. R. 1 Exch. 213. *Compare* Hubbard *v.* Moore, 24 La. Ann. 591, 13 Am. Rep. 128; Sampson *v.* Townsend, 25 La. Ann. 78.

63. Hanauer *v.* Doane, 79 U. S. 342; Keith *v.* Clark, 97 U. S. 454; Tatum *v.* Kelley, 25 Ark. 209, 94 Am. Dec. 717.

64. Carlisle *v.* United States, 83 U. S. 147; Dewing *v.* Perdicaries, 96 U. S. 193; Milner *v.* Patton, 49 Ala. 423.

See also Roquemore *v.* Alloway, 33 Tex. 461; Lewis *v.* Latham, 74 N. C. 283; Shepherd *v.* Reese, 42 Ala. 329. *Compare* Wallace *v.* Lark, 12 S. C. 576, 32 Am. Rep. 516; Pedder *v.* Odum, 2 Heisk. (Tenn.) 68, 5 Am. Rep. 25; McKinney *v.* Andrews, 41 Tex. 363; Ruckman *v.* Lightner, 24 Gratt. (Va.) 19.

65. Northington-Munger-Pratt Co. *v.* Farmers' Gin & Warehouse Co., 119 Ga. 851, 47 S. E. 200, 100 Am. St. Rep. 210; Losecco *v.* Gregory, 108 La. 648, 32 So. 985; Glass *v.* Blazer, 91 Mo. App. 564.

66. See cases cited in preceding note, also Cooke *v.* Millard, 65 N. Y. 352, 22 Am. Rep. 619.

67. *England.* — Hibblewhite *v.* M'Morine, 5 Mees. & Welsb. 462; Mortimer *v.* M'Callan, 6 Mees. & Welsb. 58.

Kentucky. — Wheeler *v.* Wheeler, 2 Metc. 474, 74 Am. Dec. 421; Whitehead *v.* Root, 2 Metc. 584.

Louisiana. — Losecco *v.* Gregory, 108 La. 648, 32 So. 985.

North Carolina. — Fonville *v.* Casey, 5 N. C. (1 Murph.) 389, 4 Am. Dec. 559.

Vermont. — Smith *v.* Atkins, 18 Vt. 461; Baxter *v.* Bush, 29 Vt. 465, 70 Am. Dec. 429.

of a future crop, based upon the means of raising such crop.[68] So a growing crop may be made the subject-matter of sale.[69]

D. The Offer of Sale or Purchase. — a. *Generally.* — The evidence must show an offer to sell on the part of the seller,[70] or to purchase on the part of the buyer.[71]

b. *Form of Offer.* — The evidence as to the form of the offer is sufficient which describes the property to be sold, and the terms of the sale.[72]

c. *Proof of Offer.* — When the offer is in writing the evidence of the offer consists of the writing itself,[73] and when not, the offer

68. Losecco *v.* Gregory, 108 La. 648, 32 So. 985.

69. Snyder *v.* Tibbals, 32 Iowa 447; Larkin *v.* Johnson, 8 Kan. App. 114, 54 Pac. 690; Glass *v.* Blazer, 91 Mo. App. 564.

70. *United States.* — Hall *v.* Kimbark, 11 Fed. Cas. No. 5,938.

Alabama. — Elliott *v.* Howison, 40 So. 1018.

Georgia. — Huggins *v.* Southeastern Lime & Cement Co., 121 Ga. 311, 48 S. E. 933.

Iowa. — Patton *v.* Arney, 95 Iowa 664, 64 N. W. 635.

Kansas. — Crystal Case Co. *v.* Arnett, 85 Pac. 302.

Montana. — Brophy *v.* Idaho Produce & Provision Co., 31 Mont. 279, 78 Pac. 493.

New York. — Worthington *v.* Herrmann, 89 App. Div. 627, 88 N. Y. Supp. 76.

Pennsylvania. — Allen *v.* Kirwan, 159 Pa. St. 612, 28 Atl. 495.

Wisconsin. — Tufts *v.* Weinfeld, 88 Wis. 647, 60 N. W. 992.

71. Abrohams *v.* Revillion Freres (Wis.), 107 N. W. 656; Minneapolis Threshing Mach. Co. *v.* Evans, 139 Fed. 860.

Countermand of Offer. — Where the offer consists in an order for the purchase of an article and it appears in evidence that such offer has been countermanded the other contracting party cannot go on and manufacture the goods and then hold the other contracting party liable for the price thereof. Tufts *v.* Weinfeld, 88 Wis. 647, 60 N. W. 992.

Evidence of Countermand. — An order given to a traveling salesman, being a mere proposition to buy subject to withdrawal at any time before acceptance, where the evidence shows the mailing of a letter countermanding an order for the purchase of goods there is a *prima facie* presumption that the letter was duly received by the addressee, and in the absence of evidence that it was not received, proof of the countermanding or the order is thus sufficiently shown. Merchants' Exch. Co. *v.* Sanders, 74 Ark. 16, 84 S. W. 786. See in this connection Burwell & Dunn Co. *v.* Chapman, 59 S. C. 581, 38 S. E. 222.

72. *Georgia.* — McCaw Mfg. Co. *v.* Felder, 115 Ga. 408, 41 S. E. 664.

Illinois. — National Furnace Co. *v.* Keystone Mfg. Co., 110 Ill. 427; Minnesota Lumb. Co. *v.* Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529.

Kentucky. — Fairmount Glass Wks. *v.* Cruden-Martin Woodenware Co., 106 Ky. 659, 21 Ky. L. Rep. 264, 51 S. W. 196.

Louisiana. — Smith *v.* Morse, 20 La. Ann. 220.

Pennsylvania. — Eckert *v.* Schoch, 155 Pa. St. 530, 26 Atl. 654; Allen *v.* Kirwan, 159 Pa. St. 612, 28 Atl. 495.

Wisconsin. — Moulton *v.* Kershaw, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516.

In Fitzhugh *v.* Jones, 6 Munf. (Va.) 83, the use of the expression by the seller that the buyer should reply as soon as possible in case he was disposed to *accede* to the terms offered was held sufficient to show that there was a definite proposition which was closed by the buyer's acceptance.

73. *United States.* — The Bertha, 91 Fed. 272, 33 C. C. A. 509, 62 U. S. App. 437.

Kansas. — Ehrsam *v.* Brown, 64 Kan. 466, 67 Pac. 867.

may be shown by parol evidence,[74] and even by the conduct of the party making it[75] and by his oral declarations,[76] or admissions.[77]

d. *General Rule as to Evidence of Offer.* — The general rule as to the evidence in support of an offer is that it must show a definite proposition to sell or buy.[78]

Mississippi. — Coats & Sons *v.* Bacon, 77 Miss. 320, 27 So. 621; Houck *v.* Wright, 23 So. 422.

Missouri. — Standard Mfg. Co. *v.* Hudson, 113 Mo. App. 344, 88 S. W. 137.

Pennsylvania. — American Home Savings Bank Co. *v.* Guardian Trust Co., 210 Pa. St. 320, 59 Atl. 1108.

Texas. — Fletcher *v.* Underhill (Tex. Civ. App.), 83 S. W. 726.

Wisconsin. — Moulton *v.* Kershaw, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516.

In Succession of Welsh, 111 La. 801, 35 So. 913, 64 L. R. A. 823, an order was taken by an agent which was reduced to writing by the parties which stipulated that the acceptance of the order was subject to the approval of the principal. It was sought to be proved by parol evidence that the traveling agent had full power to bind the principal and that the stipulation touching approval by the principal was a mere empty or meaningless formality. But this parol evidence was not allowed to be introduced on the ground that the offer contained in the writing could not be thus changed, and that the only proper evidence of the offer was that contained in the writing.

Parol Evidence of Warranty. — In Ehrsam *v.* Brown, 64 Kan. 466, 67 Pac. 867, the defendant had purchased a manufactured article of trade on a written order which described the article purchased, specified the purchase price and time of payment, and contained a condition that the title should remain in the vendor until payment was made, and other provisions of the purchase, but contained no words of express warranty either of the quality of the article sold or of its fitness for a particular use, which order the plaintiff had accepted by letter containing no words of warranty; and it was held that parol evidence was inadmissible to show the acceptance and terms of a contemporaneous oral warranty of the quality of the article sold. See also Diebold Safe & Lock Co. *v.* Huston, 55 Kan. 104, 39 Pac. 1035.

74. Smith *v.* Tobey Furniture Co., 57 Ill. App. 379.

75. *Alabama.* — Stoudenmire *v.* Harper, 81 Ala. 242, 1 So. 857.

Illinois. — Reynolds *v.* Blake, 111 Ill. App. 53.

Louisiana. — Boyd *v.* Heine, 41 La. Ann. 393, 6 So. 714.

Missouri. — W. W. Kendall Boot & Shoe Co. *v.* Bain, 46 Mo. App. 581.

Montana. — Smith *v.* Perham, 33 Mont. 309, 83 Pac. 492.

Nebraska. — Neidig *v.* Cole, 13 Neb. 39, 13 N. W. 18.

Texas. — Masterson *v.* Heitmann & Co. (Tex. Civ. App.), 87 S. W. 227.

West Virginia. — Bartholomae *v.* Paull, 18 W. Va. 771; Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015.

76. Thomas *v.* Degraffenreid, 17 Ala. 602; Larkin *v.* Baty, 111 Ala. 303, 18 So. 666; McNabb *v.* Lockhart, 18 Ga. 495; Lowman *v.* Sheets, 124 Ind. 416, 24 N. E. 351.

77. Riegel *v.* Wilson, 60 Pa. St. 388; Reed *v.* Reed, 12 Pa. St. 117; Springer *v.* Drosch, 32 Ind. 486, 2 Am. Rep. 356; Tindall *v.* McIntyre, 24 N. J. L. 147; Emery *v.* Irving Nat. Bank, 25 Ohio St. 360, 366; Kirkpatrick *v.* Muirhead, 16 Pa. St. 117.

78. Where the evidence consists of a written order for machinery to be shipped to the purchaser, fully describing the machinery, and the terms upon which it is to be purchased, this constitutes an offer which becomes a contract of sale by the unconditional acceptance thereof. If the evidence shows an acceptance of this offer by letter duly posted for transmission to the buyer, this completes the contract of sale, and parol evidence is not admissible to show that the contract is different from

e. *Authority To Make Offer Must Appear.* — It must appear from the evidence that the party making the offer had authority to make it.[79] This matter usually arises when the offer purports to come through an agent acting on behalf of his principal.[80]

f. *Offer Incomplete on Its Face.* — When the proof shows an offer to be incomplete on its face, parol evidence may be used to show what the whole offer was so as to make out a complete contract of sale between the parties.[81]

g. *Offer Cannot Be Avoided by Failure To Read It.* — In the absence of evidence of fraud and imposition, a buyer of goods will not be allowed to introduce evidence to avoid a contract of sale by showing that he signed the order for them without reading it, and thus showing that he failed to inform himself of its contents.[82]

that contained in the accepted order. Reeves & Co. *v.* Bruening, 13 N. D. 157, 100 N. W. 241.

Where the evidence showed that the plaintiff inquired the price of certain steers, and the defendant wrote that he could "not give a close price, on account of not seeing them for awhile, but they ought to be worth $4.25 per hundredweight; go and see them," — this does not constitute such an offer as that its acceptance may constitute a contract of sale. Patton *v.* Arney, 95 Iowa 664, 64 N. W. 635.

79. Whitaker *v.* Zeihme (Tex. Civ. App.), 61 S. W. 499; Born *v.* Simmons, 111 Ga. 869, 36 S. E. 956; Montgomery *v.* Enslen, 126 Ala. 654, 28 So. 626; Parlin & Orendorf Co. *v.* Boatman, 84 Mo. App. 67; Trent *v.* Sherlock (Mont.), 61 Pac. 650.

80. Bowlin Liquor Co. *v.* Beaudoin (N. D.), 108 N. W. 545; Shrimpton & Son *v.* Brice, 102 Ala. 655, 15 So. 452.

In the case last cited it was held that evidence that a merchant authorized his clerk to sign his name to an order for goods so that it would purport to be signed by the merchant himself and not by his clerk, was sufficient to bind the merchant to the same extent as if in fact the order had been signed by him.

Authority in Agent To Buy by no means implies authority to sell, and when it is sought to show an implied authority in the agent to do the act in question by proof of consent or acquiescence of the principal, this can be done only by proof of consent or of acquiescence in acts of a similar nature, or by proof of such acts as tend to show a general power. Trent *v.* Sherlock, 24 Mont. 255, 61 Pac. 650. See also McAlpin *v.* Cassidy, 17 Tex. 449.

In Montgomery *v.* Enslen, 126 Ala. 654, 28 So. 626, the evidence of the alleged sale consisted of a resolution passed by the board of directors of a corporation to sell and convey certain personal property to a given named person as trustee for one of its creditors, but it did not appear that at the time of the passage of the resolution there was any agent of the creditor present with authority to act in the matter, nor did the creditor ever accept the benefit of the provisions of the resolution in question. It was held that there was no complete sale to the creditor or the trustee for his benefit, and that the resolution conferred no title or right of possession of the property described to the trustee named therein.

81. Daniel *v.* Maddox-Rucker Bkg. Co., 124 Ga. 1063, 53 S. E. 573; United Railways & Elec. Co. *v.* Wehr & Co., 103 Md. 323, 63 Atl. 475.

82. *Alabama.* — Alfred Shrimpton & Son *v.* Brice, 102 Ala. 655, 15 So. 452; Main *v.* Radney, 39 So. 981; Wikle *v.* Johnson Laboratories, 132 Ala. 268, 31 So. 715.

Arizona. — History Co. *v.* Dougherty, 3 Ariz. 387, 29 Pac. 649.

Iowa. — McKinney *v.* Herrick, 66 Iowa 414, 23 N. W. 767.

Missouri. — Standard Mfg. Co. *v.* Hudson, 113 Mo. App. 344, 88 S. W. 137; Paris Mfg. & Importing Co. *v.*

E. Acceptance of Offer. — a. *Generally.* — The evidence must show an unconditional acceptance of the offer,[83] and in substantial

Carle, 116 Mo. App. 581, 92 S. W. 748; Crim *v.* Crim, 162 Mo. 544, 63 S. W. 489, 85 Am. St. Rep. 521, 54 L. R. A. 502; Layson *v.* Cooper, 174 Mo. 211, 73 S. W. 472, 97 Am. St. Rep. 545; Catterlin *v.* Lusk, 98 Mo. App. 182, 71 S. W. 1109; Magee *v.* Verity, 97 Mo. App. 486, 71 S. W. 472.

New Jersey. — Williams *v.* Leisen, 60 Atl. 1096.

Wisconsin. — Dowagiac Mfg. Co. *v.* Schroeder, 108 Wis. 109, 84 N. W. 14.

Statement of General Rule. "Courts of equity set aside contracts procured by fraud and reframe contracts where there has been a mutual mistake of the parties. But it is an invariable rule of law that in the absence of fraud or mistake parol evidence is not admissible to contradict or vary a written contract. The written contract is conclusively presumed to merge all prior negotiations and to express the final agreement of the parties. To permit a party when sued on a written contract to admit that he signed it but to deny that it expresses the agreement he made, or to allow him to admit that he signed it but did not read it or know its stipulations, would absolutely destroy the value of all contracts and negotiable instruments. The reason underlying the rule is to give stability to written agreements and to remove the temptation and possibility of perjury which would be afforded if parol evidence were admissible." Crim *v.* Crim, 162 Mo. 544, 63 S. W. 489, 85 Am. St. Rep. 521, 54 L. R. A. 502.

In Williams *v.* Leisen (N. J.), 60 Atl. 1096, an action on a written contract for the purchase of books, the defendant testified that the agent came to him and told him about the work and told him he just wanted to get some influential citizens to endorse the same; that he did not read the slip but signed his name to endorse the work to other citizens, and that he was in a hurry; and that the agent did not tell him he was signing a contract for the books. It was held that this testimony was not sufficient to exonerate the defendant from the contract. The court said: "It was plainly the duty of the defendant to read the instrument, to inform himself of the bargain, if he supposed a sale was contemplated, or to inform himself of the representations he would make to others to induce them to become purchasers if he supposed only a recommendation was in view. We therefore are of opinion that nothing was said to the defendant which ought to relieve him from the general legal rule that binds men by the import of documents signed by them, and which they had ability and opportunity to read. Indeed, the defendant's testimony indicated that he refrained from reading, not because of the remark of the agent, but because of his haste, and his indifference to the rights of others who might be influenced by his indorsement of the work."

83. *United States.* — Kelley, Maus & Co. *v.* Sibley, 137 Fed. 586, 69 C. C. A. 674; Martin *v.* Northwestern Fuel Co., 22 Fed. 596.

Alabama. — Falls *v.* Gaither, 9 Port. 605; Gould *v.* Cates Chair Co., 41 So. 675; Rider *v.* Wood, 35 So. 46.

California. — Four Oil Co. *v.* United Oil Producers, 145 Cal. 623, 79 Pac. 366, 68 L. R. A. 226.

Georgia. — Huggins *v.* Southeastern L. & C. Co., 121 Ga. 311, 48 S. E. 933.

Illinois. — Cornwells *v.* Krengel, 41 Ill. 394.

Iowa. — Davis Gasoline Engine Wks. Co. *v.* McHugh, 115 Iowa 415, 88 N. W. 948; Stennett *v.* First Nat. Bank, 112 Iowa 273, 83 N. W. 1069.

Kansas. — Seymour *v.* Armstrong, 10 Kan. App. 10, 61 Pac. 675.

Kentucky. — Hudson *v.* Arnold, 29 Ky. L. Rep. 375, 93 S. W. 42; L. A. Becker Co. *v.* Alvey, 27 Ky. L. Rep. 832, 86 S. W. 974.

Maine. — Jenness *v.* Mt. Hope Iron Co., 53 Me. 20; Stock *v.* Towle, 97 Me. 408, 54 Atl. 918.

Maryland. — Wheeling Steel &

accord with its terms,[84] and if the pretended acceptance varies from

Iron Co. *v.* Evans, 97 Md. 305, 55 Atl. 373; Johnson *v.* Corbett, 95 Md. 746, 53 Atl. 570; Hardwick *v.* Kirwan, 91 Md. 285, 46 Atl. 987.

Michigan. — Johnson *v.* Stephenson, 26 Mich. 63; Ayres *v.* Hinkle, 145 Mich. 283, 108 N. W. 702; Brown *v.* Snider, 126 Mich. 198, 85 N. W. 570.

Minnesota. — Reid *v.* Northwestern Implement & Wagon Co., 79 Minn. 369, 82 N. W. 672.

Missouri. — Arnold *v.* Cason, 95 Mo. App. 426, 69 S. W. 34; Denton *v.* McInnis, 85 Mo. App. 542.

Montana. — Brophy *v.* Idaho Produce & Provision Co., 31 Mont. 279, 78 Pac. 493.

North Dakota. — P. J. Bowlin Liquor Co. *v.* Beaudoin, 108 N. W. 545; Reeves & Co. *v.* Bruening, 13 N. D. 157, 100 N. W. 241.

New York. — Wilentshik *v.* Messler, 48 Misc. 362, 95 N. Y. Supp. 500; E. Bement & Sons *v.* Rockwell, 92 App. Div. 44, 86 N. Y. Supp. 876; Howells *v.* Stroock, 30 Misc. 569, 62 N. Y. Supp. 870.

Evidence of Mere Determination to Accept Offer is not sufficient to establish a binding acceptance. "Where the parties are distant and the contract is to be made by correspondence, the writing of a letter or telegram containing a notice of acceptance is not of itself sufficient to complete a contract. In such a case the act must involve an irrevocable element, and the letter must be placed in the mail or the telegram deposited in the office for transmission and thus placed beyond the power or control of the sender before the assent becomes effectual to consummate a contract; and not then unless the offer is still standing." Trounstine *v.* Sellers, 35 Kan. 447, 11 Pac. 441.

84. *United States.* — Johnston *v.* Fairmont Mills, 129 Fed. 74, 63 C. C. A. 516.

Alabama. — Falls *v.* Gaither, 9 Port. 605.

California. — Four Oil Co. *v.* United Oil Producers, 145 Cal. 623, 79 Pac. 366, 68 L. R. A. 226.

Illinois. — Cornwells *v.* Krengel, 41 Ill. 394; Chicago Curtain Stretcher Co. *v.* Paepke-Leicht Lumb. Co., 108 Ill. App. 249.

Kansas. — Seymour *v.* Armstrong, 10 Kan. App. 10, 61 Pac. 675.

Kentucky. — Hudson *v.* Arnold, 29 Ky. L. Rep. 375, 93 S. W. 42.

Louisiana. — Barrow *v.* Ker, 10 La. Ann. 120.

Maine. — Jenness *v.* Mt. Hope Iron Co., 53 Me. 20; Stock *v.* Towle, 97 Me. 408, 54 Atl. 918.

Michigan. — Wilkin Mfg. Co. *v.* H. M. Loud & Sons Lumb. Co., 94 Mich. 158, 53 N. W. 1045; Johnson *v.* Stephenson, 26 Mich. 63; United States Heater Co. *v.* Applebaum, 126 Mich. 296, 85 N. W. 743.

Minnesota. — Kileen *v.* Kennedy, 90 Minn. 414, 97 N. W. 126.

Missouri. — Tufts *v.* Sams, 47 Mo. App. 487; H. Gaus & Sons Mfg. Co. *v.* Chicago Lumb. & C. Co., 115 Mo. App. 114, 92 S. W. 121; Arnold *v.* Cason, 95 Mo. App. 426, 69 S. W. 34.

Montana. — Brophy *v.* Idaho Produce & Provision Co., 31 Mont. 279, 78 Pac. 493.

New York. — Bruce *v.* Pearson, 3 Johns. 534; Kirwan *v.* Byrne, 9 Misc. 76, 29 N. Y. Supp. 287; Wood & Selick *v.* Ellsworth, 91 N. Y. Supp. 24; Howells *v.* Stroock, 50 App. Div. 344, 63 N. Y. Supp. 1074.

Ohio. — Pappenheimer Hdw. Co. *v.* Harrison Wire Co., 8 Ohio Dec. 657.

Pennsylvania. — Bosshardt & Wilson Co. *v.* Crescent Oil Co., 171 Pa. St. 109, 32 Atl. 1120.

Texas. — Whittaker *v.* Zeihme (Tex. Civ. App.), 61 S. W. 499.

Wisconsin. — Russell *v.* Falls Mfg. Co., 106 Wis. 329, 82 N. W. 134.

In Stock *v.* Towle, 97 Me. 408, 54 Atl. 918, the offer consisted of an order for flour "Transit car," which means a car already loaded with flour and on its way from the mill to the vendee. The facts showed a tender of a car load of flour not in transit at the date of the offer, but shipped three days later, it was held by the court that this was not evidence of a compliance with the condition of sale by "Transit car" and that the defendant's refusal to accept the flour

the offer this is sufficient evidence of its rejection.[85] The acceptance need not be shown by the evidence to be in the very identical language of the offer.[86] If the proof shows that the acceptance is in the same sense in which the offer is made, the evidence of acceptance is sufficient.[87]

Illustrations. — Thus where the offer to sell was a certain quantity of "choice" potatoes, and the proof showed that acceptance required them to be "strictly choice", the evidence of acceptance was held to be sufficient.[88] But where a party offered to sell another five thousand tons of iron rails at the terms specified, and the latter wrote back directing the entry of an order for one thousand and two hundred tons "as per your favor", *Held,* that this amounted to a rejection of the offer.[89]

b. *Request for Departure From Terms of Offer.* — If the evidence shows an acceptance in accordance with the terms of the offer, but accompanied with a request to modify them, such request constitutes no evidence of conditional acceptance.[90]

c. *Acceptance Must Be Shown to Have Been Made Within Due Time.* — Where the offer stipulates a time for acceptance, the evidence must show an acceptance within the time contemplated by the offer,[91]

when tendered did not constitute a breach of contract.

85. See authorities cited under last two foot-notes.

86. *Canada.* — Anglo Newfoundland Fish Co. *v.* Smith, 35 Nov. Sc. 267.

Alabama. — Elliott *v.* Howison, 40 So. 1018.

California. — Ennis Brown Co. *v.* Hurst, 1 Cal. App. 752, 82 Pac. 1056; Hanson *v.* Slaven, 98 Cal. 377, 33 Pac. 266.

Illinois. — Olcese *v.* Mobile Fruit & Trad. Co., 211 Ill. 539, 71 N. E. 1084.

Iowa. — Minneapolis Thresh. Mach. Co. *v.* Zemanek, 130 Iowa 120, 106 N. W. 512.

Kansas. — Bennett *v.* Cummings, 85 Pac. 755.

Minnesota. — Hayden *v.* Byron, 78 Minn. 27, 80 N. W. 835.

Missouri. — Nelson *v.* Hirsch Iron & Rail Co., 102 Mo. App. 498, 77 S. W. 590; Parlin & Orendorff Co. *v.* Boatman, 84 Mo. App. 67.

Where the acceptance of an offer is otherwise sufficient, evidence showing that the acceptor added words merely stating a condition which the law would imply in any event does not render the offer ineffective. Bennett *v.* Cummings (Kan.), 85 Pac. 755.

The evidence in order to establish an unconditional acceptance need not show that the terms of the offer in detail were repeated in the acceptance. Hayden *v.* Byron, 78 Minn. 27, 80 N. W. 835.

87. See authorities cited in last foot-note.

88. Ennis Brown Co. *v.* Hurst, 1 Cal. App. 752, 82 Pac. 1056.

89. Minneapolis and St. L. R. Co. *v.* Columbus Roll. Mill Co., 119 U. S. 149.

90. Cherokee Mills *v.* Gate City Cotton Mills, 122 Ga. 268, 50 S. E. 82; King *v.* Dahl, 82 Minn. 240, 84 N. W. 737; Parlin & Orendorff Co. *v.* Boatman, 84 Mo. App. 67.

91. *United States.* — Carr *v.* Duval, 39 U. S. 77; Hargadine-McKittrick Dry Goods Co. *v.* Reynolds, 64 Fed. 560.

Illinois. — Larmon *v.* Jordan, 56 Ill. 204.

Kansas. — Trounstine *v.* Sellers, 35 Kan. 447, 11 Pac. 441.

Massachusetts. — Boston & M. R. Co. *v.* Bartlett, 3 Cush. 224.

New York. — Mactiers *v.* Frith, 6 Wend. 103, 21 Am. Dec. 262; Frith

or there will be no sufficient proof of the contract of sale.[92]

d. *Place of Acceptance of Offer.* — If the offer calls for an acceptance at a specified place, the evidence must show the acceptance to have been sent to that place,[93] else there is no evidence of sale that can be enforced.[94]

e. *Mode of Acceptance.* — If there be no particular mode of acceptance called for by the offer, it is sufficient to show an acceptance in any manner that will bring to the party making the offer knowledge of its acceptance.[95] But where the offer prescribes the manner of its acceptance, the evidence must show that this mode of acceptance has been followed.[96] Thus if an offer calls for a written acceptance, evidence of a verbal one is not sufficient.[97]

f. *The Conditions Imposed by Offer May Be Waived.* — Where the offer imposes the condition as to time, place, or manner of acceptance, there may be evidence showing a waiver of such condition.[98]

F. CONSIDERATION OF SALE. — a. *Generally.* — In order to show what is strictly denominated a sale, there must be evidence of a

v. Lawrence, 1 Paige 434; Batterman *v.* Morford, 76 N. Y. 622.

North Carolina. — Union Nat. Bank *v.* Miller, 106 N. C. 347, 11 S. E. 321, 19 Am. St. Rep. 538.

Pennsylvania. — Arnold *v.* Blabon, 147 Pa. St. 372, 23 Atl. 575.

West Virginia. — Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743.

Wisconsin. — Atlee *v.* Bartholomew, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103; Cheney *v.* Cook, 7 Wis. 413.

Time of Acceptance Not Fixed. Where the offer does not fix the time of acceptance, the evidence must show that the acceptance was made within a reasonable time. Trounstine *v.* Sellers, 35 Kan. 447, 11 Pac. 441.

92. Talbot *v.* Pettigrew, 3 Dak. 141, 13 N. W. 576; Lewis *v.* Browning, 130 Mass. 173; Park *v.* Whitney, 148 Mass. 278, 19 N. E. 161; Batterman *v.* Morford, 76 N. Y. 622; Shields *v.* Horbach, 30 Neb. 536, 46 N. W. 629.

93. Eliason *v.* Henshaw, 4 Wheat. (U. S.), 225.

94. Eliason *v.* Henshaw, 4 Wheat. (U. S.), 225.

95. Burgess Sulphite Fibre Co. *v.* Broomfield, 180 Mass. 283, 62 N. E. 367; Keohane *v.* Quinn, 18 Pa. Super. Ct. 443; Excelsior Coal Min. Co. *v.* Virginia I. & C. Co., 23 Ky. L. Rep. 1834, 66 S. W. 373; McCaw Mfg. Co. *v.* Felder, 115 Ga. 408, 41 S. E. 664; Jones *v.* Wattles, 66 Neb. 533, 92 N. W. 765; Wilcox *v.* Cline, 70 Mich. 517, 38 N. W. 555; Perry *v.* Mt. Hope Iron Co., 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902.

In the case last cited the evidence showed that the offer had been made in Boston, Massachusetts, to stand until the next day, and that the acceptance was by telegram from Providence, Rhode Island, the receipt of which was admitted; and it was held that the contract was completed in Rhode Island although to be performed in Massachusetts. The court said: "If there be any question that the telegraph is a natural and ordinary mode of transmitting such an acceptance, that is a question of fact for the jury; but we are of opinion that if it be shown that the acceptance duly reached the defendant, the question of the mode, no mode having been specified, is immaterial."

96. Bosshardt & Wilson Co. *v.* Crescent Oil Co., 171 Pa. St. 109, 32 Atl. 1120; Briggs *v.* Sizer, 30 N. Y. 647.

97. Bosshardt & Wilson Co. *v.* Crescent Oil Co., 171 Pa. St. 109, 32 Atl. 1120.

98. Atlee *v.* Bartholomew, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103.

money consideration to support it.[99] The evidence must show a certain price agreed upon by the parties,[1] or that which may be reduced to a certainty without the further acts of the parties.[2] But while a sale, technically speaking, contemplates money as its consideration,[3] this is not an essential requisite of its validity, and it may assume various forms,[4] and the evidence to sustain the consideration of a sale may take a wide range.[5]

99. Williamson *v.* Berry, 8 How. (U. S.) 495, 544; Lucas *v.* County Recorder of Cass County (Neb.), 106 N. W. 217.

1. *United States.* — Harper *v.* Daugherty, 11 Fed. Cas. No. 6,087.

Alabama. — Aderholt *v.* Embry, 78 Ala. 185.

Georgia. — Lewis *v.* Lofley, 60 Ga. 559; Falvey *v.* Richmond, 87 Ga. 99, 13 S. E. 261.

Iowa. — Salm *v.* Israel, 74 Iowa 314, 37 N. W. 387; Patton *v.* Arney, 95 Iowa 664, 64 N. W. 635.

Louisiana. — Wise *v.* Gutherie, 11 La. Ann. 91.

Michigan. — James *v.* Muir, 33 Mich. 223; Foster *v.* Lumbermen's Min. Co., 68 Mich. 188, 36 N. W. 171; Picard *v.* McCormick, 11 Mich. 68; Crapo *v.* Seybold, 36 Mich. 444.

Missouri. — Greer *v.* Lafayette Co. Bank, 128 Mo. 559, 30 S. W. 319.

New York. — Lefurgy *v.* Stewart, 140 N. Y. 661, 35 N. E. 893.

North Carolina. — Wittkowisky *v.* Wasson, 71 N. C. 451; Philfer *v.* Erwin, 100 N. C. 59, 6 S. E. 672.

2. Matthews Glass Co. *v.* Burk, 162 Ind. 608, 70 N. E. 371; American Cotton Co. *v.* Herring, 84 Miss. 693, 37 So. 117; Philfer *v.* Erwin, 100 N. C. 59, 6 S. E. 672; Daniel *v.* Hannah, 106 Ga. 91, 31 S. E. 734; Patton *v.* Arney, 95 Iowa, 664, 64 N. W. 635.

If the evidence shows that the agreement provided a definite and sure means of arriving at the sum to be paid and this was ascertained, it is the same as if the price had been definitely agreed upon at the time of the sale, and the conveyance of the title of the property is referable to that time. Philfer *v.* Erwin, 100 N. C. 59, 6 S. E. 672.

In Matthews Glass Co. *v.* Burk, 162 Ind. 608, 70 N. E. 371, an action to recover a balance alleged to be due for glass sold by the plaintiff to the defendant under a contract fixing the price at a certain per cent. lower than the lowest price of a certain other glass company named in the contract, it was held that certain circular letters issued by the latter company to its customers, informing them of the price of glass, were properly admitted in evidence.

3. *United States.* — Williamson *v.* Berry, 8 How. 495; Warner *v.* Martin, 11 How. 209.

Alabama. — Gunter *v.* Leckey, 30 Ala. 591, 596; Clement *v.* Cureton, 36 Ala. 120, 124; Coker *v.* State, 91 Ala. 92, 8 So. 874.

Arkansas. — Robinson *v.* State, 59 Ark. 341.

California. — Van Allen *v.* Francis, 123 Cal. 474, 56 Pac. 339.

Indiana. — Marmount *v.* State, 48 Ind. 21, 25.

Iowa. — Eldridge *v.* Kuehl, 27 Iowa 160, 173.

Maine. — Slayton *v.* McDonald, 73 Me. 50.

Massachusetts. — Schenck *v.* Saunders, 13 Gray 37, 41.

Missouri. — Martin *v.* Ashland Mill Co., 49 Mo. App. 29.

Oregon. — Coulter *v.* Portland Trust Co., 20 Or. 469, 26 Pac. 565, 27 Pac. 266.

4. Bell *v.* Greenwood, 21 Ark. 249; Meade *v.* Smith, 16 Conn. 346; Mudd *v.* Turton, 4 Gill (Md.) 233; Hackley *v.* Cooksey, 35 Mo. 398; Gardner *v.* Haines (S. D.), 104 N. W. 244; Aldrich *v.* Bay State Const. Co., 186 Mass. 489, 72 N. E. 53.

5. *Connecticut.* — Meade *v.* Smith, 16 Conn. 346.

Michigan. — Jones *v.* Kemp, 49 Mich. 9, 12 N. W. 890.

New York. — Smith *v.* James, 7 Cow. 328; Smith *v.* Clark, 21 Wend. 84, 34 Am. Dec. 213; Norton *v.* Woodruff, 2 N. Y. 153; Foster *v.* Pettibone, 7 N. Y. 433, 57 Am. Dec. 530; Trongott *v.* Byers, 5 Cow. 480.

Pennsylvania. — Jenkins *v.* Eichel-

b. *Price To Be Fixed by Third Parties.* — Where a sale is made for a price to be subsequently determined by third persons not parties to the contract of sale, the naming of the price by such third persons is sufficient evidence of price to establish this element of the contract.[6] When the evidence shows that the price has been thus fixed, it has the same effect as if the price had actually been agreed upon by the parties in the first instance.[7]

c. *Contract Calling for "Reasonable Price."* — Where the evidence clearly shows that a sale has been agreed upon whereby the property is to pass to the purchaser for which he agrees to pay a reasonable price, this is sufficient proof to sustain this feature of a contract of sale.[8] What is a reasonable price is a question for the jury,[9] to be determined as of the day of sale.

d. *When Title Passes Without Price Being Fixed.* — If the proof discloses that all the elements but that of price have been determined, and the title to the property has passed without a price fixed,[10] it is the legal presumption that the goods are to be paid for at what they are reasonably worth.[11]

II. FORMALITIES OF CONTRACT OF SALE.

1. Generally. — In many jurisdictions the Statute of Frauds requires contracts for the sale of chattels in certain cases to be in writing and signed by the party to be charged; and of course in such cases the only evidence to establish the contract of sale is that required by the statute.[12]

Best and Secondary Evidence. — Of course, as in the case of other contracts, where the writing evidencing the sale is lost, secondary

berger, 4 Watts 121, 28 Am. Dec. 691; Butterfield *v.* Lathrop, 71 Pa. St. 225.

Vermont. — Brown *v.* Sayles, 27 Vt. 227.

6. Brown *v.* Bellows, 4 Pick. (Mass.) 179; Fawkner *v.* Lew Smith Wall Paper Co., 88 Iowa 169, 55 N. W. 200, 45 Am. St. Rep. 230.

7. Norton *v.* Gale, 95 Ill. 533, 35 Am. Rep. 173; Dickinson *v.* Railroad Co., 7 W. Va. 390; Bass *v.* Veltum, 28 Minn. 512, 11 N. W. 65.

8. Greene *v.* Lewis, 85 Ala. 221, 4 So. 740, 7 Am. St. Rep. 42.

9. Llewellyn Steam Condenser Mfg. Co. *v.* Malter, 76 Cal. 242, 18 Pac. 271; Smalley *v.* Hendrickson, 29 N. J. L. 371.

10. Hill *v.* Hill, 1 N. J. L. 261, 1 Am. Dec. 206.

11. *Alabama.* — Wilkinson *v.* Williamson, 76 Ala. 163.

Illinois. — B. S. Green Co. *v.* Smith, 52 Ill. App. 158.

Massachusetts. — Taft v. Travis, 136 Mass. 95.

Michigan. — Lovejoy *v.* Michels, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 684; Comstock *v.* Sanger, 51 Mich. 497, 16 N. W. 872.

New York. — Konitzky *v.* Meyer, 49 N. Y. 571; Regus *v.* Moran, 9 N. Y. Supp. 927, 29 N. Y. St. 324.

Proof of Custom as to Mode of Payment. — Where a contract for the sale of a certain class of goods is silent as to the mode of payment, it is competent to prove the general custom among dealers of that class of goods as to the method of payment. Blalock & Co. *v.* Clark & Bros., 137 N. C. 140, 49 S. E. 88.

12. *England.* — Blagden *v.* Bradbear, 12 Ves. 466; Elmore *v.* Kingscote, 5 Barn. & Cress. 583.

Illinois. — Rallingall *v.* Bradley, 16 Ill. 373; McConnell *v.* Brillhart, 17 Ill. 354, 65 Am. Dec. 661.

evidence may be introduced for the purpose of establishing the fact

Louisiana. — McGuire *v.* Amelung, 12 Mart. 650.

Michigan. — Sherwood *v.* Walker, 66 Mich. 568, 11 Am. St. Rep. 531, 33 N. W. 919.

Missouri. — Williams *v.* Stifel, 64 Mo. App. 138.

New Jersey. — Johnson *v.* Buck, 35 N. J. L. 338, 10 Am. Rep. 243.

New York. — Mason *v.* Decker, 72 N. Y. 595, 28 Am. Rep. 190; Peltier *v.* Collins, 3 Wend. 459, 20 Am. Dec. 711; Merritt *v.* Clason, 12 Johns. 102, 7 Am. Dec. 286, *s. c.* 14 Johns. 484.

Oregon. — Corbitt *v.* Salem Gaslight Co., 6 Or. 405, 25 Am. Rep. 541, and note.

Pennsylvania. — Myers *v.* Vanderbelt, 84 Pa. St. 510.

South Carolina. — Givens *v.* Calder, 2 Desaus. 171; Douglass *v.* Spears, 2 Nott & McC. 207, 10 Am. Dec. 588; Louisville Asphalt Varnish Co. *v.* Lorick, 29 S. C. 533, 2 L. R. A. 212.

Vermont. — Ide & Smith *v.* Stanton, 15 Vt. 685, 40 Am. Dec. 698.

In Jones *v.* National Cotton Oil Co., 31 Tex. Civ. App. 420, 72 S. W. 248, an action was brought in the state of Texas upon an oral contract made in Arkansas and by the law of the latter state a contract for the sale of goods for the price of $30.00 or upwards was required to be in writing. The court held that the only evidence to establish this contract, although sought to be enforced in the state of Texas, was that required by the laws of Arkansas and the plaintiff being unable to introduce any writing as evidence of his contract, the court held that there could be no oral evidence to establish it; although it was insisted by the plaintiff that having performed certain acts and expended certain sums of money in reliance upon the defendant complying with its contract, he was entitled to recover, but the court refused to take this view of the case and the dismissal of his action by the trial court was confirmed on appeal.

Parol Evidence of the Meaning of Trade Terms Employed in Written Contracts. — Though a contract of sale be evidenced by a writing, if there are terms employed in it to denote some particular matter relating to the sale not commonly understood and which are usually "denominated trade terms," parol evidence of experts is admissible to explain their meaning. Thus where a proposition from one engaged in the cotton business was submitted by letter to a cotton buyer and accepted by the latter as follows: "We will pay you 25 cents a bale commission, give you a basis on which to buy and on which we will take the cotton bought on that day, subject to change as the market fluctuates. Your cotton will be received here and returns sent you as soon as possible after we receive it. We are giong to give you a good basis. If you buy your cotton with any judgment, with the 25 cents commission you ought to make a little money" — parol testimony of experts in the cotton business was held to be admissible to explain the terms "basis" and "returns." Daniel *v.* Maddox-Rucker Bkg. Co., 124 Ga. 1063, 53 S. E. 573; Fayter *v.* North, 30 Utah, 156, 83 Pac. 742; Semon Bache & Co. *v.* Coppes, Zook & Mutschler Co., 35 Ind. App. 351, 74 N. E. 41, 111 Am. St. Rep. 171.

Parol Evidence Is Not Admissible to Vary or contradict a bill of sale which is complete and unambiguous. Adams *v.* Garrett, 12 Ala. 229; Cunningham *v.* Martin, 46 Kan. 352, 26 Pac. 696; Hebert *v.* Dupaty, 42 La. Ann. 343, 7 So. 580; Haynes *v.* Hobbs, 136 Mich. 117, 98 N. W. 978; Sayre *v.* Burdick, 47 Minn. 367, 50 N. W. 245; Sanchez *v.* Goldfrank (Tex. Civ. App.), 27 S. W. 204.

A Warranty in a Bill of Sale cannot be varied or contradicted by parol evidence. Hanger *v.* Evins, 38 Ark. 334; Humphrey *v.* Merrian, 46 Minn. 413, 49 N. W. 199; Watson *v.* Roode, 30 Neb. 264, 46 N. W. 491; McQuaid *v.* Rose, 77 Wis. 470, 46 N. W. 892.

A Warranty Not Expressed in a Bill of Sale cannot be established by parol evidence. Bush *v.* Bradford, 15 Ala. 317; Johnson *v.* Powers, 65 Cal. 179, 3 Pac. 625; Rogers *v.* Perrault, 41 Kan. 385, 21 Pac. 287;

and terms of the sale,[13] the loss[14] or destruction of the written instrument having first been shown.[15]

Agreement Not Reduced to Writing. — Where it does not appear that the contract of sale was reduced to writing, nor that the law requires it to be so reduced to writing, any competent evidence may be introduced as in the case of other contracts for the purpose of establishing the terms and contract of sale.[16] And the evidence need

Wheaton Roller Co. *v.* Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854.

13. *Colorado.* — Gilpin County Min. Co. *v.* Drake, 8 Colo. 586, 9 Pac. 787.

Florida. — Edwards *v.* Rives, 35 Fla. 89, 17 So. 416.

Illinois. — Spencer *v.* Boardman, 118 Ill. 553, 9 N. E. 330.

Indiana. — Draper *v.* Vanhorn, 12 Ind. 352.

Iowa. — Louis Cook Mfg. Co. *v.* Randall, 62 Iowa 244, 17 N. W. 507.

Kentucky. — Evans *v.* Miller, 5 Ky. L. Rep. 606; Bowler *v.* Blair, 6 Ky. L. Rep. 658.

Massachusetts. — Hersey *v.* Jones, 128 Mass. 473.

Michigan. — Stanley *v.* Anderson, 107 Mich. 384, 65 N. W. 247.

Mississippi. — Perry *v.* Randolph, 14 Miss. 335.

Missouri. — Benton *v.* Craig, 2 Mo. 198.

North Carolina. — Gathings *v.* Williams, 27 N. C. (5 Ired. L.) 487, 44 Am. Dec. 49.

Pennsylvania. — Fisher *v.* Borough of South Williamsport, 1 Pa. Super. Ct. 386.

Texas. — Rains *v.* McMills, 14 Tex. 614.

Non-Production of Bill of Sale. Before the contents of a bill of sale can be proved by evidence other than the instrument itself, the instrument must be produced or its non-production accounted for. Yarbrough *v.* Hudson, 19 Ala. 653; Morton *v.* White, 16 Me. 53; Hood *v.* Olin, 80 Mich. 296, 45 N. W. 341.

14. Mordecai *v.* Beal, 8 Port. (Ala.) 529; Palmer *v.* Logan, 4 Ill. 56; Crispen *v.* Hannavan, 72 Mo. 548; Vandergriff *v.* Piercy, 59 Tex. 371.

In Baines *v.* Higgins, 2 La. 220, it was held that evidence that a bill of sale had been seen among the vendee's papers before or subsequent to his death, that an unsuccessful search had been made for it and that some of his papers had been lost, was not sufficient to authorize the introduction of secondary evidence.

In Patterson *v.* Keystone Min. Co., 30 Cal. 360, where the evidence showed that the bill of sale had been in the possession of one or the other of two persons, it was held necessary to show that both of them had searched for it and been unable to find it before secondary evidence of its contents could be received.

Advertising Loss. — In Peace *v.* Head, 12 La. Ann. 582, where it was sought to introduce secondary evidence of the contents of a bill of sale, it was held sufficient to show that the loss of the bill of sale was advertised and that proper exertion was made to recover it.

15. See authorities cited in preceding note, also McNutt *v.* McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; Louis Cook Mfg. Co. *v.* Randall, 62 Iowa 244, 17 N. W. 507; Gathings *v.* Williams, 27 N. C. (5 Ired. L.) 487, 44 Am. Dec. 49.

16. Maynard *v.* Render, 95 Ga. 652, 23 S. E. 194; Dimmack *v.* Wheeling Trac. Co., 58 W. Va. 226, 52 S. E. 101.

In Gallagher *v.* London Assur. Corp., 149 Pa. St. 25, 24 Atl. 115, it was held that the purchaser of chattels may testify to his ownership thereof notwithstanding the sale was evidenced by a written instrument. *Compare* Graham *v.* Hamilton, 25 N. C. (3 Ired.) 381.

In Stoddard *v.* Mix, 14 Conn. 12, where the issue was whether or not a proposal had been accepted, it was held that testimony of a witness that he would consult with the other party, which he did, and that the latter had agreed to the proposal and that the witness had communicated

not show that the contract of sale was in any particular form.[17]

Contract Partly in Writing and Partly in Parol. — So where the contract of sale lies partly in writing and partly in parol, extrinsic evidence is admissible to establish that part of the contract not in writing.[18]

2. Kinds of Evidence Admissible in Proof of Sale. — A. GENERALLY. — The evidence admissible in proof of a sale may assume many different phases. Thus it may consist in a formal bill of

this to the former party, who agreed to it, was competent.

In Griffin *v.* Cleghorn, 63 Ga. 384, pending a trade which resulted in the sale of certain property, it was held that statements made by a third person in the hearing of both parties touching the value of the property in question formed part of the *res gestae* and were admissible in evidence on an issue as to whether or not the property in question was worthless.

Memorandum. — In Carstens *v.* McDonald, 38 Neb. 358, 57 N. W. 757, the defendant had contracted to sell and deliver to the plaintiff certain property, a portion of the purchase price being paid at the time by plaintiff's check. A memorandum of the transaction between the parties, stating the quantity of the property, was made by the plaintiff at the time on the face of the check in the defendant's presence. In an action against the defendant for breach of the contract, it was held that the check was competent evidence.

Compare Kennedy *v.* Oswego & S. R. Co., 67 Barb. (N. Y.) 169, an action to recover for wood sold by the plaintiff to the defendant where the defendant proved that one of its agents drew a writing setting out the terms of the agreement in relation to the wood, and that he presented it to the plaintiff's agent who made the contract, who said it was correct and wished the plaintiff's name signed instead of his own. The memorandum was never signed by either party; and it was held that it was not competent evidence to show what were the terms of the contract in controversy. The basis of the decision seems to have been that the paper offered was made by the defendant's agent and not by the plaintiff or his agent.

Other Transactions. — In Plummer *v.* Mold, 22 Minn. 15, where the issue was whether or not there was an agreement to pay a certain price for property, it was held that evidence that the parties thereto had agreed upon the same price for other like property about the same time was inadmissible.

17. *United States.* — Butler *v.* Thompson, 92 U. S. 412.

Illinois. — Smith *v.* Tobey Furniture Co., 57 Ill. App. 379.

Kentucky. — Denny *v.* Campbell's Exr., 9 Ky. L. Rep. 367, 4 S. W. 301.

Louisiana. — Richards *v.* Nolan, 3 Mart. (N. S.) 336; Hitchcock *v.* Harris, 1 La. 311; Rachal *v.* Normand, 6 Rob. 88.

North Carolina. — Crawford *v.* Geiser Mfg. Co., 88 N. C. 554.

Wisconsin. — Hodson *v.* Carter, 3 Chand. 234.

In an action for the price of goods sold it is proper to admit in evidence the orders on which plaintiff shipped the property, though they were not signed by the defendant, where it appears the defendant has verbally given the orders and has received and kept the goods. Gross *v.* Feehan, 110 Iowa 163, 81 N. W. 235.

18. *Georgia.* — Maynard *v.* Render, 95 Ga. 652, 23 S. E. 194.

Illinois. — McCormick Harvesting Mach. Co. *v.* Snell, 23 Ill. App. 79; Story *v.* Carter, 27 Ill. App. 287.

Indiana. — Kieth *v.* Kerr, 17 Ind. 284; Morehead *v.* Murray, 31 Ind. 418.

Iowa. — Fawkner *v.* Smith Wall Paper Co., 88 Iowa 169, 55 N. W. 200, 45 Am. St. Rep. 230; McCormick Harv. Mach. Co. *v.* Richardson, 89 Iowa 525, 56 N. W. 682.

sale,[19] sealed[20] or unsealed,[21] or any other writing;[22] letters;[23] telegrams;[24] declarations or admissions of the parties;[25] the conduct

Minnesota. — Tufts *v.* Hunter, 63 Minn. 464, 65 N. W. 682.

South Dakota. — National Cash Reg. Co. *v.* Pfister, 5 S. D. 143, 58 N. W. 270.

Warranty. — "Where a contract is first concluded by parol and a paper is afterwards drawn up, not as containing the terms of the contract, but as a mere memorandum or bill of parcels, parol evidence is admissible to show the actual terms of the sale and that there was a warranty, although it does not appear in the memorandum or receipt." Cassidy *v.* Begoden, 38 N. Y. Super. Ct. 180.

19. Barnett *v.* Williams, 7 Kan. 339; Lemon *v.* Johnson, 6 Dana (Ky.) 399; Gage *v.* Wilson, 17 Me. 378; Dunn *v.* Hewitt, 2 Denio (N. Y.) 367.

Before a bill of sale can be received in evidence, its execution must be proved. Ramsey *v.* Waters, 1 Mo. 406. *Compare* Rhame *v.* Bower, 27 Ga. 408, an action on a note referring to a bill of sale as having been given by the plaintiff, the payee, to the defendant, the maker. After the plaintiff had read the note in evidence the defendant offered the bill of sale as the one referred to in the note, it was held that since the bill and the note agreed in many particulars and differ in none, the bill of sale was admissible without further proof of its execution.

Attested Instrument. — In Giannone *v.* Fleetwood, 93 Ga. 491, 21 S. E. 76, it was held that although a bill of sale to chattels is good without an attesting witness, yet if it is attested the instrument cannot be received in evidence as a muniment of title without proof of its execution by the attesting witness, unless his non-production is duly accounted for.

In Texas a bill of sale comes within the purview of the registration laws, and by express statute is made admissible in evidence without proof of execution if filed in the cause three days before trial with notice to the other side; but in default of such filing and notice it cannot be received in evidence without proof of execution. Morrow *v.* State, 22 Tex. App. 239, 2 S. W. 624.

20. Gibson *v.* Warden, 81 U. S. 244.

21. Gibson *v.* Warden, 81 U. S. 244.

22. Reeves & Co. *v.* Bruening, 13 N. D. 157, 100 N. W. 241; Hall *v.* Kimbark, 11 Fed. Cas. No. 5,938; Houghwout *v.* Boisaubin, 18 N. J. Eq. 315.

23. *United States.* — Utley *v.* Donaldson, 94 U. S. 29.

California. — Hanson *v.* Slaven, 98 Cal. 377, 33 Pac. 266.

Georgia. — Woolbright *v.* Sneed, 5 Ga. 167; Pitcher *v.* Lowe, 95 Ga. 423, 22 S. E. 678.

Illinois. — Olcese *v.* Mobile Fruit & Trad. Co., 211 Ill. 539, 71 N. E. 1084.

Kentucky.—Fairmount Glass Wks. *v.* Cruden-Martin Woodenware Co., 106 Ky. 659, 21 Ky. L. Rep. 264, 51 S. W. 196.

Massachusetts. — Mauger *v.* Crossby, 117 Mass. 330.

Michigan. — Tri-State Mill. Co. *v.* Breisch, 145 Mich. 232, 108 N. W. 657.

New York. — Clark *v.* Dales, 20 Barb. 42; Batterman *v.* Morford, 76 N. Y. 622; Brown *v.* Norton, 50 Hun 248, 2 N. Y. Supp. 869.

Pennsylvania. — Eckert *v.* Schoch, 155 Pa. St. 530, 26 Atl. 654; Cooper *v.* Altimus, 62 Pa. St. 486.

Texas. — Embree-McLean Carriage Co. *v.* Lusk, 11 Tex. Civ. App. 493, 33 S. W. 154.

24. Bennett *v.* Cummings (Kan.), 85 Pac. 755; Eckert *v.* Schoch, 155 Pa. St. 530, 26 Atl. 654; Utley *v.* Donaldson, 94 U. S. 29; Gartner *v.* Hand, 86 Ga. 558, 12 S. E. 878; Short *v.* Threadgill, 3 Wills. Civ. Cas. Ct. App. (Tex.) § 267; Woldert *v.* Arledge, 4 Tex. Civ. App. 692, 23 S. W. 1052.

25. Bethea *v.* McCall, 3 Ala. 449; Dale *v.* Gower, 24 Me. 563; Elliott *v.* Stoddard, 98 Mass. 145; Fellman *v.* Smith, 20 Tex. 99; Fain *v.* Edwards, 44 N. C. 64.

of the parties;[26] or such facts and circumstances as authorize the inference that a sale has been consummated.[27]

B. Bill of Sale as Evidence of Sale. — To authorize what purports to be a bill of sale to be used as evidence of a sale, the instrument must contain such a description of the property as will

26. Del Bondio *v.* Jacob Dold Co., 79 Mo. App. 465; Metropolitan Nat. Bank *v.* Benedict Co., 74 Fed. 182, 20 C. C. A. 377.

27. Johnson *v.* State (Tex. Crim.), 55 S. W. 968; Moon *v.* Hawks, 2 Aik. (Vt.) 390, 16 Am. Dec. 725; Kellog *v.* Witherhead, 6 Thomp. & C. (N. Y.) 525.

Incidental Matters and Circumstances. — A letter written in reply to an offer to sell a horse stating that "I would like to get it at once, if it would do me, which I am certain it will," is admissible in connection with parol testimony to show a contract of sale. Stagg *v.* Compton, 81 Ind. 171.

When suit is brought for the price of goods sold under an order of an alleged agent of the defendant, the latter may testify that he never bought any goods of the plaintiff. Sax *v.* Davis, 81 Iowa 692, 47 N. W. 990.

In an action brought for the price of lumber, the plaintiff's evidence tended to show that the defendant, knowing that a lot of lumber belonging to the plaintiff consisted merely of oak, with a little ash, agreed to buy the lot at a certain rate per foot. The defendant contended that he negotiated for the oak in the lot and did not buy any lumber except the oak and offered evidence that the lot contained other inferior lumber besides ash, and also as to what the market price of the oak was. *Held,* that such evidence was admissible as showing the improbability of the defendant's having made the contract as contended. Upton *v.* Winchester, 106 Mass. 330.

In an action for the price of an agricultural machine, in which the matter in issue was whether the machine was sold or taken on trial, and the machine had been shown to be in the defendant's possession, it was proper to admit evidence of the plaintiff's agent to the effect that he had requested the defendant, after he refused to keep the machine, to place it under cover on his place until he could confer with his principal. Lyon *v.* Hayden, 58 Vt. 662, 5 Atl. 892.

An action was brought to recover for goods sold, and a written order was received in evidence purporting to be from the defendant. It also appeared that the person who brought the order had been in the habit of getting goods from the plaintiff for defendant and that he had previously been in plaintiff's store with defendant when the latter was purchasing goods. *Held,* that the introduction of the order was proper, as the defendant did not deny that he received either the goods called for by the order in question or those previously delivered to him. Benson *v.* Hart, 10 Wash. 301, 38 Pac. 1041.

In an action brought to recover the price of a pump, where defendants denied the sale, and averred that the pump had been placed on their premises by plaintiff as an advertisement, it is error to exclude the testimony of a disinterested witness, that, at the time of the alleged sale, plaintiff said he was putting in the pump simply as an advertisement. Packard *v.* Backus, 78 Wis. 188, 47 N. W. 183.

Irrelevant Evidence. — When the question is whether defendant bought certain pins from plaintiff, evidence as to defendants' financial rating, and as to the amount of pins suitable for their trade, is incompetent. Shrimpton & Son *v.* Brice, 102 Ala. 655, 15 So. 452.

When the action is for goods sold through brokers, testimony that, when a broker makes a sale, each party receives a memorandum from the brokers, or that neither party receives any writing from the other, is not admissible to prove the contract. Goddard *v.* Garner, 109 Ala. 98, 19 So. 513.

identify and distinguish it;[28] a sufficient consideration,[29] which is *prima facie*,[30] but not conclusive evidence of the consideration.[31]

In a suit for goods sold and delivered, evidence that the defendant received the goods to sell, as the plaintiff's agent, and had sold them and received the money, is not admissible. Lindley *v.* Downing, 2 Ind. 418.

28. *Alabama.* — Bush *v.* Bradford, 15 Ala. 317.

California. — Coghill *v.* Boring, 15 Cal. 213.

Iowa. — Towslee *v.* Russell, 76 Iowa 525, 41 N. W. 208.

Kentucky. — Warfield *v.* Curd, 35 Ky. 318.

Louisiana. — Carpenter *v.* Featherston, 15 La. Ann. 235.

Michigan. — Brown *v.* Mynard, 107 Mich. 401, 65 N. W. 293.

Missouri. — Crow *v.* Ruby, 5 Mo. 484.

North Carolina. — Cohen *v.* Stewart, 98 N. C. 97, 3 S. E. 716.

Tennessee. — Galt *v.* Dibrell, 18 Tenn. 146.

Vermont. — Rugg *v.* Hale, 40 Vt. 138.

In Coghill *v.* Boring, 15 Cal. 213, it was held that a bill of sale of "all the goods and merchandise and property we own, have, or have an interest in, in a store in Nevada, county of Nevada, formerly occupied by Bailey Gatzert, and now in the possession of the sheriff of the county of Nevada, said goods forwarded by us to Bailey Gatzert, Nevada," contained a sufficient description of the goods.

A bill of sale of a particular number of articles of a specific grade, readily distinguishable from other grades and included within the general mass, is not void for uncertainty. Brown *v.* Mynard, 107 Mich. 401, 65 N. W. 293.

Parol Evidence to Identify Subject-Matter. — In Rugg *v.* Hale, 40 Vt. 138, the defendant had sold to the plaintiffs a farm, together with certain farm tools and other personal property, and executed a memorandum of such sale of the personal property, in which many articles were enumerated, and concluding with these words, "Meaning all the farming tools, etc., now owned by him and on the said farm." It was held that parol evidence was admissible for the purpose of ascertaining to what specific property the words quoted applied. The court said: "That the terms 'farming tools, etc.,' have a defined legal signification, is not claimed, but that they are susceptible of 'divers meanings,' as applicable to the various implements and branches of farming, is obvious. A doubt or ambiguity exists then as to the meaning or application of the words, or rather an uncertainty as to the articles intended to be conveyed. Whenever this is the case parol evidence of extrinsic circumstances and facts is admissible for the purpose of ascertaining to what specific property the words used apply, or were intended to apply. As expressed in one of the cases in which the subject is discussed, the evidence is admissible 'as explaining the object on which the parties intended the contract should operate and be rendered effectual.' And for this purpose the evidence objected to was admissible as showing that the property in dispute was purchased in connection with the farm, which the plaintiffs contemplated carrying on as a *dairy* farm, and was so understood by both parties at the time of the sale."

29. Bush *v.* Bradford, 15 Ala. 317; Nedvidek *v.* Meyer, 46 Mo. 600; Jordan *v.* Foster, 11 Ark. 139; Mueller *v.* Provo, 80 Mich. 475, 45 N. W. 498, 20 Am. St. Rep. 525.

30. Jordan *v.* Foster, 11 Ark. 139.

31. Jordan *v.* Foster, 11 Ark. 139.

Where a Bill of Sale Expressing a Money Consideration is attacked as being in fraud of the vendor's creditors, parol evidence is admissible to show that the consideration was partly in money and partly in property. Van Lehn *v.* Morse, 16 Wash. 219, 47 Pac. 435, so holding under the rule that additional and consistent circumstances may be shown.

Consideration Greater. — In Rosboro *v.* Peck, 48 Barb. (N. Y.) 92, an action to recover moneys claimed to have been paid by the plaintiff to the defendant by mistake, the money having been paid in consideration of a sale by the defendant to the plaintiff, evidenced by a bill of sale, it was held proper to permit the plaintiff to show that the consideration for the sale as expressed in the bill of sale was greater than the consideration actually agreed upon.

Additional Consideration. — In McMahan *v.* Stewart, 23 Ind. 590, it was held that a vendor of a steamboat might show that in addition to the consideration expressed in the bill of sale for the boat the vendee had agreed to indemnify and save the vendor harmless from all payments and expenses on account of the indebtedness of the boat, which he had failed to do but had permitted suit to be brought against the vendor upon such indebtedness, and judgment had been obtained.

Instrument Not Stating Whole Consideration. — Where a bill of sale states the consideration, but not the whole consideration which induced the sale, it is competent to introduce parol evidence to supply the omission and to show the actual consideration which moved between the parties if not inconsistent with that expressed in the written instrument. Nedvidek *v.* Meyer, 46 Mo. 600.

Contractual Consideration. — In Reisterer *v.* Carpenter, 124 Ind. 30, 24 N. E. 371, certain personal property was sold by a written contract in which the purchaser agreed to pay therefor by taking up and canceling certain specified debts of the seller, and it was held that in the absence of any charge of fraud or mistake the seller was not to be permitted to show that the consideration for the sale was other than that expressed in the written instrument. See also Sayer *v.* Burdick, 47 Minn. 367, 50 N. W. 245, where the bill of sale recited as the consideration a sum in hand paid and also contained a covenant on the part of the vendee to pay the partnership debts of himself and the vendor, it was held that parol evidence was not admissible for the purpose of enforcing such parol promise that the vendee also in consideration of the sale promised by parol to pay individual debts of the vendor.

In Finn *v.* Hempstead, 24 Ark. 111, it was held that a bill of sale being an executed contract, the sufficiency of the consideration cannot be inquired into by those who claim to stand in the place of the vendor, except for the purpose of conducing to show that the instrument was procured by coercion and fraud.

Illegal Consideration. — In Patterson *v.* Fowler, 22 Ark. 396, it was held that where a bill of sale shows a valid consideration upon its face, it is not error to reject evidence tending to establish other and illegal motives moving the maker to the act. In this case the plaintiff had made to the defendant a bill of sale, reciting that the latter was the former's surety in a bond for his appearance at court, and transferred to the defendant the property sued for as an indemnity, providing that if he failed to appear at court the property was to be the defendant's, otherwise the instrument was to be void. The plaintiff duly appeared at court and pleaded guilty. The defendant offered to prove that the plaintiff intended leaving the country to avoid prosecution for an offense other than that in which the defendant stood surety for his appearance, and that with a view to this effect, and for the purpose of procuring defendant's approval of the plaintiff's act in leaving the country, the plaintiff made the bill of sale in question. The court said that it was not error to exclude this evidence. "The bill of sale shows upon its face that it was made for a valid and legal consideration—to indemnify defendant as the surety of plaintiff in the bail bond. The defendant did not offer to prove that such was not in fact the consideration of the instrument, but that the consideration was different and illegal. The intention of plaintiff in executing the bill of sale was one thing, and the consideration of the instrument was another. The defendant was the plaintiff's surety in the bail-bond, and the plaintiff

It must also appear that the instrument has been delivered.[32] And

may have supposed that if he attempted to leave the country without indemnifying him, he would attempt to prevent his leaving, and this may have been the motive which induced the plaintiff to execute to the defendant the bill of sale—but the instrument being founded on a sufficient legal consideration on the part of the defendant, the particular motive which may have induced plaintiff to execute it could not affect the validity of the instrument. If the plaintiff had offered to prove that he was about to leave the country to avoid a prosecution for felony, and that the defendant was taking steps to prevent nis departure, and that the consideration of the bill of sale was that the defendant would desist and permit the plaintiff to leave, perhaps the evibence would have been admissible to prove that the instrument was executed upon an illegal consideration."

32. *Arkansas.* — Dyer *v.* Bean, 15 Ark. 519.

Connecticut. — Alsop *v.* Swathel, 7 Conn. 500.

Iowa. — Trask *v.* Trask, 90 Iowa 318, 57 N. W. 841, 48 Am. St. Rep. 446.

Massachusetts —Buffington *v.* Curtis, 15 Mass. 527, 8 Am. Dec. 115.

Michigan. — Doyle *v.* Mizner, 42 Mich. 332, 3 N. W. 968.

Minnesota. — Thompson *v.* Easton, 31 Minn. 99, 16 N. W. 542.

New Hampshire. — Lord *v.* Ferguson, 9 N. H. 380.

New York. — Bryant *v.* Bryant, 42 N. Y. 11.

South Carolina. — Collins *v.* Bankhead, 1 Strob. 25.

Delivery Is Essential to the Validity of a bill of sale, that is, it must go out of the hands or control of the grantor with the intent that it should go to those of the grantee, and it must ultimately go there. And in Dyer *v.* Bean, 15 Ark. 519, it was held that proof that at some time before or after the death of the wife the bill of sale was in the hands of the husband and was destroyed by him, was not sufficient evidence of a delivery to the wife.

A bill of sale is invalid unless delivered; and where the same persons are grantors and represent the grantee, there must be distinct evidence that the instrument was meant to be operative, and the signature is not enough to show this. Under such a transfer no new rights can arise as between the parties on which to found an estoppel. Doyle *v.* Mizner, 42 Mich. 332, 3 N. W. 968.

In Bryant *v.* Bryant, 42 N. Y. 11, where a bill of sale was found amongst the papers of the maker after his death, the bill of sale purporting to convey to his mother all the tools and stock in his shop, it was held in an action by the mother against the administrators of his estate to recover the value of the property included in the bill of sale, that no delivery of the instrument sufficient to make it operative would be presumed, although the plaintiff kept house for the deceased at the date of the paper and at the time of his death, and although it appeared that the deceased had promises to pay her for services in keeping his house, and had in his lifetime about the date of the paper said to his brother that he had given his mother a writing that was just the same to her as cash or money, and that she could sell him out at any time. The court said: "If, instead of finding, among the papers of the intestate, this bill of sale, a deed of his real estate, to his mother, executed by him, had been found, the evidence would have been equally cogent of its delivery, as this paper. The same may be said of any other paper to which his mother purported to be a party. Had the testimony in any way referred to the bill of sale in question, so as to identify it, then the remark of the intestate that he had given it to his mother would be evidence of a delivery. But it was not so identified, and consequently what the intestate said was no evidence of the delivery of the paper. Besides, the intestate spoke of a writing he had given to his mother. There was no evidence that he had ever delivered this paper to her, but

by statute in some jurisdictions, as against creditors, and purchasers for valuable consideration without notice, it must be shown that the bill of sale has been recorded.[33]

C. Formal Written Instrument. — Where a statute requires a formal written instrument, the proof of the sale consists in the production of the writing.[34] And the same rule obtains where the parties have entered into an informal written agreement, though such agreement may not necessarily be required to show a contract of sale.[35]

D. Letters as Proof of Sale. — A sale may be shown by the letters of the parties only,[36] when all the negotiations relating to

on the contrary, from its being found among his papers, after his death, the presumption was that he had never given it to her, and that in his conversation with his brother as to having given his mother a writing, he referred to some other paper. The onus was upon the plaintiff to show her title to the property. As it remained in the possession of the intestate until his death, the defendants, as his administrators, had a *prima facie* title. The plaintiff based her title upon the bill of sale. To sustain this she was bound to show a delivery of it to her by the intestate. This she failed to do, and the judge erred in not granting a nonsuit."

33. *Iowa.* — Hickok *v.* Buell, 51 Iowa 655, 2 N. W. 512; Fox *v.* Edwards, 38 Iowa 215.

Kentucky. — Dale *v.* Arnold, 2 Bibb 605.

Maryland. — Fouke *v.* Fleming, 13 Md. 392.

Michigan. — Cooper *v.* Brock, 41 Mich. 488, 2 N. W. 660.

Tennessee — Tatum *v.* Jameson, 2 Humph. 298.

Texas. — Morrow *v.* State, 22 Tex. App. 239.

Washington. — Sayward *v.* Nunan, 6 Wash. 87, 32 Pac. 1022.

34. See cases cited under II, 1, note 12.

35. *United States.* — Smith *v.* American Nat. Bk. Co., 89 Fed. 832, 32 C. C. A. 368, 60 U. S. App. 431.

Connecticut. — New Idea Pattern Co. *v.* Whelan, 75 Conn. 455, 53 Atl. 953.

Georgia. — Arnold *v.* Malsby, 120 Ga. 586, 48 S. E. 132; National Computing Scale Co. *v.* Eaves, 116 Ga. 511, 42 S. E. 783; Wilson *v.* Hinnant, 117 Ga. 46, 43 S. E. 408.

Illinois. — Telluride P. Trans. Co. *v.* Crane Co., 208 Ill. 218, 70 N. E. 319; Davis *v.* Fidelity Fire Ins. Co., 208 Ill. 375, 70 N. E. 359.

Missouri. — Walther *v.* Stampfli, 91 Mo. App. 398.

New York. — Dady *v.* O'Rourke, 172 N. Y. 447, 65 N. E. 273.

Pennsylvania. — Hatfield *v.* Thomas Iron Co., 208 Pa. St. 478, 57 Atl. 950.

South Carolina. — Cape Fear Lumb. Co. *v.* Evans, 69 S. C. 93, 48 S. E. 108.

Virginia. — Slaughter *v.* Smither, 97 Va. 202, 33 S. E. 544.

Washington. — Minnesota Sand Stone Co. *v.* Clark, 35 Wash. 466, 77 Pac. 803.

36. *United States.* — Wheeler *v.* New Brunswick & C. R. Co., 115 U. S. 29; Winterport Granite & Brick Co. *v.* The Jasper, 30 Fed. Cas. No. 17,898.

Colorado. — Robert E. Lee Silv. Min. Co. *v.* Omaha & Grant Smelt. & Ref. Co., 16 Colo. 118, 26 Pac. 326.

Georgia. — Bryant *v.* Booze, 55 Ga. 438; Gartner *v.* Hand, 86 Ga. 558, 12 S. E. 878.

Maryland. — Cheney *v.* Eastern Transp. Line, 59 Md. 557.

New York. — Mactier *v.* Frith, 6 Wend. 103, 21 Am. Dec. 262.

Pennsylvania. — Ames *v.* Pierson, 174 Pa. St. 597, 34 Atl. 317.

South Carolina. — Atlantic Phosphate Co. *v.* Sullivan, 34 S. C. 301, 13 S. E. 539.

Utah. — Haarstick *v.* Fox, 9 Utah 110, 33 Pac. 251.

Wisconsin. — Hawkinson *v.* Harmon, 69 Wis. 551, 35 N. W. 28.

the sale have been conducted solely by correspondence; and where the letters do not contain all the negotiations, they may be used in connection with parol evidence to make out the contract of sale.[37]

E. Proof of Sale by Telegram. — a. *Generally.* — The principle upon which telegrams are admissible in evidence for the purpose of establishing a contract of sale is practically the same as that upon which the introduction of letters is allowed.[38] There is conflict, however, among the cases as to whether or not a telegram received at its place of destination, in answer to a former message, may be received in evidence without proof of its genuineness,[39] as

In Short Mountain Coal Co. *v.* Hardy, 114 Mass. 197, an action to recover an overpayment on goods, wherein the issue was whether or not the goods were sold and delivered under a contract between the plaintiff and the defendant, or only between the plaintiff and the person forwarding the goods, it was held proper to receive in evidence a bill of lading, "Shipped by" the forwarder "on account of" the defendant.

In Cooper *v.* Perry, 16 Colo. 436, 27 Pac. 946, it was held that letters written to a creditor in his lifetime by a debtor containing self-serving declarations are competent evidence against the latter in an action against him by the administrators of the creditor after his decease without accounting for their custody during the interval; that proof that the letters are genuine is sufficient.

Not Admissible on Behalf of Writer. — In Hodgkins *v.* Chappell, 128 Mass. 197, where the issue was whether or not an agreement made by the plaintiff with one of the defendants acting for the defendant firm was an agreement of sale or of consignment for sale, it was held that a letter written by the defendant in question to his codefendant, in which after the contract was made he informed the codefendant of the terms of the contract, was not admissible on behalf of the defendants; that "it was not a part of the contract between the plaintiff and the defendants, for both parties agreed that the contract . . . whatever it was, had been fully made and completed between the parties before the letter was written. It was simply the declaration of one of the defendants to his codefendant in the absence of the plaintiff and without the plaintiff's knowledge."

In Clarkson *v.* Kerber, 84 Ill. App. 658, it was held that a letter written by the plaintiff to the defendant, which was in effect a mere statement that the defendant was indebted to the plaintiff for materials furnished, and a recitation by the writer of his version of what had theretofore occurred in relation to the alleged indebtedness, was not admissible in behalf of the plaintiff.

37. O'Meal *v.* Weisman (Tex. Civ. App.), 88 S. W. 290.

Where there is a written order for the purchase of property, that is incomplete, parol evidence may be introduced to show what the whole agreement was, as for instance, that it was ordered upon condition that it should be of a certain quality, and the performance on the buyer's part depended upon the compliance with such condition. Aultman, Miller & Co. *v.* Clifford, 55 Minn. 159, 56 N. W. 593, 43 Am. St. Rep. 478.

38. Southern R. Co. *v.* Howell, 135 Ala. 639, 34 So. 6; People *v.* Hammond, 132 Mich. 422, 93 N. W. 1084; Oregon S. S. Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

39. **Cases Holding That Their Genuineness Must Be Established Before They Can Be Used as Evidence.** — Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355; Howley *v.* Whipple, 48 N. H. 487; Burt *v.* Winona & St. P. R. Co., 31 Minn. 472; State *v.* Gritzner, 134 Mo. 512, 36 S. W. 39; Drexel *v.* True, 74 Fed. 12, 20 C. C. A. 265, 36 U. S. App.

in the case of a letter received in answer to a former one.[40]

b. *Showing to Authorize Introduction of Telegram.* — To authorize the introduction of a telegram in evidence, there must be proof of its genuineness by evidence of the handwriting of the sender,[41] or some other admissible method.[42] If the telegram is in answer to a former one, according to some authorities, the original should be produced and its authenticity established, and then its transmission and delivery shown as originally written,[43] while others do not require this.[44]

c. *Delivery of Telegram.* — Proof that a telegram was sent raises the presumption of fact that it was received by the party to whom it was addressed,[45] and, although this proof does not raise a conclusive

611; Whilden *v.* Merchants' & P. Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; Chester *v.* State, 23 Tex. App. 577.

Cases Holding That a Telegram Sent in Reply to a Former One May Be Received as Evidence Without Proof of Its Genuineness. — People *v.* Hammond, 132 Mich. 422, 93 N. W. 1084; Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438; Thorp *v.* Philbin, 2 N. Y. Supp. 732, 18 N. Y. St. 1005; Taylor *v.* The Robert Campbell, 20 Mo. 254; Oregon S. S. Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

40. Armstrong *v.* Advance Thresher Co., 5 S. D. 12, 57 N. W. 1131; People's Nat. Bk. *v.* Geisthardt, 55 Neb. 232, 75 N. W. 582; Melby *v.* Osborne, 33 Minn. 492, 24 N. W. 253.

41. Reynolds *v.* Hinrichs, 16 S. D. 602, 94 N. W. 694.

42. Dunbar *v.* United States, 156 U. S. 185.

Proof of Telegram by Operator. It is competent to prove a telegram by the testimony of the operator at the sending office, who though not the operator who sent it, testifies that he brought it from the file of telegrams contained in his office. Blalock & Co. *v.* Clark & Bros., 137 N. C. 140, 49 S. E. 88.

43. Cases cited in note 39, *supra.*

44. Cases cited in note 39, *supra.*

45. Eppinger *v.* Scott, 112 Cal. 369, 42 Pac. 301, 53 Am. St. Rep. 220; Oregon S. S. Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

Presumption of Fact. — The presumption indulged that a telegram given to a telegraph company for transmission, and properly addressed, was received, is one of fact, and so, open to rebuttal and contradiction, and consists merely in the natural inference which may be drawn from the experience and certainty of transmission. The great bulk of letters sent by mail reach their destination, and equally so the great bulk of telegrams. A failure in either case is an exception, possible, but rare. Letters are transported by government officials acting under oath, and upon a system framed to secure regularity and precision; telegrams by private corporations, whose success and prosperity depend largely upon the promptness and accuracy of the work, and are faithful under the incentive of interest. These companies perform a public service and are regulated to some extent by the public law. There is thus impressed upon the telegraph service something of a public character, and thrown around it the guard and obligation of the public law, and it seems to us reasonable to assimilate the rules of evidence founded upon transmission by mail to that of transmission by telegraph. It may be that the presumption of correct delivery, agreeing in kind with that raised upon delivery to the post-office, should be deemed weaker in degree, but in view of the wide extension of telegraph facilities, and of their increasing use in business correspondence, and the difficulty of tracing a dispatch to its destination, we think it should be held that upon proof of delivery of the message for the

presumption, it is sufficient in the absence of a contrary showing.[46]

F. Declarations and Admissions of Parties. — As in all matters of contract the declarations and admissions of the parties may be shown in evidence;[47] so to show a sale they are also admissible.[48]

G. Conduct of Parties. — A sale may be established by the mere conduct of the parties with reference to the subject-matter of sale.[49]

purpose of transmission, properly addressed to the correspondent at his place of residence, or where he is shown to have been, a presumption of fact arises that the telegram reached its destination, sufficient at least to put the other party to his denial, and raise an issue to be determined. Opinion of Finch, J., in Oregon S.S. Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

46. Oregon S. S. Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

47. Rice *v.* Bancroft, 28 Mass. 469; Lester *v.* McDowell, 18 Pa. St. 91; Planters Bank *v.* Crane, 2 Rob. (La.) 489; Darnell *v.* Griffin, 46 Ala. 520; New York Ice Co. *v.* Parker, 21 N. Y. Super. Ct. 688; Bair *v.* Abrams, 12 La. Ann. 753.

48. See authorities cited under preceding note, also McKay *v.* Elder (Tex. Civ. App.), 92 S. W. 268; Beckwith *v.* Mace, 140 Mich. 157, 103 N. W. 559.

Admissions in Proof of Contract of Sale. — In Hunter *v.* Davis, 128 Iowa 216, 103 N. W. 373, the court in its opinion says: "A witness testified that defendant 'acknowledged that he took the horses at a valuation of $50 per head.' Defendant moved to strike this as a conclusion and opinion of the witness. Manifestly the witness used the word 'acknowledged' as the equivalent of 'stated' or 'said,' and in this aspect there was no error in denying the motion. Surely there is nothing on the face of the record to indicate that the witness was giving an opinion rather than stating a fact."

In McKay *v.* Elder (Tex. Civ. App.), 92 S. W. 268, an action to recover damages for the breach of a contract for the delivery of certain cattle, it was held that evidence of admissions of the defendant as to the sale of the cattle to the plaintiff as well as declarations of the plaintiff in relation thereto, made in the presence of the defendant, was proper.

Declarations of Partner. — In Beckwith *v.* Mace, 140 Mich. 157, 103 N. W. 559, it was held that although the authority of an agent cannot be proved by his declarations, yet where a partnership is sued for the price of goods sold to it, evidence of the declarations of an alleged partner who bought the goods, made at the time of the purchase, is admissible as part of the *res gestae* as showing the nature of the contract actually agreed on.

Admitting Correctness of Account. In New York Ice Co. *v.* Parker, 21 How. Pr. (N. Y.) 302, it was held that proof of an admission by a buyer of the correctness of the account rendered against him was, in the absence of evidence disputing the amount, sufficient proof of the sale and delivery of the goods sued for.

In Lyon *v.* Hayden, 58 Vt. 662, 5 Atl. 892, an action for the purchase price of a machine, wherein the controversy was as to whether the machines had been sold or simply taken on trial, and the proof showed that the machine was in the defendant's possession, it was held proper to permit the defendant to show by the plaintiff's agent that he had requested the defendant after his refusal to keep the machine to place it under cover at his place until the agent could see his principal.

49. Masterson *v.* Heitmann & Co. (Tex. Civ. App.), 87 S. W. 227.

Conduct of the Parties. — Possession and use of a chattel for a long period, with knowledge of the former owner, are facts from which a jury may presume a sale against him. Bullard *v.* Billings, 2 Vt. 309.

In Cassidy *v.* Hyland, 120 Mass. 221, an action for goods sold and delivered, it was held that evidence of a sale and delivery of the goods

Illustrations. — Thus where the issue is raised as to whether there was a sale of property, evidence that the alleged buyer sold the property as his own is competent evidence of the fact of sale.[50] So the furnishing of goods by one person in his line of business and the receipt and use of them by another is *prima facie* evidence of sale of the goods.[51]

H. Facts and Circumstances as Proof of Sale. — Where such facts and circumstances are shown in relation to the transfer of property, as authorize a jury to infer that a contract of sale was intended by the parties,[52] this is sufficient proof of a sale.[53] Illustrations of this class of evidence are given in the footnote.[54]

in controversy and of a promise by the defendant to pay therefor within a few days was sufficient to warrant a verdict for the plaintiff.

In Carman *v.* Scribener, 3 Houst. (Del.) 554, it was held that proof that goods were furnished by one person in his line of business and received and used by another in his line of business, constituted *prima facie* evidence of a sale.

Compare Gibbon *v.* Hughes, 76 Wis. 409, 45 N. W. 538, where it appeared that a machine had been rejected after a trial, and the question was whether or not there had been any sale, it was held that evidence that the plaintiff had afterwards tried to sell it to other persons was properly excluded; that an attempt to resell was not at all inconsistent with his claim of a sale to the defendant.

50. Eby *v.* Winters, 51 Kan. 777, 33 Pac. 471.

51. Carman *v.* Scribner, 3 Houst. (Del.) 554.

52. Stern *v.* Filene, 96 Mass. 9; Cassidy *v.* Hyland, 120 Mass. 221; Harris Photographic Supply Co. *v.* Fisher, 81 Mich. 136, 45 N. W. 661.

In Stern *v.* Filene, 14 Allen (Mass.) 9, an action to recover for goods sold and delivered, a witness testified that he was present at and knew of the sale, that the goods in controversy were sent to another place to be packed for the defendant, where their receipt was acknowledged, and that they were sold at market prices; and it was held that this was sufficient to establish a sale.

53. Carman *v.* Scribner, 3 Houst. (Del.) 554; Wight *v.* Stiles, 29 Me. 164; Smith *v.* Colby, 136 Mass. 562; Harris Photographic Supply Co. *v.* Fisher, 81 Mich. 136, 45 N. W. 661; Barr *v.* Chandler, 47 N. J. Eq. 532, 20 Atl. 733; New York Ice Co. *v.* Parker, 21 How. Pr. (N. Y.) 302.

54. Receipt and Use of Property. Where it appears in evidence that a party received and used the property of the plaintiff, this is sufficient to render him liable as upon a sale, and does show an implied contract of sale. Boyd *v.* Heine, 41 La. Ann. 393, 6 So. 714. See also Indiana Mfg. Co. *v.* Hayes, 155 Pa. St. 160, 26 Atl. 6.

Acceptance of Goods. — Where it is shown that a defendant ordered goods from a dealer who was unable to fill the order, and it was handed to another, who sent the goods accompanied by the bill, and the goods thus sent were accepted, this is evidence sufficient to establish the sale and the consequent liability of the defendant. Neidig *v.* Cole, 13 Neb. 39, 13 N. W. 18. See Butler *v.* Moses, 43 Ohio St. 166, 1 N. E. 316.

Permitting Third Party To Use the Goods. — So where one merchant ships goods to another, and the latter, disclaiming to have purchased them, permits a third party to take them and use a part of them, though he may afterwards recover the residue from such party and return them to the shipper, these are such acts of ownership and evidence of sale that the party to whom the goods were shipped is liable as the purchaser thereof. Bartholomae *v.* Paull, 18 W. Va. 771. See also Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015.

Possession and Use of Property for a long period of time with knowl-

III. WARRANTIES IN CONTRACTS OF SALE.

1. Classes. — To properly apply the law of evidence relating to warranties, it is necessary to specify the different classes. They are express,[55] or implied;[56] oral,[57] or written.[58]

2. Distinctions To Be Observed. — In determining whether the evidence offered amounts to a warranty, the distinction between a warranty and a mere representation,[59] must be observed, as well as

edge of the former owner are facts from which a sale, as against the latter, may be inferred. Bullard *v.* Billings, 2 Vt. 309.

55. *United States.* — Accumulator Co. *v.* Dubuque St. R. Co., 64 Fed. 70, 12 C. C. A. 37.

Alabama. — Tabor *v.* Peters, 74 Ala. 90, 49 Am. Rep. 804.

Illinois. — White *v.* Gresham, 52 Ill. App. 399.

Indiana. — Crist *v.* Jacoby, 10 Ind. App. 688, 38 N. E. 543.

Massachusetts. — Whitehead & Atherton Mach. Co. *v.* Ryder, 139 Mass. 366, 31 N. E. 736.

Michigan. — Zimmerman Mfg. Co. *v.* Dolph, 104 Mich. 281, 62 N. W. 339.

Minnesota. — Fitzpatrick *v.* Osborne, 50 Minn. 261, 52 N. W. 861.

New York. — Dike *v.* Reitlinger, 23 Hun 241.

56. *United States.* — English *v.* Spokane Comm. Co., 57 Fed. 451, 6 C. C. A. 416; Willings *v.* Consequa, 30 Fed. Cas. No. 17,767.

Alabama. — Magee *v.* Billingsley, 3 Ala. 679.

Arkansas. — Weed *v.* Dyer, 53 Ark. 155, 13 S. W. 592.

Georgia. — Walters *v.* Croasdale, 43 Ga. 204; Cochran *v.* Jones, 85 Ga. 678, 11 S. E. 811.

Illinois. — Chicago Pack. & Prov. Co. *v.* Tilton, 87 Ill. 547; Babcock *v.* Trice, 18 Ill. 420, 68 Am. Dec. 560; Fish *v.* Roseberry, 22 Ill. 288.

Indiana. — Bell *v.* Cafferty, 21 Ind. 411.

Iowa. — Myer *v.* Wheeler, 65 Iowa 390, 21 N. W. 692; Blackmore *v.* Fairbanks, Morse & Co., 79 Iowa 282, 44 N. W. 548; Bucy *v.* Pitts Agr. Wks., 89 Iowa 464, 56 N. W. 541.

Kansas. — Field *v.* Kinnear, 4 Kan. 476.

Maine. — Downing *v.* Dearborn, 77 Me. 457, 1 Atl. 407.

Massachusetts. — Alden *v.* Hart, 161 Mass. 576, 37 N. E. 742; Baker *v.* Frobisher, Quincy 4; Merriam *v.* Wolcott, 85 Mass. 258, 80 Am. Dec. 69; Gould *v.* Stein, 149 Mass. 570, 22 N. E. 47, 14 Am. St. Rep. 455, 5 L. R. A. 213.

Missouri. — Whitaker *v.* McCormick, 6 Mo. App. 114.

New York. — Cleu *v.* McPherson, 14 N. Y. Super. Ct. 480; Hamilton *v.* Ganyard, 34 Barb. 204.

Ohio. — Rodgers *v.* Niles, 11 Ohio St. 48, 78 Am. Dec. 667.

Pennsylvania. — Chambers *v.* Crawford, Add. 150; Edwards *v.* Hathaway, 1 Phila. 547.

South Carolina. — Wood *v.* Ashe, 3 Strob. 64.

Texas. — Brantley *v.* Thomas, 22 Tex. 270, 73 Am. Dec. 264.

Vermont. — Pease *v.* Sabin, 38 Vt. 432, 91 Am. Dec. 364.

Wisconsin. — Boothby *v.* Scales, 27 Wis. 626.

57. Tabor *v.* Peters, 74 Ala. 90, 49 Am. Rep. 804; Waterbury *v.* Russell, 67 Tenn. 159; Ruff *v.* Jarrett, 94 Ill. 475; Crist *v.* Jacoby, 10 Ind. App. 688, 38 N. E. 543; Valerius *v.* Hockspiere, 87 Iowa 332, 54 N. W. 136; Gale Sulky Harrow Mfg. Co. *v.* Stark, 45 Kan. 606, 26 Pac. 8, 23 Am. St. Rep. 739; Storer *v.* Taber, 83 Me. 387, 22 Atl. 256.

58. Accumulator Co. *v.* Dubuque St. R. Co., 64 Fed. 70, 12 C. C. A. 37; Whitehead & Atherton Mach. Co. *v.* Ryder, 139 Mass. 366, 31 N. E. 736.

59. *United States.* — Bank of Montreal *v.* Thayer, 2 McCrary 1, 7 Fed. 622.

Indiana. — Rose *v.* Hurley, 39 Ind. 77.

Michigan. — Linn *v.* Gunn, 56 Mich. 447, 23 N. W. 84.

New York. — Lawton *v.* Keil, 61 Barb. 558.

Pennsylvania. — Weimer *v.* Clement, 37 Pa. St. 147, 78 Am. Dec. 411; Bigler *v.* Flickinger, 55 Pa. St. 279; Jackson *v.* Wetherill, 7 Serg. & R. 480; Wetherill *v.* Neilson, 20 Pa. St. 448, 54 Am. Dec. 741.

When Representation Amounts to Warranty. — In Holmes *v.* Tyson, 147 Pa. St. 305, 23 Atl. 546, 15 L. R. A. 209, the distinction between a mere representation, and a representation amounting to a warranty, is clearly drawn by the court in its opinion, and the evidence necessary to make out a representation which shall constitute a warranty is clearly stated: "At the time the transaction was closed and the money paid there was no warranty. On the contrary, the plaintiff said to the defendant, 'I have nothing to show that you warrant this horse as you represent him,' to which the defendant replied, 'The horse is just the same as when you drove him on Monday.' This is very far from being a warranty. It was at most an assertion that the horse was in the same condition as on the previous Monday, and there was nothing in the case to show that it was not true. There was evidence of previous statements having been made to the plaintiff that the horse was kind, sound, and gentle, but the defendant did not warrant him to be so. It was held in Jackson *v.* Wetherill, 7 Serg. & R. 480, that an assertion by the vendor to the vendee, at the time of selling a mare, that he is sure she is safe, and kind, and gentle in harness, amounts only to a representation, and does not constitute a warranty or express promise that she is so. In M'Farland *v.* Newman, 9 Watts 55, 34 Am. Dec. 497, the action was assumpsit on an alleged warranty in the sale of a horse; and the court below charged the jury that 'a positive averment, made by the defendant at the time of the contract, is a warranty; that it is part or parcel of the contract.' This ruling was reversed in this court, Gibson, Ch. J., saying in his opinion: 'As the cause goes back to another jury, it is proper to intimate the principle on which a correct decision of it must depend. Though to constitute a warranty requires no particular form of words, the naked averment of a fact is neither a warranty of itself, nor evidence of it. In connection with other circumstances, it certainly may be taken into consideration; but the jury must be satisfied from the whole that the vendor actually, and not constructively, consented to be bound for the truth of his representation. Should he have used expressions fairly importing a willingness to be thus bound, it would furnish a reason to infer that he had intentionally induced the vendee to treat on that basis; but a naked affirmation is not to be dealt with as a warranty merely because the vendee had gratuitously relied on it, for not to have exacted a direct engagement, had he desired to buy on the vendor's judgment, must be accounted an instance of folly. Testing the vendor's responsibility by these principles, justice will be done without driving him into the toils of an imaginary contract.' We have quoted this extract from the opinion in McFarland *v.* Newman, 9 Watts (Pa.) 55, 34 Am. Dec. 497, because it bears upon another point. It was contended in the case in hand that the question whether there was a warranty should have been submitted to the jury. As the warranty, if any, is to be found in the oral testimony, it would undoubtedly be the province of the jury to determine it if there was a conflict of evidence. Had the language used been equivocal, had the one party asserted a warranty, and the other denied it, the matter should have been submitted to the jury. But the plaintiff's own testimony showed there was no warranty. There was the mere assertion of a fact, which the cases cited show was not a warranty, nor the evidence of one. Under such circumstances, it would have been the duty of the court to instruct the jury that upon the undisputed facts there was not sufficient evidence of a warranty."

that which exists between merely false statements and warranty.[60]

3. Burden of Proof as to Warranty. — When a warranty is relied on by a party, the burden of proving its existence is upon him.[61]

4. Evidence of Warranty. — A. GENERALLY. — Where the warranty is contained in a written contract of sale, the only competent evidence of the warranty is that contained in the contract,[62] and all parol evidence as to the warranty is inadmissible.[63] Statements

60. *Alabama.* — Bain *v.* Withey, 107 Ala. 223, 18 So. 217.
Indiana. — House *v.* Fort, 4 Blackf. 293.
Iowa. — Tewkesbury *v.* Bennett, 31 Iowa 83; McGrew *v.* Forsythe, 31 Iowa 179.
Kentucky. — Bacon *v.* Brown, 6 Ky. 35.
Massachusetts. — Hogins *v.* Plympton, 28 Mass. 97.
Michigan. — Worth *v.* McConnell, 42 Mich. 473, 4 N. W. 198.
Missouri. — Matlock *v.* Meyers, 64 Mo. 531.
Montana. — Kircher *v.* Conrad, 9 Mont. 191, 23 Pac. 74, 18 Am. St. Rep. 731, 7 L. R. A. 471.
Nebraska. — Halliday *v.* Briggs, 15 Neb. 219, 18 N. W. 55.
New York. — McMaster *v.* Smith, 3 N. Y. St. 481.
North Carolina. — Erwin *v.* Maxwell, 7 N. C. 241, 9 Am. Dec. 602.
Pennsylvania. — Holmes *v.* Tyson, 147 Pa. St. 305, 23 Atl. 564, 15 L. R. A. 209; Benhead *v.* Scott, 1 Phila. 84.

61. *Colorado.* — Dry Goods Co. *v.* Dunn., 18 Colo. App. 409, 71 Pac. 887.
Georgia. — Carter & Dorough *v.* Minton, 119 Ga. 474, 46 S. E. 658.
Iowa. — Wingate *v.* Johnson, 126 Iowa 154, 101 N. W. 751.
Kansas. — Acme Harv. Co. *v.* Erne, 63 Kan. 858, 66 Pac. 1004.
Louisiana. — Prejan *v.* Wogan Bros., 34 So. 476.
Missouri. — Roth *v.* Continental Wire Co., 94 Mo. App. 236, 68 S. W. 594.
New York. — Eureka Fire Hose Co. *v.* Reynolds, 86 N. Y. Supp. 753.
Texas. — C. H. Dean Co. *v.* Standifer (Tex. Civ. App.), 83 S. W. 230.

62. *Alabama.* — Brown *v.* Jones, 24 Ala. 463.
Kansas. — Ehrsam *v.* Brown, 64 Kan. 466, 67 Pac. 867; Rogers *v.* Perrault, 41 Kan. 385, 21 Pac. 287; Diebold Safe & Lock Co. *v.* Huston, 55 Kan. 104, 39 Pac. 1035, 28 L. R. A. 53.
Maine. — Millett *v.* Marston, 62 Me. 477.
Minnesota. — Thompson *v.* Libby, 34 Minn. 374, 26 N. W. 1; Jones *v.* Alley, 17 Minn. 269; American Mfg. Co. *v.* Klarquist, 47 Minn. 344, 50 N. W. 243.

63. *Georgia.* — National Computing Scale Co. *v* Eaves, 116 Ga. 511, 42 S. E. 783.
Kansas. — Diebold Safe & Lock Co. *v.* Huston, 55 Kan. 104, 39 Pac. 1035, 28 L. R. A. 53; Phelps-Bigelow Windmill Co. *v.* Piercy, 41 Kan. 763, 21 Pac. 793; Willard *v.* Ostrander, 46 Kan. 591, 26 Pac. 1017; Rogers *v.* Perrault, 41 Kan. 385, 21 Pac. 287.
Michigan. — McCray Refrigerator Co. *v.* Woods, 99 Mich. 269, 58 N. W. 320, 41 Am. St. Rep. 599.
North Dakota. — Reeves *v.* Corrigan, 3 N. D. 415, 57 N. W. 80.

Written Instrument Silent as to Warranty. — Where the contract of sale is evidenced by a formal written instrument which is silent on the question of warranty, no oral warranty made previously or at the same time can be shown, nor can an additional oral warranty be engrafted upon the written instrument. Galpin *v.* Atwater, 29 Conn. 93; Shepherd *v.* Gilroy, 46 Iowa 193; Lamb *v.* Crafts, 12 Met. (Mass.) 353; Frost *v.* Blanchard, 97 Mass. 155; Van Ostrand *v.* Reed, 1 Wend. (N. Y.) 424; Merriam *v.* Field, 24 Wis. 640.

Writing Merely a Memorandum. Where the writing is not regarded by either party as evidencing the ultimate intentions of the parties, but is a mere informal memorandum, the sale then rests in parol, and the fact of a warranty, if there be one, may be established by any competent evidence. Stacy *v.* Kemp, 97 Mass. 168; Atwater *v.* Clancy, 107 Mass.

contained in a catalogue when relied on by the purchaser, are admissible evidence as warranties.[64] So circulars sent out by the seller may constitute evidence of warranties.[65] So a representation by the seller with reference to the quality of the goods sold amounts to a warranty, if so intended by the parties to the sale.[66] But the statement must be more than a mere opinion,[67] or matter of judg-

365; Wallace *v.* Rogers, 2 N. H. 506; Perrine *v.* Cooley, 39 N. J. L. 449; Filkins *v.* Whyland, 24 N. Y. 338.

In Diebold Safe & Lock Co. *v.* Huston, 55 Kan. 104, 39 Pac. 1035, 28 L. R. A. 53, plaintiffs ordered from the defendant a No. 4 fireproof safe. The order was in writing. It contained no reference to a warranty. A safe was delivered in compliance with the order, and received and used by the plaintiffs to store valuable papers. The building in which it was kept was afterwards destroyed by fire, and some of the contents of the safe were consumed. *Held:* That parol evidence was inadmissible to prove a warranty made at the time the order was given.

64. Morris *v.* Bradley, 64 Fed. 55, 12 C. C. A. 34; Snow *v.* Schomacher Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509; Milburn Wagon Co. *v.* Nisewarner, 90 Va. 714, 19 S. E. 846.

65. Snow *v.* Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509; Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241; Robinson *v.* Miller, 12 S. C. 586, 32 Am. Rep. 518; but see Berman *v.* Woods, 38 Ark. 351.

66. Drew *v.* Edmunds, 60 Vt. 401, 15 Atl. 100, 6 Am. St. Rep. 122; Hahn *v.* Doolittle, 18 Wis. 196, 86 Am. Dec. 757; Ellis *v.* Andrews, 56 N. Y. 83, 15 Am. Rep. 382; McCaa *v.* Elam Drug Co., 114 Ala. 74, 21 So. 479, 62 Am. St. Rep. 88; Hoffman *v.* Dixon, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 914; Reiger *v.* Worth, 130 N. C. 268, 41 S. E. 377, 89 Am. St. Rep. 865; Hexter *v.* Bast, 125 Pa. St. 52, 17 Atl. 252, 11 Am. St. Rep. 874.

67. *United States.* — Schroeder *v.* Trubee, 35 Fed. 652.

Alabama. — Ricks *v.* Dillahunty, 8 Port. 133; Farrow *v.* Andrews, 69 Ala. 96; Bain *v.* Withey, 107 Ala. 223, 18 So. 217.

Kentucky. — Lamme *v.* Gregg, 58 Ky. 444, 71 Am. Dec. 489.

Nebraska. — Halliday *v.* Briggs, 15 Neb. 219, 18 N. W. 55.

New York. — Coates *v.* Harvey, 10 N. Y. St. 276; Rogers *v.* Ackerman, 22 Barb. 134.

Virginia. — Mason *v.* Chappell, 15 Gratt. 572.

Wisconsin. — White *v.* Stelloh, 74 Wis. 435, 43 N. W. 99; Tenney *v.* Cowles, 67 Wis. 594, 31 N. W. 221; Montreal Lumb. Co. *v.* Mihills, 80 Wis. 540, 50 N. W. 507.

"The Mere Description of Iron Sold as mill iron in a bill rendered to the purchaser will not amount to a warranty that the same is of the quality or grade described, but will be regarded as a mere statement or expression of opinion as to the quality." Carondelet Iron Wks. *v.* Moore, 78 Ill. 65.

In Towell *v.* Gatewood, 3 Ill. 22, 33 Am. Rep. 437, a bill of sale of good first and second rate tobacco was made, and the court refused to treat this as a warranty but rather as an expression of opinion as to the quality of the article sold, concerning which the buyer should have relied on his own judgment or have obtained an express warranty.

In Fraley *v.* Bispham, 10 Pa. St. 320, 51 Am. Dec. 486, it was held that a sale bill of superior sweet-scented Kentucky leaf tobacco affords no evidence from which the jury may infer a warranty that it is either superior or sweet-scented.

In Diebold Safe & Lock Co. *v.* Huston, 55 Kan. 104, 39 Pac. 1035, 28 L. R. A. 53, it was held that the words "fire proof safe" in an order for such a safe do not imply a warranty of the quality of the safe or that it will protect its contents from fire for any definite period, or under any given circumstances.

ment.[68] And matters of description may amount to a warranty.[69] As no mere form of words is necessary to constitute a warranty,[70] nor the use of the word "warrant",[71] any language indicating an intention of the parties to create a warranty may be given in evidence on the question of its existence.[72]

B. Statements Comparing Article With Sample or Other Goods of Same Kind. — Statements of seller at time of sale, that the article sold is as good as any other of its kind,[73] or as good as the sample furnished,[74] constitute warranties, and are admissible in evidence of the existence of warranties.[75]

68. Halliday *v.* Briggs, 15 Neb. 219, 18 N. W. 55.

69. *United States.* — Bertram *v.* Lyon, 3 Fed. Cas. No. 1,362.

Maine. — Morse *v.* Moore, 83 Me. 473, 22 Atl. 362, 23 Am. St. Rep. 783.

Massachusetts. — Hastings *v.* Lovering, 19 Mass. 214, 13 Am. Dec. 420; Hogins *v.* Plympton, 28 Mass. 97; Henshaw *v.* Robins, 50 Mass. 83, 43 Am. Dec. 367; Gould *v.* Stein, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455.

New York. — Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753.

A Sale of Goods by a Particular Description imports a warranty that the goods are of that description. Gould *v.* Stein, 149 Mass. 570, 22 N. E. 47, 14 Am. St. Rep. 455, 5 L. R. A. 213.

70. Kircher *v.* Conrad, 9 Mont. 191, 23 Pac. 74, 18 Am. St. Rep. 731, 7 L. R. A. 471.

71. Hoffman *v.* Dixon, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 914; Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753.

72. Beeman *v.* Buck, 3 Vt. 53, 21 Am. Dec. 571; Chapman *v.* Murch, 19 Johns. (N. Y.) 290, 10 Am. Dec. 227; Kinley *v.* Fitzpatrick, 4 How. (Miss.) 59, 34 Am. Dec. 108; Van Buskirk *v.* Murden, 22 Ill. 446, 74 Am. Dec. 163; Randall *v.* Thornton, 43 Me. 226, 69 Am. Dec. 56; Weimer *v.* Clement, 37 Pa. St. 147, 78 Am. Dec. 411.

73. Buckman *v.* Haney, 11 Ark. 339; C. Aultman & Co. *v.* Weber, 28 Ill. App. 91; Stevens *v.* Bradley, 89 Iowa 174, 56 N. W. 429; Briggs *v.* Rumely, 96 Iowa 202, 64 N. W. 784; Neave *v.* Arntz, 56 Wis. 174, 14 N. W. 41; Winkler *v.* Patten, 57 Wis. 405, 15 N. W. 380.

74. Brower *v.* Lewis, 19 Barb. (N. Y.) 574; Zabriskie *v.* Central Vt. R. Co., 131 N. Y. 72, 29 N. E. 1006; Moore *v.* King, 134 N. Y. 596, 31 N. E. 624; Smith *v.* Foote, 81 Hun 128, 30 N. Y. Supp. 679.

75. *Arkansas.* — Buckman *v.* Haney, 11 Ark. 339.

Illinois. — Aultman & Co. *v.* Weber, 28 Ill. App. 91.

Iowa. — Stevens *v.* Bradley, 89 Iowa 174, 56 N. W. 429; Briggs *v.* M. Rumley Co., 96 Iowa 202, 64 N. W. 784.

New York. — Brown *v.* Lewis, 19 Barb. 574; Zabriskie *v.* Central Vt. R. Co., 131 N. Y. 72, 29 N. E. 1006; Moore *v.* King, 134 N. Y. 596, 31 N. E. 624; Smith *v.* Foote, 81 Hun 128, 30 N. Y. Supp. 679.

Wisconsin. — Neave *v.* Arntz, 56 Wis. 174, 14 N. W. 41; Winkler *v.* Patten, 57 Wis. 405, 15 N. W. 380.

If the evidence shows a contract for the sale of goods made by sample, it amounts to an undertaking on the part of the seller with the purchaser, that all the goods are similar both in nature and quality to those exhibited; and if they be not, the purchaser may either rescind the contract by returning the goods in a proper time, or keep them and recover damages for the breach of warranty. Waring *v.* Mason, 18 Wend. (N. Y.) 425; Wright *v.* Hart, 18 Wend. (N. Y.) 449; Moses *v.* Meade, 1 Denio (N. Y.) 378, 43 Am. Dec. 676; Sands *v.* Taylor, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374; Andrews *v.* Kneeland, 6 Cow. (N. Y.) 354; Beebe *v.* Robert, 12 Wend. (N Y.) 413, 27 Am. Dec. 132; Bradford *v.* Manly, 13 Mass. 139, 7 Am. Dec.

5. Implied Warranties. — A. GENERALLY. — An implied warranty differs from an express warranty, in that the former is implied by law from certain facts established by the proof relating to the contract of sale as a necessary incident thereto,[76] while the latter is a matter of fact dependent alone upon contract.[77]

Implied warranties usually relate to title,[78] adaptation to intended use,[79] and particular kinds of sales.[80]

122; Boorman *v.* Jenkins, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158; Parker *v.* Palmer, 4 Barn. & Ald. (Eng.) 387; Germaine *v.* Burton, 3 Stark. (Eng.) 32.

What Must Appear To Make a Sale by Sample. — The mere circumstance that the seller exhibits a sample at the time of the sale is not sufficient evidence, of itself, to constitute a sale by sample, so as to subject the seller to liability on an implied warranty as to the nature and quality of the goods; because the sample may have been exhibited simply, not as a warranty that the bulk corresponds to it, but only to enable the purchaser to form a judgment on its kind and quality. Beirne *v.* Dord, 5 N. Y. 95, 55 Am. Dec. 321, 323. As stated by Jewett, Judge, in Beirne *v.* Dord, 5 N. Y. 95, 55 Am. Dec. 321, 323, "whether a sale be a sale by sample or not, is a question of fact for the jury to find from the evidence in each case, and to authorize the jury to find such a contract, the evidence must satisfactorily show that the parties contracted solely in reference to the sample exhibited; that they mutually understood that they were dealing with the sample as an agreement or understanding that the bulk of the commodity corresponded with it; or, in other words, the evidence must be such as to authorize the jury, under all the circumstances of the case, to find that the sale was intended by the parties as a sale by sample." Here the court cites in support of this, Waring *v.* Mason, 18 Wend. (N. Y.) 425; Long on Sales (Rand. ed.) 192; Story on Contracts, § 640; Gardner *v.* Gray, 4 Campb. (Eng.) 144; Meyer *v.* Evereth, 4 Campb. (Eng.) 22.

76. Borrekins *v.* Bevan, 3 Rawle (Pa.) 23, 36, 23 Am. Dec. 85; Osgood *v.* Lewis, 2 Har. & Gill. (Md.) 495, 18 Am. Dec. 317.

77. Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; Borrekins *v.* Bevan, 3 Rawle (Pa.) 23, 36, 23 Am. Dec. 85.

78. Williamson *v.* Sammons, 34 Ala. 691; Lines *v.* Smith, 4 Fla. 47; Chancellor *v.* Wiggins, 43 Ky. 201, 39 Am. Dec. 499; Defreeze *v.* Trumper, 1 Johns. (N. Y.) 274, 3 Am. Dec. 329; Charlton *v.* Lay, 24 Tenn. 496; Linton *v.* Porter, 31 Ill. 107; Fawcett *v.* Osborn, 32 Ill. 411, 83 Am. Dec. 278; White *v.* Robinson, 50 Mich. 73, 14 N. W. 704; Flandrow *v.* Hammond, 148 N. Y. 129, 42 N. E. 511; Strong *v.* Barnes, 11 Vt. 221, 34 Am. Dec. 684; Costigan *v.* Hawkins, 22 Wis. 74, 94 Am. Dec. 583.

79. *Alabama.* — Perry *v.* Johnston, 59 Ala. 648; Kennebrew *v.* Southern Automatic Elec. Shock Mach. Co., 106 Ala. 377, 17 So. 545.

Georgia. — Radcliff *v.* Gunby, 46 Ga. 464; Barry *v.* Usry, 70 Ga. 711.

Illinois. — Ramming *v.* Caldwell, 43 Ill. App. 175; Lanz *v.* Wachs, 50 Ill. App. 262.

Indiana. — Zimmerman *v.* Drueker, 15 Ind. App. 512, 44 N. E. 557.

Iowa. — Rose *v.* Meeks, 91 Iowa 715, 59 N. W. 30.

Minnesota. — Breen *v.* Moran, 51 Minn. 525, 53 N. W. 755.

80. *Georgia.* — Americus Grocery Co. *v.* Brackett & Co., 119 Ga. 489, 46 S. E. 657.

Iowa. — Timken Carriage Co. *v.* Smith, 123 Iowa 554, 99 N. W. 183.

Maine. — Morse *v.* Moore, 83 Me. 473, 22 Atl. 362, 23 Am. St. Rep. 783, 13 L. R. A. 224.

Massachusetts. — Williams *v.* Spafford, 8 Pick. 250; Bradford *v.* Manley, 13 Mass. 138, 7 Am. Dec. 122.

New York. — Beebe *v.* Robert, 12 Wend. 413, 27 Am. Dec. 158; Salisbury *v.* Stainer, 19 Wend. 159, 32 Am. Dec. 437; Fairbank Canning Co.

B. Title of Seller Implied. — It is a general rule that upon a sale no evidence is required to show a warranty of the title of the goods sold, as the law implies such a warranty.[81] If, however, the evidence shows that the seller was not in possession of the property at the time of the sale, by the weight of authority there arises no implied warranty of title,[82] and the rule of *caveat emptor* applies.[83]

C. No Implied Warranty as to Quality. — The general common-law rule is that evidence of the payment of a full price for the goods sold does not raise an implied warranty as to their quality.[84]

D. Warranty as to Quality in Certain Cases. — There are some exceptions to the common-law rule that there is no implied warranty as to the quality of the goods sold, which are depen-

v. Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753.

Oregon. — Lenz *v.* Blake, 44 Or. 569, 76 Pac. 356.

Pennsylvania. — Borrekins *v.* Bevan, 3 Rawle 23, 23 Am. Dec. 85.

Texas. — Brantley *v.* Thomas, 22 Tex. 270, 73 Am. Dec. 264.

81. *United States.* — Gaylor *v.* Copes, 4 Woods 158, 16 Fed. 49.

Alabama. — Williamson *v.* Sammons, 34 Ala. 691.

Illinois. — Linton *v.* Porter, 31 Ill. 107; Fawcett *v.* Osbourn, 32 Ill. 411, 83 Am. Dec. 278.

Iowa. — Barton *v.* Flaherty, 3 Greene 327, 54 Am. Dec. 503.

New York. — Defreeze *v.* Trumper, 1 Johns. 274, 3 Am. Dec. 329; Burt *v.* Dewey, 40 N. Y. 283, 100 Am. Dec. 482.

Oregon. — Balte *v.* Bedemiller, 37 Or. 27, 60 Pac. 601, 82 Am. St. Rep. 737.

Pennsylvania. — Dorsey *v.* Jackman, 1 Serg. & R. 42, 7 Am. Dec. 611; Eagan *v.* Call, 34 Pa. St. 236, 75 Am. Dec. 653; Whitaker *v.* Eastwick, 75 Pa. St. 229.

82. *Indiana.* — Lackey *v.* Stouder, 2 Ind. 376; Norton *v.* Hooton, 17 Ind. 365.

Massachusetts. — Shattuck *v.* Green, 104 Mass. 42; Stratton *v.* Hill, 134 Mass. 27.

Mississippi. — Storm *v.* Smith, 43 Miss. 497.

New York. — Scranton *v.* Clark, 39 Barb. 273, 39 N. Y. 220, 100 Am. Dec. 430.

Tennessee. — Scott *v.* Hix, 34 Tenn. 192, 62 Am. Dec. 458; Word *v.* Caven, 38 Tenn. 506.

West Virginia. — Byrnside *v.* Burdett, 15 W. Va. 702.

83. *Indiana.* — Lackey *v.* Stouder, 2 Ind. 376; Norton *v.* Hooten, 17 Ind. 365.

Mississippi. — Storm *v.* Smith, 43 Miss. 497.

Montana. — Budd *v.* Power, 8 Mont. 380, 20 Pac. 820.

New York. — Scranton *v.* Clark, 39 Barb. 273; Edick *v.* Crim, 10 Barb. 445.

Tennessee. — Scott *v.* Hix, 34 Tenn. 192, 62 Am. Dec. 458; Word *v.* Cavin, 38 Tenn. 506.

West Virginia. — Byrnside *v.* Burdett, 15 W. Va. 702.

84. *Alabama.* — West *v.* Cunningham, 9 Port. 104, 33 Am. Dec. 300.

Connecticut. — Dean *v.* Mason, 4 Conn. 428, 10 Am. Dec. 162.

Maryland. — Johnston *v.* Cope, 3 Har. & J. 66, 5 Am. Dec. 423.

Massachusetts. — Mixer *v.* Coburn, 52 Mass. 559, 45 Am. Dec. 230.

New Jersey. — Beninger *v.* Corwin, 24 N. J. L. 257.

New York. — Hoe *v.* Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Seixas *v.* Woods, 2 Caines 48, 2 Am. Dec. 215; Hart *v.* Wright, 17 Wend. 267; Wright *v.* Hart, 18 Wend. 449.

Pennsylvania. — Weimer *v.* Clement, 37 Pa. St. 147, 78 Am. Dec. 411.

Rhode Island. — King *v.* Quidnick Co., 14 R. I. 131.

South Carolina. — Thompson *v.* Lindsay, 3 Brev. 305.

Virginia. — Mason *v.* Chappell, 15 Gratt. 572.

But the rule is different where the civil law obtains. How *v.* Sanborn, 21 N. Y. 552, 78 Am. Dec. 163.

dent upon the evidence as to the nature of the contract of sale.[85] These relate to merchantability,[86] fitness for purpose intended,[87] goods manufactured for specific use,[88] drugs and chemicals,[89] and provisions.[90]

E. Merchantability of Goods Sold. — Where the evidence discloses a contract calling for the delivery of merchandise which the buyer has no opportunity to inspect, there is raised an implied warranty that the goods delivered are merchantable.[91] As there is no

85. *United States.* — Kellogg Bridge Co. *v.* Hamilton, 110 U. S. 108.

Alabama. — Snow *v.* Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509; McCaa *v.* Elam Drug Co., 114 Ala. 74, 21 So. 479, 69 Am. St. Rep. 88.

Illinois. — Wiedeman *v.* Keller, 171 Ill. 93, 49 N. E. 210.

Missouri. — Skinner *v.* Glass Co., 103 Mo. App. 650, 77 S. W. 1011.

Pennsylvania. — Holloway *v.* Jacoby, 120 Pa. St. 583, 15 Atl. 487, 6 Am. St. Rep. 737.

Texas. — Jones *v.* George, 56 Tex. 149, 42 Am. Rep. 689.

86. Blackwood *v.* Cutting Pack. Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199.

87. Beals *v.* Olmstead, 24 Vt. 114, 58 Am. Dec. 150; Rodgers *v.* Niles, 11 Ohio St. 48.

88. Merchants' and Mechanics' Sav. B. *v.* Fraze, 9 Ind. App. 161, 36 N. E. 378, 53 Am. St. Rep. 341.

89. Jones *v.* George, 56 Tex. 149, 42 Am. Rep. 689.

90. Wiedeman *v.* Keller, 171 Ill. 93, 49 N. E. 210.

91. *United States.* — English *v.* Spokane Com. Co., 57 Fed. 451, 6 C. C. A. 416.

Arkansas. — Bunch *v.* Weil, 72 Ark. 343, 80 S. W. 582, 65 L. R. A. 80.

Georgia. — Snowden *v.* Waterman, 100 Ga. 588, 28 S. E. 121, 38 L. R. A. 721.

Iowa. — McClung *v.* Kelly, 21 Iowa 508.

Massachusetts. — Alden *v.* Hart, 161 Mass. 576, 37 N. E. 742.

New York. — Howard *v.* Hoey, 23 Wend. 350, 35 Am. Dec. 572; Hart *v.* Wright, 17 Wend. 267; Bierman *v.* City Mills Co., 151 N. Y. 482, 45 N. E. 856, 56 Am. St. Rep. 636, 37 L. R. A. 799; Dowdle *v.* Bayer, 9 App. Div. 308, 41 N. Y. Supp. 184.

Ohio. — Rogers *v.* Niles, 11 Ohio St. 48, 78 Am. Dec. 290.

Pennsylvania. — Holloway *v.* Jacoby, 120 Pa. St. 583, 15 Atl. 487, 6 Am. St. Rep. 737.

South Dakota. — Standard Rope & Twine Co. *v.* Olmen, 13 S. D. 296, 83 N. W. 271.

Texas. — Brantley *v.* Thomas, 22 Tex. 270, 73 Am. Dec. 264.

West Virginia. — Hood *v.* Bloch, 29 W. Va. 244, 11 S. E. 910.

Where Goods Are Ordered by One Dealer and Sent by Another, there is an implied warranty that the goods delivered shall correspond with the order, or that they are merchantable, and suitable to the market where they are to be sold. Brantley *v.* Thomas, 22 Tex. 270, 73 Am. Dec. 264.

A Breach of an Implied Warranty That Goods Sold Are Merchantable and reasonably suited to the use intended may arise when the goods because of a defect which could not in the exercise of due caution be detected, are totally useless and worthless, though in point of fact the seller was ignorant of the existence of such defect. Snowden *v.* Waterman & Co., 100 Ga. 588, 28 S. E. 121, 38 L. R. A. 72.

In English *v.* Spokane Com. Co., 57 Fed. 451, 6 C. C. A. 416, where a purchaser at S. had telegraphed to vendor at O. as to the price of car loads of good potatoes from which a sale resulted and the goods shipped to purchaser at S., it was held that there was an implied warranty that the potatoes were of a good merchantable quality when shipped.

Where a Manufacturer Undertakes To Supply Goods manufactured

implied warranty in executed contracts of sales of this character,[92] it must appear from the evidence that the contract is executory.[93]

Whether Contract Is Executed or Executory. — How Determined. If the question arises in the application of this rule as to whether the contract is executed or executory, it is to be determined from the intent of the parties as gathered from the contract, the situation of the thing sold and the circumstances surrounding the sale.[94]

by himself, or in which he deals, but which the vendee has not the opportunity of inspecting, it is an implied term of the contract that he shall supply a merchantable article. Hood *v.* Block, 29 W. Va. 244, 11 S. E. 910.

Warranty Survives Acceptance. The obligation arising from the implied warranty imposed upon the seller of goods manufactured by himself, survives their acceptance, if their defects were not discernible upon inspection by ordinary tests. Bierman *v.* City Mills Co., 151 N. Y. 482, 45 N. E. 856, 56 Am. St. Rep. 636, 37 L. R. A. 799.

Under a Contract To Supply Goods of a Specified Description, which the buyer has no opportunity of inspecting, the goods must not only, in fact answer the specific description, but must be merchantable and salable under that description. In Jones *v.* Just, L. R. 3 Q. B. (Eng.) 197, the plaintiff, at Liverpool, entered into a contract with defendant for the purchase of a quantity of Manilla hemp, to arrive from Singapore by certain ships. The ships arrived and the hemp was delivered to the plaintiff and paid for. On examination of the bales it was found that it had been wetted through with water, and afterwards unpacked and dried, and then repacked and shipped at Singapore. The hemp was not damaged to such an extent as to make it lose its character of hemp, but it was not "merchantable." The defendant did not know of the state in which the hemp had been shipped at Singapore. The plaintiff sold the hemp at auction as Manilla hemp with all faults, and it raised 75 per cent. of the price which similar hemp would have brought if undamaged. *Held*, that there was an implied warranty on the part of the defendant to supply Manilla hemp of the particular quality of which the bales consisted in a merchantable condition, and that plaintiff was entitled in damages to the difference in price of what the hemp was worth when it arrived and what it would have been worth had it been shipped in proper state.

92. Hargous *v.* Stone, 5 N. Y. 73, 86.

"Executory contracts of sale do not depend on the same principles as executed contracts of sale. The doctrine of implied warranty has properly no application to the former. Where a contract is executory, that is, to deliver an article not defined at the time, on a future day, whether the vendor has at the time an article of the kind on hand, or it is afterwards to be procured, or manufactured, the contract carries with it an obligation that the article shall be merchantable at least of medium quality of goodness. But if the article is at the time of the sale in existence and defined, and is specifically sold, and the title passes *in presenti* to the vendee, the contract amounts to an executed sale; and although there is no opportunity for inspection there will be no implied warranty that the article is merchantable." Hargous *v.* Stone, 5 N. Y. Supp. 73, 86.

93. Getty *v.* Rountree, 2 Chand. (Wis.) 28, 2 Pin. 379, 54 Am. Dec. 138; Howard *v.* Hoey, 23 Wend. (N. Y.) 350, 35 Am. Dec. 572; Hargous *v.* Stone, 5 N. Y. 86.

94. Hood *v.* Bloch, 29 W. Va. 244, 11 S. E. 910; Morgan *v.* King, 28 W. Va., 1;

What Intended by Executory Contract. — By the term "executory contract" is meant that kind of contract calling for the delivery of an article not defined at the time, on a future day, and whether the vendor has at

F. Fitness of Article for Purpose Intended. — If it appears from the evidence that the contract between the parties was executory,[95] embodying an agreement to furnish an article not yet ascertained, but to be determined by seller according to his own judgment, to subserve the purpose made known to him by the buyer,[96] proof of these facts raises an implied warranty that the article shall be reasonably fit for the use intended.[97]

the time an article of the kind on hand, or it is afterward to be procured or manufactured. In such case the contract carries with it an obligation that the article shall be merchantable, at least of medium quality of goodness. Hargous *v.* Stone, 5 N. Y. 73.

95. Lee *v.* Sickles Saddlery Co., 38 Mo. App. 201; Wood Mower & Reaper Co. *v.* Thayer, 50 Hun 516 3 N. Y. Supp. 465; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737; Ketchum *v.* Wells, 19 Wis. 25.

In executory contracts to furnish articles for a specific purpose, especially by manufacturers, there is an implied warranty that the articles delivered shall answer the purpose for which they were designed. Fisk *v.* Tank, 12 Wis. 306, 78 Am. Dec. 737.

96. *Alabama.* — Perry *v.* Johnston, 59 Ala. 648.

Indiana. — McClamrock *v.* Flint, 101 Ind. 278; Zimmerman *v.* Druecker, 15 Ind. App. 512, 44 N. E. 557.

Minnesota. — Breen *v.* Moran, 51 Minn. 525, 53 N. W. 755.

Missouri. — Lee *v.* Sickles Saddlery Co., 38 Mo. App. 201.

Tennessee. — Overton *v.* Phelan, 39 Tenn. 445.

Wisconsin. — Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737; Ketchum *v.* Wells, 19 Wis. 25.

Representation as Implied Warranty. — While upon a sale of goods which are present and open to the inspection and examination of the purchaser there is no implied warranty of their fitness for any particular purpose, if the vendor is informed that the vendee is buying the goods for a particular use, a representation by the seller of its fitness is an implied, if not an express, warranty. Perry *v.* Johnston, 59 Ala. 648.

A producer and dealer in horses for breeding purposes who undertakes to sell one of his horses for breeding purposes impliedly warrants the reasonable fitness of the horse sold for said purpose. Sav. Bank *v.* Fraze, 9 Ind. App. 161, 36 N. E. 378, 53 Am. St. Rep. 341.

97. *England.* — Jones *v.* Just, L. R. 3 Q. B. Cas. 197.

United States. — Dushane *v.* Benedict, 120 U. S. 630.

Alabama. — McCaa *v.* Elam Drug Co., 114 Ala. 74, 21 So. 479, 62 Am. St. Rep. 88.

California. — Flint *v.* Lyon, 4 Cal. 17.

Kansas. — Shaw *v.* Smith, 45 Kan. 334, 25 Pac. 886, 11 L. R. A. 681.

Kentucky. — Hanks *v.* McKee, 2 Litt. 227, 13 Am. Dec. 265.

Missouri. — Whitaker *v.* McCormick, 6 Mo. App. 114.

North Carolina. — Lewis *v.* Rountree, 78 N. C. 323.

Oregon. — Morse *v.* Union Stockyards Co., 21 Or. 289, 28 Pac. 2, 14 L. R. A. 157.

Wisconsin. — Ketchum *v.* Wells, 19 Wis. 25.

Though it is true as a general rule that on a sale of an existing thing, which is present and open to the inspection and examination of the purchaser, there is no implied warranty of its fitness for any particular use; yet when a manufacturer or dealer contracts to supply an article in which he deals knowing that the purchaser wishes to apply it to a particular purpose, and that he necessarily trusts to his judgment or skill, there is an implied warranty on the part of the seller that the article shall be reasonably fit for the purposes to which it is to be applied. Snow *v.* Shomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509; McCaa *v.* Elam Drug Co., 114 Ala. 74, 21 So. 479, 62 Am. St. Rep. 88.

In Shaw *v.* Smith, 45 Kan. 334, 25

G. Articles Manufactured for Particular Use. — If the evidence discloses that an article is ordered of a manufacturer or producer for a specific purpose,[98] no evidence of an express warranty is required,[99] as the law implies a warranty that the article is reasonably suitable for the purpose for which it was ordered.[1]

Pac. 886, 11 L. R. A. 681, defendant, who desired to grow flax-seed, entered into a contract of purchase with plaintiff to furnish him with flax-seed to sow and raise a crop. The flax-seed was not present at time of purchase. Plaintiff furnished the flax-seed which appeared to be good, and which the parties believed to be good, but which in fact was worthless. Defendant sowed the flax-seed but it did not germinate, and in consequence of which he lost his time, labor and use of the ground. *Held*, under such circumstances a warranty may be implied upon the part of plaintiff that the flax-seed should be sufficient for the purpose of sowing and raising a crop.

The sale of an article made by a manufacturer with knowledge of the place where it is to be used, and the purpose to which it is to be applied, implies a warranty that the article is reasonably fit for such place and purpose. McClamrock *v.* Flint, 101 Ind. 278.

Inspection of Goods by Purchaser before or after delivery, and the selection of particular barrels of goods purchased, does not affect the implied warranty that the goods should be of a specific description. Thus, where plaintiff purchased of defendant a certain number of barrels of rosin under the following contract: "Received of plaintiff $700 in part payment of 500 barrels of strained rosin, to be delivered," etc., and thereupon at the place of delivery plaintiff selected the number of barrels purchased from a lot of barrels, and the barrels selected afterwards proved in a great measure not to be strained rosin; it was held that the agreement of defendant to deliver, etc., amounted to a warranty on his part, that the rosin received by plaintiff should be strained rosin. Lewis *v.* Rountree, 78 N. C. 323.

98. Snow *v.* Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509; Brenton *v.* Davis, 8 Blackf. (Ind.) 317, 44 Am. Dec. 769; Maurer *v.* Bliss, 14 Daly (N. Y.) 150; Thomas *v.* Simpson, 80 N. C. 4; Brown *v.* Murphee, 31 Miss. 91.

99. Crane *v.* Lord, 1 Wils. (Ind.) 263; Brenton *v.* Davis, 8 Blackf. (Ind.) 317, 44 Am. Rep. 769; Maurer *v.* Bliss, 14 Daly (N. Y.) 150; Thomas *v.* Simpson, 80 N. C. 4.

Where an Article Is Bought for a Particular Use and it is known by the vendor that the purchaser would not buy an inferior article, it is held that the sale for that particular use, ordinarily implies a certainty that it is fit for that use. Beals *v.* Olmstead, 24 Vt. 114, 58 Am. Dec. 150.

1. An agreement by a manufacturer to make steamboilers to run the engines in the purchaser's mill, implies a warranty that the boilers shall be free from all such defects of material and workmanship, whether latent or otherwise, as will render them unfit for the usual purposes of such boilers. Rodgers & Co. *v.* Niles & Co., 110 Ohio St. 48.

A manufacturer who undertakes to deliver a pump designed for pumping water out of lead mines, impliedly warrants that, in form and construction, it will be suitable for the purpose intended by the buyers. Getty *v.* Roundtree, 2 Pin. (Wis.) 379.

Payment Does Not Affect Purchaser's Right to Warranty. — In Thomas *v.* Simpson, 80 N. C. 4, defendant employed plaintiff's skill and labor in making shingles for him for the purpose of recovering his house. The shingles were not fit for the purpose for which they were wanted, and their deficiency was not brought to the knowledge of the defendant, who was ignorant of what constituted good shingles, until after he had paid the plaintiff a part of the price of his labor. *Held*, that the payment did not affect the defendant's right

H. Drugs and Chemicals. — If the evidence shows that a party is engaged in the business of selling drugs and chemicals, and he sells what purports to be a certain drug or chemical, the law implies a warranty that the article is what it purports to be.[2]

I. Provisions Sold for Immediate Use. — When the evidence shows a sale of provisions by an ordinary dealer[3] for immediate

to object to an action for the value of the work and labor in making them.

Where a manufacturer sells a piano, with knowledge that the purchaser is a dealer in pianos and is purchasing to resell or let or rent, there is, in the absence of an express agreement to the contrary, an implied warranty that the material and workmanship are good, that the instrument is adapted to the uses for which it was made and sold, and that it is a reasonably good musical instrument, taking into estimate its class, style or price; and if by reason of defective material, workmanship or structure, it falls below this standard, there is a breach of the warranty. Snow *v.* Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509.

In McClamrock *v.* Flint, 101 Ind. 278, it appeared that the agent of the manufacturer through whom the sale of the pump mill was negotiated was shown the place where the mill was to be erected, and the agent examined the spot selected and designed, and said to the purchaser that the pump would work all right at that place, and the order for pump was then and there signed. It was indorsed on the contract "that the company will not recognize or be responsible for any understanding with agents that is not in the order." *Held,* it would be unreasonable to expect a purchaser to know as much about a windmill or any other machinery as the person who makes it, and that where a manufacturer makes for himself an examination of the place where the mill is to be used, knows the purpose to which it is to be applied he impliedly warrants that it is suitable for that purpose and place.

In Brenton *v.* Davis, 8 Blackf. (Ind.) 317, 44 Am. Rep. 769, an action for breach of warranty in the sale of a boat purchased by the plaintiff of the defendant, the evidence showed that the defendant was the manufacturer of the boat; that the boat was purchased for the purpose of transporting freight down White river, and the other rivers to the lower market, which purpose the defendant knew; that at the time of the contract the boat was lying in White river filled with water and leaves so that it could not be perfectly inspected; and that the defendant represented it to be a good boat. The trial court instructed the jury that unless the purchaser had succeeded in proving an express warranty of the qualities of the boat by the defendant, or that the defendant had made representations of its qualities which he knew to be false, the plaintiff could not recover. *Held,* that the charge was wrong, as the law is well settled, that if a manufacturer of an article sells it at a fair price, knowing the purchaser to apply it to a particular purpose, he impliedly warrants it to be fit for that purpose, and that if owing to some defect in the article not visible to the purchaser, it is unfit for the purpose for which it is sold and bought the seller is liable on his implied warranty.

2. Jones *v.* George, 56 Tex. 149, 42 Am. Rep. 689; Jones *v.* George, 61 Tex. 345, 48 Am. Rep. 280.

In Jones *v.* George, 61 Tex. 345, 48 Am. Rep. 280, a planter engaged in raising cotton purchased from a druggist an article known as Paris Green for the known purpose of killing cotton worms, though it was not shown that the seller warranted that the article would accomplish that purpose. *Held,* that though no warranted existed, there was an implied contract that the seller sold and delivered an article of the kind contracted.

3. Hoovers *v.* Peters, 18 Mich.

domestic use,[4] the law implies a warranty on the part of the dealer

51; Burch *v.* Spencer, 15 Hun (N. Y.), 504; Sinclair *v.* Hathaway, 57 Mich. 60, 23 N. W. 450, 53 Am. Rep. 327; Wiedeman *v.* Keller, 171 Ill. 93, 49 N. E. 210.

Rule Applies to Sale by Any Other Person as Well as Dealer. — A warranty is implied that food sold for domestic consumption is fit for such purpose, whether the sale be by a retail dealer or by any other person. "Where articles of food are bought for consumption, and the vendor sells them for that express purpose, the consequences of unsoundness are so dangerous to health and life, and the failure of considertion is so complete, that we think the rule which has often been recognized, that such sales are warranted, is not only reasonable but essential to public safety. There may be sellers who are not much skilled, and there may be purchasers able to judge for themselves, but in sales of provisions the seller is generally so much better able than the buyer to judge of quality and condition, that if a general rule is to be adopted, it is safer to hold the vendor to a strict accountability than to throw the risk on the purchaser. The reason given by the New York authorities, in favor of health and personal safety, is much more satisfactory than the purely commercial considerations which take no account of these important interests. . . . We can conceive of no special reason for regarding one sale for this purpose as differing in its incidents from any other. The doctrine seems to be that any purchase for domestic consumption is protected." Hoovers *v.* Peters, 18 Mich. 51.

Sales Between Dealers.— There is no implied warranty in the sale of a cow by a farmer to a butcher, that she is fit for food, although the vendor knows that the butcher buys it for the purpose of beef. The rule with reference to dealer and consumer does not apply to sales between one dealer and another, as the same reasons are not applicable. Howard *v.* Emerson, 110 Mass. 320, 14 Am. Rep. 608.

4. Divine *v.* McCormick, 50 Barb. (N. Y.) 116; Moses *v.* Mead, 1 Den. (N. Y.) 378; Van Bracklin *v.* Fonda, 12 Johns. (N. Y.) 468; Emerson *v.* Brigham, 10 Mass. 197, 202.

Executed Contracts.— In an executed contract for the sale of provisions, if the vendor has personal knowledge of the quality and condition of the articles sold, which are unknown to the purchaser, and the vendor knows that the purchaser intends to use the articles for food or to sell them to others to be used for that purpose, a warranty is implied by law that the articles are sound, wholesome and fit to be used as articles of food. Burch *v.* Spencer, 15 Hun (N. Y.) 504.

In Morse *v.* Union Stockyards Co., 21 Or. 289, 28 Pac. 2, 14 L. R. A. 157, the evidence showed that plaintiff was a butcher and that he used beef cattle for retail in his market; that he gave an order to defendant for two carloads of good beef cattle, who selected and shipped the cattle to the place designated; that the plaintiff paid for the cattle before delivery by draft drawn on him by the defendant; that the defendant had no opportunity to examine them before their arrival; that the defendant knew what plaintiff's business was and the purpose for which he wanted good beef cattle; that the cattle were not good beef cattle, but only stock cattle, and not fit for the purpose intended; that as soon as plaintiff saw the cattle he notified the defendant of their not being the kind and quality ordered, and unfit for business purposes, but at the same time made a proposition as to part of them, which was refused by defendant who claimed that the cattle complied with order. *Held*, that although the defendant had received the full consideration for cattle thus making the contract in part executed when cattle were delivered, and the repudiation of the contract by plaintiff became impossible, yet the plaintiff was entitled to the benefit of the implied warranty.

Rule Rests on Statutory Enactment and Not Doctrine of Implied

that the provisions in question are wholesome and fit for food.[5]

J. SALE OF STOCKS. — When the evidence shows a sale of stocks, no evidence of their genuineness is required,[6] as this is implied by law.[7] The same rule applies to all other choses in action.[8]

Warranty. — The rule that the seller is responsible for defects unknown to him applies only to sales of provisions for consumption, and rests on statutory enactments, and not on the doctrine of implied warranty. Goad *v.* Johnson, 6 Heisk. (Tenn.) 340.

5. *Massachusetts.* — Emerson *v.* Brigham, 10 Mass. 197, 6 Am. Dec. 109; Howard *v.* Emerson, 110 Mass. 320, 14 Am. Rep. 608.

Michigan. — Craft *v.* Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; Hoover *v.* Peters, 18 Mich. 51; Sinclair *v.* Hathaway, 57 Mich. 60, 23 N. W. 459, 58 Am. Rep. 327.

Minnesota. — Ryder *v.* Neitge, 21 Minn. 70.

New York. — Money *v.* Fisher, 92 Hun 347, 36 N. Y. Supp. 862; Van Bracklin *v.* Fonda, 12 Johns. 468, 7 Am. Dec. 339; Divine *v.* McCormick, 50 Barb. 116; Moses *v.* Mead, 1 Denio 378, 43 Am. Dec. 676; Fairbank Cann. Co. *v.* Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; Burch *v.* Spencer, 15 Hun 504; Hart *v.* Wright, 17 Wend. 267, 18 Wend. 449; Hyland *v.* Sherman, 2 E. D. Smith 234.

Tennessee. — Goad *v.* Johnson, 6 Heisk. 340.

Warranty of Wholesomeness of Food. — Where it appears from the evidence that the sale of food is not for immediate domestic use, but to a middleman who buys for the purpose of selling to others, no implied warranty as to the wholesomeness of the article sold is created. Wiedeman *v.* Keller, 171 Ill. 93, 49 N. E. 210.

Distinction Between Sale for Domestic Use and Sale as Merchandise. There is a very plain distinction between selling provisions for domestic use, and selling them as merchandise, which the buyer does not intend to consume, but to sell again. In sale for domestic use the vendor is bound to know that they are sound and wholesome at his peril. The sale as merchandise are usually made in large quantities, and with less opportunity to know the actual condition of the goods than when they are sold by retail. When provisions are not sold for immediate consumption, there is no more reason for implying a warranty of soundness, than there is in relation to sales of other articles. Moses *v.* Mead, 1 Den (N. Y.) 378, 43 Am. Dec. 676.

A keeper of a meat market who sells meat for consumption impliedly warrants that the meat is fit to eat, and if he sells meat that is dangerous to those who eat it, he is liable if he knew the meat to be dangerous or could have known so by the exercise of proper care. Craft *v.* Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139.

6. People's Bank *v.* Kurtz, 99 Pa. St. 344, 44 Am. Rep. 112.

7. See cases in following note.

That Stock Sold Is Not in Excess of the Charter Limit is not impliedly warranted by the vendor in the sale of the stock. People's Bank *v.* Kurtz, 99 Pa. St. 344, 44 Am. Rep. 112.

That Stock Is Issued by the Duly Constituted Officers of the Company and Is Sealed With the Genuine Seal of the Corporation is impliedly warranted by the vendor in the sale of the stock. People's Bank *v.* Kurtz, 99 Pa. St. 344, 44 Am. Rep. 112.

8. *Indiana.* — Ward *v.* Haggard, 75 Ind. 381; Willson *v.* Binford, 81 Ind. 588.

Massachusetts.—Merriman *v.* Wolcott, 3 Allen 258, 80 Am. Dec. 69; Worthington *v.* Cowles, 112 Mass. 30; Cabot Bank *v.* Morton, 4 Gray 156; Wilder *v.* Cowles, 100 Mass. 487.

New York. — Shaver *v.* Ehle, 16 Johns. 201; Ross *v.* Terry, 63 N. Y. 613; Herrick *v.* Whitney, 15 Johns. 240.

Pennsylvania. — People's Bank *v.* Kurtz, 99 Pa. St. 344, 44 Am. Rep. 112.

Vermont. — Gilchrist *v.* Hilliard, 53 Vt. 592, 38 Am. Rep. 706; Mar-

K. Usage of Trade. — When the question of a warranty is involved, the usage of a particular trade,[9] may, in certain cases, be given in evidence to prove a warranty.[10]

shall *v.* Morgan, 58 Vt. 60, 3 Atl. 465.

Seller of Promissory Note Impliedly Warrants Its Genuineness, whether the purchaser pays cash or discharges a debt in payment for the paper. Merriman *v.* Walcott, 3 Allen (Mass.) 258, 80 Am. Dec. 69.

Assignor of Note Impliedly Warrants Its Genuineness. — Shaver *v.* Ehle, 16 Johns. (N. Y.) 201; Herrick *v.* Whitney, 15 Johns. (N. Y.) 240.

Where the Holder of a Note Payable to Bearer, transfers it to another person for a valuable consideration, under an agreement that the person to whom it is transferred shall collect it at his own risk, the risk meant is the maker's solvency, not the risk of the note's being a forgery, for he impliedly warrants the genuineness of the instrument. Shaver *v.* Ehle, 16 Johns. (N. Y.) 201.

Assignor's Contract of Assignment of Note Negotiable Under the Statute, but not governed by the law-merchant, carries with it an implied warranty that the maker is liable on the note and able to pay it. Ward *v.* Haggard, 75 Ind. 381; Wilson *v.* Binford, 81 Ind. 588.

It is well settled that a party selling as his own personal property of which he is in possession, warrants the title of the thing sold, and that if, by reason of defect of title, nothing passes, the purchaser may recover back his money, though there be no fraud or warranty on the part of vendor. People's Bank *v.* Kurtz, 99 Pa. St. 344, 44 Am. Rep. 112.

Accounts. — There is an implied warranty in the sale of accounts that they are genuine and real, and that they are what they appear to be,— accounts, due and owing. Gilchrist *v.* Hilliard, 53 Vt. 592, 38 Am. Rep. 706.

Bond or Other Security. — As a general rule, there is implied from the sale of a bond or other security a warranty on the part of the vendor that it is a subsisting and valid security for the amount expressed. Ross *v.* Terry, 63 N. Y. 613. In this case defendant had sold and assigned to plaintiff a bond and mortgage which were usurious and void. Defendant was personally concerned in the making of them, and in the unlawful acts which vitiated them. It was held that there was an implied warranty on the part of the defendant of the validity of the bond and mortgage, for the breach of which he was liable.

9. Boorman *v.* Jenkins, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158; Harris *v.* Nasito, 23 La. Ann. 457; Conestoga Cigar Co. *v.* Finke, 144 Pa. St. 159, 22 Atl. 922, 13 L. R. A. 438; Landman *v.* Bloomer, 117 Ala. 312, 23 So. 75.

10. Frum *v.* Keeney, 109 Iowa 393, 80 N. W. 507; Gehl *v.* Milwaukee Produce Co., 105 Wis. 573, 81 N. W. 666; Walker *v.* Syms, 118 Mich. 183, 76 N. W. 320, 321; Patterson *v.* Crowther, 70 Md. 124, 16 Atl. 531; Walls *v.* Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Cleveland Oil & Paint Mfg. Co. *v.* Norwich Union F. Ins. Co., 34 Or. 288, 55 Pac. 435.

When Custom or Usage Not Admissible in Evidence. — Usage or custom is not admissible in evidence, when upon the admitted facts the law precludes the inference of a warranty. Chicago Pack. & Prov. Co. *v.* Tilton, 87 Ill. 547; Baird *v.* Matthews, 6 Dana (Ky.) 129; Whitmore *v.* South Boston Iron Co., 2 Allen (Mass.) 52; Dickinson *v.* Gay, 7 Allen (Mass.) 29, 83 Am. Dec. 656; Thompson *v.* Ashton, 14 Johns. (N. Y.) 316; Wetherill *v.* Neilson, 20 Pa. St. 448, 59 Am. Dec. 741; Stamps *v.* Tennessee Marble Co. (Tenn. Ch. App.), 59 S. W. 769; McKinney *v.* Fort, 10 Tex. 220; Barnard *v.* Kellogg, 77 U. S. 383.

Evidence of Usage in Modification of Contract of Sale. — Evidence cannot be introduced to modify the essential terms of a contract, whether express or implied, nor be shown at all, if it conflicts with the settled rules of law, or unless it is known to the parties. The presumption,

L. Judicial Sales. — If it appear from the evidence that the property was sold at a judicial sale,[11] there is no implied warranty of title.[12] The rule is that in respect of all judicial sales the

however, is that a contract made in the light of usage attaches to such as are made in the ordinary course of business, without particular stipulation. Van Hoesen *v.* Cameron, 54 Mich. 609, 20 N. W. 609, 611.

In Harris *v.* Nasits, 23 La. Ann. 457, it being shown to be the custom in New York among tobacco merchants, to close a transaction of the sale of a lot of tobacco at once and without reclamation, and it being shown in this case that that custom was observed, and that the customer examined the tobacco before purchasing, and having given his written acceptance in payment thereof, it was held that he could not be allowed thereafter to resist the payment of the draft given on the ground that the tobacco was unsound and worthless.

Where Plaintiff Shows the Custom To Be To Warrant Goods for Thirty Days, defendant may show the custom to be that such goods are warranted for twelve months. Laudman *v.* Bloomer, 117 Ala. 312, 23 So. 75.

In the sale of goods by a merchant who is not a manufacturer, where both the samples and the bulk of the goods contain a latent defect, a warranty against the defect is not implied, and proof of usage is not admissible to show that the seller is responsible therefor. Such a sale by a commission merchant having no authority to sell on credit, renders him accountable to the consignor without a deduction for such defect. Dickinson *v.* Gay, 7 Allen (Mass.) 29, 83 Am. Dec. 656.

Explanation of Warranty by Proof of Custom Is Competent. — Baird *v.* Matthews, 6 Dana (Ky.) 129; Barnard *v.* Kellogg, 10 Wall. (U. S.) 383; Conestoga Cig. Co. *v.* Finke, 144 Pa. St. 159, 22 Atl. 922, 13 L. R. A. 438.

11. Bland *v.* Bowie, 53 Ala. 152; Williams *v.* Glenn, 87 Ky. 87, 7 S. W. 610, 12 Am. St. Rep. 461; Holmes *v.* Shaver, 78 Ill. 578; Smith *v.* Wortham, 82 Va. 937, 1 S. E. 331.

Sheriff. — In execution sales there is no implied warranty by the sheriff of the title to the property sold, nor implied promise to refund the purchase money if the buyer be evicted. Stone *v.* Pointer, 5 Munf. (Va.) 287.

After a judicial sale has been made complete by a confirmation of the sale, the purchaser cannot successfully resist the payment of the purchase price on the ground that he acquired no title to the property, unless he can show that he was induced to make it by the representation of the creditor or person making the sale as to the condition of the title, and that he did not discover, and could not discover with reasonable diligence, the true condition of the title until after the confirmation of the sale. Williams *v.* Glenn, 87 Ky. 87, 7 S. W. 610, 12 Am. St. Rep. 461.

Probate Sales are judicial sales to which the doctrine of *caveat emptor* applies. Bland *v.* Bowie, 53 Ala. 152.

Equity. — With respect to judicial sales the maxim of *caveat emptor* is equally applicable in equity as at law, and equity cannot relieve in the absence of fraud in case of failure of title. Holmes *v.* Shaver, 79 Ill. 578.

In Equity Before Confirmation. The chancellor will relieve purchaser before the sale is confirmed, by refusing to approve the same. Farmers' Bank *v.* Peter, 13 Bush (76 Ky.) 591; Balgiano *v.* Cooke, 19 Md. 375.

Right, Title and Interest Sold. Where a trustee of the court at the time of sale expressly declared that he only sold the estate, right, title and interest, which the parties to the decree had in certain land, and if they had no right he sold none, there can be no pretense of warranty; nor is it necessary in such a case to determine whether the doctrine of *caveat emptor* applies to trustees' sale. Brown *v.* Wallace, 4 Gill & J. (Md.) 479.

12. Capehart *v.* Dowery, 10 W. Va. 130; Fore *v.* McKenzie, 58 Ala. 115; Stone *v.* Pointer, 5 Munf. (Va.)

maxim *caveat emptor* is applicable equally at law and in equity.[13]

M. Time to Which Evidence of Warranty Must Relate. When the existence and character of a warranty are sought to be established, the evidence relating thereto must be confined to the time of the sale.[14] If it appear that the warranty was made after the contract of sale, there must be evidence of a consideration to support it.[15]

287; Farmer's Bank *v.* Peter, 13 Bush (Ky.) 591.

13. Farmers' & Planters' Bank *v.* Martin, 7 Md. 342, 61 Am. Dec. 350; Farmers' Bank *v.* Peter, 13 Bush (Ky.) 591; Brown *v.* Wallace, 4 Gill & J. (Md.) 479; Bolgiano *v.* Cooke, 19 Md. 375; Stewart *v.* Devries, 81 Md. 525, 32 Atl. 285; Mott *v.* Mott, 68 N. Y. 246; Threlkelds *v.* Campbell, 2 Gratt. (Va.) 198, 44 Am. Dec. 384; Thomas *v.* Davidson, 76 Va. 338; Shields *v.* McClung, 6 W. Va. 79.

14. *United States.* — Accumulator Co. *v.* Dubuque St. R. Co., 64 Fed. 70, 12 C. C. A. 37.

Georgia. — Dean *v.* Taylor, 8 Ga. 169; McCoy *v.* Wily, 50 Ga. 126.

Illinois. — Luthy *v.* Waterbury, 140 Ill. 664, 30 N. E. 351.

Indiana. — Bowman *v.* Clemmer, 50 Ind. 10.

Louisiana. — Hall *v.* Plassan, 19 La. Ann. 11.

Mississippi. — Millsaps *v.* Merchants' & Planters' Bank, 71 Miss. 361, 13 So. 903.

Missouri. — Best Bros. *v.* Kempt, 64 Mo. App. 460.

Texas. — Murphy *v.* Crain, 12 Tex. 297.

Wisconsin. — Miller *v.* McDonald, 13 Wis. 673; Smith *v.* Swarthout, 15 Wis. 550.

Where the commodity is by its nature subject to change or deterioration, and no fraud or concealment is shown, the buyer must show that the defect or deterioration existed at the date of sale, or show that it was discovered as early as was practicable to make an examination. Hall *v.* Plassan, 19 La. An. 11.

In McCoy *v.* Wily, 50 Ga. 126, evidence for plaintiff in an action on a warranty of a mule traded was held deficient in that it failed to show that at the time of the warranty the mule was affected with the disease of which it died.

Future Delivery Sales. — A guaranty by the seller under contract for future delivery, that the article is in good merchantable condition, refers to the condition of the article at the date of contract. Luthey *v.* Waterbury, 140 Ill. 664, 30 N. E. 351.

15. *Delaware.* — Burton *v.* Young, 5 Harr. 233.

Georgia. — Brooks *v.* Matthews, 78 Ga. 739, 3 S. E. 627.

Illinois. — Towell *v.* Gatewood, 3 Ill. 22, 33 Am. Dec. 437.

Indiana. — Ohio Thresher & Engine Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716; Summers *v.* Vaughan, 35 Ind. 323, 9 Am. Rep. 741.

Maine. — White *v.* Oaks, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592.

Massachusetts. — McGaughey *v.* Richardson, 148 Mass. 608, 20 N. E. 202.

Minnesota. — Aultman *v.* Kennedy, 33 Minn. 339, 23 N. W. 528; Hansen *v.* Gaar, Scott & Co., 63 Minn. 94, 65 N. W. 254.

North Carolina. — McDugald *v.* McFadgin, 51 N. C. (6 Jones L.) 89.

Wisconsin. — Congar *v.* Chamberlain, 14 Wis. 258.

Warranty Without Consideration. In White *v.* Oaks, 88 Me. 367, 32 L. R. A. 592, 34 Atl. 175, the evidence disclosed a sale of a folding bed by a dealer, who did not manufacture it, and did not know that it was dangerous, and the sale was made in writing without any warranty. The vendor, on repairing the bed after it had been broken, and when he was not obliged to repair it or take it back, warranted it to be all right, but without any consideration to support the warranty. The court held that this testimony disclosed a gratuitous warranty, and that it could not be enforced.

N. Comparison of Goods Sold With Others of Same Kind. If a question arises as to whether the goods sold are of the same quality as warranted, by the weight of authority it is competent to prove that they are identical in quality with other goods sold at the same time to other parties;[16] but it must also be shown that such

But where the evidence shows a written contract guaranteeing the quantity of certain logs sold, though executed subsequently to the conveyance of the property, this is not void for want of consideration, if it appear from the evidence that it is simply an affirmance in writing of a parol agreement made at the time of the sale. Collette *v.* Weed, 68 Wis. 428, 32 N. W. 753.

If the warranty is made after the sale or completion of the contract, it is void for want of consideration, and the plaintiff in such case cannot recover. Burton *v.* Young, 5 Harr. (Del.) 233.

Written Warranty Superceding Verbal Warranty After Sale. — In Aultman *v.* Kennedy, 33 Minn. 339, 23 N. W. 528, the defendant testified to a verbal warranty given him by plaintiff at the time of the purchase of the machine. Subsequently on his cross-examination, it appeared that some time after the sale, and after the machine had been delivered and partly paid for, the defendant delivered to him a written warranty. There was no evidence that there was at that time any change or modification of the contract, or that any new consideration passed between the parties. Plaintiff moved to strike out the evidence of verbal warranty. *Held,* that the evidence at least tended to show that the verbal warranty given at time of sale was the one which constituted the contract of sale between the parties and in reliance of which the defendant purchased, and that the gratuitous delivery by plaintiff to defendant of the writing, after the contract of sale was fully executed, could not affect the rights of the parties.

Warranty Made After Sale Upon a Distinct Consideration is valid. Thus, in Conger *v.* Chamberlain, 14 Wis. 258, where A agreed to deliver fruit trees to B in time to enable B to deliver them at a certain point before they should be injured by freezing, but delivered them at so late a period that B objected to receiving them, it was held, that if A for the purpose of inducing B to receive the trees, thereupon warranted that they would not be frozen within the time required for their delivery by B at the point aforesaid, and also that if frozen, they would upon being buried in a certain manner come out good in the spring, such warranty was founded upon a consideration distinct from that of the sale, and was binding.

In McGaughey *v.* Richardson, 148 Mass. 608, 20 N. E. 202, an action for breach of warranty, the following instruction was held correct: That if before the money was paid and the horse was delivered, the question arose between the parties as to the form of the warranty to be given and the parties agreed that these words of warranty should be written into the bill of sale as a part of the contract, and they were so written into the bill of sale, "and the money was then paid and the horse delivered, the warranty would rest upon a good consideration, and would bind the defendant; but, that if, after the horse had been delivered and the money paid, the warranty was inserted by the defendant in the bill of sale, and the defendant was not bound by the contract of sale to insert it, but he voluntarily chose to put it in, then the defendant was not bound by it."

16. *United States.* — City of Findlay *v.* Pertz, 74 Fed. 681, 20 C. C. A. 662, 43 U. S. App. 383; St. Louis Paper Box Co. *v.* Hubinger Co., 100 Fed. 595, 40 C. C. A. 577.

Alabama. — Davis *v.* Adams, 18 Ala. 264; Wilcox *v.* Henderson, 64 Ala. 535; Anniston L. & C. Co. *v.* Lewis, 107 Ala. 535, 18 So. 326.

Georgia. — Mayes *v.* McCormick Harv. Mach. Co., 110 Ga. 545, 35 S. E. 714.

Illinois. — Tomlinson *v.* Earnshaw, 112 Ill. 311; Luetgert *v.* Volker, 153 Ill. 385, 39 N. E. 113, *affirming* 54 Ill. App. 287.

Iowa. — Davis *v.* Sweeney, 80 Iowa 391, 45 N. W. 1040.

Kansas. — Manufacturing Co. *v.* Nicholson, 36 Kan. 383, 13 Pac. 597.

Michigan. — Imbrie *v.* Wetherbee, 70 Mich. 103, 37 N. W. 910.

Minnesota. — Worden *v.* Hitter, 35 Minn. 244, 28 N. W. 503.

In action for price of sausages claimed by defendant to have been spoiled, plaintiff may show that other sausages made at the same time were in good condition after the sale as tending to show that those sued for were also good. Luetgert *v.* Volker, 153 Ill. 385, 39 N. E. 113, *affirming* 54 Ill. App. 287.

In action to recover the purchase price of machine sold defendant who claimed that machine was not satisfactory, it is competent to prove the purchaser's satisfaction with operation of another machine, there being evidence tending to show that it was identical in character and construction with the machine purchased and that the latter machine operated as well as the former. Mayes *v.* McCormick Harv. Mach. Co., 110 Ga. 545, 35 S. E. 714.

Where a machine is bought for a specific purpose and the question tried is whether the machine purchased did or did not do the work for which it was designed and purchased, and defendant contends that the machine was worthless, and plaintiff states that it was not properly managed, evidence tending to show that like machines failed to do good work in the matter complained of is competent. Manufacturing Co. *v.* Nicholson, 36 Kan. 383, 13 Pac. 597.

In St. Louis Paper Box Co. *v.* Hubinger Co., 100 Fed. 595, 40 C. C. A. 577, an action by a manufacturer to recover the price of cartons manufactured for which defendant refused to pay because they were worthless and did not comply with the contract, it was held that the court properly permitted witnesses who worked in defendant's starch factory and were familiar with the construction and use of starch cartons, to compare the cartons shipped by the plaintiff with samples attached to contract, and point out to the jury the differences and various alleged defects and imperfections in the plaintiff's cartons.

In Davis & Sons *v.* Sweeney, 80 Iowa 391, 45 N. W. 1040, where evidence was admitted comparing the machine in question with a subsequent machine purchased by the defendant as tending to establish the breach of warranty, it was held proper to permit a witness to testify that he had never seen a machine that did not do better work than the one in question.

Proof of Quality of Goods by Comparison. — Ames *v.* Quimby, 106 U. S. 342, 1 Sup. Ct. 116, was an action of assumpsit for the recovery of the price of certain goods sold, and in the action the question arose as to whether the quality of the goods sued for conformed to the warranty. It was held by the court competent for the plaintiff to show that the quality of like articles furnished at the same time by him to another party was good, if such evidence was followed by evidence that the goods furnished by him at that time to such other party, and the goods furnished by him at that time to the defendant, were of the same kind and quality.

Compare Barton *v.* Kane, 17 Wis. 38, 84 Am. Dec. 738, an action to recover the price of cigars sold by sample, where it was held that testimony that the plaintiff about the same time, forwarded to other purchasers cigars, the same in kind as those furnished the defendant, and that those purchasers made no complaint that the cigars received by them were damp, unseasoned, or unfit for use, was not competent, as it was *res inter alios acta.*

In Barr *v.* Borthwick, 19 Or. 578, 25 Pac. 360, an action for wood sold defendant under a contract calling for specified quality, it was held that plaintiff could not show the merchantable quality of wood of the same grade, cut from the same place, and on hand a day or two before the trial and some considerable time after the delivery of the wood sued for.

In Kauffman *v.* Stuckey, 37 S. C.

other goods were or were not of the kind and quality warranted.[17]

O. Warranty to Extent of Seller's Knowledge. — Where the warranty is simply "so far as the seller knows," the evidence must show that the defect was known to the seller in order to make out the warranty.[18]

P. Acceptance of Goods After an Inspection of Them. — If the evidence shows a sale to and an acceptance by the buyer of goods after he has inspected them,[19] or has had an opportunity to inspect

7, 16 S. E. 192, an action to recover the purchase price of flour, defendant claimed that the goods did not come up to the standard as represented by the sample shown him by plaintiff's agent. *Held,* that plaintiff could not show by such agent that flour of the same brand sold at the same time to other parties had given satisfaction. The court said: "It made no difference how fair plaintiff was in its dealings with people other than defendant, for the issues tendered by the defendant to the plaintiff in the case at bar were strictly confined to the dealings between them. . . . We can easily see how tastes of men may differ,— what to one man is good, wholesome bread is not to another. . . . Besides, who was able to say that the grade of flour in each case was the same?"

17. Chariton Plow Co. *v.* Davidson, 16 Neb. 374, 20 N. W. 256; Morawetz *v.* McGovern, 68 Wis. 312, 32 N. W. 290; Locke *v.* Priestly Express W. & S. Co., 71 Mich. 263, 39 N. W. 54; Second Nat. Bank *v.* Wheeler, 75 Mich. 546, 42 N. W. 963; Gage *v.* Meyers, 59 Mich. 300, 26 N. W. 522.

In a suit involving an alleged breach of warranty of a threshing separator, evidence of witnesses who were unacquainted with said machine, and had never seen it work, that separators made and sold by the same manufacturer, and of the same pattern and size as the one in question, worked well and gave satisfaction, is inadmissible, having no tendency to show that the machine in controversy was properly constructed and did its work well. Second Nat. Bank *v.* Wheeler, 75 Mich. 546.

18. Wood *v.* Smith, 4 M. & W. (Eng.) 522; Burnham *v.* Sherwood, 56 Conn. 229, 14 Atl. 715; Wason *v.* Rowe, 16 Vt. 525.

In Burnham *v.* Sherwood, 56 Conn. 229, 14 Atl. 715, the warranty relied on was "So far as known," to the seller. With reference to this character of warranty which related to the soundness of the subject-matter of sale which consisted of a horse, the court in its opinion said: "The whole case was, therefore, affected by this qualification of the warranty," and the judge very properly charged the jury that "To prove a breach of the warranty that the horse was sound and right in every particular so far as the defendant knew required not only proof of the existence of the claimed disease or defect but of the defendant's knowledge of its existence."

19. Smith *v.* Coe, 170 N. Y. 162, 57 N. E. 57; Louis Werner Saw Mill Co. *v.* Ferree, 201 Pa. St. 405, 50 Atl. 924.

Proof that the vendee of goods purchased without warranty, after full opportunity for inspection, accepted them without objection when delivered, precludes him from showing, in an action to recover the price, that they did not conform to the contract of sale. Smith *v.* Coe, 170 N. Y. 162, 57 N. E. 57.

Where the evidence shows that the lumber sued for was being delivered during a period of seven weeks and was unloaded by the purchaser, who had a full opportunity to inspect every piece of it, and the lumber was used by him in a building operation, without any complaint of its condition made either to the seller or carrier, the purchaser, when called upon to pay for the lumber can not show its damaged condition as a defense. Louis Werner Saw M. Co. *v.* Ferree, 201 Pa. St. 405, 50 Atl. 924.

them,[20] this rebuts the implication of a warranty,[21] and is sufficient evidence of their contractual quality.[22]

Q. Susceptibility of Goods to Injury From External Agency. — When the issue involves the quality of goods sold, and their nature will admit of it, their susceptibility to injury from external agency may be shown in evidence.[23]

R. Evidence of Experts. — When it is shown that a person is an expert in the line of business to which the goods belong,[24] he

20. Smith *v.* Coe, 170 N. Y. 162, 57 N. E. 57.

What Is Evidence of Acceptance. While a vendee who accepts articles of inferior quality tendered to him as in fulfillment of an executory contract of sale, is, in the absence of fraud, deemed to assent that they are of the quality to which he was entitled under the contract, and is precluded from subsequently urging their inferiority, it must not be thought that the mere receipt of goods constitutes evidence of acceptance (Pierson *v.* Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831). The law accords to the vendee the right to inspect the goods, and allows him for this purpose a reasonable time; what is a reasonable time is a question of fact to be determined by the jury from all the circumstances in the case (South Bend Pulley Co. *v.* Caldwell, 21 Ky. L. Rep. 1084, 54 S. W. 12). If, however, the buyer remains inactive, and neither rejects or accepts within a reasonable time, this will constitute evidence of his acquiescence, and be sufficient proof of the fulfillment of the contract on the part of the seller. E. A. Moor Furniture Co. *v.* Sloane, 166 Ill. 457, 46 N. E. 1128; Hobbs *v.* Massasoit Whip Co., 158 Mass. 194, 33 N. E. 495; Berthold *v.* Seevers Mfg. Co., 89 Iowa 506, 56 N. W. 669.

21. Smith *v.* Coe, 170 N. Y. 162, 57 N. E. 57.

22. Calhoun *v.* Vechio, 3 Wash. C. C. 165, 4 Fed. Cas. No. 2,310; Barnard *v.* Kellogg, 77 U. S. 383; Willings *v.* Consequa, Pet. C. C. 301, 30 Fed. Cas. No. 17, 767; Brackett *v.* Edgerton, 14 Minn. 174, 100 Am. Dec. 211; Carleton *v.* Lombard, Ayres & Co., 72 Hun 254, 25 N. Y. Supp. 570; McGuire *v.* Kearny, 12 La. Ann. 295.

Acceptance of Goods After Opportunity to Inspect. — Where goods are purchased under a contract specifying the kind and quality, and the vendee accepts such goods, after an inspection or an opportunity to inspect, and uses the goods, ordinarily, he will not be heard to object to their sufficiency to meet the character or description of goods contemplated by the contract. Thomas China Co. *v.* Raymond Co., 135 Fed. 251, 67 C. C. A. 629; Parker *v.* Fenwick, 138 N. C. 209, 50 S. E. 627; Cohen *v.* Hawkins (Neb.), 104 N. W. 179.

Some of the Articles Examined and Approved. — Waiver of a stipulation in a contract of sale calling for a designated quality which the vendor warrants, is not established by proof of an examination and approval of some of the articles by the vendee. Willings *v.* Consequa, 1 Pet. C. C. 301, 30 Fed. Cas. No. 17,767.

Samples. — Proof of an examination of samples, when the vendor cannot examine the articles, does not establish a waiver of express an warranty. Willings *v.* Consequa, 1 Pet. C. C. (U. S.) 301, 30 Fed. Cas. No. 17,767.

23. In Standard Rope & Twine Co. *v.* Olmen, 13 S. Dak. 291, 83 N. W. 271, an action for the price of binding twine, where defendant claimed that it was unfit for the purpose for which it was sold, evidence was held admissible to show that the quality of the twine rendered it more susceptible to the action of crickets, by reason of which it was almost totally destroyed after the grain was bound.

24. Ward *v.* Reynolds, 32 Ala. 384; Bonnett *v.* Glattfelt, 24 Ill. App. 533; Blackmore *v.* Fairbanks, Morse

may give his opinion as to the character and extent of the defect complained of,[25] or whether, indeed, there is any defect at all.[26] To authorize the introduction of such person as a witness, the court must first ascertain whether he is qualified as an expert.[27]

IV. PERSONS SUSTAINING MUTUAL RELATIONS OF TRUST.

1. Generally. — The principles applying to sales made between parties sustaining fiduciary relations toward each other,[28] or a purchase of property with relation to which the purchaser sustains a trust relation,[29] are quite different from those applying to ordinary sales.[30] The rules of evidence governing the burden of proof in such cases,[31]

& Co., 79 Iowa 282, 44 N. W. 548; Hood *v.* Maxwell, 1 W. Va. 219.

In Blackmore *v.* Fairbanks Morse & Co., 79 Iowa 282, 44 N. W. 548, plaintiff claimed that the machinery purchased of defendant was warranted to furnish sufficient power to run his mill, and he was allowed to show by witnesses who had been engaged in operating the mill, the power of the engine in question as compared with that of three water wheels of known power by which the mill had been run.

And see the articles "CAPACITY," Vol. II, p. 838; "EXPERT AND OPINION EVIDENCE," Vol. V, p. 506.

25. Albany & Rensseler Co. *v.* Lundberg, 121 U. S. 451; Scattergood *v.* Wood, 79 N. Y. 263, 35 Am. Rep. 515.

26. In Scattergood *v.* Wood, 79 N. Y. 263, 35 Am. Rep. 515, the action involved a breach of warranty that a cotton gin was "equal in all respects to the best saw gin then in use." The introduction of expert evidence on the question whether or not the cotton gin was as warranted was assigned as error in the action of the referee. Disposing of this point, the court of appeals said: "The general rule requires a witness to testify to facts, and not conclusions. Yet to this rule there are exceptions, and one is here presented. The parties by their contract required that the cotton gin covered by the patent 'should be equal in all respects to the best saw gin then in use.' To determine this question special knowledge was necessary, and this could be best acquired by experience in the use of that and other machines made for a like purpose. Indeed it is doubtful whether any person could answer it. The invention or a machine made under it could be described, and its operation, as it affected the quantity and quality of the substance with which it was fed, stated to the referee; and all this was done, but it was also proper to take the opinion of competent persons as to its practical working and its comparative value."

27. Laing *v.* United New Jersey R. & C. Co., 54 N. J. L. 576, 25 Atl. 409, 33 Am. St. Rep. 682, 33 L. R. A. 682; Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Germania L. Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215.

28. Pacific V. & P. Wks. *v.* Smith, 145 Cal. 352, 78 Pac. 550, 104 Am. St. Rep. 42; Scott *v.* Farmers' and Merchants' Nat. Bk., 97 Tex. 31, 75 S. W. 7, 104 Am. St. Rep. 835.

29. Briggs *v.* Hodgdon, 78 Me. 514, 7 Atl. 387; Elliott *v.* Tyler (Pa.), 6 Atl. 917; Cleine *v.* Engelbrecht, 41 N. J. Eq. 498, 5 Atl. 718.

30. Stewart *v.* Harris, 69 Kan. 498, 77 Pac. 277, 105 Am. St. Rep. 178.

31. *Alabama.* — Malone *v.* Kelly, 54 Ala. 532.

Georgia. — Nicholson *v.* Spencer, 11 Ga. 607; Munroe *v.* Phillips, 64 Ga. 32.

Illinois. — Jennings *v.* McConnell, 17 Ill. 148; McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609.

Indiana. — Wainwright *v.* Smith, 106 Ind. 239, 6 N. E. 333.

Kansas. — Stewart *v.* Harris, 69

and the character and quantum of evidence,[32] are not the same as those which apply to ordinary contracts of sales.[33] Among the relations to which these principles apply are those of attorney and client,[34] guardian and ward,[35] administrators and executors and the devisees and heirs,[36] principal and agent.[37] These

Kan. 498, 77 Pac. 277, 105 Am. St. Rep. 178.

North Carolina. — Williams *v.* Powell, 36 N. C. 460.

Texas. — Hastings *v.* Bachelor, 27 Tex. 259.

32. Briggs *v.* Hodgdon, 78 Me. 514, 7 Atl. 387; Cleine *v.* Englebrecht, 41 N. J. Eq. 498, 5 Atl. 718; Stewart *v.* Harris, 69 Kan. 498, 77 Pac. 277, 105 Am. St. Rep. 178.

Burden of Proof Where Parties Sustain Fiduciary Relations. — In Rochester *v.* Levering, 104 Ind. 562, 4 N. E. 203, which involved a transaction between principal and agent, relating to the sale of property by the former to the latter, the court in the course of its opinion, said: "When the transaction is seasonably challenged, a presumption of its invalidity arises, and the agent then assumes the burden of making it affirmatively appear that he dealt fairly, and in the strictest of faith imparted to his principal all the information concerning the property possessed by him. The confidential relation and the transaction having been shown, the onus is upon the agent to show that the bargain was fair and equitable; that he gave all the advice within his knowledge pertaining to the subject of the sale and the value of the property; and that there was no suppression or concealment which might have influenced the conduct of the principal."

33. Stewart *v.* Harris, 69 Kan. 498, 77 Pac. 277, 105 Am. St. Rep. 178; Dunn *v.* Dunn, 42 N. J. Eq. 431, 7 Atl. 842; Gibson *v.* Jeyes, 6 Ves. (Eng.) 266; Luddy *v.* Peard, 33 Ch. Div. (Eng.) 500, 24 E. R. C. 670.

Confidential Relation of Parties. The relation of confidence existing between partners may be presumed to have continued after they have formed a corporation, to which the partnership property was transferred, and in which 'they were practically the only stockholders, and to have induced one in selling his stock to the other, who was the active manager of the business, to place reliance on the latter's statements in respect to the condition and value of the property to the same extent as though the partnership had continued, in the absence of evidence to the contrary. Sullivan *v.* Pierce, 125 Fed. 104, 60 C. C. A. 148.

34. Olson *v.* Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670; Kisling *v.* Shaw, 33 Cal. 425, 91 Am. Dec. 644; Ford *v.* Harrington, 16 N. Y. 285; Leisenring *v.* Black, 5 Watts (Pa.) 303, 30 Am. Dec. 322.

35. Zander *v.* Feely, 47 Ill. App. 659; Hanna *v.* Spotts, 5 B. Mon. (Ky.) 362, 43 Am. Dec. 132; Love *v.* Lea, 37 N. C. (2 Ired. Eq.) 627; Rawlins *v.* Gidens, 46 La. Ann. 1136, 17 So. 262, 15 So. 501, 25 L. R. A. 577; Malone *v.* Kelly, 54 Ala. 532.

36. *Alabama.* — Brannan *v.* Oliver, 2 Stew. 47, 19 Am. Dec. 37; Raines *v.* Raines, 51 Ala. 237.

Mississippi. — Henderson *v.* Clark, 1 Smed. & M. (Miss.) 436; Baines *v.* McGee, 9 Miss. 208.

Missouri. — Overfield *v.* Bullitt, 1 Mo. 749.

North Carolina. — Ryden *v.* Jones, 8 N. C. (1 Hawks) 497, 9 Am. Dec. 660.

Pennsylvania. — Appeal of Grim, 105 Pa. St. 375.

South Carolina. — Cunningham *v.* Cauthen, 37 S. C. 123, 15 S. E. 917.

37. Disbrow *v.* Secor, 58 Conn. 35, 18 Atl. 981; Colbert *v.* Sheperd, 89 Va. 401, 16 S. E. 246; Friesenhahn *v.* Bushnell, 47 Minn. 443, 50 N. W. 597; Grumley *v.* Webb, 44 Mo. 444, 100 Am. Dec. 304; Dana *v.* Duluth Trust Co., 99 Wis. 663, 75 N. W. 429.

Where two parties occupy to each other a confidential or fiduciary relation, and a sale is made by one to the other, equity raises a presumption against the validity of the transaction. To sustain it the buyer must show affirmatively that the

principles are also applicable to corporations and their directors.[38]

2. Evidence To Sustain Such Sales. — If the sale be one which the policy of the law will permit to stand,[39] after it has been shown by the evidence that the sale has taken place to one who sustains a fiduciary relation to the property of the seller,[40] the evidence, in order to establish a valid sale, must show affirmatively that the transaction was conducted in the utmost good faith,[41] without undue influence on the part of the purchaser;[42] and that it was with full knowledge of all the circumstances on the part of the seller,[43]

transaction was conducted in good faith, without pressure or influence on his part, and with express knowledge of the circumstances and entire freedom of action on the part of seller. Stewart *v.* Harris, 69 Kan. 498, 77 Pac. 277, 105 Am. St. Rep. 178.

38. Stanley *v.* Luse, 36 Or. 25, 58 Pac. 75; Hoffman Co. *v.* Cumberland Co., 16 Md. 456, 77 Am. Dec. 311; Millsaps *v.* Chapman, 76 Miss. 942, 26 So. 369, 71 Am. St. Rep. 547; Horbach *v.* Marsh, 37 Neb. 22, 55 N. W. 286; Straine *v.* Bradford, 88 Fed. 571; Thompson *v.* Meisser, 108 Ill. 359.

39. Copsey *v.* Sacramento Bk., 133 Cal. 659, 66 Pac. 7, 204, 85 Am. St. Rep. 238; Mott *v.* Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550.

"Notwithstanding the general principle of equity which forbids trustees dealing with the trust property in any way looking toward their own private advancement, it is a well settled principle of law, that the mortgagee who is vested with power to sell for breach of condition may purchase at his own sale." Copsey *v.* Sacramento Bank, 133 Cal. 659, 66 Pac. 7, 204, 85 Am. St. Rep. 238.

40. See *ante*, notes 28 to 38.

41. Kisling *v.* Shaw, 33 Cal. 425, 91 Am. Dec. 644; Stewart *v.* Harris, 69 Kan. 498, 77 Pac. 277, 105 Am. St. Rep. 178; Dunn *v.* Dunn, 42 N. J. Eq. 431, 7 Atl. 842; Korn *v.* Becker, 40 N. J. Eq. 408, 4 Atl. 434.

Attorney and Client. — Where the confidential relation is that of attorney and client, the attorney who buys, must show that he gave his client, who sells, full information and disinterested advice. Dunn *v.* Dunn, 42 N. J. Eq. 431, 7 Atl. 842.

Corporation Officer. — A director or managing officer of a corporation having knowledge of the condition of its affairs, because of the trust relation and the superior opportunities offered for acquiring information, must inform a stockholder not actively engaged in the management of the true condition of the corporation before he can rightfully purchase stock. Stewart *v.* Harris, 69 Kan. 498, 77 Pac. 277, 105 Am. St. Rep. 178.

42. Merryman *v.* Euler, 59 Ind. 588, 43 Am. Rep. 564; Stewart *v.* Harris, 69 Kan. 498, 77 Pac. 277, 105 Am. St. Rep. 178; Dunn *v.* Dunn, 42 N. J. Eq. 431, 7 Atl. 842; Miles *v.* Ervin, 1 McCord Ch. (S. C.) 524, 16 Am. Dec. 623.

The highest degree of fairness and good faith is required from an attorney toward his client and all their dealings will be closely scrutinized, and no contract between them will be upheld where any undue consequences result to the attorney. The attorney is supposed to have an ascendency over the client, because of his relation to him, and can easily impose on his credulity; therefore transactions which would be open to no objection where no such relation exists will be void against a client. Merryman *v.* Elder, 59 Ind. 588, 43 Am. Rep. 564.

43. Kisling *v.* Shaw, 33 Cal. 425, 91 Am. Dec. 644; Cook *v.* Burlin Co., 43 Wis. 433; McCormick *v.* Malin, 5 Blackf. (Ind.) 509-522; Porter *v.* Woodruff, 36 N. J. Eq. 174; Young *v.* Hughes, 32 N. J. Eq. 372; Farnam *v.* Brooks, 9 Pick. (Mass.) 212; Moore *v.* Mandlebaum, 8 Mich. 433.

Where the nature of the agency has given the agent control in the management of the principal's property, and peculiar opportunity of

and also that there was entire freedom of action on his part.[44]

3. Policy of Law Not To Enforce Such Sale. — In most cases it is held to be against the policy of the law to enforce a sale, where the evidence discloses that the purchaser sustained a trust relationship to the property sold.[45]

4. Sale Under Trust Deed To Secure Debts. — In order to establish a valid sale by a trustee under a deed of trust given to secure the payment of a debt, the evidence must establish that public notice of the sale has been given as provided by statute,[46] or as required by the instrument of trust,[47] that the form of the notice was suffi-

knowing its condition and value, a purchase of it by the agent will be avoided unless the purchaser makes it affirmatively appear that the transaction was fair, and that he imparted to the principal all his information concerning the property, and acted throughout *uberrima fides*. Cook *v.* Burlin Co., 43 Wis. 433. In this case, the board of directors of a manufacturing company sold their mill and machinery to the person employed by them as superintendent thereof, and who had charge of the books, accounts and papers of the corporation, and the principal charge of its general business. It was held that the sale was voidable in the absence of affirmative proof to sustain it, of the kind above described.

44. Miles *v.* Ervin, 1 McCord Ch. (S. C.) 524, 16 Am. Dec. 623; Hess *v.* Voss, 52 Ill. 472.

Master's Sale. — Purchase by Attorney. — "There is no rule of law which prohibits an attorney from becoming a purchaser at a master's sale, even of land owned by his client, but in such case the attorney must act in good faith. On such a purchase the conduct of the attorney will be closely scrutinized, and if he has not acted with strict fairness, his purchase will be held to have been made for his client." Hess *v.* Voss, 52 Ill. 472.

45. Gilbert *v.* Hewetson, 79 Minn. 326, 82 N. W. 655, 79 Am. St. Rep. 486; Chicago Hansom Cab Co. *v.* Yerkes, 141 Ill. 320, 30 N. E. 667, 33 Am. St. Rep. 315; Galbraith *v.* Tracy, 153 Ill. 54, 38 N. E. 937, 46 Am. St. Rep. 867, 28 L. R. A. 129.

Fraud Immaterial. — A receiver, trustee, attorney, agent or any other person occupying a fiduciary relation respecting property or persons is utterly disabled from acquiring for his own benefit the property committed to his custody for management. The rule is entirely independent of any fact whether any fraud has intervened. No fraud in fact need be shown, and no excuse will be heard from the trustee. It is to avoid the necessity of any such inquiry that the rule take so general a form. The rule stands on the moral obligation to refrain from placing one's self in positions which ordinarily excite conflicts between self-interest and integrity. It seeks to remove the temptations that might arise out of such a relation to serve one's self interest at the expense of one's integrity and duty to another by making it impossible to profit by yielding to temptations. Gilbert *v.* Hewetson, 79 Minn. 326, 82 N. W. 655, 79 Am. St. Rep. 486.

46. Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447; Walker *v.* Boggess, 41 W. Va. 588, 23 S. E. 550; Shillaber *v.* Robinson, 97 U. S. 68; Lee *v.* Mason, 10 Mich. 403; Grover *v.* Fox, 36 Mich. 461; Butterfield *v.* Farnham, 19 Minn. 85.

47. *Colorado.* — Stephens *v.* Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328.

Illinois. — Hall *v.* Towne, 45 Ill. 493.

Iowa. — Leffler *v.* Armstrong, 4 Iowa 482, 68 Am. Dec. 672.

Kentucky. — Hahn *v.* Pindell, 1 Bush 538.

Maryland. — Hunt *v.* Townshend, 31 Md. 336, 100 Am. Dec. 63.

Minnesota. — Dana *v.* Farrington, 4 Minn. 433.

Missouri. — Powers *v.* Kueckhoff, 41 Mo. 425, 97 Am. Dec. 281.

cient,[48] that the terms of sale were those provided by the trust deed,[49] that the sale occurred at the place advertised,[50] or if the trust deed fixes the place of sale, that it was made at that place,[51] that no more of the property was sold than was necessary to satisfy the debt,[52] and that the sale was conducted by the trustee in person.[53] If it appear that the trustee was interested in the sale it is not valid.[54]

5. Presumption as to Trust Sale To Pay Debt. — When a sale has been made by a trustee under a deed of trust given to secure debts, and it is attacked in a court of equity, as having been illegally made, it is a presumption of law that the sale was regularly made,[55] but this is not a conclusive presumption.[56]

V. REMEDIES OF SELLER.

1. Generally. — In determining what evidence is applicable to the remedies of the seller, the character of the remedy invoked must be considered. The law affords to him six methods of enforcing his rights, which may be thus enumerated: stoppage *in transitu*;[57] equit-

Pennsylvania. — Bradley *v.* Chester Val. R. Co., 36 Pa. St. 141.

48. Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447.

49. Lallance *v.* Fisher, 29 W. Va. 512, 2 S. E. 775; Walker *v.* Boggess, 41 W. Va. 588, 23 S. E. 550; Graeme *v.* Cullen, 23 Gratt. (Va.) 266; Hunter *v.* Johnston, 23 Gratt. (Va.) 266; Heermans *v.* Montague (Va.), 20 S. E. 899.

50. Fry *v.* Old Dominion B. & L. Assn., 48 W. Va. 61, 35 S. E. 842; Martin *v.* Barth, 4 Colo. App. 346, 36 Pac. 72; Shurtz *v.* Johnson, 28 Gratt. (Va.) 657.

51. Fry *v.* Old Dominion B. & L. Assn., 48 W. Va. 61, 35 S. E. 842.

52. Curry *v.* Hill, 18 W. Va. 370.

53. *Illinois.* — Taylor *v.* Hopkins, 40 Ill. 442; Grover *v.* Hale, 107 Ill. 638.

Maryland. — Wicks *v.* Westcott, 59 Md. 270.

Missouri. — Graham *v.* King, 50 Mo. 22, 11 Am. Rep. 401; Howard *v.* Thornton, 50 Mo. 291; Vail *v.* Jacobs, 62 Mo. 130.

South Dakota. — Stacy *v.* Smith, 9 S. D. 137, 68 N. W. 198.

West Virginia. — Smith *v.* Lowther, 35 W. Va. 300, 13 S. E. 999.

54. *Illinois.* — Mapps *v.* Sharpe, 32 Ill. 13; Hall *v.* Towne, 45 Ill. 493; Griffin *v.* Marine Co., 52 Ill. 130.

Minnesota. — Lowell *v.* North, 4 Minn. 32.

Missouri. — Reddick *v.* Gressman, 49 Mo. 389; Gaines *v.* Allen, 58 Mo. 537.

North Carolina. — Whitehead *v.* Hellen, 76 N. C. 99; Dawkins *v.* Patterson, 87 N. C. 384; Simpson *v.* Simpson, 107 N. C. 552, 12 S. E. 447.

Rhode Island. — Parmenter *v.* Walker, 9 R. I. 225.

Virginia. — Harrison *v.* Manson, 95 Va. 593, 29 S. E. 420.

55. Burke *v.* Adair, 23 W. Va. 139; Fulton *v.* Johnson, 24 W. Va. 95; Lallance *v.* Fisher, 29 W. Va. 512, 2 S. E. 775.

56. Dryden *v.* Stephens, 19 W. Va. 1.

57. *United States.* — Burnham *v.* Winsor, 5 L. Rep. 507, 4 Fed. Cas. No. 2,180.

Maine. — Tufts *v.* Sylvester, 79 Me. 213, 9 Atl. 357, 1 Am. St. Rep. 303; Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489.

Massachusetts. — Rowley *v.* Bigelow, 29 Mass. 307, 23 Am. Dec. 607; Keeler *v.* Goodwin, 111 Mass. 490.

Missouri. — Heinz *v.* Railroad Transfer Co., 82 Mo. 233.

New Hampshire. — Inslee *v.* Lane, 57 N. H. 454.

New York. — Buckley *v.* Furniss, 17 Wend. 504.

able lien;[58] recovery of the goods sold;[59] resale of the goods;[60] action for the price or value of the goods;[61] action for damages.[62] Which of these remedies he may assert, or whether two or more of them are concurrent, depends upon the facts and circumstances of each case.[63]

2. Stoppage in Transitu. — A. Evidence To Support Stoppage In Transitu. — In order to support the right of stoppage *in transitu*, the evidence adduced in support thereof must show that the goods or some part thereof have not been paid for;[64] that the goods

Ohio. — Jordan *v.* James, 5 Ohio 88.

Pennsylvania. — White *v.* Welsh, 38 Pa. St. 396.

58. Parks *v.* Hall, 2 Pick. (Mass.) 206; Barrett *v.* Pritchard, 2 Pick. (Mass.) 512, 13 Am. Dec. 449; Arnold *v.* Delano, 4 Cush. (Mass.) 33, 50 Am. Dec. 754; Curtin *v.* Isaacsen, 36 W. Va. 391, 15 S. E. 171; National State Bank of Camden *v.* Korting Gas Engine Co., 3 Pa. Dist. R. 604.

59. Amer *v.* Hightower, 70 Cal. 440, 11 Pac. 697; Dietz *v.* Sutcliffe, 80 Ky. 650; Tyler *v.* Freeman, 57 Mass. 261; Johnson-Brinkman Comm. Co. *v.* Missouri Pac. R. Co., 52 Mo. App. 407; Cary *v.* Hotailing, 1 Hill (N. Y.) 311, 37 Am. Dec. 323; Hunter *v.* Hudson River I. & Mach. Co., 20 Barb. (N. Y.) 493; Weed *v.* Page, 7 Wis. 503.

60. *Alabama.* — Penn *v.* Smith, 93 Ala. 476, 9 So. 609.

California. — King *v.* Sheward, 97 Cal. 235, 31 Pac. 1107.

Delaware. — Barr *v.* Logan, 5 Harr. 52.

Illinois. — Bagley *v.* Findlay, 82 Ill. 524.

Kentucky. — Cook *v.* Brandeis, 3 Metc. (Ky.) 555.

Louisiana. — Gilly *v.* Henry, 8 Mart. 402, 13 Am. Dec. 291; Judd Linseed & Sperm Oil Co. *v.* Kearney, 14 La. Ann. 352.

Mississippi. — Swann *v.* West, 41 Miss. 104.

Missouri. — Van Horn *v.* Rucker, 33 Mo. 391, 84 Am. Dec. 52.

New York. — Bogart *v.* O'Regan, 1 E. D. Smith 590; Crooks *v.* Moore, 1 Sandf. 297; Pollen *v.* LeRoy, 30 N. Y. 549; Hayden *v.* Demets, 53 N. Y. 426; Mason *v.* Decker, 72 N. Y. 595, 28 Am. Rep. 190.

61. *United States.* — Slocomb *v.* Lurty, 1 Hempst. 431, 22 Fed. Cas. No. 12,949.

Illinois. — Dwyer *v.* Duquid, 70 Ill. 307; Hess Co. *v.* Dawson, 149 Ill. 138, 36 N. E. 557.

Michigan. — Gibbs *v.* Blanchard, 15 Mich. 292; Stone *v.* Nichols, 43 Mich. 16, 4 N. W. 545.

New Hampshire. — Snow *v.* Prescott, 12 N. H. 535.

New York. — Kingman *v.* Hotaling, 25 Wend. 423; Kokomo Straw Board Co. *v.* Inman, 58 Hun 603, 11 N. Y. Supp. 329.

62. *Georgia.* — Biggers *v.* Pace, 5 Ga. 171; Groover *v.* Warfield, 50 Ga. 644.

Illinois. — Morier *v.* Moran, 58 Ill. App. 235; Houston *v.* Clark, 62 Ill. App. 174.

Indiana. — Indianapolis, P. & C. R. Co. *v.* Maguire, 62 Ind. 140.

New York. — Underhill *v* North American Kerosene Gas Light Co., 36 Barb. 354; Bailey *v.* Western Vermont R. Co., 18 Barb. 112.

Texas. — Tufts *v.* Lawrence, 77 Tex. 526, 14 S. W. 165.

63. Merriam *v.* Kellogg, 58 Barb. (N. Y.) 445; Dunstan *v.* McAndrew, 44 N. Y. 72; Hayden *v.* Demets, 53 N. Y. 426; Mason *v.* Decker, 72 N. Y. 595, 28 Am. Rep. 190.

64. Wood *v.* Roach, 1 Yeates (Pa.) 177, 1 Am. Dec. 276; Clark *v.* Mauran, 3 Paige (N. Y.) 373; Jordan *v.* James, 5 Ohio 88.

In Clark *v.* Mauran, 3 Paige (N. Y.) 373, the evidence showed that Hodges, a shipping merchant of Providence, Rhode Island, was indebted to Mauran of New York to the extent of about $7,000. Mauran desired payment and wrote Hodges to that effect. Hodges directed his agents at Curacoa to sell what goods he had at that place and ship the proceeds

are in transit;[65] the fact that, unknown to the seller, the buyer was insolvent at the time of the purchase,[66] or became insol-

thereof in Spanish doubloons to Mauran at New York to apply on the aforesaid debt. This was done. The doubloons were shipped on board the complainant's brig to Mauran at New York. Shortly after this shipment Hodges failed and made a general assignment to Kelley & Cole. Upon arrival of the doubloons in New York Mauran received the bill of lading and entered the doubloons at the custom house. The same day the agent of Kelly & Cole presented to the complainant, the master of the brig in whose hands the doubloons were, their assignment and demanded the doubloons as their property. A bill of interpleader was filed by complainant in the circuit court and the vice chancellor decided that the doubloons belonged to Mauran. On appeal taken by Kelley & Cole the chancellor said: "The right of the consignor to stop *in transitu* is limited to the case of the insolvency of the consignee, and where the goods have not been paid for. Consequently it can never apply to a consignment to a creditor to whom the consignor is indebted in the full value of the goods."

65. Keeler *v.* Goodwin, 111 Mass. 490; Inslee *v.* Lane, 57 N. H. 454; Buckley *v.* Furniss, 17 Wend. (N. Y.) 504; White *v.* Welsh, 38 Pa. St. 396.

Part Only of Shipment in Transit. Right May Be Exercised as to That Part. — In Buckley *v.* Furniss, 17 Wend. (N. Y.) 504, it appeared from the evidence that a portion of the goods shipped by the seller, which consisted of iron bars, had been actually received by the purchaser at his residence, while another portion of the same shipment had become separated from the first and remained in the hands of the carrier, and therefore in contemplation of law was in transit. It was held that the right of stoppage *in transitu* might be exercised as to the portion still remaining in the hands of the carrier.

66. Smith *v.* Barker, 102 Ala. 679, 15 So. 340; Gustine *v.* Phillips, 38 Mich. 674; Walsh *v.* Blakely, 6 Mont. 194, 9 Pac. 809; Inslee *v.* Lane, 57 N. H. 454; Evans Co. *v.* Missouri, K. & T. R. Co., 64 Mo. App. 305; Fenkhausen *v.* Fellows, 20 Nev. 312, 21 Pac. 886, 4 L. R. A. 732.

In Smith *v.* Barker, 102 Ala. 679, 15 So. 340, the evidence showed that Smith shipped oranges from Anthony, Florida, to the Decatur Grocery Co. in Decatur, Alabama, by rail, to whom they had been sold. The goods were levied upon under attachment against the Grocery Co. in favor of Barker while they were in possession of the carrier, in Decatur, consigned to the Grocery Co. To show their right of estoppage *in transitu* Smith & Co. relied upon evidence introduced by them to the effect that "the individuals composing the firm of the Decatur Grocery Co. had on or about the 25th day of December, 1890, absconded." The court held that this did not constitute proof of insolvency, for even though the individuals composing the firm of the Decatur Grocery Co. had absconded, they might have left abundant property with which to pay their debts. The court was of the opinion that inasmuch as insolvency is the chief basis of the right of stoppage *in transitu*, Smith had no just claim to the oranges.

In Gustin *v.* Phillips, 38 Mich. 674, an action of replevin for certain goods sold by the plaintiff at Grand Rapids to Morton & Gale of Greenville, and which were attached by the defendant on a demand against one of the firm of Morton & Gale, before the goods had left Grand Rapids, and while they were in the hands of a carrier for transportation, it was not denied by the plaintiff that his sale of the goods to Morton & Gale was complete, but the sale was on credit, and he insisted on his right to reclaim them *in transitu*. The court said: "But the facts make out no such right. That right is grounded on insolvency of the vendees, unknown at the time of the sale or arising afterwards, and the circuit judge finds in this case that insolvency was not shown."

In Evans Garden C. Co. *v.* Missouri, K. & T. R. Co., 64 Mo. App.

vent after the sale and before the termination of the transit.[67]

B. Possession by Purchaser to Bar Stoppage In Transitu. a. *Generally.* — In order to bar the seller of the exercise of his right of stoppage *in transitu,* the evidence must show that the goods have been delivered into the actual,[68] or constructive possession of the

305, the cause of action stated in the petition was that the plaintiff, a manufacturing corporation, delivered to the defendant, a common carrier, twenty-five bundles of "patent garden cultivators," consigned to J. B. Evans, to be transported over its said railway to Waco, Texas; that the plaintiff, immediately after the said shipment and consignment, and before said goods had reached their destination, gave the defendant's agent at the latter place written notice not to deliver the same to the person named as consignee thereof, and to hold the same for plaintiff, subject to its order, and that defendant, wholly disregarding said notice, delivered the said goods to some person to plaintiff unknown, to its damage, etc. The court said: "The last remedy which an unpaid vendor has against the goods is stoppage *in transitu.* This is a right which arises solely upon the insolvency of the buyer and is based on the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts. If, after the vendor has delivered the goods out of his possession and put them in the hands of the carrier for delivery to the buyer, he discovers the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession. . . . The undisputed evidence shows that the general manager of the plaintiff, who had charge of the sale and shipment of its cultivators, well knew before and at the time the transaction took place between him and Evans, the consignee, that the latter was wholly insolvent."

67. Ryberg *v.* Snell, 2 Wash, C. C. 403, 21 Fed. Cas. No. 12,190; Stevens *v.* Wheeler, 27 Barb. (N. Y.) 658.

In Stevens *v.* Wheeler, 27 Barb. (N. Y.) 658, plaintiff shipped several cases of shoes from Haverhill, Massachusetts, to Knower & Co. at Brooklyn, New York. The evidence showed that the firm of Knower & Co. was indebted to the defendant on a promissory note and gave the latter in payment thereof an order on the shoes while in transit. The defendant later received a bill of the goods from Knower & Co. and settled for the price, in part by giving up and and canceling Knower & Co's. note, and partly cash. After giving the order on the shoes to defendant, Knower & Co. made a general assignment for the benefit of creditors. Plaintiff had never been paid for the shoes. The plaintiff insisted that inasmuch as the insolvency of the vendees occurred immediately after the purchase and before the goods ever came into their possession, he was entitled to exercise the right of stoppage *in transitu,* and demanded the goods of the defendant, who refused to deliver them up, claiming to hold them as a *bona fide* purchaser from Knower & Co. *Held,* that the vendor has a right to stop goods sold by him, where he discovers the vendee to be insolvent, at any time while the goods are in transit.

68. Sheppard *v.* Newhall, 54 Fed. 306, 4 C. C. A. 352; Branan *v.* Atlanta & W. P. R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26; Clapp *v.* Peck, 55 Iowa 270, 7 N. W. 587; Newhall *v.* Vargas, 15 Me. 314, 33 Am. Dec. 617; Reynolds *v.* Boston & M. R., 43 N. H. 580, 588; Dows *v.* Perrin, 16 N. Y. 325; Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188.

In Clapp *v.* Peck, 55 Iowa 270, 7 N. W. 587, it appeared that an organ company sold on credit and shipped to the defendant Peck at Waverly, Iowa, two organs. The organs arrived at the latter place, were unloaded from the car in which they were shipped and stored in the carrier's depot. Shortly after Peck was forced into a suspension of business by reason of insolvency. The sheriff levied an attachment upon the organs, they being at the time in the

buyer.[69] A clear and unequivocal case of the termination of the transit should be made out by the evidence before the seller can be deprived of this right.[70]

b. *Illustrations.* — **(1.) Delivery to Drayman.** — Thus the fact that goods are shipped to the purchaser and at his instance placed on drays, thus being carried from the railway depot to his store, does not afford sufficient evidence of the termination of the transit.[71]

depot. The attachment was at the suit of the plaintiff against Peck. The organ company intervened in the action, claiming the right to reclaim the organs. The evidence showed that the organs had not been paid for by defendant Peck; that even the freight charges on the same had not been paid by him and that the goods had in no manner entered into the possession of defendant. Judgment was rendered for the intervenor, and on appeal this judgment was sustained.

69. Clapp *v.* Peck, 55 Iowa 270, 7 N. W. 587, 588; Williams *v.* Hodges, 113 N. C. 36, 18 S. E. 83.

In Williams *v.* Hodges, 113 N. C. 36, 18 S. E. 83, the plaintiffs, merchants doing business in Norfolk, Va. on the order of the defendant, Hodges, a merchant doing business in Washington, North Carolina, sold and shipped to the latter certain articles of personal property. The goods arrived at Washington and were placed in the carrier's warehouse where they remained until the beginning of this action. Before this action was brought, Hodges, being insolvent, although this fact was not known to plaintiff, executed a deed of trust to his codefendant, Chauncey, whereby he conveyed to him all his goods in trust to pay his debts, the deed of trust including the goods claimed by plaintiff. The evidence showed that Chauncey paid the freight charges on the goods and directed that the goods be placed in storage on his account, and otherwise exercised dominion over said goods. The trial court adjudged defendant Chauncey the owner of the goods. Plaintiffs appealed. The court said: "In this case there was no actual delivery, but according to the statement of facts agreed there was an express agreement between the carrier and the assignee of the vendee that the former should hold the goods in storage as the agent of the latter. The goods were no longer *in transitu*, and the rights of the plaintiff were therefore defeated."

70. Rogers *v.* Schneider, 13 Ind. App. 23, 41 N. E. 71.

71. Harris *v.* Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

In Harris *v.* Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796, the court said: "Plaintiff sold the goods to the firm of Moser & Son, merchants in Waco, on a credit, and shipped them by rail to Waco, the point of destination, for Moser & Son. They arrived in Waco by the Missouri, Kansas & Texas Railway, and were left in the depot. On the 3d day of October, 1888, Moser & Son were closed out by attachment, their business house, and all their goods therein, levied on by the sheriff and taken into his possession. Moser & Son were then insolvent. On the 4th of October, 1888, the Waco State Bank sued out attachment against Moser & Son on a debt of $6990.88, and caused the sheriff to levy the same on the goods sold by plaintiffs to Moser & Son — the goods involved in this suit." The question arising in this suit was as to whether plaintiff, the seller, was entitled, in view of the evidence, to a right of stoppage *in transitu*. It appeared from the evidence that through Seley, cashier of the bank, the railway company was directed to deliver the goods to a dray line, by whom the goods were to be delivered to Moser & Son. The evidence showed that the goods were loaded on the drays. The court continuing said: "We are of opinion that plaintiffs' right of stoppage *in transitu* was not at an end while the goods were at the depot or on the drays. They were still in course of transportation, and had not been delivered to the consignees in person, or to their agent. There is no testimony in the case that can be con-

(2.) Delivery to Agent. — So the evidence is not sufficient to show a termination of the transit, where the goods are delivered to an agent of the buyer for the purpose of being transmitted to him.[72]

(3.) Consignee's Order To Deliver to Third Person. — A termination of the transit is not shown by evidence that the consignee of goods has given an order to the carrier still in possession of them, directing such carrier to deliver the goods to a third person upon his payment of the freight.[73]

(4.) Goods in Warehouse of Carrier at Destination. — If it be shown that the goods have reached their point of destination and are in the warehouse of the carrier, under an agreement between such carrier and the buyer's assignee, this is sufficient evidence of constructive delivery to bar the right of stoppage *in transitu*.[74] If it appears from the evidence that the goods have reached their destination, and by an arrangement with the carrier the goods are held by him as the agent of the consignee and subject to his order, this concludes the transit,[75] and the seller's right of stoppage *in transitu* is lost.[76]

C. Payment as Bar to Stoppage In Transitu. — If the goods have actually been paid for in money, or its equivalent, the question of non-payment cannot arise, nor, of course, the right of stoppage *in transitu* be asserted. The issue made on this point has usually arisen upon the claim by the purchaser that the seller has received what was tantamount to payment.[77]

It is well settled that the giving of a promissory note does not constitute evidence of payment,[78] unless it is further shown that it

strued to make the railway company or the dray line agents of the consignees, nor does the evidence show that Seley ever received the goods into his possession, even if under the circumstances he was the agent of Moser & Son to receive possession, for them."

72. Parker *v.* McIver, 1 Desaus. (S. C.), 274, 1 Am. Dec. 656.

73. Jeffris *v.* Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 57 Am. St. Rep. 919.

74. Williams *v.* Hodges, 113 N. C. 36, 18 S. E. 83.

75. Williams *v.* Hodges, 113 N. C. 36, 18 S. E. 83.

76. See notes 74 and 75, next preceding.

77. Lake Shore & M. S. R. Co. *v.* National Live Stock Bk., 59 Ill. App. 451; Rogers *v.* Schneider, 13 Ind. App. 23, 41 N. E. 71; Clapp *v.* Sohmer, 55 Iowa 273, 7 N. W. 639; Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489; Eaton *v.* Cook, 32 Vt. 58.

78. Clapp *v.* Sohmer, 55 Iowa 273, 7 N. W. 639; Rogers *v.* Schneider, 13 Ind. App. 23, 41 N. E. 71; Brewer Lumb. Co. *v.* Boston & A. R. Co., 179 Mass. 228, 60 N. E. 548, 88 Am. St. Rep. 375; Davis *v.* Parsons, 157 Mass. 584, 32 N. E. 1117; Arnold *v.* Delano, 4 Cush. (Mass.) 33, 50 Am. Dec. 754; Hays *v.* Mouille, 14 Pa. St. 48; Diem *v.* Koblitz, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531.

In Rogers *v.* Schneider, 13 Ind. App. 23, 41 N. E. 71, the question arose as to whether the execution and delivery of promissory notes by the purchaser to the seller constituted payment on the part of the purchaser, thus making him the owner of the goods and depriving the seller of the right of stoppage *in transitu*. The court said: "This action involves the right of a vendor of personal goods to stop and retake them while in transit to the vendee. It arises in an action to recover the possession of goods, brought by the appellee against the appellants. Rogers, Brown & Co. was a copartnership engaged in selling iron. The South Side Foundry

was agreed between the parties that it should be received in absolute payment of the debt.[79] Nor does the giving of a draft, though duly accepted, but not paid,[80] constitute proof of payment,[81] in the absence of an express agreement to that effect.[82] If it appears from the evidence that shipment of the goods has been made to discharge an antecedent debt, this will prevent the assertion of the right of stoppage *in transitu*.[83]

D. When Goods Are In Transit. — If the evidence shows that the goods were still in the possession of the carrier in course of transmission to the buyer when the right of stoppage *in transitu* was exercised,[84] or have only been delivered to a connecting carrier as a continuation of the transmission,[85] or have arrived at their destination but not gone into the possession of the purchaser,[86] or have

Company was a copartnership engaged in manufacturing iron in the city of Indianapolis. About the 20th of April, 1893, Rogers, Brown & Co. sold to the South Side Foundry Company 47 tons of pig iron. The sale was made on four months' time, and the South Side Foundry Company executed its notes, payable to the vendors, for the purchase price. . . . The evidence makes a strong impression upon our minds that the railroad company had not ceased to be a carrier, in relation to the iron, at the time the appellant exercised its right of stoppage *in transitu*. At all events, under the circumstances of this case, the appellant was entitled to go to the jury on that question. Nor does the fact that the appellant took the notes of the South Side Foundry Company for the purchase money of the iron deprive it of its right of stoppage *in transitu*."

79. Clapp *v.* Sohmer, 55 Iowa 273, 7 N. W. 639; Sheahan *v.* Davis, 27 Or. 278, 40 Pac. 405, 50 Am. St. Rep. 722, 28 L. R. A. 476.

80. Seymour *v.* Newton, 105 Mass. 272; Mohr *v.* Boston & A. R. Co., 106 Mass. 67; *In re* Batchelder, 2 Lowell 245, 2 Fed. Cas. No. 1,099.

81. Seymour *v.* Newton, 105 Mass. 272.

82. See cases cited under note 79, next preceding.

83. Shepard & Morse Lumb. Co. *v.* Burroughs, 62 N. J. L. 469, 41 Atl. 695; First Nat. Bk. *v.* Schmidt, 6 Colo. App. 216, 40 Pac. 470.

In Shepard & Morse Lumb. Co. *v.* Burroughs, 62 N. J. L. 469, 41 Atl. 695, the plaintiff sold lumber to Towner, and Towner sold it to the defendant in New York on bills of lading naming the defendant as consignee, and sent the bills to Towner. The evidence showed that the sale from Towner to the defendant was for a price which the defendant credited on a pre-existing debt due to him from Towner. *Held*, that the defendant was purchaser for value so far as was necessary to entitle him to defeat the plaintiff's right to stop the lumber *in transitu* for the insolvency of Towner.

84. Sawyer *v.* Joslin, 20 Vt. 172, 49 Am. Dec. 768; Powell *v.* McKechnie, 3 Dak. 319, 19 N. W. 410; Atkins *v.* Colby, 20 N. H. 154; Hays *v.* Mouille, 14 Pa. 48; Keeler *v.* Goodwin, 111 Mass. 490; Buckley *v.* Furniss, 17 Wend. (N. Y.) 504.

85. Aguirre *v.* Parmelee, 22 Conn. 473; White *v.* Mitchell, 38 Mich. 390; Scott *v.* Grimes Dry Goods Co., 48 Mo. App. 521; Calahan *v.* Babcock, 21 Ohio St. 281, 8 Am. Rep. 63; Cabeen *v.* Campbell, 30 Pa. St. 254.

86. *Dakota.* — Powell *v.* McKechnie, 3 Dak. 319, 19 N. W. 410.

Georgia. — Macon & W. R. Co. *v.* Meador, 65 Ga. 705.

Iowa. — McFetridge *v.* Piper, 40 Iowa 627.

Kansas. — Symns *v.* Schotten, 35 Kan. 310, 10 Pac. 828.

New Hampshire. — Inslee *v.* Lane, 57 N. H. 454.

Ohio. — Calahan *v.* Babcock, 21 Ohio St. 281, 8 Am. Rep. 63.

Texas. — Halff *v.* Allyn, 60 Tex. 278.

Vermont. — Kitchen *v.* Spear, 30 Vt. 545.

arrived at the custom-house at the end of the line of carriage awaiting the payment of duties,[87] they are still in transit[88] and the right of stoppage *in transitu* still exists.[89]

Wisconsin. — Jeffris *v.* Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 57 Am. St. Rep. 919, 3 L. R. A. 351.

87. Burnham *v.* Winsor, 4 Fed. Cas. No. 2,180; Mottram *v.* Heyer, 5 Denio (N. Y.) 629; Hauterman *v.* Bock, 1 Daly (N. Y.) 366; Western Transp. Co. *v.* Hawley, 1 Daly (N. Y.) 327; Donath *v.* Broomhead, 7 Pa. St. 301.

88. See authorities under notes 84, 85, 86, 87 next preceding.

89. Sawyer *v.* Joslin, 20 Vt. 172, 29 Am. Dec. 768; Powell *v.* McKechnie, 3 Dak. 319, 19 N. W. 410; Atkins *v.* Colby, 20 N. H. 154; Macon & W. R. Co. *v.* Meador, 65 Ga. 705; McFetridge *v.* Piper, 40 Iowa 627; Aguirre *v.* Parmelee, 22 Conn. 473; White *v.* Mitchell, 38 Mich. 390.

In Powell *v.* McKechnie, 3 Dak. 319, 19 N. W. 410, an action by the plaintiff under the statute of claim and delivery of personal property, it appeared from the evidence that the respondents, who were doing business at Waukegan, Illinois, were the owners of twenty-one Star wood pumps, which were by them shipped on the second day of November, 1880, by rail, consigned to one H. L. Inman, at Jamestown, Dakota, who had previously ordered the same, and was to pay for them the sum of $200, in ninety days from that date. Said pumps arrived in Jamestown, via the Northern Pacific railroad, about November 30, 1880, and were unloaded and placed in the freight depot at Jamestown. Immediately after said pumps were put in the depot, the appellant, as sheriff of said county, claimed to levy upon them under a writ of attachment in favor of John Deere & Co., against the goods of said H. L. Inman, the consignee. The writ was served by leaving a copy thereof with the defendant therein, H. L. Inman, and notifying said railroad company to hold said pumps subject to said writ. The sheriff did not remove them from the depot, nor pay the freight to the railroad company for their transportation. During the transit of said pumps, said H. L. Inman became insolvent, of which fact the respondents were notified, and they notified said railroad company of their claim as vendors by a legal notice served on the station agent at Jamestown, and to hold said pumps subject to their order, on account of said Inman's insolvency. Counsel for the appellant contended strongly that the pumps were in the constructive possession of H. L. Inman, the consignee, as a fact decisive of the case; but, said the court: "If such constructive possession be conceded, still the vendor had his right of stoppage *in transitu*, for the reason that the purchase price was unpaid, and the vendee had not actually received them and was insolvent." It was also insisted that the railroad company had changed their relation to the goods and become warehouseman, holding them for the consignee. The court said: "There is no doubt but that the carrier may and often does become a warehouseman for the consignee; but that must be by virtue of some contract or course of dealing between them, that, when arrived at their destination, the character of carrier shall cease, and that of warehouseman supervene; but no contract of that kind, or course of dealing, appears anywhere in the evidence, and until something of that kind is shown the *transitu* is not at an end; the carrier cannot change his character so as to become the buyer's agent to keep the goods for him without the latter's consent."

In Atkins *v.* Colby, 20 N. H. 154, the plaintiffs, merchants in Boston, sold goods on account, to said Bacon, April 26, 1847. They were packed by plaintiffs, directed to said Bacon, at Barre, Vt., and by them delivered, in accordance with said Bacon's order, at the depot in Boston, to be forwarded over the railroad to Concord, and from thence by such conveyances as he might provide, to said Bacon, at Barre aforesaid; the truckage to the depot in Boston was charged by the plaintiffs against said Bacon, and the freight from thence

E. Levy of Attachment or Execution on Goods In Transit. The fact that it is made to appear in evidence that the goods have

was at his own expense. Said Bacon failing, these goods were attached by the defendant as aforesaid, at the freight depot in Concord, May 10, 1847. Shortly after said attachment, said Bacon having failed and become insolvent, as aforesaid, the plaintiffs demanded the goods of the defendant, claiming the right to stop them *in transitu*, they not having received any pay or security therefor; the defendant refused to deliver them up, and they were replevied by this suit. The court said: "The railroad agent at the depot had no authority to deliver the goods to Bacon. He had authority only to transport them to Concord; there they were to be forwarded to Bacon by such conveyances as he might furnish. In whose possession were they at Concord, if they had reached that place before Bacon had provided any conveyances from thence? They would not have been *actually delivered* to Bacon. In such cases, the question is whether the goods have arrived at their final destination, or are still *in transitu*. In general, the *transitu* continues until the goods reach the place *originally* named by the vendee to the vendor, as the ultimate destination of the goods, and have come to the actual or constructive possession of the vendee."

In Macon & W. R. Co. *v.* Meador, 65 Ga. 705, on November 12th, the Macon & W. R. Co. received certain boxes of tobacco to be carried from Atlanta to Macon; they reached the latter place on November 15th, and under an agreement between the consignee and the carrier, they were set aside by the latter in its depot to be sold and the proceeds used to pay past due freights, it being agreed that the balance, if any, should go to the consignee. He did not receive the boxes and then turn them over, nor did he assign the bill of lading, nor was the freight paid. On December 12th, the consignors sought to stop the boxes *in transitu* and failing to obtain them on demand, sought to recover against the carrier. *Held*, that no actual delivery had taken place so as to prevent a stoppage *in transitu*.

In McFetridge *v.* Piper, 40 Iowa 627, replevin for goods shipped by plaintiffs to one Lutz, at Osage, which were seized upon an attachment by defendant, Piper, issued in an action by his co-defendants, it appeared that the goods were transported upon the Illinois Central Railroad, which was also made a defendant. The plaintiff claimed the goods as the vendor thereof under the right of stoppage *in transitu*. The defendants claimed as attaching creditors of the consignee of the goods. The court said: "The arrival of the goods at the place of destination will not defeat the vendor's right to take them. That right will only be terminated by the goods passing into the actual or constructive possession of the vendee. Hence the inquiry in such cases must always be: have the goods passed into the possession of the purchaser? The carrier is authorized to hold the goods until delivered to the consignee, and if they be removed from cars or vessels to a warehouse used by the carrier for the storage of goods transported, they remain in his possession. If they be held by the carrier as the agent of the consignee, the vendor's right is terminated, but if they be held without such relation existing between the carrier and vendee, the vendor may seize them."

In White *v.* Mitchell, 38 Mich. 390, trover was brought by the original vendors of goods against a sheriff who had seized them on attachment before they had come into the purchaser's possession. The purchaser made his bargain on the 19th of May, 1876; the goods were sent from New York on the 22d May, directed to the purchaser, one Christian Sternhagen, at East Saginaw, and arrived at that place on or before May 29th. On May 23rd Sternhagen absconded and never came back. On the 24th his stock of goods was all taken on a chattel mortgage and his store closed. On the 29th attachments were sued out. On the same day the railway company placed the goods in question in custody of Hendrie & Co., a company engaged in the local de-

been levied on by attachment,[90] by the creditor of the buyer, or by execution,[91] is not sufficient to defeat the right of stoppage *in transitu*.[92]

livery to persons in East Saginaw, and while in their possession the attachments were served. The sheriff paid the freight. Sternhagen was insolvent when the bargain was made for the goods, and this was unknown to the vendors. The court said: "We see no difficulty about the claim of stoppage *in transitu*. Hendrie & Co. seem to have been, and on this record it is enough that they may have been, intermediate carriers between the railway and consignee, just as the railway was such a carrier between the New York carriers and East Saginaw. They had no employment or authority to act for Sternhagen, and their possession was not his possession. The goods were clearly in transit when they were taken."

90. O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284; Sawyer *v.* Joslin, 20 Vt. 172, 49 Am. Dec. 768; Hepp *v.* Glover, 15 La. 461, 35 Am. Dec. 206; Hause *v.* Judson, 4 Dana (Ky.) 7, 29 Am. Dec. 377.

91. Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84; Farrell *v.* Richmond & D. R. Co., 102 N. C. 390, 9 S. E. 302, 11 Am. St. Rep. 760, 3 L. R. A. 647; Blackman *v.* Pierce, 23 Cal. 508.

92. *Alabama.* — Bayonne Knife Co. *v.* Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114.

Iowa. — O'Neil *v.* Garrett, 6 Iowa 480.

Maryland. — O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284.

Massachusetts. — Seymour *v.* Newton, 105 Mass. 272.

Mississippi. — Morris *v.* Shryock, 50 Miss. 590.

Nevada. — More *v.* Lott, 13 Nev. 376.

New Hampshire. — Atkins *v.* Colby, 20 N. H. 154.

New York. — Covell *v.* Hitchcock, 23 Wend. 611; Buckley *v.* Furniss, 15 Wend. 137.

Ohio. — Benedict *v.* Schaettle, 12 Ohio St. 515; Calahan *v.* Babcock, 21 Ohio St. 281, 8 Am. Rep. 63.

Pennsylvania. — Hays *v.* Mouille, 14 Pa. St. 48.

Texas. — Harris *v.* Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

Wisconsin. — Sherman *v.* Rugee, 55 Wis. 346, 13 N. W. 241.

Where a seizure of goods is made in transit, at the suit of the consignee's creditors, the vendor's right of stoppage is not extinguished; but such seizure furnishes him a cause of action for them or their value against the officer making the seizure, which will be enforced if asserted in due time. Calahan *v.* Babcock, 21 Ohio St. 281, 8 Am. Rep. 63.

In Sherman *v.* Rugee, 55 Wis. 346, 13 N. W. 241, a quantity of leather was shipped by plaintiff to Scheiderer & Reid, tanners at Milwaukee. While in the hands of the carrier it was seized by the defendant sheriff on an execution issued upon a judgment against Scheiderer & Reid, and stored in the latter's warehouse. The bill of the leather upon being shown to the sheriff was retained by him. The court said: "It was argued that the taking of the leather by the sheriff from the railway company and removing it to the store of the purchasers operated as a delivery to the purchasers and foreclosed the right of the plaintiffs to reclaim it. We find nothing in the testimony which supports this position. It is conclusively proved that the sheriff seized the property and held it under his processes against the purchasers, and not as the agent of the purchasers. It is entirely immaterial that they delivered to him or allowed him to take the bill of the leather and the plaintiffs' letter of advice inclosing it, or that he stored the goods in the building in which before their failure the purchasers carried on their business. The testimony fails entirely to show that there was ever a moment in which they had any dominion over or control of the property."

In Bavonne Knife Co. *v.* Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114, the appellee, Umbenhauer, sued out an attachment

F. Carrier Need Not Be a Public One. — To establish the existence of transit, it is not necessary to prove that the goods were in course of transportation by a public carrier.[93]

G. Bona Fide Sale of Goods by Purchaser While In Transit. If it be shown that the purchaser has made a *bona fide* sale of the goods, accompanied by a transfer of the bill of lading, while in transit, this evidence will be sufficient to defeat the right of stoppage *in transitu*;[94] even though the consideration from the purchaser to the

which was levied upon certain goods as the property of Kaufman, the defendant in the attachment suit. The Bayonne Knife Company interposed a claim to the property, and an issue was made up under the direction of the court for the trial of the right of property. The goods in question were shipped by claimant to Kaufman at Birmingham, Alabama, where he had been engaged in the mercantile business. The evidence showed that at the time the goods reached Birmingham, the store of Kaufman had been closed by the sheriff by virtue of sundry attachments issued against him. The court held that the mere levy of the attachments did not defeat the right of stoppage.

In O'Neil *v.* Garrett, 6 Iowa 480, an action of replevin to recover the possession of five barrels of ale, the defendant claimed to hold the property as sheriff under certain writs of attachment in his hands, against one Holmes. On the trial plaintiff proved that Holmes purchased the ale in controversy of plaintiff on credit; that Holmes became insolvent before the arrival of the ale at its destination. It appeared from the evidence that after the arrival of the ale it was levied upon by the sheriff, by virtue of an attachment at the suit of a creditor of Holmes. The court said: "As to the effect of the levy upon the goods by the defendant, Garrett, as sheriff, by virtue of an attachment at the suit of a creditor of Holmes, there can be no doubt but that the plaintiff's right as vendor is not divested by the levy before the goods came into the possession of the buyer. The plaintiff has the preference over the legal process of a general creditor, although, but for the suit, they would have fallen into the hands of the vendee, Holmes."

93. Johnson *v.* Eveleth, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50; Aguirre *v.* Parmelee, 22 Conn. 473; Guilford *v.* Smith, 30 Vt. 49.

In Johnson *v.* Eveleth, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50, logs were bargained and sold to be delivered "over the dam" at the outlet of Moosehead Lake, and thence to be driven by the Kennebec Log-Driving Company to the booms and mill of the purchaser. In an action involving the right of the seller to stop the logs in transit, it appeared from the evidence that the above company was not a common carrier, but the court was of the opinion that it was unnecessary to show that goods in the hands of a carrier are in the hands of a *common* carrier in order to establish the existence of a transit.

94. *United States.* — Walter *v.* Ross, 2 Wash. C. C. 283; St. Paul Roller Mill Co. *v.* Great Western Despatch Co., 27 Fed. 434.

Alabama. — Loeb *v.* Peters, 63 Ala. 248, 35 Am. Rep. 17.

California. — Newall *v.* Cent. Pac. R. Co., 51 Cal. 345, 21 Am. Rep. 713.

Georgia. — Branan *v.* Atlanta & W. P. R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26.

Maine. — Lee *v.* Kimball, 45 Me. 172; Winslow *v.* Norton, 29 Me. 419, 50 Am. Dec. 601.

Maryland. — Tiedman *v.* Knox, 53 Md. 612.

Massachusetts. — Brooke Iron Co. *v.* O'Brien, 135 Mass. 442; Stubbs *v.* Lund, 7 Mass. 453, 5 Am. Dec. 63.

New York. — Becker *v.* Hallgarten, 86 N. Y. 167.

Texas. — Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

In Lee *v.* Kimball, 45 Me. 172, the court said: "In the celebrated case of Lickbarrow *v.* Mason (reported in 6 East, 21), it was settled that 'the consignor of goods may stop them *in*

buyer be shown to be an antecedent debt due from the former to the latter.[95] But if from the evidence no more appears than a mere

transitu, before they get into the hands of the consignee, in case of the insolvency of the consignee; but, if the consignee assign the bill of lading to a third person for a valuable consideration, the right of the consignor, as against such assignee, is divested.' Such, now, is the established rule of commercial law in England, and in this country."

In Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861, according to the evidence a purchaser of goods being insolvent transferred and assigned a bill of lading for the goods while in transit to a *bona fide* purchaser for value, without notice of the assignor's insolvency. The question was as to whether the vendor had a right of stoppage *in transitu*. The court said: "A bill of lading is regarded as a quasi-negotiable instrument. It symbolizes the property which it describes. The assignment of a bill of lading, indorsed thereon, accompanied by delivery of the instrument, passes to the assignee title to the goods, though actually in transit, as complete as if they had passed through the buyer's hands and been delivered bodily to the assignee. When by such an assignment the consignee transfers it for value to a third party acquiring it in good faith, the right of 'stoppage *in transitu*' is defeated."

In Newall *v.* Central Pac. R. Co., 51 Cal. 345, 21 Am. Rep. 713, it appeared that a mercantile firm in New York sold certain merchandise to a similar firm in San Francisco and shipped the same by rail to the vendees as consignees, under bills of lading in the usual form. The bills of lading were received in San Francisco by the consignees before the goods arrived. Before receiving the goods the consignees failed and thereupon the vendors notified the carrier to stop the goods *in transitu*. The evidence showed that soon after a notice of stoppage had been served on the carrier, the consignees indorsed and delivered the bills of lading to commission merchants of San Francisco, for a consideration. The assignees had no notice at the time of the assignment, of a failure on the part of their assignors, or that any notice of stoppage had been served on the carrier. The assignment being of a *bona fide* nature in every way, it was held that the consignors had no right of stoppage *in transitu*.

95. Leask *v.* Scott, L. R., 2 Q. B. Div. 376; St. Paul Roller Mill Co. *v.* Great Western Despatch Co., 27 Fed. 434; Davis *v.* Russell, 52 Cal. 611, 28 Am. Rep. 647; Peters *v.* Elliott, 78 Ill. 321; Shepard & M. Lumb. Co. *v.* Burroughs, 62 N. J. L. 469, 41 Atl. 695.

In St. Paul Roller Mill Co. *v.* Great Western Dispatch Co., 27 Fed. 434, the plaintiff shipped a car load of flour at St. Paul by the defendant's transportation line, which was consigned to itself at Boston, and took therefor a bill of lading showing such consignment. On the day of shipment, plaintiff executed its draft at fifteen days sight against the flour upon one Whitcomb of Boston and forwarded the draft attached to the bill of lading to the Tremont National Bank of Boston "for acceptance and collection." Upon presentation Whitcomb accepted the draft and received the bill of lading unindorsed from the bank. The evidence showed that afterwards the bill of lading was indorsed and transferred by him to a third party for an antecedent debt which he owed the latter, the transfer being of a strictly *bona fide* character. Before the flour arrived in Boston plaintiff was informed of the insolvency of Whitcomb and notified the defendant not to deliver the flour to Whitcomb or to his assigns. The flour arrived in Boston. The third person mentioned above claimed the flour and the same was delivered to him. This action was brought by plaintiff, the vendor, against defendant, the carrier, for conversion of the flour. The question was, did the plaintiff upon discovering Whit-

delivery to a third person, this of itself will not defeat the right.[96]

H. Evidence of Insolvency to Support Right. — a. *Generally.* — There is great liberality manifested by the courts as to the evidence required to establish the buyer's insolvency.[97] It is not necessary, in order to establish his insolvency, to prove bankruptcy,[98] or an assignment of his property.[99] Direct evidence of insolvency is not necessary.[1] Indeed insolvency is in most cases hardly sus-

comb's insolvency and upon notification to the defendant not to deliver the flour, have the right of stoppage *in transitu* when it appeared from the evidence that the assignment by the purchaser was *bona fide* but for an antecedent debt. The court held that he had not.

96. Ocean Steamship Co. *v.* Ehrlich, 88 Ga. 502, 14 S. E. 707, 30 Am. St. Rep. 164.

In Ocean S. S. Co. *v.* Ehrlich, 88 Ga. 502, 14 S. E. 707, 30 Am. St. Rep. 164, goods were shipped from New York to Savannah by a steamship line. They arrived and were put on the wharf at Savannah. The freight and wharfage had been paid, the bills therefor were receipted, and nothing remained to be done to change the actual possession from the carrier to the consignees except to remove the goods from the wharf. The evidence showed that the consignees sold the goods to Ehrlich & Brother, exhibiting to them the bills of lading, but executing no assignment of the same. In lieu of such assignment they delivered to them the receipted freight and wharfage bills, together with an order upon the carrier for the goods, and Ehrlich & Brother paid the agreed purchase price. Under this order a portion of the goods were delivered to their drayman and hauled away. Upon the following day the drayman returned for the residue, but as to this residue the right of stoppage had been exercised on that morning by the consignors; and for this reason the carrier refused to make delivery to Ehrlich & Brother. This suit, brought by Ehrlich & Brother against the carrier, was the result of such refusal. The question was, under the evidence, did the consignors act in time. The court held that they did. The following is the language of the court: "Confessedly there was no assignment of the bills of lading. If these bills had been assigned, that would have been equivalent to an actual delivery of the goods. The law recognizes no substitute for such assignment."

97. Jeffris *v.* Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 57 Am. St. Rep. 919; Bayonne Knife Co. *v.* Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114; Diem *v.* Koblitz, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531.

In Jeffris *v.* Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 57 Am. St. Rep. 919, the question was as to the right of stoppage *in transitu* of lumber sold and consigned to a lumber company. Evidence was introduced showing that such company had failed to pay just and undisputed debts for over ten months, and that upon inquiry no such concern was to be found at or about the alleged place of its business, and it was not named in the city directory. Such evidence was held to be sufficient, in the absence of any attempt to dispute or rebut it, to sustain a finding that the company was insolvent.

In Diem *v.* Koblitz, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531, it was held that the fact that a consignee so conducted his business as to afford the ordinary apparent evidences of insolvency, was sufficient evidence of insolvency to entitle the consignor to the right of stoppage *in transitu.*

98. If the fact of insolvency exist, no matter how proved; if it be sufficiently and satisfactorily proved, the law requires no more. Hays *v.* Mouille, 14 Pa. St. 48.

99. Hays *v.* Mouille, 14 Pa. St. 48.

1. Reynolds *v.* Boston & M. R., 43 N. H. 580.

In this case, certain sewing machines were consigned by the manu-

ceptible of direct proof; circumstantial evidence must be resorted to.[2]

b. *Purchaser's Inability to Pay His Debts.* — If the evidence show a probable inability on the part of the purchaser to pay his debts in the usual course of business his insolvency is sufficiently established.[3]

c. *Stoppage of Payment.* — Where the evidence establishes the fact that the buyer has stopped payment on his debts, his insolvency is thus shown.[4]

facturer at Dover to a person in Boston. Upon the question as to whether there was sufficient evidence of the insolvency of the consignee to entitle the consignor to a right of stoppage *in transitu*, the court *held*: "It is contended that there is no evidence upon which the jury could be justified in finding the insolvency of Murcheson & Co., but we think otherwise. The evidence of the contract, of the sending the goods, and the bill, tend to show that they were regarded by the plaintiff as solvent. The proof that they did not pay the bill, that they got possession of the goods without payment, and that no such parties could be found afterward, was competent evidence, from which the jury might find their insolvency, as well as their entire failure to perform the condition of the sale."

2. Reynolds *v.* Boston & M. R., 43 N. H. 580. See article "*Insolvency*," Vol. VII, p. 481.

3. Secumb *v.* Nutt, 53 Ky. 324; Inslee *v.* Lane, 57 N. H. 454; Chandler *v.* Fulton, 10 Tex. 2. 60 Am. Dec. 188; Durgy Co. *v.* O'Brien, 123 Mass. 12; O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284.

In Secomb, Voorhies & Co. *v.* Nutt, 14 B. Mon. (Ky.) 324, the court stated the facts thus: "Secomb, Voorhies & Co., upon their petition filed in the Louisville chancery court, claiming a large debt as due from S. J. Wade, obtained an attachment under which goods, viz: pitch, tar, turpentine, and resin were seized. During the pendency of the attachment, and after a sale of part of the goods under an interlocutory order to prevent loss, Henry Nutt was made a defendant, and by cross petition claimed the right to stop the same goods *in transitu*, as part of a large quantity sold by him at Wilmington, North Carolina, to S. J. Wade, of Cincinnati, on a credit of ninety days, and at prices amounting to upwards of $7,000, as per invoice filed; and which having been shipped by the vendor to the house of Marsh & Rowlett of New Orleans, to be by them forwarded to said S. J. Wade at Cincinnati, were in fact reshipped by them for that destination; and he alleged that the price is still unpaid; that Wade has failed in business; that other portions of the goods may have reached their destination, or at least have not been found by him; and that these goods having been seized at Louisville, and there detained on their way to Cincinnati, are still *in transitu*, and subject to his claim as vendor." As to what evidence of insolvency was sufficient to enable the vendor to maintain his claim, the court further said: "The true meaning and effect of the preference given to the vendor, while the goods sold on a credit are *in transitu*, is that he is relieved from the necessity of a race for priority, and of sharing with general creditors the proceeds of goods sold by himself. To save him from this scramble it is sufficient to show, with reasonable certainty, that is, with probability, that the vendee is embarrassed and not able to make full or general payment of his debts. And it would seem that the vendee's own admission of the fact to his vendor would be sufficient to authorize the latter to act upon it, and should, unless disproved, sustain his claim to stop the goods *in transitu*."

4. O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284.

The question of the sufficiency of the evidence showing insolvency on the part of the consignee arose in the case of O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284, and the court

d. *Failure to Pay for Goods Sold.* — If it is agreed that the goods sold are to be paid for at a specified time, and the purchaser fails to do this, in the absence of other proof, the fact of insolvency is shown.[5]

e. *Failure to Pay One Just Debt.* — If the evidence shows a failure to pay one just debt, the fact of insolvency is sufficiently proved.[6]

f. *Insufficient Assets to Pay Debt.* — When it is shown that a person's assets are not sufficient to pay his debts, the general insolvency of the party is proved.[7]

I. Notice to Carrier to Stop Goods In Transit. — To constitute notice to a common carrier to stop goods in transit, it is not necessary that the evidence relied upon for that purpose should disclose any particular form of notice.[8] If the evidence be sufficient

said: "'The validity of the right (of stoppage *in transitu*) depends entirely on the bankruptcy or insolvency of the vendee.' 2 Kent, 543, 6 Rob. Adm. Rep., 321, the case of the Constantia. In the case before us, there was sufficient evidence to authorize the jury to find the insolvency of Turner (the vendee) at the time of the attachment, and of the claim made by the appellees. It is not necessary that it should be a technical insolvency; if a stoppage of payment by the vendee be proved, it is sufficient. Smith's Mer. Law, 678, 3rd Am. Ed., note (a.)"

5. Jeffris *v.* Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 57 Am. St. Rep. 919, 33 L. R. A. 351.

In Bloomingdale *v.* Memphis & C. R. Co., 6 Lea (Tenn.) 616, which was a case in which the question arose as to what constituted insolvency on the part of a vendee, the court quoting from Wait's Actions and Defense, Vol. 5, p. 614, said: "Insolvency, in a case like this, fairly means that the party shall be shown to have been unable to meet the debt due the seller at the time of the exercise of the right (of stoppage *in transitu*) when that debt should fall due; and if this fact satisfactorily appear, no matter how proven, the law requires no more."

6. Jeffris *v.* Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 57 Am. St. Rep. 919, 33 L. R. A. 351.

7. Dewey *v.* St. Albans T. Co., 56 Vt. 476, 48 Am. Rep. 803; Toof *v.* Martin, 80 U. S. 40; Smith *v.* Collins, 94 Ala. 394, 10 So. 334, 340.

For a full consideration of the subject of the evidence of insolvency generally, see article "Insolvency," Vol. VII, pp. 481-495.

8. Allen *v.* Maine Cent. R. Co., 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 310; Jones *v.* Earl, 37 Cal. 630, 99 Am. Dec. 338; Reynolds *v.* Boston & M. R., 43 N. H. 580; Bell *v.* Moss, 5 Whart. (Pa.) 189; Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84; Bloomingdale *v.* Memphis & Charleston R. Co., 6 Lea (Tenn.) 616.

"A demand of the carrier, or notice to him to stop the goods, or a claim and endeavor to get the possession, is sufficient. No particular form of notice and demand is required." Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84.

Notice Need Not State Nature or Basis of Consignor's Claim. In Allen *v.* Maine Cent. R. Co., 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 310, which was an action involving the right of a consignor to stop goods in transit, the court said: "The only mooted question in this case is, whether the plaintiffs effectually exercised against the carrier their clear right of stopping the goods *in transitu*. The plaintiffs seasonably telegraphed and wrote the proper officer of the defendant company, (the carrier) to stop, and return the goods. The defendant company contend the notice was insufficient, because there was no statement of the nature or basis of the claim, to have the goods stopped. While such a statement is probably

to show a countermand of delivery,[9] that is all that will be required.

3. Lien of Seller for Purchase Money. — In order to establish a lien of the seller upon the goods sold for the purchase price thereof,[10] the evidence must either show an express lien reserved by him in the contract of sale,[11] or his possession of the goods at the time the lien is asserted.[12]

usual, it does not seem necessary in this case. The carrier is presumed to know the law, and by such a notice as was given here, is effectually apprised of a claim adverse to the consignee, as well as of a claim upon himself. In Benj. on Sales, 1276, while it is said that the usual mode is a simple notice to the carrier, stating the vendor's claim, etc., it is also stated, that, 'all that is required is some act, or declaration of the vendor countermanding the delivery.'"

Notice Need Not Be One by Which a Redelivery Is Demanded. In Jones *v.* Earl, 37 Cal. 630, 99 Am. Dec. 338, the evidence showed that a notice to this effect was sent to forwarders of goods in whose hands the plaintiff's merchandise was held: "If the goods have not been forwarded yet from Cisco, please hold on to them until you hear from us again, as the party to whom they were consigned at Virginia has been attached, and we want to save the goods." In holding this to be sufficient notice, the court said: "A notice by the vendor, without an express demand to redeliver the goods, is sufficient to charge the carrier. If the carrier is clearly informed that it is the intention and desire of the vendor to exercise his right of stoppage *in transitu*, the notice is sufficient."

9. Allen *v.* Maine Cent. R. Co., 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 310.

10. Jones *v.* Earl, 37 Cal. 630, 99 Am. Dec. 338; Reynolds *v.* Boston & M. R., 43 N. H. 580; Allen *v.* Maine Cent. R. Co., 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 310; Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84; Whitehead *v.* Benbow, 9 Mees. & W. (Eng.) 517.

11. *United States.* — Gregory *v.* Morris, 96 U. S. 619.

Alabama. — Wood *v.* Holly Mfg. Co., 100 Ala. 326, 13 So. 948, 46 Am. St. Rep. 56.

Maine. — Sawyer *v.* Fisher, 32 Me. 28; Folsum *v.* Merchants' Mut. Ins. Co., 38 Me. 414.

Missouri. — Redenbaugh *v.* Kelton, 130 Mo. 558, 32 S. W. 67.

New York. — Husted *v.* Ingraham, 75 N. Y. 251.

South Carolina. — Alexander *v.* Heriot, Bailey Eq. 223; Welsh *v.* Usher, 2 Hill Eq. 167, 29 Am. Dec. 63.

Texas. — Gay *v.* Hardeman, 31 Tex. 245.

Vermont. — Burnham *v.* Marshall, 56 Vt. 365.

West Virginia. — Cole *v.* Smith, 24 W. Va. 287.

In Husted *v.* Ingraham, 75 N. Y. 251, the evidence showed that certain carpets were sold and delivered under an agreement that the price should be secured by a mortgage thereon. It was held that such an agreement could have been specifically enforced in equity and constituted sufficient evidence of an equitable lien upon the property as against the vendee and all persons claiming through or under them, except *bona fide* purchasers having no notice of the lien.

12. Perrine *v.* Barnard, 142 Ind. 448, 41 N. E. 820; Laughlin *v.* Ganahl, 11 Rob. 140; Thompson *v.* Baltimore & Ohio R. Co., 28 Md. 396; Parks *v.* Hall, 2 Pick. 206; Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Vogelsang *v.* Fisher, 128 Mo. 386, 31 S. W. 13; Robinson *v.* Morgan, 65 Vt. 37, 25 Atl. 899; Bohn Mfg. Co. *v.* Hynes, 83 Wis. 388, 53 N. W. 684.

If the evidence shows that the goods sold are still in the possession of the seller, and it is not otherwise stipulated, this is sufficient to establish the right of the seller to his lien. Curtin *v.* Isaacsen, 36 W. Va. 391, 15 S. E. 171; see in this connection Burk *v.* Dunn, 117 Mich. 430, 75 N.

4. Proof To Authorize Recovery of Goods by Seller. — A. GENERALLY. — To authorize a seller to retake goods which he has sold the evidence must disclose either a conditional sale,[13] with the right of recaption reserved,[14] and a failure to perform the condition which reinvests the seller with the title;[15] or a sale induced by the fraudu-

W. 931; Safford *v.* McDonough, 140 Mass. 290; Robinson *v.* Morgan, 65 Vt. 37, 25 Atl. 899.

If the seller mark, measure, weigh or set aside the goods, this serves only to identify them and ascertain the quantity, and is not evidence of delivery so as to destroy the lien. Curtin *v.* Isaacsen, 36 W. Va. 391, 15 S. E. 171; Southwestern F. & C. Co. *v.* Stanard, 44 Mo. 71, 100 Am. Dec. 255; Arnold *v.* Delano, 4 Cush. (Mass.) 33, 50 Am. Dec. 754.

What Evidence Shows a Waiver of the Lien. — If it appears that the seller has taken from the buyer a promissory note, bill of exchange, or other security, payable at a future date, this is sufficient evidence to establish a waiver. McElwee *v.* Metropolitan Lumb. Co., 69 Fed. 302, 16 C. C. A. 232, 37 U. S. App. 266; Leonard *v.* Davis, 1 Black (U. S.) 476, McCraw *v.* Gilmer, 83 N. C. 162; McNail *v.* Ziegler, 68 Ill. 224; Thompson *v.* Wedge, 50 Wis. 642, 7 N. W. 560.

13. *United States.* — The Oriole, 1 Spr. 31, 18 Fed. Cas. No. 10,574.

Alabama. — Jones *v.* Pullen, 66 Ala. 306.

California. — Lambert *v.* McCloud, 63 Cal. 162.

Delaware. — Watertown Steam Engine Co. *v.* Davis, 5 Houst. 192.

Kansas. — Richardson *v.* Great Western Mfg. Co., 3 Kan. App. 445, 43 Pac. 809.

Massachusetts. — Blanchard *v.* Cooke, 147 Mass. 215, 17 N. E. 313.

Michigan. — Adams *v.* Wood, 51 Mich. 411, 16 N. W. 788; Wiggins *v.* Snow, 89 Mich. 476, 50 N. W. 991; Ryan *v.* Wayon, 108 Mich. 519, 66 N. W. 370; Bayird *v.* Grand Rapids School Furn. Co., 98 Mich. 457, 57 N. W. 729.

North Carolina. — Buffkins *v.* Eason, 112 N. C. 162, 16 S. E. 916.

Vermont. — Watson *v.* Goodno, 66 Vt. 229, 28 Atl. 987.

West Virginia. — McGinnis *v.* Savage, 29 W. Va. 362, 1 S. E. 746.

Wisconsin. — Pent *v.* Hoxie, 90 Wis. 625, 64 N. W. 426; Hyland *v.* Bohn Mfg. Co., 92 Wis. 157, 65 N. W. 170.

In Ryan *v.* Wayson, 108 Mich. 519, 66 N. W. 370, it appeared from the evidence that a contract had been entered into between plaintiff and defendant for the sale of a stock of goods which provided that title should remain in the vendor until the whole of the purchase price should be paid, but that the vendee should have the right of possession of the goods, with the right to sell them at retail. The defendant was to pay a certain sum at the time of the purchase and the balance in instalments at stated intervals. The vendee failed to meet the payments as agreed and the vendor brought this action to recover possession of the goods. The court held that there was sufficient evidence of a conditional sale to entitle the vendor to recover the goods upon failure of the vendee to meet his payments on time. The right of possession was given to the defendant, but this must be held to be limited to the period that he should not be in default.

14. Louis *v.* Hogan, 9 Ohio Dec. 342; McGinnis *v.* Savage, 29 W. Va. 362, 1 S. E. 746; Gregory *v.* Morris, 1 Wyo. 213; Latham *v.* Sumner, 89 Ill. 233, 31 Am. Rep. 79; Giddy *v.* Altman, 27 Mich. 206; Katz *v.* Diamond, 38 N. Y. Supp. 766.

15. Sutherland *v.* Brace, 73 Fed. 624, 34 U. S. App. 638, 19 C. C. A. 589; Shines *v.* Steiner, 76 Ala. 458; Sere *v.* McGovern, 65 Cal. 244, 3 Pac. 859; Lambert *v.* McCloud, 63 Cal. 162; Campion *v.* Smith, 46 Ill. App. 501; Wiggins *v.* Snow, 89 Mich. 476, 50 N. W. 991; Ryan *v.* Wayson, 108 Mich. 519, 66 N. W. 370.

lent representations of the buyer,[16] or by his fraudulent concealments.[17]

B. Burden of Proof as to Fraud and Failure to Perform Conditions. — To justify a retaking by the seller of the goods sold, the burden of proof is upon him to establish fraudulent representa-

16. Donaldson *v.* Farwell, 93 U. S. 631; Spira *v.* Hornthall, 77 Ala. 137.

Fraud of Purchaser. — In Kuh, Nathan & Fisher Co. *v.* Glucklick, 120 Iowa 504, 94 N. W. 1105, the seller brought an action for the recovery of goods, alleging that the purchaser induced the sale by "false and fraudulent representations as to his solvency, financial condition and standing." It was in this case held that a written statement by the purchaser, furnished the seller at his request, and showing the purchaser's assets and liabilities and general financial standing, was admissible in evidence. It was further decided that to avoid the sale on the ground that it had been induced by the purchaser's fraudulent misrepresentations as to his solvency, proof of such representations was a part of the seller's case in chief. In this case it was also decided that the purchaser's cash book was admissible to show in a general way the character and extent of his business, though it was made up from memoranda of daily sales and disbursements which were not produced, and the person making the entries did not verify them, the purchaser testifying, however, said that the books contained the record of cash sales and disbursements. It appearing also in this case that the purchaser had gone into bankruptcy, the schedules attached to his petition in bankruptcy were held admissible against his trustee who had been substituted as defendant, though the purchaser was not in possession of the property in controversy when the declarations and admissions appearing in the bankruptcy proceedings were made.

17. *United States.* — Donaldson *v.* Farwell, 93 U. S. 631.

Indiana. — Kieth *v.* Kerr, 17 Ind. 284.

Iowa. — Oswego Starch Factory *v.* Lendrum, 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53; Lindauer *v.* Hay, 61 Iowa 665, 17 N. W. 98.

Maryland. — Glenn *v.* Rogers, 3 Md. 312.

Massachusetts. — Dow *v.* Sanborn, 3 Allen 181.

Missouri. — Moss *v.* Green, 41 Mo. 389.

New Hampshire. — Webster *v.* Hodgkins, 25 N. H. 128.

North Carolina. — Johnston *v.* McRary, 50 N. C. (5 Jones L.) 369; Perry *v.* Hill, 68 N. C. 417.

New Jersey. — Crane *v.* Elizabeth Lib. Assn., 29 N. J. L. 302.

New York. — Nichols *v.* Michael, 23 N. Y. 264; Hennequin *v.* Naylor, 24 N. Y. 140; Hope *v.* Balen, 58 N. Y. 380; Wentworth *v.* Buhler, 3 E. D. Smith, 305; Potter *v.* Hopkins, 25 Wend. 417.

Ohio. — Randall *v.* Turner, 17 Ohio St. 262.

Pennsylvania. — Miller *v.* Fichthorn, 31 Pa. St. 252.

Tennessee. — Belding *v.* Frankland, 8 Lea 67, 41 Am. Rep. 631.

Vermont. — Houghton *v.* Carpenter, 40 Vt. 588.

Wisconsin. — Lee *v.* Simmons, 65 Wis. 523, 27 N. W. 174.

In Donaldson *v.* Farwell, 93 U. S. 631, it appeared that defendant at Chicago sold on credit certain merchandise to Mann to be shipped to Milwaukee. Soon after the arrival of the goods Mann filed a petition in bankruptcy and was duly adjudged a bankrupt, and plaintiff in this action was appointed his assignee. Defendant seized the goods mentioned above and this action was brought by Mann's assignee to recover them. Mann's son testified that he knew his father was insolvent at the time of the sale, that he did not expect his father would pay for the goods, and that he did not expect to pay for them himself. The plaintiff was not allowed to recover. The court speaking through Mr. Justice Davis, said: "The doctrine is now established by

tions,[18] or concealment by the buyer,[19] or to show that the buyer

a preponderance of authority, that a party not intending to pay, who, as in this instance, induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods."

18. Swaim *v.* Humphreys, 15 Ill. App. 451; Horn *v.* Reitler, 12 Colo. 310, 21 Pac. 186; Reid *v.* Cowduroy, 79 Iowa 169, 44 N. W. 351, 18 Am. St. Rep. 359; Hovey *v.* Grant, 55 N. H. 497; Wells *v.* Sperry (Tex. Civ. App.), 27 S. W. 900.

In an action of trover for the taking and reselling of goods sold which the purchaser had obtained with no intention of paying for same, the burden is upon the plaintiff to make out a sufficient title to maintain suit. Hovey *v.* Grant, 55 N. H. 497.

19. Pelham *v.* Chattahoochee Grocery Co. (Ala.), 41 So. 12.

The Mere Suppression of a Fact Is Not Evidence of Fraud. — In Kohl *v.* Lindley, 39 Ill. 195, 89 Am. Dec. 294, the court in its opinion announced the rule as to what character of concealments or suppressions may be treated as evidence of fraud as follows: "To make the mere suppression of a fact such a fraud as will justify a court in declaring the contract void, we believe the more modern and more correct doctrine to be, there must be something more than a failure to communicate facts within the knowledge of the party selling, there must be concealment; and that may consist in withholding the information when it is asked for, or by making the use of some devise to mislead, thus involving act and intention. Thus Parsons, in his able treatise on the law of contracts, the most modern work on that subject to which we have access, says: 'If the seller knows of a defect in his goods which the buyer does not know, and if he had known would not have bought the goods, and the seller is silent, and only silent, his silence is nevertheless a moral fraud, and ought, perhaps, on moral grounds, to avoid the contract. But this moral fraud has not yet grown into a legal fraud. In cases of this kind, there may be circumstances which cause this moral fraud to be a legal fraud, and give the buyer his action on the implied warranty, or on the deceit. And if the seller be not silent, but produce the sale by means of false representations, then the rule of *caveat emptor* does not apply, and the seller is answerable for his fraud. But the weight of authority requires that this should be active fraud. The common law does not oblige a seller to disclose all that he knows which lessens the value of the property he would sell. He may be silent, leaving the purchaser to inquire and examine for himself, or to require a warranty. He may be silent and be safe; but if he be more than silent, if by acts, and certainly if by words, he leads the buyer astray, inducing him to suppose that he buys with warranty or otherwise preventing his examination or inquiry, this becomes a fraud, of which the law will take cognizance. The distinction seems to be, and it is, grounded upon the apparent necessity of leaving men to take care of themselves in their business transactions. The seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself; 1 Parsons on Contracts, 461.' Here the seller was silent; he made no representations of any kind as to the quality of the hay, and used no artifice to induce the defendants' agent to buy. The hay was there in ricks, and it was quite easy for the purchaser to satisfy himself as to its quality by pulling a few handfuls from the ricks. Damaged hay, as every one knows, can be very readily detected by the color and smell. It was in the power of the purchaser to test in this way every one of the ricks. It was his own folly that he did not do so. It was lawful for the seller to suffer the buyer to cheat himself *ad libitum*, so that the seller does not actively

has failed to perform the conditions upon which the sale was made.[20]

C. What Constitutes Fraud on Part of Buyer. — Any material misstatement of the buyer of a matter of fact designed to operate on the seller and induce him to enter into the sale, is evidence of misrepresentation,[21] and any facts misstated or concealed having a tendency to deceive the seller, are evidence of fraud.[22]

D. Purchase of Goods With Intent Not to Pay. — Evidence of fraud is shown where it appears therefrom that a person who is insolvent and knows himself to be insolvent, purchases goods with

assist him therein. Proper diligence would have enabled the buyer to detect the unsound condition of the hay. The charge of fraud is in no wise established."

20. Lambert *v.* McCloud, 63 Cal. 162.

21. *Arkansas.* — Richmond *v.* Mississippi Mills, 52 Ark. 30, 11 S. W. 960, 4 L. R. A. 413.

Georgia. — Hughes *v.* Winship Mach. Co., 78 Ga. 793, 4 S. E. 6.

Iowa. — Morris *v.* Posner, 111 Iowa 335, 82 N. W. 755.

Maryland. — Standard Horseshoe Co. *v.* O'Brien, 91 Md. 751, 46 Atl. 346.

New Hampshire. — Syracuse Knitting Co. *v.* Blanchard, 69 N. H. 447, 43 Atl. 637.

New York. — Droege *v.* Ahrens & Ott Mfg. Co., 163 N. Y. 466, 57 N. E. 747; Smith *v.* Countryman, 30 N. Y. 655.

Pennsylvania. — Barker *v.* Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697.

Where the buyer of goods, in making a statement of his assets and liabilities, falsely stated the amount of his liabilities to be less than they actually were, knowing that the seller had requested such statement as a basis for determining as to his credit, the seller, if he relied on the statement, on discovering such falsity, may rescind the sale, and recover the goods, though the buyer intended to pay for the goods, and did not intend to defraud the seller thereof. Morris *v.* Posner, 111 Iowa 335, 82 N. W. 755.

22. Newell *v.* Randall, 32 Minn. 171, 19 N. W. 972, 50 Am. Rep. 562; George *v.* Johnson, 6 Humph. (Tenn.) 36, 44 Am. Dec. 288; Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383; Ennis *v.* Borner, 100 Fed. 12, 40 C. C. A. 249.

Misrepresentations Must Not Be Mere Opinion To Constitute Fraud. Where the evidence shows that the representations were merely expressive of opinion as to the value or worth of an article, and did not purport to state or embody an existing fact, it is not sufficient to establish fraud. Esterly Harv. Mach. Co. *v.* Berg, 52 Neb. 147, 71 N. W. 952; Lynch *v.* Murphy, 171 Mass. 307, 50 N. E. 623; Evans *v.* Gerry, 174 Ill. 595, 51 N. E. 615.

Thus mere expression of an opinion by a promoter of a corporation as to the value of its stock as an investment, which would naturally be based largely on the success of a certain patent, is not sufficient to show a false representation as a ground of relief. Lynch *v.* Murphy, 171 Mass. 307, 50 N. E. 623.

Representation Made to an Infant. When the sale is made to an infant, who is not familiar with values, the question whether the representation or opinion as to value deceived him, is a matter of fact to be left to the jury. Welch *v.* Olmstead, 90 Mich. 492, 51 N. W. 541.

Concealment or Suppression by either party to a contract of sale, of a material fact which he is in good faith bound to disclose, is evidence of and equivalent to a false representation because concealment or suppression is in effect a representation that what is disclosed is the whole truth. Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383.

Silence as to a material fact is not, as a matter of law, evidence equivalent to a false representation. Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383.

a preconceived intention not to pay for them.[23] But if it appear that such intention was formed after the purchase, evidence of fraud is not shown.[24]

E. False Statements as to Financial Standing.— On the question of fraud in the procurement of a sale of goods which

False Statements of a Promissory Nature. — If the evidence shows a statement to be promissory in character, relating to future events, and not as to an actual existing state of things, it does not constitute proof of misrepresentation or fraud within the requirements of the law. Dawe *v.* Morris, 149 Mass. 188, 21 N. E. 313, 14 Am. St. Rep. 404, 4 L. R. A. 158; Adams *v.* Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202; Knowlton *v.* Keenan, 146 Mass. 86, 15 N. E. 127, 4 Am. St. Rep. 282.

23. *United States.* — Donaldson *v.* Farewell, 93 U. S. 631.

Iowa. — Kearney Mill. & Elev. Co. *v.* Union Pac. R. Co., 97 Iowa 719, 66 N. W. 1059, 59 Am. St. Rep. 434; Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217; Reid *v.* Cowduroy, 79 Iowa 169, 44 N. W. 351, 18 Am. St. Rep. 359.

Maine. — Burril *v.* Stevens, 73 Me. 395, 40 Am. Rep. 366.

Michigan. — Frisbee *v.* Chickering, 115 Mich. 185, 73 N. W. 112.

Minnesota. — Sprague *v.* Kempe, 74 Minn. 465, 77 N. W. 412.

Tennessee. — Belding *v.* Frankland, 8 Lea 67, 41 Am. Rep. 630; Wertheimer-Schwartz Shoe Co. *v.* Faris (Tenn. Ch. App.), 46 S. W. 336.

Wisconsin. — Consolidated Mill. Co. *v.* Fogo, 104 Wis. 92, 80 N. W. 103; Lee *v.* Simmons, 65 Wis. 523, 27 N. W. 174; Alder *v.* Thorp, 102 Wis. 70, 78 N. W. 184.

How Pre-conceived Design Not To Pay for Goods Purchased May Be Shown. — When it is sought to show that a party who is insolvent has purchased goods with a pre-conceived design not to pay for them, such design may be shown by proof of the fact of a re-sale of the goods at a sacrifice, an assignment in insolvency or to a favored creditor, or absconding with the goods, or other circumstances (Bidault *v.* Wales, 19 Mo. 36, 59 Am. Dec. 327). In all cases evidence of what was done after the goods were purchased is admissible in evidence for the purpose of throwing light upon the intention of the buyer at the time of the purchase (Ross *v.* Miner, 67 Mich. 410, 35 N. W. 60). Evidence of the buyer's purchase of goods at the same time from other persons in large quantities and not in season for their sale may be introduced (Cox Shoe Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316). Evidence of purchases by the vendee in fraud of other parties at the same time as the purchases in question, are admissible to show fraudulent intent upon the part of the buyer. Raby *v.* Frank, 12 Tex. Civ. App. 125, 34 S. W. 777; Freeman *v.* Topkis, 1 Marv. (Del.) 174, 40 Atl. 498.

24. Burril *v.* Stevens, 73 Me. 395, 40 Am. Rep. 366; King *v.* Brown, 24 Ill. App. 579; Syracuse Knitting Co *v.* Blanchard, 69 N. H. 447, 43 Atl. 637; Skinner *v.* Michigan Hoop Co., 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413.

False Statements as to Financial Standing. — As the supposed solvency of the purchaser is a material inducement to a sale of goods, and it appears that he has made false and fraudulent representations in regard to it, upon which the vendor, not knowing the truth, relies in effecting the sale, the seller may rescind it as fraudulent, without proof that the purchaser did not intend to pay for the goods when he bought them. Reid *v.* Cowduroy, 79 Iowa 169, 44 N. W. 351, 18 Am. St. Rep. 359.

A sale of goods is not rendered fraudulent, so as to entitle the seller to rescind, by the buyer's conceiving the intention while the goods are in transit, of not paying for them. Skinner *v.* Michigan Hoop Co., 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413.

has been made on credit, the false statements of the purchaser as to his financial standing are always competent evidence.[25]

F. False Statements to Commercial Agency. — False statements made to a commercial agency by a party as to his financial standing, with a view to obtaining credit may be received as evidence of fraud in favor of a subscriber to such agency who acts on such statements,[26] though the party making them did not know when they were made that the person acting on such statements was a subscriber.[27]

G. Intent of Buyer to Deceive. — In some jurisdictions, in order that representations which are false may amount to fraud in a matter of sale, there must be evidence of an intent to deceive.[28]

25. Cary *v.* Hotailing, 1 Hill (N. Y.) 311, 37 Am. Dec. 323; Olmsted *v.* Hotailing, 1 Hill (N. Y.) 317; Hughes *v.* Winship Mach. Co., 78 Ga. 793, 4 S. E. 6; Richmond *v.* Mississippi Mills, 52 Ark 30, 11 S. W. 960, 4 L. R. A. 413; Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259.

26. *Connecticut.* — Soper Lumb. Co. *v.* Halsted, 73 Conn. 547, 48 Atl. 425.

Georgia. — Mashburn *v.* Dannenberg, 117 Ga. 567, 44 S. E. 97.

Illinois. — Moyer *v.* Lederer, 50 Ill. App. 94.

Indiana. — Furry *v.* O'Connor, 1 Ind. App. 573, 28 N. E. 103.

Michigan. — Mooney *v.* Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425.

Minnesota. — Kellog *v.* Holm, 82 Minn. 416, 85 N. W. 159.

Mississippi. — Hiller *v.* Ellis, 72 Miss. 701, 18 So. 95, 41 L. R. A. 707.

New York. — Bliss *v.* Sickles, 142 N. Y. 647, 36 N. E. 1064; Eaton Cole & Burnham Co. *v.* Avery, 83 N. Y. 31, 38 Am. Rep. 389; Victor *v.* Henlein, 67 How. Pr. 486.

In Tindle *v.* Birkett, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822, the plaintiffs sought to recover in an action based upon the alleged fraud and deceit practiced upon them by the defendant for the price of goods which they were induced by such fraud to sell to a firm of dealers, of which the defendant was a member. The firm was composed of the defendant and another person, who died before the trial. There was practically no dispute about the facts and the question presented was the sole one whether a member of a firm knowingly making false statements as to its financial condition to a mercantile agency in order to obtain a favorable rating in the reference books furnished to the subscribers of the agency, constituted fraud. The court held that a subscriber who sells and delivers goods to such firm on credit, relying solely on such rating and without any further knowledge, where the members were adjudged bankrupt on their own petition before the goods are paid for, may maintain an action for obtaining the goods by fraud, though the statements were made to the agency and not to the vendor personally.

27. False Statements to Financial Agency. — In a case in which it appears that several statements were made to a financial agency, and at the time the credit was extended, some of them were too old to be acted upon and others not, but that credit was extended on each, in order that the seller may reclaim the goods sold the burden of proof is on him to show that they were sold on the faith of the statements which had not become stale. Representations as to financial standing and worth, made to induce a sale on credit, when acted upon by the seller to his injury, will, if untrue, constitute such evidence of fraud as will avoid the sale, at the option of the seller, though the buyer did not know they were false. Mashburn *v.* Dannenberg Co., 117 Ga. 567, 44 S. E. 97.

28. Holt *v.* Sims, 94 Minn. 157, 102 N. W. 386.

But by the weight of authority such evidence is not necessary to show fraud.[29]

H. Insolvency of Buyer as Evidence of Fraud. — The bare fact that the buyer is insolvent is not sufficient evidence to show fraud on his part, authorizing the seller to avoid the sale.[30] And

29. *England.* — Polhill *v.* Walter, 3 Barn. & Ad. 114.

United States. — Billings *v.* Aspen Min. & Smelt. Co., 51 Fed. 338, 2 C. C. A. 252.

Illinois. — Allen *v.* Hart, 72 Ill. 104; Ruff *v.* Jarrett, 94 Ill. 475.

Indiana. — Quick *v.* Milligan, 108 Ind. 419, 422, 9 N. E. 392, 58 Am. Rep. 49; Anderson *v.* Hubble, 93 Ind. 570, 47 Am. Rep. 394; Pitcher *v.* Dove, 99 Ind. 175.

Iowa. — Foster *v.* Bettsworth, 37 Iowa 415.

Kentucky. — Rudd *v.* Matthews, 79 Ky. 479, 42 Am. Rep. 231.

Massachusetts. — Stone *v.* Denny, 4 Metc. 151, 161; Fisher *v.* Mellen, 103 Mass. 503; Litchfield *v.* Hutchinson, 117 Mass. 195.

New York. — Continental Nat. Bk. *v.* National Bk., 50 N. Y. 575; Blair *v.* Wait, 69 N. Y. 113.

Wisconsin. — Racine Co. Bk. *v.* Lathrop, 12 Wis. 466; Chynoweth *v.* Tenney, 10 Wis. 397; Vilas *v.* Mason, 25 Wis. 310.

"It is necessary for the plaintiff to prove that the defendant made false representations, which were material, with a view to induce the plaintiff to purchase, and that the plaintiff was thereby induced to purchase. But it is not always necessary to prove that the defendant knew that the facts stated by him were false. If he states, as his own knowledge material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defense that he believed the facts to be true. The falsity and fraud consists in representing that he knew the facts to be true, of his own knowledge when he had no such knowledge." Litchfield *v.* Hutchinson, 117 Mass. 195.

In Equity it is not necessary that the party should design to mislead; it is enough if the acts or declarations were calculated to and did in fact mislead another acting in good faith and with reasonable diligence. Blair *v.* Wait, 69 N. Y. 113.

30. *United States.* — *In re* Lewis, 125 Fed. 143.

Delaware. — Mears *v.* Waples, 3 Houst. 581.

Illinois. — Hacker *v.* Munroe, 56 Ill. App. 532.

Michigan. — Reeder Shoe Co. *v.* Prylinski, 102 Mich. 468, 60 N. W. 969.

Missouri. — Bidault *v.* Wales, 19 Mo. 36, 59 Am. Dec. 327; Stein *v.* Hill (Mo. App.), 71 S. W. 1107.

Nevada. — Klopenstein *v.* Mulcahy, 4 Nev. 296.

New York. — Hennequin *v.* Naylor, 24 N. Y. 139.

Tennessee. — Rome Furn. & Lumb. Co. *v.* Walling (Tenn. Ch. App.), 58 S. W. 1094. But see Seligman *v.* Kalkman, 8 Cal. 207; Henshaw *v.* Bryant, 5 Ill. 97; Brower *v.* Goodyer, 88 Ind. 572; Durell *v.* Haley, 1 Paige (N. Y.) 492.

If the evidence merely shows that a party purchases goods on credit, with no reasonable expectation of being able to pay for them, this does not constitute evidence of a purchase with an intention on his part not to pay for them. If at the time a party purchases goods he has no reasonable cause to believe that he will be able to pay for the goods, this will not by itself be sufficient evidence to avoid the sale; but the jury in passing upon the question of the buyer's intent, may consider his financial condition at the time of his purchase, whether solvent or not, and whether he had any reasonable grounds to believe that he would be able to pay for the goods, and all the other circumstances connected with the transaction. Galin *v.* Armistead, 57 Ark. 574, 22 S. W. 431, 38 Am. St. Rep. 262.

"It is well settled in Pennsylvania that the insolvency of the purchaser

the promise of an insolvent buyer to pay cash on delivery of the goods, and his failure to do so, is not sufficient evidence of fraud.[31]

5. Resale of Goods by Seller. — A. GENERALLY. — In order to establish the right on the part of the seller to resell the goods in question the evidence must show a valid contract of sale,[32] the seller's compliance with its terms,[33] the readiness of the seller to deliver the goods,[34] and the refusal of the buyer to accept them,[35]

and his knowledge of it when he made the purchase are not alone sufficient to invalidate the sale. But they are evidence to go to the jury with other facts to show the intended fraud. It is essential to the impeachment of the rule as fraudulent, that there should be artifice, trick and false pretense intended and fitted to deceive the vendor, and operate in obtaining from him possession of his property. But the insolvency of the purchaser and his knowledge of it, coupled with a representation of solvency which induced the seller to part with the possession of his property, will have that effect." Cincinnati Cooperage Co. *v.* Gaul, 170 Pa. St. 545, 32 Atl. 1093; *in re* Lewis, 125 Fed. 143.

Concealment of insolvency by the vendee from the vendor, when he knows himself to be insolvent, and does not intend to pay for the goods he buys on credit, is evidence of fraud entitling the vendor to disaffirm the contract and replevy the property from the vendee. Brower *v.* Goodyear, 88 Ind. 572.

31. *In re* Lewis, 125 Fed. 143.

32. Curtis *v.* Piedmont Lumb. Co., 114 N. C. 530, 19 S. E. 374; Mason *v.* Decker, 72 N. Y. 595, 28 Am. Rep. 190.

33. Colorado Springs Live Stock Co. *v.* Godding, 2 Colo. App. 1, 29 Pac. 529; House *v.* Babcock, 63 Hun 626, 17 N. Y. Supp. 640.

34. Camp *v.* Hamlin, 55 Ga. 259; Johnson *v.* Powell, 9 Ind. 566; Duncan *v.* Holt, 21 La. Ann. 235; Bogart *v.* O'Regan, 1 E. D. Smith (N. Y.), 590; Granberry *v.* Frierson, 2 Baxt. (Tenn.) 326; Jones *v.* Marsh, 22 Vt. 141.

Evidence of Notice. — Evidence of notice by the seller to the buyer is not an essential requisite to the exercise of the right of resale. But if it is shown in evidence that notice of resale has been given to the purchaser, that the seller will resort to his right of resale, such notice will enable the seller to hold the buyer for the difference between the contract price and that obtained at the sale. American Hide & Leather Co. *v.* Chalkey, 101 Va. 458, 44 S. E. 705; Sands *v.* Taylor, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374; Patten's Appeal, 45 Pa. St. 151, 84 Am. Dec. 479; Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713; Rosenbaums *v.* Weeden, 18 Gratt. (Va.) 785; Allegheny Iron Co. *v.* Teaford, 96 Va. 372, 31 S. E. 525.

35. *United States.* — McCulloh *v.* Smith, 44 Fed. 12.

Alabama. — West *v.* Cunningham, 9 Port. 104, 33 Am. Dec. 300.

Indiana. — Johnson *v.* Powell, 9 Ind. 566.

Louisiana. — Gilly *v.* Henry, 8 Mart. 402, 13 Am. Dec. 291; White *v.* Kearney, 9 Rob. 495; Judd Linseed & Sperm Oil Co. *v.* Kearney, 14 La. Ann. 352; Duncan *v.* Holt, 21 La. Ann. 235.

Mississippi. — Swann *v.* West, 41 Miss. 104.

Missouri. — Van Horn *v.* Rucker, 33 Mo. 391, 84 Am. Rep. 52; McClelland *v.* Picher L. & Z. Co., 85 Mo. 636.

New York. — Sands *v.* Taylor, 5 Johns. 395, 4 Am. Dec. 374; Hunter *v.* Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Petrie *v.* Stark, 79 Hun 550, 29 N. Y. Supp. 881.

North Carolina. — Hurlburt *v.* Simpson, 25 N. C. (3 Ired. L.) 233.

Pennsylvania. — Barney *v.* Clarke, 22 Pa. L. J. 69.

Tennessee. — Williams *v.* Godwin, 4 Sneed 557; Granberry *v.* Frierson, 61 Tenn. 326.

Texas. — Weathered *v.* Golden (Tex. Civ. App.), 34 S. W. 761.

Vermont. — Jones *v.* Marsh, 22 Vt. 144.

or his failure to pay for them when the sale is for cash.[36]

B. Burden to Show Resale Fairly Conducted. — When a buyer has refused to accept and pay for goods sold to him, and the seller has exercised his right of resale, and brings an action to recover the difference between the amount realized and the contract price, the burden is on the seller to prove that the resale was fairly conducted.[37]

6. Action for Price or Value of Goods. — A. Generally. — That the evidence may show a right to maintain an action by the seller for the price or value of the goods sold by him, it must appear therefrom that he has done all that the contract of sale requires of him.[38]

In Granberry *v.* Frierson, 61 Tenn. 326, where the time of delivery in the sale of cotton was not fixed, it was held, that if the owner gave the purchaser notice of his readiness to deliver the cotton, and the latter failed to receive it, after a reasonable time he might give notice and resell at the purchaser's risk, or treat the contract as rescinded.

36. McCulloh *v.* Smith, 44 Fed. 12; White *v.* Kearney, 9 Rob. (La.), 495; Miller *v.* Steen, 30 Cal. 402, 89 Am. Dec. 124; Owens *v.* Weedman, 82 Ill. 409; M'Combs *v.* M'Kennan, 2 Watts & S. (Pa.) 216, 37 Am. Dec. 505; Heller *v.* Charleston Phosphate Co., 28 S. C. 224, 5 S. E. 611; Barker *v.* Reagan, 4 Heisk. (Tenn.) 590.

The seller cannot recover from the buyer, who refuses to accept the goods and pay for them, the difference between the agreed price and the price obtained on a resale, where the evidence indicates that the goods as tendered to the buyer were not merchantable or did not correspond with the samples. Duncan *v.* Holt, 21 La. Ann. 235.

Where Purchaser Refuses To Comply With Contract. — Where it appears from the evidence that the purchaser refuses to comply with his contract, the seller need not hold himself in readiness to deliver the article, but may sell it, and sue immediately for the damages he has sustained. West *v.* Cunningham, 9 Port. (Ala.) 104, 33 Am. Dec. 300.

Where Purchaser Refuses Opportunity To Inspect the Goods. — If it appears from the evidence that the seller offers to the purchaser an opportunity to examine the chattels sold at the railroad station, and the latter refuses such offer, demanding the right to take them to his own factory and there examine them, this is sufficient evidence that the purchaser has broken the contract, and authorizes the seller to re-sell the chattels and charge the purchaser with the difference in price and expenses, after giving notice that he will pursue that course, unless the purchaser complies with the contract. Sawyer *v.* Dean, 114 N. Y. 469, 21 N. E. 1012.

37. Magnes *v.* Sioux City Nursery & Seed Co., 14 Colo. App. 219, 59 Pac. 879; Brownlee *v.* Bolton, 44 Mich. 218, 6 N. W. 657; Smith *v.* Pettee, 70 N. Y. 13.

The vendor has the burden of showing that his right of resale was exercised in good faith and at such time, by such methods and under such circumstances as were most likely to produce the fair value of the property. Brownlee *v.* Bolton, 44 Mich. 218, 6 N. W. 657.

38. *California.* — Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618.

Colorado. — Armor *v.* Fisk, 1 Colo. 148.

Illinois. — Brand *v.* Henderson, 107 Ill. 141; Holmes *v.* Stummel, 24 Ill. 370; Phelps *v.* Hubbard, 59 Ill. 79; Peake *v.* Railroad Co., 18 Ill. 88; Heath & Milligan Mfg. Co. *v.* Flannery, 58 Ill. App. 300.

Kentucky. — Totten *v.* Cooke, 59 Ky. 375.

Minnesota. — Wood *v.* Michaud, 63 Minn. 478, 65 N. W. 963; Martin *v.* Hurlbutt, 9 Minn. 142.

Missouri. — Dobbins *v.* Edmunds, 18 Mo. App. 307; Roth *v.* Continen-

Where the evidence thus shows a full performance of the contract, including a delivery of the goods,[39] evidence of the defendant's refusal to accept the goods will not defeat the action.[40]

B. Where Contract Is Executory. — If the evidence only shows the contract to be executory under which the title has not passed to the buyer,[41] or that the goods have not been delivered to

tal Wire Co., 94 Mo. App. 236, 68 S. W. 504.

New York. — Donnell *v.* Hearn, 12 Daly 230; Pratt *v.* Gulick, 13 Barb. 297; Dunham *v.* Pettee, 8 N. Y. 508.

Pennsylvania. — Bellentine *v.* Robinson, 46 Pa. St. 177; Sidney School Furn. Co. *v.* Warsaw School Dist., 122 Pa. St. 494, 15 Atl. 881, 9 Am. St. Rep. 124.

Texas. — Pontiac Shoe Mfg. Co. *v.* Hamilton, 18 Tex. Civ. App. 283.

Virginia. — Page *v.* Winston, 2 Munf. 298; Lewis *v.* Weldon, 3 Rand. 71.

In Morris *v.* Wibaux, 159 Ill. 627, 43 S. E. 837, the contract sued on was in writing. It was stipulated as to quality that the steers were to be good merchantable cattle with no stags, cripples, or big jaws among them and the cows were to be dry. Plaintiff warranted the cattle sold when delivered should correspond in identical quality and description with the property described in the contract. The court in the course of its opinion referring to the obligation of the plaintiff to prove his case stated: "Whether the contract has been complied with on the part of the plaintiff is to be determined from the evidence, and if on trial it appears that the plaintiff has not fully executed his contract, where not prevented by the defendant, he would have no right to recover, regardless of his manner of declaring either specially or by the common counts. . . . And it was incumbent upon him to show that he delivered the property of the character and description that constitute the substantive terms of the contract, the subject-matter of the sale being steers three years old and up, bearing certain brands, on certain ranges, etc., and cows two years old and up, bearing certain brands, on certain ranges, etc., at an agreed price. The plaintiff had the onus of proving that he had complied with the terms of the contract in delivering the identical thing sold, and this regardless of the defendant's pleas."

39. *Illinois.* — House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307.

Maine. — Greenleaf *v.* Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371; Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640; Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713; Edwards *v.* Grand Trunk R. Co., 54 Me. 105; Means *v.* Williamson, 37 Me. 556.

New Hampshire. — Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241.

Pennsylvania. — Unexcelled Fire Wks. *v.* Polites, 130 Pa. St. 536, 18 Atl. 1058, 17 Am. St. Rep. 788.

Inferring Acceptance From Conduct. — Actual acceptance of delivery may sometimes be inferred from the conduct of the parties. Greenleaf *v.* Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371.

Silence and Delay for an Unreasonable Time are conclusive evidence of acceptance, as the *burden* is upon the buyer, and he must seasonably notify the seller of his refusal to accept the goods. Greenleaf *v.* Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371.

40. Wood *v.* Michaud, 63 Minn. 478, 65 N. W. 963.

41. *California.* — Heskell *v.* McHenry, 4 Cal. 41.

Connecticut. — Allen *v.* Jarvis, 20 Conn. 38.

Illinois. — Brand *v.* Henderson, 107 Ill. 141.

Indiana. — Pittsburgh, C & St. L. R. Co. *v.* Heck, 50 Ind. 303, 19 Am. Rep. 713; Gatling *v.* Newell, 12 Ind. 118; Beard *v.* Sloan, 38 Ind. 128.

Kentucky. — Williams & Davis *v.* Jones, 1 Bush 621.

New Hampshire. — Gordon *v.* Norris, 49 N. H. 376.

him,[42] it is not sufficient to maintain an action for the price of the goods sold.[43]

C. Transfer of Title or Delivery to Purchaser. — In addition to full performance of the contract by the seller, the evidence must affirmatively show that the title to the goods has been transferred to the buyer,[44] or that there has been a delivery of them to him,[45] else the action for the price thereof cannot be maintained.[46]

Pennsylvania. — Ballentine *v.* Robinson, 46 Pa. St. 177.

Wisconsin. — Gansan *v.* Madigan, 13 Wis. 68.

42. *Maine.* — Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713.

Massachusetts. — Stearns *v.* Washburn, 7 Gray 187; Hallwood Cash Reg. Co. *v.* Lufkin, 179 Mass. 143, 60 N. E. 473; White *v.* Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537; Collins *v.* Delaporte, 115 Mass. 159; Whitney *v.* Thacher, 117 Mass. 523; Schramm *v.* Boston Sugar Ref. Co., 146 Mass. 211, 15 N. E. 571.

Mississippi. — Burnley *v.* Tufts, 66 Miss. 48, 5 So. 627.

New Hampshire. — Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241.

North Carolina. — Tufts *v.* Griffin, 107 N. C. 47, 12 S. E. 68, 22 Am. St. Rep. 863.

43. Scotten *v.* Sutter, 37 Mich. 526; McCormick Harv. Mach. Co. *v.* Balfany, 78 Minn. 370, 81 N. W. 10, 79 Am. St. Rep. 393; Rail *v.* Little Falls Lumb. Co., 47 Minn. 422, 50 N. W. 471; Scott *v.* Wood, 41 Miss. 661; Tufts *v.* Weinfeld, 88 Wis. 647, 60 N. W. 992; Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130.

In Tufts *v.* Weinfeld, 88 Wis. 647, 60 N. W. 992, the order being for a soda fountain to be manufactured, and having been countermanded, it was held that the vendor had no right to go and manufacture the fountain for the purpose of charging the full contract price or to increase the damages for the breach.

44. American Hide & Leather Co. *v.* Chalkley & Co., 101 Va. 458, 44 S. E. 705; Orand *v.* Mason, 1 Swan (Tenn.) 196; Barrow *v.* Window, 71 Ill. 214; Doremus *v.* Howard, 23 N. J. L. 390; Fowler *v.* Fisk, 12 Cal. 112; Pittsburgh, C. & St. L. R. Co. *v.* Heck, 50 Ind. 303, 19 Am. Rep. 715.

Transfer of Title Dependent Upon Future Contingencies. — Where a contract of sale provides that certain things are to be done in order to complete the sale, the title does not pass to the purchaser unless the evidence shows that it was the intention of the parties to pass the title to the property without reference to these contingencies. Reed Smokeless Furnace Co. *v.* State, 34 Ind. App. 265, 72 N. E. 615; Robinson *v.* Stricklin (Neb.), 102 N. W. 479. Thus where plaintiff sold the defendant onions under an agreement that they were to be screened and weighed and to remove any unmarketable ones, and paid for on a certain date, title did not pass before they were screened, weighed and paid for, there being no evidence that it was intended that title should pass before this was done. Wesoloski *v.* Wysoski, 186 Mass. 495, 71 N. E. 982. See in this connection Holmes *v.* Bailey, 16 Neb. 300, 20 N. W. 304; Brown *v.* Neilson, 61 Neb. 765, 86 N. W. 498, 87 Am. St. Rep. 525, 54 L. R. A. 328; Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28.

45. *Illinois.* — Havana Press Drill Co. *v.* Scurlock, 23 Ill. App. 426; Heath & Milligan Mfg. Co. *v.* Flannery, 58 Ill. App. 300.

Indiana. — Pittsburgh, C. & St. L. R. Co. *v.* Heck, 50 Ind. 303, 19 Am. Rep. 713.

Kansas. — Southwestern Stage Co. *v.* Peck, 17 Kan. 271.

Kentucky. — Warner *v.* Reardon, 32 Ky. 219.

Maine. — Savage Mfg. Co. *v.* Armstrong, 19 Me. 147; Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713.

Massachusetts. — Hart *v.* Tyler, 32 Mass. 171.

Michigan. — Jackson *v.* Evans, 8 Mich. 476.

46. Jones *v.* Schneider, 22 Minn.

D. Burden of Proof. — In an action by the seller to recover the contract price of the goods sold, the burden of proof is upon him to establish performance of the contract on his part,[47] as well as the transfer of title,[48] or the delivery of the goods.[49] In fact, he must show all the essential requisites of a *prima facie* case,[50] unless, of

279; Scott *v.* Wood, 41 Miss. 661; Barker *v.* Davies, 47 Neb. 78, 66 N. W. 11; Babcock *v.* Stanley, 11 Johns. (N. Y.) 178; Champlin *v.* Rowley, 18 Wend. (N. Y.) 187; Osborne *v.* Martin, 4 S. D. 297, 56 N. W. 905; Pittsburgh, C. & St. R. Co. *v.* Heck, 50 Ind. 303, 19 Am. Rep. 713.

47. McCall *v.* Jacobson, 139 Mich. 455, 102 N. W. 960; Stewart *v.* Ashley, 34 Mich. 183; Rosenstein *v.* Casein Mfg. Co., 98 N. Y. Supp. 645; Feagan *v.* Barton-Parker Mfg. Co. (Tex. Civ. App.), 93 S. W. 1076; Edmunds *v.* Wiggin, 24 Me. 505; Gilmore *v.* Wilbur, 35 Mass. 517.

48. Jones *v.* Schneider, 22 Minn. 270; Barker *v.* Davies, 47 Neb. 78, 66 N. W. 11; Muckey *v.* Howenstine, 3 Thomp. & C. (N. Y.) 28.

In Barker *v.* Davies, 47 Neb. 78, 66 N. W. 11, instructions were held correct, which while recognizing a defendant's right to insist upon the strict performance of the terms upon which a sale of personal property was alleged to have been made, nevertheless, consistently with the evidence introduced, permitted the jury to consider whether or not such strict performance had been waived by the party sought to be charged.

49. Morris *v.* Wibaux, 159 Ill. 627, 43 N. E. 837; Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713; Babcock *v.* Stanley, 11 Johns. (N. Y.) 178; Moses *v.* Banker, 2 Sweeney (N. Y.) 267; Scott *v.* Wood, 41 Miss. 661.

Presentation of Bill for Goods. In an action for the sale and delivery of goods, when the evidence consists only of a presentation of a bill for the goods alleged to have been sold and delivered, there is no sufficient proof to sustain the action. Ashton *v.* Thompson (Colo.), 85 Pac. 697. In this case the only testimony consisted of one witness who testified that he presented the bill for the books to the defendant, and that defendant refused to pay it, stating that they had not treated him right. Aside from this testimony the only other evidence introduced was a statement of account, from which it appeared that plaintiff charged defendant on account of law books $142.00, and gave credit by cash received for $25.00, leaving a balance of $117.00. Upon this state of facts the court held the evidence insufficient to sustain the burden of proof upon the plaintiff.

50. **The Burden of Proof Is on Plaintiff To Establish a Valid Sale, Which Must Show the Contract of Sale.** — Edmunds *v.* Wiggin, 24 Me. 505.

The Terms and Conditions of the Sale. — Morrison *v.* Clark, 7 Cush. (Mass.) 213; Paine *v.* Smith, 33 Minn. 495, 24 N. W. 305; Hebbard *v.* Haughian, 70 N. Y. 54.

The Amount Due on the Contract of Sale. — Garretson *v.* Bitzer, 57 Iowa, 469, 10 N. W. 818.

Evidence Must Show Debt Due and Payable. — In Rauer *v.* Merani, 130 Cal. 616, 63 Pac. 31, plaintiff's evidence tended to show a sale in August, on Saturday, payment to be part on Monday following, part the following week, and the balance the week after that. Defendant's evidence was that the terms of payment were 30, 60 and 90 days, in accordance with notes payable September 15th, October 15th, and November 15th. The action was commenced on August 28th, and there was judgment for the whole price in favor of plaintiff. *Held*, that the judgment was not supported by the evidence, since, in the absence of other proof as to the date in August on which the sale was made, it was inferable from the defendant's 30 day note that it was on August 15th; and as, under plaintiff's evidence, there was a credit of 14 and 21 days for the second and third payments, the whole purchase price was not due on August 28th, when suit was begun.

course, the purchaser in some manner admits the necessary facts.[51]

E. What Sufficient to Show Transfer of Title. — If it be shown that all the terms of sale were agreed upon and the contract of sale concluded,[52] this constitutes evidence sufficient to establish a transfer of title to the property,[53] although the right of actual

51. Wheeler C. & E. Co. *v.* Packard Co., 83 App. Div. 288, 82 N. Y. Supp. 165.

Admitted by the Pleading. — An action was brought to recover the price of fruit sold to defendant and plaintiff attached to its petition a verified account. Defendant in its answer filed pleaded various items as damages and stated that plaintiff had "a good cause of action as stated in his complaint except in so far as it might be defeated in the whole or in part by the facts in the answer constituting a good defense which might be established on the trial." *Held*, that this was an admission of every fact alleged in the petition which it was necessary for the plaintiff to establish and hence evidence as to the quantity, quality or variety of the fruit delivered was inadmissible as such matter was not in issue. Mobile F. & Trad. Co. *v.* Boere (Tex. Civ. App.), 55 S. W. 361.

Admission Upon the Trial. — It was admitted upon the trial in an action for the price of shoes that a certain amount was due, except as it might be reduced by proof of off-sets or settlement. This makes proof of the delivery of the shoes unnecessary. Danziger *v.* Pittsfield Shoe Co., 204 Ill. 145, 68 N. E. 534.

52. Schreiber *v.* Andrews, 101 Fed. 763, 41 C. C. A. 663; Erwin *v.* Harris, 87 Ga. 333. 335, 13 S. E. 513; Shadoan *v.* Kenney, 21 Ky. L. Rep. 1819, 56 S. W. 506; Kerr *v.* Henderson, 62 N. J. L. 724, 42 Atl. 1073; Holmes *v.* Sheehan, 118 Mich. 539, 77 N. W. 88; Irvin *v.* Edwards, 92 Tex. 258, 47 S. W. 719.

Transfer of Title. — In Richardson *v.* Insurance Co., 136 N. C. 314, 48 S. E. 733, was an action against the insurance company which involved the question of plaintiff's title to the property insured. The evidence showed that there was a verbal sale of goods made, that the purchaser paid a portion of the price, and that the whole price was agreed upon, and an inventory was being taken, and there was an understanding between the parties that a settlement was to be made when the inventory was complete, and that thereupon the seller should take a mortgage for the remainder on the stock. It was held that the question as to whether the title had passed should have been submitted to the jury.

In Millhiser *v.* Erdman, 98 N. C. 292, 3 S. E. 521, 2 Am. St. Rep. 334, the plaintiff had shipped to the defendant a lot of tobacco,. with the understanding and agreement that the defendant should execute his promissory notes at three, four and five months time in payment thereof. The defendant refused to execute the notes, whereupon the plaintiff sued the defendant for the possession of the tobacco. It was held that the execution and delivery of the notes was an essential part of the contract, and that upon the evidence shown, no title passed to the tobacco because the contract had not been performed.

53. *Illinois.* — Graff *v.* Fitch, 58 Ill. 373, 11 Am. Rep. 85; Wade *v.* Moffett, 21 Ill. 110, 74 Am. Dec. 79.

Maine. — Mixer *v.* Cook, 31 Me. 340.

Massachusetts. — DeWolf *v.* Gardner, 12 Cush. 19, 59 Am. Dec. 165; Upton *v.* Sturbridge Cotton Mills, 111 Mass. 446; Freeman *v.* Nichols, 116 Mass. 309.

Minnesota. — Fishback *v.* Van Dusen, 33 Minn. 111, 22 N. W. 244.

Mississippi. — Crane *v.* Davis, 21 So. 17.

Missouri. — Ober *v.* Carson, 62 Mo. 213.

New York. — Burrows *v.* Whitaker, 71 N. Y. 291, 27 Am. Rep. 42.

North Carolina. — Williams *v.* Chapman, 118 N. C. 943, 24 S. E. 810.

Oregon. — Wadhams *v.* Balfour, 32 Or. 313, 51 Pac. 642.

Wisconsin. — Fletcher *v.* Ingram, 46 Wis. 19, 50 N. W. 424.

Proof of an Unconditional Delivery of Goods for cash is sufficient

possession on the part of the buyer may be shown not to exist.[54]

F. Whether Contract Complete a Question of Intention. When the question arises whether or not a contract is complete so as to pass title, it is one of intention between the parties,[55] to be determined by the court when the terms of the contract are not controverted,[56] otherwise by the jury from all the facts and circumstances in the case.[57]

G. Where Goods Have Not Been Identified. — If the evidence shows that the property alleged to have been sold is to be taken from a bulk,[58] it must further show that it was set apart from the bulk so as to be treated as the identical property of the pur-

to show a waiver of a condition in the sale; and the seller cannot afterwards assert a title to the goods. Freeman *v.* Nichols, 116 Mass. 309.

Weighing and Measuring To Be Done Before Final Settlement. "When a mere operation of weight, measurement, counting or the like remains to be performed after the goods are actually delivered, and it is shown that it was the intention of the parties to complete the sale by delivery, such weighing, measuring or counting afterwards will not be regarded as a part of the contract of sale, but will be considered as referring to adjustment on a final settlement." Wadhams *v.* Balfour, 32 Or. 313, 51 Pac. 642.

54. Clark *v.* Greeley, 62 N. H. 394, where the sale was by auction and the terms were cash down; and it was held that when the auctioneer's hammer fell nothing remained to be done to designate the property sold, or to put it in condition for delivery, and the title passed immediately to the defendant, unless the parties intended otherwise.

55. *California.* — Ford *v.* Chambers, 28 Cal. 13.

Maine. — Cushman *v.* Holyoke, 34 Me. 289; Stone *v.* Peacock, 35 Me. 388.

Massachusetts. — Marble *v.* Moore, 102 Mass. 443.

New Hampshire. — Fuller *v.* Bean, 34 N. H. 290.

New Jersey. — Kerr *v.* Henderson, 62 N. J. L. 724, 42 Atl. 1073.

Vermont. — Bemis *v.* Morrill, 38 Vt. 153; Bellows *v.* Wells, 36 Vt. 599.

Wisconsin. — Sewell *v.* Eaton, 6 Wis. 490, 70 Am. Dec. 471.

56. Smith *v.* Parkman, 55 Miss. 649, 30 Am. Rep. 537; Thomas *v.* Knowles, 128 Mass. 22.

57. McClung *v.* Kelley, 21 Iowa, 508; DeRidder *v.* M'Knight, 13 Johns. (N. Y.) 294; Riddle *v.* Varnum, 20 Peck. (Mass.) 280; George *v.* Stubbs, 26 Me. 250; Morgan *v.* King, 28 W. Va. 1, 57 Am. Rep. 633.

58. *Alabama.* — Browning *v.* Hamilton, 42 Ala. 484.

California. — Blackwood *v.* Cutting Pack. Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199.

Illinois. — Dunlap *v.* Berry, 4 Ill. 327, 39 Am. Dec. 413; Wood *v.* Roach, 52 Ill. App. 388.

Iowa. — Cook *v.* Logan, 7 Iowa 142; Davis *v.* Budd, 60 Iowa, 144, 14 N. W. 211.

New Hampshire. — Davis *v.* Hill, 3 N. H. 382, 14 Am. Dec. 373; Andrews *v.* Cheney, 62 N. H. 404.

New York. — Foot *v.* Marsh, 51 N. Y. 288.

Washington. — Anderson *v.* Crisp, 5 Wash. 178, 31 Pac. 638, 18 L. R. A. 419.

In Davis *v.* Budd, 60 Iowa 144, 14 N. W. 211, where defendant signed a contract to deliver to plaintiff in May, June and July, a certain quantity of "dry, sound, shelled corn," and defendant had at the time of the contract a quantity of such corn, out of which he intended to fill the contract, but the time of delivery was by agreement postponed from time to time until July 20, when the corn was found recently to have been damaged by heating, it was held that there was a sale of any specific corn; that the contract was executory, and might have been performed by delivery of any corn of the required quality, and that

chaser,[59] or that the agreement between the parties considered it as belonging to him.[60]

H. What Sufficient Proof of Delivery. — Delivery to Carrier. — Ordinarily, the delivery of goods by a seller to a common carrier for shipment to consignee, in the absence of circumstances indicating a contrary intention, is sufficient evidence of a delivery to the buyer.[61] But the rule that the delivery of goods to a carrier is a delivery to the purchaser is a rule of evidence rather than

plaintiff did not, by securing a postponement of the date of delivery, assume the risk of damage to defendant's corn.

59. *Alabama.* — Browning *v.* Hamilton, 42 Ala. 484.

California. — Blackwood *v.* Cutting Pac. Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199.

Georgia. — Love *v.* State, 78 Ga. 66, 3 S. E. 893, 6 Am. St. Rep. 234.

Illinois. — Wood *v.* Roach, 52 Ill. App. 388.

Iowa. — Courtwright *v.* Leonard, 11 Iowa 32.

Maine. — Stone *v.* Peacock, 35 Me. 385; Levasseur *v.* Cary, 3 Atl. 461; Phillips *v.* Moore, 71 Me. 78.

Massachusetts. — Keeler *v.* Goodwin, 111 Mass. 490.

Minnesota. — Dodge *v.* Rodgers, 9 Minn. 223.

New Hampshire. — Buncher *v.* Warren, 33 N. H. 183; Ockington *v.* Richey, 41 N. H. 275; Hutchinson *v.* Grand Trunk R. Co., 59 N. H. 487.

New Jersey. — Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184.

Ohio. — Woods *v.* McGee, 7 Ohio, 127.

60. *California.* — Horr *v.* Barker, 8 Cal. 603.

Florida. — Watts *v.* Hendry, 13 Fla. 523.

Georgia. — Philips *v.* Ocmulgee Mills, 55 Ga. 633.

Kansas. — Kingman *v.* Holmquist, 36 Kan. 735, 14 Pac. 168, 59 Am. Rep. 604.

Maine. — Lavasseur *v.* Cary, 3 Atl. 461.

New Jersey. — Hires *v.* Hurff, 39 N. J. L. 4; Hurff *v.* Hires, 40 N. J. L. 581, 29 Am. Rep. 282.

New York. — Russell *v.* Carrington, 42 N. Y. 118, 1 Am. Rep. 498.

Pennsylvania. — Smyth *v.* Craig, 3 Watts & S. 14.

61. Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 264; Diversy *v.* Kellogg, 44 Ill. 114, 92 Am. Dec. 154; Krulder *v.* Ellison, 47 N. Y. 36, 7 Am. Rep. 402; Magruder *v.* Gage, 33 Md. 344, 3 Am. Rep. 177; Hall *v.* Richardson, 16 Md. 397, 77 Am. Dec. 303; Sarbecker *v.* State, 65 Wis. 171, 26 N. W. 541, 56 Am. Rep. 624.

Evidence That the Seller Shipped Within a Reasonable Time goods of the amount and quality ordered, and in the manner directed, was held sufficient to show that the title thereby vested in the buyer, in Diversy *v.* Kellogg, 44 Ill. 114, 92 Am. Dec. 154.

Evidence showing a delivery to a warehouseman or carrier, indicated by the buyer, is sufficient to establish a delivery to the buyer; and it is at his risk when delivered, without notice, unless by the contract of the parties he is to be notified of the fact of the delivery. Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 264.

In Krulder *v.* Ellison, 47 N. Y. 36, 7 Am. Rep. 402, it was shown by the evidence that plaintiff, a merchant in New York, received from N. & T. of Rochester, an order in writing for certain goods to be sent them "via canal." The goods were delivered to defendants, common carriers upon the canal, consigned to N. & T. pursuant to the order. The goods were lost en route. *Held,* that upon the delivery to the carrier, the title passed absolutely to the consignees, subject only to the right of stoppage *in transitu,* and that plaintiff, the consignor, could not maintain an action for their loss against the carrier.

In Sarbecker *v.* State, 65 Wis. 171, 26 N. W. 541, 56 Am. Rep. 624, the evidence showed that the agent of a brewery took orders in Houghton for beer and transmitted the orders

of property,[62] and the question in such case is ultimately one of intention.[63] Thus if it appear that a shipment is made by the seller to himself as consignee, of goods intended for another, it is an almost universal rule, where a contrary intention is not shown,[64] that this constitutes evidence of a reservation of title in himself.[65]

to his manufacturer in Janesville, who filled the orders and delivered the goods to a common carrier in the latter city, consigned to such customer at his place of residence, or to such agent for him. The court held that the sale was completed and the title passed at the place of shipment upon such delivery to the common carrier.

62. In Armstrong *v.* Coyne, 64 Kan. 75, 67 Pac. 537, the court in its opinion said: "The claim of error is based upon the proposition that in case of the sale of property to be shipped to the buyer, title passes on delivery to the carrier. Such is undoubtedly the general rule, but it is a rule of evidence rather than of property. The question whether in such cases title passes is, in the ultimate, one of intention. The delivery of goods by a consignor to a carrier for shipment to a consignee, without other circumstances indicating a contrary intention, is held to pass title to the latter; but the almost universal holding of the courts is that a shipment by a seller to himself as consignee, of goods intended for another, is in the lack of evidence of a contrary intention, a reservation of title to himself.

63. Armstrong *v.* Coyne, 64 Kan. 75, 67 Pac. 537, 538; Willman Mercantile Co. *v.* Fussy, 15 Mont. 511, 39 Pac. 738, 48 Am. St. Rep. 698.

"If the vendor, when shipping, takes the bill of lading in his own name, this fact, when not rebutted by evidence to the contrary, is very strong proof of the intention of the vendor to reserve title in himself, and is almost decisive to prove the vendor's intention to retain the *jus dispossendi* of the property, and to prevent the delivery of the same to the vendee." Willman Mercantile Co. *v.* Fussy, 15 Mont. 511, 39 Pac. 738, 48 Am. St. Rep. 698.

64. Willman Mercantile Co. *v.* Fussy, 15 Mont. 511, 39 Pac. 738, 48 Am. St. Rep. 698; Missouri Pac. R. Co. *v.* Law, 57 Neb. 559, 78 N. W. 291; Bank of Litchfield *v.* Elliott, 83 Minn. 469, 86 N. W. 454.

"**That the Goods Were Shipped to the Order of the Consignor,** as evidenced by the bill of lading, was presumptive or almost conclusive of the fact of the continued title or ownership in the shipper, but it is competent and allowable to show the contrary." Missouri Pac. R. Co. *v.* Law, 57 Neb. 559, 78 N. W. 291. See also Gates *v.* Chicago, B. & Q. R. Co., 42 Neb. 379, 60 N. W. 583; Union Stock Yards Co. *v.* Westcott, 47 Neb. 300, 66 N. W. 419; Union Pac. R. Co. *v.* Johnson, 45 Neb. 57, 63 N. W. 144; Neimeyer Lumb. Co. *v.* Burlington & M. R. Co., 54 Neb. 321, 74 N. W. 670; where the court said: "Where a vendor of goods delivers them to a carrier for transit to his vendee, and causes the goods to be consigned in the bill of lading to himself, his agent, or his order, the presumption arises that he thereby intended to retain the title in himself to the goods."

65. *United States.* — Dows *v.* National Bank, 91 U. S. 618.

Arkansas. — Berger *v.* State, 50 Ark. 20, 6 S. W. 15.

Kentucky. — Kentucky Ref. Co. *v.* Globe Ref. Co., 104 Ky. 559, 20 Ky. L. Rep. 778, 47 S. W. 602, 42 L. R. A. 353.

Massachusetts. — Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291; Alderman *v.* Eastern R. Co., 115 Mass. 233.

Missouri. — Bergeman *v.* Indianapolis & St. L. R. Co., 104 Mo. 77, 15 S. W. 992.

Nebraska. — Union Stock Yards Co. *v.* Westcott, 47 Neb. 300, 66 N. W. 419.

Wisconsin. — Doyle *v.* Roth Mfg. Co., 76 Wis. 48, 44 N. W. 1100.

In Kentucky Ref. Co. *v.* Globe Ref. Co., 104 Ky. 559, 20 Ky. L. Rep. 778, the evidence showed that a consignor of personal property drew on the con-

I. Delivery When No Time Is Specified. — When the contract is silent as to the time of delivery, the law presumes that the delivery will be made in a reasonable time,[66] and what is evidence of delivery within a reasonable time, depends upon the nature of the article sold, the usual course of the particular business and all the other relevant circumstances,[67] and is a question for the jury.[68]

J. Proof of Immediate Delivery. — Where the contract of sale calls for "immediate delivery" of the article sold, it is sufficient if the evidence shows delivery within a reasonable time in the usual course of the business in hand.[69]

signee for the agreed purchase price 47 S. W. 602, 42 L. R. A. 353, where with a bill of lading attached, upon which was indorsed, "On payment of attached draft, deliver to Globe Refining Co.," and signed by the consignor, it was held that the title to the property did not pass until the draft was paid, and that the plaintiff in an action for damages against the consignor who attached the property before payment of the draft acquired a valid lien, which was not defeated by subsequent payment of the draft.

In Doyle *v.* Roth Mfg. Co., 76 Wis. 48, 44 N. W. 1100, by a contract of sale goods were to be shipped to Milwaukee and to be paid for by draft at five days sight after their receipt by the vendee, and the vendors took the bill of lading in their own names as consignees, indorsed it in blank, and sent it to their agents with instructions to deliver it to the vendor only upon payment of the draft. No notice was given defendants of the arrival of the goods. The bank telephoned defendant four different times that the draft was in possession of the bank. This action was brought upon defendants' refusal to accept the draft. The court, in holding that there was no delivery of the goods to defendants, said: "Under (the) contract it is very clear to us that the plaintiffs were bound to show that the goods had been delivered by them to the defendant, either at the point of shipment or at Milwaukee, in such manner that the defendants could lawfully demand them of the transportation company at Milwaukee, before the plaintiffs could demand of the defendants that they should accept the draft for the purchase price. . . . In the case at bar, there is not only no evidence tending to show that plaintiffs intended to part with their property, but on the contrary, when they shipped them on the cars, the evidence shows that they intended to retain the title and right of disposition."

66. Walker *v.* Taylor, 4 Penne. (Del.) 118, 53 Atl. 357, was an action for the recovery of damages for the breach of a written agreement for the sale and delivery among other things of sixty butter tubs belonging to the defendant's creamery, and sold to the plaintiff. No time for the delivery was specified in the contract. The court in charging the jury with reference to a reasonable time for the delivery said: "What is such reasonable time may be determined by the nature of the article sold, usual course of the particular business or trade, and other circumstances relevant to the time of delivery as shown by the evidence."

67. Walker *v.* Taylor, 4 Penne. (Del.) 118, 53 Atl. 357.

68. Blalock *v.* Clark, 137 N. C. 140, 49 S. E. 88, holding that where a contract for the sale of cotton is silent as to time of delivery, the buyer has a reasonable time in which to demand it, and what is a reasonable time is for the jury.

69. Inman *v.* Barnum, 115 Ga. 117, 41 S. E. 244; Shull *v.* New Birdsall Co., 15 S. D. 8, 86 N. W. 654.

In Inman *v.* Barnum, 115 Ga. 117, 41 S. E. 244, the court said: "The word 'immediately,' in such an order or contract, must be construed according to the nature of the goods, whether they are kept in stock or to be manufactured, and in the light of the circumstances of the case gen-

K. Not Necessary to Show Manual Possession. — On the question of delivery, it is not necessary that the evidence show that the buyer actually took the property into manual possession.[70] Proof of constructive delivery is sufficient,[71] and what is sufficient evidence of constructive delivery will depend upon the facts and circumstances of the case.[72] Thus, the execution, acknowledg-

erally. The judge also charged the jury that if Inman & Co. believed that the goods were kept in stock and could be shipped at once, and the terms of the order were sufficient to put the plaintiff on notice of that belief, then Barnum be bound by the terms of the order; but that if the defendants subsequently ascertained that the goods had to be manufactured and the delivery delayed, then the law imposed upon them the duty of *rescinding within a reasonable* time, and a failure to do so waived the right of rescission. We think this charge was correct and applicable to the facts in the case."

70. Long *v.* Knapp, 54 Pa. St. 514; Douglass *v.* Garrett, 5 Wis. 85; Whittle *v.* Phelps, 181 Mass. 317, 63 N. E. 907; Parry *v.* Libbey, 166 Mass. 112, 44 N. E. 124; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74.

In Whittle *v.* Phelps, 181 Mass. 317, 63 N. E. 907, the plaintiff bought certain brick purporting to be about two hundred thousand and received a bill of sale from the vendor therefor and described as "two hundred thousand bricks, more or less as desired . . . to be shipped from the northerly end of kiln No. 3, consisting of the first ten arches, located in the southerly end of the kiln shed." The evidence showed that at the time of the execution of the bill of sale the plaintiff supposed he was buying merchantable brick ready for delivery; that it was agreed plaintiff should go and take possession of the brick the following week; that he went to the brickyard as agreed and there were nine and a half or ten arches of brick set up, but not burned; that Bailey, the vendor, put his hand on the arches on the southerly end of the kiln and said: "These are your brick. Here are nine and one-half arches, and there should be ten arches, which they are drawing at the present time;" that plaintiff said he would not be able to take the brick until the following spring, and Bailey said he would let the bricks lie there as long as he pleased; that plaintiff did not go for the brick until the following April. It also appeared that Bailey afterwards made a mortgage to the defendant of the personal property in the brick yard, which included the brick in question, and leased the premises to him for a year; that he told defendant he had sold 200,000 bricks to plaintiff; that more arches were set up and added to those there and all were burned by defendants. This suit was brought by plaintiff to replevy the bricks purchased from Bailey. *Held*, that "upon this evidence we think that it was competent for the judge to find that there was a sale and delivery to the plaintiff of the bricks that were replevied. . . . It was sufficient if the delivery was such as the nature of the property admitted of. . . . Assuming that only merchantable brick was to be paid for, there was nothing in the circumstance to prevent the judge from finding that there was a sale and delivery of the nine and a half arches."

71. Blumenthal *v.* Greenberg, 130 Cal. 384, 62 Pac. 599, where the court held that under a contract for the sale of personal property to the vendees as partners, evidence of a delivery to one of the partners is a delivery to both, and that parol evidence is admissible to show that at the time of the sale the vendees stated, in the presence of the vendor and of each other, that they were partners.

72. Glauber Mfg. Co. *v.* Voter, 70 N. H. 332, 47 Atl. 612; Tift *v.* Wight & Weslosky Co., 113 Ga. 681, 39 S. E. 503; Sawyer Medicine Co. *v.* Johnson, 178 Mass. 374, 59 N. E. 1022.

In Glauber Mfg. Co. *v.* Voter, 70

ment and recordation of a bill of sale show a delivery of the goods.[73]

N. H. 332, 47 Atl. 612, evidence was submitted tending to show that in response to an order for the merchandise sued for in this case, the plaintiffs delivered the goods to a common carrier, addressed to the defendants, and the court held that such delivery was a compliance with the contract of sale and a delivery to the defendants.

In Sawyer Medicine Co. *v.* Johnson, 178 Mass. 374, 39 N. E. 1022, the defendant ordered goods to be shipped "direct prepaid freight and await billing." The plaintiff shipped the goods, properly marked with defendant's name and place of business, and received a temporary receipt therefor from the railroad company in his own name, and prepaid the freight, the receipt reciting that it was to be surrendered in exchange for the carrier's bill of lading; that the receipt was given up and no bill of lading was ever sent by plaintiff to defendants; that the evidence showed that upon the arrival of the goods in due time the defendant received a notice from the railroad company announcing the fact and afterwards they received a second notice, but never called for the goods. *Held*, that a delivery to common carrier according to the instructions in the order was a delivery to the defendant, and that the plaintiff could maintain an action for goods sold and delivered.

Proof that a customer of a merchant agreed to purchase a certain quantity of seed oats, then in the house of the merchant, at a given price, and that the oats were weighed, set aside, and the customer's name placed on them and the same charged to him, under an agreement that this should be done, and that the customer should subsequently send and get them, is sufficient, in the absence of anything to the contrary, to establish a complete sale of the oats by constructive delivery. Tift *v.* Wight & Weslosky Co., 113 Ga. 681, 39 S. E. 503.

73. Highlander *v.* Fluke, 5 Mart. (La.) 442; Gibson *v.* Stevens, 8 How. (U. S.) 384; Cocke *v.* Chapman, 7 Ark. 197, 44 Am. Dec. 536; Southworth *v.* Sebring, 2 Hill, L. (S. C.) 587; Buffington *v.* Curtis, 15 Mass. 527, 8 Am. Dec. 115; Williams *v.* Walton, 8 Yerg. (Tenn.) 387, 29 Am. Dec. 122; Dempsey *v.* Gardner, 127 Mass. 381, 34 Am. Rep. 389.

Where personal property left in the custody of a warehouseman as bailee is incapable of actual delivery at the time of its sale, the indorsement and delivery of the warehouse receipts and documents is sufficient evidence of the transfer of the legal title and constructive possession of the property. "The delivery of the evidences of title and the orders indorsed upon them were equivalent, in the then situation of the property, to the delivery of the property itself. . . . A ship at sea may be transferred to a purchaser by the delivery of a bill of sale. So also as to the cargo, by the indorsement and delivery of the bill of lading." Gibson *v.* Stevens, 8 How. (U. S.) 384.

Where possession of the thing sold cannot be actually given, a symbolical delivery — such as the delivery of the bill of sale — is sufficient evidence of the sale and is equivalent to the delivery of the thing itself. Cocke *v.* Chapman, 7 Ark. 197, 44 Am. Dec. 536.

In Buffington *v.* Curtis, 15 Mass. 527, 8 Am. Dec. 115, it was shown that the plaintiffs applied to one Woods, in whom defendants claimed the title of the brig to be, for a bill of sale of three-quarters of the brig, in conformity with a previous agreement; that he then declined giving the bill of sale, saying he had not a copy of the register necessary to be inserted therein, and that he had not come to a resolution to make such bill of sale, but that if, on his return to his home he should conclude to comply with their request he would make the bill of sale and deliver it to the collector of the customs at the port Wiscasset for their use and benefit; that the day after the arrival of the brig at said port he made such bill of sale and delivered it to the collector; the defendants, as deputy sheriffs, attached

So, where the parties to a contract of sale treat the property as having passed to and become the property of the buyer, this will be considered evidence of constructive delivery,[74] though the property may not have gone into the actual possession of the purchaser.[75]

L. No Particular Character of Evidence Required to Prove Delivery. — a. *Generally.* — On the question of the delivery of

the brig two days thereafter and before the bill of sale was in the possession of plaintiff, claiming the collector had no authority from plaintiffs to receive the bill of sale. The court held, "the delivery to the collector, for the plaintiffs, and the acceptance of it by them, as soon as possible after they were informed that it was so delivered, was sufficient to complete the transfer; one of the plaintiffs having taken possession as soon as it was practicable after the arrival of the vessel;" that the transfer took place on the delivery of the bill of sale to the collector, two days before the attachment.

74. *United States.* — Barrett *v.* Goddard, 3 Mason 107, 2 Fed. Cas. No. 1,046.

Kansas. — Richey *v.* Shinkle, 36 Kan. 516, 13 Pac. 795.

Maine. — Phillips *v.* Moor, 71 Me. 78.

Massachusetts. — Chapman *v.* Searle, 20 Mass. 38; Ingalls *v.* Herrick, 108 Mass. 351, 11 Am. Rep. 360.

Missouri. — Roth *v.* Continental Wire Co., 94 Mo. App. 236, 68 S. W. 594.

New York. — Shindler *v.* Houston, 1 Denio 48; McCready *v.* Wright, 5 Duer 571; Meyers *v.* Davis, 26 Barb. 367.

Compare Parker *v.* Byrnes, 18 Fed. Cas. No. 10,728, *overruling* Barrett *v.* Goddard, *supra.*

In McCready *v.* Wright, 5 Duer (N. Y.) 571, where the evidence showed that the quantity of grain sold had been ascertained by measurement according to the custom of the port, and that the purchaser had an order for the delivery of the grain, upon the storekeeper, in whose custody it was, it was held that evidence of the delivery, so far as the seller is concerned, was complete.

In Roth *v.* Continental Wire Co., 94 Mo. App. 236, 68 S. W. 594, where both parties understood that certain machinery was ready for actual delivery, and the only reason why an actual delivery of it had not been made was because the purchaser had not signified that he was ready to receive it, it was held proper to show, in an action for the purchase price, that constructive delivery had been made within the period fixed by the contract.

75. *Illinois.* — May *v.* Tallman, 20 Ill. 443; Hart *v.* Wing, 44 Ill. 141.

Kansas. — Richey *v.* Shinkle, 36 Kan. 516, 13 Pac. 795.

Maine. — Means *v.* Williamson, 37 Me. 556; Phillips *v.* Moor, 71 Me. 78.

Massachusetts. — Ingalls *v.* Herrick, 108 Mass. 351, 11 Am. Rep. 360.

Missouri. — Roth *v.* Continental Wire Co., 94 Mo. App. 236, 68 S. W. 594.

New York. — Meyers *v.* Davis, 26 Barb. 367.

In May *v.* Tallman, 20 Ill. 443, evidence tending to prove that an offer was made by the seller of a crib of corn on certain terms, which after consultation were accepted by the purchaser, who took two loads of the corn away without objection, was held to be a good transfer of title, the court further saying: "Where a strict delivery is necessary to protect the purchaser, an actual removal of the entire mass of a cumbrous article, like a crib of corn, is not necessary to constitute a delivery and change of possession."

In Phillips *v.* Moor, 71 Me. 78, the evidence showed that the defendant wrote to plaintiff's guardian and offered a certain sum per ton for a quantity of hay in plaintiff's barn, which offer was accepted in writing six days thereafter by mailing a postal to defendant, which was received the same day or the next morning, and defendant made no reply; that three days thereafter the hay was burned. The court held the

goods, no particular character of evidence is required.[76] Whatever facts tend to show delivery,[77] or bear on the question, are admissible in evidence.[78]

b. *Illustrations.* (1.) Thus, marking shingles with the initials of the purchaser under a bill of sale for a specified quantity out of a larger mass, is evidence of delivery to be received by the jury.[79]

(2.) So evidence that a person who saw an unfinished piano in the shop of the maker offered to purchase it of him, if he would finish it, that the offer was then and there accepted, and a bill of sale made, the price fixed at a subsequent day and the piano left in

title passed upon plaintiff's acceptance of defendant's offer, and the latter having failed to retract his offer after plaintiff's acceptance, such acceptance was held to be seasonable, and that notwithstanding the fact that no delivery had been made of the hay, the terms of the sale had been agreed upon and the bargain struck, and everything the seller had to do was complete, and he having authorized the buyer to take it, the contract of sale became absolute without actual payment or delivery.

76. Thompson *v.* Brannin, 94 Ky. 490, 21 S. W. 1057; Putnam *v.* Tillotson, 54 Mass. 517; Lance *v.* Pearce, 101 Ind. 595; Greenleaf *v.* Hamilton, 94 Me. 118, 46 Atl. 798; Houdlette *v.* Tallman, 14 Me. 490.

In Lance *v.* Pearce, 101 Ind. 595, it was held that to recover the value of goods sold and delivered, the delivery need not necessarily be proved by direct evidence, but it may, like any other fact, be inferred from circumstances.

In Greenleaf *v.* Hamilton, 94 Me. 118, 46 Atl. 798, the court said: "Delivery and acceptance are questions of fact and are to be proved as other facts may be proved. They may be established by direct testimony or may be inferred from circumstances proved in the case. . . . The acts of the purchaser, or his failure to act, may be properly considered upon the question of delivery and acceptance."

77. Stern *v.* Frommer, 10 Misc. 219, 30 N. Y. Supp. 1067; Carpenter *v.* Tucker, 98 N. C. 316, 3 S. E. 831.

Bills of Lading as Evidence. — In an action by a seller for the recovery of the price of goods sold, the bills of lading made out for said goods are admissible in evidence as part of the transaction. O'Brien *v.* Higley, 162 Ind. 316, 70 N. E. 242.

78. Shumway *v.* Rutter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340; Hoguet *v.* Mommer, 78 Hun 459, 29 N. Y. Supp. 146; Gibson *v.* Chicago Pack. & Prov. Co., 108 Ill. App. 100.

In Shumway *v.* Rutter, 8 Pick, (Mass.) 443, 19 Am. Dec. 340, the evidence tended to show that the furniture in a tavern was sold and the vendee took a lease on the house and went there to live and permitted the vendor, who had previously occupied the place under a lease, to remain there and run the tavern, that the vendor afterwards moved to another house and took the furniture with him, using it as his own and it was attached as his property. *Held*, that the evidence of the entry of the vendee was sufficient to prove a delivery and possession; and "whether there is a formal delivery or not, if the vendee obtains possession by consent of the vendor, before any attachment or second sale, the transfer is complete."

Where a sale of potatoes has been made without a distinct warranty that they should be of the kind and quality ordered, and the evidence shows their acceptance by the vendee, after an opportunity for inspection, the vendee is estopped from claiming damages for alleged defects therein. Williams *v.* Robb, 104 Mich. 242, 62 N. W. 352.

79. Jewett *v.* Lincoln, 14 Me. 116, 31 Am. Dec. 36.

the shop to be finished, will authorize a jury in finding a delivery of the piano.[80]

M. Delivery Subject to Inspection and Acceptance. — If a sale of property contemplates a delivery subject to inspection and acceptance, there can be no recovery for the contract price unless the evidence shows an inspection and acceptance,[81] or a reasonable opportunity therefor.[82]

N. Buyer's Acceptance of Goods. — a. *Generally.* — When the seller's right to recover the contract price of the goods sold depends upon the buyer's acceptance of them, such acceptance may be shown by any act of the buyer indicating that he regards the property as his own.[83]

b. *Illustrations.* (1.) Thus, where a purchaser of goods sold a part of them before he discovered that they were not suitable for the purpose for which they were ordered, he thereby accepted them.[84]

(2.) So a party to whom a corn harvester was delivered on a contract that if it worked well he should keep it, and pay for it, ac-

80. Thorndike *v.* Bath, 114 Mass. 116, 19 Am. Rep. 318.

81. Black River Lumb. Co. *v.* Warner, 93 Mo. 374, 6 S. W. 210; Monitor Milk Pan Co. *v.* Remington, 41 Hun (N. Y.) 218; Hutches *v.* Case Thresh. Mach. Co. (Tex. Civ. App.), 35 S. W. 60.

82. Barker *v.* Turnbull, 51 Ill. App. 226; Williams *v.* Robb, 104 Mich. 242, 62 N. W. 352; McCormick *v.* Sarson, 45 N. Y. 265, 6 Am. Rep. 80.

83. *Georgia.* — Butler *v.* Lawshe, 74 Ga. 352; Georgia Ref. Co. *v.* Augusta Oil Co., 74 Ga. 497.

Iowa. — Leggett & Myers Tobacco Co. *v.* Collier, 89 Iowa 144, 56 N. W. 417; Inman Mfg. Co. *v.* American Cereal Co., 124 Iowa 737, 100 N. W. 860.

Massachusetts. — Rodman *v.* Guilford, 112 Mass. 405.

Missouri. — Nugent *v.* Armour Pack. Co. (Mo. App.), 81 S. W. 506.

Nebraska. — Burchan *v.* Griffeth, 31 Neb. 778, 48 N. W. 824.

New York. — Doerr *v.* Woolsey, 15 Daly 284, 5 N. Y. Supp. 447.

Oregon. — Lenz *v.* Blake, 44 Or. 569, 76 Pac. 356.

In Georgia Ref. Co. *v.* Augusta Oil Co., 74 Ga. 497, where the buyer agreed to take all the oil manufactured during the season and receive it at the seller's warehouse in parcels, and did receive some parcels, and then refused the balance when tendered in good quality and quantity according to the contract, it was held that evidence that the buyer, after testing the oil, made no objection to it, but continued to exercise ownership over it, such as insuring it or offering to mortgage, amounted to an acceptance of the contract price.

In Butler *v.* Lawshe, 74 Ga. 352, where the evidence showed an iron press was sent by the vendor to the purchasers by a drayman, and the purchasers, or one of them, told the drayman where to deposit it in their yard, which was done, it was held that this amounted to a delivery and reception of the property.

In Rodman *v.* Guilford, 112 Mass. 405, the defendants entered into an agreement whereby they promised to pay the plaintiff ten cents a pound for perfect rosewood cut into pieces of a certain shape and size. It was shown that plaintiff furnished 333 pounds, out of which defendants found 176 pounds to be perfect and had same set apart. *Held,* that the setting aside of the 176 pounds of perfect rosewood amounted to an acceptance thereof, and plaintiff could recover therefor.

84. Lenz *v.* Blake, 44 Or. 569, 76 Pac. 356; Inman Mfg. Co. *v.* American Cereal Co., 124 Iowa 737, 100 N. W. 860.

cepts it by loaning it to another for use, such other person using it without the knowledge or consent of the seller.[85]

O. Character of Evidence of Delivery and Acceptance. When the seller sues for the price of goods, their delivery and acceptance are questions of fact, to be proved as other facts,[86] and they may be established by direct,[87] or circumstantial evidence.[88]

P. Acts of Purchaser as Evidence of Acceptance. — In an action on a contract of sale when the controversy involves the acceptance of the goods sold, the acts of the purchaser,[89] or his failure to act may be considered as evidence.[90]

Q. Burden of Excusing Failure to Deliver. — When a failure to deliver goods as agreed is shown, the burden of proving a legitimate excuse for such failure is upon the seller.[91]

R. Evidence of Usage as to Place of Delivery. — When in an action for the price of property sold, it becomes a question at which one of two points the property was to be delivered under the contract, evidence of a custom to deliver at one of these points is not admissible.[92]

85. Hensen *v.* Beebe, 111 Iowa 534, 82 N. W. 942.

86. Greenleaf *v.* Hamilton, 94 Me. 118, 46 Atl. 798; Byer *v.* Entyre & Besore, 2 Gill (Md.) 150, 41 Am. Dec. 410; Hall & Loney *v.* Richardson, 16 Md. 397, 77 Am. Dec. 303; Shumway *v.* Rutter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340; Wilson *v.* Hooper, 12 Vt. 653, 36 Am. Dec. 366; Walden *v.* Murdock, 23 Cal. 540, 83 Am. Dec. 135.

87. Greenleaf *v.* Hamilton, 94 Me. 118, 46 Atl. 798.

88. Greenleaf *v.* Hamilton, 94 Me. 118, 46 Atl. 798.

89. Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640; Greenleaf *v.* Hamilton, 94 Me. 118, 46 Atl. 798.

An action against a customer, as for an article sold and delivered, cannot be maintained by a manufacturer unless there is proof of an acceptance or of acts or words respecting it, from which an acceptance may be inferred. Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640.

90. Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640; Greenleaf *v.* Hamilton, 94 Me. 118, 46 Atl. 798.

91. Speer *v.* Cowles, 72 N. C. 265; Raisin Fertilizer Co. *v.* Barrow Jr. Co., 97 Ala. 694, 12 So. 388.

Burden of Proof. — In Smokeless Fuel Co. *v.* Seaton, 105 Va. 170, 52 S. E. 829, the action was to recover damages for a breach of contract to furnish coal by the defendants. The contract was in writing and provided that the defendants should use every effort possible towards completing the contract in a satisfactory manner, but that it was taken subject to strikes, accidents, shortage of cars, or any other cause beyond the control of said party of the first part. It was attempted to be shown that it was precluded from complying with the terms of this contract by reason of strikes, and the court instructed the jury that the burden of proof was upon the defendants to show that they were prevented from fulfilling their contract by reason of strikes, shortage of cars, or other causes beyond their control; and this action of the court below was sustained by the court of appeals of Virginia.

Where a defendant agrees to deliver certain goods, with a proviso that the agreement shall be void, in either of two events, such condition is a subsequent one, and on the trial it is incumbent on the defendant to show that at least one of the events, which was to avoid the agreement, had occurred. Speer *v.* Cowles, 72 N. C. 265.

92. Williams *v.* Ninemire, 23 Wash. 393, 63 Pac. 534; Vollrath *v.* Crowe, 9 Wash. 374, 37 Pac. 474.

S. Conflict in Evidence of Acceptance. — When a conflict arises in the evidence on a question of acceptance, the matter should be submitted to the jury for its determination.[93]

T. Proof of Price of Goods Sold. — As the price to be paid for

In an action for the price of cattle sold by plaintiff to defendants, in which plaintiff alleges a contract for delivery at one point, and the defendants allege delivery was to be made at another point, where it was agreed the cattle were to be weighed, evidence of a custom is inadmissible for the purpose of showing that where cattle were sold to be weighed at a designated point, title to the cattle was considered as not passing to the buyer until they had been weighed, since the pleadings show that the point of delivery was a matter of express contract between the parties. Williams *v.* Ninemire, 23 Wash. 393, 63 Pac. 534.

In Vollrath *v.* Crowe, 9 Wash. 374, 37 Pac. 474, the court held that where a definite contract had been made, and the controversy is not as to the meaning of the terms used by the parties, but as to what precise terms had in fact been used, evidence of custom is not admissible.

93. Smith *v.* Friend, 15 Cal. 124; Thomas *v.* Degraffenreid, 17 Ala. 602; Wood *v.* Roach, 52 Ill. App. 388; Byer *v.* Entyre & Besore, 2 Gill (Md.) 150, 41 Am. Dec. 410; Gibbons *v.* Robinson, 63 Mich. 146, 29 N. W. 533; Jones *v.* Hook, 47 Mo. 329; Weld *v.* Came, 98 Mass. 152.

In Smith *v.* Friend, 15 Cal. 124, the plaintiff contracted to sell to defendant sixty tons of baled hay at $18 per ton and have the same piled up in the corral. By mistake there were sixty-two tons, four hundred and thirty pounds, baled and piled up. Plaintiff went to defendant's house and informed him the hay was baled and piled up and advised him as to the excess and asked defendant if he would take the excess, to which defendant replied that he would be over soon and see about the excess, and then paid plaintiff $200. The hay was burned a few days after the payment of the $200 and plaintiff brough suit for the balance due. The trial court instructed the jury that if they believed from the evidence that it was the understanding of the parties that the right and possession was deemed to have accrued to defendant to take the hay as stacked and piled in the corral, upon the payment of the $200 by defendant, the plaintiff was entitled to recover, notwithstanding the fact that the bargain was not concluded as to the excess. *Held*, the court did not err in giving the instruction, the question being whether there had been a delivery, and any agreement between the parties on the subject was a legitimate matter for the jury. The fact that the hay purchased by the defendant was mixed with other hay belonging to plaintiff made no difference, if the defendant agreed to accept it in that condition and consider it delivered, the contract for delivery must be considered as executed.

In the sale of personal property, where there is any conflict of testimony, questions as to whether the vendor intended by the bill of sale to vest immediate title in the vendee, and whether there was a delivery to and subsequent possession by the vendee, are issues which under proper instructions, should be submitted to the jury. Jones *v.* Hook, 47 Mo. 329.

In Weld *v.* Came, 98 Mass. 152, an action to recover the price paid for a table, there was evidence that the defendants contracted to make and deliver the table in their wharf, packed and ready for shipment. Plaintiffs were notified that the table was ready, and defendants proposed to dispose of it, but to this plaintiffs objected and paid for it according to the contract, and plaintiffs stated that they would advise defendants when they had a vessel ready to receive it, to which defendants made no objection, and the table was accidentally burned while in their possession. *Held*, that the question as to whether the property had passed to the plaintiffs should have been left to the jury.

the goods is always an element of the sale,[94] it not infrequently becomes a question as to what the price actually was.[95] In such case everything materially bearing on such question is admissible as evidence.[96] Thus, where the plaintiff had contracted to sell glass to the defendant during a season, at prices dependent on those to be fixed by the A. Glass Company, circular letters purporting to be addressed by such company to its customers, shown to be the means by which it informed its customers of its prices, received in the regular course of business, and recognized and acted upon by such company, are admissible as evidence in an action for the price of glass sold by the plaintiff to the defendant.[97]

U. Proof of Price in Absence of Stipulation. — When goods are furnished, in the absence of a stipulated price in the contract of sale, evidence of the market value of goods of the character of those sold is proper.[98] Evidence of market value must relate to the place

94. *United States.* — Harper *v.* Dougherty, 2 Cranch C. C. 284, 11 Fed. Cas. No. 6,087.

Louisiana. — Holmes *v.* Patterson, 5 Mart. 693; Rhodes *v.* Rhodes, 10 La. 85; D'Orgenoy *v.* Droz, 13 La. 382; Conway *v.* Bordier, 6 La. 346; Tierman *v.* Martin, 2 Rob. 523; Gorham *v.* Hayden, 6 Rob. 450; Fort *v.* Union Bank, 11 La. Ann. 708; Wise *v.* Guthrie, 11 La. Ann. 91.

In Wise *v.* Guthrie, 11 La. Ann. 91, it was held that in a sale it is essential that the price should be certain, that is to say, fixed and determined between the parties, either by themselves or by the intervention of a third person; otherwise there exists no sale.

95. Fear *v.* Jones, 6 Iowa 169; Salm *v.* Israel, 74 Iowa 314, 37 N. W. 387; Woods *v.* Cramer, 34 S. C. 508, 13 S. E. 660; Falvey *v.* Richmond, 87 Ga. 99, 13 S. E. 261.

96. *Alabama.* — Anniston Lime & Coal Co. *v.* Lewis, 107 Ala. 535, 18 So. 326.

California. — Llewellyn Steam Condenser Co. *v.* Malter, 76 Cal. 242, 18 Pac. 271.

Indiana. — Diether *v.* Ferguson Lumb. Co., 9 Ind. App. 173, 35 N. E. 843, 36 N. E. 765.

Minnesota. — Miller *v.* Lamb, 22 Minn. 43; Kumler *v.* Ferguson, 7 Minn. 351; Schwerin *v.* De Graff, 21 Minn. 354.

Nebraska. — Fry *v.* Tilton, 11 Neb. 456, 9 N. W. 638.

Wisconsin. — Bell *v.* Radford, 72 Wis. 402, 39 N. W. 482.

97. Matthews Glass Co. *v.* Burk, 162 Ind. 608, 70 N. E. 371.

98. Green *v.* Smith, 52 Ill. App. 158; Lent *v.* Hodgman, 15 Barb. (N. Y.) 274; Burr *v.* Williams, 23 Ark. 244; McEwen *v.* Morey, 60 Ill. 32.

Price Paid by Vendor. — When the action is by the vendor for breach of contract to purchase grain, evidence of the price paid by the vendor is immaterial on the question of damages. Kadish *v.* Young, 108 Ill. 170, 48 Am. Rep. 548.

But evidence of the price stipulated to be paid for an article by the terms of a contract of sale deliberately and in good faith entered into, and so far completed that nothing remains to be done to pass the property but the payment of the purchase money, is competent to be considered on the question of the value of such article. Ferguson *v.* Clifford, 37 N. H. 86.

Price Brought on Re-sale. — Where a seller sued for a breach of a contract to purchase, the price brought at a re-sale, upon notice to the original buyer, may be shown as determining the market value. Rickey *v.* Tenbroeck, 63 Mo. 563.

What Owner Would Take for Property. — What the owner would take for his property, or what it would cost to replace it, can be shown as proof of its value. Watts *v.* Nevada Cent. R. Co., 23 Nev. 154, 44

of delivery, when this is possible,[99] and not elsewhere,[1] nor to a place where there is no market value of the kind of property sold.[2] If there be no market value for the goods at the contractual point of delivery, then the actual value at such place may be ascertained by evidence of the market value at the nearest convenient point where such goods are bought and sold, with the cost of transportation added or deducted, as the case may require.[3]

Pac. 423, 46 Pac. 52, 726, 62 L. R. A. 772.

99. Burr *v.* Williams, 23 Ark. 244; McEwen *v.* Morey, 60 Ill. 32.

Upon an agreement to sell and deliver corn, where there is no evidence as to the price agreed upon, the law fixes the prices at the market value at the time of its delivery. Burr *v.* Williams, 23 Ark. 244.

In McEwen *v.* Morey, 60 Ill. 32, a suit brought to recover for a quantity of corn, it was shown by the evidence that one party said to another that when he got ready to shell his corn, to haul it to his warehouse and he would make it satisfactory as to price, and the corn was hauled and delivered at the warehouse. *Held*, the law implied a contract to pay the market price at the time and place of delivery, for which a recovery might be had.

1. Specialty Furniture Co. *v.* Kingsbury (Tex. Civ. App.), 60 S. W. 1030.

2. In Specialty Fur. Co. *v.* Kingsbury (Tex. Civ. App.), 60 S. W. 1030, a suit for breach of contract for the sale of certain personal property, it was held that the court erred in admitting testimony of the market value of the goods at the time of the breach at the place to which they were to be shipped, it having been shown that the goods could not have been purchased at such place at any price and that the measure of damages should have been the difference between the market value and contract price at the place of delivery at the time of the breach.

3. *United States.* — Grand Tower Co. *v.* Phillips, 23 Wall. 471.

Indiana. — Vickery *v.* McCormick, 117 Ind. 594, 20 N. E. 495.

Maine. — Gardiner Lumb. Co. *v.* Bradstreet, 97 Me. 165, 53 Atl. 1110; Furlong *v.* Polleys, 30 Me. 491, 50 Am. Dec. 635; Berry *v.* Dwinel, 44 Me. 255.

Minnesota. — Baine *v.* Sherwood, 21 Minn. 225.

Missouri. — Cobb *v.* Whitsett, 51 Mo. App. 146.

New Hampshire. — Stevens *v.* Lyford, 7 N. H. 360.

New York. — O'Gara *v.* Ellsworth, 85 App. Div. 216, 83 N. Y. Supp. 120; Gregory *v.* McDowell, 8 Wend. 435.

Tennessee. — McDonald *v.* Unaka Timber Co., 88 Tenn. 38, 12 S. W. 420.

A company having coal mines at a place on the Mississippi, eighty miles above Cairo, agreed to deliver 150,000 tons of coal, the product of its mines, to P. & S. at $3.00 a ton during the year 1870, in equal daily proportions between the 15th of February and the 15th of December, that is to say, 15,000 tons each month. There was no other market at the place for the purchase of coal but that of the company itself. Coal rose greatly in value, that is to say, from about $3.00 to $9.00 per ton, and without fault of P. & S. The company failed to deliver the quota due in October and also in November. *Held*, that the measure of damages sustained (in view of the fact that there was no market for the purchase of coal at the place of delivery but that of the company itself) was the price P. & S. would have had to pay for coal of the sort in the quantities in which they were entitled to receive it from the company under the contract, at the nearest available place where it could have been obtained. Grand Tower Co. *v.* Phillips, 23 Wall. (U. S.) 471.

If the market value at the place of delivery be incapable of direct proof, it may be shown indirectly by proof of market value of the com-

V. What Evidence Admissible to Prove Market Value. The market value of goods sold may be proved by witnesses who have a competent knowledge of such matter,[4] or it may be shown, where there is a refusal by the vendee to accept the goods, by evi-

modity involved, at other and accessible points, where transactions of like magnitude had, or could reasonably have, occurred, the cost of the transportation being deducted from the latter figure. McDonald *v.* Unaka Timber Co., 88 Tenn. 38, 12 S. W. 420.

Upon a breach of a contract for the delivery of lumber, the party is entitled to recover the difference between the value of the lumber at the place where it was to be delivered, and the sum to be paid; and in order to ascertain such value, the market value of such lumber at markets to which lumber is usually sent from the place of delivery, may be given in evidence, with evidence of the expense of transportation, as one of the means of ascertaining the true value. Stevens *v.* Lyford, 7 N. H. 360.

4. *Alabama.* — American Oak Extract Co. *v.* Ryan, 112 Ala. 337, 20 So. 644.

California. — Grunwald *v.* Freese, 34 Pac. 73.

Colorado. — Smith *v.* Jensen, 13 Colo. 213, 23 Pac. 434.

Florida. — Sullivan *v.* Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388.

Iowa. — Leek *v.* Chesley, 98 Iowa 593, 67 N. W. 580.

Kansas. — Reed *v.* New, 35 Kan. 727, 12 Pac. 139.

Massachusetts. — Davis *v.* Elliott, 15 Gray 90.

Michigan. — Woods *v.* Gaar, Scott & Co., 99 Mich. 301, 58 N. W. 307.

Minnesota. — Hoxsie *v.* Empire Lumb. Co., 41 Minn. 548, 43 N. W. 476.

Nebraska. — Reed Bros. & Co. *v.* R. T. Davis Milling Co., 37 Neb. 391, 55 N. W. 1068.

New York. — Joy *v.* Hopkins, 5 Denio 84; Hangen *v.* Hachemeister, 114 N. Y. 566, 21 N. E. 1046, 11 Am. St. Rep. 691, 5 L. R. A. 137.

Oklahoma. — Coyle *v.* Baum, 3 Okla. 695, 41 Pac. 389.

South Dakota. — Gleckler *v.* Slavens, 5 S. D. 364, 59 N. W. 323; Johnson *v.* Gilmore, 6 S. D. 276, 60 N. W. 1070.

Texas. — Reynolds *v.* Weinman (Tex. Civ. App.), 33 S. W. 302.

Wyoming. — Edwards *v.* Murray, 5 Wyo. 153, 38 Pac. 681.

Competency of Witness To Prove Value. — In American Oak Extract Co. *v.* Ryan, 112 Ala. 337, 20 So. 644, the action was for the recovery of the price of wood sold by the plaintiff to the defendant. To prove the value of the wood a witness was called who testified that the wood was worth so much per cord on the river bank. He stated that to cord it on the barge was worth fifteen cents per cord, and that he knew it was worth $2.50 when corded on the barge. The defendant moved to exclude this evidence on the ground of the want of sufficient knowledge on the subject to render the witness competent to testify to the value of the wood. The court stated in its opinion and so decided, that to render such testimony admissible, it was unnecessary that the witness should have been shown to possess any peculiar skill to qualify him as an expert on the subject, citing in support of this position East Tennessee, V. & G. R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813; Burks *v.* Hubbard, 69 Ala. 379; Rawles *v.* James, 49 Ala. 183.

A farmer who has been accustomed to raising, handling, buying and selling horses, in the part of the state where the action arose, is competent to testify as to the value of a pacing horse, for the possession of which he brings suit, although he resides one hundred miles distant from the place of trial and does not know that he knows the value of horses within the county, the value of such horse is not so likely to depend upon local demand. Leek *v.* Chesley, 98 Iowa 593, 67 N. W. 580.

Where a witness is shown to have been a farmer and livery stable keeper, and that he has dealt in

dence of the price of things at a resale by the seller, all reasonable efforts being used to secure the best price obtainable.[5]

7. Action by Seller for Damages. — A. Generally. — When the title to the property has not passed, the remedy of the seller is one for damages on the contract of sale, and no evidence to sustain the action is admissible unless the contract is executory,[6] and the pleadings in the case must show such contract to be executory.[7]

B. Evidence Necessary to Authorize Recovery. — It is absolutely necessary to authorize a recovery of damages by the seller in an action on a contract of sale, that he show by his evidence that he has fully complied with all terms of the contract on his part to be

horses and has some knowledge of the value thereof, he may testify with regard to the value of particular horses which he has known and owned; and it will generally be presumed, in the absence of evidence to the contrary, that a dealer in any particular kind of article has sufficient knowledge of the value of such article that he may testify with regard thereto. Reed *v.* New, 35 Kan. 727, 12 Pac. 139.

A witness who has been engaged for five years in selling threshing machines and engines, and who knows that he is possessed of a degree of knowledge upon the question of their values, is competent to testify as to what their depreciation in value would be by reason of use for one season. Woods *v.* Gaar, 99 Mich. 301, 58 N. W. 307.

A person whose business is such that by commercial reports or other like means he is familiar with the market value of an article which is the common subject of sale, is competent to testify as to its value, although he has no personal knowledge of any particular sales. Hoxsie *v.* Empire Lumb. Co., 41 Minn. 548, 43 N. W. 476.

5. Gehl *v.* Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26; Pratt *v.* Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368; Scott Lumber Co. *v.* Hafner-Lothman Mfg. Co., 91 Wis. 667, 65 N. W. 513; Gehl *v.* Milwaukee Produce Co., 105 Wis. 573, 81 N. W. 666; Davis Sulphur Ore Co. *v.* Atlantic Guano Co., 109 Ga. 607, 34 S. E. 1011; Bigelow *v.* Legg, 102 N. Y. 652, 6 N. E. 107. See authorities cited under VI, 4, D, note 59.

In Bigelow *v.* Legg, 102 N. Y. 652, 6 N. E. 107, an action to recover damages for breach of contract by the defendants in refusing to take a quantity of wool, it was held that the measure of damages is the difference between the market value of the goods at the time of the breach and the price at which the purchaser agreed to take them. The price obtained after such breach, upon a resale, within a reasonable time, though at auction, is evidence of the market value of the article, and to be allowed such weight as the circumstances of the sale entitled it to.

6. American Hide & Leather Co. *v.* Chalkley & Co., 101 Va. 458, 44 S. E. 705; Pittsburgh, C. & St. L. R. Co., 50 Ind. 303, 19 Am. Rep. 713.

In American Hide & Leather Co. *v.* Chalkley & Co., 101 Va. 458, 44 S. E. 705, an action brought on an executory contract to recover damages for a breach of the contract by the defendant in refusing to accept and pay for the goods, the court held that the proper remedy is an action of assumpsit against the buyer on a special count to recover damages for the breach of contract, and the measure of damages is the difference between the contract price of the goods and the net price which they produce at a resale, fairly made, after deducting all expenses incurred in taking care of the goods and selling them.

7. James *v.* Adams, 16 W. Va. 245; Baltimore, etc., R. Co. *v.* Lafferty, 2 W. Va. 104; Baltimore & R. Co. *v.* Polly, 14 Gratt. (Va.) 447.

performed[8] or has offered to do so;[9] that the defendant has failed to perform his part of the contract;[10] the difference between contract

8. Jones *v.* Marsh, 22 Vt. 144; Clark *v.* Fey, 51 Hun 639, 4 N. Y. Supp. 18; Shepard *v.* Weiss (Tex. Civ. App.), 28 S. W. 355; Bowman *v.* Horr, 63 Minn. 400, 65 N. W. 725; Tilton *v.* Miller, 66 Pa. St. 388, 5 Am. Rep. 373; Aldine Press *v.* Estes, 75 Mich. 100, 42 N. W. 677.

9. *United States.* — Neis *v.* Yocum, 9 Sawy. 24, 16 Fed. 168.

Alabama. — Davis *v.* Adams, 18 Ala. 264.

California. — Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288.

Idaho. — Sweetser *v.* Mellick, 4 Idaho 201, 38 Pac. 403.

Illinois. — Lassen *v.* Mitchell, 41 Ill. 101.

Indiana. — Campbell *v.* Miller, Wils. 412.

New York. — Newbery *v.* Furnival, 56 N. Y. 638.

Ohio. — Hounsford *v.* Fisher, Wright 580.

Texas. — Kelly *v.* Webb, 27 Tex. 368; Shepard *v.* Weiss (Tex. Civ. App.), 28 S. W. 355.

Vermont. — Jones *v.* Marsh, 22 Vt. 144.

Burden of Proof on Seller To Show Goods Tendered or Delivered Comply With the Contract. — In McCall Co. *v.* Jacobson, 139 Mich. 455, 102 N. W. 969, the action was for damages for a refusal to accept goods under a contract of sale. The defendant refused to accept the goods tendered by the plaintiff, and the trial court charged the jury that the burden rested upon the defendant to show that the goods tendered did not comply with the contract. On appeal to the supreme court this action of the court was held to be error. The appellate court decided that it was an essential part of the plaintiff's case to prove that the goods tendered complied with the contract, *citing* Simons *v.* Ypsilanti Paper Co., 77 Mich. 185, 43 N. W. 864; Stahelin *v.* Sowle, 87 Mich. 124, 49 N. W. 529.

In an action to recover on a contract for the sale of lumber where no time of payment and no time of delivery are stated, the delivery and payment of the purchase money are by the contract concurrent acts, and neither party can maintain an action against the other for non-performance without showing a readiness and willingness to perform on his part. Cole *v.* Swanston, 1 Cal. 51.

In Kelly *v.* Webb, 27 Tex. 368, the defendant executed his obligation to deliver to plaintiff 500 bushels of corn on or before a certain date in the future, and at the same time plaintiff made, executed and delivered to defendant his promissory note, whereby he promised to pay the defendant $250, payable on or before the date mentioned in the contract for the delivery of the corn. The evidence tended to prove that the contract between the parties was mutual and dependant, and the court held that inasmuch as the plaintiff failed to prove demand and the tender of amount due on the note he could not maintain his action, and that neither party was entitled to enforce from the other a fulfillment of the contract without a performance or offer of performance on his part.

In Neis *v.* Yocum, 9 Sawy. 24, 16 Fed. 168, where according to the contract, the defendant agreed to sell and deliver hops to the plaintiff at a certain place upon the payment of a stipulated price, the court held that the contract was mutual and dependent, and before either party could enforce this contract against the other he must show a performance or an offer to perform on his part or according to the circumstance of the case, that he was ready and willing to perform at the time and place appointed.

10. Williams Harv. Co. *v.* Pope, 69 Iowa 523, 29 N. W. 438; Hawley *v.* Mason, 39 Ky. 32, 33 Am. Dec. 522; James *v.* Adams, 16 W. Va. 245; Pancake *v.* George Campbell Co., 44 W. Va. 82, 28 S. E. 719.

In Williams Harvester Co. *v.* Pope, 69 Iowa 523, 29 N. W. 438, a suit on a contract in which it was provided that the agent should make sales "to such persons only as are known to be responsible and of good reputa-

price and the market price of the goods sold[11] at the time and place of the delivery agreed upon between the parties.[12]

tion for the payment of their debts," it was held that the agent could not recover compensation for sales made on credit to persons not shown to be such as were contemplated in the contract.

11. *Illinois.* — Murray *v.* Doud, 167 Ill. 368, 47 N. E. 717, 59 Am. St. Rep. 297.

Kansas. — Lawrence Cann. Co. *v.* Lee Mercantile Co., 5 Kan. App. 77, 48 Pac. 749.

Massachusetts. — Tufts *v.* Bennett, 163 Mass. 398, 40 N. E. 172.

Nebraska. — Funke *v.* Allen, 54 Neb. 407, 74 N. W. 832, 69 Am. St. Rep. 716.

New York. — Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203.

Pennsylvania. — Unexcelled Fire Works Co. *v.* Polites, 130 Pa. St. 536, 18 Atl. 1058, 17 Am. St. Rep. 788; Jones *v.* Jennings Bros. & Co., 168 Pa. St. 493, 32 Atl. 51.

West Virginia. — Hall *v.* Pierce, 4 W. Va. 107.

In Jones *v.* Jennings, 168 Pa. St. 493, 32 Atl. 51, it was held that where the vendee refuses to accept goods without sufficient cause, the title remains in the seller, and the measure of damage for the refusal to accept is not the purchase price of the goods, but the difference between the price agreed upon and the market value on the day appointed for delivery, and since the plaintiffs failed to submit any evidence of damage, the court should have directed a verdict for the defendants.

In Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203, plaintiff, at New York, contracted to sell defendants a quantity of glass to be delivered at Antwerp, and to be paid for in New York on receipt of invoice and bills of lading. After delivery and acceptance of a portion, defendants notified plaintiff not to ship and refused to take the residue. In an action upon the contract, *held*, that the proper measure of damages was the difference between the contract price and the market price at the time and place of delivery.

12. *United States.* — Yellow Poplar Lumb. Co. *v.* Chapman, 74 Fed. 444, 20 C. C. A. 503.

Alabama. — Clements *v.* Beatty, 87 Ala. 238, 6 So. 151.

California. — Tahoe Ice Co. *v.* Union Ice Co., 109 Cal. 242, 41 Pac. 1020.

Illinois. — Murray *v.* Doud, 167 Ill. 368, 47 N. E. 717, 59 Am. St. Rep. 297.

Indiana. — Pittsburgh, C. & St. L. R. Co. *v.* Heck, 50 Ind. 303, 19 Am. Rep. 713.

Massachusetts. — Deutsch *v.* Pratt, 149 Mass. 415, 21 N. E. 1072; Schramm *v.* Boston Sugar Ref. Co., 146 Mass. 211, 15 N. E. 571.

Michigan. — Dennis *v.* Leaton, 72 Mich. 586, 40 N. W. 753.

Nebraska. — Drummond Carriage Co. *v.* Mills, 54 Neb. 417, 69 Am. St. Rep. 719, 74 N. W. 966, 40 L. R. A. 761.

New York. — Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203.

North Carolina. — Heiser *v.* Mears, 120 N. C. 443, 27 S. E. 117.

Pennsylvania. — Guillon *v.* Earnshaw, 169 Pa. St. 463, 32 Atl. 545.

Vermont. — Rider *v.* Kelley, 32 Vt. 268, 76 Am. Dec. 176.

Virginia. — Eastern Ice Co. *v.* King, 86 Va. 97, 9 S. E. 506.

In Dennis *v.* Leaton, 72 Mich. 586, 40 N. W. 753, an action to recover damages for the alleged failure of defendants to perform a contract for the manufacture and sale of lumber, the court held plaintiff's measure of damages to be the difference between the contract price of the lumber sawed and the cost of replacing it.

In Yellow Poplar Lumb. Co. *v.* Chapman, 74 Fed. 444, 20 C. C. A. 503, an action to recover damages for defendant's failure to receive timber, under a contract for its sale and delivery at certain points, the court held the true measure of damages to be "the difference between the contract price of the timber and its market value at the places where it was to be delivered; and if defendant below had entire control of the market at those places . . . then the measure of damages was the dif-

VI. REMEDIES OF BUYER.

1. Generally. — As in the case of the seller, in determining the evidence properly applicable to the remedies of the buyer, the nature of the remedy invoked must be considered. There are four remedies open to the buyer, any of which is available, determinable by the nature of his injury. These are an action for the recovery of the price paid,[13] an action for the recovery of the goods sold,[14] an action for the breach of the contract of the sale,[15] or one for counter-claim and breach of warranty.[16]

ference between the contract price of the timber at such points and the price of like timber in the nearest available market, less the additional cost of delivering such timber from said points to such nearest markets."

13. *United States.* — Nash *v.* Towne, 5 Wall. 689.

Connecticut. — Sanford *v.* Dodd, 2 Day 437.

Florida. — Evans *v.* Givens, 22 Fla. 476.

Massachusetts. — Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230.

New Hampshire. — Stevens *v.* Lyford, 7 N. H. 360.

New York. — Dubois *v.* Delaware & H. C. Co., 4 Wend. 285.

South Carolina. — Byers *v.* Bostwick, 2 Mill 75; Huckson *v.* Avant, 2 Brev. 264.

In the case of Nash *v.* Towne, 5 Wall. (U. S.) 689, where plaintiffs had purchased and paid for flour, which had never been delivered by the defendants, the court in an opinion by Mr. Justice Clifford, said: "Where the seller of goods received the purchase money at the agreed price, and subsequently refused to deliver the goods, and it appeared at the trial that he had converted the same to his own use, it was held at a very early period that an action for money had and received would lie to recover back the money, and it has never been heard in a court of justice since that decision that there was any doubt of its correctness. Anonymous, 1 Stra. (Eng.) 407."

14. Boyle *v.* Rankin, 22 Pa. St. 168; Schenck *v.* Sithoff, 75 Ind. 485; Willis *v.* Willis's Admrs., 36 Ky. 48.

15. Ives *v.* Carter, 24 Conn. 392; Buckingham *v.* Osborne, 44 Conn. 133; Barr *v.* Logan, 5 Harr. (Del.) 52; Gurney *v.* Atlantic & G. W. R. Co., 58 N. Y. 358; Cummings *v.* Dudley, 60 Cal. 383, 44 Am. Rep. 58.

16. *United States.* — West B. & C. Mfg. Co. *v.* Ansonia B. & C. Co., 4 Fed. 145.

Arkansas. — Winter *v.* Bandel, 30 Ark. 362.

California. — Earl *v.* Bull, 15 Cal. 421.

Colorado. — Smith *v.* Mayer, 3 Colo. 207.

Connecticut. — Hitchcock *v.* Hunt, 28 Conn. 343.

Georgia. — Wright *v.* Findley, 21 Ga. 59; Williamson *v.* Walker, 24 Ga. 257, 71 Am. Dec. 119.

Illinois. — Sterrett Mfg. Co. *v.* Kaszczyki, 18 Ill. App. 623; Crabtree *v.* Kile, 21 Ill. 180.

Indiana. — House *v.* Fort, 4 Blackf. 293; Gatling *v.* Newell, 9 Ind. 572.

Kentucky. — Culver *v.* Blake, 45 Ky. 528.

Maine. — Hillman *v.* Wilcox, 30 Me. 170.

Missouri. — Nelson *v.* Johnson, 25 Mo. 430; Smith *v.* Steinkamper, 16 Mo. 150.

New York. — Cook *v.* Moseley, 13 Wend. 277; McAllister *v.* Reab, 4 Wend. 483.

Ohio. — Timmons *v.* Dunn, 4 Ohio St. 680.

Pennsylvania. — Vanleer *v.* Earle, 26 Pa. St. 277.

South Carolina. — Parker *v.* Pringle, 2 Strobh. 242.

Tennessee. — Sample *v.* Looney, 1 Overt. 85.

Vermont. — Walker *v.* Hoisington, 43 Vt. 608.

Wisconsin. — Getty *v.* Rountree, 2 Pin. 379, 2 Chand. 28, 54 Am. Dec. 138.

In Nelson *v.* Johnson, 25 Mo. 430, which was a suit to recover the pur-

2. Evidence in Action To Recover Price Paid. — To authorize the buyer to maintain an action to recover the price paid by him for goods under a contract of sale, the evidence must show a sale with warranty,[17] and a breach of such warranty;[18] or, a sale of goods and a rescission of the contract because of the fraud of the seller;[19] or, sale of an article absolutely worthless evidencing a total failure of consideration;[20] or, a contract with the seller for the return of goods

chase price of slaves sold, the defense was that the slaves were not sound and healthy. The court, in affirming the judgment of the lower court, said: "Since the decision made by this court in the case of Wade *v.* Scott, 7 Mo. 509, . . . it has been considered as the settled law in this state that in a suit for the consideration money arising on the sale of a slave, the defendant, in case there was fraud or a breach of warranty, may give evidence showing the amount of damages sustained by him by reason of the fraud or breach of warranty in diminution of the stipulated price. 'It is more reasonable,' said the judge who delivered the opinion of the court, 'that when a suit is brought to recover the price of an article, that any reduction of the stipulated price, to which the defendant may be entitled either from a fraud or breach of warranty in the sale, should be made in the action in which the price is sought to be recovered, than that he should be driven to his cross action for a redress of the injury."

17. Rouple *v.* McCarty, 1 Bay (S. C.) 480; Burns *v.* Nichols, 89 Ill. 480; Raines *v.* Totman, 64 How. Pr. (N. Y.) 493; Milk *v.* Moore, 39 Ill. 584; Noble *v.* Fagnant, 162 Mass. 275, 38 N. E. 507; Tacoma Coal Co. *v.* Bradley, 2 Wash. St. 600, 27 Pac. 454, 26 Am. St. Rep. 890.

18. Milk *v.* Moore, 39 Ill. 584; Noble *v.* Fagnant, 162 Mass. 275, 38 N. E. 507; Tacoma Coal Co. *v.* Bradley, 2 Wash. St. 600, 27 Pac. 454, 26 Am. St. Rep. 890; First Nat. Bank of Canton *v.* McCann, 4 Ill. App. 250; Tipton *v.* Triplett, 58 Ky. 570; Gutta Percha Mfg. Co. *v.* Wood, 84 Mich. 452, 48 N. W. 28.

19. Fellows *v.* Judge, 72 N. H. 466, 57 Atl. 653; Noyes *v.* Patrick, 58 N. H. 618; Manahan *v.* Noyes, 52 N. H. 232.

Fraud as Ground of Rescission. — Burden of Proof. — If the action be brought, not for a breach of warranty, but for fraud in the sale of the goods, by representations which the defendant knew to be false, such knowledge is an essential ingredient in the fraud and must be proved by the plaintiff. Bartholomew *v.* Bushnell, 20 Conn. 271, 52 Am. Dec. 338.

When Burden of Proof is on Defendant. — In Pence *v.* Langdon, 99 U. S. 578, the action was brought to recover certain money paid upon the purchase of mining stock. The plaintiff's knowledge of the fraud and his neglect to act promptly to rescind the contract were relied upon to defeat the action to recover the price paid for the stock alleged to have been fraudulently sold, and the court held that the burden of proving the fact of such knowledge and the time when it was acquired rested upon the defendant.

When suit is brought on a note and defendant pleads failure of consideration, and that the plaintiff falsely represented the quality of the goods, for the price of which the note was given, he must show that the representations were false as to material matter, and that he relied upon them, and the jury should be instructed the burden is on him to prove these facts. Carrothers *v.* Cherry (Tex.), 16 S. W. 67.

When representations made by the seller are shown to be material and false, the burden is then upon him to show that the buyer did not rely on them, and that in the absence of the representations the purchase would have been made. Fishback *v.* Miller, 15 Nev. 428.

20. Crooks *v.* Eldgrige & Higgins Co., 64 Ohio St. 195, 60 N. E. 203; Stone *v.* Frost, 6 Lans. (N. Y.) 440.

not of the quality or character stipulated,[21] the return of the goods,[22] or offer to return and refusal to accept by the seller;[23] or, the sale of goods to which the seller has no title,[24] and the buyer's loss of the use of the property by reason thereof;[25] or, payment of the price of the goods sold,[26] and failure to deliver the goods by the seller;[27]

21. McCormick Harv. Mach. Co. *v.* Knoll, 57 Neb. 790, 78 N. W. 394; Sycamore Marsh Harv. Co. *v.* Grundrad, 16 Neb. 529, 20 N. W. 832.

22. *United States.* — Campbell Printing-Press Co. *v.* Thorp, 36 Fed. 414, 1 L. R. A. 645.

Alabama. — Rice *v.* Gilbreath, 119 Ala. 424, 24 So. 421.

Colorado. — Zang *v.* Adams, 23 Colo. 408, 48 Pac. 509, 58 Am. St. Rep. 249.

Georgia. — Smith *v.* Estey Organ Co., 100 Ga. 628, 28 S. E. 392; Cohen *v.* Lasky, 102 Ga. 846, 30 S. E. 531.

Indiana. — Ohio Thresher & Engine Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716.

Kentucky. — McCulloch *v.* Scott, 13 B. Mon. 172, 56 Am. Dec. 561.

Maine. — Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77.

Montana. — Schultz *v.* O'Rourke, 18 Mont. 418, 45 Pac. 634; Sanford *v.* Gates T. & Co., 21 Mont. 277, 53 Pac. 749.

New Hampshire. — Noyes *v.* Patrick, 58 N. H. 618.

Tennessee. — Lyons *v.* Stills, 97 Tenn. 514, 37 S. W. 280.

In Campbell *v.* Thorp, 36 Fed. 414, it was shown that plaintiff agreed to sell to defendants certain printing presses, and guaranteed that the presses should be "free from defective material or workmanship, and should do their work satisfactorily;" that neither of the presses was as guaranteed and did not work satisfactorily to the defendants; that defendants did not return the presses, but in an action by the plaintiffs for the agreed price, sought to recoup damage sustained. The referee held, that neither of the three presses was satisfactory to defendants, nor did they do their work reasonably well; that, having kept them, there was no method of estimating the loss they suffered by reason of their dissatisfaction and that plaintiff could recover the whole agreed price, less a small sum, conceded as a set off. The court in affirming the finding of the referee, said, in substance: The plaintiff was bound to furnish presses that should work satisfactorily to the defendants, and it is very evident that they were not satisfied with their operation and that they had had reasonable grounds for their dissatisfaction. "This undoubtedly gave them the power to reject the machines. Instead of doing this, however, they kept them, and now seek to recoup their damages by reason of their failure to work as they ought," and that the defendants having elected to retain the presses are bound to pay the full price for them."

23. Rice *v.* Gilbreath, 119 Ala. 424, 24 So. 421; Smith *v.* Estey Organ Co., 100 Ga. 628, 28 S. E. 392; McCulloch *v.* Scott, 13 B. Mon. (Ky.) 172, 56 Am. Dec. 561; Lyons *v.* Stills, 97 Tenn. 514, 37 S. W. 280; Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77; Ohio Thresher & Engine Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716; Sanford *v.* Gates, 21 Mont. 277, 53 Pac. 749.

24. Matheney *v.* Mason, 73 Mo. 677, 39 Am. Rep. 541; Bailey *v.* Foster, 9 Pick. (Mass.) 139; Hunt *v.* Sackett, 31 Mich. 18; Costigan *v.* Hawkins, 22 Wis. 74, 94 Am. Dec. 583; Marshall *v.* Duke, 51 Ind. 62.

25. Wood *v.* Sheldon, 42 N. J. L. 421, 36 Am. Rep. 523; Sandage *v.* Studebaker Mfg. Co., 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363; Ledwich *v.* McKim, 53 N. Y. 307; Wilkinson *v.* Ferree, 24 Pa. St. 190; Paul *v.* Kenosha, 22 Wis. 266, 94 Am. Dec. 598.

26. McCormick Harv. Mach. Co. *v.* Courtright, 54 Neb. 18, 74 N. W. 418.

27. McCormick Harv. Mach. Co. *v.* Courtright, 54 Neb. 18, 74 N. W. 418.

In an action to recover the price of a harvester it was shown that plaintiff contracted to deliver a harvester and bundle carrier and had

or, a sale with agreement for delivery of the goods when called for,[28] a demand for the goods and a failure to deliver them;[29] and in any case, the amount paid by the buyer to the seller on account of the contract of sale;[30] and if property has been delivered to the buyer, its return,[31] on an offer to return it, to the seller.[32]

3. Action by Buyer To Recover Goods. — A. Generally. — To enable the buyer to sustain an action for the recovery of specific personal property which he has purchased, he must show a contract of sale fully consummated,[33] whereby the title to the property sold has passed to him,[34] or a constructive delivery, conferring the right to

failed to deliver the latter. *Held*, that if a contract of sale is entire and indivisible, though it may include the delivery to the purchaser of two or more distinct articles at different dates, a failure as to any one on the part of the seller may afford ground for a rescission by the purchaser. McCormick *v.* Courtright, 54 Neb. 18, 74 N. W. 418.

28. Andrews *v.* Cheney, 62 N. H. 404.

29. Andrews *v.* Cheney, 62 N. H. 404; Gleckler *v.* Slavens, 5 S. D. 364, 59 N. W. 323; Fisher *v.* Dow Bros. 72 Tex. 432, 10 S. W. 455.

30. Stroud *v.* Pierce, 6 Allen (Mass.) 413; Phippen *v.* Morehouse, 50 Mich. 537, 15 N. W. 895.

31. *United States.* — Gunnel *v.* Dade, 1 Cranch C. C. 427, 11 Fed. Cas. No. 5,869.

Illinois. — Henderson *v.* Wheaton, 139 Ill. 581, 28 N. E. 1100.

Indiana. — Baldwin *v.* Marsh, 6 Ind. App. 533, 33 N. E. 973.

Louisiana. — Morris *v.* Kendig, 15 La. Ann. 404.

Massachusetts. — Miner *v.* Bradley, 22 Pick. 457.

Michigan. — Condon *v.* Hughes, 92 Mich. 367, 52 N. W. 638.

Missouri. — Walls *v.* Gates, 6 Mo. App. 242.

Pennsylvania. — Morrow *v.* Rees, 69 Pa. St. 368; George *v.* Braden, 70 Pa. St. 56.

South Carolina. — Ashley *v.* Reeves, 2 McCord 432.

32. Gunnel *v.* Dade, 1 Cranch C. C. 427, 11 Fed. Cas. No. 5,869; Smith *v.* McNair, 19 Kan. 330, 27 Am. Rep. 117; Condon *v.* Hughes, 92 Mich. 367, 52 N. W. 638.

Evidence Must Show that the Buyer has Complied With His Terms of the Contract and has not Abandoned It. — The proof of sale necessarily implies, of course, that the buyer has complied with his part of the terms of contract, and that he has not abandoned it. So that if it appear that the buyer has not complied with the terms of the contract, or has abandoned it, he cannot recover from the seller the consideration paid to him. Kendall *v.* Young, 141 Ill. 188, 30 N. E. 538. See in this connection Ketcham *v.* Evertson, 13 Johns. (N. Y.) 359; Green *v.* Green, 9 Cow. (N. Y.) 46.

In Ketchum *v.* Evertson, 141 Ill. 188, 30 N. E. 538, the court instructed the jury as follows: "The jury are hereby instructed, as a general principle of law, that a party cannot recover back any money paid by him upon a contract, which he has himself refused to perform, without fraud of the other party thereto; and in this case, if the jury find from the evidence that the defendant was ready and willing and offered to perform the contract in evidence on his part, and that the plaintiff refused to execute and perform said contract on his part, then the plaintiff is not entitled to recover any portion of the money paid by him upon said contract."

33. Stanley *v.* Robinson, 14 Ill. App. 480.

34. Millay *v.* Dunn, 27 Ill. 516; Boutelf *v.* Warne, 62 Mo. 350; Graves *v.* Damrow, 28 Neb. 271, 44 N. W. 234; Hamilton *v.* Gordon, 22 Or. 557, 30 Pac. 495; Kent Iron & Hardware Co. *v.* Norbeck, 150 Pa. St. 559, 24 Atl. 737.

immediate possession of the property,[35] and that the possession of the goods is unlawfully withheld from him.[36]

B. Bill of Sale May be Shown to be a Mortgage. — When a bill of sale is relied on by the buyer in an action to recover the property, as evidence of his title and right of property,[37] the defendant may show by parol evidence that the bill of sale was intended only as a mortgage.[38]

C. Evidence to Determine Whether Bill of Sale Was a Mortgage. — a. *Generally.* — In determining the question as to whether a bill of sale was intended as a mortgage many facts are admissible in evidence for the consideration of the court or jury in arriving at a conclusion.[39] Anything which bears upon the in-

35. Haverstick *v.* Fergus, 71 Ill. 105; Updike *v.* Henry, 14 Ill. 378; Smyth *v.* Craig, 3 Watts & S. (Pa.) 14.

36. Washburn *v.* Cordis, 1 Misc. 427, 21 N. Y. Supp. 422; Harris *v.* McCasland, 29 Ill. App. 430.

37. Morgan *v.* Shinn, 82 U. S. 105; Hayworth *v.* Worthington, 5 Blackf. (Ind.) 361, 35 Am. Dec. 126; O'Neill *v.* Murry, 6 Dak. 107, 50 N. W. 619; Butts *v.* Privett, 36 Kan. 711, 14 Pac. 247; Caswell *v.* Keith, 12 Gray (Mass.) 351; Howard *v.* Odell, 1 Allen (Mass.) 85.

38. *United States.* — Morgan *v.* Shinn, 82 U. S. 105.

Arkansas. — Nattin *v.* Riley, 54 Ark. 30, 14 S. W. 1100; George *v.* Norris, 23 Ark. 121.

Dakota. — O'Neill *v.* Murry, 6 Dak. 107, 50 N. W. 619.

Indiana. — Hayworth *v.* Worthington, 5 Blackf. 361, 35 Am. Dec. 126.

Iowa. — McAnnulty *v.* Seick, 59 Iowa 586, 13 N. W. 743.

Kansas. — Butts *v.* Privett, 36 Kan. 711, 14 Pac. 247.

Maryland. — Rogers *v.* Severson, 2 Gill 385.

Massachusetts. — Caswell *v.* Keith, 12 Gray 351; Howard *v.* Odell, 1 Allen 85; Harper *v.* Ross, 10 Allen 332.

Michigan. — Buhl Iron Wks. *v.* Teuton, 67 Mich. 623, 35 N. W. 804; Pinch *v.* Willard, 108 Mich. 204, 66 N. W. 42.

Nevada. — Carlyon *v.* Lannan, 4 Nev. 156.

New York. — Champlin *v.* Butler, 18 Johns. 169; Birkbeck *v.* Tucker, 2 Hall 121; Thomas *v.* Scutt, 127 N. Y. 133, 27 N. E. 961.

Wisconsin. — Manufacturers' Bank of Milwaukee *v.* Rugee, 59 Wis. 221, 18 N. W. 251.

Where plaintiff contended that he made an absolute sale of the property, and the defendant that he accepted the bill of sale as a chattel mortgage, it was competent for the plaintiff to show that the defendant had sold the property or a part thereof as his own. Eby *v.* Winters, 51 Kan. 777, 33 Pac. 471.

It requires clear and decisive testimony to show that a bill of sale, absolute in its terms, was intended as a mortgage. Trieber *v.* Andrews, 31 Ark. 165.

On the question whether a transaction was a sale as claimed by defendant, of notes and mortgages, or was an assignment as collateral security, as it purported to be, and as was claimed by plaintiff, the statement in a letter from the plaintiff to defendant's attorney that the transaction "was only an indirect way to purchase" the notes and mortgages, is sufficient corroboration of defendant's testimony to sustain a finding in his favor. Standen *v.* Brown, 83 Hun 610, 31 N. Y. Supp. 535.

39. *Virginia.* — Tuggle *v.* Berkeley, 101 Va. 83, 43 S. E. 199; Thompson *v.* Davenport, 1 Wash. 125; Strider *v.* Reed, 2 Gratt. 39; Holladay *v.* Willis, 101 Va. 274, 43 S. E. 616.

West Virginia. — Davis *v.* Demming, 12 W. Va. 246; Vangilder *v.* Hoffman, 22 W. Va. 1; Matheney

tention of the parties relating to the instrument is admissible.[40]

b. *Illustrations.* — (1.) Thus the admissions of the parties after the execution of the instrument, that the maker owes the alleged buyer the consideration thereof as a debt, are competent evidence.[41]

(2.) So, evidence of the gross inadequacy of the consideration is admissible.[42]

(3.) So the retention of the property by the alleged seller after the execution of the instrument may also be considered as evidence.[43]

(4.) That there had been negotiations between the parties prior to the execution of the instrument for a loan of money to the maker of it, is properly admissible.[44]

(5.) That the alleged seller was hard pressed for money, and the alleged buyer was known to be a money lender, is competent evidence.[45]

(6.) That the parties did not apparently take into consideration the value or extent of the property when the bill of sale was made, is proper evidence.[46]

4. Action for Breach of Contract of Sale. — A. GENERALLY. In order that the buyer may maintain an action to recover damages for an alleged breach of the contract of sale, the evidence on his part must establish the existence of a valid contract of sale[47] the breach

v. Sandford, 26 W. Va. 386; Lee *v.* Smith, 54 W. Va. 89, 46 S. E. 352.

40. Sadler *v.* Taylor, 49 W. Va. 104, 38 S. E. 583; Thacker *v.* Morris, 52 W. Va. 220, 43 S. E. 141, 94 Am. St. Rep. 928; Holladay *v.* Willis, 101 Va. 274, 43 S. E. 616; Strider *v.* Reid, 2 Gratt. (Va.) 39.

41. Lawrence *v.* DuBois, 16 W. Va. 443; Hoffman *v.* Ryan, 21 W. Va. 415.

Where the creditor surrenders certain notes to his debtor upon the execution and delivery of a bill of sale by the latter to the former, this is not conclusive evidence that the transaction was a sale and not a mortgage. Buhl Iron Wks. *v.* Teuton, 67 Mich. 623, 35 N. W. 804. See in this connection Cake *v.* Shull, 45 N. J. Eq. 208, 16 Atl. 434.

42. Gilchrist *v.* Beswick, 33 W. Va. 168, 10 S. E. 371; Tuggle *v.* Berkeley, 101 Va. 83, 43 S. E. 199.

Where a mortgage is transferred for much less than its real value, slight circumstances will be sufficient to determine the transaction to be a transfer as collateral security and not a sale. McKinney *v.* Miller, 19 Mich. 142.

43. Kerr *v.* Hill, 27 W. Va. 576; Ransone *v.* Frayser, 10 Leigh (Va.) 592; Snavely *v.* Pickle, 29 Gratt. (Va.) 27.

44. Davis *v.* Demming, 12 W. Va. 246, 283.

"An attorney who was employed by a person only for the purpose of drawing up a deed and a bill of sale, to be executed to such person by another, may testify, on behalf of the latter, as to what was said between the parties, and between them and himself, for the purpose of showing that the bill of sale was intended as a mortgage." O'Neill *v.* Murry, 6 Dak. 107, 50 N. W. 619.

45. Vangilder *v.* Hoffman, 22 W. Va. 1; Gilchrist *v.* Beswick, 33 W. Va. 168, 10 S. E. 371.

46. Vangilder *v.* Hoffman, 22 W. Va. 1; Gilchrist *v.* Beswick, 33 W. Va. 168, 10 S. E. 371.

47. Richardson *v.* Hoyt, 60 Iowa 68, 14 N. W. 122; Bradley *v.* Morris, 4 Ill. 182; Farwell *v.* Dewey, 12 Mich. 436; Berber *v.* Kerzinger, 23 Ill. 286; Brockman Commission Co. *v.* Kilbourne (Mo. App.), 86 S. W. 275.

Before a buyer can recover damages for failure of the seller to deliver goods as agreed, where it ap-

relied on,[48] and the buyer's damages.[49] It is also incumbent upon the plaintiff in such an action to show that he has performed[50]

pears that the seller has tendered goods in performance which the buyer refused, claiming that they were not of the grade agreed upon, it is incumbent upon the buyer to prove a contract valid under the Statute of Frauds for the sale and delivery of goods of the particular grade demanded. Bacon *v.* Eccles, 43 Wis. 227.

In Aulls *v.* Young, 98 Mich. 231, 57 N. W. 119, where the plaintiff alleged that the defendant had agreed to deliver to him certain goods any time during the month, it was held that the fact that the defendant alleged that the goods were to be taken not later than a certain time during the month did not place upon the defendant the burden of proving the contract as claimed by him.

48. *United States.* — Lonergan *v.* Buford, 148 U. S. 581.

Alabama. — Raisin Fertilizer Co. *v.* Barrow Jr., 97 Ala. 694, 12 So. 388.

California. — Cummings *v.* Dudley, 60 Cal. 383, 44 Am. Rep. 58.

Kansas. — Warner *v.* Thompson, 35 Kan. 27, 10 Pac. 110.

Louisiana. — Gallagher *v.* Pike, 24 La. Ann. 344.

Michigan. — Spaulding *v.* Coon, 50 Mich. 622, 16 N. W. 169.

Minnesota. — Coffin *v.* Reynolds, 21 Minn. 456.

Oregon. — Catlin *v.* Jones, 85 Pac. 515; Hockersmith *v.* Hanley, 29 Or. 27, 44 Pac. 497.

Utah. — Buford *v.* Lonergan, 6 Utah 301, 22 Pac. 164.

Where it is sought to enforce a stipulation by the buyer to give the vendor the privilege of repurchasing a portion of the goods within a certain time, the fact that the specified property has been lost through the buyer's fault must be shown. Sykes *v.* Parks, 1 Baxt. (Tenn.) 460.

49. *Alabama.* — Belote *v.* Wilcox, 41 So. 673; McFadden *v.* Henderson, 128 Ala. 221, 29 So. 640.

Georgia. — Sanders, Swann & Co. *v.* Allen, 124 Ga. 684, 52 S. E. 884; Seaboard Lumb. Co. *v.* Cornelia Plan. Mill Co., 122 Ga. 370, 50 S. E. 121.

Illinois. — Armeny *v.* Madson & Buck Co., 111 Ill. App. 621.

Louisiana. — Chattanooga Car & Foundry Co. *v.* Lefebvre, 113 La. 487, 37 So. 38.

Pennsylvania. — Morris *v.* Supplee, 208 Pa. St. 253, 57 Atl. 566.

Texas. — McKay *v.* Elder (Tex. Civ. App.), 92 S. W. 268.

50. *United States.* — Neis *v.* Yocum, 9 Sawy. C. C. 24, 16 Fed. 168; United States *v.* Robeson, 34 U. S. 319.

Alabama. — Davis *v.* Adams, 18 Ala. 264.

Arkansas. — Bradley *v.* Farrington, 4 Ark. 532.

California. — Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288; Crosby *v.* Watkins, 12 Cal. 85; Hanson *v.* Slaven, 98 Cal. 377, 33 Pac. 266.

Georgia. — Phillips *v.* Williams, 39 Ga. 597.

Illinois. — Metz *v.* Albrecht, 52 Ill. 491; Taylor *v.* Beck, 13 Ill. 376.

Indiana. — Campbell *v.* Miller, 1 Wils. 412.

Kentucky. — Letcher *v.* Taylor, Hardin 79; Wilmouth *v.* Patton, 2 Bibb 280; Hume *v.* Mullins, 18 Ky. L. Rep. 108, 35 S. W. 551.

Massachusetts. — West *v.* Platt, 127 Mass. 367.

Michigan. — Pennwell *v.* Wilkinson, 97 Mich. 110, 56 N. W. 235.

Minnesota. — Snow *v.* Johnson, 1 Minn. 24.

Missouri. — Fairbanks *v.* DeLissa, 36 Mo. App. 711; St. Joseph Iron Co. *v.* Halverson, 48 Mo. App. 383.

New York. — Cook *v.* Ferral, 13 Wend. 285; McDonald *v.* Williams, 1 Hilt. 365; Lawrence *v.* Everett, 11 N. Y. Supp. 881, 34 N. Y. St. 753; Pullman *v.* Corning, 9 N. Y. 93; West *v.* Conesus Lake Salt Min. Co., 4 N. Y. St. 384.

North Carolina. — Cole *v.* Hester, 31 N. C. 23.

Ohio. — Hounsford *v.* Fisher, Wright 580.

Texas. — Kelly *v.* Webb, 27 Tex. 368.

Wisconsin. — Kellogg *v.* Nelson, 5 Wis. 125.

or that he has offered to perform his part of the agreement.[51]

B. When Gist of Action Is for Non-Delivery. — When the action is founded upon the seller's non-delivery of the goods purchased, the buyer must prove a tender of the contract price,[52] unless it be shown that the purchase was on a credit,[53] or that the seller disposed of the goods before the time of delivery;[54] also a demand

51. *United States.* — Neis *v.* Yocum, 8 Sawy. 24, 16 Fed. 168.

Alabama. — Davis *v.* Adams, 18 Ala. 264.

Illinois. — Metz *v.* Albrecht, 52 Ill. 491.

Iowa. — Wire *v.* Foster, 62 Iowa 114, 17 N. W. 174.

Louisiana. — Brahear *v.* McMasters, 15 La. 282.

North Carolina. — Cole *v.* Hester, 31 N. C. 23; Benners *v.* Howard, 1 N. C. 93, 1 Am. Dec. 583.

Texas. — Kelly *v.* Webb, 27 Tex. 368.

Where a buyer of property seeks to recover damages for the seller's failure to deliver the property at the time and place agreed upon, it is incumbent upon the buyer to show that he was ready and willing to pay for the property at the time and place. Kitzinger *v.* Sanborn, 70 Ill. 146. See also Cummings *v.* Tilton, 44 Ill. 172; Simmons *v.* Green, 35 Ohio St. 104.

52. *United States.* — Neis *v.* Yocum, 9 Sawy. (C. C.) 24, 16 Fed. 168.

Alabama. — Davis *v.* Adams, 18 Ala. 264.

Illinois. — Sexton *v.* Brown, 36 Ill. App. 281.

Iowa. — Wire *v.* Foster, 62 Iowa 114, 17 N. W. 174.

Louisiana. — Brashear *v.* McMasters, 15 La. 282; Gilbert *v.* Cooper, 4 Rob. 161; Sewell *v.* Willcox, 5 Rob. 83.

New York. — Lawrence *v.* Everett, 11 N. Y. Supp. 881, 34 N. Y. St. 753.

North Carolina. — Benners *v.* Howard, 1 N. C. 93, 1 Am. Dec. 583; Grandy *v.* Small, 48 N. C. 8.

South Carolina. — Mitchell *v.* Georgia R. & Banking Co., 6 Rich. L. 188.

Texas. — Kelly *v.* Webb, 27 Tex. 368.

Vermont. — Packer *v.* Button, 35 Vt. 188.

As to Sales for Cash on Delivery the rule is that the buyer in order to recover damages for non-delivery must show that he was ready to receive and pay for the goods as delivered and upon request for payment. Metz *v.* Albrecht, 52 Ill. 491.

Proof of an Offer to Perform by a Vendee ready and willing and followed by the absolute refusal of the vendor to deliver the goods is sufficient to entitle the vendee to damages; proof of an actual tender and payment of the consideration is not necessary. West *v.* Platt, 127 Mass. 367.

Where the Vendor Refuses to Deliver the Goods, it is not necessary that the vendee show that at and before the time of bringing his action he had actually in his possession or control the money or other consideration to be paid over contemporaneously with the receipt of the goods purchased. Williams *v.* Woods, 16 Md. 220.

53. Sexton *v.* Brown, 36 Ill. App. 281; Dox *v.* Dey, 3 Wend. (N. Y.) 356.

54. *Delaware.* — Lea *v.* Ennis, 6 Houst. 433.

Iowa. — Boies *v.* Vincent, 24 Iowa 387.

Louisiana. — Marchesseau *v.* Chaffee, 4 La. Ann. 24.

Maine. — Bassett *v.* Bassett, 55 Me. 127.

Minnesota. — Lieberman *v.* Isaacs, 43 Minn. 186, 45 N. W. 8.

New Jersey. — Parker *v.* Pettit, 43 N. J. L. 512.

New York. — Crist *v.* Armour, 34 Barb. 378.

North Carolina. — Harriss *v.* Williams, 48 N. C. 483, 67 Am. Dec. 253.

for the goods at a certain time,[55] or a disposal of the goods by the seller before the time for delivery has arrived.[56]

C. Failure to Deliver Goods of Contractual Quality. When the buyer brings an action for damages for non-delivery of the goods by seller, and the seller relies on a tender of the goods, the plaintiff may introduce evidence that the property tendered was defective in quality.[57]

D. Proof of Damages for Failure to Deliver Goods. — In an action by the buyer, there must be sufficient evidence of the damages sustained by him in consequence of the non-delivery.[58] The evidence of such damages must, ordinarily, show the difference between the contract price and the market price at the time when and place where the delivery was to be made under the contract.[59]

55. *Arkansas.* — Patterson *v.* Jones, 13 Ark. 69, 56 Am. Dec. 296; Bradley *v.* Farrington, 4 Ark. 532.

Connecticut. — Smith *v.* Leavensworth, 1 Root 209.

Illinois. — Sexton *v.* Brown, 36 Ill. App. 281.

Indiana. — Mountjoy *v.* Adair, 1 Ind. 254; Foust *v.* Hannah, 1 Ind. 273.

Iowa. — Decker *v.* Birhap, Morris 62.

Kentucky. — Letcher *v.* Taylor, Hardin 79; Wilnouth *v.* Patton, 2 Bibb 280; Mitchell *v.* Gregory, 1 Bibb 449, 4 Am. Dec. 655.

Minnesota. — Snow *v.* Johnson, 1 Minn. 24.

56. Lea *v.* Ennis, 6 Houst. (Del.) 433; Boies *v.* Vincent, 24 Iowa 387; Marchesseau *v.* Chaffee, 4 La. Ann. 24; Bassett *v.* Bassett, 55 Me. 127; Lieberman *v.* Isaacs, 43 Minn. 186, 45 N. W. 8; Parker *v.* Pettit, 43 N. J. L. 512; Harriss *v.* Williams, 48 N. C. 483, 67 Am. Dec. 253.

57. Gould *v.* Banks, 8 Wend. (N. Y.) 562, 24 Am. Dec. 90.

See also Meader *v.* Cornell, 58 N. J. L. 375, 33 Atl. 960; Peck *v.* Armstrong, 38 Barb. (N. Y.) 215.

58. De Wolf *v.* McGinnis, 106 Ill. 553; Faulkner *v.* Closter, 79 Iowa 15, 44 N. W. 208; Kountz *v.* Kirkpatrick, 72 Pa. St. 376, 13 Am. Rep. 687; Theiss *v.* Weiss, 166 Pa. St. 9, 31 Atl. 63, 45 Am. St. Rep. 638.

Proof of Damages. — When the action is by the buyer for damages for failure to deliver property purchased, in order that the plaintiff may succeed in the action, it is necessary for him to prove the amount he agreed to pay for the property, and what it was worth in the market at the time the property was to be delivered. This is sufficient proof of his damages. De Wolf *v.* McGinnis, 106 Ill. 553.

59. *United States.* — Roberts *v.* Benjamin, 124 U. S. 64.

Alabama. — Harralson *v.* Stein, 50 Ala. 347.

Arkansas. — Hanna *v.* Harter, 2 Ark. 397.

California. — Crosby *v.* Watkins, 12 Cal. 85; Tobin *v.* Post, 3 Cal. 373.

Illinois. — DeWolf *v.* McGinnis, 106 Ill. 553; Kitzinger *v.* Sanborn, 70 Ill. 146; Phelps *v.* McGee, 18 Ill. 155; Slueter *v.* Wallbaum, 45 Ill. 43; Fletcher *v.* Patton, 21 Ill. App. 228.

Indiana. — Beard *v.* Sloane, 38 Ind. 128; Zehner *v.* Dale, 25 Ind. 433; McCollum *v.* Huntington, 51 Ind. 229; Coffin *v.* State, 144 Ind. 578, 43 N. E. 654, 55 Am. St. Rep. 188.

Iowa. — Faulkner *v.* Closter, 79 Iowa 15, 44 N. W. 208; Boies *v.* Vincent, 24 Iowa 387; Harris *v.* Morgan, 62 Iowa 112, 17 N. W. 195.

Kansas. — Gray *v.* Hall, 29 Kan. 704.

Kentucky. — Caldwell *v.* Reed, 5 Litt. 366, 12 Am. Dec. 314; Miles *v.* Miller, 12 Bush. 134; Cole *v.* Ross, 9 B. Mon. 393, 1 Am. Rep. 517.

Maryland. — Pinckney *v.* Dambmann, 72 Md. 173, 19 Atl. 450; McGrath *v.* Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415.

Massachusetts. — Bartlett *v.* Blanchard, 13 Gray 429.

E. Evidence Need Not Relate to Contractual Quantity. The evidence to prove the difference between the contract and market prices in an action for damages for non-delivery, need not be confined to the price of goods in the quantity contracted for.[60]

F. Evidence of Value of Goods Actually Delivered. Where there is a non-delivery of the goods of quality contracted for, and as represented by the seller, evidence of the value of the goods actually delivered is necessarily admissible.[61]

G. Proof That Delivery Would Affect Market Price. Where a contract calls for the delivery of a large quantity of goods, in an action for the recovery of their non-delivery, evidence is not admissible to show that the delivery of such a large quantity on that day would or might have affected the market price.[62]

Michigan. — McKercher *v.* Curtis, 35 Mich. 478.

Minnesota. — Olson *v.* Sharpless, 53 Minn. 91, 55 N. W. 125; Whalon *v.* Aldrich, 8 Minn. 346

Missouri. — Northrup *v.* Cook, 39 Mo. 208; Price *v.* Van Stone, 40 Mo. App. 207.

Nebraska. — McCormick Harv. Mach. Co. *v.* Jensen, 29 Neb. 102, 45 N. W. 160.

New Hampshire. — Bailey *v.* Shaw, 24 N. H. 297, 55 Am. Dec. 241.

New York. — Parsons *v.* Sutton, 66 N. Y. 92; McKnight *v.* Dunlop, 5 N. Y. 537, 55 Am. Dec 370; Reeve *v.* Gallivan, 89 Hun 59, 34 N. Y. Supp. 1000; Davis *v.* Shields, 24 Wend. 322.

Pennsylvania. — North *v.* Phillips, 89 Pa. St. 250; Marshall *v.* Campbell, 1 Yeates 36.

Tennessee. — Thompson *v.* Woodruff, 7 Coldw. 401.

Texas. — Ullman *v.* Babcock, 63 Tex. 68; Tyler Car & Lumb. Co. *v.* Wettermark, 12 Tex. Civ. App. 399, 34 S. W. 807.

Wisconsin. — Hill *v.* Chipman, 59 Wis. 211, 18 N. W. 160.

Price Current Lists. — When the market value of an article of merchandise is in issue, price current lists are admissible in evidence (Suttle *v.* Falls, 98 N. C. 393, 4 S. E. 541, 2 Am. St. Rep. 338; Cliquot's Champagne, 3 Wall. (U. S.) 114; Smith *v.* North Carolina R. Co., 68 N. C. 107; Whitney *v.* Thacher, 117 Mass. 523; Peter *v.* Thickstun, 51 Mich. 589, 17 N. W. 68); but in some jurisdictions it must appear that the prices quoted therein are derived from sources showing actual sales as therein published. Whelan *v.* Lynch, 60 N. Y. 469, 19 Am. Rep. 202; Hoskins *v.* Missouri Pac. R. Co., 19 Mo. App. 315; Whelan *v.* Lynch, 60 N. Y. 469, 19 Am. Rep. 202.

Competency of Witness as to Market Price. — The market price of an article of merchandise may be proved by the testimony of a witness whose only knowledge is derived from quotations and newspaper publications. Central R. & Bkg. Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017; Morris *v.* Columbian I. Wks. & D. D. Co., 76 Md. 354, 25 Atl. 417, 17 L. R. A. 851; Smith *v.* North Carolina R. Co., 68 N. C. 107; Suttle *v.* Falls, 98 N. C. 393, 4 S. E. 541, 2 Am. St. Rep. 338; Gulf C. & S. F. R. Co. *v.* Patterson, 5 Tex. Civ. App. 523, 24 S. W. 349.

60. Faulkner *v.* Closter, 79 Iowa 15, 44 N. W. 208.

61. Traver *v.* Shaefle, 33 Neb. 531, 50 N. W. 683.

62. Dana *v.* Fiedler, 12 N. Y. 40, was an action brought to recover damages for the non-delivery of one hundred and fifty casks of madder of one ton each. Certain questions put in various forms were not permitted to be answered, and their admissibility was urged upon the ground that in ascertaining the market value of the madder, the jury were to consider how the plaintiffs could dispose of the madder in question, if it had been delivered to them. On this proposition the court decided as follows: "In ascertain-

H. Evidence That Buyer Could Have Procured Goods Elsewhere. — In an action to recover damages for the non-delivery of goods, evidence that the plaintiff could have purchased the same kind of goods elsewhere is, ordinarily, not admissible.[63]

I. Market Value Before and After Stipulated Day of Delivery. — In ascertaining what the market value was on the day the goods should have been delivered, evidence of what it was before and after that day may be considered by the jury,[64] when it

ing the amount of damages, the evidence is confined to the actual condition of the market; questions cannot be raised as to what the probable market value would have been if the defendant had performed his contract; nor as to what the market value of the goods was in the quantity called for by the contract, unless it is first shown that there was a market value for the article in such quantities; nor as to the usual difference in the price of the commodity on sales in small quantities and on sales in the quantity called for by the contract, when it does not appear that such amount could be purchased at the time and place specified. Where it is shown that no sales of the article in question were made on the day when it should have been delivered, in order to determine the market value at that time reference may be had to sales within a reasonable time, in the discretion of the court, before and after. A question as to the range of the market value of the article for a period of three months before and after the day when the delivery was due is properly excluded."

63. Cockburn *v.* Ashland Lumb. Co., 54 Wis. 619, 12 N. W. 49; Austrian & Co. *v.* Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350.

Compare Miller *v.* Mariner's Church, 7 Me. 51, 20 Am. Dec. 341.

"In an action to recover damages for failure to deliver seasonably goods sold by the defendants to the plaintiffs, it appeared that, when the time agreed upon for the delivery of the goods was so nearly expired that it was evident that they could not be delivered within it, the defendants asked the plaintiffs whether they would receive the goods afterwards, and the plaintiffs replied that they not only would consent to, but insisted upon, the delivery. The plaintiffs introduced evidence tending to show that they then said that they would claim damages for any increase in the cost of the goods, produced by any advance in freights or insurance. The defendants introduced evidence tending to contradict this, and to show that the plaintiffs waived any objection on the ground of the delay. The judge instructed the jury that receiving the goods without objection on the ground of delay would be *prima facie* a waiver of any such objection, but that if, on consenting to receive the goods, the plaintiffs gave notice that they should claim damages for increased expenses growing out of the delay, then receiving the goods would not be evidence of a waiver. The jury found for the plaintiffs. *Held*, that the question of waiver was properly left to them." Merrimack Mfg. Co. *v.* Quintard, 107 Mass. 127.

Buyer May Show Inability to Purchase Elsewhere. — In Vickery *v.* McCormick, 117 Ind. 594, 20 N. E. 495, an action to recover damages for breach of contract to deliver articles for a particular use, it was held that the plaintiff might show that he could not procure such articles in the market where they were to be delivered and might recover the enhanced cost of procuring them elsewhere.

64. Kountz *v.* Kirkpatrick, 72 Pa. St. 376, 13 Am. Rep. 687; Boyd & Co. *v.* Gunnison & Co., 14 W. Va. 1.

See also Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Boyd *v.* Gunnison, 14 W. Va. 1; Alabama Iron Wks. *v.* Hurley, 86 Ala. 217, 5 So. 418; Olson *v.* Sharpless, 53 Minn. 91, 55 N. W. 125.

appears that there is no method of determining the true market value on that day.[65]

J. Where Buyer Has Bought Goods From Others to Fill His Orders. — In an action on the contract of sale for damages for failure to deliver the goods purchased, if the buyer has bought goods from other parties to fill his orders, the defendant may prove the actual cost of the goods so bought.[66]

K. Rental Value as an Element of Damages. — Where the contract of sale is for the delivery of certain articles for use in a going concern, as for instance a steamboat,[67] a mill,[68] or the like,[69] and the buyer sues for damages for the non-delivery of these articles, evidence of the rental value of such concern, during the time the buyer was deprived of the use of such articles, is competent as proof of one of the elements of the buyer's damages,[70] and such rental value may be shown by the evidence of persons having knowl-

65. Kountz *v.* Kirkpatrick, 72 Pa. St. 376, 13 Am. Rep. 687.

As Corroborative Evidence. — In Gordon *v.* Bowers, 16 Pa. St. 226, an action for non-delivery of wheat in the interior of the state of Pennsylvania, it was held that evidence as to the price of the wheat in Philadelphia at and soon after the time stipulated for delivery, was admissible as corroborative of the evidence as to its value at the place of delivery.

Where it is not practicable to show the market price of the goods at the precise time and place of delivery, evidence of the price for a brief period before and after such time and at the place not distant or in other controlling markets, is competent for the purpose of establishing the market price at the time and place of delivery. Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203, *reversing* 8 Jones & S. (N. Y.) 483.

Compare Ramish *v.* Kirschbraun, 90 Cal. 581, 27 Pac. 433, where the defendant had agreed to deliver goods to the plaintiff at one place as soon as they could be transferred from another, and it appeared that the goods had arrived at the place of delivery but were not delivered to the plaintiff until about a week later, it was held that evidence as to the price of the goods on a day still later was inadmissible to show damages.

For a full discussion of this question, see article "Value."

66. Theiss *v.* Weiss, 166 Pa. St. 9, 31 Atl. 63, 45 Am. St. Rep. 638.

67. Brownell *v.* Chapman, 84 Iowa 504, 51 N. W. 249, 35 Am. St. Rep. 326.

68. New York & C. Min. Syndicate & Co. *v.* Fraser, 130 U. S. 611; Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635.

69. Paola Gas Co. *v.* Paola Glass Co., 56 Kan. 614, 44 Pac. 621, 54 Am. St. Rep. 598.

70. *Illinois.* — Benton *v.* Fay, 64 Ill. 417; Strawn *v.* Cogswell, 28 Ill. 457.

Indiana. — Sinker *v.* Kidder, 123 Ind. 528, 24 N. E. 341.

Iowa. — Brownell *v.* Chapman, 84 Iowa 504, 51 N. W. 249, 35 Am. St. Rep. 326; Nye *v.* Iowa City Alcohol Wks., 51 Iowa 129, 50 N. W. 988, 33 Am. Rep. 121.

Kansas. — Paola Gas Co. *v.* Paola Glass Co., 56 Kan. 614, 44 Pac. 621, 54 Am. St. Rep. 598.

Maryland. — Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635.

New York. — Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718.

Pennsylvania. — Brown *v.* Foster, 51 Pa. St. 165.

In Liljengren Furn. & Lumb. Co. *v.* Mead, 42 Minn. 420, 44 N. W. 306, where the contract called for the furnishing and delivering of the window and door frames for a building in process of construction, it was held that in order to charge the vendor with loss of rents of the building by reason of delay in its completion caused by failure to furnish the materials at the time agreed upon, the

edge of the business for which said articles were intended to be used, and the price paid for rental of other like going concerns.[71]

L. When Evidence of Loss of Profits Is Admissible. — The ordinary rule is that evidence of loss of profits in an action for damages by the buyer for the seller's failure to deliver the article sold is not admissible.[72] But if the evidence in the case shows that profits were reasonably certain to have been realized if the article had been delivered as agreed,[73] and that such profits must have been in the contemplation of the parties at the time the contract of sale

owner must prove that the circumstances were such that it might reasonably be supposed that the parties when making the contract contemplated that such loss would probably follow its breach.

In Berkey & Gay Furn. Co. *v.* Hascall, 123 Ind. 502, 24 N. E. 336, 8 L. R. A. 65, it was held that where a dealer contracts to deliver furniture for a hotel, set up in the rooms ready for use and occupancy on a certain day, the purchaser may, on the question of damages for the delay, show the rent of the rooms when furnished from the date agreed upon for delivery.

71. Brownell *v.* Chapman, 84 Iowa 504, 51 N. W. 249, 35 Am. St. Rep. 326.

In Sinker *v.* Kidder, 123 Ind. 528, 24 N. E. 341, the action was brought to recover damages arising out of the sale and delivery of a steam boiler. The complaint alleged an express warranty and a breach thereof. On the question as to the evidence admissible in proof of damages the court in its opinion said: "We think that the court committed no error in instructing the jury that one element of damages was the rental value of the mill during the length of time that it remained idle on account of the explosion of the boiler which furnished the power that moved the machinery. In ascertaining such value it was proper to call on witnesses who were acquainted with the capacity of the mill, and its work from day to day, down to the time when the boiler exploded."

72. Peace River Phosphate Co. *v.* Graffin, 58 Fed. 550; Jones *v.* Nathrop, 7 Colo. 1, 1 Pac. 435; Benton *v.* Fay, 64 Ill. 417; Sherman *v.* Roberts, 1 Grant Cas. (Pa.) 261; Porter *v.* Woods, 3 Humph. (Tenn.) 56, 39 Am. Dec. 153; Hamilton *v.* Schumacher (Tex. App.), 15 S. W. 715.

In Griffin *v.* Colver, 22 Barb. (N. Y.) 587, *affirmed* 16 N. Y. 489, 60 Am. Dec. 718, an action to recover the purchase price of an engine, it was held that the defendants could show the loss of the value of the use of the engine when not delivered at the time stipulated, but that they could not show the profits of running it in their ordinary business.

In Titley *v.* Enterprise Stone Co., 127 Ill. 457, 20 N. E. 71, where the buyer claimed that the goods had not been delivered within the time stipulated and that he had suffered a loss from not being able to supply his customers, it was held that he could not show the amount which could have been sold in the time named; that he should be restricted to showing the extent of the demand at that time and his inability to meet it.

73. Van Arsdale *v.* Rundel, 82 Ill. 63; Liggett Spring & Axle Co. *v.* Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466; Imperial Coal Co. *v.* Port Royal Coal Co., 138 Pa. St. 45, 20 Atl. 937; Shadbolt & Boyd Iron Co. *v.* Topliff, 85 Wis. 513, 55 N. W. 854.

In Shadbolt & Boyd Land Co. *v.* Topliff, 85 Wis. 513, 55 N. W. 854, where the defendants had contracted to fill all orders given them by the plaintiffs during a certain time, it was held proper to permit plaintiffs to show the loss of profits on sales which the plaintiffs would have had the opportunity to make and would have made but for the refusal of the defendants to fill any more orders

was made,[74] and loss resulting proximately from the seller's breach of the contract of sale,[75] then such evidence is admissible.[76] But if it appear that the profits sought to be recovered are speculative or contingent,[77] evidence of such profits cannot be received.[78]

74. Booth *v.* Spuyten Duyvil Roll. Mill Co., 3 Thomp. & C. (N. Y.) 368; Fessler *v.* Love, 48 Pa. St. 407; Alamo Mills Co. *v.* Hercules Iron Works, 1 Tex. Civ. App. 683, 22 S. W. 1097.

In Fessler *v.* Love, 48 Pa. St. 407, where the contract called for the delivery of logs to the vendee, who was a manufacturer of lumber, it was held that he could not show damages suffered as such manufacturer by reason of the failure to deliver the logs, in consequence whereof his sawmill stood idle for a part of the season, unless he also showed that this was contemplated by the parties at the time of making the contract.

75. Van Arsdale *v.* Rundel, 82 Ill. 63; Liggett Spring & Axle Co. *v.* Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466; Booth *v.* Spuyten Duyvil Roll. Mill Co., 3 Thomp. & C. (N. Y.) 368; Imperial Coal Co. *v.* Port Royal Coal Co., 138 Pa. St. 45, 20 Atl. 937; Shadbolt & Boyd Iron Co. *v.* Topliff, 85 Wis. 513, 55 N. W. 854.

76. Jones *v.* Nathrop, 7 Colo. 1, 1 Pac. 435; Benton *v.* Fay, 64 Ill. 417; Liggett Spring & Axle Co. *v.* Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466; Sherman *v.* Roberts, 1 Grant Cas. (Pa.) 261; Porter *v.* Woods, 3 Humph. (Tenn.) 56, 39 Am. Dec. 153.

77. Brigham *v.* Carlisle, 78 Ala. 243, 56 Am. Rep. 28; Sherman Center Town Co. *v.* Leonard, 46 Kan. 354, 26 Pac. 717, 26 Am. St. Rep. 101; Cates *v.* Sparkman, 73 Tex. 619, 11 S. W. 846; 15 Am. St. Rep. 806; Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635; Cannon *v.* Folsom, 2 Iowa 101, 63 Am. Dec. 474; Coweta Falls Mfg. Co. *v.* Rogers, 19 Ga. 416, 65 Am. Dec. 602.

In Allis *v.* McLean, 48 Mich. 428, 12 N. W. 640, it appeared that the owner of a saw mill had contracted for "wrought feed friction works" to be placed in his mill early in March, and notified the vendor that he would suffer for every day's delay damages to a certain amount. The machinery was not put in until some four months later, although frequently promised; but the mill was furnished with other machinery enabling it to be operated except for a few days. It was held that the loss of profits from the inability to manufacture lumber during the time was too uncertain to permit that to be considered as a basis for damages for a breach of the contract.

78. See cases cited under VI, 4, L, note 77.

How Damages Proved. — When it is sought to show damages, though they may consist in loss of profits, the testimony of the witnesses must be based on specific facts, and not on mere opinion, in a lump sum, as to the amount of damages sustained by reason of the breach of the contract. Sherman Center Town Co. *v.* Leonard, 46 Kan. 354, 26 Pac. 717, 26 Am. St. Rep. 101. In the case just cited, in order to prove the extent of the plaintiff's damages, a witness was asked to state as nearly as he could, what would have been the plaintiff's profits if the contract had been fulfilled. And also was asked to state what the damages were by reason of the breach of contract, both of which questions were answered over an objection. In holding this to be error the supreme court of Kansas, in the course of its opinion, says: "The questions asked were objectionable, and the testimony given was inadmissible, upon two grounds: 1. The questions were objectionable because they did not call for specific facts, but permitted the witness to state a mere opinion, giving in the lump the amount of damages sought to be sustained. It is the function of the court or jury trying the case to determine, from evidence properly presented, what the amount of damages sustained is, and while it might be very convenient for the plaintiff to permit him and his witnesses to

5. Action for Breach of Warranty, and Counter-Claim. — A. GENERALLY. — The evidence in this form of remedy either relates to an independent action brought by the buyer on the contract of warranty,[79] or it is relied on by him to reduce the claim of the seller in an action by him for the price of the goods sold.[80] In the code states this right of the buyer to reduce the amount of the seller's demand in an action for the price of the goods sold is known as a "counter-claim",[81] and in other jurisdictions as "recoupment".[82] The evidence to support the buyer's contention is the same in either case.[83]

B. EVIDENCE TO SUSTAIN AN ACTION ON THE WARRANTY. When the buyer brings an action against the seller for a breach of warranty, there must be evidence to prove the warranty,[84] the breach

give the damages suffered in a lump, it would be a very unsafe practice to allow them to state the amount of damages supposed to be sustained, without regard to the facts or knowledge upon which their opinions were based. It is well settled that the practice is not permissible. Roberts *v.* Brown Co., 21 Kan. 248; Wichita & W. R. Co. *v.* Kuhn, 38 Kan. 675, 17 Pac. 322; Sharon Town Co. *v.* Morris, 39 Kan. 377, 18 Pac. 230; Chicago, K. & N. R. Co., *v.* Neiman, 45 Kan. 533, 26 Pac. 22."

See further the article "DAMAGES," Vol. IV, p. 1.

79. Winter *v.* Bendel, 30 Ark. 362; Cook *v.* Gray, 2 Bush (Ky.) 121; Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230; Park *v.* Richardson & Boynton Co., 81 Wis. 399, 51 N. W. 572.

80. Hitchcock *v.* Hunt, 28 Conn. 343; Dukes *v.* Nelson, 27 Ga. 457; Rosebrook *v.* Runals, 32 Wis. 415.

81. Shipman Coal Min. & Mfg. Co. *v.* Pfeiffer, 11 Ind. App. 445, 39 N. E. 291, 292; Wright *v.* Anderson, 117 Ind. 349, 353, 354, 20 N. E. 247; Deford *v.* Hutchinson, 45 Kan. 318, 25 Pac. 641, 643, 11 L. R. A. 257; Jacobson *v.* Aberdeen Packing Co., 26 Wash. 175, 66 Pac. 419, 421; Hurst *v.* Everett, 91 N. C. 399.

82. Fidelity & Deposit Co. *v.* Haines, 78 Md. 454, 28 Atl. 393; 23 L. R. A. 652; Fontaine *v.* Baxley, 90 O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775; Myers *v.* Estell, 47 Miss. 4, 23.

83. Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382; Moore *v.* Barber Asphalt Pav. Co., 118 Ala. 563, 23 So. 798, 801; Ely *v.* Spiero, 28 App. Div. 485, 51 N. Y. Supp. 124, 126; Hay *v.* Short, 49 Mo. 139, 142; Hudson *v.* Snipes, 40 Ark. 75; Freeman *v.* Seitz, 126 Cal. 291, 58 Pac. 690; Shipman Coal Min. & Mfg. Co. *v.* Pfeiffer, 11 Ind. App. 445, 39 N. E. 291.

84. *Arkansas.* — Johnson *v.* McDaniel, 15 Ark. 109.

Connecticut. — Bartholomew *v.* Bushnell, 20 Conn. 271, 52 Am. Dec. 338.

Illinois. — Babcock *v.* Trice, 18 Ill. 420, 68 Am. Dec. 560; Cooke *v.* Preble, 80 Ill. 382; Milk *v.* Moore, 39 Ill. 584; Burns *v.* Nichols, 89 Ill. 480.

Massachusetts. — Noble *v.* Fagnant, 162 Mass. 275, 38 N. E. 507

Minnesota. — Wilson *v.* Fuller, 58 Minn. 149, 52 N. W. 988.

New Hampshire. — Fisk *v.* Hicks, 31 N. H. 535.

New York. — Raines *v.* Totman, 64 How. Pr. 493.

Rhode Island. — Fogarty *v.* Barnes, 16 R. I. 627, 18 Atl. 982.

South Carolina. — Allen *v.* Potter, 2 McCord 323.

Vermont. — Beeman *v.* Buck, 3 Vt. 53, 21 Am. Dec. 571; Pinney *v.* Andrus, 41 Vt. 631.

Washington. — Tacoma Coal Co. *v.* Bradley, 2 Wash. St. 600, 27 Pac. 454, 26 Am. St. Rep. 890.

In Smilie *v.* Hobbs, 64 N. H. 75, 5 Atl. 711, it was held that evidence that after the sale of a boiler by the vendor's agent, but before payment,

complained of,[85] and the damages resultant from the breach.[86] Evidence of an offer to return the property,[87] or of its return is not necessary.[88]

the vendee claimed the agent warranted its durability, which the vendor neither admitted nor denied but received the purchase price, was sufficient to establish a warranty.

In Messenger *v.* Pratt, 3 Lans. (N. Y.) 234, it was held that evidence that at the time of selling an article which was not then present, and the color of which was the test of its quality, the vendor pointed out a certain color and said that the article would run about that color, was sufficient to establish a warranty.

85. *United States.* — Buckstaff *v.* Russell & Co., 151 U. S. 626.

Illinois. — First Nat. Bank *v.* McCann, 4 Ill. App. 250; Cook *v.* Tavener, 41 Ill. App. 642; Morris *v.* Wibaux, 159 Ill. 627, 43 N. E. 837.

Iowa — Case Thresh. Co. *v.* Haven, 65 Iowa 359, 21 N. W. 677; McCormick Harv. Mach. Co. *v.* Brower, 88 Iowa 607, 55 N. W. 537; Hoffman *v.* Independent School Dist., 96 Iowa 319, 65 N. W. 322.

Kentucky. — Tipton *v.* Triplett, 1 Met. 570.

Louisiana. — Whitney Iron Wks. *v.* Reuss, 40 La. Ann. 112, 3 So. 500.

Massachusetts. — Cunningham *v.* Hall, 4 Allen 268; Lothrop *v.* Otis, 7 Allen 435.

Missouri. — Stearns *v.* McCollough, 18 Mo. 411.

New York. — Wells *v.* Selwood, 61 Barb. 238.

North Dakota. — Plano Mfg. Co. *v.* Root, 3 N. D. 165, 54 N. W. 924.

Wisconsin. — Case Plow Wks. *v.* Niles & Scott Co., 90 Wis. 590, 63 N. W. 1013.

Washington. — Tacoma Coal Co. *v.* Bradley, 2 Wash. St. 600, 27 Pac. 454, 26 Am. St. Rep. 890.

In Kerrick *v.* Van Dusen, 32 Minn. 317, 20 N. W. 228, the action involved a sale of a mill, which the sellers represented would grind forty bushels of corn per hour. It was held that this representation was not shown to be untrue by proof that the mill would only grind fifteen bushels of corn and oats per hour.

In J. I. Case Plow Wks. *v.* Niles & Scott Co., 90 Wis. 590, 63 N. W. 1013, where the buyer claimed a breach of warranty in delivering goods not in conformity with the contract, it was held that it could not be inferred that all the goods were defective simply because some of them were.

In Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93, it was held that evidence that a horse upon trial a few days after the purchase proved to be balky, was evidence that he was balky when sold.

In Conestoga Cigar Co. *v.* Finke, 144 Pa. St. 159, 22 Atl. 868, 13 L. R. A. 438, where leaf tobacco had been sold by sample, it appeared that the vendor's agents had examined the tobacco in question, admitted the defects and promised to make good the loss, and that in other similar actions the vendors had made good losses by paying for defective tobacco, it was held that the breach of warranty was sufficiently established.

86. Carter & Dorough *v.* Minton, 119 Ga. 474, 46 S. E. 658; Case Thresh. Mach. Co. *v.* Haven, 65 Iowa 359, 21 N. W. 677. See also Van Allen *v.* Allen, 1 Hilt. (N. Y.) 524; A. B. Cleveland Co. *v.* A. C. Nellis Co., 18 N. Y. Supp. 448; Aherin *v.* O'Brien, 84 Hun 633, 18 N. Y. Supp. 821.

In Thompson *v.* Martin, 84 Ga. 11, 10 S. E. 369, an action for breach of warranty of a mule, it was held that although a preponderance of the evidence showed that in age and soundness the mule came up to the warranty, yet as the evidence showed no damage to the plaintiff by reason thereof, the defendant was entitled to a verdict.

87. Olson *v.* Mayer, 56 Wis. 551, 14 N. W. 640; Buffalo Barb Wire Co. *v.* Phillips, 67 Wis. 129, 30 N. W. 295; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737; Borrekins *v.* Bevan, 3 Rawle (Pa.) 23, 23 Am. Dec. 85; Getty *v.* Rountree, 2 Pin. (Wis.) 379, 2 Chand. 28, 54 Am. Dec. 138.

88. *United States.* — Bagley *v.*

C. Scienter Need Not Be Proved. — In an action by the buyer on a contract of warranty in a sale of goods, to recover damages for a breach, it is not necessary to prove that the seller knew of the defect in the article to which the warranty related,[89] even if such scienter be averred in the pleading.[90]

D. Time to Which Evidence Must Relate. — In an action for breach of warranty, the point of time to which the evidence must be directed is that of the date at which the contract of warranty was made.[91] The object of the evidence must always be to show the condition of the goods at the time of the warranty;[92] but where the evidence tends to show an existing defective condition,[93] such evidence may be received as to such condition both before,[94] and after the warranty,[95] as tending to show such condition at the date of the warranty.[96]

Cleveland Roll. Mill Co., 22 Blatchf. 342.

California. — Polhemus *v.* Heiman, 45 Cal. 573; Blackwood *v.* Cutting Pack. Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199.

Connecticut. — Shupe *v.* Collender, 56 Conn. 489, 15 Atl. 405.

Georgia. — Woodruff *v.* Graddy, 91 Ga. 333, 17 S. E. 264, 44 Am. St. Rep. 33.

Illinois. — Babcock *v.* Trice, 18 Ill. 420, 68 Am. Dec. 560.

Maine. — Downing *v.* Dearborn, 77 Me. 457, 1 Atl. 407.

New York. — Fairbank Cann. Co. *v.* Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; Day *v.* Pool, 52 N. Y. 416, 11 Am. Rep. 719; Parks *v.* Morris Ax & Tool Co., 54 N. Y. 586; Dounce *v.* Dow, 57 N. Y. 16; Brigg *v.* Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Mack *v.* Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. Rep. 534.

Ohio. — Dayton *v.* Hooglund, 39 Ohio St. 671.

Pennsylvania. — Holloway *v.* Jacoby, 120 Pa. St. 583, 15 Atl. 487, 6 Am. St. Rep. 737.

Washington. — Tacoma Coal Co. *v.* Bradley, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890.

89. *Indiana.* — House *v.* Fort, 4 Blackf. 293.

Iowa. — Swayne *v.* Waldo. 73 Iowa 749, 33 N. W. 78, 5 Am. St. Rep. 712.

Kentucky. — Massie *v.* Crawford, 3 Mon. 218

Maryland. — Osgood *v.* Lewis, 2 Har. & J. 495, 18 Am. Dec. 317.

Rhode Island. — Place *v.* Merrill, 14 R. I. 578.

Vermont. — Beeman *v.* Buck, 3 Vt. 53, 21 Am. Dec. 571; Pinney *v.* Andrus, 41 Vt. 631; Edson *v.* Trask, 22 Vt. 18.

90. Beeman *v.* Buck, 3 Vt. 82, 21 Am. Dec. 82; House *v.* Fort, 4 Blackf. (Ind.) 293; Massie *v.* Crawford, 19 Ky. 218; Place *v.* Merrill, 14 R. I. 578; Pinney *v.* Andrus, 41 Vt. 631.

91. Postel *v.* Oard, 1 Ind. App. 252, 27 N. E. 584; Titus *v.* Poole, 73 Hun 383, 26 N. Y. Supp. 451; Kuntzman *v.* Weaver, 20 Pa. St. 422, 50 Am. Dec. 740; Marsh *v.* Nordyke & Marmon Co. (Pa.), 15 Atl. 875; Walton *v.* Cottingham, 30 Tex. 772; Foote *v.* Woodworth, 66 Vt. 216, 28 Atl. 1034; Sledge *v.* Scott, 56 Ala. 202.

92. Kuntzman *v.* Weaver, 20 Pa. St. 422, 59 Am. Dec. 740.

93. Van Hoesen *v.* Cameron, 54 Mich. 609, 20 N. W. 609; Freyman *v.* Knecht, 78 Pa. St. 141.

94. Plano Mfg. Co. *v.* Jackson, 38 Ill. App. 104; Starke *v.* Dicks, 2 Ind. App. 125, 28 N. E. 214; Dickens *v.* Williams, 2 B. Mon. (Ky.) 374; Daniells *v.* Aldrich, 42 Mich. 58, 3 N. W. 253.

95. Johnston *v.* Ashley, 7 Ark. 470; Hollingsworth *v.* Sharp, 66 Iowa 331, 23 N. W. 731; Daniells *v.* Aldrich, 42 Mich. 58, 3 N. W. 253.

96. *Arkansas.* — Johnston *v.* Ashley, 7 Ark. 470.

E. Proof of Breach of Warranty. — The evidence necessary to establish a breach of warranty depends upon the nature of the warranty.[97] Any evidence tending to show that the warranty is substantially untrue is sufficient to establish the breach.[98] Thus, on a warranty that a horse is gentle and willing to work, evidence that the horse on a trial three or four days after the purchase proved to

Illinois. — Plano Mfg. Co. *v.* Jackson, 38 Ill. App. 104.

Indiana. — Starke *v.* Dicks, 2 Ind. App. 125, 28 N. E. 214.

Iowa. — Hollingsworth *v.* Sharp, 66 Iowa 331, 23 N. W. 731.

Kentucky. — Dickens *v.* Williams, 41 Ky. 374.

Michigan. — Van Hoesen *v.* Cameron, 54 Mich. 609, 20 N. W. 609; Daniells *v.* Aldrich, 42 Mich. 58, 3 N. W. 253.

Pennsylvania. — Kuntzman *v.* Weaver, 20 Pa. St. 422, 59 Am. Dec. 740; Freyman *v.* Knecht, 78 Pa. St. 141.

A buyer of a horse may show by a former owner that the horse while owned by him was diseased, if the disease be such that it might have resulted in the subsequent unsoundness in question. Van Hoesen *v.* Cameron, 54 Mich. 609, 20 N. W. 609.

In Freyman *v.* Knecht, 78 Pa. St. 141, where the question was as to the soundness of a horse whose eyes were sore at the time of the sale, it was held that evidence of the condition of his eyes a year afterwards was admissible for the purpose of showing that the disease was permanent; but that such evidence would not be proper of itself to show the condition at the time of the sale; that there should also be evidence of the condition during the intervening time.

97. *Connecticut.* — Clark *v.* Wooster, 79 Conn. 126, 64 Atl. 10.

Kansas. — Wolf Bros. Shoe Co. *v.* Bishop, 72 Kan. 687, 84 Pac. 133.

Minnesota. — Case Thresh. Mach. Co. *v.* McKinnon, 82 Minn. 75, 84 N. W. 646.

Missouri. — Woods *v.* Thompson, 114 Mo. App. 38, 88 S. W. 1126; Texas Fruit Co. *v.* Lane, 101 Mo. App. 712, 74 S. W. 400.

Nebraska. — Shuman *v.* Heater, 106 N. Y. 1042.

West Virginia. — Wallice *v.* Douglas, 58 W. Va. 102, 51 S. E. 869.

Wisconsin. — Milwaukee Rice Mach. Co. *v.* Hamacek, 115 Wis. 422, 91 N. W. 1010.

98. Buford *v.* Gould, 35 Ala. 265; Hutchings *v.* Cole, 42 Ill. App. 261; Blodget *v.* Detroit Safe Co., 76 Mich. 538, 43 N. W. 451; Finley *v.* Quirk, 9 Minn. 179, 86 Am. Dec. 93.

Proof of Breach of Warranty. In Robinson *v.* Snow (Tex. Civ. App.), 74 S. W. 328, the action was instituted to recover damages for the sale of a horse, with warranty of health and certain other qualities. The only contention was the sufficiency of the evidence to show a breach of the warranty. On this proposition the court in the course of its opinion said: "It seems that the horse had been kept by the owner in Montgomery county for a number of years, when he concluded to sell him, and placed him in the hands of Charles Bybee to be sold. Bybee carried the horse to San Jacinto county and sold him to appellee. The horse at time of sale showed no signs of disease, but about a week or ten days after appellee bought him a disease was discovered, and the horse utterly failed to perform the services for which he was warranted. The disease progressed until the horse died. This occurred about four months after the purchase of the horse. There was evidence tending to show that the horse was well cared for after appellee purchased him, and was not exposed to any disease. While there was no positive proof that the horse was diseased at the time of the sale, the evidence justified the jury in finding that, the development of the disease having followed so quickly, he must have been diseased then, and they were also justified in finding that he would not in so short a time have lost the power to perform the service for which he was warranted. He was apparently in fine

be "balky" is sufficient to show a breach of such warranty.[99] So, on a warranty of a stallion, sold for breeding purposes and represented to be sound, a breach is shown by evidence that the horse was diseased and worthless as a stallion.[1]

F. Proof of Damages. — To establish the amount of damages to be recovered in an action on a warranty for its breach, the general rule is that the evidence must show the difference between the actual value of the article as sold, and its value, if the warranty had not been broken.[2] While the true rule requires that the evidence be directed to this point of difference, there are many cases which hold

condition when he failed and refused to perform the service, and it was a reasonable presumption that he was incapable of performing it at the time he was sold by the agent of appellant."

99. Finley *v.* Quirk, 9 Minn. 179, 86 Am. Dec. 93.

1. Snyder *v.* Baker (Tex. Civ. App.), 34 S. W. 981.

2. *Alabama.* — Kornegay *v.* White, 10 Ala. 255; Marshall *v.* Wood, 16 Ala. 806; Worthy *v.* Patterson, 20 Ala. 172; Stoudenmeier *v.* Williamson, 29 Ala. 558.

Arkansas. — Tatum *v.* Mohr, 21 Ark. 349.

Delaware. — Burton *v.* Young, 5 Harr. 233.

Georgia. — Porter *v.* Pool, 62 Ga. 238.

Illinois. — Strawn *v.* Cogswell, 28 Ill. 457; Miller *v.* Law, 44 Ill. App. 630; Skinner *v.* Mulligan, 56 Ill. App. 47; Woodworth *v.* Woodburn, 20 Ill. 184; Wallace *v.* Wren, 32 Ill. 146; Glidden *v.* Pooler, 50 Ill. App. 36.

Indiana. — Overbay's Admr. *v.* Lighty, 27 Ind. 27; Ferguson *v.* Hosier, 58 Ind. 438; Crist *v.* Jacoby, 10 Ind. App. 688, 38 N. E. 543; Street *v.* Chapman, 29 Ind. 142.

Iowa. — Douglass *v.* Moses, 89 Iowa 40, 56 N. W. 271, 48 Am. St. Rep. 353; Lacey *v.* Straughan, 11 Iowa 258; Aultman & Taylor Co. *v.* Shelton, 90 Iowa 288, 57 N. W. 857.

Kentucky. — Sharpe *v.* Bettis, 17 Ky. L. Rep. 673, 32 S. W. 395.

Maine. — Moulton *v.* Scruton, 39 Me. 287.

Maryland. — Horn *v.* Buck, 48 Md. 358.

Massachusetts. — Tuttle *v.* Brown, 4 Gray 457, 64 Am. Dec. 80; Whitmore *v.* South Boston Iron Co., 2 Allen 52.

Michigan. — Maxted *v.* Fowler, 94 Mich. 106, 53 N. W. 921.

Minnesota. — Merrick *v.* Wiltse, 37 Minn. 41, 33 N. W. 3; Frohreich *v.* Cammon, 28 Minn. 476, 11 N. W. 88; Hanson *v.* Gaar, Scott & Co., 63 Minn. 94, 65 N. W. 254.

Missouri. — Layson *v.* Wilson, 37 Mo. App. 636.

Montana. — Hogan *v.* Shuart, 11 Mont. 498, 28 Pac. 969.

Nebraska. — Brown *v.* Rogers, 20 Neb. 547, 31 N. W. 75.

New Jersey. — Perrine *v.* Serrell, 30 N. J. L. 454.

New York. — Sharon *v.* Mosher, 17 Barb. 518; Muller *v.* Eno, 14 N. Y. 597; Fales *v.* McKeon, 2 Hilt. 53; Renaud *v.* Peck, 2 Hilt. 137; Kiernan *v.* Rocheleau, 6 Bosw. (N. Y.) 148; Kays *v.* Eugert, 8 N. Y. St. 505.

North Carolina. — Pritchard *v.* Fox, 49 N. C. 140.

North Dakota. — Aultman & Co. *v.* Ginn, 1 N. D. 402, 48 N. W. 336.

Ohio. — Beresford *v.* McCune, 1 Cin. 50

Pennsylvania. — Cothers *v.* Keever, 4 Pa. St. 168; Struthers *v.* Clark, 30 Pa. St. 210; Himes *v.* Kiehl, 154 Pa. St. 190, 25 Atl. 632.

South Carolina. — Wallis *v.* Frazier, 2 Nott & McC. 516.

Tennessee. — McGavock *v.* Wood, 1 Sneed 181; Allen *v.* Anderson, 3 Humph. 581, 39 Am. Dec. 197.

Texas. — Howard *v.* Moore, 1 White & W. Civ. Cas. Ct. App. § 225; Russell *v.* Walker, 1 White & W. Civ. Cas. Ct. App. § 889; Cullers *v.* Wilson, 2 Wills. Civ. Cas. Ct. App. § 816. *Compare* Beard *v.* Miller (Tex. App.), 16 S. W. 655.

that the evidence must show the difference between the actual value of the article and the price paid.[3]

G. Proof of Expenses Incurred Caused by Breach of Warranty. — The decisions seem to be in conflict as to whether or not evidence is admissible to prove expenses incurred by the buyer in an endeavor to remedy the defect.[4]

H. Evidence of Interest in Proof of Damage. — The weight of authority is in favor of allowing proof of interest as one of the elements of damages in an action for breach of warranty.[5]

I. Evidence in Support of Counter-Claim. — As already

Vermont. — Houghton *v.* Carpenter, 40 Vt. 588.

Wisconsin. — Park *v.* Richardson & Boynton Co., 91 Wis. 189, 64 N. W. 859; Aultman & Taylor Co. *v.* Hetherington, 42 Wis. 622.

3. *Georgia.* — Badgett *v.* Broughton, 1 Ga. 591; Feagin *v.* Beasley, 23 Ga. 17; Clark *v.* Neufville, 46 Ga. 261.

Illinois. — Crabtree *v.* Kile, 21 Ill. 180; Wallace *v.* Wren, 32 Ill. 146.

Kansas. — Wheeler & Wilson Mfg. Co. *v.* Thompson, 33 Kan. 491, 9 Pac. 902.

Missouri. — Courtney *v.* Boswell, 65 Mo. 196, holding that where a seller warranted a machine perfect and fit and proper for a particular use, the buyer, on showing a breach of the warranty, was entitled, as damages, to the difference between the price paid and the real value of the machine.

New York. — Chace *v.* Nichols, 56 Hun 647, 9 N. Y. Supp. 878; Prentice *v.* Dike, 6 Duer 220; Roberts *v.* Carter, 26 Barb. 462; Wells *v.* Selwood, 61 Barb. 238; Edwards *v.* Collson, 5 Lans. 324; Aherin *v.* O'Brien, 64 Hun 633, 18 N. Y. Supp. 821.

4. **Cases Holding Such Evidence Admissible.** — Kelly *v.* Cunningham, 36 Ala. 78; Murry *v.* Meredith, 25 Ark. 164; Phelan *v.* Andrews, 52 Ill. 486; Thoms *v.* Dingley, 70 Me. 100, 35 Am. Rep. 310; Whitehead & Atherton Mach. Co. *v.* Ryder, 139 Mass. 366, 31 N. E. 736; Perrine *v.* Serrell, 30 N. J. L. 454; Routh *v.* Caron, 64 Tex. 289.

Freight Paid by the Vendee may be shown as damages for breach of warranty, where it appears that by the contract of sale the freight was a part of the purchase price. Briggs *v.* M. Rumely Co., 96 Iowa 202, 64 N. W. 784.

In Reeds *v.* Lee, 64 Mo. App. 683, where a vendor of paint had guaranteed that it would stand for five years and that in case it failed to stand for that period of time he would repaint the house, it was held that the vendor might show as his measure of damages the reasonable cost of repainting.

In J. I. Case Plow Wks. *v.* Niles & Scott Co., 90 Wis. 590, 63 N. W. 1013, it was held that the measure of damages for breach of warranty is the difference between the actual value of the defective goods and their value if they had been as warranted, to which may be added compensation for the trouble and expense suffered and any other special damages.

The expense of treating a horse may be shown in an action for breach of warranty of soundness of the horse. Perrine *v.* Serrell, 30 N. J. L. 454. *Contra.* — Merrick *v.* Wiltse, 37 Minn. 41, 33 N. W. 3.

Cases Holding Contrary. — Merrick *v.* Wiltse, 37 Minn. 41, 33 N. W. 3; Aultman *v.* Stout, 15 Neb. 586, 19 N. W. 464.

In Sycamore Marsh Harv. Co. *v.* Sturn, 13 Neb. 210, 13 N. W. 202, where the vendee claimed damages by reason of the failure of a reaper to work as warranted, it was held that evidence of expenses incurred in hiring another machine and for extra help was not admissible because too remote.

5. *Alabama.* — Marshall *v.* Wood, 16 Ala. 806; Stoudenmeier *v.* Williamson, 29 Ala. 558; Buford *v.* Gould, 35 Ala. 265; Rowland's Admr. *v.* Shelton, 25 Ala. 217; Kornegay *v.* White, 10 Ala. 255.

stated,[6] the evidence in support of a counter-claim founded on a breach of warranty in the sale of goods, is the same as that necessary to support an independent action by the buyer.[7]

Evidence of breach of warranty in many states may be received under the general issue,[8] while in others, such breach must be specially pleaded in order to allow the introduction of such evidence.[9]

J. Burden of Proof as to Warranty and Its Breach. — In any case where the buyer relies upon a warranty, the burden of proof is upon him to establish its existence,[10] and also the breach

Connecticut. — Ferris *v.* Comstock, 33 Conn. 513.

Georgia. — Butler *v.* Moore, 68 Ga. 780, 45 Am. Rep. 508.

Louisiana. — Burnham *v.* Hart, 15 La. Ann. 517.

Michigan. — Felt *v.* Reynolds R. F. E. Co., 52 Mich. 602, 18 N. W. 378.

Minnesota. — Merrick *v.* Wiltse, 37 Minn. 41, 33 N. W. 3.

Mississippi. — Noel *v.* Wheatly, 30 Miss. 181; Texada *v.* Camp, Walk. 150.

New York. — Burt *v.* Dewey, 31 Barb. 540.

North Carolina. — Williamson *v.* Canaday, 25 N. C. 349.

South Carolina. — Ware *v.* Weathnall, 2 McCord 413.

Tennessee. — Crittenden *v.* Posey, 1 Head 311.

Texas. — Jones *v.* George, 61 Tex. 345, 48 Am. Rep. 280.

But see Ancrum *v.* Slone, 2 Speers (S. C.) 594; Riss *v.* Messmore, 58 N. Y. Super. Ct. 23, 9 N. Y. Supp. 320.

6. See VI, L, 5, A, note 83.

7. Clark *v.* Wooster, 79 Conn. 126, 64 Atl. 10.

In Henkel *v.* Trubee (Conn.), 11 Atl. 722, defendants alleged that they were induced to enter into the contract by the false representations of the plaintiff's agent that he had fourteen orders for the goods in defendants' district, which orders he would transfer to defendants. Some of the orders were forged and others were conditional, but the evidence did not cover all of the fourteen. *Held* that, nevertheless, having proved a fraudulent misrepresentation as to a material fact, defendants were entitled to a verdict.

8. Babcock *v.* Trice, 18 Ill. 420, 68 Am. Dec. 560; Wilson *v.* Greensboro, 54 Vt. 533; Allen *v.* Hooker, 25 Vt. 137; Keyes *v.* Western Vt. Slate Co., 34 Vt. 81; Lee *v.* Rutledge, 51 Md. 311; Sterling Organ Co. *v.* House, 25 W. Va. 64.

9. *Indiana.* — Lewellen *v.* Crane, 113 Ind. 289, 15 N. E. 515; Postel *v.* Oard, 1 Ind. App. 252, 27 N. E. 584; J. F. Seiberling & Co. *v.* Tatlock, 13 Ind. App. 345, 41 N. E. 841; Kern *v.* Saul, 14 Ind. App. 72, 42 N. E. 496.

Minnesota. — Torkelson *v.* Jorgenson, 28 Minn. 383, 10 N. W. 416; Schurmeier *v.* English, 46 Minn. 306, 48 N. W. 1112; Allen *v.* Swenson, 53 Minn. 133, 54 N. W. 1065.

Missouri. — Keystone Implement Co. *v.* Leonard, 40 Mo. 477.

Wisconsin. — Red Wing Mfg. Co. *v.* Moe, 62 Wis. 240, 22 N. W. 414; Hessel *v.* Johnson, 70 Wis. 538, 36 N. W. 417.

10. *Colorado.* — Colorado Dry Goods Co. *v.* W. P. Dunn Co., 18 Colo. App. 409, 71 Pac. 887.

Illinois. — Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40.

Iowa. — Wingate *v.* Johnson, 126 Iowa 154, 101 N. W. 751.

Kentucky. — Gardner *v.* Winter, 25 Ky. L. Rep. 1472, 78 S. W. 143, 63 L. R. A. 647.

Michigan. — Keystone Mfg. Co. *v.* Forsyth, 123 Mich. 626, 82 N. W. 521; Gutta Percha Mfg. Co. *v.* Wood, 84 Mich. 452, 48 N. W. 28.

Missouri. — Brockman Com. Co. *v.* Kilbourne, 111 Mo. App. 542, 86 S. W. 275; Monumental Bronze Co. *v.* Doty, 92 Mo. App. 5; Roth *v.* Continental Wire Co., 94 Mo. App. 236, 68 S. W. 594; Garvey *v.* Hauck, 85 Mo. App. 14.

New York. — Eureka Fire Hose Co. *v.* Reynolds, 86 N. Y. Supp. 753.

thereof;[11] and this is true whether the buyer is plaintiff or defendant.

VII. RESCISSION OF CONTRACT OF SALE.

1. Generally. — As the right to rescind a contract of sale is a mutual one with reference to the parties thereto,[12] the evidence

Texas. — C. H. Dean Co. *v.* Standifer (Tex. Civ. App.), 83 S. W. 230.

Washington. — Tacoma Coal Co. *v.* Bradley, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890.

West Virginia. — Wallace *v.* Douglas, 58 W. Va. 102, 51 S. E. 869.

Wisconsin. — Lieberman *v.* Lippert, 109 Wis. 1, 85 N. W. 126.

11. *Illinois.* — Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40.

Iowa. — Swayne *v.* Waldo, 73 Iowa 749, 33 N. W. 78, 5 Am. St. Rep. 712.

Kansas. — Acme Harvester Co. *v.* Erne, 63 Kan. 858, 66 Pac. 1004.

Louisiana. — Prejean *v.* Wogan Bros., 110 La. 362, 34 So. 476.

Mississippi. — Stillwell, Bierce & Smith Vaile Co. *v.* Biloxi Canning Co., 78 Miss. 779, 29 So. 513.

Texas. — C. H. Dean Co. *v.* Standifer (Tex. Civ. App.), 83 S. W. 230.

Washington. — Tacoma Coal Co. *v.* Bradley, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890.

West Virginia. — Wallace *v.* Douglas, 58 W. Va. 102, 51 S. E. 869.

12. **Rescission by Seller.** — *United States.* — Fechheimer *v.* Baum, 37 Fed. 167, 2 L. R. A. 153.

Alabama. — Pelham *v.* Chattahooche Grocery Co., 41 So. 12.

Arkansas. — Richmond *v.* Mississippi Mills, 52 Ark. 30, 11 S. W. 960, 4 L. R. A. 413.

Indiana. — Thompson *v.* Peck, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201.

Iowa. — Rappleye *v.* Racine Seeder Co., 79 Iowa 220, 44 N. W. 363, 7 L. R. A. 139.

Rhode Island. — Arnold *v.* Carpenter, 16 R. I. 560, 18 Atl. 174, 5 L. R. A. 357.

Wisconsin. — German Nat. Bank *v.* Princeton State Bank, 128 Wis. 60, 107 N. W. 454.

Rescission by Buyer. — *Arkansas.* Bunch *v.* Weil, 72 Ark. 343, 80 S. W. 582, 65 L. R. A. 80.

Connecticut. — Clark *v.* Wooster, 79 Conn. 126, 64 Atl. 10.

Iowa. — Timken Carriage Co. *v.* Smith, 123 Iowa 554, 99 N. W. 183; Berkey *v.* Lefebure, 125 Iowa 76, 99 N. W. 710.

Michigan. — Simonds *v.* Cash, 136 Mich. 558, 99 N. W. 754.

Missouri. — Phares *v.* Jaynes, 118 Mo. App. 546, 94 S. W. 585.

Nebraska. — Rownd *v.* Hollenbeck, 108 N. W. 259.

New York. — Rose *v.* Merchants' Trust Co., 96 N. Y. Supp. 946.

Where the evidence shows a vendor was induced to sell a party goods on credit through fraudulent concealment of his insolvency and of his intent not to pay for them, the vendee is guilty of fraud, which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods. Fechheimer & Co. *v.* Baum, 37 Fed. 167, 2 L. R. A. 153.

Where the evidence shows goods are purchased through fraudulent misrepresentations, the vendor may repudiate the contract of sale and sue to recover possession of the goods. Richmond *v.* Mississippi Mills, 52 Ark. 30, 11 S. W. 960, 4 L. R. A. 413.

Where the evidence shows a sale of property was induced by fraud, the contract is not void, but voidable upon the election of the vendor. He may elect to rescind the contract by returning or offering to return whatever of value he may have received, and reclaim his property, or he may retain the consideration and treat the bargain as subsisting. Thompson *v.* Peck, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201.

Where the evidence shows the contract was induced by the fraud of the vendor, or that the terms of the contract gives him such right, a vendee has the right to rescind an executed sale and to return the thing

necessary to authorize a rescission is practically the same both as to buyer and seller,[13] and the rules of evidence applying thereto are the same as in other forms of contract.[14]

2. Evidence Authorizing Rescission by Seller. — A. GENERALLY. To justify a rescission of a contract of sale by the seller the evidence must show a contract between the parties agreeing to rescind,[15] which may be either an express agreement,[16] or one implied from

sold. But if the evidence merely shows a breach of warranty, the vendee does not have such right to rescind and return; and where the charge in the complaint is not one of fraud and deceit but merely a breach of warranty, evidence that plaintiff rescinded the sale of contract and returned the goods is inadmissible. Clark *v.* Wooster, 79 Conn. 126, 64 Atl. 10.

Where the evidence shows the goods are inferior to those bought, the vendee has the option to stand by the contract and accept the goods and sue for damages sustained, or to rescind the same and refuse to take the goods and sue for the money paid or expenses incurred; and the fact that the evidence shows that a part of the goods complied with the contract will not prevent a rescission. Phares *v.* Jaynes, 118 Mo. App. 546, 94 S. W. 585.

Where the evidence shows a stallion was purchased under an agreement that upon failure of the warranty he might return the horse and get another, the purchaser is entitled to a rescission of the contract on the refusal of the seller to comply with the provisions. Berkey *v.* Lefebure, 125 Iowa 76, 99 N. W. 710.

13. Florence Min. Co. *v.* Brown, 124 U. S. 385; Patten's Appeal, 45 Pa. St. 151, 84 Am. Dec. 479; Mayhew *v.* Mather, 82 Wis. 355, 52 N. W. 436; Bacon *v.* Sondley, 3 Strobh. (S. C.) 542, 51 Am. Dec. 646; Weill *v.* American Metal Co., 182 Ill. 128, 54 N. E. 1050.

Where the evidence shows a boilermaker agreed to deliver and set up boilers of a specified capacity, to be determined by a test made after the boilers were set up, such contract is executory and may be rescinded by the purchaser if the test, when made, fails to show compliance with the contract. Smith *v.* York Mfg. Co., 58 N. J. L. 242, 33 Atl. 244.

Where the evidence shows that the vendee did not call upon the vendor for the enforcement of the contract, its silence was evidence that it desired to rescind the contract; and the suspension by the vendor of further shipments to the vendee, or failure to call upon the vendee to comply with the contract was evidence that it also desired to rescind the contract. Florence Min. Co. *v.* Brown, 124 U. S. 385.

14. James *v.* Adams, 16 W. Va. 245; Manss-Bruning Shoe Co. *v.* Prince, 51 W. Va. 510, 41 S. E. 907; Harris *v.* Magee, 3 Call (Va.) 502; Bell *v.* Anderson, 74 Wis. 638, 43 N. W. 666; Schultz *v.* O'Rourke, 18 Mont. 418, 45 Pac. 634; Smith *v.* York Mfg. Co., 58 N. J. L. 242, 33 Atl. 244.

15. Quincy *v.* Tilton, 5 Me. 277; Hardenburgh *v.* Schmidt, 5 N. Y. St. 844; McLean *v.* Richardson, 127 Mass. 339; Kendall *v.* Young, 141 Ill. 188, 30 N. E. 538.

In McLean *v.* Richardson, 127 Mass. 339, the evidence showed that by the terms of a contract between the parties, the plaintiff was bound to deliver, and the defendants were bound to accept and pay for, at least two thousand hides; that plaintiff sent this number of such weight and quality as to satisfy the terms of the contract; that defendants refused to accept, claiming the quality was inferior. *Held*, that as the contract was not rescinded by mutual consent and that evidence failed to show the hides were not of the quality called for by the contract, the plaintiff could maintain an action against defendant for the difference between the contract price and the price received on the resale of the hides.

16. Bryant *v.* Thesing, 46 Neb.

the acts and declarations of the parties,[17] and the proof of the agreement may consist of documentary evidence,[18] or of parol testimony;[19]

244, 64 N. W. 967; Flynn *v.* Ledger, 48 Hun 465, 1 N. Y. Supp. 235; Quincy *v.* Tilton, 5 Me. 277.

Where the evidence shows that the parties agreed to rescind a sale once made and perfected without fraud, the same formalities of delivery as amount to a resale or re-exchange are necessary to revert the property in the original vendor which were necessary to pass it from him to the vendee. Quincy *v.* Tilton, 5 Me. 277.

In an action against the defendant as assignee of one Bell, the evidence showed that Bell had ordered the goods from plaintiffs, and upon the arrival of the goods Bell wrote to plaintiffs informing them he had become insolvent, and telling them how to dispose of them; that plaintiff answered the letter and wrote to him to sell the goods and give them the name of the party to whom the sale was made, such letter being received by Bell on April 24; that Bell had not taken the goods from the freight office or paid the charges upon them; that on April 26, he made an assignment to defendant for the benefit of his creditors and that defendant immediately took the goods out and paid the charges. *Held,* that as the goods were in the custody of the railroad company and the charges remained unpaid at the time at which the letter of the plaintiffs accepting Bell's offer to rescind the contract was mailed, and the assignment had not been made when such offer was made by Bell, the sale was rescinded. Flynn *v.* Ledger, 48 Hun 465, 1 N. Y. Supp. 235.

17. Fancher *v.* Goodman, 29 Barb. (N. Y.) 315; Mayhew *v.* Mather, 82 Wis. 355, 52 N. W. 436; Collins *v.* Brooks, 20 How. Pr. (N. Y.) 327; Sloane *v.* Van Wyck, 4 Abb. Dec. (N. Y.) 250; Healy *v.* Utly, 1 Cow. (N. Y.) 345.

Where the evidence showed the plaintiff contracted with defendant for the purchase of sheep for a stipulated sum, paying fifty dollars down; that he was to pay fifty dollars more in three days, and to take the sheep away within ten days from the date of sale and pay the balance then due; that plaintiff failed to make the other payments and to take the sheep away within the specified time; that upon the failure of plaintiff to make the balance of the payments and take the sheep away within the time specified, defendant sold the sheep to another person and refused to let plaintiff have them or to return the money paid by him. *Held,* that if the defendant meant to enforce the contract he should have notified plaintiff that if he did not take the sheep away and pay the balance due by the time specified, he should sell the sheep and look to the plaintiff for any deficiency. That the defendant, having failed to give such notice and resold the sheep, rescinded the contract *in toto* and lost all right of action against plaintiff for his breach of it, and became liable to refund the fifty dollars paid. Fancher *v.* Goodman, 29 Barb. (N. Y.) 315.

Where the evidence shows that a seller of an article of merchandise, which is returned to him by the purchaser on account of a breach of the warranty, consents to the return of the same without objection, he must be regarded as consenting to the rescission of the contract, and, therefore, is liable for the return of the money paid. Collins *v.* Brooks, 20 How. Pr. (N. Y.) 327.

18. Flynn *v.* Ledger, 48 Hun 465, 1 N. Y. Supp. 235.

19. Grant *v.* Shelton, 3 B. Mon. (Ky.) 420; Bryant *v.* Thesing, 46 Neb. 244, 64 N. W. 967.

Where the evidence shows that defendant purchased a horse from plaintiff; that the horse was unsound, and such unsoundness was known to plaintiff at the time of sale; that the horse was in a reasonable time after the discovery of the fraud tendered back to plaintiff and by a parol agreement between the parties the contract of sale was rescinded, but it being inconvenient at the time for the plaintiff to take possession of the horse the defendant was to keep it for a

or ground of rescission may be shown by proof of fraud by the buyer,[20] whereby the sale was induced;[21] so the evidence may consist of mutual mistake in a material matter to the contract of sale;[22] failure of consideration;[23] discovery after sale of an intended unlawful use of the goods by the buyer,[24] non-performance of some material part of the contract by the buyer;[25] non-payment for goods where payment and delivery are concurrent under contract of sale;[26]

while for plaintiff, which he did, and thereafter tendered the horse to plaintiff in pursuance of the contract of rescission. *Held,* that an agreement by parol to rescind a contract for the purchase of personal property is binding as a contract of purchase, without actual delivery in the one case or redelivery in the other. Gant *v.* Shelton, 3 B. Mon. (Ky.) 420.

20. Brower *v.* Goodyear, 88 Ind. 572; Bradbury *v.* Keas, 5 J. J. Marsh. (Ky.) 446; Bradley *v.* Obear, 10 N. H. 477; Bowen *v.* Schuler, 41 Ill. 192.

Where the evidence shows a party purchased goods upon fraudulent misrepresentations to the seller, the latter has the right to rescind the sale and recover back the property, but must first place the purchaser in *statu quo,* or at least make the offer. Bowen *v.* Schuler, 41 Ill. 192.

21. Bower *v.* Goodyer, 88 Ind. 572; Bradbury *v.* Keas, 5 J. J. Marsh. (Ky.) 446; Bradley *v.* Obear, 10 N. H. 477.

Where the evidence shows goods are obtained by a purchase effected through the fraudulent representations of the vendee, the vendor may rescind the contract on the discovery of the fraud, and reclaim the goods. Bradley *v.* O'Bear, 10 N. H. 477.

22. Rovegno *v.* Defferari, 40 Cal. 459; Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; Sheffield *v.* Hamlin, 26 Hun (N. Y.) 237; Ketchum *v.* Catlin, 21 Vt. 191.

Where the evidence shows that defendants contracted to sell to plaintiff a certain cow, it being mutually understood that she was barren and useless for breeding purposes, and before delivery, the defendants discovered such was not the case. *Held,* that the defendants had a right to rescind the contract of sale and refuse to deliver the property. Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531.

23. McCollom *v.* McCollom, 6 Rob. (La.) 506; Carter *v.* Walker, 2 Rich. L. (S. C.) 40.

Where the evidence shows that a purchaser of a tract of land and slaves has been evicted as to one-third of the property, he has a right to have the sale canceled *in toto,* and to be relieved from the payment of the price. McCollom *v.* McCollom, 6 Rob. (La.) 506.

24. Cowan *v.* Milbourn, L. R. 2 Ex. (Eng.) 230.

25. Hayden *v.* Reynolds, 54 Iowa 157, 6 N. W. 180; Goodrich *v.* Lafflin, 1 Pick. (Mass.) 57; Fuller *v.* Little, 7 N. H. 535.

Where the evidence shows that, after a contract has been partly performed, one party refuses to complete the same upon tender of performance by the other, the latter may treat the contract as rescinded. Hayden *v.* Reynolds, 54 Iowa 156, 6 N. W. 180.

26. The Treasurer, 1 Spr. 473, 24 Fed. Cas. No. 14,159; Stokes *v.* Baars, 18 Fla. 656; George H. Hess Co. *v.* Dawson, 149 Ill. 138, 36 N. E. 557; Guilbeau *v.* Melancon, 28 La. Ann. 627; McGrath *v.* Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415; Jenness *v.* Shaw, 35 Mich. 20; Bright *v.* Dean, 2 N. Y. Supp. 658, 18 N. Y. St. 1019.

In a case where it was shown by the evidence that plaintiff agreed to buy of the defendant all the oyster shells made by him during a certain season and was to pay on the first day of each and every successive week for the shells delivered during the previous week; that the contract contemplated the delivery of 200,000 bushels; that after the delivery of 75,000 bushels the defendant notified

non-acceptance of goods by the buyer,[27] or his repudiation of the contract of sale.[28]

B. Proof of Agreement for Rescission. — Where the agreement for rescission consists of a written instrument, the writing

plaintiff that the contract was at an end on account of plaintiff's failure to make the weekly payments and defendant refused to deliver him any more shells. It also appeared from the evidence that defendant had notified plaintiff that unless the payments due were paid at once the defendant would refuse to allow him to take away any more shells, to which construction of the contract plaintiff made no objection, nor to defendant's right to annul the contract upon failure of plaintiff to make the payments. *Held*, that the weekly payments were meant and understood by the parties to be of the essence of the contract, and the plaintiff having failed time and again to make these payments according to the agreement, the defendant had the right to rescind the contract. McGrath *v.* Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415.

Where the evidence shows the consignee named in a bill of lading made a contract for the sale of the cargo for cash or notes, and assigned the bill of lading to the purchaser, and the latter refused to receive the cargo and make payment except upon certain conditions, which he had no right to prescribe, the consignee had the right to rescind the contract of sale. The Treasurer, 1 Spr. 473, 24 Fed. Cas. No. 14,159.

27. Tabary *v.* Thieneman, 27 La. Ann. 720.

28. *Alabama.* — Behrman *v.* Newton, 103 Ala. 525, 15 So. 838.

Delaware. — Johnson Forge Co. *v.* Leonard, 3 Penne. 342, 51 Atl. 305, 94 Am. St. Rep. 86.

Massachusetts. — King *v.* Faist, 161 Mass. 449, 37 N. E. 456; Stephenson *v.* Cady, 117 Mass. 6.

Michigan. — West *v.* Bechtel, 125 Mich. 144, N. W.

New Jersey. — Blackburn *v.* Reilly, 47 N. J. L., 290, 1 Atl. 27, 54 Am. Rep. 159.

North Carolina. — Heiser *v.* Mears, 120 N. C. 443, 27 S. E. 117.

Pennsylvania. — White *v.* Wolf, 185 Pa. St. 369, 39 Atl. 1011.

Tennessee. — Ault *v.* Dustin, 100 Tenn. 366, 45 S. W. 981.

Where the evidence showed that by the terms of a contract for the sale and delivery of a quantity of flour, the vendor was to ship the flour specified as the vendee might direct, drawing upon him drafts for the flour shipped, and the vendee was to take out the flour by a certain date and to honor the drafts; that a month before the time limited for withdrawing the flour the vendee wrote to the vendor, "Before we pay any more drafts we want some assurance from you that you will make good any claims on account of quality," and stated orally to the agent of the vendor that he would pay no future drafts without some guaranty to protect him in case flour should on arrival prove deficient in quality, and he returned a draft unpaid; that the vendor thereupon wrote "We are not going to send any more flour." *Held*, that the vendor had a right to rescind the contract, the vendee having, without justification, declared his intention not to perform it; and that the letter of the vendor was an effectual rescission, and relieved him thereafter from all obligation under the contract to deliver the flour. King *v.* Faist, 161 Mass. 449, 37 N. E. 456.

In Johnson Forge Co. *v.* Leonard, 3 Penne. (Del.) 342, 51 Atl. 305, 94 Am. St. Rep. 86, an action brought to recover the amount due for 100 tons of scrap iron, it was shown by the evidence that plaintiff contracted to sell defendants 300 tons of scrap iron; that defendants were to pay for the same on the delivery of each 100 tons; that defendants refused to pay for the iron until they had received the entire amount called for by the contract, and that plaintiff thereupon rescinded the contract of sale, because of the repudiation by defendants of the terms of same.

must be the evidence thereof;[29] but where it is not in writing, it may be shown as any other contract is proved.[30]

C. Proof of Fraud as Ground of Rescission. — The evidence of fraud to authorize a rescission of a contract of sale, must show actual fraud,[31] and not mere constructive fraud.[32] It may and usually does consist of misrepresentations of material facts,[33] oper-

Held, that the refusal of the buyers to make the payments as stipulated in the contract of sale evinced a repudiation of the contract and justified a rescission by the sellers.

In an action for breach of a contract of sale, it was shown by the evidence that the plaintiff contracted with defendant for the purchase of a quantity of rope, which was to be manufactured and delivered upon plaintiff's orders, in assorted sizes, by a specified time; that after a part of the rope had been delivered a dispute arose as to the size of the reels and plaintiff wrote defendant canceling the contract, to which letter the latter replied refusing to allow plaintiff to rescind the order; that plaintiff again refused to carry out the agreement; that thereafter and when it was too late for defendant to fill the order plaintiff commenced sending in orders for rope according to the contract; that defendant refused to carry out the contract. *Held,* that plaintiff breached his contract by failure to give orders a sufficient time before the date fixed for final delivery to reasonably enable the seller to manufacture and deliver the goods; that defendant's refusal to agree to a rescission of the contract could not prevent a rescission by plaintiff or compel a specific performance, but that plaintiff would be liable in damages for the breach. Ault *v.* Dustin, 100 Tenn. 366, 45 S. W. 981.

29. Aldine Press *v.* Estes, 75 Mich. 100, 42 N. W. 677; Giles *v.* Bradley, 2 Johns. Cas. (N. Y.) 253; Dykers *v.* Stuart, 2 Jones & S. (N. Y.) 189; Stewart *v.* Huntington, 4 N. Y. St. Rep. 760; Stiles *v.* Seaton, 200 Pa. St. 114, 49 Atl. 774.

30. Hirschberg Optical Co. *v.* Michaelson (Neb.), 95 N. W. 461; Baltimore & L. R. Co. *v.* Steel Rail Supply Co., 123 Fed. 655, 59 C. C. A. 419; Gentry Co. *v.* Margolius, 110 Tenn. 669, 75 S. W. 959; Darby *v.* Hall, 3 Penne. (Del.) 25, 50 Atl. 64; McGregor-Noe Hdw. Co. *v.* Livesay, 85 Mo. App. 271; Stiles *v.* Seaton, 200 Pa. St. 114, 49 Atl. 774.

31. Barnett *v.* Speir, 93 Ga. 762, 21 S. E. 168.

32. Barnett *v.* Speir, 93 Ga. 762, 21 S. E. 168.

33. Brower *v.* Goodyer, 88 Ind. 572; Bradbury *v.* Keas, 5 J. J. Marsh. (Ky.) 446; Bradley *v.* Obear, 10 N. H. 477; Hall *v.* Orvis, 35 Iowa 366; Thurston *v.* Blanchard, 22 Pick. (Mass.) 18, 33 Am. Dec. 700; Spangler *v.* Kite, 47 Mo. App. 230; Bridge *v.* Penniman, 105 N. Y. 642, 12 N. E. 19.

Where the evidence shows that the vendee of personal property knowingly or fraudulently concealed his insolvency and that he bought the property from the vendors intending to defraud them and secure it without paying them the agreed price, the vendors, if no innocent third party has acquired an interest in the goods, are entitled to rescind the sale and recover the goods. Brower *v.* Goodyear, 88 Ind. 572.

Where the evidence showed an insolvent, by representing himself to be a merchant of good standing and solvency, succeeded in making a purchase of goods, it was held to be fraud and the contract could be rescinded on that ground by the seller. Bradbury *v.* Keas, 5 J. J. Marsh. (Ky.) 446.

Where the evidence shows that the buyer purchased two mares upon the false and fraudulent representations as to their age, made to him by the seller at or prior to the sale, he may, at his election, rescind the sale by returning or offering to return the mares within a reasonable time after the discovery of the fraud. Spangler *v.* Kite, 47 Mo. App. 230.

ating on the party to induce the sale.[34] These principles apply alike to seller and purchaser.[35]

D. Proof of Mistake as Ground of Rescission. — The evidence as to mistake must show that the mistake was mutual,[36] and

34. *Arkansas.* — Righter *v.* Roller, 31 Ark. 170.
Indiana. — Brower *v.* Goodyear, 88 Ind. 572.
Iowa. — Hall *v.* Orvis, 35 Iowa 366.
Kentucky. — Bradbury *v.* Keas, 5 J. J. Marsh. 446.
Massachusetts. — Perley *v.* Balch, 23 Pick. 283, 34 Am. Dec. 56; Holbrook *v.* Burt, 22 Pick. 546.
Missouri. — Spangler *v.* Kite, 47 Mo. App. 230.
New Hampshire. — Demorest *v.* Eastman, 59 N. H. 65; Bradley *v.* Obear, 10 N. H. 477.
New York. — Bridge *v.* Penniman, 105 N. Y. 642, 12 N. E. 19.
Where it is shown by the evidence that plaintiffs were induced to purchase a certain invention from the defendant by the false and fraudulent representations of the latter in reference to the patent, the plaintiffs are entitled to have the contract rescinded and to have the deed for certain lands, given in payment for said patent, canceled. Hall *v.* Orvis, 35 Iowa 366.
Where the evidence showed that defendants were induced to purchase certain goods through the false representations of the plaintiff's agent, of which she had knowledge and subsequently ratified, it was held that the defendants had the right to rescind, and having notified the plaintiff to that effect and offered to return the goods, no action could be maintained against them to recover the price. Demorest *v.* Eastman, 59 N. H. 65.

35. *Arkansas.* — Righter *v.* Roller, 31 Ark. 170.
Indiana. — Brower *v.* Goodyear, 88 Ind. 572.
Iowa. — Hall *v.* Orvis, 35 Iowa 366.
Kentucky. — Bradbury *v.* Keas, 5 J. J. Marsh. 446.
Maine. — Junkins *v.* Simpson, 14 Me. 364.
Massachusetts. — Thurston *v.* Blanchard, 22 Pick. 18, 33 Am. Dec. 700.
Missouri. — Spangler *v.* Kite, 47 Mo. App. 230.
New Hampshire. — Bradley *v.* Obear, 10 N. H. 477.
New York. — Bridge *v.* Penniman, 105 N. Y. 642, 12 N. E. 19.

36. *England.* — Torrance *v.* Bolton, L. R. 8 Ch. App. 118; Smith *v.* Hughes, L. R. 6 Q. B. Cas. 597.
United States. — Allen *v.* Hammond, 11 Pet. 63, 71.
Massachusetts. — Harvey *v.* Harris, 112 Mass. 32; Gardner *v.* Lane, 9 Allen 492, 85 Am. Dec. 779.
Michigan. — Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; Gibson *v.* Pelkie, 37 Mich. 380.
New York. — Cutts *v.* Guild, 57 N Y. 229.
Ohio. — Byers *v.* Chapin, 28 Ohio St. 300.
Pennsylvania. — Huthmacher *v.* Harris, 38 Pa. St. 491. Leake on Contracts 338.
It appeared from the evidence that the plaintiff offered to sell to the defendants oats and exhibited a sample; the defendant took the sample, and on the following day wrote to say that he would take the oats; that the defendant afterwards refused to accept the oats on the ground that they were new, and he thought he was buying old oats; that nothing, however, was said at the time the sample was shown as to their being old; but the price was very high for new oats. The trial judge left to the jury the question whether the plaintiff had believed the defendant to believe or to be under the impression that he was contracting for old oats, and, if they were of the opinion from the evidence that the plaintiff had so believed, he directed them to find for the defendant, and the jury so found. *Held*, that there must be a new trial: Per Hannen, J., on the ground that the direction did not sufficiently explain to the jury that, in order to relieve the defendant from liability it was necessary that

is available to both seller and buyer.[37] The evidence as to mutual mistake may relate to the price which was to be paid for the goods,[38] the article to which the contract of sale related,[39] the party contracted

they should find, not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that the plaintiff believed the defendant to believe that he, the plaintiff, was contracting to sell old oats. Smith *v.* Ruggles, L. R. 6 Q. B. Cas. 597.

In an action where the evidence showed that damaged flour was offered for sale at auction, divided into two classes; that one class, slightly damaged, was offered by the barrel, in the barrels in which it was originally packed; that the other, much damaged, had been repacked and was offered by the pound as repacked flour or "dough;" that the sale took place in an auction room and the flour was in the street outside; that after the auctioneer had sold, as he thought, all of the first class, he offered for sale the second class, stating the differences between the two classes; that the plaintiff, who was the highest bidder, selected by their numbers two rows of barrels as the flour he would take and these rows were made up of barrels of flour of the first class, accidentally misplaced without the knowledge of the owner or auctioneer, it was held that there had been no sale, as the minds of the parties had not met as to the subject-matter of the sale. Harvey *v.* Harris, 112 Mass. 32.

Where the evidence showed that a party purchased at an administrator's sale a "drill machine," which, unknown to all parties, contained money and other valuables secreted there by the decedent, it was held that the sale passed to the purchaser the right to the machine and every constituent part of it, but not to the valuables contained in it, which, on discovery, were to be held as treasure trove for the personal representatives of the deceased owner. Hutchmacher *v.* Harris, 38 Pa. St. 491, 80 Am. Dec. 502.

37. Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531.

38. Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; 1 Benjamin on Sales, §§ 605, 606; Leake on Contracts, 339; Story on Sales, 4th ed., §§ 148, 377.

39. Hecht *v.* Batcheller, 147 Mass. 335, 9 Am. St. Rep. 708, 17 N. E. 651, and cases there cited.

The evidence showed that the owner of a promissory note sold it through a broker shortly after the maker made an assignment for the benefit of creditors, neither seller, nor buyer, nor broker knowing that fact, but all supposing that he was still doing business, and it was agreed that such sales through brokers "are confined to the paper of persons actually carrying on business, in other words, it is the universal custom of such brokers not to offer for sale the paper of any person whom they have reason to believe have failed or made an assignment." The court in holding such sale valid, in an opinion by Morton, C.J., said: "It is a general rule, that, where parties assume to contract, and there is a mistake as to the existence or identity of the subject-matter, there is no contract, because of the want of mutual assent necessary to create one; so that in the case of a contract for the sale of personal property, if there is such mistake, and the thing delivered is not the thing sold, the purchaser may refuse to receive it, or, if he received it, may upon discovery of the mistake return it and recover back the price he has paid. But to produce this result the mistake must be one which affects the *existence or identity of the thing sold.* Any mistake as to its value or quality, or other collateral attributes, is not sufficient if the thing delivered is existent, and is the *identical thing in kind which was sold.* . . . In the case at bar the subject-matter of the contract was the note of J. and S. B. Sachs. The note delivered was the same note which the parties bought and sold. They may both have understood that

with,[40] or any other material fact,[41] evidence of a mutual mistake in any of which matters is sufficient to authorize rescission.[42]

E. Restoration Must Be Proved. — If either party has received anything in consideration of the sale, and he desires to rescind the contract, rescission cannot be upheld without evidence of his restoration of such consideration;[43] but evidence establishing a

the makers were solvent, whereas they were insolvent; but such a mistake or misapprehension affects the value of the note, and *not its identity*. . . . The maker of the note had made an assignment for the benefit of their creditors, but this *did not extinguish* the note, or destroy its identity. . . . Its quality and value were impaired, but not its identity. The parties bought and sold what they intended, and their mistake was not as to the subject-matter of the sale, but as to its quality." Hecht *v.* Batcheller, 147 Mass. 335, 17 N. E. 651, 9 Am. Dec. 708.

40. Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; Consumers' Ice Co. *v.* Webster, Son & Co., 32 App. Div. 592, 53 N. Y. Supp. 56; Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184.

In an action brought by the plaintiff, a corporation, to recover damages for the failure of the defendant to deliver ice, pursuant to a contract entered into between the parties, and which contract the defendant repudiated, alleging that the same was entered into under the belief that the vendee named in the contract was a certain old firm, well known to defendant, when, in fact, it was a corporation engaged in the same business, doing business under the same name, and the existence of which corporation was unknown to the vendor. The defendant, on the trial, offered to prove that, during the negotiations in the contract, it was expressly stated that the contract was for the benefit of the old firm. In holding the refusal of such testimony error, the court said: "In case the jury should find that the existence of the plaintiff corporation was unknown to the officers of the defendant, and that they were led to believe they were contracting with the firm having the same name of the plaintiff corporation, the minds of the parties never met, and there was no contract; and if, as the defendant offered to prove, it was represented by the person negotiating the contract for the plaintiff that he was making it for the firm, it was a misrepresentation, and there was no contract, and, in case ice had been delivered under it without knowledge of the facts, title to ice would not have passed to the plaintiff." Consumer's Ice Co. *v.* Webster, Son & Co., 32 App. Div. 592, 53 N. Y. Supp. 56.

41. Hecht *v.* Batcheller, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708; Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; Huthmacher *v.* Harris, 38 Pa. St. 491, 80 Am. Dec. 502; Durfee *v.* Jones, 11 R. I. 588, 23 Am. Rep. 528; Bowen *v.* Sullivan, 62 Ind. 281, 30 Am. Rep. 172.

42. Benson *v.* Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816; Sawyer *v.* Hovey, 3 Allen (Mass.) 331, 81 Am. Dec. 659.

43. *California.* — Herman *v.* Haffenegger, 54 Cal. 161.

Indiana. — Thompson *v.* Peck, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201; Vance *v.* Schroyer, 79 Ind. 380; Haase *v.* Mitchell, 58 Ind. 213.

Maine. — Potter *v.* Titcomb, 22 Me. 300; Tisdale *v.* Buckmore, 33 Me. 461.

Massachusetts. — Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230; Thurston *v.* Blanchard, 22 Pick. 18, 33 Am. Dec. 700.

Mississippi. — Brown *v.* Norman, 65 Miss. 369, 4 So. 293, 7 Am. St. Rep. 663.

Missouri. — Merrill *v.* Nickells, 66 Mo. App. 678.

Nevada. — Bishop *v.* Stewart, 13 Nev. 25.

New York. — Berry *v.* American Ins. Co., 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548.

bona fide offer to restore the consideration will be sufficient.[44]

Oregon. — Crossen *v.* Murphy, 31 Or. 114, 49 Pac. 858; Frink *v.* Thomas, 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239.

Pennsylvania. — Babcock *v.* Case, 61 Pa. St. 427, 100 Am. Dec. 654; Schwartz *v.* McCloskey, 156 Pa. St. 258, 27 Atl. 300.

Vermont. — Smith *v.* Smith, 30 Vt. 139; Fay *v.* Oliver, 20 Vt. 118, 49 Am. Dec. 764.

Wisconsin. — Friend Bros. Clothing Co. *v.* Hulbert, 98 Wis. 183, 73 N. W. 784.

In Thompson *v.* Peck, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201, it was shown that goods were purchased from appellees upon fraudulent representations as to the solvency of the vendees, and the vendors had received notes and cash in payment for the same; that after the assignment of the vendees a replevin suit was brought by vendors for the property sold; that appellee failed to return or offer to return the notes and cash received in consideration of such sale. *Held,* that although a sale of property is induced by fraud, the contract is not void but voidable, and a party may elect to rescind the sale, by returning or offering to return whatever of value he may have received and reclaim his property, or he may retain the property and treat the bargain as subsisting. The appellees having failed to make such return or offer were not in a position to rescind the contract and recover the goods.

Where the evidence shows a purchaser bought goods on credit knowing that he was insolvent and with the intention not to pay, the vendor may avoid the contract and reclaim the goods, but there must be a rescission with tender of consideration received before the vendor is entitled to retake the property; and since there was no evidence of rescission in this case, a peremptory instruction to find for the defendant was proper. Merrill *v.* Nickells, 66 Mo. App. 678.

In an action to rescind a contract, under which chattels have been exchanged, which proved to have been fraudulent, as against one of the parties thereto, he cannot replevy the chattel parted with unless it is shown by the evidence that he first rescinded the contract, by tendering back to the other party whatever thing of value he received from him in such exchange. Haase *v.* Mitchell, 58 Ind. 213.

44. *Alabama.* — Jones *v.* Anderson, 82 Ala. 302, 2 So. 911.

California. — Coghill *v.* Boring, 15 Cal. 213.

Illinois. — Hanchett *v.* Sorg, 15 Ill. App. 493; Ryan *v.* Brant, 42 Ill. 78.

Maine. — Ayers *v.* Hewett, 19 Me. 281; Emerson *v.* McNamara, 41 Me. 565.

New Hampshire. — Weed *v.* Garland, 58 N. H. 154.

New York. — Stevens *v.* Hyde, 32 Barb. 171.

Vermont. — Poor *v.* Woodburn, 25 Vt. 234.

The Production of the Consideration of the Sale at the Time of Trial Is Evidence of a Seasonable Offer To Return. — Wood *v.* Garland, 58 N. H. 154. See also in this connection Ryan *v.* Brant, 42 Ill. 78; Hathorne *v.* Hodges, 28 N. Y. 486; Sloane *v.* Shiffer, 156 Pa. St. 59, 27 Atl. 67; Wood *v.* Page, 7 Wis. 503.

In an action for the recovery of goods sold upon fraudulent representations to enable the reader to rescind the sale, the evidence must show an offer to return the notes given for the goods. Coghill *v.* Boring, 15 Cal. 213.

Where the vendor of goods, sold on credit, elects to rescind the sale for the fraudulent misrepresentations of the vendee in obtaining the goods, if the vendor received a note or acceptance in payment of the goods, the evidence must show a return or offer to return such note or acceptance before he is in a position to bring a suit of replevin for the goods. Hanchett *v.* Sorg, 15 Ill. App. 493.

In an action to rescind a sale and recover possession of his property, where a vendor has, by the fraud of the other party, been induced to part

3. Evidence Authorizing Rescission by Buyer. — A. Generally. As the evidence to authorize rescission by the seller is alike open to the buyer,[45] the only additional grounds with reference to this matter are those of non-delivery,[46] and breach of warranty.[47]

B. Non-Delivery in Support of Rescission. — Evidence of the seller's failure to deliver the goods sold,[48] or delay in delivery at the time stipulated,[49] or where the contract calls for a delivery by

with his property, the evidence must show that the vendor returned or offered to return whatever he received in payment therefor prior to the commencement of suit. Emerson *v.* McNamara, 41 Me. 565.

In an action to rescind a sale and recover possession of property on the ground of fraud, the party defrauded must first show that he offered to the purchaser the notes taken on the sale or have them ready at the trial. It is too late to make the offer after verdict has been rendered. Ayers *v.* Hewett, 19 Me. 281.

Where the evidence shows that goods were purchased under false and fraudulent pretences, and part of the purchase money paid, the vendor cannot sustain an action for the recovery of the goods on the ground that the title did not pass because of the fraud, unless it appears from the evidence that he returned or offered to return the money received on the contract of sale. Wied *v.* Page, 7 Wis. 503.

45. See notes under VII, 3, B, C, D, E.

46. See notes under VII, 3, B.

47. See notes under VII, 3, C.

48. *United States.* — Norrington *v.* Wright, 115 U. S. 188; *In re* Kelly, 51 Fed. 104.

Alabama. — Behrman *v.* Newton, 103 Ala. 525, 15 So. 838.

Indiana. — Smith *v.* Lewis, 40 Ind. 98.

Iowa. — Kuhlman *v.* Wood, 81 Iowa 128, 46 N. W. 738.

New York. — Frost *v.* Smith, 7 Bosw. 108; Elting Woolen Co. *v.* Martin, 5 Daly 417.

In Smith *v.* Lewis, 40 Ind. 98, the defendant, who was a retail dealer, contracted with the plaintiff, a wholesale dealer, for a lot of clothing to be shipped defendant, a part of which consisted of clothing of a particular kind, quality and price. The evidence showed that part of the goods shipped were not of the kind, quality and price contracted for; that the defendant refused to accept any portion of the goods, and immediately returned them to plaintiff. It was held that the contract of defendant was an entire contract for the whole bill of goods, and he was not obliged to accept a part without the whole.

Where the evidence shows that defendant contracted to make and deliver from time to time, as required, six engines, and he delivers only two, and on request to deliver another, refuses, without cause, so to do, the contract may be rescinded, and any moneys advanced to him over and above the worth or contract price of the two delivered, may be recovered. Frost *v.* Smith, 7 Bosw. (N. Y.) 108.

49. Jones *v.* United States, 96 U. S. 24; Rouse *v.* Lewis, 4 Abb. Dec. (N. Y.) 121; Bidwell *v.* Overton, 26 Abb. N. C. 402, 13 N. Y. Supp. 274.

In Jones *v.* United States, 96 U. S. 24, it was shown by the evidence that the petitioner entered into an agreement with an assistant quarter master of the army to manufacture and deliver two hundred thousand yards of uniform cloth; that he was to deliver 5000 yards in June, 25,000 yards in July, 25,000 yards in August, 35,000 yards in September, 50,000 yards in October, 50,000 yards in November, and 10,000 yards in December 15th of the same year; that certain instalments were delivered and paid for; that in August the petitioner's mill was destroyed by fire and in consequence thereof failed to make the deliveries as required by the agreement; that petitioner being unable to fill the contract as required applied to be released therefrom, which request was refused; that

installments, and there is a failure to deliver any one of the installments,[50] or if the contract is entire, a failure to deliver a part of the goods, provided there is restoration of the part delivered,[51] is, in

thereafter petitioner tendered the cloth to the assistant quartermaster, who refused to receive the same because the time for deliveries under the contract had passed. *Held*, that in an executory contract for the manufacture of goods and their delivery on a specified day, no right of property passes to the vendee, and, time being of the essence of the contract, he is not bound to accept and pay for them unless they are delivered or tendered on that day; and it having been proven that the goods had not been delivered or tendered at the stipulated time, nor an extension of time for the performance of the contract granted, the United States was not estopped from setting up that when the goods were tendered the contract was at an end.

50. Norrington *v.* Wright, 115 U. S. 188; *In re* Kelly, 51 Fed. 194; Elting Woolen Co. *v.* Martin, 5 Daly (N. Y.) 417.

In Elting Woolen Co. *v.* Martin, 5 Daly (N. Y.) 417, an action to recover damages for the breach of a written agreement for the manufacture and delivery of 40,000 yards of flannel each month, the evidence showed that the plaintiff furnished only 25,000 yards during the first month. *Held*, that this was such a breach of the contract as entitled the defendant to rescind it, and refuse to receive any more goods, notwithstanding the plaintiff had offered to supply the deficiency by goods bought in the market, and had been excused by the defendants from doing so.

Contra. — Gerli *v.* Poidebard Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401, 51 Am. St. Rep. 612, 30 L. R. A. 61, where the court quoting from Blackburn *v.* Reilly, 47 N. J. L. 290, 1 Atl. 27, 54 Am. Rep. 159, said: "In contracts for sale of goods to be executed by a series of deliveries and payments, defaults of either party with reference to one or more of the stipulated acts will not ordinarily discharge the other party from his obligation, unless the conduct of the party in default be such as to evince an intention to abandon the contract or a design no longer to be bound by its terms." In the former case the defendant, who was the vendee, insisted that the rule was not applicable to that case because the vendor's fault consisted in failing to do the first thing required to be done in performance of the contract. The court in refusing to sanction this contention, said: "On principle, I do not see that, for such a purpose, the first act to be done stands upon a different footing from subsequent acts. And default in that does not make it more certain than do other defaults that the party aggrieved cannot get exactly what he contracted for; for that default, as well as for others, he may be compensated by suit, and by that default, as readily as by others, he may obtain an unconscionable advantage if he is entitled to rescind or retain the bargain as self-interest may dictate. As evidence of repudiation or abandonment, non-performance of the first thing required to be done may be more persuasive than if the promisor had partially carried out his contract, but, as a basis on which a right of rescission is to be supported, it cannot, merely because it is first in order of time, have any greater importance than later defaults." It should be noted, perhaps, that in this case there was a strong dissenting opinion by Justice Van Syckel, in which he takes the view stated in the text.

51. Behrman *v.* Newton, 103 Ala. 525, 15 So. 838; Kuhlman *v.* Wood, 81 Iowa 128, 46 N. W. 738; Frost *v.* Smith, 7 Bosw. (N. Y.) 108; Smith *v.* Lewis, 40 Ind. 98.

In Kuhlman *v.* Wood, 81 Iowa 128, 46 N. W. 738, the evidence showed that the plaintiff agreed to sell to defendant certain specific articles of household furniture situated in a hotel, for a sum named; that before delivery he removed a number of

each of these cases sufficient to show the buyer's right to rescind.[52]

C. Breach of Warranty in Support of Rescission. Whether the right to rescind an executed contract of sale by the buyer may be shown by evidence of a mere breach of warranty, the courts are not agreed. In some jurisdictions such matter is admitted as evidence to establish a right of rescission,[53] while in others and by the weight of authority in the absence of fraud it is not.[54]

articles from the premises and substituted for some, other articles of less value; that upon discovery of these facts the defendant refused to carry out the agreement and left the property in the possession of plaintiff. It was held that the defendant was entitled to rescind the sale, and recover from plaintiff the money paid thereunder.

52. Smith *v.* Lewis, 40 Ind. 98; Norrington *v.* Wright, 115 U. S. 188; Kuhlman *v.* Wood, 81 Iowa 128, 46 N. W. 738; Jones *v.* United States, 96 U. S. 24; Elting Woolen Co. *v.* Martin, 5 Daly (N. Y.) 417.

In Norrington *v.* Wright, 115 U. S. 188, an action on a contract for the sale of 5000 tons of iron rails, the evidence showed the sellers contracted to deliver 1000 tons per month; that only 400 tons were shipped in February and 885 tons in March; that the buyer accepted and paid for the February shipment in March on its arrival at the stipulated price and above its market value and in ignorance that no more had been shipped in February; that he was informed of that fact after the arrival of the March shipments. It was held that he might rescind the contract by reason of the failure to ship about 1000 tons in each of the months of February and March.

53. *Alabama.* — Thompson *v.* Harvey, 86 Ala. 519, 5 So. 825; Hodge *v.* Tufts, 115 Ala. 366, 22 So. 422.

California. — Hoult *v.* Baldwin, 67 Cal. 610, 8 Pac. 440.

Illinois. — Skinner *v.* Mulligan, 56 Ill. App. 47.

Iowa. — Upton Mfg. Co. *v.* Huiske, 69 Iowa 557, 29 N. W. 621.

Kansas. — Gale Sulky Harrow Mfg. Co. *v.* Stark, 45 Kan. 606, 26 Pac. 8, 23 Am. St. Rep. 735; Latham *v.* Hartford, 27 Kan. 249.

Maine. — Marston *v.* Knight, 29 Me. 341.

Maryland. — Clements *v.* Smith, 9 Gill 156.

Massachusetts. — Bryant *v.* Isburgh, 13 Gray 607, 74 Am. Dec. 655; Smith *v.* Hale, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485.

Missouri. — Johnson *v.* Whitman Agricultural Co., 20 Mo. App. 100; Bronson *v.* Turner, 77 Mo. 489.

Where it is shown by the evidence that one, though without fraud, sells property with a warranty of its quality, the vendee may rescind the sale, if the property be not of the warranted quality. Marston *v.* Knight, 29 Me. 341.

Where the evidence shows a breach of warranty, the vendee may rescind the contract, return the property within a reasonable time and recover the purchase money paid. Johnson *v.* Whitman, 20 Mo. App. 100.

In an action to recover the price of a horse sold and delivered to the defendant by the plaintiff, it was shown by the evidence that the plaintiff warranted the horse to be sound at the time of the sale; that the horse proved unsound and was returned to the plaintiff, who refused to receive the horse back. *Held,* that a breach of an express warranty of soundness upon the sale of a horse authorizes the purchaser to rescind the contract and return the horse, although there was no express agreement to that effect, and no fraud. Bryan *v.* Ieburgh, 13 Gray (Mass.) 607, 74 Am. Dec. 655.

54. *England.* — Street *v.* Blay, 2 B. & Ad. 456; Dawson *v.* Collis, 10 C. B. 527.

United States. — Thornton *v.* Wynn, 12 Wheat. 183.

Illinois. — Crabtree *v.* Kile, 21 Ill. 180.

D. What Constitutes Evidence of Rescission. — Any acts on the part of the buyer or seller, indicating that he disavows the contract of sale, is sufficient evidence to constitute a rescission.[55]

Indiana. — Mardh *v.* Low, 55 Ind. 271.

Missouri. — Walls *v.* Gates, 6 Mo. App. 242.

New York. — Vorhees *v.* Earl, 2 Hill 288; Cary *v.* Gruman, 4 Hill 625; Muller *v.* Eno, 14 N. Y. 597.

Pennsylvania. — Kase *v.* John, 10 Watts 107, 36 Am. Dec. 149; Freyman *v.* Knecht, 78 Pa. St. 141.

Vermont. — Matteson *v.* Holt, 45 Vt. 336; West *v.* Cutting, 19 Vt. 536; Mayer *v.* Dwinell, 29 Vt. 298.

A breach of warranty of personal property which was unconditionally sold, in the absence of evidence of fraud, gives to the purchaser no right to rescind the contract. Marsh *v.* Low, 55 Ind. 271.

Where there is a warranty as to quality on the sale of goods, but no fraud is shown by the evidence, and no stipulation that the goods may be returned, though the warranty be broken the vendee cannot rescind the contract without the consent of the vendor. Voorhees *v.* Earl, 2 Hill (N. Y.) 288.

Where the evidence shows a sale of specific goods, with a warranty that they are equal to sample, the vendee cannot, it seems, refuse to receive them, on the ground that they do not correspond to the sample, unless there is an express condition to that effect. Dawson *v.* Collis, 10 C. B. (Eng.) 527.

If a horse be sold with warranty of soundness, though he turn out to be unsound at the time, the vendee has no right to return him and recover back the price paid, unless there be either an agreement to that effect or evidence of fraud on the part of the vendor. Cary *v.* Gruman, 4 Hill (N. Y.) 625.

On a sale of a horse where there is a warranty, but the evidence shows no fraud or agreement to return, the vendee cannot rescind the sale after it has been executed; his only remedy is on the warranty. Freyman *v.* Knecht, 78 Pa. St. 141.

55. *United States.* — Florence Min. Co. *v.* Brown, 124 U. S. 385.

Connecticut. — Soper Lumb. Co. *v.* Halsted, 73 Conn. 547, 48 Atl. 425.

Illinois. — Weill *v.* America Metal Co. 182 Ill., 128, 54 N. E. 1050.

Indiana. — Mahoney *v.* Gano, 2 Ind. App. 107, 27 N. E. 315.

Iowa. — Kearney Mill. & Elev. Co. *v.* Union Pac. R. Co., 97 Iowa 719, 66 N. W. 1059, 59 Am. St. Rep. 434.

Massachusetts. — King *v.* Faist, 161 Mass. 449, 37 N. E. 456.

New Jersey. — State *v.* Davis, 53 N. J. L. 144, 20 Atl. 1080.

New York. — Fancher *v.* Goodman, 29 Barb. 315; Riendean *v.* Bullock, 66 Hun 628, 20 N. Y. Supp. 976; Collins *v.* Brooks, 20 How. Pr. 327; Morris *v.* Rexford, 18 N. Y. 552.

North Carolina. — Grist *v.* Williams, 111 N. C. 53, 15 S. E. 889, 32 Am. St. Rep. 782.

Pennsylvania. — Patten's Appeal, 45 Pa. St. 151, 84 Am. Dec. 479.

South Carolina. — Bacon *v.* Sondley, 3 Strobh. 542, 51 Am. Dec. 646.

Texas. — Raby *v.* Frank, 12 Tex. Civ. App. 125, 34 S. W. 777.

Wisconsin. — Second Nat. Bank *v.* Larson, 80 Wis. 469, 50 N. W. 499; Mayhew *v.* Mather, 82 Wis. 355, 52 N. W. 436; Shores Lumb. Co. *v.* Claney, 102 Wis. 235, 78 N. W. 451.

By an agreement between plaintiff and defendants, as extended, plaintiff contracted to sell ice to the defendants; that the latter agreed to take the ice during the month of August and to pay therefor $3.25 per ton; that defendants failed to take the ice away in August, and plaintiff in a letter to defendants assumed to raise the price 25 cents per ton; that the defendants on the receipt of the letter, answered, "As to paying a further advance, would say the market will not stand it. We cannot get our money back as it is, and rather than pay any advance would prefer, after you load the boats we put in this month, that you sell it elsewhere." On September 4th, defend-

Illustrations. — Thus a suit by the seller to recover the goods sold constitutes sufficient evidence of his rescission.[56] But the exercise of the right of stoppage *in transitu* does not.[57] So a notice by the purchaser to the seller of his intention to rescind and an offer to return the property, is sufficient evidence of rescission by such purchaser.[58]

E. Proof of Waiver of Right to Rescind. — Delay in the assertion of the right to rescind, if unreasonable, may constitute evidence of an intention to abide by the contract of sale.[59] The evidence should show that the party acted promptly after the discovery of his right to rescind.[60] So any conduct on the part of either the

ants telegraphed plaintiff as follows: "Please wire at once how many tons you have, and whether you intend to load any more boats than those there now at August prices." On September 7th plaintiff answered as follows: "Will call these four at August figure, and balance 25 cents extra, providing you keep on sending boats," to which telegram defendants replied, telling plaintiff not to load any more boats as they would not pay the advance. *Held*, that plaintiff's telegram of September 7th amounted to a rescission of the contract, and that defendants, having acted upon plaintiff's refusal, were not bound to afterwards take such balance, notwithstanding plaintiff subsequently offered to deliver it at August prices. Riendeau *v.* Bullock, 66 Hun 628, 20 N. Y. Supp. 976.

56. Thompson *v.* Peck, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201; Mahoney *v.* Gano, 2 Ind. App. 107, 27 N. E. 315; Wallace *v.* O'Gorman, 53 Hun 638, 6 N. Y. Supp. 890; Bacon *v.* Sondley, 3 Strobh. (S. C.) 542, 51 Am. Dec. 646.

57. Kearney Mill. & Elev. Co. *v.* Union Pac. R. Co., 97 Iowa 719, 66 N. W. 1059, 59 Am. St. Rep. 434.

58. Close *v.* Crossland, 47 Minn. 500, 50 N. W. 694.

59. *Alabama.* — Young *v.* Arntze, 86 Ala. 116, 5 So. 253.

California. — Bailey *v.* Fox, 78 Cal. 389, 20 Pac. 868.

Delaware. — Wilson *v.* Fisher, 5 Houst. 395.

Illinois. — Morgan *v.* Thetford, 3 Ill. App. 323.

Iowa. — Hirshhorn *v.* Stewart, 49 Iowa 418.

Mississippi. — Jagers *v.* Griffin, 43 Miss. 134.

Missouri. — Lapp *v.* Ryan, 23 Mo. App. 436.

Pennsylvania. — Backentoss *v.* Speicher, 31 Pa. St. 324.

Texas. — Hunt *v.* Kellum, 59 Tex. 535.

A party who seeks to avoid a contract for fraud must rescind the same promptly after the fraud is discovered, or he will be deemed to have waived. And where the evidence showed a delay of four months after the discovery of fraud in a partnership contract, during which business was carried on as usual under the contract, it was held to be a waiver of the right to rescind. Bailey *v.* Fox, 78 Cal. 389, 20 Pac. 868.

Where the evidence shows that the goods purchased did not comply with the conditions of the contract and that the vendee did not return or offer to return them to the vendor within a reasonable time, the vendee is presumed to have waived his right of rescission. Hirschborn *v.* Stewart, 49 Iowa, 418.

In Morgan *v.* Thetford, 3 Ill. App. 323, an action on a note given for the purchase of a reaper and mower combined, it was shown by the evidence that defendant used the reaper until he finished his harvest and then notified plaintiff's agent that the machine did not work well. *Held*, that the party, seeking to rescind the contract for the sale of the machine, not having returned or offered to return it within a reasonable time after he discovered the defect, cannot defeat a recovery on the contract price.

60. Hall *v.* Fullerton, 69 Ill. 448; Musick *v.* Gatzmeyer, 47 Ill. App.

seller or purchaser, indicating his purpose to adhere to the contract is evidence of ratification,[61] unless it be shown by the evidence that he acted in ignorance of the facts giving the right to rescind.[62]

329; Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 52 Mo. App. 407; Tilton Safe Co. *v.* Tisdale, 48 Vt. 83; Dill *v.* Camp, 22 Ala. 249; Cutler *v.* Gilbreth, 53 Me. 176.

A person induced to part with his property on a fraudulent contract, may, on discovering the fraud, rescind the contract and claim a return of what has been advanced upon it, but the evidence must show he did so at the earliest possible moment. Musick *v.* Gatzmeyer, 47 Ill. App. 329.

In Cutler *v.* Gilbreth, 53 Me. 176, where the plaintiffs sold defendant five barrels of "machinery best coal oil," which was received November 16th, 1862, and the evidence shows that on January 29, 1869, defendant wrote plaintiffs that the oil was not "best" and stated he wanted them to send him some that was and have the other returned at their expense, to which proposition they refused to accede, it was held that the defendant was barred from rescinding the contract on account of his own laches.

61. *Arkansas.* — Bridgeford *v.* Adams, 45 Ark. 136; Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458, 12 S. W. 1073.

Illinois. — Streator Tile Wks. *v.* Coe, 53 Ill. App. 483; Wolf *v.* Dietzsch, 75 Ill. 205.

Michigan. — Galloway *v.* Holmes, 1 Dougl. 330.

Nebraska. — First Nat. Bank *v.* McKinney, 47 Neb. 149, 66 N. W. 280.

New York. — Cahen *v.* Platt, 40 N. Y. Super. Ct. 483.

Ohio. — Seeds *v.* Simpson, 16 Ohio St. 321.

Vermont. — Downer *v.* Smith, 32 Vt. 1, 76 Am. Dec. 148.

How Waiver of Right To Rescind May Be Shown. — A waiver of the right to rescind a contract of sale may be evidenced by bringing an action for the price (Conrow *v.* Little, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693; Equitable Foundry Co. *v.* Hersee, 103 N. Y. 25, 9 N. E. 487; Hays *v.* Midas, 104 N. Y. 602, 11 N. E. 141; Fowler *v.* Bowery Sav. Bank, 113 N. Y. 450, 21 N. E. 172, 10 Am. St. Rep. 479, 4 L. R. A. 145); accepting part payment on the sale (Boyd *v.* Shiffer, 156 Pa. St. 100, 27 Atl. 60; Dennis *v.* Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899); taking security for the price (Joslin *v.* Cowee, 52 N. Y. 90); but a demand for security made by an agent of the seller, in ignorance of the fraud constituting the right to rescind, does not prevent a rescission (Woonsocket Rubber Co. *v.* Loewenberg, 17 Wash. 29, 48 Pac. 785, 61 Am. St. Rep. 902); nor do unsuccessful efforts to effect a compromise or security preclude the right to rescind, in the absence of an act evincing a clear intention to waive the right (Cortland Mfg. Co. *v.* Platt, 83 Mich. 419, 47 N. W. 330).

62. Rochester Dist. Co. *v.* Devendorf, 72 Hun 428, 25 N. Y. Supp. 200; Kraus *v.* Thompson, 30 Minn. 64, 14 N. W. 266, 44 Am. Rep. 182; Norrington *v.* Wright, 5 Fed. 768; Pennock *v.* Stygles, 54 Vt. 226; Hudson *v.* Roos, 72 Mich. 363, 40 N. W. 467.

The fact that a vendor of goods has proceeded to judgment against his vendee for the purchase price of the goods, where the evidence shows the vendor to have been ignorant of the fraud on the part of the vendee constituting a ground for a rescission of the contract of sale, will not amount to an affirmance or ratification of the contract, so as to prejudice him from rescinding upon subsequent discovery of such fraud. Kraus *v.* Thompson, 30 Minn. 64, 14 N. W. 266.

SALVAGE.

CROSS-REFERENCE:

Admiralty.

I. DEFINITIONS.

In so far as matters of evidence are concerned, salvage may be defined in two ways, that is to say, salvage as an act, and salvage as a compensation.

Salvage as an Act is defined to be "the relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property."[1]

Salvage as a Compensation is a "reward for meritorious services in saving property on navigable waters, in peril, and which might otherwise be destroyed."[2]

II. SALVAGE AS AN ACT.

1. Services Not Rendered Under Contract. — A. PRESUMPTIONS AND BURDEN OF PROOF. — a. *In General.* — In proceeding to recover compensation for salvage service, the libelant has the burden of proving not only the rendition of a service to the vessel or property, but also that the service rendered was an act of salvage within the meaning of that term.[3]

b. *Existence and Extent of Peril.* — Thus it is incumbent upon the libelant to show that at the time the services were rendered the vessel or property was exposed to peril,[4] since in the absence

1. "It may be a case of more or less merit, according to the degree of peril in which the property was, and the danger and difficulty of relieving it; but these circumstances affect the degree of the service and not its nature." Williamson *v.* The Alphonso, 1 Curt. 376, 30 Fed. Cas. No. 17,749; The Alaska, 23 Fed. 597.

2. Salvage "is allowed as an encouragement to all persons engaged in business at sea or on navigable waters, and others, to bestow their utmost endeavors to save vessels and cargoes which are in imminent peril." Sonderburg *v.* Ocean Tow Boat Co., 3 Woods 146, 22 Fed. Cas. No. 13,175; Stone *v.* The Jewell, 41 Fed. 103; The Sabine, 101 U. S. 384; The Blackwall, 10 Wall. (U. S.) 1; The Annie Henderson, 15 Fed. 550; The Brandow, 29 Fed. 878; Cope *v.* Vallette Dry Dock Co., 119 U. S. 625; The Clarita, 23 Wall. (U. S.) 1.

3. The Myrtle Tunnel, 146 Fed. 324; The J. C. Pfluger, 109 Fed. 93; The Henry Steers, Jr., 110 Fed. 578. And see other cases cited in succeeding notes.

4. *England.* — Akerblom *v.* Price, L. R. 7 Q. B. Div. 129.

United States. — The Weber Bros. & Thirteen Other Canal Boats, 88 Fed. 92; The Alamo, 75 Fed. 602, 21 C. C. A. 451; The C. D. Bryant, 19 Fed. 603; The Dolcoath, 16 Fed. 264; The Thomas Hilyard, 55 Fed. 1015; Blagg *v.* The E. M. Bicknell, 1 Bond 270, 3 Fed. Cas. No. 1,476.

Proof of Laying by During a Period of Apprehended Danger and rendering more or less service for the protection of the salved vessel has been held sufficient to establish a service of a salvage nature. The Hudson, 68 Fed. 936.

Proof That the Salvors Stood by a Vessel when she was in such condition as to excite considerable apprehension on the part of her master, and those interested in her preservation, is sufficient to entitle the salvors to compensation, although it may appear that the assistance rendered was not actually necessary. The Courier, 1 Adm. Rec. 287, 6 Fed. Cas. No. 3,283.

Proof That the Ship "Was So Far

of peril it is not salvage however beneficial or meritorious the service may be.[5] He need not, however, prove that the danger was imminent or immediate; it is sufficient to show that the vessel or property was exposed to a danger greater than is incurred in ordinary navigation.[6] But it is not enough to show a peril incon-

Disabled as to be in need of assistance to enable her to complete her voyage, and, although not in immediate peril, was so in distress as to justify the use of the word 'salvage' in designating the aid she required" establishes the right to compensation as for salvage services. The Catalina, 105 Fed. 633, 44 C. C. A. 638; Compagnie Commerciale De Transport A Vapeur Francaise *v.* Charente S. S. Co., 60 Fed. 921, 9 C. C. A. 292; The New Camelia, 105 Fed. 637, 44 C. C. A. 642.

If a Vessel Is in a Position Which Requires Towage Service Only, the mere fact that she had previously suffered injury does not change the nature of the service to that of salvage, unless there is shown some circumstance of peril, immediate or reasonably to be apprehended, from which the vessel is relieved, or some hazard encountered or unusual work done by the relieving vessel. The Robert S. Besnard, 144 Fed. 992.

Piracy. — While there can be no doubt that salvage is demandable of right upon property rescued from pirates, yet to entitle a party claiming salvage therefor he must establish two facts: First, that the service rendered was a lawful taking of the property; and second, that the taking was meritorious and useful. Davidson *v.* Seal-Skins, 2 Paine 324, 7 Fed. Cas. No. 3,661.

Rescue From Enemy. — In order to entitle a party to salvage for recapture or rescue of the property from the enemy, it must be shown by the salvor that the property was taken from the actual or constructive possession of the enemy. The Ann Green, 1 Gall. 274, 1 Fed. Cas. No. 414.

5. The J. C. Pfluger, 109 Fed. 93.

"Salvage Is in the Nature of a Bounty for Extraordinary Exertions as distinguished from payment for ordinary exertions, being the outgrowth of public policy, and designed to encourage persons who are under no legal obligations to do so to go to the rescue of vessels exposed to perils beyond their own ability to subdue by giving a reward in addition to compensation for the work done. The amount of such bounty or reward depends upon the success achieved, the value of the property saved, and the degree of danger from which it was rescued, and is enhanced or diminished according to the skill or courage displayed, the time and labor bestowed, and the risk to persons or property encountered by the salvors. While there are many ingredients, the one essential element is that the property shall be saved from danger either actually impending or reasonably to be apprehended. In the absence of such peril it is not salvage, however beneficial and meritorious the service may be." The Robert S. Besnard, 144 Fed. 992.

6. The Cheeseman *v.* Two Ferry-Boats, 2 Bond 363, 5 Fed. Cas. No. 2,633. See also Seven Coal Barges, 2 Biss. 297, 21 Fed. Cas. No. 12,677.

It Is Not Necessary That the Proof Show That the Danger Was Imminent and Absolute; it is sufficient to show that at the time the assistance was rendered the vessel had encountered damage or misfortune which might possibly expose her to destruction if the service were not rendered. And if the evidence shows that the vessel was in a situation of actual apprehension, though not in actual danger, and the assistance of the salvors was requested by, and rendered to, the persons in charge of the vessel, they cannot be permitted to assert that they are not bound to pay for the services rendered on the ground that the vessel would have been saved if left in her former position. Stone *v.* The Jewell, 41 Fed. 103.

siderable, uncertain and distant, existing rather in the imagination of the putative salvors than in reality.[7]

Proof of Bargain Not Necessary. — The salvor who rescues a ship or cargo from the grasp of the sea, wind and wave, need prove no bargain with the owner or master.[8]

Co-Salvors. — Where compensation is claimed as co-salvors or joint salvors, the libelants must show that the efforts of the second salvors were in connection with, and a continuation of, the efforts of the first salvors, where it is one and the same enterprise.[9]

c. *Service Must Have Been Beneficial.* — So, too, it is of the very essence of the right to compensation for an alleged salvage service that the libelants show that the service contributed to the rescue of the vessel or property in peril.[10] But it is not necessary that the evidence shall show that the service rendered was entirely successful.[11]

B. Mode of Proof. — Whether or not a particular service was one of salvage is always a question of fact to be ascertained from a consideration of the circumstances under which the court shall find the service was rendered.[12]

7. The Robert S. Besnard, 144 Fed. 992. See also Talbot *v.* Seeman, 1 Cranch (U. S.) 1; McGinnis *v.* The Pontiac, 5 McLean 359, Newb. Adm. 130, 16 Fed. Cas. No. 8,801.

8. The Thomas L. James, 115 Fed. 566.

Acceptance of Service Under Conditions Implying Notice to the Master that something more than ordinary towage would be demanded raises a presumption that the service was in the nature of a salvage service, and imposes upon the vessel the burden of proving that nothing more than towage was required, although it is not claimed that any bargain was actually made that the service was to be considered a salvage service, and although the master may deny that anything was said about his being in a position of danger. The Robert S. Besnard, 144 Fed. 992.

9. The Myrtle Tunnel, 146 Fed. 324. See also The Henry Ewbank, 1 Sumn. 400, 11 Fed. Cas. No. 6,376.

10. The Blackwall, 10 Wall. 1; The Sabine, 101 U. S. 384; The Myrtle Tunnel, 146 Fed. 324; The New Camelia, 105 Fed. 637, 44 C. C. A. 642; The Strathnevis, 76 Fed. 855; The Angeline Anderson, 34 Fed. 925; The Aberdeen, 27 Fed. 479; Browning *v.* Baker, 2 Hughes 30, 4 Fed. Cas. No. 2,041; The L. W. Perry, 71 Fed. 745.

An indispensable element to be established by one claiming compensation for salvage service is that the service was to some degree beneficial. He must, even though his efforts were not the sole cause of the rescue, establish that those efforts in fact contributed to that result. The Henry Steers, Jr., 110 Fed. 578.

11. The I. W. Nicholas, 147 Fed. 793. See also The Strathnevis, 76 Fed. 855; The Flottbek, 118 Fed. 954, 55 C. C. A. 448.

A Salvor's Compensation Depends Upon the Success of the Undertaking; but there is no implied obligation on his part that he will succeed or that he is capable of so doing, and therefore he is only responsible for the exercise of ordinary skill and diligence in the use of the means or machinery with which he undertakes to render the salvage service. The Allegiance, 6 Sawy. 68, 1 Fed. Cas. No. 207.

12. The J. C. Pfluger, 109 Fed. 93

The Fact of Peril is to be ascertained from a consideration of all the circumstances surrounding the vessel at the commencement of the service. McGinnis *v.* The Pontiac, 5

2. Service Rendered Under Contract. — A. The Fact of Agreement. — a. *In General.* — Where the evidence shows, or it is admitted, that the service rendered was in the nature of salvage, the presumption is that it was rendered for a salvage compensation.[13] And where the vessel owner asserts that the service for which salvage is claimed was rendered under a contract to pay at all events, he has the burden of proving the contract and its terms as asserted;[14] and his evidence must show a definite and explicit bargain.[15]

b. *Mode of Proof.* — Of course upon the question whether an agreement was actually entered into so as to defeat an otherwise proper claim for salvage, all the surrounding circumstances are proper to be shown and considered.[16]

B. Validity of Agreement. — a. *Presumptions.* — It will be presumed that an agreement for salvage services was fair and equitable, and the burden is upon the party who seeks to avoid it.[17]

Fraud. — The burden of proving fraud in a salvage contract is upon the party asserting that fact.[18]

Duress. — In order to set aside a salvage contract for duress, it is not necessary to show such duress as would require a court of law to set aside an ordinary contract.[19]

McLean 359, Newb. Adm. 130, 16 Fed. Cas. No. 8,801.

13. This presumption is not conclusive and may be rebutted by evidence. Bowley *v.* Goddard, 1 Lowell 154, 3 Fed. Cas. No. 1,736.

14. The Flottbek, 112 Fed. 682; Elphicke *v.* White Line Tow Co., 106 Fed. 945, 46 C. C. A. 56; The Brig Susan, 1 Sprague 499, 23 Fed. Cas. No. 13,630.

15. Bowley *v.* Goddard, 1 Lowell 154, 3 Fed. Cas. No. 1,736.

To Bar Salvage an Agreement for a Sum Certain Must Be Proved. It is quite immaterial whether the salvors accidentally fall in with the wreck and volunteer their services, or are called upon by the owners or persons interested to aid in saving it. It is the place where the property is situated and the circumstances of exposure and peril which determine the question of salvage; and it has been determined that to bar a claim of this description it is necessary to prove a binding contract to pay for the services at all events, whether the property be lost or not. Adams *v.* The Island City, 1 Cliff. 210, 1 Fed. Cas. No. 55.

The Proof in Support of a Contract set up in defense to a salvage claim, must show an agreement to pay a certain definite sum for the service to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise. Coffin *v.* The John Shaw, 1 Cliff. 230, 5 Fed. Cas. No. 2,949.

16. Dominy *v.* The Anchors, Sails, Etc., 1 Ben. (U. S.) 77, 7 Fed. Cas. No. 3,977.

17. The Elfrida, 172 U. S. 186; The Clotilda, 1 Hask. 412, 5 Fed. Cas. No. 2,903; Eads *v.* The H. D. Bacon, 1 Newb. 274, 8 Fed. Cas. No. 4,232.

A salvage agreement between the master of the vessel and the salvors is presumed to be fair and equitable, and the burden is upon the claimant to satisfy the court that to carry it into effect would be contrary to equity and justice, or that it was procured by fraud or compulsion. The Clotilda, 1 Hask. 412, 5 Fed. Cas. No. 2,903.

18. Coffin *v.* The John Shaw, 1 Cliff. 230, 3 Fed. Cas. No. 2,949.

19. The Elfrida, 172 U. S. 186; The Thornley, 98 Fed. 735, 39 C. C. A. 248.

b. *Mode of Proof.* — For the purpose of aiding in determining whether the contract was fair and equitable, it is proper to show, and for the court to consider, the fact that other assistance was available.[20] And on this question it is proper to consider whether the contract was entered into after due deliberation.[21]

III. SALVAGE AS A COMPENSATION.

1. In General. — Viewing salvage in the light of a compensation or reward for a service rendered to a vessel or property in distress, the courts, upon the question of the amount of the award, differ to such an extent that it may be said that there is no fixed rule; each case depends to a large extent on the facts and circumstances peculiar to it.[22]

20. The Alert, 56 Fed. 721; The Agnes I. Grace, 51 Fed. 958, 2 C. C. A. 581; The Wellington, 48 Fed. 475; The Jessomene, 47 Fed. 903.

21. The Elfrida, 172 U. S. 186; The Thornley, 98 Fed. 735, 39 C. C. A. 248; The Young America, 20 Fed. 926.

22. The Penobscot, 103 Fed. 205; The Peter White, 149 Fed. 594; Stone *v.* The Jewell, 41 Fed. 103.

There Is Not, and Cannot Be Any Fixed or Invariable Rule on the question of the compensation to be awarded to salvors. Every case must necessarily depend on its peculiar circumstances. It has been recognized as a rule founded in sound policy, that salvage services should be so liberally rewarded as to afford encouragement to engage promptly, and even at great personal sacrifice and hazard, in saving property and life endangered by the perils of navigation. Courts of admiralty have, however, held it to be an indispensable element of a salvage service, that the danger to the property rescued should have been actual and not speculative merely: This fact being satisfactorily established, there are other considerations which will affect and control the amount of the allowance. The value of the property saved, the promptness and energy with which the salvors have interposed, the hazard of life and property which they have encountered in the service, and the duration and arduousness of their labors, are proper elements in fixing the amount of remuneration. Blagg *v.* The E. M. Bicknell, 1 Bond 270, 3 Fed. Cas. No. 1,476.

"**The Allowance of Salvage Is Necessarily Largely a Matter of Discretion,** which cannot be determined with precision by the application of exact rules. Different minds, in the exercise of independent judgment upon the same evidence, seldom coincide exactly in their view of the facts, or give the same prominence to the varied elements which make up the case. An approximate concurrence is all that can be expected." The Baker, 25 Fed. 771; The George W. Clyde, 86 Fed. 665, 30 C. C. A. 292.

It Is Not What Salvors Offer or Attempt To Do that entitles them to compensation, but what they succeed in doing to the benefit of the property. And where their efforts are unsuccessful, however honest or earnest or energetic, they are not entitled to a reward for salvage, strictly speaking, yet all the circumstances of the case may be considered, and their willingness to go out in bad weather and do all within their power although unsuccessful, may properly be considered in determining the amount of compensation to which they are entitled for actual services rendered. Curry *v.* The Loch Goil, 6 Fed. Cas. No. 3,495.

The Amount To Be Awarded for Salvage Is Always a Question of Delicacy and Difficulty. — Full and fair compensation for the work and labor actually done, and for skill

2. Matters Proper To Be Considered. — A. In General. — But while it is true, as stated, that there is no hard and fast rule to be followed in all cases, there are nevertheless certain matters recognized by the courts as proper upon which to hear evidence, and to be considered for the purpose of aiding the court in determining the amount to be awarded to the salvors.[23]

and diligence, is always allowed, and consideration must be had of the dangers and difficulties of the service. This much the salvors are entitled to as of right, and to this amount should be added so much as, in the discretion of the court, is reasonable and proper, in the interests of commerce, to encourage others to like exertions to save life and property in peril. The Alexandra, 104 Fed. 904.

Precedents, although frequently cited by counsel on the one side to show that the amount should be moderate, and on the other hand to show that the amount should be higher, are not often regarded by the courts as of great value; and indeed the courts have frequently refused to discuss the precedents on the ground that confusion could only come from trying to apply them to the facts in the case at bar. The Haxby Merritt's W. O., 83 Fed. 715, 28 C. C. A. 33; Ulster S. S. Co. *v.* Cape Fear Tow. & Transp. Co., 94 Fed. 215, 36 C. C. A. 201.

See also The Alexandra, 104 Fed. 904, where the court in referring to the numerous cases cited by counsel as worthy of consideration by the court, said: "The books are full of them, and they have all received careful consideration; but, as each case must be determined by the facts peculiar to it, they furnish no guide to any infallible conclusion."

Compare The Neto, 15 Fed. 819, where the court said: "Although each cause is disposed of upon its own particular merits, and is referred to the discretion of the court which acts in the matter, this discretion should, as far as possible, be guided and controlled by certain general considerations which have been found to enter into the estimates made by courts; and whenever several causes are found so nearly parallel in their circumstances as to offer a line of precedents, or different circumstances can be so explained as to show a similarity of reasoning and a common point of agreement as to amount, such should be considered in reaching a conclusion, although not, perhaps, necessarily accepted as binding."

23. Instructions By British Board of Trade. — Judge Hughes in The Sandringham, 10 Fed. 556, in referring to the leading considerations to be observed in determining the amount of the award for salvage services, says that he does not know where those considerations can be found more explicitly stated than in the instructions given in 1865 by the British Board of Trade to the receivers of wrecks of Great Britain. Embodying the result of the decisions of the English and American courts of admiralty, the board of trade laid down the rules to be considered in determining the amount of the award:

(1.) The degree of danger from which the lives or property are rescued.

(2.) The value of the property saved.

(3.) The risk incurred by the salvors.

(4.) The value of the property employed by the salvors in the wrecking enterprise, and the danger to which it was exposed.

(5.) The skill shown in rendering the service.

(6) The time and labor occupied.

And Judge Hughes adds a seventh consideration:

(7.) The degree of success achieved, and the proportions of value lost and saved.

It Is Eminently Proper to Inquire Exactly What the Salvor Has Done, and regulate such remuneration accordingly. The cases are numerous where one rate of award has been given on the proceeds of the ship

B. As Regards Property Salved. — a. *Perils From Which Salved.* — The degree of danger and distress from which the vessels or property was rescued, whether in imminent peril, and almost certainly lost if not at that time rescued, is very material matter proper to be shown and considered.[24]

Risk of Colliding With Other Vessels. — The probability that the vessels salved might by collision or otherwise have damaged other ships seems not always to have been regarded as proper to be taken into consideration as an element in fixing the salvor's allowance.[25]

and another and different one on the proceeds of the cargo. The St. Paul, 86 Fed. 340, 30 C. C. A. 70.

The Various Risks Incident to the Rendering of a Salvage Service by a very large steamer in and about a narrow channel and sandy and rocky shore where the salved vessel was in distress, and its complete ultimate success, are matters properly to be considered on the question of compensation. The Niagara, 89 Fed. 1000.

Where a Ferry Boat Abandons a Regular Trip to give aid to a ship in distress, the nature of the ferry-boat's employment, the inconvenience that arises from leaving a regular trip and the danger of complaint by passengers in case she does so are all matters proper to be taken into consideration in determining the amount of the award. The Bay of Naples, 44 Fed. 90.

Usage of Port. — Where a usage of the port well known to all the parties fixes the rate of compensation for salvage services, such usage may be shown on the question of compensation. The Louisa Jane, 2 Lowell 295, 15 Fed. Cas. No. 8,532.

24. The Werra, 12 P. D. 52; The Blackwall, 10 Wall. 1; The Alice Blanchard, 106 Fed. 238; The Monticello, 81 Fed. 211; The O. C. Hanchett, 76 Fed. 1003, 22 C. C. A. 678; The Fairfield, 30 Fed. 700; The Grace Dollar, 103 Fed. 665; The Cheeseman *v.* Two Ferry-Boats, 2 Bond 363, 5 Fed. Cas. No. 2,633; The Bay of Naples, 44 Fed. 90; Robson *v.* The Huntress, 2 Wall. Jr. C. C. 59, 20 Fed. Cas. No. 11,971; The Georgiana, 1 Lowell 91, 10 Fed. Cas. No. 5,355; The H. B. Foster, Abb. Adm. 222, 11 Fed. Cas. No. 6,290.

Where the Peril Is Not Immediate and the situation of the saved vessel is such that other assistance might probably have been rendered, if that of the actual salvors had not been accepted, the value saved is not so important on a question of compensation as in cases of more urgency. Bowley *v.* Goddard, 1 Lowell 154, 3 Fed. Cas. No. 1,736.

The Absence of Other Assistance is an important element to be considered in determining the amount of the award. The Penobscot, 103 Fed. 205. See also The Boyne, 98 Fed. 444; The Niagara, 89 Fed. 1000.

Rescue of Burning Ship. — The fact that the salving vessels speeded to the rescue of a burning ship on the instant of discovering the fire, with pumps and hose put in readiness for use, is to be considered. The J. Emory Owen, 128 Fed. 996.

25. The Baker, 25 Fed. 771, where the court held that the danger of communicating fire to other vessels from the fire on board the vessel saved was a danger not arising through any fault of the latter vessel; and that since in such case the owners of the saved vessel could not have been called upon to pay any such damage to others, the risk, so caused, was not to be considered.

Compare Stebbins *v.* Five Mud-Scows, 50 Fed. 227. In this case it appeared that five barges broke adrift from a bulkhead and went drifting up at the beginning of the flood tide, which it appeared was so weak as to drift them but a short distance in half an hour except under very insufficient and negligent mooring, and it was held that the rescue of the scows from almost certain collision with other vessels saved

In the Case of a Derelict Brought Into Port, its removal from the waters where it would be a menace to navigation should be considered.[26]

b. *Nature and Character of Cargo Salved.* — The nature and character of the cargo salved is always a matter proper to be considered.[27]

c. *Value of Property Salved.* — The value of the vessel or property salved is another important matter proper to be shown and considered.[28] But it is not proper to consider the value of the salved property to the total disregard of the other elements of salvage, and base the award solely on that element.[29]

d. *Saving of Human Life.* — The saving of life, forms an essential element proper to be shown and considered upon the question of compensation.[30]

the owners from damage which they might have been called upon to pay; and as the court said in that case "it is not the loss to other persons that is considered, but the saving to the owners themselves."

26. The Theta, 135 Fed. 129.

27. Warder *v.* La Belle Creole, 1 Pet. Adm. 31, 29 Fed. Cas. No. 17,165.

28. The Werra, 12 P. D. 52; The Blackwall, 10 Wall. (U. S.) 1; Scott *v.* The Clara E. Bergen, 21 Fed. Cas. No. 12,526*a*; The Alice Blanchard, 106 Fed. 238; The Wellington, 52 Fed. 605; The St. Paul, 86 Fed. 340, 30 C. C. A. 70; The Niagara, 89 Fed. 1000; Stone *v.* The Jewell, 41 Fed. 103; The Grace Dollar, 103 Fed. 665; The Cheeseman *v.* Two Ferry-Boats, 2 Bond 363, 5 Fed. Cas. No. 2,633; The Elm Branch, 106 Fed. 952; Bean *v.* The Grace Brown, 2 Hughes 112, 2 Fed. Cas. No. 1,171; The Georgiana, 1 Lowell 91, 10 Fed. Cas. No. 5,355.

Private Sale by Vessel Owner. Evidence of the amount received by the vessel owner for part of the property salved, at private sale and without advertisement, is not conclusive of its value for the purpose of determining the question of compensation. The Thomas L. James, 115 Fed. 566.

29. The Catalina, 105 Fed. 633, 44 C. C. A. 638. In this case, the award made in the district court seems to have been based almost wholly upon the value of the salved property, and with the view of making a considerable reward to the salvors, in the main disregarding the other elements of salvage, and particularly the character and risk of the services actually rendered. The services required by the Catalina were simple towage services; those applied for and those contracted for and furnished by the Olympia were simple towage services. The Olympia was not required to and did not approach the Catalina within any dangerous distance. The hawsers of the Catalina were put aboard the Olympia by the crew of the Catalina. The court said: "We are unable to perceive that the services rendered to the Catalina by the Olympia were attended with any extra risk not accompanying ordinary towage, except that they were rendered by a ship not constructed for, nor engaged in, the towing business. It may be that the services rendered were enhanced by the fact that the Olympia, to render them, made a deviation in her voyage; but she was in ballast, and we find nothing . the record to show that she suffered any damage or great inconvenience therefrom. While we agree with the district court in holding that the services rendered were salvage services, we are clearly of opinion that they should be held to be salvage services of a low order, and be compensated on the basis of towage services." See also The New Camelia, 105 Fed. 637, 44 C. C. A. 642.

30. The Edith L. Allen, 139 Fed. 883. See also Sturtevant *v.* The

C. As Regards Salvors and Property Employed. — a. *Risk to Life and Property.* — Again, as regards the salvors and property employed in the service, there are various matters, all of which are proper to be shown and considered upon the question of compensation, such as the danger to human life,[31] the danger to the property employed in the service,[32] and its value.[33]

b. *Time, Labor and Skill Employed in Service.* — Again, the time,[34] labor, [35] skill and judgment employed[36] by the salvors are matters proper to be shown and considered. And where the services rendered are of so low an order as to be in reality merely

George Nicholaus, Newb. 449, 23 Fed. Cas. No. 13,578.

The Rescue of the Crew of a Burning Ship is an important factor to be considered. The J. Emory Owen, 128 Fed. 996.

31. The Blackwall, 10 Wall. 1; The Alexandra, 104 Fed. 904; The Grace Dollar, 103 Fed. 665; The Emblem, 2 Ware 68, 8 Fed. Cas. No. 4,434; The Amity, 69 Fed. 110, 16 C. C. A. 170; The Great Northern, 72 Fed. 678; Spencer *v.* The Charles Avery, 1 Bond 117, 22 Fed. Cas. No. 13,232; The M. B. Stetson, 1 Lowell 119, 16 Fed. Cas. No. 9,363.

32. The Werra, 12 P. D. 52; The Alice Blanchard, 106 Fed. 238; The Great Northern, 72 Fed. 678; The Alexandra, 104 Fed. 904; The Wellington, 52 Fed. 605; The Cheeseman *v.* Two Ferry-Boats, 2 Bond 363, 5 Fed. Cas. No. 2,633.

The Danger Encountered By the Saving Vessel Herself, her detention or deviation to render aid, the risk she encountered, and her important contribution in making the personal service and danger incurred by her master and crew effective, are all matters proper to be considered by the court in awarding compensation. The Birdie, 7 Blatchf. 238, 3 Fed. Cas. No. 1,432.

The Risk Assumed By the Salving Vessel, together with the skill and promptitude in getting alongside and taking the hawser of the distressed vessel, her willingness to be helpful, irrespective of the danger or pecuniary loss from delay, are all elements proper to be shown and considered on the question of compensation. The Peter White, 149 Fed. 594.

Where a Service Is Rendered By a Steamer to a Sailing Vessel, it often happens that a material service is rendered to the latter by which it is rescued from a serious and impending danger with very little risk or trouble to the former or its crew. A vessel propelled by steam has a command over its motion and direction comparatively independent of the winds and currents, and may therefore approach a vessel in danger and take her off with comparative safety to itself. In such cases, an important element in the value of the services, namely, the risk to the vessel and lives of the salvors, is more or less wanting, and they must be estimated accordingly. The Allegiance, 6 Sawy. 68, 1 Fed. Cas. No. 207.

33. The Werra, 12 P. D. 52; The Alexandra, 104 Fed. 904; The Wellington, 52 Fed. 605; The Flottbek, 118 Fed. 954, 55 C. C. A. 448; The Katie Collins, 21 Fed. 409.

34. The Alexandra, 104 Fed. 904.

The Shortness of the Duration of the services is a matter to be considered, not for the purpose of reducing the award, but rather as going to the meritoriousness of the services. The Northumberland *v.* The Andalusia, 12 L. T. N. S. 584; The United Kingdom *v.* The Syrian, 14 L. T. N. S. 533.

35. The Alexandra, 104 Fed. 904; The Grace Dollar, 103 Fed. 665.

36. The Alexandra, 104 Fed. 904; The Elm Branch, 106 Fed. 952; The Cheeseman *v.* Two Ferry-Boats, 2 Bond 363, 5 Fed. Cas. No. 2,633; The Wellington, 52 Fed. 605; The Blackwall, 10 Wall. (U. S.) 1; The Flottbek, 118 Fed. 954, 55 C. C. A.

towage services, that fact should be considered and the award made accordingly.[37]

Relation of Salvors to Property, — The relation of the salvors to the property salved may be considered.[38]

Reward Contingent Upon Effectiveness of Services. — The fact that the reward for salvage services is contingent upon the efficiency of the services is proper to be considered upon the question of the amount.[39]

Causes Necessitating Services. — The cause which necessitated the salvage service is, as a general rule, not material on the question of the amount to be awarded.[40]

The Number of Persons and Vessels Employed in the salvage service must be considered.[41]

The Employment of an Unnecessary Number of Vessels cannot be considered as a basis for increasing the compensation.[42]

The Deviation of the Salving Vessel From Her Course to render the service must be considered.[43]

448; The Annie Henderson, 15 Fed. 550; The J. F. Farlan, 8 Blatchf. 207, 13 Fed. Cas. No. 7,314.

The Exercise of Skill May Increase the Award. — The Henry Steers, Jr., 110 Fed. 578.

Diving for the Property is a fact proper to be shown and considered for the purpose of increasing the compensation. The Northwester, 10 Adm. Rec. 415, 18 Fed. Cas. No. 10,333; The America, 1 Adm. Rec. 449, 1 Fed. Cas. No. 279; *In re* Buckley *v.* The William M. Jones, 4 Fed. Cas. No. 2,095.

Proof of Extraordinary Knowledge on the part of the salvors may be considered for the purpose of enhancing the compensation to be awarded. The D. M. Hall *v.* The John Land, Hoff. Op. 96, 7 Fed. Cas. No. 3,939.

When Salvors Have Used All the Means Within Their Power to save the property, it is but just to consider the actual amount of labor performed; and the fact that their labor was increased because of their inability to come along side the wreck due to their not being possessed of appliances or vessels is not sufficient ground for entirely refusing them compensation for the increased labor. Curry *v.* The H. J. May, 6 Fed. Cas. No. 3,494.

37. The New Camelia, 105 Fed. 637, 44 C. C. A. 642.

38. Bean *v.* The Grace Brown, 2 Hughes 112, 2 Fed. Cas. No. 1,171.

39. The Sandringham, 10 Fed. 556; The Missouri, 1 Sprague 260, 17 Fed. Cas. No. 9,654.

40. Browning *v.* Baker, 2 Hughes 30, 4 Fed. Cas. No. 2,041. *Compare* Malone *v.* The Pedro, 16 Fed. Cas. No. 8,995, where it was held that the fact that the master of the vessel salved wilfully caused the wrecking of the vessel was proper to be considered.

41. The Flottbek, 112 Fed. 682.

42. The Ashburton, 5 Adm. Rec. 432, 2 Fed. Cas. No. 575. See also The Kaiser Wilhelm Der Grosse, 106 Fed. 963.

The fact that a large number of vessels and persons are employed in a salvage service cannot be shown as a ground for awarding greater compensation than would be allowed to a lesser number efficiently and properly performing the same service. The Crown, 5 Adm. Rec. 675, 681, 6 Fed. Cas. No. 3,450; Moore *v.* The Caribon, 17 Fed. Cas. No. 9,753a; The Mount Washington, 4 Adm. Rec. 523, 17 Fed. Cas. No. 9,887; Sanderson *v.* The Ann Johnson, 3 Adm. Rec. 159, 4 Adm. Rec. 527, 21 Fed. Cas. No. 12,297a.

43. The Theta, 135 Fed. 129.

The Fact That a Forfeiture of Insurance Results from a deviation of

Delay. — While the delay of her voyage is no doubt a fact proper to be shown and considered, it must appear that the delay was unavoidable.[44]

3. Matters in Reduction of Award. — A. In General. — The fact that the services rendered were chiefly towage and were rendered under a contract for the payment of a fixed sum, if the services should be successful, may be taken into consideration in reduction of a claim for salvage.[45]

The Fact That the Persons Engaged in the Business of Wrecking eke out a precarious living by using their vessels for other services cannot be considered for the purpose of reducing the award.[46]

The Fact That the Services Rendered Were Not Completely Successful may be shown and considered on the question of compensation.[47]

The Fact That There Was No Extraordinary Labor Nor Exposure, or peril to life are all matters proper to be considered as tending to diminish the amount of the salvage award.[48]

The Fact That the Risk Was Slight, and that the duration of the salvage service was comparatively brief can be taken into consideration upon the question of compensation, but cannot be shown in bar of the claim.[49]

Proof of Avarice and Hard Dealing By a Salvor may be considered for the purpose of reducing the amount of compensation to be awarded.[50]

B. Misconduct of Salvors. — While misconduct on the part of the salvors, such as misrepresentation as to the amount of the property salved,[51] or exaggerated statements as to the character and extent of their services[52] may not constitute ground for declaring an entire forfeiture of their claim, evidence of misconduct

the voyage, made for the purpose of rendering a salvage service, may properly be considered in fixing the compensation to be awarded to the salvors; but the mere possibility that such forfeiture might have resulted is a contingency too remote and speculative to be considered. Blagg *v.* The E. M. Bicknell, 1 Bond 270, 3 Fed. Cas. No. 1,476; The Boston, 1 Sumn. 328, 3 Fed. Cas. No. 1,673; Sturtevant *v.* The George Nicholaus, Newb. 449, 23 Fed. Cas. No. 13,578.

The fact that the salving vessel by reason of the service rendered was thrown out of place in the line of vessels of which it was one, and thus submitted to expense and loss of time may be considered on the question of compensation. Blagg *v.* The E. M. Bicknell, 1 Bond 270, 3 Fed. Cas. No. 1,476.

44. The Ereza, 124 Fed. 659. In this case it appeared that the detention was caused by the vessel's grounding while on her way to another port to coal up, made necessary by her deviation from her course to render the salvage service; but it was not made clear that the grounding was not due to the fault of the vessel, and it was held that the detention was too remote

45. The Elmbank, 69 Fed. 104, 16 C. C. A. 164.

46. The Alexandra, 104 Fed. 904.

47. The I. W. Nicholas, 147 Fed. 793.

48. The Bay of Naples, 44 Fed. 90.

49. Coffin *v.* The John Shaw, 1 Cliff. 230, 5 Fed. Cas. No. 2,949.

50. The D. M. Hall *v.* The John Land, Hoff. Op. 96, 7 Fed. Cas. No. 3,939.

51. Roberts *v.* The St. James, 20 Fed. Cas. No. 11,911.

52. The Alma, 5 Nova Scotia (1 Oldwright) 789.

may be received and considered on the question of reducing the amount to which they would otherwise be entitled.[53] But the burden of proving misconduct is on the party asserting that fact.[54]

Act of Salvor Contributing to Danger. — The fact that the salvors, by their own acts, contributed to putting the vessel in the situation requiring the salvage services for which compensation is asked, is proper to be considered.[55]

53. The Gov. Ames, 108 Fed. 969, 48 C. C. A. 170; Fleming *v.* Lay, 109 Fed. 952, 48 C. C. A. 748.

In The Alexandra, 104 Fed. 904, it was held that where the distressed vessel, which had gone ashore, was permitted to ground again through the fault of the master wrecker, that fact may be considered by the court in reduction of the award.

54. The Alexandra, 104 Fed. 904. **Fraud or Gross Negligence on the Part of the Salvors** is visited by the law with an entire forfeiture of their claim to compensation; but where any such imputation is made the burden of proof is on the party making the charge. Coffin *v.* The John Shaw, 1 Cliff. 230, 5 Fed. Cas. No. 2,949.

55. See The Bolivar *v.* The Chalmette, 1 Woods 397, 3 Fed. Cas. No. 1,611.

SATISFACTION.—See Accord and Satisfaction; Mortgages.

SCIENTER.—See Counterfeiting; False Pretenses.

SCIENCE, BOOKS OF.—See Books; Expert and Opinion Evidence.

SCIENCE, FACTS OF.—See Judicial Notice.

SCIRE FACIAS.

CROSS-REFERENCES:

Bills and Notes;
Judgments;
Recognizance;
Records.

I. CRIMINAL.

1. Presumption and Burden of Proof. — A. In General. — To entitle the state to a final judgment under a *scire facias* issued upon a forfeited recognizance, the recognizance and judgment *nisi*, or of forfeiture, must be produced.[1]

B. Presumption as to Recognizance. — Where the record of the recognizance contains the essential recitals, all the necessary steps leading up to the recognizance will be presumed to be regular in a *scire facias* proceeding.[2]

1. Eubank *v.* People, 50 Ill. 496; Farris *v.* People, 58 Ill. 26; People *v.* Meacham, 74 Ill. 292; Peacock *v.* People, 83 Ill. 331; Kepley *v.* People, 123 Ill. 367, 13 N. E. 512; Nelson *v.* State, 44 Tex. Crim. 595, 73 S. W. 398.

"A proceeding upon a forfeited bail-bond is, in effect, a suit upon the bond, in which the *scire facias* serves the purpose of both a petition and a citation. Its foundation is the bond and the judicial declaration of the forfeiture of the bond, which is the judgment *nisi*. To entitle the state to a judgment final, it must prove the cause of action as in a civil suit. This proof is made by, first, the bond; and, second, the judgment *nisi* declaring its forfeiture." Houston *v.* State, 13 Tex. App. 560; Hester *v.* State, 15 Tex. App. 418; McWhorter *v.* State, 14 Tex. App. 239.

The Production of Bond on the Forfeiture Proceedings Before Judgment Nisi, does not dispense with the necessity of its production upon the subsequent proceedings for judgment final. Hester *v.* State, 15 Tex. App. 418.

Under General Denial or Nul Tiel Record. — General Denial. — The effect of a general denial is to traverse every allegation contained in the *scire facias*, including the execution of the bond; and the bond is indispensable evidence to authorize judgment for the state. Baker *v.* State, 21 Tex. App. 359, 17 S. W. 256.

Plea of Nul Tiel Record raises only the question as to the existence of the recognizance, and this must be determined by a court by inspection. State *v.* Sutcliffe, 16 R. I. 520, 17 Atl. 920. See Peacock *v.* People, 83 Ill. 331.

2. See article "Recognizance." The effect of a recognizance conforming to statute is that of a confessed judgment. Lewis *v.* Mull, 3 Greene (Iowa) 437.

The recognizance is evidence itself that the court directed the recognizance to be taken for the amount mentioned in it. Chumasero *v.* People, 18 Ill. 405.

The authority of a deputy to act for sheriff in taking recognizance will be presumed in *scire facias*, and if he had no authority, it should be shown as a matter of defense. Carmody *v.* State, 105 Ind. 546, 5 N. E. 679.

An indorsement by the clerk of the court into which the recognizance is returnable, that it was "returned to and entered of record in said court," is competent evidence of those facts against the sureties on the bond. Coin *v.* Slocum, 14 Gray (Mass.) 395.

Obligor, in Making Bail, Admits Facts Which Rendered Bond Necessary. — Furgison *v.* State, 4 Greene (Iowa) 302, 61 Am. Dec. 120; State *v.* Ryan, 23 Iowa 406; State *v.* Emily, 24 Iowa 24; Decatur County *v.* Maxwell, 26 Iowa 398; State *v.* Cannon, 34 Iowa 322; State *v.* Wells, 36 Iowa 238; State *v.* Wright, 37 Iowa 522; Ringgold County *v.* Ross, 40 Iowa 176.

Indictment. — The indictment against a principal need not be shown in order to recover amount of bail-bond from sureties. Hester *v.* State, 15 Tex. App. 418; State *v.* Coppock, 79 Iowa 482, 44 N. W. 714; nor can the sufficiency or validity of indict-

2. Mode of Proof. — A. RECOGNIZANCE. — Proof of recognizance and matters appertaining thereto are treated elsewhere.[3]

B. BREACH OF RECOGNIZANCE. — a. *Record Conclusive.* — The record of the forfeiture or breach of recognizance, entered in the proper court, is conclusive evidence of the fact.[4]

b. *Record Evidence Essential.* — The breach of the recognizance can only be shown by record evidence, except when otherwise provided by statute.[5]

c. *Sufficiency of Record.* — While a sufficient record must be shown, not every fact essential to the recovery need appear by record, but to a certain extent, omissions in the record may be supplied by proper averments in the *scire facias*, followed by proof thereof.[6]

d. *Parol Evidence to Contradict Record.* — The record of the

ment be questioned. Hester *v.* State, 15 Tex. App. 418.

Under a recognizance stating that it is for the appearance of principal to answer indictment pending against him, it is not necessary to prove that an indictment was ever found in order to render sureties liable on default of their principal to appear. Kepley *v.* People, 123 Ill. 367, 13 N. E. 512.

Judgment of conviction need not be shown, and it can in no way affect the issue. Martin *v.* State, 16 Tex. App. 265.

3. See article "RECOGNIZANCE," Vol. X.

4. United States *v.* Ambrose, 7 Fed. 554; State *v.* Gorley, 2 Iowa 52; State *v.* Cobb, 71 Me. 198; Loeber *v.* Moore, 20 D. C. 1.

A forfeiture of a recognizance is a judicial act and is conclusive of the breach of it. Pierson *v.* Com., 3 Grant Cas. (Pa.) 314.

After a recognizance which is entered into upon an examination of a party charged with a crime, and before a magistrate having jurisdiction of the offense, has properly become a part of the record, the action of the magistrate cannot be impeached, nor the proceedings assailed. Bulson *v.* People, 31 Ill. 409.

A short entry in the record of a "recognizance forfeited May 5, 1891" is conclusive that the defendant and his sureties were called and did not appear. Com. *v.* Basendorf, 153 Pa. St. 459, 25 Atl. 779.

If the defendant wishes to deny the forfeiture of his recognizance he should have pleaded *nul tiel record*, for the forfeiture is alleged by *scire facias* to be of record. Wilson *v.* State, 6 Blackf. (Ind.) 212.

When Parties Agree as to Statement of Facts, by which it appears that the recognizance was not duly taken, the record is not conclusive to show that it was duly taken. Com. *v.* Greene, 13 Allen (Mass.) 251.

5. See articles "JUDGMENTS" and "RECORDS;" Com. *v.* Slocum, 14 Gray (Mass.) 395; Com. *v.* Bail of Gordan, 15 Pick. (Mass.) 193; State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930; Hollister *v.* United States, 145 Fed. 773; McRoberts *v.* Lyon, 79 Mich. 25, 44 N. W. 160.

Statute. — Where, on account of the neglect of the clerk of court, or for other reasons, the default is not made a matter of record, by statute, the state may prove the default of defendant by parol evidence. Hesselgrave *v.* State, 63 Neb. 807, 89 N. W. 295. See article "RECORD."

The failure of principal to comply with conditions of recognizance can be proved only by the journals of the court in which proceedings on indictment were had. Clifford *v.* Marston, 14 Or. 426, 13 Pac. 62.

6. People *v.* Baughman, 18 Ill. 152; McFarlan *v.* People, 13 Ill. 9; Thomas *v.* People, 13 Ill. 696.

What Record Must Show. — The right of state to have recognizance must appear in the record. State *v.* Foster, 11 Iowa 291.

When the minutes of the court contain no record of the forfeiture of an appearance bond in a criminal case,

court into which the recognizance is returned, showing that the principal made default, cannot be contradicted or controlled by parol evidence.[7]

3. Sufficiency of Evidence. — The recognizance of record and judgment of forfeiture are sufficient evidence to authorize judgment of execution in accordance with recognizance in a *scire facias* proceeding.[8]

4. Defense. — A. Burden of Proof. — When judgment *nisi,* or judgment of default, of appearance, has been entered against the principal, the burden is upon the defendant to show cause why the recognizance shall not be forfeited.[9]

B. Evidence Admissible in Defense. — It is competent for the defense to show, under proper plea, that some of the essentials of the bond were inserted after signing;[10] that defendant was incarcerated at time of forfeiture and his default thereby excused[11] that

the record cannot be supplied by parol testimony. State *v.* Doyle, 42 La. Ann. 640, 7 So. 699.

7. State *v.* Clemons, 9 Iowa 534; Calvin *v.* State, 12 Ohio St. 60; State *v.* Coppock, 79 Iowa 482, 44 N. W. 714; United States *v.* Ambrose, 7 Fed. 554.

Parol evidence is not admissible to contradict the record showing that a recognizance was taken and approved by sheriff, or to show that when the recognizance was filed there was no approval on it. Wellborn *v.* People, 76 Ill. 516.

Where the defendant enters into a recognizance for his appearance before a justice, at a time fixed by adjournment, and at such time the justice enters in his docket that the defendant did not appear, in a *scire facias* proceeding such entry cannot be contradicted by parol. State *v.* Gorley, 2 Iowa 52.

8. *Illinois.* — Peacock *v.* People, 83 Ill. 331; People *v.* Witt, 19 Ill. 169; Kepley *v.* People, 123 Ill. 367, 13 N. E. 512; Burrall *v.* People, 103 Ill. App. 81.

Texas. — Martin *v.* State, 16 Tex. App. 265; McWhorter *v.* State, 14 Tex. App. 239; Hester *v.* State, 15 Tex. App. 418; Housten *v.* State, 13 Tex. App. 560.

9. In other words, why the conditional judgment of record against him shall not be made absolute, and execution issue thereon. State *v.* Carr, 4 Iowa 289.

Where to a *scire facias* to forfeit recognizance, a plea was filed by the surety to the effect that he signed the bond when there was no obligee or penalty stated therein, and that the name of the obligee and amount of bond had since been inserted, in his absence, *held,* such plea was not a general plea of *non est factum,* but a special plea, and the onus of sustaining it was on defendant. Brown *v.* Colquitt, 73 Ga. 59, 54 Am. Rep. 867.

As a defense to the *scire facias* the sureties on the bail-bond pleaded that prior to the forfeiture of bond, the principal was incarcerated in the penitentiary upon a conviction of felony, and at the time of such forfeiture, he was restrained of his liberties by process of law. *Held,* that the defense thus pleaded devolved on the sureties the burden of proving such restraint. Allee *v.* State, 28 Tex. App. 531, 13 S. W. 991.

10. Defendant may show that he signed the bond when there was no obligee or penalty stated therein, and that the name of the obligee and amount of bond had since been inserted in his absence. But the same must be specially pleaded. Brown *v.* Colquitt, 73 Ga. 59, 54 Am. Rep. 867.

11. The sureties on bond may show a defense of *scire facias,* that prior to the forfeiture of bond, the principal was incarcerated in a penitentiary upon a conviction of felony, and at the time of such forfeiture he

the defendant is not the person who gave the recognizance.[12]

II. CIVIL.

1. Presumption and Burden of Proof. — A. ORIGINAL JUDGMENT. In a *scire facias* proceeding to revive a judgment, there must be proof of the original judgment.[13]

B. ASSIGNMENT. — The assignee of a judgment is bound to show that he is entitled to maintain suit by virtue of a valid assignment.[14]

2. Mode of Proof. — Judgment. — A. IN GENERAL. — In a *scire facias* proceeding, the judgment of a court of competent jurisdiction, which is sought to be revived, is generally conclusive evidence between the parties thereto,[15] and sufficient to make out plaintiff's case.[16]

B. AS TO HEIRS. — In order to revive a judgment as against the heirs of a judgment debtor, in addition to the judgment, it must be shown that the heirs inherited property from such judgment debtor.[17]

C. TERRE-TENANT. — As against a terre-tenant the plaintiff cannot offer his judgment in evidence and rest his case, but he must offer proof outside the record to establish the liability of a party as terre-tenant. He must show by evidence *aliunde* that he acquired

was restrained of his liberties by process of law. Allee *v.* State, 28 Tex. App. 531, 13 S. W. 991.

12. Renoard *v.* Noble, 2 Johns. Cas. (N. Y.) 293; State *v.* Sutcliffe, 16 R. I. 520, 17 Atl. 920.

Under Nul Tiel Record He Cannot Show that he was not the person recognizing. State *v.* Sutcliffe, 16 R. I. 520, 17 Atl. 920.

13. Campbell *v.* Carey, 5 Harr. (Del.) 427.

14. Barry *v.* Hoffman, 6 Md. 78.

15. **Strangers.** — It is evident from the reason and nature of things that strangers are not concluded by the judgment. Griswold *v.* Stewart, 4 Cow. (N. Y.) 459.

16. *United States.* — United States *v.* Thompson, Gilp. 614.

Alabama. — Duncan *v.* Hargrove, 22 Ala. 150.

Arkansas. — Anthony *v.* Humphries, 9 Ark. 176.

District of Columbia. — Loeber *v.* Moore, 20 D. C. 1.

Indiana. — Tripp *v.* Potter, 11 Ind. 121.

Maine. — Woods *v.* Cooke, 61 Me. 215.

Pennsylvania. — Campbell's Appeal, 118 Pa. St. 128, 12 Atl. 299; Hauer's Appeal, 5 Watts & S. 473; Silverthorn *v.* Townsend, 37 Pa. St. 263; Davidson *v.* Thornton, 7 Pa. St. 128.

Tennessee. — Bell *v.* Williams, 4 Sneed 196.

Texas. — McFadden *v.* Lockhart, 7 Tex. 573.

West Virginia. — Garrison, Admr. *v.* Myers, 12 W. Va. 330.

17. In a suit to revive a money judgment against the heirs of the original defendant to the judgment, it must be shown that assets were left by deceased at his death, for, without inheriting assets, no liability rests upon the heirs for debts of the ancestor. Schmidtke *v.* Miller, 71 Tex. 103, 8 S. W. 638. See Mayes *v.* Jones, 62 Tex. 365; Webster *v.* Willis, 56 Tex. 468; State *v.* Lewellyn, 25 Tex. 797.

Inheritance From Other Parties. The proceeds from the sale of land inherited by the children of the deceased judgment debtor, from their aunt, cannot, in *scire facias* proceeding against them as heirs of such judgment debtor, be subjected to the payment of such judgment. Adams *v.* Stake, 67 Md. 447, 10 Atl. 444.

As the *scire facias* does not charge that the children inherited any property from the deceased judgment debtor, it raises only the question of

title to land after the rendition of judgment and during the time that such judgment was a lien upon the land.[18]

3. Defense. — A. Burden of Proof. — The burden rests upon the defendant to show cause against the revival of decree or judgment.[19]

B. Shifting of Burden. — In the states where the distinction between legal and equitable actions no longer exists, facts offered in evidence tending strongly to impeach the original judgment as collusive and fraudulent, as a matter of law, will shift the burden upon the plaintiff.[20]

C. Evidence Admissible in Defense. — a. *Matters Prior to Judgment.* — **(1.) General Rule.** — Except for want of jurisdiction, matters occurring prior to judgment which could have been pre-

the satisfaction of the judgment and the liability of property owned by the judgment debtor; and the fiat only operates on those questions so raised by the pleadings, and does not affect the children's own land. Adams *v.* Stake, 67 Md. 447. 10 Atl. 444.

18. Kinports *v.* Kinports, 1 Pa. Co. Ct. 610; Saunders *v.* Webster, 3 Har. & J. (Md.) 432; Ford *v.* Gwinn, 3 Har. & J. (Md.) 496; Silverthorn *v.* Townsend, 37 Pa. St. 263.

"This was a writ of *scire facias* issued against the defendant, as terre-tenant of Duley, on a judgment rendered in that court against Duley, the defendant pleaded, that Duley was not seized of the lands, etc. at the time of rendition of the judgment. At the trial, to prove a seizin of the lands in dispute, which was part of a tract called Coleraine, in Duley, the plaintiff, offered in evidence a deed from Duley, to the defendant, dated the 16th of June, 1803, for part of a tract called Williams' Ridge, containing 100 perches, and for ten acres, part of a tract called Coleraine. He also offered parol evidence to prove that James Duley was in possession of the said land, and has been in possession of it for nine years before the execution of said deed. . . . *Held*, that plaintiff cannot support the *scire facias* against the terre-tenant, without producing a grant from the proprietary for the tract of land called Coleraine, or laying a sufficient foundation for presuming one; for without such grant Duley could not have been seized of the ten acres of land, at the time of the obtention of the judgment on which the *scire facias* was sued out, nor could the land have been liable to execution thereon — the possession of the ten acres being by intrusion on the proprietary." But the grant, with the evidence produced, the deed from D. to S. and the parol evidence that D. was and had been in possession for nine years before his deed to S. would support the issue for plaintiff. Saunders *v.* Webster, 3 Har. & J. (Md.) 432. See Ford *v.* Gwinn, 3 Har. & J. 496.

19. Garrison, Admr. *v.* Myers, 12 W. Va. 330; Smith *v.* Burnett, 17 N. J. Eq. 40.

"The pleadings and findings of the court upon the issues do not appear in the present record; and in this collateral proceeding (appeal from *scire facias*) we may presume, in support of the judgment, that, when the pleadings, the findings, and judgment are considered together, the nature and extent of the plaintiff's title will sufficiently appear. . . . If the plaintiff's title is one which had terminated, as, for example, if it was for a term of years which had expired, it was for the defendant to show that fact as a reason why the judgment should not be revived, or the writ of possession awarded." Smith *v.* Stevens (Ill.), 23 N. E. 594.

20. If, upon trial of the *scire facias*, facts are put in evidence by the devisee which strongly impeach the original judgment as collusive and fraudulent, as a matter of law the burden is shifted upon the plaintiff to establish the debt with which

sented in the original action, cannot, in a *scire facias* proceeding, be inquired into or set up in defense.[21]

(2.) Terre-Tenant. — Where in *scire facias* it is sought to charge the land of a third party with the lien of the judgment as *terre-tenant* of the original defendant, he may show that he acquired title before the rendition of the judgment and before the judgment became a

it is sought to charge the real estate. Lee *v.* McMillan, 125 Pa. St. 74, 17 Atl. 247.

21. See *supra*, note 16.

England. — Baylis *v.* Hayward, 4 Ad. & El. 256, 31 E. C. L. 66; Allen *v.* Andrews, 1 Croke 283; Cook *v.* Jones, 2 Cowp. 727.

United States. — United States *v.* Thompson, Gilp. 614; Dickson *v.* Wilkinson, 3 How. 57.

Alabama. — Miller *v.* Shackelford, 16 Ala. 95; Betancourt *v.* Eberlin, 71 Ala. 461.

Connecticut. — Robbins *v.* Bacon, 1 Root 548; Bradford *v.* Bradford, 5 Conn. 127.

Georgia. — Camp *v.* Baker, 40 Ga. 148.

Iowa. — Vredenburgh *v.* Snyder, 6 Iowa 39.

Maine. — Smith *v.* Eaton, 36 Me. 298, 58 Am. Dec. 746.

Maryland. — Kemp *v.* Cook, 6 Md. 305.

Massachusetts. — Springfield Mfg. Co. *v.* West, 1 Cush. 388; Thayer *v.* Tyler, 10 Gray 164; Sigourney *v.* Stockwell, 4 Metc. 518; Stephens *v.* Howe, 127 Mass. 164.

Mississippi. — Mathews *v.* Mosby, 13 Smed. & M. 422; Anderson *v.* Williams, 2 Cushm. 684; Pollard *v.* Eckford, 50 Miss. 631.

Missouri. — Watkins *v.* State, 7 Mo. 334; Riley *v.* McCord, 24 Mo. 265.

Pennsylvania. — Hauer's Appeal, 5 Watts & S. 473; Campbell's Appeal, 118 Pa. St. 128, 12 Atl. 299.

South Carolina. — Koon *v.* Ivey, 8 Rich. L. 37.

Tennessee. — Love *v.* Allison, 2 Tenn. Ch. 111; Bell *v.* Williams, 4 Sneed 196.

Texas. — Baxter *v.* Dear, 24 Tex. 17, 76 Am. Dec. 89.

Under Plea of Nul Tiel Record. Except for want of jurisdiction, defendant cannot avoid judgment because of errors or irregularities. Anthony *v.* Humphries, 9 Ark. 176; Bell *v.* Williams, 4 Sneed (Tenn.) 196; McFadden *v.* Lockhart, 7 Tex. 573; Tripp *v.* Potter, 11 Ind. 121; Campbell's Appeal, 118 Pa. St. 128, 12 Atl. 299; Davidson *v.* Thornton, 7 Pa. St. 128.

"The record showing that the defendant was personally served and that he appeared, and that the declaration stated a cause of action (defectively, it may be admitted) of which the court had jurisdiction, the defendant should have appealed from the original judgment or in some way proceeded directly to set it aside." He cannot be permitted to show error, however gross, falling short of showing a want of jurisdiction in the court to render the judgment. Loeber *v.* Moore, 20 D. C. 1.

A judgment sought to be revived by *scire facias* imports absolute verity and cannot be impeached by matters going behind it. Duncan *v.* Hargrove, 22 Ala. 150.

The defendant in *scire facias* cannot show, in order to reduce the damages, that the adjudication of the court in the original action was erroneous. Woods *v.* Cooke, 61 Me. 215.

No one but *terre-tenant* can show that the land is discharged from the lien of the original judgment. Silverthorn *v.* Townsend, 37 Pa. St. 263.

It is no defense to an action of *scire facias* that the note, upon which the original suit was instituted, was afterwards paid by the indorser, and the suit carried on for the benefit of such indorser in the name of the payee. Woods *v.* Cooke, 61 Me. 215.

An outstanding title is no defense, as the only issue is as to the rights of the parties to the judgment. Smith *v.* Stevens (Ill.), 23 N. E. 594.

When Proceeding Is in Effect a Summons. — Under statutory proceeding in the nature of a *scire facias* to bring a defendant before the

lien on the land, or he may show a restriction or release of the lien of the judgment.[22]

b. *Matters Subsequent to Judgment.* — The defendant, in a *scire facias* proceeding, may offer in defense, evidence of matters occurring after the rendition of judgment.[23] He may show that an assignment of judgment is not *bona fide*,[24] and that judgment has been paid[25] or satisfied,[26] or tender made;[27] that the defendant was discharged in bankruptcy after rendition of judgment;[28] that pro-

court which contemplates a trial *de novo* as to him, the trial will proceed as if there had been no judgment, and the defendant has the right to make any defense which he might have had to the original action. Ryder *v.* Glover, 4 Ill. 547; Lasman *v.* Harts, 112 Ill. App. 82.

22. Kinports *v.* Kinports, 1 Pa. Co. Ct. 610; Silverthorn *v.* Townsend, 37 Pa. St. 263.

In a *scire facias* proceeding to revive a judgment against a defendant therein and a terre-tenant, the terre-tenant may give in evidence a collateral agreement between the original parties when its effect is not to impair the judgment, but to restrain the lien incident to it. This might be done by arrangement beforehand, or by a release subsequent, without impinging on record. Sankey *v.* Reed, 12 Pa. St. 95.

23. *Alabama.* — Duncan *v.* Hargrove, 22 Ala. 150

Delaware. — Campbell *v.* Carey, 5 Harr. 427.

Illinois. — Carr *v.* Miner, 92 Ill. 604.

Louisiana. — Hayden *v.* Sheriff, 43 La. Ann. 385, 8 So. 919.

Maryland. — Blackburn *v.* Beal, 21 Md. 208.

Nebraska. — McCormick *v.* Carey, 62 Neb. 494, 87 N. W. 172.

Pennsylvania. — Bishop *v.* Goodhart, 135 Pa. St. 374, 19 Atl. 1026; Jenkins *v.* Anderson, 11 Atl. 558; Phillips *v.* Beatty, 135 Pa. St. 431, 19 Atl. 1020; Smith *v.* Coray, 196 Pa. St. 602, 46 Atl. 855; Stewart *v.* Colwell, 24 Pa. St. 67; Spring Run Coal Co. *v.* Tosier, 102 Pa. St. 342; Walters *v.* Oyster, 1 Atl. 430.

South Carolina. — Babb *v.* Sullivan, 43 S. C. 436, 21 S. E. 277.

Tennessee. — Cowan *v.* Shields, 1 Overt. 64.

Evidence of matters subsequent to judgment, partly *in pais* and partly of record, is admissible. McCullough *v.* Franklin Coal Co., 2 Md. 256; Harden *v.* Campbell, 4 Gill (Md.) 29; Booth *v.* Campbell, 15 Md. 569.

24. Barry *v.* Hoffman, 6 Md. 78.

25. Payment. — Hayden *v.* Sheriff, 43 La. Ann. 385, 8 So. 919; Blackburn *v.* Beall, 21 Md. 208; McCormick *v.* Carey, 62 Neb. 494, 87 N. W. 172; Phillips *v.* Beatty, 135 Pa. St. 431, 19 Atl. 1020; Smith *v.* Coray, 196 Pa. St. 602, 46 Atl. 855; Campbell *v.* Carey, 5 Harr. (Del.) 427.

A plea of payment to a *scire facias* will not be supported by evidence of a bargain and sale of lands, by the defendant to the plaintiff in execution, unless such bargain and sale has been consummated. Earle *v.* Earle, 20 N. J. L. 347.

Payments prior to judgment are inadmissible. McVeagh *v.* Little, 7 Pa. St. 279; Trader *v.* Lawrence, 182 Pa. St. 233, 37 Atl. 812.

26. Accord and Satisfaction. Bishop *v.* Goodhart, 135 Pa. St. 374, 19 Atl. 1026; Jenkins *v.* Anderson (Pa.), 11 Atl. 558.

27. Tender of full amount of judgment is a good defense if kept good. Carr *v.* Miner, 92 Ill. 604.

28. Bankruptcy. — Duncan *v.* Hargrove, 22 Ala. 150; Stewart *v.* Colwell, 24 Pa. St. 67; Spring Run Coal Co. *v.* Tosier, 102 Pa. St. 342; Walters *v.* Oyster (Pa.), 1 Atl. 430.

A discharge dated prior to the date of the judgment on which *scire facias* is founded, is inadmissible. Stewart *v.* Colwell, 24 Pa. St. 67.

In an action in trespass for damages, plaintiff obtained judgment for want of appearance, but before damages were assessed by inquisition, de-

ceedings upon the judgment had been released by release of all actions.[29]

fendant was adjudged a bankrupt — the claim for damages being a provable debt under bankruptcy act, the discharge was admissible as a defense. Spring Run Coal Co. *v.* Tosier, 102 Pa. St. 342. See further Walters *v.* Oyster (Pa.), 1 Atl. 430.

29. The writ of *scire facias* is classed among actions and a release of all actions is a good bar to the writ. McCullough *v.* Franklin Coal Co., 21 Md. 256.

SCROLL.—See Seals.

SEALS.

By W. L. Willie.

I. PUBLIC OFFICERS.

1. Notaries. — A. JUDICIAL NOTICE. — The courts will take judicial notice of notary's seal.[1]

B. PRESUMPTIONS. — a. *That Seal Used Is Proper One.* — The seal appended by a notary public is presumptively his, in absence of evidence to the contrary.[2]

b. *That Seal Is Affixed According to Law of Place.* — It will be presumed, until the contrary is shown, that demand and protest were made according to the law of the place where they were made.[3]

c. *As To Sealing From Record Copy.* — Where a certified copy of a deed is offered in evidence and the notary in his certificate declares that he has affixed his seal thereto, it will be presumed that his seal was properly attached, although its place is not indicated by the character ordinarily used for that purpose.[4]

C. PROOF OF ABSENCE OF SEAL. — *Failure of Record to Show.* The failure of the record to show the presence of a notary's seal is

1. See article "JUDICIAL NOTICE," Vol. VII.

England. — Hutcheon *v.* Mannington, 6 Ves. Jr. 823, 1 Eng. Reprint 1327; Wright *v.* Barnard, 2 Esp. 699, 5 R. R. 767.

United States. — Yeaton *v.* Fry, 5 Cranch C. C. 335.

District of Columbia. — Denmead *v.* Maack, 2 McArthur 475.

Massachusetts. — Porter *v.* Judson, 1 Gray 476.

New York. — Chanoine *v.* Fowler, 3 Wend. 173.

Pennsylvania. — Browne *v.* Philadelphia Bank, 6 Serg. & R. 484, 9 Am. Dec. 463.

The certificate of a notary public, under his notorial seal, is *prima facie* evidence that the person who uses it and signs the certificate is a notary commissioned by the governor. Browne *v.* Philadelphia Bank, 6 Serg. & R. (Pa.) 484, 9 Am. Dec. 463.

The courts will presume that the seal used by one who styles himself, without contradiction, a commissioner of Louisiana, in authenticating an affidavit made before him, as commissioner, was the seal of a commissioner of Louisiana, until the contrary is clearly and specifically shown to the court. Tunstall *v.* Madison, 30 La. Ann. 471.

2. Deans *v.* Pate, 114 N. C. 194, 19 S. E. 146.

3. Carter *v.* Burley, 9 N. H. 558.

4. The same rule applies to the record itself when used instead of a certified copy thereof under agreement of counsel. Coffey *v.* Hendricks, 66 Tex. 676, 2 S. W. 47.

"Where the instrument offered in evidence is not the original deed itself, but a certified copy from the records in the county clerk's office, by which copy it appears that the original was proved for record before a notary, who stated in his certificate that he thereto affixed his official seal, it seems that from such statement in the certificate and from the fact that the clerk admitted the deed to record upon the certificate, it may be presumed that the notary's seal was properly attached to the original certificate, although no evidence of that fact appears on the face of the copy of the record. Under such circumstances it may be inferred that the clerk who recorded the deed did not suppose it necessary to put upon record the characters usually employed to indicate the seal affixed to certificate." Ballard *v.* Perry, 28 Tex. 348.

An objection to the validity of the acknowledgment to a deed attested by the notary as "given under hand," on the ground that the notary omitted to affix his seal, is not well taken where instrument offered in evidence was duly admitted to record. Mitchner *v.* Holmes, 117 Mo. 185, 22 S. W. 1070.

no affirmative evidence of the absence of a seal at the time it was made,[5] nor is the recital in record, made by recorder, "no seal," conclusive evidence of the absence of seal.[6]

2. Other Public Officers. — A. JUDICIAL NOTICE. — Courts take judicial notice of the great seal of its own or foreign governments;[7] of other courts within the state,[8] and of federal courts,[9] and those created by act of Congress.[10] The seal of a consular officer is judicially noticed by courts of his own country.[11] Judicial notice is taken of the seals of county executive officers.[12]

B. PRESUMPTIONS. — a. *Of Sealing From Record Copy.* — The original instrument executed by a public officer will be presumed to have been sealed, where the record copy states that it was sealed, although such copy does not show a seal.[13]

5. Todd *v.* Union Dime Sav. Inst., 118 N. Y. 337, 23 N. E. 299; Dana *v.* Jones, 91 App. Div. 496, 86 N. Y. Supp. 1000.

6. The record of a mortgage, showed at the usual place for seal that it had been marked by officer making record "No seal on." The original of mortgage was produced with the impress thereon of the official seal. The officer making the certificate testified that he attached the seal at time he made the certificate. *Held,* that instrument was properly of record, because there was in fact a seal to the officer's certificate, when it was recorded, and that it was constructive notice to the mortgage company of the prior lien. Equitable Mtg. Co. *v.* Kempner, 84 Tex. 102, 19 S. W. 358.

7. See article "JUDICIAL NOTICE," Vol. VII.

United States. — Patterson *v.* Winn, 5 Pet. 233; Schoerken *v.* Swift Co., 7 Fed. 469.

Connecticut. — Griswold *v.* Pitcairn, 2 Conn. 85.

Illinois. — Chicago & A. R. Co. *v.* Keegan, 152 Ill. 413, 39 N. E. 33.

Indiana. — Gatling *v.* Newell, 9 Ind. 572, 582.

Maine. — Robinson *v.* Gilman, 20 Me. 299.

New Hampshire. — Beech *v.* Workman, 20 N. H. 379; Watson *v.* Walker, 23 N. H. 471; State *v.* Carr, 5 N. H. 367.

New York. — Coit *v.* Millikin, 1 Denio 276.

Texas. — Phillips *v.* Lyons, 1 Tex. 392.

8. Womack *v.* Dearman, 7 Port. (Ala.) 513; Delafield *v.* Hand, 3 Johns. (N. Y.) 310.

9. Adams *v.* Way, 33 Conn. 419; Womack *v.* Dearman, 7 Port. (Ala.) 513.

10. Mangun *v.* Webster, 7 Gill. (Md.) 78.

11. Barber *v.* International Co., 73 Conn. 587, 48 Atl. 758. See Church *v.* Hubbart, 2 Cranch C. C. (U. S.) 187.

12. *Alabama.* — Ingram *v.* State, 27 Ala. 17.

California. — Wetherbee *v.* Dunn, 32 Cal. 106; Himmelmann *v.* Hoadley, 44 Cal. 213.

Illinois. — Thielmann *v.* Burg, 73 Ill. 293; Walcott *v.* Gibbs, 97 Ill. 118.

Louisiana. — Scott *v.* Jackson, 12 La. Ann. 640; Wood *v.* Fitz, 10 Mart. O. S. 196; Templeton *v.* Morgan, 16 La. Ann. 438.

Tennessee. — State *v.* Evans, 8 Humph. 110; Major *v.* State, 2 Sneed 11.

Texas. — Alford *v.* State, 8 Tex. App. 545.

Wisconsin. — Martin *v.* Aultman, 80 Wis. 150, 49 N. W. 749; Ward *v.* Henry, 19 Wis. 76, 88 Am. Dec. 672.

13. Adams *v.* Wilder, 91 Ga. 562, 18 S. E. 530.

Where the record copy of a sheriff's deed does not show a seal, the presumption will be indulged that the original deed was sealed, when so stated in copy of the deed. McCoy *v.* Cassidy, 96 Mo. 429, 9 S. W. 926.

Where a judgment is rendered

b. *As to Ancient Process.* — A slight impression upon a process, after the lapse of many years, will be presumed to be the seal and the due and legal authentication of the writ, and that the impression of the seal has disappeared from lapse of time.[14]

C. Expert Evidence. — Persons acquainted with parchment patents may be examined as to traces of a seal.[15]

D. Parol Proof of Sealing. — The mere testimony of a witness that wax and seal had been attached to a grant or patent, is not competent as primary evidence to show the sealing of such instrument.[16]

E. Comparison to Determine Genuineness of Seal. —a. *Judicial Comparison.* — The genuineness of the seal of the recorder of deeds attached to his certificate of a record copy, may be proved by comparing the instrument in evidence with others that are proven to be genuine produced in court from the files of the office.[17]

upon default, and such judgment is assailed in the supreme court because the court below had no jurisdiction of the defendants, for the alleged reason that the summons was not attested with the seal of the court, and nothing is presented to the supreme court to sustain the said claim except the transcript of the record of the court below, which fails to show on the copy of the summons set forth any seal annexed thereto, but the journal entry of the judgment states the court found that due personal service of summons was made upon the said defendants as required by law. *Held,* that such finding and adjudication of the court are *prima facie* evidence of the legal authentication of the summons with the seal. Dexter *v.* Cochran, 17 Kan. 447.

The record copy of a deed need not contain a copy of the seal, nor any *locus sigilli* or *scroll.* A statement in body of certificate that the officer who made it affixed the seal of his office, raises the presumption that such was the fact. Geary *v.* Kansas, 61 Mo. 378.

The registration of a grant, with a certificate that it conferred a complete title, justifies the presumption that it was duly sealed. Sneed *v.* Ward, 5 Dana (Ky.) 187.

14. Even where this is the first opportunity to take advantage of the assumed defect in the process. Heighway *v.* Pendleton, 15 Ohio 735.

15. Follet *v.* Rose, 3 McLean C. C. 332, 9 Fed. Cas. No. 4,900.

16. Unless there is some evidence of the genuineness of an unsealed document offered in evidence as a plat or grant from the state, testimony of a witness that the wax and seal had been attached but were lost was properly excluded. If there had been proof by certified copy from the secretary of state's office, where all grants are recorded, this evidence would have been admissible, showing by necessary inference that a genuine plat or grant had once existed. Adams *v.* Wilder, 91 Ga. 562, 18 S. E. 530.

"The genuineness of the seal itself is always determined by the court from inspection, and the seal being genuine, it vouches for the genuineness of the document to which it is attached. But where the seal is not produced, no inspection by the court can take place, and the mere testimony of a witness that wax and seal had been attached to the document could be no substitute for inspection by the court as a means of inferring genuineness of document. There can be no trial by inspection on a past inspection made by witness. There must be present inspection made by the court. In Smalley *v.* McKilvain, 14 Ga. 252, the absence of seal was accounted for by parol evidence, but there was other evidence from which the genuineness of document could be inferred." Adams *v.* Wilder, 91 Ga. 562, 18 S. E. 550.

17. Where the certified copy of a deed, constituting a link in the chain

b. *Extra-Judicial Comparison.* — The recorder is permitted to testify that he had examined a number of other old certificates of the same clerk whose certificate is offered in evidence, and to give the result of his comparisons.[18]

II. PRIVATE SEALS.

1. Presumptions. — A. Of Sealing at Time of Delivery. — An instrument, purporting to be sealed,[19] is presumed to have been sealed at time of delivery in absence of contrary evidence.[20]

B. Of Sealing From Record Copy. — When a certified copy of an instrument is admissible, a recital in such copy from recorder's office, that deed was executed under hand and seal of signer creates the presumption that the original was under seal, although the certified copy shows no such seal or scroll.[21]

of title is claimed to be spurious and did not bear the seal used by recorder at the time of the date of certificate, the defendant was permitted to introduce a certain instrument proven to be the genuine and having the seal of recorder of the same period. Loring *v.* Jackson (Tex. Civ. App.), 95 S. W. 19.

18. To show whether or not the certificate of recorder to an instrument bears the genuine seal of office of the date of the certificate, the testimony of the present recorder, that according to his examination made of other old certificates issued by the recorder before and after the date of certificate in evidence all of them have the same seal, except the one introduced in evidence which is a fraction smaller, is held to be competent testimony. Loring *v.* Jackson (Tex. Civ. App.), 95 S. W. 19.

19. When an Instrument Is Sealed. — At common law, the mere attaching of seal or scroll to an agreement made it a sealed instrument, without any recital in body of instrument recognizing seal as witness my hand and seal. Thrasher *v.* Everhart, 3 Gill & J. (Md.) 234.

But the statutes of those states where private seals are in use require some recognition of the seal in the body of the instrument, viz., "Witness my hand and seal," or "signed and sealed." Baird *v.* Blaigrove, 1 Wash. (Va.) 170; Orgenbright *v.* Campbell, 3 Hen. & M. (Va.) 144, 174; Clegg *v.* Lemessurier, 15 Gratt. (Va.) 108.

The mere words, "Witness my hand and seal" will not make the instrument a specialty, but there must be affixed a seal or scroll. Williams *v.* Young, 3 Ala. 145; Moore *v.* Leseur, 18 Ala. 606; Vance *v.* Funk, 3 Ill. 263.

20. Trasher *v.* Everhart, 3 Gill & J. (Md.) 234; Merritt *v.* Cornell, 1 E. D. Smith (N. Y.) 335.

Mere possession by the obligee upon the proof simply of the signature of the obligor, under a plea of *non est factum* on a single bill, is not *prima facie* evidence that instrument was sealed by obligor. Keedy *v.* Moats, 72 Md. 325, 19 Atl. 965.

21. Van Riswick *v.* Goodhue, 50 Md. 57; McCoy *v.* Cassidy, 96 Mo. 429, 9 S. W. 926; Equitable Mtg. Co. *v.* Kempner, 84 Tex. 102, 19 S. W. 358; Deininger *v.* McConnel, 41 Ill. 227; Growning & Co. *v.* Behn, 10 B. Mon. (Ky.) 383; Starkweather *v.* Martin, 28 Mich. 471.

The recording of a seal to a deed is not absolutely essential. If the original instrument cannot be produced, and the record thereof is offered in evidence, the existence of the seal will be presumed from the statement in the deed, that grantor did set his hand and affix his seal thereto, and from the attestation clause that it was signed, sealed, and delivered in the presence of witnesses. Flowery Min. Co. *v.* Bonanza Min. Co., 16 Nev. 302.

C. That Seal Used Is Proper One. — The seal affixed by maker of instrument will be presumed to be his proper seal.[22]

D. As To Adoption of Seal. — Where a sealed obligation purports on its face to be sealed by all the signers, and one or more seals are affixed, but not so many seals as there are signers, the court will presume that each person signing adopted some one of the seals, and the instrument will be valid against all, but the obligors will be allowed to rebut such presumption by plea and proof.[23] There are cases, however, holding that the burden of proof is on the party asserting that the seal was so adopted.[24]

Administrator's Deed. — A recital in a certified copy of an administrator's deed from the recorder's office that the deed was executed under the hand and seal of the administrator creates the presumption that the original deed was under seal, though the certified copies show no scroll or seal. Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088.

22. Pillow *v.* Roberts, 54 U. S. 472; Trasher *v.* Everhart, 3 Gill & J. (Md.) 234.

23. *Florida.* — Bacon *v.* Green, 36 Fla. 325, 18 So. 870; Cotten *v.* Williams, 1 Fla. 42.

Illinois. — Davis *v.* Burton, 4 Ill. 41, 36 Am. Dec. 511; Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. 213.

Missouri. — Burnett *v.* McCluey, 78 Mo. 676; Lunsford *v.* La Motte Lead Co., 54 Mo. 426.

New Hampshire. — Northumberland *v.* Cobleigh, 59 N. H. 250; Tenney *v.* Lumber Co., 43 N. H. 343; Pequawkett Bridge *v.* Mathes, 7 N. H. 230, 26 Am. Dec. 737.

Pennsylvania. — Bowman *v.* Robb, 6 Pa. St. 302.

West Virginia. — Norvell *v.* Walker, 9 W. Va. 447.

An obligation signed by two or more parties, concluding: "Given under our hands and seals," with a seal under the name of the first signer and the other signature immediately under it, is a sealed instrument. Those whose names follow the first signature are presumed to have adopted the seal affixed. Hatch *v.* Crawford, 2 Port. (Ala.) 54.

The recital in a bond with fewer seals than signatures, that it was "sealed with our seals," is a manifest adoption by each of one of the seals. Bank of Cumberland *v.* Bugbee, 19 Me. 27.

Husband and Wife. — Where a bond was executed by the husband and wife, and there was a seal opposite the name of the husband and none opposite th t of his wife, in absence of evidence to the contrary the presumption is, that the wife adopted the seal opposite the name of her husband. Warder, Bushnell & Glessner *v.* Stewart, 2 Marv. (Del.) 275; Tasker *v.* Bartlett, 5 Cush. (Mass.) 359.

24. Building Assn. *v.* Cummings, 45 Ohio St. 664, 16 N. E. 841; Pickens *v.* Rymer, 90 N. C. 282, 47 Am. Rep. 526; Hollis *v.* Pond, 7 Humph. (Tenn.) 222; Baird *v.* Reynolds, 99 N. C. 469, 6 S. E. 377.

Many obligors may adopt one seal or one scroll; and the question as to whether the instrument is sealed or unsealed is one of intention, and the *onus* lies on the plaintiff to prove that the party adopted the seal or scroll. Hollis *v.* Pond, 7 Humph. (Tenn.) 222.

Where there is a greater number of signatures than seals, whether it was the intention of the party signing the instrument to adopt the seal of another signer, is a question of fact for the jury, the burden being on the plaintiff to prove that the party adopted the seal or scroll. Building Assn. *v.* Cummings, 45 Ohio St. 664, 16 N. E. 841.

"If it be doubtful upon the face of the paper, whether it be a deed or a simple contract, the *onus* lies upon the plaintiff to prove his case. And where there are a greater number of signatures than seals, it must always

2. Proof of Sealing. — Testimony of Notary as to Custom. — The person taking the acknowledgment may testify that from his uniform practice in taking acknowledgments, he could not have taken it to the instrument had no seal been attached.[25]

III. PRIVATE CORPORATIONS.

1. Judicial Notice is not taken by the courts of the seals of private corporations, but such seals must be proved.[26]

2. Presumptions. — A. Of Sealing From Record Copy. — When a corporate instrument has been duly proved for record, and recorded, a certified copy of same, as in the case of an individual deed, is competent evidence of the sealing of the original.[27]

be doubtful on the face of the paper, whether it be not the deed of all the parties, and the probability, that it is the deed of all is increased when the instrument uses the words "Witness our hands and seals," for although these words will not make it a sealed instrument in the absence of the scroll, yet they may be looked to as a circumstance to explain the intention of the parties."

Ordinarily each party affixes a seal opposite to his signature, and in the absence of proof to the contrary the instrument will be held to be the deed of the parties only, to the signatures of whom seals are attached, or in some manner connected. State *v.* Himbird, 54 Md. 327.

Whether all the signers intended to adopt the seal or scroll is a question of fact to be determined by the jury on the evidence. Lambden *v.* Sharp, 9 Humph. (Tenn.) 224.

Two persons may adopt the same seal to an instrument, and it then becomes the deed of both; otherwise it is the deed of one and the simple contract of the other; and whether the party signing intended to adopt the seal of another signer is a question of fact for the jury, the burden being on the plaintiff to show that the defendant adopted the seal or scroll. It is error for the court, on inspection of instrument, to decide the matter as a question of law. Pickens *v.* Rymer, 90 N. C. 282, 47 Am. Rep. 526.

25. Follet *v.* Rose, 3 McLean C. C. 232, 9 Fed. Cas. No. 4,900.

26. Osborne *v.* Tunis, 25 N. J. L. 633; Tours *v.* Vreelandt, 7 N. J. L. 352, 11 Am. Dec. 551; Mann *v.* Pentz, 2 Sandf. Ch. (N. Y.) 257; Farmers' & Mechanics' Tpk. Co. *v.* McCollough, 25 Pa. St. 303; Chew *v.* Keck, 4 Rawle (Pa.) 163.

A corporation may adopt the seal of another or an ink impression, but such adoption or impression must be proved. Crossman *v.* Hiltown Tpk. Co., 3 Grant Cas. (Pa.) 225.

A deed proved by one of the subscribing witness to have been executed in Ireland and certified by the sovereign of Belfast under the seal of the corporation, is not evidence without proof that the seal is the seal of the corporation. Foster *v.* Shaw, 7 Serg. & R. (Pa.) 156.

The production of a physician's diploma, is not, in itself, evidence to show that the person named in the diploma is entitled to that degree. Moises *v.* Thornton, 8 Durnf. & E. (Eng.) 303. See also as to Medical Society-Vaughn *v.* Hankinson's Admr., 35 N. J. L. 79.

Public Hospital. — A deed from a public hospital under its corporate seal must be proved in the same manner as other deeds, the hospital not being of such notoriety that its seal will prove itself. Jackson *v.* Pratt, 10 Johns. (N. Y.) 381.

27. See *supra* "Private Deeds." Kelly *v.* Calhoun, 95 U. S. 710; Chamberlin *v.* Bradley, 101 Mass. 188, 3 Am. Rep. 331; Colvin *v.* Republican Val. Land Assn. 23 Neb. 75, 36 N. W. 361, 8 Am. St. Rep. 114; Lovett *v.* Steam Saw Mill Assn., 6 Paige (N. Y.) 54

B. That Seal Used Is Proper One. — When the signature of the duly authorized agent of the corporation, executing the instrument in its behalf is proved, the seal, though a mere paper, or wafer, scroll or rectangle, containing the word seal, will, in the absence of evidence to the contrary, be presumed to be the proper seal.[28]

28. *England.* — *In re* Barned's Bkg. Co., 37 L. J. Ch. 81, 17 L. T. 269, L. R. 3 Ch. 105.

Georgia. — Solomon's Lodge *v.* Montmollin, 58 Ga. 547.

Illinois. — Phillips *v.* Coffee, 7 Ill. 154, 63 Am. Dec. 357.

Maryland. — Susquehanna Bridge & B. Co. *v.* General Ins. Co., 3 Md. 305, 56 Am. Dec. 740.

Massachusetts. — Stebbins *v.* Merritt, 10 Cush. 27.

Michigan. — Benedict *v.* Denton, 1 Walk. Ch. 336.

Missouri. — Chouquette *v.* Barada, 28 Mo. 491, 75 Am. Dec. 131.

Nevada. — Evans *v.* Lee, 11 Nev. 194.

South Carolina. — Josey *v.* Railroad Co., 12 Rich. L. 134.

Tennessee. — Levering & Carncross *v.* Mayor, 7 Humph. 553.

The signatures of the agent of a corporation executing an instrument in its behalf, being proved, a common seal will be presumed to have been intended as the seal of the corporation, in the absence of competent evidence to the contrary. Pennsylvania Nat. Gas Co. *v.* Cook, 123 Pa. St. 170, 16 Atl. 762.

When an instrument is duly executed by one having authority, it is *prima facie* evidence that the seal attached is the seal of the corporation until it is impeached or shown to be otherwise. Wagg-Anderson Woolen Co. *v.* Lesher & Co., 78 Ill. App. 678.

In the absence of evidence to the contrary, the scroll or rectangle containing the word "seal" will be deemed to be the proper and common seal of the corporation. The presumption would be, if the paper were a copy, that the original was duly sealed, or if it were the original, that the scroll was adopted and used by the company as its seal, for the purpose of executing the contract in question. Jacksonville R. Co. *v.* Hooper, 160 U. S. 514.

An act which sanctions the use of scrawls, or "scrolls" and makes them valid as seals, applies to corporations, as the terms any person, in a statute apply to and include a corporation. As the scrolls may be used by a corporation, we should rather presume that they were used as their corporate seal, especially as that presumption supports the deed, and comports with the clear object of the instrument. The execution of the deed purports to be a corporate act. It is executed in the corporate name, by the majority of those persons who were constituted the corporate body, and purports to be a conveyance of the donation lands vested in them as such. Reynolds *v.* Trustees of Glasgow Academy, 6 Dana (Ky.) 37.

When a corporation deed recites that it is sealed with the corporate seal, it will be presumed that what purports to be such seal, placed after the name of the officer executing the deed, is the seal of a corporation. Benbow *v.* Cook, 115 N. C. 324, 20 S. E. 453, 44 Am. St. Rep. 454.

Adoption by Corporation. — A corporation, as well as an individual, may adopt any seal. They need not say it is their common seal. Mill Dam Foundry *v.* Hovey, 21 Pick. (Mass.) 417.

Where an appeal bond appeared to have been executed by an attorney in fact for a railway upon motion to dismiss for want of corporate seal, it was held that the court did not know judicially that the company had a seal other than the scroll appearing in the record. Illinois Cent. R. Co. *v.* Johnson, 40 Ill. 35.

"The deed throughout indicates a clear intention to convey, in their corporate fiduciary character, as trustees, and not as individuals; and in the conclusion they have not denominated the seal by which they testify it their individual seals. In-

C. Of Authority To Affix Seal. — The appearance of the common seal of a corporation to an instrument is *prima facie* evidence that it was affixed by proper authority, and the burden is thrown upon the party questioning the authenticity to overcome the presumption by competent evidence.[29] By some of the courts the principle is stated a little differently, viz.: where the seal of the corporation appears to be affixed to an instrument, and the signatures of the proper officers thereto are proved, the court will presume that they did not exceed their authority. The seal itself is *prima facie* evidence that it was affixed to the instrument under proper authority.[30]

asmuch, therefore, as they had the right to adopt the scroll as their seal—and it does not appear that they had any other seal as a corporation—and the act attempted to be done is a corporate act, and in the name of the corporate body, and done by those entrusted with the powers conferred by the act, and they have not denominated the scroll their individual seals, we may well intend the scrolls were used as their corporate seal." Reynolds *v.* Trustees of Glasgow Academy, 6 Dana (Ky.) 37.

29. *England.* —Scott *v.* Colburn, 26 Beav. 276, 28 L. J. Ch. 635, 5 Jur. N. S. 183, 53 Eng. Reprint 904; Royal British Bank *v.* Turquand, 5 El. & Bl. 248, 24 L. J. Q. B. 327, 85 E. C. L. 248.

United States. — Bank of U. S. *v.* Dandridge, 12 Wheat. 64.

Colorado. — Union Gold Min. Co. *v.* Bank, 2 Colo. 248.

Connecticut. — Hart *v.* Stone, 30 Conn. 94.

Michigan. — Benedict *v.* Denton, 1 Walk. Ch. 336.

Nevada. —Evans *v.* Lee, 11 Nev. 194.

New Hampshire. — Flint *v.* Clinton Co., 12 N. H. 430.

New York. — Whitney *v.* Union Trust Co., 65 N. Y. 576; Canadarqua Academy *v.* McKechnie, 19 Hun 62; Murray *v.* Vanderbilt, 39 Barb. 140; Jackson *v.* Campbell, 5 Wend. 572; Bowen *v.* Irish Presby. Cong., 6 Bosw. 245; Gillett *v.* Campbell, 1 Denio 520; Bank of Vergennes *v.* Warren, 7 Hill 91; Moore *v.* Rector of St. Thomas, 4 Abb. N. C. 51; Lovett *v.* Steam Saw Mill Assn., 6 Paige 54.

30. Berkes & D. Tpk. Road *v.* Myers, 6 Serg. & R. (Pa.) 12, 9 Am. Dec. 402; Josey *v.* Railroad Co., 12 Rich. L. (S. C.) 134; Levering & Carncross *v.* Mayor, 7 Humph. (Tenn.) 553; Union Bank *v.* United States Bank, 4 Humph. (Tenn.) 369; Hopkins *v.* Gallatin Tpk. Co., 4 Humph. (Tenn.) 403; Darnell *v.* Dickins, 4 Yerg. (Tenn.) 7.

The signing, sealing and delivering of the instrument raises the presumption that the seal was affixed by proper authority. Jacksonville R. Co. *v.* Hooper, 160 U. S. 514.

An appeal bond purporting to be executed by the attorney of the railroad company in the corporation's name, bearing the seal of the corporation, will be presumed to have been sealed by proper authority. I. & St. L. R. Co. *v.* Morganstern, 103 Ill. 149.

Signature of Rector and Clerk of Religious Corporation. — A bond and mortgage purporting to be executed by a religious corporation, bearing a seal, purporting on its face to be the corporate seal and declared to be such in the instruments, the instruments being proved to be signed by the rector and clerk of the corporation, are sufficiently authenticated to be admitted in evidence, although the acknowledgment or proof taken by the officer and annexed, be not sufficient to entitle the mortgage to record. Such proof, however, is only *prima facie* evidence that the instruments were the corporate acts. Moore *v.* Rector of St. Thomas, 4 Abb. N. C. (N. Y.) 51.

Private Seal of Officer. — Where there is no corporate seal, the seal of the treasurer is *prima facie* evi-

3. Proof of Genuineness of Seal. — The genuineness of corporate seal may be proved either by one who saw it affixed or one who knows the seal.[31]

dence of his authority to execute the instrument. Hunter *v.* Hudson River I. & M. Co., 20 Barb. (N. Y.) 493.

When a mortgage purports to have been executed by a corporation, through its treasurer, a certificate of acknowledgment, stating that the treasurer testified before the officer that he was the treasurer of the corporation; that it was a corporation but had no corporate seal; that he signed his name to the mortgage and affixed his own seal thereto, by the order and resolution of the trustees of said corporation, duly made and given in writing, and that the same was executed by him as such treasurer, for the purposes therein mentioned, is *prima facie,* sufficient evidence of the due execution of the mortgage, without producing and proving the resolution of the trustees; where the instrument is offered for the purpose of proving an act of acknowledgment of their pecuniary condition, by the mortgagors. Hunter *v.* Hudson River I. & M. Co. 20 Barb. (N. Y.) 493.

By Statute. — The appearance of seal is *prima facie* evidence of due authority. Sarmiento *v.* Davis Boat & Oar Co., 105 Mich. 300, 63 N. W. 205, 55 Am. St. Rep. 446; Bowers *v.* Hechtman, 45 Minn. 238, 47 N. W. 792.

United States. — Koehler *v.* Black River Co., 2 Black 715.

California. — Crescent City Wharf. & Light Co. *v.* Simpson, 77 Cal. 286, 19 Pac. 426; Andres *v.* Fry, 113 Cal. 124, 45 Pac. 534.

Georgia. — Solomon's Lodge *v.* Montmollin, 58 Ga. 547.

Iowa. — Morse *v.* Beale, 68 Iowa, 463, 27 N. W. 461.

Louisiana. — Adams *v.* His Creditors, 14 La. 454.

Minnesota. — Morris *v.* Keil, 20 Minn. 531.

Missouri. — Chouquette *v.* Barada, 28 Mo. 491, 75 Am. Dec. 131; Musser *v.* Johnson, 42 Mo. 74, 97 Am. Dec. 316.

Massachusetts. — Stebbins *v.* Merritt, 10 Cush. 27.

New Hampshire. — Flint *v.* Clinton Co., 12 N. H. 430.

South Carolina. — Josey *v.* Railroad Co., 12 Rich. L. 134.

West Virginia. — Boyce *v.* Montauck Gas C. Co., 37 W. Va. 73, 16 S. E. 501.

President and Cashier's Signature. A mortgage signed by the president and cashier of a bank and sealed with the corporate seal, is *prima facie,* duly and lawfully executed. Leggett *v.* New Jersey M. & B. Co., 1 N. J. Eq. 241, 23 Am. Dec. 728.

Statutes Requiring Corporate Deed To Be Signed by Person Executing It. — Where the statute requires that a corporate deed shall be signed by the persons executing it, proof that the individuals whose names are subscribed to the deed sealed and delivered the instrument as their deed, neither proves the seal of the corporation nor their authority to execute the deed. Osborne *v.* Tunis, 25 N. J. L. 633.

Where the seal of a corporation is affixed to a conveyance of real estate, and the signature of the president and secretary executing it are admitted, the courts will presume that they had authority to execute it, even though the articles of incorporation do not expressly confer such authority on them, but confer the power to contract and manage the business of the corporation upon the board of directors and a committee of first mortgage bondholders. Morse *v.* Beale, 68 Iowa 463, 27 N. W. 461.

Paper Seal. — No presumption of the president's authority arises from his attaching a paper seal, and stating in the certificate, "Witness the corporate seal of said defendant," there having been in fact no delegation of authority to him by the company to sign the cognovit or attach the seal. Raub *v.* Blairstown Cr. Assn., 56 N. J. L. 262, 28 Atl. 384.

31. Jackson *v.* Pratt, 10 Johns.

4. Rebuttal of Presumption of Authority To Affix Seal. — Parol Evidence. — The presumption that the corporate seal was affixed by proper authority, not being conclusive, may be overcome by parol evidence.[32]

IV. PUBLIC CORPORATIONS.

1. Judicial Notice is not taken of the seals of public corporations; but they must be proved by competent evidence.[33]

2. Presumptions. —.Of Authority To Affix Seal. — Where the signatures of the proper officers to a municipal document are proven, it will be presumed that the officers or agents did not exceed their authority in affixing the seal of the public corporation.[34]

(N. Y.) 381; Finch *v.* Gridley, 25 Wend. (N. Y.) 469. But evidence of witness who had been told by the officers that such was the corporate seal, is admissible. Moises *v.* Thornton, 8 Durnf. & E. (Eng.) 303.

32. *England.* — Mayor of Colchester *v.* Lowten, 1 Ves. & B. 226; D'Arcy *v.* Tamar, K. H. & C. R. Co., L. R. 2 Exch. 158, 4 H. & C. 463, 36 L. J. Exch. 37, 21 Jur. N. S. 548, 13 L. T. 626.

United States. — Koehler *v.* Black River Co. 2 Black 715.

New Jersey. — Leggett *v.* New Jersey M. & B. Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

Nevada. — Sharan *v.* Minnock, 6 Nev. 377.

New York. — Johnson *v.* Bush, 3 Barb. Ch. 207; Lovett *v.* Steam Saw Mill Assn., 6 Paige 54.

Pennsylvania. — *In re* Roman Catholic Society, 6 Serg. & R. 498; Berkes & D. Tpk. Road *v.* Myers, 6 Serg. & R. 12, 9 Am. Dec. 402.

The authority for the execution of the instrument claimed, being a resolution recorded in minutes of board meeting, evidence showing that there was not a quorum present at such meeting, rebuts the presumption of proper execution. Moore *v.* Rector of St. Thomas, 4 Abb. N. C. (N. Y.) 51.

No Vote of Directors. — The mere fact that there is no vote of directors authorizing it will overcome presumption of authority to affix seal. Crumlish *v.* Shenandoah Val. R. Co., 32 W. Va. 244, 9 S. E. 180.

33. See articles "JUDICIAL NOTICE" and "MUNICIPAL CORPORATIONS." Vaughn *v.* Hankinson's Admr., 35 N. J. L. 79.

Public Incorporated Hospital. Jackson *v.* Pratt, 10 Johns. (N. Y.) 381. See Moises *v.* Thornton, 8 Durnf. & E. (Eng.) 303.

Public Incorporated Medical Society. — Vaughn *v.* Hankinson's Admr., 35 N. J. L. 79.

Seal of Corporation of Belfast, Ireland, not judicially noticed. Foster *v.* Shaw, 7 Serg. & R. (Pa.) 156.

Exception is made in the case of the seal of the city of London, which exception is based on the antiquity of the city and its recognition by *Magna Charta* and the importance and dignity of its judicial and municipal institutions. Doe *v.* Mason, 1 Esp. 53, 5 R. R. 718; cited in Vaughn *v.* Hankinson's Admr., 35 N. J. L. 79.

34. St. Louis Pub. Schools *v.* Risley, 28 Mo. 415, 75 Am. Dec. 131.

"Without stopping to examine whether the principle is applicable to the committee of the legislative body, such as the mayor and aldermen of a town, it is sufficient to observe, that the seal of a corporation to an instrument constitutes *prima facie* evidence that it was placed there by proper authority and that the instrument is the act of corporation." Levering & Carncross *v.* Mayor, 7 Humph. (Tenn.) 553.

SEAMEN.—See Admiralty; Ships and Shipping.

SEAWORTHINESS.—See Admiralty; Ships and Shipping.

SECONDARY EVIDENCE.—See Best and Secondary Evidence.

SEDUCTION.

CROSS-REFERENCES:

Abduction;
Alienating Affections;
Breach of Promise;
Rape.

I. DEFINITION.

"Seduction" means illicit sexual intercourse with a woman of previous physical chastity, her consent being obtained by means of influence, inducement, promise, artifice, over-persuasion, or deception.[1]

II. CIVIL ACTIONS FOR DAMAGES.

1. Matters Essential to Recovery. — A. Burden of Proof and Presumptions. — a. *Distinction Between Common Law and Statutory Actions.* — The rights of action afforded by law for the redress of seduction as a civil wrong are of two classes: first, the common law action by some person standing *in loco parentis* for the loss of her services resulting from her seduction,[2] and second, the statutory action, subsequently created and now prevailing in nearly all jurisdictions, giving the wronged woman or some one in her behalf, the

1. *Arkansas.* — Walton *v.* State, 71 Ark. 398, 75 S. W. 1.
Indiana. — Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112.
Michigan. — People *v.* Bressler, 131 Mich. 390, 91 N. W. 639.
Missouri. — State *v.* Wheeler, 108 Mo. 658, 18 S. W. 924.
North Carolina. — Hood *v.* Sudderth, 111 N. C. 215, 16 S. E. 397.
Tennessee. — Bradshaw *v.* Jones, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. Rep. 655.
Texas. — Putnam *v.* State, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. Rep. 738.
Virginia. — Flick *v.* Com., 97 Va. 766, 34 S. E. 39.
Physical Chastity. — Washington *v.* State, 124 Ga. 423, 52 S. E. 910.

2. At common law a woman seduced has no right of action. See cases cited *infra,* this article.

right to damages for the seduction itself.[3] Naturally the elements which constituted seduction as the basis for an action at common law, and the establishment of which by competent evidence was necessary in order to recover damages, differ in some respects from those necessary to be proved in order to entitle recovery under the statutes—that is to say, the gist of the action at common law being the loss of some service to the plaintiff, his right to such service, and the consequent loss of service were facts necessary to be established in order to a successful prosecution of the action, while in an action under the statutes by the woman seduced, or someone in her behalf, all these matters are entirely eliminated.

Matters Common to Both Actions. — The fact of seduction, however, is a material fact common to both kinds of actions, and of course in so far as concerns the proof of the elements necessary to constitute seduction, such as the chastity of the woman, the illicit intercourse, the consent and the means of procuring that consent, the rules of evidence are substantially the same.

Materiality of Age of Woman. — In some jurisdictions the right of action given by statute to a woman for her own seduction depends upon her minority at the time of her alleged seduction,[4] while in others her age is not material.[5] And sometimes the statute giving

3. In many jurisdictions a woman has a statutory right of action for her own seduction as the real party in interest.

California. — Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144; Swett *v.* Gray, 141 Cal. 83, 74 Pac. 551.

Colorado. — Fleetford *v.* Barnett, 11 Colo. App. 77, 52 Pac. 293.

Indiana. — Simons *v.* Busby, 119 Ind. 13, 21 N. E. 451; Bartlett *v.* Kochel, 88 Ind. 425.

Iowa. — Dodd *v.* Focht, 72 Iowa 579, 34 N. W. 425; Hawk *v.* Harris, 112 Iowa 543, 84 N. W. 664, 84 Am. St. Rep. 352; Clifton *v.* Granger, 86 Iowa 573, 53 N. W. 316.

Michigan. — Fisher *v.* Hood, 14 Mich. 189; Rabeke *v.* Baer, 115 Mich. 328, 73 N. W. 242, 69 Am. St. Rep. 567; Watson *v.* Watson, 49 Mich. 540, 14 N. W. 489, 53 Mich. 168, 18 N. W. 605, 51 Am. Rep. 111; 58 Mich. 507, 25 N. W. 497; Hallock *v.* Kinney, 91 Mich. 57, 51 N. W. 706, 30 Am. St. Rep. 462.

North Carolina. — Hood *v.* Sudderth, 111 N. C. 215, 16 S. E. 397.

Tennessee. — Franklin *v.* McCorkle, 16 Lea 609, 57 Am. Rep. 244. See also Bradshaw *v.* Jones, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. Rep. 655.

"Seduction" and "Debauching" Distinguished. — Patterson *v.* Hayden, 17 Or. 238, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529; Breon *v.* Henkle, 14 Or. 494, 13 Pac. 289; Parker *v.* Monteith, 7 Or. 277.

4. Right of Action in Minor.

Indiana. — Henneger *v.* Lomas, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848; McCoy *v.* Trucks, 121 Ind. 292, 23 N. E. 93; Bartlett *v.* Kochel, 88 Ind. 425; Hart *v.* Walker, 77 Ind. 331; Smith *v.* Yaryan, 69 Ind. 445, 35 Am. Rep. 232; Dowling *v.* Crapo, 65 Ind. 209; Galvin *v.* Crouch, 65 Ind. 56.

Iowa. — Stevenson *v.* Belknap, 6 Iowa 97, 71 Am. Dec. 392.

5. Breon *v.* Henkle, 14 Or. 494, 13 Pac. 289.

Age Immaterial in England and Canada if daughter is residing with parent. Blaymire *v.* Haley, 6 M. & W. 55, 9 L. J. Exch. 147, 4 Jur. 107; Griffiths *v.* Teetgen, 15 C. B. 344, 28 Eng. L. & Eq. 371, 80 E. C. L. 344, 24 L. J. C. Pl. 35, 1 Jur. N. S. 426; Muckleroy *v.* Burnham, 1 U. C. Q. B. 351.

the parent a right of action for the seduction of a daughter makes the minority of the daughter an essential element, and of course that fact must be shown.[6]

Woman Must Be Unmarried. — In some jurisdictions, the fact that the woman was unmarried at the time of the alleged seduction is, by the statute giving her the right of action for her own seduction, made an essential element to her right of recovery.[7]

Common Law Action Not Superseded by Statutory Action. — It has been held that the common law right of action is not superseded by the statutory right, unless such effect shall have been expressly prescribed in such statute.[8]

b. *Loss of Service.* — **(1.) Generally.** — In common law cases, where the plaintiff is required to show that he has sustained damage from the seduction of his daughter or servant, by being deprived of her services, the fact that such services actually existed must be proven,[9] or that because of her blood relation,[10] membership in his

6. **As in Iowa.** — Dodd *v.* Focht, 72 Iowa 579, 34 N. W. 425.

7. See Bradshaw *v.* Jones, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. Rep. 655; also La Rosae *v.* State, 132 Ind. 219, 37 N. E. 798. And when that fact is put in issue it must be proved. Gover *v.* Dill, 3 Iowa 337. *Compare* Egan *v.* Murray, 80 Iowa 180, 45 N. W. 563, *holding* that an unmarried state need not be affirmatively proved in the first instance.

8. Updegraff *v.* Bennett, 8 Iowa 72; Smith *v.* Milburn, 17 Iowa 30; Wilhoit *v.* Hancock, 5 Bush (Ky.) 567.

"The providing a remedy for the daughter, should not be construed as taking away that of the father, or as restricting his damages to the loss of service, or actual expenses incurred; especially since the relation of master and servant need not be shown to exist, and there may have been no actual loss of service proved." Stevenson *v.* Belknap, 6 Iowa 97, 71 Am. Dec. 392.

9. Dunlap *v.* Linton, 144 Pa. St. 335, 25 Atl. 819; Fernsler *v.* Moyer, 3 Watts & S. (Pa.) 416, 39 Am. Dec. 33; South *v.* Denniston, 2 Watts (Pa.) 474.

The theory of the loss of service to the master has been characterized as a necessary fiction of law in order that the person seduced might be a competent witness; otherwise the wrongdoer might escape for want of proof, the injury from its nature being susceptible of proof only through the parties to it. See Parker *v.* Meek, 3 Sneed (Tenn.) 29.

The Mother, Not Being Bound to Maintenance, can maintain the action only by proving actual service at the time of the seduction. South *v.* Denniston, 2 Watts (Pa.) 474, where the court said: "Not being bound to the duty of maintenance, she is not entitled to the correlative right of service; and standing as a stranger to her daughter in respect to these, the relation of mistress and servant can be constituted between them but as it may be constituted between strangers in blood, save that less evidence would perhaps be sufficient to establish it." See also Fernsler *v.* Moyer, 3 Watts & S. (Pa.) 416, 39 Am. Dec. 33.

10. *England.* — Terry *v.* Hutchinson, 9 B. & S. 487, 37 L. J. Q. B. 257, L. R. 3 Q. B. 599; Griffiths *v.* Teetgen, 15 C. B. 344, 28 Eng. L. & Eq. 371, 80 E. C. L. 344, 24 L. J. C. P. L. 35, 1 Jur. N. S. 426; Mann *v.* Barret, 6 Esp. (Eng.) 32, 9 R. R. 804; Harper *v.* Luffkin, 7 Barn. & Cress. 387, 1 M. & Ry. 166, 6 L. J. (O. S.) K. B. 23, 31 R. R. 236.

United States. — Barbour *v.* Stephenson, 32 Fed. 66.

Arkansas. — Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52.

family,[11] or by some contractual relation,[12] he had control over, and a right to command her services.[13] In any event proof of a nom-

Maryland. — Greenwood *v.* Greenwood, 28 Md. 370.

Pennsylvania. — Mohry *v.* Hoffman, 86 Pa. St. 358.

11. Moran *v.* Dawes, 4 Cow. (N. Y.) 412; Long *v.* Keightley, Irish R. 11 C. L. 221; Harper *v.* Luffkin, 7 Barn. & Cress. (Eng.) 387, 1 M. & Ry. 166, 6 L. J. (O. S.) K. B. 23, 31 R. R. 236.

Presumption of Relationship. In Barbour *v.* Stephenson, 32 Fed. 66, it is held that upon proof that the daughter was in the family of her father, was under his control, and under age, the law presumes the relation of servant; that is, that the plaintiff had a right to her services, and that he may recover for the wrongful act of seducing her, whereby loss of her service resulted. The court said: "The old idea or theory was that the parent recovered only for the loss of service, together with such actual expense as he may have been subjected to in and about the daughter's confinement. But it may be said, to the credit of modern jurisprudence, that the law has advanced far beyond this relic of barbarism, and that now the damage resulting from such an injury is not confined to loss of service and attendant expenses, but reaches far beyond, and aims to give compensation to the wounded feelings of the plaintiff. According to the modern rule, the plaintiff goes through the *form* of showing that he was entitled to the daughter's service, in order to reach the higher plane of injury and wrong, for which he is entitled to compensation." See also Herring *v.* Jester, 2 Houst. (Del.) 66.

12. Tweedlie *v.* Bogie, 27 U. C. C. P. 561; Westacott *v.* Powell, 2 U. C. Er. & Ap. 525; Cromie *v.* Skene, 19 U. C. C. P. 328.

13. *England.* — Holloway *v.* Abell, 7 Car. & P. 528, 32 E. C. L. 615; Maunder *v.* Venn, Moody & M. 323, 22 E. C. L. 323, 31 R. R. 734; Hedges *v.* Tagg, 41 L. J. Exch. 169, L. R. 7 Exch. 283; Harris *v.* Butler, 2 Mees. & Welsb. 539, M. & H. 117, 6 L. J. Exch. 133, 1 Jur. 608.

Canada. — Anderson *v.* Rannie, 12 U. C. C. P. 536; Healey *v.* Crummer, 11 U. C. C. P. 527; Simpson *v.* Read, 9 N. Bruns. 52; Hebb *v.* Lawrence, 7 Manitoba 222; Lake *v.* Bemiss, 4 U. C. C. P. 430; Entner *v.* Benneweis, 24 Ont. 407.

United States. — Stevenson *v.* Barbour, 140 U. S. 48.

Alabama. — Roberts *v.* Connelly, 14 Ala. 235.

Arkansas. — Patterson *v.* Thompson, 24 Ark. 55.

Delaware. — Herring *v.* Jester, 2 Houst. 66.

Georgia. — Kendrick *v.* McCrary, 11 Ga. 603.

Illinois. — Heaps *v.* Dunham, 95 Ill. 583; Garretson *v.* Becker, 52 Ill. App. 255; White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100.

Indiana. — Bolton *v.* Miller, 6 Ind. 262; Boyd *v.* Byrd, 8 Blackf. 113, 44 Am. Dec. 740.

Iowa. — Stevenson *v.* Belknap, 6 Iowa 97, 71 Am. Dec. 392.

Kansas. — Anthony *v.* Norton, 60 Kan. 341, 56 Pac. 529, 72 Am. St. Rep. 360.

Maine. — Beaudette *v.* Gagne, 87 Me. 534, 33 Atl. 23; Emery *v.* Gowen, 4 Me. 33, 16 Am. Dec. 233.

Massachusetts. — Blagge *v.* Ilsley, 127 Mass. 191, 34 Am. Rep. 361.

Mississippi. — Ellington *v.* Ellington, 47 Miss. 329.

Missouri. — Comer *v.* Taylor, 82 Mo. 341.

New Jersey. — Sutton *v.* Huffman, 32 N. J. L. 58.

New York. — Furman *v.* Van Sise, 56 N. Y. 435, 15 Am. Rep. 441; Badgley *v.* Decker, 44 Barb. 577; Hewitt *v.* Prime, 21 Wend. 79; Bartley *v.* Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338; Ingerson *v.* Miller, 47 Barb. 47.

North Carolina. — Kinney *v.* Laughenour, 89 N. C. 365.

Oregon. — Breon *v.* Henkle, 14 Or. 494, 13 Pac. 289.

Pennsylvania. — South *v.* Denniston, 2 Watts 474; Wilson *v.* Sproul, 3 Pen. & W. 49.

Tennessee. — Parker *v.* Meek, 3 Sneed 29.

inal relationship of master and servant is requisite,[14] though evidence of the slightest service is sufficient.[15] And when the parent satisfactorily establishes his right to command the services of his daughter, a loss thereof sufficient to sustain an action for damages will be presumed.[16]

Virginia. — Fry *v.* Leslie, 87 Va. 269, 12 S. E. 671.

West Virginia. — Hudkins *v.* Haskins, 22 W. Va. 645.

14. Garretson *v.* Becker, 52 Ill. App. 255; Anthony *v.* Norton, 60 Kan. 341, 56 Pac. 529, 72 Am. St. Rep. 360.

The Theory of an Injury to the Master is pertinaciously retained as the essential basis of the action by the father, although it is now little more than a legal fiction, used as a peg on which to hang a substantial award of damages as compensation, not to the master, but to the head of the family. As a logical sequence proof of the mere nominal relation of master and servant is sufficient to give the parent a footing in court to recover damages commensurate with his injury. Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52.

"It is perfectly well settled by the authorities that the right which the plaintiff has, in cases like the present, to maintain his action, is founded upon the actual relation of master to the party most immediately injured, and that this relation must be proved; but it is also well settled that the relation need not be very strict, or one that exacts a very burdensome service. If the plaintiff was the parent, or stood in the place of a parent to the supposed servant, and she was accustomed actually to render services at his request, although no reward or term of apprenticeship had been arranged, and although she was of age and might have removed her situation at her own will, it is considered that enough is proved to establish the relation for the purposes of such an action as the present. Nor is it considered to be dissolved by a temporary absence, nor against the wishes of the master, while an intention remains of returning to his house." Davidson *v.* Goodall, 18 N. H. 423.

15. Proof of the Most Trifling and Valueless Acts of Service is sufficient; proof of actual menial service is not necessary. Parker *v.* Meek, 3 Sneed (Tenn.) 29.

The legal fiction in actions by a parent for seduction is that he has lost the services of his daughter and has been subjected to expense on her account, wherefore he sues for such loss and expense, and for them alone. The fiction assumes his right to recover for these and these alone. The fact is that he has lost no services and has been subjected to no expense, but the law is that, notwithstanding his lack of loss and expense, he may nevertheless recover for the wounds to his parental feelings, and may mulct the seducer in punitive damages also. We say the law is that he may recover notwithstanding his lack of loss in his capacity as master. The courts make a pretense of holding him to proof of such loss, and make a pretense of withholding relief if he fails to make the proof; but it is a pretense only. Proof of the very slightest kind of service will suffice. The service proved need be nothing more than nominal. It need not be actual or beneficial. Anthony *v.* Norton, 60 Kan. 341, 56 Pac. 529.

Proof of the slightest degree of service is sufficient in an action for seduction to establish the relation of master and servant, and to allow a recovery for the heaviest damages. Badgley *v.* Decker, 44 Barb. (N. Y.) 577.

16. Badgley *v.* Decker, 44 Barb. (N. Y.) 577; Dunlap *v.* Linton, 144 Pa. St. 335, 25 Atl. 819; Hebb *v.* Lawrence, 7 Manitoba 222; Evans *v.* Walton, L. R. 2 C. P. 615, 36 L. J. C. P. Pl. 307, 17 L. T. 92; Harris *v.* Butler, 2 Mees. & Welsb. 539, M. & H. 117, 6 L. J. Exch. 133, 1 Jur. 608.

Where the complaint avers that the defendant with force and arms entered plaintiff's dwelling house, and with force and arms assaulted, debauched and carnally knew the plaintiff's daughter against her consent, the gist of the action is the trespass in unlawfully and forcibly entering the plaintiff's house, and it is not necessary to prove loss of service.[17]

(2.) Distinction Between English and American Rule. — In England the rule is that the plaintiff must show actual, although slight, service of which he has been deprived.[18]

In Upper Canada the statute requires no proof of actual service by a master where the servant's parents reside outside the province, or have abandoned her, or have failed to institute proceedings for her seduction within six months after her confinement.[19]

In the United States the general rule is that it is sufficient if the plaintiff show constructive service [20] a right to the control of the ser-

The loss of service is the cause of action and when that is established a basis for damages to some extent exists, and whether that loss is caused or attended or followed by sexual intercourse, defilement or pregnancy, loss of health or disability to serve, or for the purpose, or with the intention of obtaining those results through a formal but criminal marriage, has relation more especially to the damages the plaintiff may recover than to his cause of action. Lawyer *v.* Fritcher, 130 N. Y. 239, 29 N. E. 267, 27 Am. St. Rep. 521.

17. Donohue *v.* Dyer, 23 Ind. 521.

18. Torrance *v.* Gibbons, 5 Adolph. & E. N. S. 297, 48 E. C. L. 295, *s. c.* 1 D. & Mer. 226; Grinnell *v.* Wells, 7 Man. & Gr. 1033, 49 E. C. L. 1032; Manly *v.* Field, 7 C. B. (N. S.) 96, 97 E. C. L. 96, 29 L. J. C. P. 79; Blaymire *v.* Haley, 6 Mees. & Welsb. 55, 9 L. J. Ex. 147, 4 Jur. 107; Carr *v.* Clarke, 2 Chitty 260, 18 E. C. L. 328; Dean *v.* Peel, 5 East 45; Thompson *v.* Ross, 5 Hurlst. & N. 16; Hedges *v.* Tagg, L. R. 7 Exch. 283, 41 L. J. Exch. 169; Terry *v.* Hutchinson, 9 B. & S. 487, 37 L. J. Q. B. 257, L. R. 3 Q. B. 599, 18 L. T. 521; Griffiths *v.* Teetgen, 28 Eng. L. & Eq. 371, 15 C. B. 344, 80 E. C. L. 344; Mann *v.* Barret, 6 Esp. 32, 9 R. R. 804; Harper *v.* Luffkin, 7 Barn. & C. 387, 1 M. & Ry. 166, 6 L. J. (O. S.) K. B. 23, 31 R. R. 236; Holloway *v.* Abell, 7 Car. & P. 528, 32 E. C. L. 615; Rist *v.* Faux, 4 Best & S. 409, 32 L. J. Q. B. 386, 8 L. T. 737; Speight *v.* Oliviera, 2 Stark. 493, 3 E. C. L. 445.

Specifies Acts of Service. — It is unnecessary to show specific acts of service even in England, if the seduced daughter resided at the time in the household of her father, affording him control over such services, even though trivial, as she might be wont to render therein. Rist *v.* Faux, 4 Best & S. 409, 32 L. J. Q. B. 386, 8 L. T. 737; Manly *v.* Field, 7 C. B. (N. S.) 96, 97 E. C. L. 96, 29 L. J. C. Pl. 79, 6 Jur. (N. S.) 300; Carr *v.* Clarke, 2 Chit. 260, 18 E. C. L. 328; Hebb *v.* Lawrence, 7 Manitoba 222.

19. Tweedlie *v.* Bogie, 27 U. C. C. P. 561; Westacott *v.* Powell, 2 U. C. Er. & Ap. 525; Cromie *v.* Skene, 19 U. C. C. P. 328; Cross *v.* Goodman, 20 U. C. Q. B. 242.

20. *England.* — Maunder *v.* Venn, 1 Moody & M. 323, 22 E. C. L. 323, 31 R. R. 734.

Arkansas. — Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52 (although daughter reside elsewhere).

Indiana. — Bolton *v.* Miller, 6 Ind. 262.

Maryland. — Greenwood *v.* Greenwood, 28 Md. 370.

Massachusetts. — Blagge *v.* Ilsley, 127 Mass. 191, 34 Am. Rep. 361.

Mississippi. — Ellington *v.* Ellington, 47 Miss. 329.

vices of the woman, even although at the time of the seduction she is residing away from home.[21]

Constructive Service denotes that right in a parent to command or control the services of his daughter, though she be not at the time actually serving him, and which right the courts will recognize as of pecuniary value to such parent, even though the daughter is not a member of the household,[22] and is in the employment of another,[23] receiving the returns of her own services with his consent,[24] provided, of course, that he retains the power to recall her, and has never relinquished such power.[25] It is upon this *right to services* that courts in most jurisdictions of this country place a value, and for its infringement will allow compensation to a parent, in the

Missouri. — Vossel *v.* Cole, 10 Mo. 634, 47 Am. Dec. 136.

New York. — Martin *v.* Payne, 9 Johns. 387, 6 Am. Dec. 288; Mulvehall *v.* Millward, 11 N. Y. 343; Hewitt *v.* Prime, 21 Wend. 79.

Pennsylvania. — Hornketh *v.* Barr, 8 Serg. & R. 36, 11 Am. Dec. 568.

Wisconsin. — Lavery *v.* Crooke, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768.

"While we yet preserve the old doctrine that the father must prove that the relation of master and servant existed; yet it is little more than a legal fiction, and proof of the nominal relation of master and servant is all that is required to give the father a standing in the courts. Proof of the slightest service is sufficient . . . and when proven and the cause otherwise established, the extent of the recovery is not limited to the value of the services lost to the parent as a master, but the shame and mortification of the father, the injury to the good name and character of the family of which he is the head, and the mental suffering of the father because of the dishonor to his family, are proper elements of damage." Garretson *v.* Becker, 52 Ill. App. 255.

21. Greenwood *v.* Greenwood, 28 Md. 370; Bolton *v.* Miller, 6 Ind. 262; Mohry *v.* Hoffman, 86 Pa. St. 358; Hornketh *v.* Barr, 8 Serg. & R. (Pa.) 36, 11 Am. Dec. 568; Mulvehall *v.* Millward, 11 N. Y. 343; Lavery *v.* Crooke, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768; Boyd *v.* Byrd, 8 Blackf. (Ind.) 113, 44 Am. Dec. 740.

22. *Alabama.* — Roberts *v.* Connelly, 14 Ala. 235.

Arkansas. — Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52.

Illinois. — White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100.

Indiana. — Boyd *v.* Byrd, 8 Blackf. 113, 44 Am. Dec. 740.

Massachusetts. — Blagge *v.* Ilsley, 127 Mass. 191, 34 Am. Rep. 361; Kennedy *v.* Shea, 110 Mass. 147, 14 Am. Rep. 584.

New York. — Certwell *v.* Hoyt, 6 Hun 575.

North Dakota. — Ingwaldson *v.* Skrivseth, 7 N. D. 388.

Pennsylvania. — Milliken *v.* Long, 188 Pa. St. 411, 41 Atl. 540.

Tennessee. — Wallace *v.* Clark, 2 Overt. 93, 5 Am. Dec. 654.

23. Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52; Ellington *v.* Ellington, 47 Miss. 329; Middleton *v.* Nichols, 62 N. J. L. 636, 43 Atl. 575; White *v.* Nellis, 31 N. Y. 405, 88 Am. Dec. 282; Mohry *v.* Hoffman, 86 Pa. St. 358; Riddle *v.* McGinnis, 22 W. Va. 253; Lavery *v.* Crooke, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768.

24. Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52; Bolton *v.* Miller, 6 Ind. 262; Boyd *v.* Byrd, 8 Blackf. (Ind.) 113, 44 Am. Dec. 740; Hartman *v.* McCrary, 59 Mo. App. 571; Certwell *v.* Hoyt, 6 Hun (N. Y.) 575.

25. Roberts *v.* Connelly, 14 Ala. 235; Patterson *v.* Thompson, 24 Ark. 55.

event of his daughter's indisposition resulting from her seduction, whereby she is rendered incapable to respond to his command of her assistance, should he choose to make it.

A Contract Between Father and Daughter for Her Services need not be shown to exist,[26] nor is it necessary that he pay her a salary.[27]

(3.) Woman Under Age. — If the woman is under age and resides with her parents as a member of the family, the rule is that proof of actual loss of service, although but little, is sufficient.[28] And it has even been held that it is not necessary to prove a loss or expense incurred.[29]

(4.) Woman of Age. — When the daughter is of age the father is not entitled to her services, and he cannot maintain the action without showing that the relation of master and servant actually existed at the time of the injury.[30] But if she is residing with her parents

26. Vanhorn *v.* Freeman, 6 N. J. L. 322; Hudkins *v.* Haskins, 22 W. Va. 645.

27. Lamb *v.* Taylor, 67 Md. 85, 8 Atl. 760; Vanhorn *v.* Freeman, 6 N. J. L. 322.

28. Fores *v.* Wilson, 1 Peake 55, 3 R. R. 652; Maunder *v.* Venn, Moody & M. 323, 22 E. C. L. 323, 31 R. R. 734; Barbour *v.* Stephenson, 32 Fed. 66.

Presumption of Service. — "When the daughter seduced is a minor under the age of twenty-one years and is residing at the time with her parent, the law presumed service because she owed it to him, and he might maintain an action for her seduction, without any proof of actual service by her; but when the daughter was over that age at the time of her seduction and was living with her father, as had been proved in the present case, then some proof of actual service, and the loss of it by reason of her seduction, was necessary to entitle him to recover damages for it. But any service rendered him in his family, or otherwise, by her, however slight, would be sufficient for this purpose; and would entitle him at least, to nominal damages." Herring *v.* Jester, 2 Houst. (Del.) 66.

29. Ellington *v.* Ellington, 47 Miss. 329.

30. Postlethwaite *v.* Parkes, 3 Burr. (Eng.) 1878; Nickleson *v.* Stryker, 10 Johns. (N. Y.) 115, 6 Am. Dec. 318. These were actions of trespass for assaulting the daughter and getting her with child; but they rest on the same general principle as the action on the case. See also Ellington *v.* Ellington, 47 Miss. 329; Herring *v.* Jester, 2 Houst. (Del.) 66.

"The father is not permitted to maintain this action, unless he can show the relation of master and servant existing either actually or constructively. If the daughter is above twenty-one years of age, the father cannot prosecute unless the daughter resides with him and performs some acts of service, and any act, however slight, will answer the purpose; but if the daughter is under twenty-one, he may maintain the action, although she does not live with him, and is servant *de facto* to another, provided she is servant *de jure* to him; and in ascertaining whether the daughter is the servant, I apprehend the same liberality is to be extended to the father whose daughter within the years of minority is debauched, as to him whose daughter is above that age. It is, indeed, a legal fiction to call the daughter a servant who renders no service in fact, except, perhaps, making tea, mending stockings, etc., and is not under the control of her father. And it is also something like fiction to give the appellation of servant to a daughter who has been permitted, during her minority, to place herself in the service of others, and receive the wages of her own earnings for her own use. It would comport much better with common sense to say that a father, whose

and actually rendering service, it has been held sufficient to show actual loss of service, although but little, in cases where the daughter is not a minor.[31]

(5.) Loss Must Result From Seduction. — It must of course be shown that the loss of service resulted directly and immediately from the seduction.[32]

(6.) Statutory Modification of Common Law Rule. — In some states, however, the right of action has been vested by express statute in a parent or guardian, although dispensing with the necessity of proving loss of service.[33] And in others the statutes expressly afford the

daughter has been seduced, shall maintain an action for the injury done to his wounded honor and his parental feelings; but such is not the law, and unless a party brings himself within the established principles in cases of this kind, he can not maintain his action." Clark *v.* Fitch, 2 Wend (N. Y.) 459, 20 Am. Dec. 639.

31. *England.* — Griffiths *v.* Teetgen, 15 C. B. 344, 28 Eng. L. & Eq. 371, 80 E. C. L. 344, 24 L. J. C. Pl. 35, 1 Jur. N. S. 426; Bennett *v.* Allcott, 2 T. R. 166.

Arkansas. — Patterson *v.* Thompson, 24 Ark. 55.

Georgia. — Kendrick *v.* McCrary, 11 Ga. 603.

Illinois. — Garretson *v.* Becker, 52 Ill. App. 255.

Kansas. — Anthony *v.* Norton, 60 Kan. 341, 56 Pac. 529, 72 Am. St. Rep. 360.

Kentucky. — Wilhoit *v.* Hancock, 5 Bush 567.

Maine. — Beaudette *v.* Gagne, 87 Me. 534, 33 Atl. 23.

Maryland. — Lamb *v.* Taylor, 67 Md. 85, 8 Atl. 760; Mercer *v.* Walmsley, 5 Har. & J. 27, 9 Am. Dec. 486.

New Jersey.—Sutton *v.* Huffman, 32 N. J. L. 58.

New York. — Gray *v.* Durland, 51 N. Y. 424; Badgley *v.* Decker, 44 Barb. 577.

North Carolina. — Briggs *v.* Evans, 27 N. C. (5 Ired. L.) 16.

South Carolina. — Villepigue *v.* Shular, 3 Strobh. L. 462.

Vermont. — Davidson *v.* Abbott, 52 Vt. 570, 36 Am. Rep. 767.

West Virginia. — Hudkins *v.* Haskins, 22 W. Va. 645.

32. Cause of Loss Immaterial, if Result of Seduction. — Comer *v.* Taylor, 82 Mo. 341; Donohue *v.* Dyer, 23 Ind. 521.

If Disease Contracted. — Mohelsky *v.* Hartmeister, 68 Mo. App. 318; White *v.* Nellis, 31 N. Y. 405, 88 Am. Dec. 282.

Mental Suffering — Blagge *v.* Illsley, 127 Mass. 191, 34 Am. Rep. 361.

Must Be Direct Result of Seduction. — Knight *v.* Wilcox, 14 N. Y. 413; Boyle *v.* Brandon, 13 Mees. & Welsb. (Eng.) 738, wherein suffering resulted from cessation of intercourse, recovery denied.

"It is not sufficient to sustain the action to prove the seduction merely. That is the wrongful act from which it must appear that a direct injury to the relative rights of the master has followed. The right of the master, as recognized by the law, is to have the services of the servant undisturbed by the wrongful act of another. Whenever the wrongful act, by immediate and direct consequence, deprives the master of the service of his servant, or injuriously affects his legal right to such service, the law gives a remedy." White *v.* Nellis, 31 N. Y. 405, 88 Am. Dec. 282.

33. *Canada.* — Gould *v.* Erskine, 20 Ont. 347, 11 Can. L. T. 47; Hogan *v.* Aikman, 30 U. C. Q. B. 14; Tweedlie *v.* Bogie, 27 U. C. C. P. 561; Meyer *v.* Bell, 13 Ont. 35.

Kentucky. — Stowers *v.* Singer, 113 Ky. 584, 68 S. W. 637; Pence *v.* Dozier, 7 Bush 133.

Michigan. — Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696.

Minnesota. — Schmit *v.* Mitchell, 59 Minn. 251, 61 N. W. 140; Hein *v.* Holdridge, 78 Minn. 468, 81 N. W. 522.

Oregon. — Patterson *v.* Hayden, 17

parent a right of action for the loss of services, and for expenses incurred as a result of the daughter's seduction, in addition to her right to damages for the wrong itself.[34]

c. *The Seduction.* — **(1.) Generally.** — As has been previously stated, the fact of the seduction is a material fact necessary to be established whether the action is at common law or under the statute, and of course the burden is on the plaintiff to establish all the elements which constitute seduction, except perhaps the previous chastity of the woman.

(2.) The Illicit Intercourse. — Of course, in an action for damages for seduction, whether at common law or under the statutes, the burden is upon the plaintiff to establish the fact of the illicit intercourse.[35]

(3.) Chastity of Woman. — (A.) GENERALLY. — The very term "seduction" itself implies the previous chastity of the woman.[36] But the general rule is that unless her character is attacked by the defendant, her chastity will be presumed,[37] although in some jurisdictions that character is directly in issue in such proceeding; but

Or. 238, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529.

Tennessee. — Graham *v.* Reynolds, 90 Tenn. 673, 18 S. W. 272; Franklin *v.* McCorkle, 16 Lea 609, 57 Am. Rep. 244.

Virginia. — Clem *v.* Holmes, 33 Gratt. 722, 36 Am. Rep. 793; Fry *v.* Leslie, 87 Va. 269, 12 S. E. 671.

West Virginia. — Hudkins *v.* Haskins, 22 W. Va. 645; Riddle *v.* McGinnis, 22 W. Va. 253.

In Kansas a parent may maintain an action for the seduction of the daughter without averment or proof of loss of services or expenses of sickness. Anthony *v.* Norton, 60 Kan. 341, 56 Pac. 529.

34. Updegraff *v.* Bennett, 8 Iowa 72; Stevenson *v.* Belknap, 6 Iowa 97, 71 Am. Dec. 392.

35. Holloway *v.* Abell, 7 Car. & P. 528, 32 E. C. L. 615.

36. Previous Chastity Required. *Illinois.* — White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100.

Indiana. — Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112; Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691; Bell *v.* Rinker, 29 Ind. 267.

Iowa. — Smith *v.* Milburn, 17 Iowa 30; West *v.* Druff, 55 Iowa 335, 7 N. W. 636.

Kentucky. — Stowers *v.* Singer, 113 Ky. 584, 68 S. W. 637.

Michigan. — Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696

Missouri. — Bailey *v.* O'Bannon, 28 Mo. App. 39.

New York. — Akerley *v.* Haines, 2 Caines 292.

Pennsylvania. — Milliken *v.* Long, 188 Pa. St. 411, 41 Atl. 540.

Tennessee. — Reed *v.* Williams, 5 Sneed 580, 73 Am. Dec. 157.

37. Barbour *v.* Stephenson, 32 Fed. 66; Gunder *v.* Tibbits, 153 Ind. 591, 55 N. E. 762; Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112; Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691; West *v.* Druff, 55 Iowa 335, 7 N. W. 636; Hodges *v.* Bales, 102 Ind. 494, 1 N. E. 692.

In Gunder *v.* Tibbits, 153 Ind. 591, 55 N. E. 762, it was held that an instruction in the trial of an action for seduction, that the law presumes, in the absence of evidence, that plaintiff was virtuous before her alleged seduction, and that in weighing the evidence as to her general reputation for chastity the jury were not bound by that evidence to find that she was not virtuous, but must consider all the evidence in the case in determining whether or not she was virtuous, was correct, where a proper instruction was given as to burden of proof.

In Bell *v.* Rinker, 29 Ind. 267, the court refused to instruct the jury that "they could not indulge in any presumption in favor of the good character of the plaintiff, as the law

even so it is held that unless impeached the presumption is sufficient to sustain the action.[38] But evidence to overcome the presumption in favor of chastity need not be clear and satisfactory.[39]

(B.) Reformation. — Unchastity beyond reform is inconceivable. Therefore a previously unchaste woman may show that at the time of the seduction she had reformed, and was virtuous.[40] The quality and weight of evidence to this point, of course, must necessarily vary in accordance with the length of time which has lapsed between her unchaste mode of life and the date of the alleged seduction.[41]

d. *Consent of Woman.* — **(1.) Generally.** — Again, the consent of the woman is an essential element necessary to be shown in order to establish the fact of seduction.[42]

raised no such presumption — that being matter of proof. In passing upon the question of character, you should take into consideration her own evidence, and her own conduct as shown by the evidence." It was *held* that the instruction was correctly refused: First, because much of the evidence of the plaintiff had no bearing upon the subject of character; and second, because her conduct was not proper to be considered in that connection, as character can neither be attacked nor sustained by proof of specific acts.

It is improper to admit evidence of the reputed good character of the female, when her general reputation has not been attacked. Bracy *v.* Kibbe, 31 Barb. (N. Y.) 273.

In an action by a father to recover damages for the seduction of his daughter, evidence is admissible of the previous good character of the daughter in the neighborhood where the intercourse took place, in rebuttal of defendant's evidence that her reputation was bad before she came to that place. Milliken *v.* Long, 188 Pa. St. 411, 41 Atl. 540.

38. Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112.

39. "The presumption of the law establishes *prima facie* the chaste character of plaintiff. This presumption is overcome by evidence sufficient to satisfy the jury that the plaintiff is unchaste. In other words the law imposes upon defendant the burden of establishing plaintiff's want of virtue. The character of the evidence demanded to overcome the presumption is such as will satisfy the mind of the jury that plaintiff is unchaste. No higher order of evidence, or fuller measure of proof, is required than to establish any other fact. The mind may be satisfied of the existence of any fact by less than what may be called clear proof. The proof, indeed, may be wanting in clearness and completeness, yet when considered in the light of experience and observation may satisfy the mind. And this is the simple test of the evidence applicable to the question of the plaintiff's chastity, as it is in most other cases. The proof need not be clear; it must be satisfactory to the mind of the jury." West *v.* Druff, 55 Iowa 335.

40. Stowers *v.* Singer, 113 Ky. 584, 68 S. W. 637; Patterson *v.* Hayden, 17 Or. 238, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529.

In an action by a father to recover damages for the seduction of his daughter, the plaintiff may recover although the girl may have led a life of prostitution, if it appear that at the time of defendant's connection with her she was leading a virtuous life. Milliken *v.* Long, 188 Pa. St. 411, 41 Atl. 540.

41. People *v.* Squires, 49 Mich. 487, 13 N. W. 828; People *v.* Clark, 33 Mich. 112; People *v.* Millspaugh, 11 Mich. 278.

42. Lee *v.* Hefley, 21 Ind. 98; Bradshaw *v.* Jones, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. Rep. 655; White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100; Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144.

The performance of such an act against the will of the female would

(2.) Means of Procuring Consent. — But proof of mere consent is not of itself sufficient; it must be shown that the consent was procured by inducements or persuasive advances on the part of the man which resulted in overcoming her aversion or scruples.[43]

Or as it is stated by some of the courts, in order to constitute a case of seduction, it is necessary to prove it technically, since proof of intercourse between a man and a woman, without any deception or undue persuasion on his part, will not entitle the woman to recover.[44] Nor will a verdict for plaintiff in seduction be justified

constitute an offense other than seduction. Lee *v.* Hefley, 21 Ind. 98.

43. *California.* — Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144.

Illinois. — Leucker *v.* Steilen, 89 Ill. 545, 31 Am. Rep. 104.

Indiana. — Johnson *v.* Holliday, 79 Ind. 151.

Iowa. — Smith *v.* Milburn, 17 Iowa 30; Hawn *v.* Banghart, 76 Iowa 683, 14 Am. St. Rep. 261, 39 N. W. 251; Delvee *v.* Boardman, 20 Iowa 446; Baird *v.* Boehner, 72 Iowa 318, 33 N. W. 694; Gover *v.* Dill, 3 Iowa 337.

Kentucky. — Stowers *v.* Singer, 113 Ky. 584, 68 S. W. 637.

Michigan. — Watson *v.* Watson, 53 Mich. 168, 18 N. W. 605, 51 Am. Rep. 111.

Missouri. — Bailey *v.* O'Bannon, 28 Mo. App. 39.

New York. — Hogan *v.* Cregan, 6 Rob. 138; Clark *v.* Fitch, 2 Wend. 459, 20 Am. Dec. 639.

Oregon. — Breon *v.* Henkle, 14 Or. 494, 13 Pac. 289.

Tennessee. — Graham *v.* McReynolds, 90 Tenn. 673, 18 S. W. 272; Bradshaw *v.* Jones, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. Rep. 655.

"To entitle the plaintiff to recover, it was not sufficient that she should show alone, that defendant had carnally known her, or that there was merely an illicit intercourse between them; but she is required to show, that the defendant accomplished his purpose by some promise or artifice, or that she was persuaded to surrender herself to his embraces, by his flattery or deception. There may be, between man and woman, a criminal connection, and yet he not be guilty of seduction. If she, without being deceived by him, or without any false promises, deceit, or artifice, on his part, voluntarily submits to the connection, he is not liable to this action." Gover *v.* Dill, 3 Iowa 337.

"It is not sufficient, in order to make out her case for the plaintiff, to show alone that the defendant had sexual intercourse with her, but she must show that he accomplished his purpose by some promise or artifice, or that she had been induced to yield to his embraces by flattery or deception; if without being deceived, and without any false promises, deceit or artifice, she voluntarily submitted to the defendant's embraces, the law affords her no remedy in a civil action." Brown *v.* Kingsley, 38 Iowa 220.

Patterson *v.* Hayden, 17 Or. 238, 21 Pac. 129, 11 Am. St. Rep. 822. In this case it was held that the court should have given the following instruction: "Proof that the defendant and plaintiff's daughter had illicit sexual intercourse with each other does not of itself show that the plaintiff's daughter was seduced by the defendant; but before you can find such seduction, you must first find from the evidence that the plaintiff's daughter was chaste, and that she was overcome by the defendant by the use of some artifice or promise, which by reason of her relations with and confidence in the defendant she, although a moral and chaste female, could not resist."

44. In the statutory action by the woman seduced there must be proof of seduction in its technical signification. Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52.

Father suing must show as matter of fact that seduction was accom-

by evidence showing that the connection was accomplished by any force such as would constitute rape,[45] or, that it was accomplished with a female under the legal age of consent.[46] Some of the courts have, however, held that proof of the fact of the intercourse is of itself sufficient to sustain an action for loss of services.[47]

Something More Than a Mere Appeal to the Lust or passion of the woman must be shown.[48]

Promise of Marriage. — In a statutory action by the woman seduced, where promise of marriage is one of the means for procuring her consent relied upon, it is not essential that the plaintiff show a willingness on her part to marry the defendant.[49]

B. Mode of Proof. — a. *General Rules of Evidence Applicable.* Whether the action to recover damages for seduction is at common law, or under the statute, the general rule as to competency, materiality and relevancy of the evidence sought to be adduced in proof of the plaintiff's right to recovery, is to be observed.[50]

b. *Value of Services Lost.* — In an action by the father for the seduction of his daughter, the plaintiff may prove the value of her services by any competent evidence.[51]

c. *The Seduction.* — **(1.) The Illicit Intercourse.** — (A.) Testimony of Woman Seduced. — The fact of the intercourse may be testified to by the woman alleged to have been seduced, although she may have subsequently and before the trial married another man.[52] But

plished by defendant. Barbour *v.* Stephenson, 32 Fed. 66.

45. Lee *v.* Hefley, 21 Ind. 98; Hogan *v.* Cregan, 6 Rob. (N. Y.) 138; Johnson *v.* Holliday, 79 Ind. 151; Watson *v.* Watson, 53 Mich. 168, 18 N. W. 605, 51 Am. Rep. 111; Graham *v.* McReynolds, 90 Tenn. 673, 18 S. W. 272.

46. White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100.

47. Leucker *v.* Steilen, 89 Ill. 545, 31 Am. Rep. 104; Hogan *v.* Cregan, 6 Rob. (N. Y.) 138; Reed *v.* Williams, 5 Sneed (Tenn.) 580, 73 Am. Dec. 157. *Contra.* — See White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100. *holding* that judgment could not be given unless seduction were proven.

48. Hawn *v.* Banghart, 76 Iowa 683, 39 N. W. 251, 14 Am. St. Rep. 261.

49. Swett *v.* Gray, 141 Cal. 83, 74 Pac. 551. The court referring to the contention that such proof is necessary, said: "There might possibly exist some reason in the position where the promise of marriage was the sole inducement, and the plaintiff was of age, although even in that case we should doubt it, but where other artifices are resorted to, and promise of marriage is but one of the means used by defendant to accomplish his purpose, it would certainly not be so. As well might it be said that defendant in fact cherished genuine love and affection for his victim when he so represented his feeling to her, and hence that would excuse him, and so of any other of the inducements which brought about her ruin. In a seduction case it may sometimes happen that the victim of the seducer's passion may awake to a realization of his unworthiness upon finding herself pregnant, and that her former love, which he had played upon, would suddenly turn to hate. Must she still avow willingness to marry the author of her disgrace and ruin, or be foreclosed the scant recompense the law affords by civil action? We think not."

50. Fisher *v.* Hood, 14 Mich. 189.

51. Dunlap *v.* Linton, 144 Pa. St. 335, 22 Atl. 819.

52. While a married woman su-

in an action by a husband for seduction of his wife, she cannot testify for the defendant against her husband without his consent.[53]

Corroboration. — In an action for seduction it is competent to support the plaintiff's evidence on the trial by her confirmatory statement, made next morning after her seduction, giving her version of the affair, especially when it was vigorously assailed and stoutly disputed and denied by defendant.[54]

(B.) CIRCUMSTANTIAL EVIDENCE. — (a.) *Generally.* — Ocular evidence of sexual intercourse is seldom obtainable.[55] Circumstantial evidence is accordingly generally received.[56]

ing for her seduction shortly before her marriage cannot testify to non-access with her husband during the period of gestation, she may nevertheless testify to acts of intercourse with the defendant, conception not being an essential element of her cause of action. Rabeke *v.* Baer, 115 Mich. 328, 73 N. W. 242, 69 Am. St. Rep. 567.

53. Speck *v.* Gray, 14 Wash. 589, 45 Pac. 143.

54. Bradshaw *v.* Jones, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. Rep. 655.

55. Chase *v.* Chase, 19 N. Y. Supp. 268, 44 N. Y. St. Rep. 766.

56. Thompson *v.* Clendening, 1 Head (Tenn.) 287; Baird *v.* Boehner, 77 Iowa 622, 42 N. W. 454.

"If plaintiff's testimony tended in any degree to show that she had been seduced, it would be error to exclude it, notwithstanding it also tended to show that she had been forcibly debauched." Brown *v.* Kingsley, 38 Iowa 220.

Continued Conduct of Defendant. It is competent for the plaintiff to show that she and the defendant were together during the time in which she alleges that he importuned and persuaded her to yield to his embraces, and that they were in a place where it was likely that sexual intercourse would take place. McCoy *v.* Trucks, 121 Ind. 292, 23 N. E. 93. The court said: "In a case of this character the plaintiff is not confined to evidence of one act, nor to evidence covering one particular day or week, but she has a right to give evidence covering many acts and extending over a considerable period of time. She has a right to show the continued conduct of the defendant towards her."

Relations of Parties. — In Baird *v.* Boehner, 77 Iowa 622, 42 N. W. 454, after plaintiff had often submitted to defendant's desires, she determined, as she testifies, to break off her relations with him, and reform. To accomplish this end, she went to Kansas, and remained for eight months. After her return defendant resumed his intimacy with her, and she again submitted to his desires. Defendant objected to evidence showing the relations of the parties and other matters connected with them before she went to Kansas. The court said: "We think it was rightly admitted. It disclosed the relations between the parties, the extent of the control which defendant had acquired over plaintiff, and the manner in which he acquired it — matters proper to be considered in determining plaintiff's right to recover."

Period of Gestation. — In an action for seduction, where there is an issue as to the paternity of the child, evidence of the period of gestation is admissible. Kesselring *v.* Hummer, 130 Iowa 145, 106 N. W. 501.

Previous Acts of Familiarity. — In an action for seduction, where the plaintiff claimed as part of her case that she had been gotten with child at a certain time, and that the illicit intercourse was kept up for some time afterwards, it was *held*, that proof was admissible of acts of previous familiarity as bearing upon a previous seduction and as giving probability to her subsequent testimony that intercourse had been continuous. Watson *v.* Watson, 53

The Fact That the Defendant Disappeared when charged with the seduction may be shown as an indication of his fear of prosecution.[57]

(b.) *Pregnancy.* — The plaintiff in a civil suit for seduction may introduce testimony relating to the pregnancy of the female who is claimed to have been seduced, notwithstanding the defendant admits the alleged illicit intercourse.[58]

(c.) *Dying Declarations of Woman.* — Dying declarations of the woman seduced are not admissible in a civil action for damages.[59]

Mich. 168, 18 N. W. 605, 51 Am. Rep. 111.

Subsequent Acts of Intercourse. Where a plaintiff in an action for seduction has furnished a bill of particulars by order of the court, specifying time and place of the alleged seduction, he is limited in his proof to the charges thus specified; and evidence of acts of intercourse at any subsequent time, although offered for the purpose of corroborating the testimony of a witness as to acts specified in the bill of particulars, should be excluded. Tourgee *v.* Rose, 19 R. I. 432, 37 Atl. 9.

57. Parker *v.* Monteith, 7 Or. 277.

In Hopkins *v.* Mathias, 66 Iowa 333, 23 N. W. 732, the court instructed the jury that if they found that, as soon as defendant learned that he was accused of seducing the plaintiff, he changed his plans, disposed of his property at a sacrifice, and hastily left the state, such facts were proper to be considered by the jury in determining the question of the defendant's alleged guilt. The court said: "In criminal actions, the hasty flight upon being accused of a crime is admissible, we apprehend, on the ground that it tends to show that the accused is thereby seeking to escape prosecution and punishment for the crime. In such actions he can only be tried in the county and state where the crime was committed, and he cannot be tried there until he has been arrested, and ordinarily his personal presence is required at the trial. Not so in civil actions. They may be tried in the absence of the defendant from the state, if property has been attached, and such was the fact in this action. Ordinarily, civil actions are transitory, and may be brought in any state where the defendant can be found. We merely allude to these differences between civil and criminal actions, without determining whether the same rule should prevail in both, for the reason that it is deemed unnecessary to do so. The rule in criminal actions, we believe, is, that the flight must be immediately after the accusation is made. It need not be instantly, but soon afterwards, so that it can be said that the flight was caused by the accusation. As we understand the record, Roswell Hopkins testified that he married the plaintiff on the seventh day of August, 1882, and that about three months thereafter he charged the defendant with being the father of her unborn child. This is the only evidence we are able to find which tends to show that the defendant was charged with the seduction of the plaintiff. It is true, there were rumors in the neighborhood possibly to that effect; but there is no evidence tending to show that he had knowledge of such rumors, unless it should be so inferred because, in the opinion of one or more witnesses, his appearance and looks were suspicious; that is to say, he seemed to such witnesses to be nervous and apprehensive. But we think this evidence, in the absence of evidence showing that the defendant had knowledge that he was charged with seducing the plaintiff, was inadmissible. Conceding that he was so charged by Hopkins, the charge was made some six weeks prior to the supposed flight of the defendant. This, it seems to us, is too remote, and therefore the court erred in the instruction on this subject given to the jury."

58. Badder *v.* Keefer, 100 Mich. 272, 58 N. W. 1007.

59. Wooten *v.* Wilkins, 39 Ga.

(d.) *Admissions of Defendant.* — Where defendant denies the fact of intercourse, evidence of his admissions is admissible.[60]

(2.) Means of Procuring Consent. — In an action by a parent for the seduction of his daughter, it is competent to show the circumstances under which she was seduced, and the means used for corrupting her mind.[61]

Promise of Marriage. — Thus the plaintiff in such an action, while he cannot give evidence of a promise of marriage by the defendant as the basis of the action, or the measure of damages,[62] may give

223, 99 Am. Dec. 456 (action by father for the seduction of his minor daughter).

In North Carolina they were admitted in an early case. McFarland *v.* Shaw, 4 N. C. 102.

60. Rabeke *v.* Baer, 115 Mich. 328, 73 N. W. 242, 69, Am. St. Rep. 567.

The testimony of a physician that the defendant called upon him, and asked "what was good to get a young lady out of a fix," is competent in such a case, as bearing upon the question whether the defendant was the father of the child, the fruit, as claimed, of the illicit intercourse. Badder *v.* Keefer, 100 Mich. 272, 58 N. W. 1007.

In an action by a father for the seduction of his daughter, an agreement in writing between the defendant and the daughter, by which the defendant admits the seduction, and agrees to pay her a sum of money, and the daughter releases and discharges him from all actions for damages, and claims of every kind, is admissible in evidence, not for the purpose of showing the extent of the injury which the defendant has inflicted on the plaintiff, or the amount of damages to which the latter is entitled, but as an admission by the defendant of the facts necessary to be proved by the plaintiff, in order to maintain the action. Strong, J., *dissented.* Travis *v.* Barger, 24 Barb. (N. Y.) 614.

61. Bracy *v.* Kibbe, 31 Barb. (N. Y.) 273.

In an action by a father for the seduction of his daughter, evidence of promises made to her by the defendant during his guilty visits is admissible. Fox *v.* Stevens, 13 Minn. 272.

In an action by a father for the seduction of his daughter, it may be proved in what manner and on what terms the defendant visited the daughter and the family and her relations; but she cannot, for this purpose, be asked if he visited her with a view to marriage. "The witness should speak of facts and leave the jury to draw the inference." Herring *v.* Jester, 2 Houst. (Del.) 66.

"Acted Like Lovers." — Where the actions and conduct of parties can be described a witness should not be permitted to give his conclusion as to how they acted toward each other, as for example that the parties "acted like lovers." Kesselring *v.* Hummer, 130 Iowa 145, 106 N. W. 501. The court said: "Some difficulty may be experienced in accurately describing the phenomenon mentioned, but the manifestation is seldom the same between different persons, and what might appear to one as the action of a lover would seem but the indication of friendship to another. The safer rule is to permit proof of acts and conversations and leave the deductions to be drawn therefrom to the jury. The answer, as it must have been deduced from many circumstances, was not within the rule permitting a witness to state a conclusion when the matter to which his testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time."

62. Robinson *v.* Burton, 5 Harr. (Del.) 335; Herring *v.* Jester, 2 Houst. (Del.) 66; Comer *v.* Taylor, 82 Mo. 341; Davidson *v.* Goodall, 18 N. H. 423. *Contra.* — Parker *v.* Monteith, 7 Or. 277.

In an action brought by the father

evidence showing that the defendant was paying his addresses to the daughter upon the promise, and with the intention of marriage.[63] It may be shown that the defendant addressed the girl with professions of honorable intentions.[64]

2. Defenses. — A. Parent's Consent. — In an action by a parent for the seduction of his daughter, the defendant may show the parent's consent.[65]

B. Seeming Carelessness of Parent. — The defendant cannot, by way of defense, show mere carelessness on the part of the parent regarding her associations, or indifference to the defendant's attentions to his daughter,[66] although it has been held that evidence of

for the seduction of his daughter, evidence of a promise of marriage to the daughter, made either before or after the seduction, is not competent or lawful, under any circumstances, or for any purpose. Kip *v.* Berdan, 20 N. J. L. 239.

The Reason is that such a promise, and a breach of it, are the subjects of an action by the daughter herself. See Dunlap *v.* Linton, 144 Pa. St. 335, 22 Atl. 819.

63. Davidson *v.* Goodall, 18 N. H. 423.

See also Mains *v.* Cosner, 62 Ill. 465, an action by the father, holding that evidence of promise of marriage was admissible because tending to show that the defendant sought the society of plaintiff's daughter under the pretense of honorable motives, and that the illicit intercourse was therefore the result of seduction on his part in the strict sense of the term; but that such evidence is not to be considered by the jury in aggravation of damages in such an action.

"The law is well settled, as claimed by defendant, that no evidence can be given of any such promise either as the basis of the action, or the measure of damages. It is permitted, however, to ask the daughter whether the defendant was paying his addresses to her in an honorable way. (Dodd *v.* Norris, 3 Campbell, 519.) And plaintiff may give in evidence the terms on which defendant visited his house, and that he was paying his addresses to the daughter upon the promise, and with the intention of marriage." Stevenson *v.* Belknap, 6 Iowa 97, 71 Am. Dec. 392.

64. Davidson *v.* Goodall, 18 N. H. 423.

65. Reddie *v.* Scoolt, Peake N. P. 240; Walmsley *v.* Mitchell, 5 Ont. 427; Vossel *v.* Cole, 10 Mo. 634, 47 Am. Dec. 136; Seagar *v.* Sligerland, 2 Caines (N. Y.) 219; Travis *v.* Barger, 24 Barb. (N. Y.) 614; Breon *v.* Henkle, 14 Or. 494, 13 Pac. 289.

Proof that the plaintiff knew of the improper intercourse between his daughter and the defendant, when it took place, and did not interfere to prevent it; or that he connived at the intercourse, and consented to his daughter and the defendant being together and having such intercourse, after it came to his knowledge, is a bar to an action by the father, for the seduction of his daughter, *per quod servitium amisit.* Travis *v.* Barger, 24 Barb. (N. Y.) 614.

But if the fact is not set up in the answer as a defense, nor offered in mitigation of damages, but is offered to be proved on the ground that it will furnish a complete defense to the action the evidence is inadmissible. Travis *v.* Barger, 24 Barb. (N. Y.) 614.

66. Zerfing *v.* Mourer, 2 Greene (Iowa) 520; Parker *v.* Elliott, 6 Munf. (Va.) 587.

In an action for the seduction of the plaintiff's daughter, the fact of the seduction of another daughter three years previously by a man other than the defendant, and the attendant circumstances, are not admissible in evidence, in mitigation of damages, as tending to show that the plaintiff was chargeable with careless indifference in affording op-

such facts may be taken into consideration in mitigation of damages.[67]

C. Consent of Daughter. — It has been held that in an action by a parent, evidence that the daughter yielded willingly to the

portunities for criminal intercourse between the defendant and the daughter for whose seduction the action was brought. The court said: "We fail to see that any careless indifference or connivance in connection with this event, on the part of the plaintiff, can properly be inferred from these facts. It is to be presumed that the men who visited and lodged at his house were decent and respectable persons until the contrary is made to appear, and that they were rightfully and properly permitted to visit and lodge there. The only thing which appears against them is that one of their number may have seduced the plaintiff's elder daughter, which was indeed a grave offense, but for which he apparently sought to make amends as far as possible by subsequently marrying her. But the mere fact that he committed said offense, if he did commit it, does not show that there was anything in his previous conduct or character which should have put the plaintiff on his guard in permitting him to visit and lodge at his house. It is a matter of common knowledge, as well as of common regret, that cases of seduction do happen in families where parental diligence and care are of the highest order. And while it is doubtless very rare that two daughters of the same family should meet with such a serious misfortune, yet we fail to see how it can be legitimately inferred that because one daughter had previously been seduced, in the circumstances aforesaid, the father in any way connived at or contributed to the seduction of the other." Tourgee *v.* Rose, 19 R. I. 432, 37 Atl. 9.

In Zerfing *v.* Mourer, 2 Greene (Iowa) 520, action of trespess for debauching the plaintiff's daughter, defendant requested the court to instruct the jury, that if the plaintiff, by a careless indifference of his daughter's chastity, whether by design or otherwise, has afforded facilities of criminal intercourse between his daughter and the defendant, he cannot recover. The court refused to give this instruction as asked, and instead of it, charged the jury, that if from the testimony they believed the plaintiff had, by a careless indifference for his daughter's chastity, either by design or otherwise, afforded facilities for criminal intercourse between her and the defendant, it would be matter in mitigation of damages only, and not a bar to plaintiff's recovery. The court said: "The plaintiff's loss of his daughter's service caused by the defendant's carnal intercourse with her, constitutes the gravamen of this action. If, therefore, the plaintiff did not actually connive at the guilty intercourse, evidence of loss occasioned by it would be sufficient to justify a recovery. If instances of careless indifference for a daughter's chastity should be admissible to defeat a suit of this character, the action could seldom be maintained. Such instances might be adduced in every proceeding of the kind. The fact that a parent should ever suffer his daughter to place herself in any situation where she might be seduced, could under such a rule be referred to the jury as evidence of 'careless indifference.' And thus the very proof of debauchery would defeat the cause of action it was intended to establish, by showing that through the carelessness or indifference of a father, the daughter, at an unlucky moment, was permitted to go beyond his immediate observation, when she was entrammeled by the seducer, or voluntarily injured by her paramour."

67. Kip *v.* Berdan, 20 N. J. L. 239; Parker *v.* Elliott, 6 Munf. (Va.) 587; Zerfing *v.* Mourer, 2 Greene (Iowa) 520.

Compare Bolton *v.* Miller, 6 Ind. 262, an action by a father for the seduction of his minor daughter, *holding* that evidence of a seeming insensibility of the father to his daughter's disgrace is not admissible

intercourse is not admissible for the defendant, by way of defense,[68] the courts proceeding on the theory that as to the plaintiff the daughter was incapable of consenting.

D. Release by Daughter. — Nor can a release by the seduced daughter be introduced by the defendant in defense of the parent's action.[69]

E. Infancy of Defendant. — Since infants are liable for their torts, defendant cannot show infancy as a defense.[70]

F. Rape. — In a common law action, it has been held that proof that force was used will not defeat a parent's case, but will aggravate the injury.[71]

G. Submission Through Passion. — That the woman submitted to the intercourse, not through the defendant's inducement, but for the purpose of gratifying her curiosity or passion, may be shown by the defendant.[72]

for the defendant, even to mitigate the damages.

In such case, to show the relations of confidence between the parties, and as affecting the question of negligence by the father with respect to his daughter, it is proper to prove that defendant was influential in procuring plaintiff's appointment to a responsible position, and also that defendant proposed to plaintiff that the daughter should marry his son. Fox *v.* Stevens, 13 Minn. 272.

68. Barbour *v.* Stephenson, 32 Fed. 66, *affirmed* 140 U. S. 48; Bartlett *v.* Kochel, 88 Ind. 425; McAulay *v.* Birkhead, 35 N. C. (13 Ired. L.) 28, 55 Am. Dec. 427; Ross *v.* Merritt, 2 U. C. Q. B. 421; White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100.

It should be observed that while these cases hold, as stated, the holding seems to be inconsistent with the definition of seduction, which all of these same cases, even if not expressly, at least inferentially recognize. Perhaps the inconsistency is due to the fact that the cases, while called cases of seduction, are in substance and effect actions on the case to recover damages for debauching the plaintiff's daughter.

"Whatever bearing the forward and indelicate conduct of the plaintiff's daughter ought to have had, on the question of damages, it certainly had none on the question of his right of action. In respect to him, she had no right to consent, and her act in assenting to, or even procuring, the criminal connection, was a nullity; so the defendant must stand as a wrongdoer, from whose act the plaintiff has suffered damage. There is *damnum et injuria.*" McAulay *v.* Birkhead, 35 N. C. (13 Ired. L.) 28, 55 Am. Dec. 427.

69. Gimbel *v.* Smidth, 7 Ind. 627.

70. Lee *v.* Hefley, 21 Ind. 98; Becker *v.* Mason, 93 Mich. 336, 53 N. W. 361; Fry *v.* Leslie, 87 Va. 269, 12 S. E. 671. See also Hawk *v.* Harris, 112 Iowa 543, 84 N. W. 664, 84 Am. St. Rep. 352.

71. Hogan *v.* Cregan, 6 Rob. (N. Y.) 138; Furman *v.* Applegate, 23 N. J. L. 28; Kennedy *v.* Shea, 110 Mass. 147, 14 Am. Rep. 584; White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100.

The same observation made in note 68 *supra,* is pertinent here.

Contra in Canada. — Walsh *v.* Nattrass, 19 U. C. C. P. 453; Williams *v.* Robinson, 20 U. C. C. P. 255; Brown *v.* Dalby, U. C. Q. B. 160.

Even In an Action Under the Statute by the Woman for seduction, proof of rape does not defeat the action; it aggravates the injury. Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144.

72. Hawn *v.* Banghart, 76 Iowa 683, 39 N. W. 251, 14 Am. St. Rep. 261; Bradshaw *v.* Jones, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. Rep. 655.

H. Want of Chastity of Woman. — The unchastity of the woman may be shown by the defendant for the purpose of showing that she was not seduced.[73] Evidence of particular acts of immorality or indecorum as well as proof of general bad character of the woman, must be confined to what occurred previously to the defendant's misconduct.[74] Evidence as to the character of the woman

73. Bracy *v.* Kibbe, 31 Barb. (N. Y.) 273.

That is, that she did not yield by reason of any influence, promises, arts or means brought to bear upon her by the man, but yielded on account of her own lust and want of chastity. Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112.

Evidence of former unchastity is admissible to show the illicit intercourse was without enticement, artifice, persuasion or solicitation; but not as a complete defense if the woman had for a reasonable time before the alleged seduction been leading a virtuous life. Stowers *v.* Singer, 113 Ky. 584, 68 S. W. 637.

Since the injury which the father, as distinguished from the master, sustained by the seduction of his daughter, depends upon the value of her previous character, it is competent for the defendant to show that she did not have a good character for chastity before his intercourse with her. Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4. The court said: "Such proof diminishes the father's right of recovery, for the damages should be commensurate with the pain and disgrace which follow the wrong, and must vary according as the daughter has been unblemished or profligate. . . . If it is proved that she was notoriously unchaste prior to the defendant's intercourse with her, and had thereby disgraced her family to such extent that the defendant's conduct added nothing to her parent's suffering or to the danger of corrupting the family's morals, no damages could be awarded beyond what is suffered by the master, as distinguished from the parent. . . . If the proof falls short of that mark, evidence of previous incontinence only mitigates the damages, for to whatever extent the defendant's act, when it can be made the foundation of a suit, has contributed to the girl's downward tendency, to that extent he has injured the parent, and must respond to him in damages. . . . As the girl's willing assent in the absence of the seducer's arts is only evidence at most of a want of chastity, it would follow that direct proof of unchastity should have the same effect upon the father's recovery. But, as we have seen, such proof goes only to mitigate the damages."

The character of the plaintiff for chastity being in issue, evidence of improper conversations or association with men prior to the alleged seduction is admissible. West *v.* Druff, 55 Iowa 335, 7 N. W. 636.

In an action for damages for seduction, testimony showing that the party alleged to have been seduced had, previous to the time of the alleged seduction, introduced another party to her parents as her husband, was held to be immaterial, as not tending to show unchaste conduct. Burtis *v.* Chambers, 51 Iowa 645, 2 N. W. 503.

In trespass *quare clausum,* by a father, for debauching and getting his daughter with child, *per quod,* etc., the grounds of the action are the loss of service, and expenses of lying in; it is therefore no defense to show the daughter to be unchaste, unless the father has connived at her criminal intercourse. Akerley *v.* Haines, 2 Caines (N. Y.) 292.

74. White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100; Clifton *v.* Granger, 86 Iowa 573, 53 N. W. 316.

In a civil action for seduction, the cross-examination of prosecutrix on the subject of intercourse with other parties within sixty days of the date at which she testified her child was begotten by the defendant, was not subject to the objection that the time inquired about was too remote from the date of the alleged crime.

should be confined to facts; and not consist of mere opinion evidence as to her disposition.[75] Plaintiff in an action for seduction may, as a witness, refuse to answer whether she has previously had intercourse with other men, on the ground that the matter sought to be elicited tends to expose her to public ignominy.[76]

I. Character of Defendant. — The general character of defendant is not involved, and evidence in relation thereto on behalf of defendant is not admissible.[77]

3. Damages. — A. In General. — The plaintiff has a right to prove the consequences which resulted from the defendant's misconduct, such as pregnancy, childbirth and sickness,[78] all of which are proper to be considered by the jury in estimating the damages to be awarded.

Kesselring *v.* Hummer, 130 Iowa 145, 106 N. W. 501.

75. White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100. In this case a witness was asked if he had "observed and was acquainted with the disposition" of the woman, and to state "whether or not she was a pert forward girl." The court said the question "called for no acts, but the mere opinion of the witness as to her disposition. She might have been both pert and forward without being lewd."

76. Brown *v.* Kingsley, 38 Iowa 220.

The plaintiff in a civil action for seduction may refuse to answer, upon cross-examination, the question whether she had not had sexual intercourse with certain men other than the defendant, previous to the alleged seduction, upon the ground that her answers would criminate her, and such privilege may be claimed by the witness through her attorney. Clifton *v.* Granger, 86 Iowa 573, 53 N. W. 316.

77. Delvec *v.* Boardman, 20 Iowa 446; Herring *v.* Jester, 2 Houst. (Del.) 66.

Defendant cannot show that his general reputation for chastity and purity of life had always been good. Watson *v.* Watson, 53 Mich. 168. The court said: "Good reputation is a very obvious defense in such a case, if it is admissible, and the failure to resort to it hitherto must be referred to a general understanding that the courts were not at liberty to receive it. In criminal cases the defendant may prove good reputation for what it is worth; but the weight of it in his favor would be much more conclusive in some cases than in others. In cases of alleged seduction it would be likely to have less importance than in cases involving accusations of wrongs by violence; for a woman would naturally be more on her guard in the case of a notorious character than when the man was one in whom the community confided. Indeed, seduction is often the result of an intimacy originating in mutual respect, and which has become dangerous before the parties are fairly aware of it, and while reputation on both sides is unblemished. We think that in this regard the court committed no error."

78. McCoy *v.* Trucks, 121 Ind. 292, 23 N. E. 93.

In an action for seduction it is competent to show pregnancy and when that occurred. Baird *v.* Boehner, 77 Iowa 622, 42 N. W. 454, so holding as tending to disclose the relations of the parties and the results of the alleged seduction.

After the introduction of evidence on the trial tending to establish a seduction by the defendant of the daughter of the plaintiff, all evidence properly admissible on the assumption that it had occurred, should be received, because the jury, if they should find that there was a seduction, have a right to punish the defendant by exemplary damages. Hence proof of money paid by the plaintiff in consequence of the ill-

The jury on a trial for seduction under promise of marriage, may look to any indignity offered plaintiff during the trial, or any imputation against her character, or impeaching her virtue, if untrue and wantonly made, as an element of damage.[79]

B. Means Used to Procure Consent. — The defendant's attentions to the daughter as a suitor, and the arts, flatteries, persuasions and promises made use of by him to accomplish his ends, may be taken into consideration by the jury in estimating the damages.[80]

C. Exclamations of Pain. — In an action by a father for the seduction of his minor daughter, exclamations or expressions, indication of present pain or illness, whether uttered before or after suit brought, are admissible.[81]

D. Pecuniary Circumstances of Parties. — The pecuniary circumstances of the parties, both plaintiff and defendant, may be shown in an action for seduction on the question of damages.[82]

ness of his daughter arising from her illicit intercourse with her supposed seducer, is admissible. Hogan *v.* Cregan, 6 Rob. (N. Y.) 138.

79. Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341.

80. These go to make out, not merely the fact of seduction, but the guilty motive of the act, which enters so largely into the question of damages, and which may influence to so great an extent the verdict of the jury, where, as in this action, they are permitted to give as damages more than simple compensation for the actual injury sustained. Stevenson *v.* Belknap, 6 Iowa 97, 71 Am. Dec. 392.

81. Hatch *v.* Fuller, 131 Mass. 574, the fact that some of the complaints were made after the date of the writ affected their weight only and not their competency. "The plaintiff was entitled to recover in this action all the damages, whether before or after the date of the writ, resulting from the injury sued for."

82. Herring *v.* Jester, 2 Houst. (Del.) 66; Wilson *v.* Shepler, 86 Ind. 275.

In an action on the case for the seduction of the plaintiff's daughter, it is competent for him to give in evidence, on the question of damages, the character of his own family, and, also, the pecuniary circumstances of the defendant. McAulay *v.* Birkhead, 35 N. C. (13 Ired. L.) 28, 55 Am. Dec. 427.

In an action by the father for seducing his infant daughter, it is always competent to show the pecuniary circumstances and position in society of both plaintiff and defendant. The principle upon which evidence of the defendant's pecuniary circumstances is regarded as competent is not to ascertain what amount of damages can be collected, but to ascertain the extent of plaintiff's injury and perhaps fixing a standard of exemplary damages. White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100.

Contra.—Watson *v.* Watson, 53 Mich. 168, 18 N. W. 605, 51 Am. Rep. 111. In this case the plaintiff sought to show what the defendant had told her respecting his pecuniary circumstances, the court said: "In this case, the plaintiff, if she establishes her case, should recover such damages as will fairly compensate her for the wrong she has suffered. But we do not see how the wealth of the defendant can add either to the shame and mortification she must suffer, or to the injurious consequences in after life. If wealth could be inquired into at all, the inquiry could not well go beyond general reputation; for a knowledge of actual wealth involves an inquiry into details, which in such a suit would render necessary a collateral investigation more troublesome, in many cases, than the principal issue. But proof of one's wealth by general reputation would be only a part of the showing of his standing in the

In proving pecuniary circumstances, the inquiry should in the first instance be general, that is, whether the party be in poor, moderate or good circumstances, leaving the details to be brought out on cross-examination if desired.[83]

E. Loss of Social Standing. — The loss of social standing as a result of the seduction is a proper matter to be shown and considered in estimating damages.[84] But the effect upon individual members of society cannot be shown for that or any other purpose.[85]

F. Mitigation of Damages. — The unchastity of the woman may be proved for the purpose of mitigating the damage.[86]

Offer of Marriage. — Evidence of an offer of marriage by the de-

community; and the plaintiff in this case had the full benefit of this showing without objection. She proved that the defendant was a considerable farmer when he invited her to his house, and continued to be such a farmer until after the wrong was made public, and his importance in the community was apparent. To follow this showing with evidence that he admitted his property to amount to a certain sum was to suggest to the jury the idea of a division of this property between the defendant and the woman who claimed to have been injured by him. This is not a very safe idea to suggest to a tribunal supposed to act with discretionary authority, and whose feelings may be excited by a pathetic story, under the influence of which they act immediately. The evidence ought not to have been received."

In an action to recover for the seduction of the plaintiff, evidence of her financial condition is not admissible to affect the question of damages. West *v.* Druff, 55 Iowa 335, 7 N. W. 636.

83. White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100.

84. Hawn *v.* Banghart, 76 Iowa 683, 39 N. W. 251, 14 Am. St. Rep. 261.

85. Hawn *v.* Banghart, 76 Iowa 683, 39 N. W. 251, 14 Am. St. Rep. 261. In this case the plaintiff sought to prove that certain individual acquaintances with whom she had associated before the seduction had refused to recognize her, or hold any social intercourse with her after her condition of pregnancy became known. The court said: "Some are inclined to look with charity and forbearance upon the victim of such a wrong, while others treat her with indifference or contempt. The loss of social standing, however, is the uniform result. This loss is matter of common knowledge, and may be taken notice of by the jury without proof. But the treatment of neither of the classes of individuals can be inquired into."

86. Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112; Bell *v.* Rinker, 29 Ind. 267; Stowers *v.* Singer, 113 Ky. 584, 68 S. W. 637.

Character is not brought into the question, except upon the inquiry as to damages. Evidence of general character is not admissible, except in those actions where the jury may, in its discretion, give exemplary damages. In such actions, upon the inquiry as to damages, for the purpose of regulating the discretion of juries, they should be put into possession of all the circumstances connected with the grievance. Thus, the general character and conduct of the plaintiff and his family, and the pecuniary circumstances of the defendant, are relevant, and may be brought into the question, by either party. McAulay *v.* Birkhead, 35 N. C. (13 Ired. L.) 28, 55 Am. Dec. 427.

In an action by a father for the seduction of a daughter, proof of a want of chastity, loose conduct and bad character of the latter is always admissible in mitigation of damages, and particular instances thereof may be given in evidence. Hogan *v.* Cregan, 6 Rob. (N. Y.) 138.

fendant after the suit was brought is not admissible to mitigate the damages.[87]

III. CRIMINAL PROSECUTIONS.

1. Matters Essential to Conviction. — A. Presumptions and Burden of Proof. — a. *In General.* — In a prosecution for seduction as a crime, the burden of proof as to all the essential elements constituting the crime rests upon the prosecution[88] to establish those elements beyond a reasonable doubt,[89] except perhaps as to the chastity of the prosecutrix.[90]

b. *The Illicit Intercourse.* — The prosecutrix upon the trial for seduction must of course establish the fact of the illicit intercourse.[91]

c. *Chastity of Prosecutrix.* — **(1.) Generally.** — In many jurisdictions the prosecution upon a trial for seduction need not in the first

87. White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100. The court said: "If such a rule should be recognized in this case, it would be applicable to every other. There seems to us to be no sound principle upon which such a doctrine can rest. We will not stop to suppose cases of a class frequently occurring, but any one may conceive of them, where, from the character of the defendant, the fraud, deception and hypocrisy used in accomplishing the seduction, such an offer would be but adding insult to injury. The authorities, so far as there are any upon the question, are against its admissibility."

88. *Alabama.* — Smith *v.* State, 107 Ala. 139, 18 So. 306; Suther *v.* State, 118 Ala. 88, 24 So. 43.

California. — People *v.* Krusick, 93 Cal. 74, 28 Pac. 794.

Missouri. — State *v.* Marshall, 137 Mo. 463, 36 S. W. 619; State *v.* Fisher, 162 Mo. 169, 62 S. W. 690.

New York. — People *v.* Eckert, 2 N. Y. Crim. 470.

Texas. — Snodgrass *v.* State (Tex. Crim.), 31 S. W. 366.

The New Jersey Statutes require that the woman must become pregnant as a result of the alleged seduction. Price *v.* State, 61 N. J. L. 500, 39 Atl. 709; Zabriskie *v.* State, 43 N. J. L. 640, 39 Am. Rep. 610; State *v.* Brown, 64 N. J. L. 414, 45 Atl. 800, *affirmed* 65 N. J. L. 687, 51 Atl. 1109.

89. *Alabama.* — Smith *v.* State, 107 Ala. 139, 18 So. 306; Cooper *v.* State, 90 Ala. 641, 8 So. 821, 24 Am. St. Rep. 934; Smith *v.* State, 118 Ala. 117, 24 So. 55.

Arkansas. — Caldwell *v.* State, 69 Ark. 322, 63 S. W. 59.

Iowa. — State *v.* Haven, 43 Iowa 181.

Michigan. — People *v.* De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863; People *v.* Hubbard, 92 Mich. 322, 52 N .W. 729.

Missouri. — State *v.* Fisher, 162 Mo. 169, 62 S. W. 690; State *v.* Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63.

New Jersey. — State *v.* Brown, 64 N. J. L. 414, 45 Atl. 800, *affirming* 65 N. J. L. 687, 51 Atl. 1109.

North Carolina. — State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613.

90. See *infra*, "Chastity of Prosecutrix."

91. *Alabama.* — Cunningham *v.* State, 73 Ala. 51.

Arkansas. — Cheaney *v.* State, 36 Ark. 74.

Michigan. — People *v.* Hubbard, 92 Mich. 322, 52 N. W. 729.

Missouri. — State *v.* Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349.

New York.—Safford *v.* People, 1 Park. Crim. 474.

North Carolina. — State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613.

South Dakota. — State *v.* King, 9 S. D. 628, 70 N. W. 1046.

Texas. — Bailey *v.* State, 36 Tex. Crim. 540, 38 S. W. 185; Gorzell *v.* State, 43 Tex. Crim. 82, 63 S. W. 126.

instance prove the chastity of the prosecutrix,[92] the reason being that chastity is presumed, and accordingly it devolves upon the defendant to prove her unchastity if he relies upon that fact.[93] Many courts hold, however, that the presumption of innocence which the law bestows upon defendants in criminal prosecutions offsets the presumption of chastity, and that the prosecution should prove all the elements of its charge.[94]

In states where the words "chaste repute" are used in the statutes instead of "character," the presumption in favor of the prosecutrix does not exist,[95] and evidence of her reputation is there admissible on either side.[96]

(2.) Reformation. — When the unchastity of the prosecutrix long prior to the date of the alleged seduction is admitted, or is known, the burden is upon the state to show a reformation,[97] and the woman may testify that she was virtuous when she submitted to the defendant.[98] There is conflict among the authorities as to the length of time necessary for a woman to live a virtuous life in order to justify a conviction, but if the period intervening between the time she claims to have abandoned immoral practices, and the date upon which she alleges that she was seduced, is but short, the courts uniformly require clear and convincing evidence of such reformation, and that it be established beyond a reasonable doubt.[99]

92. *Georgia.* — McTyier *v.* State, 91 Ga. 254, 18 S. E. 140; O'Neill *v.* State, 85 Ga. 383, 11 S. E. 856.

Iowa. — State *v.* Andre, 5 Iowa 389, 68 Am. Dec. 708; State *v.* McClintic, 73 Iowa 663, 35 N. W. 696.

Michigan. — People *v.* Brewer, 27 Mich. 134; People *v.* Squires, 49 Mich. 487, 13 N. W. 828.

Mississippi. — Ferguson *v.* State, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492.

Virginia. — Mills *v.* Com., 93 Va. 815, 22 S. E. 863.

93. Smith *v.* State, 118 Ala. 117, 24 So. 55; Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17; State *v.* Higdon, 32 Iowa 262; State *v.* McClintic, 73 Iowa 663, 35 N. W. 696; State *v.* Curran, 51 Iowa 112, 49 N. W. 1006; State *v.* Burns (Iowa), 78 N. W. 681.

In some jurisdictions the presumption of chastity of prosecutrix is carried to the extent of requiring defendant to prove the contrary by a preponderance of evidence, in order to escape conviction. State *v.* Hemm, 82 Iowa 609, 48 N. W. 971; State *v.* Brown, 86 Iowa 121, 53 N. W. 92.

94. People *v.* Wallace, 109 Cal. 611, 42 Pac. 159; State *v.* Lockerby, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656; State *v.* Wenz, 41 Minn. 196, 42 N. W. 933; State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613; Harvey *v.* Territory, 11 Okla. 156; West *v.* State, 1 Wis. 209.

95. State *v.* McCaskey, 104 Mo. 644, 16 S. W. 511; State *v.* Eckler, 106 Mo. 585, 17 S. W. 814, 27 Am. St. Rep. 372; State *v.* Sharp, 132 Mo. 165, 33 S. W. 795; Zabriskie *v.* State, 43 N. J. L. 640, 39 Am. Rep. 610; Oliver *v.* Com., 101 Pa. St. 215, 47 Am. Rep. 704.

Both parties being presumed innocent, some evidence of woman's good repute should be offered. State *v.* Hill, 91 Mo. 423, 4 S. W. 121.

96. See last preceding note.

97. People *v.* Squires, 49 Mich. 487, 13 N. W. 828; People *v.* Clark, 33 Mich. 112.

98. Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177.

99. People *v.* Squires, 49 Mich. 487, 13 N. W. 828; People *v.* Clark, 33 Mich. 112; People *v.* Millspaugh, 11 Mich. 278.

d. *Consent.* — **(1.) Generally.** — That the prosecutrix consented to the illicit intercourse is of course an essential element to the crime of seduction.[1] It is held, however, that since the mere charge of seduction comprehends consent, which must have first been obtained,[2] the consent of the woman to the alleged intercourse will be presumed.[3] This element alone distinguishes seduction from rape,[4] and here immediately arises the importance of proving the age of the person seduced,[5] in support of her capability to give such consent.[6]

(2.) Means of Procuring Consent. — The means whereby the consent of the prosecutrix was obtained, also being an element of the offense, must be proven by the prosecutrix.[7]

Where a Promise of Marriage is alleged to have been the means employed, such promise must be shown to have existed at the time the prosecutrix consented,[8] which may be proven by circumstantial

1. *Georgia.* — Jones *v.* State, 90 Ga. 616, 16 S. E. 380.
Michigan. — People *v.* Gibbs, 70 Mich. 425, 38 N. W. 257.
New York. — People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592.
North Carolina. — State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613.
Tennessee. — Bradshaw *v.* Jones, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. Rep. 655.
Texas. — Barnes *v.* State, 37 Tex. Crim. 320, 39 S. W. 684.
Wisconsin. — Croghan *v.* State, 22 Wis. 444.

2. Barnes *v.* State, 37 Tex. Crim. 320, 39 S. W. 684; Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177; People *v.* Kane, 14 Abb. Pr. (N. Y.) 15; Wilson *v.* State, 58 Ga. 328.

3. Jones *v.* State, 90 Ga. 616, 16 S. E. 380; People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592; People *v.* Gumaer, 4 App. Div. 412, 39 N. Y. Supp. 326; State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613; Croghan *v.* State, 22 Wis. 444.

4. **Consent the Sole Distinction Between Seduction and Rape.** — See Jones *v.* State, 90 Ga. 616, 16 S. E. 380, which holds that slight reluctance and physical resistance does not make the intercourse amount to rape, if she ultimately consented.

5. Carlisle *v.* State, 73 Miss. 387, 19 So. 207.

6. As to the age of consent most authorities draw no line. Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17; even though it be a girl within the age fixed by statute relating to rape. People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592, *reversing* 91 Hun (N. Y.) 635, 36 N. Y. St. 1130.

In Mississippi, however, a girl under age of ten years is not the subject of seduction, but of rape. Carlisle *v.* State, 73 Miss. 387, 19 So. 207.

7. *California.* — People *v.* Wallace, 109 Cal. 611, 42 Pac. 159; People *v.* Krusick, 93 Cal. 74, 28 Pac. 794.
Iowa. — State *v.* Mulholland, 115 Iowa 170, 88 N. W. 325; State *v.* Hayes, 105 Iowa 82, 74 N. W. 757.
Minnesota. — State *v.* Lockerby, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656.
Missouri. — State *v.* Thornton, 108 Mo. 640, 18 S. W. 841; State *v.* Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63.
New York. — People *v.* Eckert, 2 N. Y. Crim. 470.
Pennsylvania. — Oliver *v.* Com., 101 Pa. St. 215, 47 Am. Rep. 704.
Texas. — Snodgrass *v.* State (Tex. Crim.), 31 S. W. 366.

8. Bailey *v.* State, 36 Tex. Crim. 540, 38 S. W. 185, Armstrong *v.* People, 70 N. Y. 38. But the prosecution need not prove renewal of promise at time of intercourse. State *v.* Brassfield, 81 Mo. 151, 51 Am. Rep. 234.

evidence such as would tend to indicate an engagement, with honorable intentions,[9] and not merely evidence indicating lustful intimacy.[10]

e. *Intent.* — The criminal intent of the defendant must, as in other offenses, be established by the state.[11]

B. Mode of Proof. — a. *In General.* — Subject of course to the general rules of evidence as to competency, materiality and relevancy, any competent evidence may be resorted to for the purpose of proving the elements necessary to a conviction for seduction.[12]

b. *The Illicit Intercourse.* — **(1.) Generally.** — The fact that the intercourse occurred may be proved by the uncorroborated testimony of the woman herself,[13] but there must be other evidence of some fact, or act, an element of the offense, which tends to connect the defendant therewith.[14] Her testimony is not indispensable though her silence will be open to observation.[15]

Letters from the defendant to the complaining witness are admissible.[16]

So Also Are His Admissions[17] or statements to third persons,[18] both prior and subsequent to the alleged intercourse.

9. People *v.*, Orr, 92 Hun 199, 149 N. Y. 616, 44 N. E. 1127, 52 Am. St. Rep. 707; Armstrong *v.* People, 70 N. Y. 38; Rice *v.* Com., 100 Pa. St. 28.

10. Rice *v.* Com., 100 Pa. St. 28.

11. Bailey *v.* State (Tex. Crim.), 30 S. W. 669.

12. *Alabama.* — Anderson *v.* State, 104 Ala. 83, 16 So. 108.

Georgia. — McTyier *v.* State, 91 Ga. 254, 18 S. E. 140; Wood *v.* State, 48 Ga. 192, 15 Am. Rep. 664.

Iowa. — State *v.* Burns, 119 Iowa 663, 94 N. W. 238; State *v.* Whalen, 98 Iowa 662, 68 N. W. 554; State *v.* Thompson, 79 Iowa 703, 45 N. W. 293; State *v.* Deitrick, 51 Iowa 467, 1 N. W. 732.

Michigan. — People *v.* Hubbard, 92 Mich. 322, 52 N. W. 729; Lewis *v.* People, 37 Mich. 518.

Missouri. — State *v.* Eckler, 106 Mo. 585, 17 S. W. 814, 27 Am. St. Rep. 372.

New York. — Armstrong *v.* People, 70 N. Y. 38.

13. People *v.* Wade, 118 Cal. 672, 50 Pac. 841; State *v.* Lauderbeck, 96 Iowa 258, 65 N. W. 158; State *v.* Bollerman, 92 Iowa 460, 61 N. W. 183; State *v.* Bell, 79 Iowa 117, 44 N. W. 244.

14. *Alabama.* — Cunningham *v.* State, 73 Ala. 51; Munkers *v.* State, 87 Ala. 94, 6 So. 357; Cooper *v.* State, 90 Ala. 641, 8 So. 821, 24 Am. St. Rep. 934.

Iowa. — State *v.* Bell, 79 Iowa 117, 44 N. W. 244; State *v.* Smith, 84 Iowa 522, 51 N. W. 24; State *v.* Lauderbeck, 96 Iowa 258; 65 N. W. 158; State *v.* Coffman, 112 Iowa 8, 83 N. W. 721.

Oklahoma. — Harvey *v.* Territory, 11 Okla. 156.

Texas. — Creighton *v.* State (Tex. Crim.), 61 S. W. 492.

15. Revill *v.* Satterfit, 1 Holt's Cas. 451, 3 E. C. Pl. 153; Cock *v.* Wortham, 2 Stra. (Eng.) 1054.

May show fact of her death, as reason, but not suicide within few days after seduction. Bailey *v.* State (Tex. Crim.), 30 S. W. 669.

16. Bracken *v.* State, 111 Ala. 68, 20 So. 636, 56 Am. St. Rep. 23; State *v.* Bell, 79 Iowa 117, 44 N. W. 244.

17. Also his admissions. Bracken *v.* State, 111 Ala. 68, 20 So. 636, 56 Am. St. Rep. 23. Testimony of defendant in previous trial for rape, admissible. Hall *v.* State, 134 Ala. 90, 32 So. 750.

18. Also his statements to third persons. Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17; State *v.* Thornton, 108 Mo. 640, 18 S. W. 841; Bailey *v.* State, 36 Tex. Crim. 540, 38 S. W. 185.

(2.) Circumstantial Evidence. — Sexual intercourse may be inferred from the relations of the parties, the opportunities, and from the circumstances attending the parties prior to and at the time of the alleged intercourse.[19]

Conduct of the Parties may also be shown, relative to the question of marriage engagement,[20] and in proof of the intercourse itself.[21]

Pregnancy, and the Birth of a Child, the prosecutrix being unmarried, are of course conclusive proof of an unlawful sexual intercourse,[22] but as to whether or not she was seduced,[23] or whether the defendant was in any way connected with, or responsible for, her condition, these facts standing alone furnish no evidence whatever.[24]

Resemblance of Child to Defendant. — It is held proper in some cases to show that the bastard child of the prosecutrix resembles the defendant,[25] though in some jurisdictions the appearance of the child is considered no evidence, and inadmissible, resemblances being so frequent everywhere that they are dangerous indications to rely upon in prosecuting a man for an alleged crime.[26]

That Defendant Requested the Prosecutrix to Submit to an Abortion, is admissible.[27]

The General Good Character of Her Family is incompetent evidence on the part of the plaintiff.[28]

c. *Consent and the Means of Its Procurement.* — **(1.) Testimony of Prosecutrix.** — Prosecutrix may testify that she consented because of defendant's promise,[29] that she loved him and expected to

19. Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17; State *v.* Thornton, 108 Mo. 640, 18 S. W. 841; Bailey *v.* State, 36 Tex. Crim. 540, 38 S. W. 185; Armstrong *v.* People, 70 N. Y. 38; People *v.* Orr, 92 Hun 199, 36 N. Y. St. 398, *affirmed* 149 N. Y. 616, 44 N. E. 1127, 52 Am. St. Rep. 707.

20. Harvey *v.* Territory, 11 Okla. 156; People *v.* Orr, 92 Hun 199, 36 N. Y. St. 398, *affirmed* 149 N. Y. 616, 44 N. E. 1127, 52 Am. St. Rep. 707; Armstrong *v.* People, 70 N. Y. 38, Rice *v.* Com., 100 Pa. St. 28.

21. Lewis *v.* People, 37 Mich. 518.

22. *Alabama.* — Cunningham *v.* State, 73 Ala. 51.

Iowa. — State *v.* McGinn, 109 Iowa 641, 80 N. W. 1068; State *v.* Clemons, 78 Iowa 123, 42 N. W. 562; State *v.* Mulholland, 115 Iowa 170, 88 N. W. 325; State *v.* Coffman, 112 Iowa 8, 83 N. W. 721.

New York. — People *v.* Kearney, 110 N. Y. 188, 17 N. E. 736, *reversing* 47 Hun 129; Armstrong *v.* People, 70 N. Y. 38.

North Carolina. — State *v.* Holton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613.

Texas. — Gorzell *v.* State, 43 Tex. Crim. 82, 63 S. W. 126.

23. State *v.* Coffman, 112 Iowa 8, 83 N. W. 721; State *v.* Kissock, 111 Iowa 690, 83 N. W. 724.

24. State *v.* Coffman, 112 Iowa 8, 83 N. W. 721; State *v.* McGinn, 109 Iowa 641, 80 N. W. 1068; State *v.* Clemons, 78 Iowa 123, 42 N. W. 562; State *v.* Mulholland, 115 Iowa 170, 88 N. W. 325.

25. State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613. *Contra.* — Barnes *v.* State, 37 Tex. Crim. 320, 39 S. W. 684.

26. In Texas, exhibition of child excluded. Barnes *v.* State, 37 Tex. Crim. 320, 39 S. W. 684. So held in Iowa. State *v.* Danforth, 48 Iowa 43, 30 Am. Rep. 387.

27. People *v.* Orr, 92 Hun 199, 36 N. Y. St. 398 *affirmed* 149 N. Y. 616, 44 N. E. 1127, 52 Am. St. Rep. 707.

28. Lewis *v.* State, 89 Ga. 396, 15 S. E. 489.

29. State *v.* Brinkhaus, 34 Minn. 285, 25 N. W. 642; Ferguson *v.*

marry the defendant at that time;[30] and that the defendant repeated his promise of marriage after the seduction had been committed.[31]

(2.) Circumstantial Evidence. — All the circumstances peculiar to the case may be shown,[32] such as the relations of the parties, their age, intelligence, character and advantages,[33] the question of seduction being one of fact for the jury to decide in accordance therewith.[34]

(3.) Admissions. — Witnesses may testify as to admissions of defendant that he intended to marry the prosecutrix,[35] when *promise of marriage* is made the basis of the action, though such promise was made long prior to the seduction.[36] A promise of marriage conditioned upon pregnancy, however, is not sufficient.[37]

d. *Corroboration of Prosecutrix.* — **(1.) Necessity.** — Although the prosecutrix is not necessarily required to be corroborated upon the ground that she is an accomplice in the sense which that term implies,[38] the statutes usually require a prosecutrix upon a charge of seduction to be corroborated as to material facts, in order to sustain her allegations and justify a conviction.[39] Some jurisdictions demand corroboration to the same extent as in a charge of

State, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492.

30. State *v.* Burns, 119 Iowa 663, 94 N. W. 238.

31. McTyier *v.* State, 91 Ga. 254, 18 S. E. 140, indicating persuasion.

32. Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17; People *v.* Kearney, 110 N. Y. 188, 17 N. E. 736; State *v.* Curran, 51 Iowa 112, 49 N. W. 1006; State *v.* McClintic, 73 Iowa 663, 35 N. W. 696; State *v.* Bell, 79 Iowa 117, 44 N. W. 244.

33. State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202; State *v.* Higdon, 32 Iowa 262; State *v.* Heatherton, 60 Iowa 175, 14 N. W. 239.

34. State *v.* Bell, 49 Iowa 440; State *v.* Kingsley, 39 Iowa 439; State *v.* Brinkhaus, 34 Minn. 285, 25 N. W. 642; State *v.* Curran, 51 Iowa 112, 49 N. W. 1006; State *v.* Smith, 124 Iowa 334, 100 N. W. 40; Jones *v.* State, 90 Ga. 616, 16 S. E. 380.

Evidence That Prosecutrix Adjusted Herself to assist defendant is immaterial. Barnes *v.* State, 37 Tex. Crim. 320, 39 S. W. 684.

35. Munkers *v.* State, 87 Ala. 94, 6 So. 357; McTyier *v.* State, 91 Ga. 254, 18 S. E. 140; State *v.* Phillips, 185 Mo. 185, 83 S. W. 1080. See, however, La Rosae *v.* State, 132 Ind. 219, 31 N. E. 798.

36. Armstrong *v.* People, 70 N. Y. 38.

37. Conditional promise of marriage not within statute. People *v.* Van Alstyne, 144 N. Y. 361, 39 N. E. 343; People *v.* Ryan, 63 App. Div. 429, 71 N. Y. Supp. 527; State *v.* Adams, 25 Or. 172, 35 Pac. 36, 42 Am. St. Rep. 790, 22 L. R. A. 840.

38. Washington *v.* State, 124 Ga. 423, 52 S. E. 910.

39. State *v.* Timmens, 4 Minn. 325; State *v.* Lockerby, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656; Zabriskie *v.* State, 43 N. J. L. 640, 39 Am. Rep. 610; State *v.* Andre, 5 Iowa 389, 68 Am. Dec. 708. See also, as to corroboration, La Rosae *v.* State, 132 Ind. 219, 31 N. E. 798; Hinkle *v.* State, 157 Ind. 237, 61 N. E. 196; Bucker *v.* State, 77 Ark. 23, 90 S. W. 151.

Corroboration necessary in nearly all jurisdictions, as to material facts.

Alabama. — Wilson *v.* State, 73 Ala. 527; Munkers *v.* State, 87 Ala. 94, 6 So. 357; Cooper *v.* State, 90 Ala. 641, 8 So. 821, 24 Am. St. Rep. 934; Suther *v.* State, 118 Ala. 88, 24 So. 43.

Arkansas. — Wright *v.* State, 62 Ark. 145, 34 S. W. 545.

Indiana. — Hinkle *v.* State, 157 Ind. 237, 61 N. E. 196.

Iowa. — State *v.* Garrity, 98 Iowa 101, 67 N. W. 92.

Kansas. — State *v.* Bryan, 34 Kan. 63, 8 Pac. 260.

perjury,[40] but it is deemed sufficient if her testimony be corroborated only as to the illicit intercourse, and the seductive means employed by the defendant,[41] and that her own averments as to previous chastity,[42] and the fact that she was unmarried[43] are sufficient upon those particular items.

Defendant is entitled to require that complainant be corroborated as to the sexual intercourse, to the extent that such intercourse actually occurred, and that the defendant was the man.[44] But she can not show subsequent acts of intercourse to corroborate her charge of intercourse upon a certain day.[45]

Minnesota. — State *v.* Brinkhaus, 34 Minn. 285, 25 N. W. 642.

Mississippi. — Ferguson *v.* State, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492.

New Jersey. — Zabriskie *v.* State, 43 N. J. L. 640, 39 Am. Rep. 610.

New York. — *In re* Dempsey, 65 N. Y. Supp. 717; People *v.* Gumaer, 80 Hun 78, 30 N. Y. St. 17; People *v.* Orr, 92 Hun 199, 36 N. Y. St. 398; *affirmed* 149 N. Y. 616, 44 N. E. 1127, 52 Am. St. Rep. 707.

North Carolina. — State *v.* Garland, 95 N. C. 671.

Texas. — Snodgrass *v.* State (Tex. Crim.), 31 S. W. 366; Creighton *v.* State (Tex. Crim.), 61 S. W. 492.

Virginia. — Barker *v.* Com., 90 Va. 820, 20 S. E. 776; Mills *v.* Com., 93 Va. 815, 22 S. E. 863. See also Keller *v.* State, 102 Ga. 506, 31 S. E. 92, *holding* that a victim of seduction is not an accomplice.

40. *Indiana.* — Callahan *v.* State, 63 Ind. 198, 30 Am. Rep. 211; La Rosae *v.* State, 132 Ind. 219, 31 N. E. 798; Hinkle *v.* State, 157 Ind. 237, 61 N. E. 196.

Missouri. — State *v.* Hill, 91 Mo. 423, 4 S. W. 121; State *v.* Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; State *v.* Primm, 98 Mo. 368, 11 S. W. 732; State *v.* Eisenhour, 132 Mo. 140, 33 S. W. 785.

New Jersey. — State *v.* Brown, 65 N. J. L. 687, 51 Atl. 1109.

41. Corroboration only to essential elements of offense. Munkers *v.* State, 87 Ala. 94, 6 So. 357; Cunningham *v.* State, 73 Ala. 51; State *v.* Smith, 84 Iowa 522, 51 N. W. 24; State *v.* Brown, 86 Iowa 121, 53 N. W. 92; Ferguson *v.* State, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492; Armstrong *v.* People, 70 N. Y. 38.

42. Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177; People *v.* Kearney, 110 N. Y. 188, 17 N. E. 736. *Contra.* — State *v.* Lockerby, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656.

43. Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177; People *v.* Kearney, 110 N. Y. 188, 17 N. E. 736; Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837.

Need not prove by independent testimony, that she was unmarried but circumstances are sufficient corroboration on this point. State *v.* Heatherton, 60 Iowa 175, 14 N. W. 230; Bailey *v.* State, 36 Tex. Crim. 540, 38 S. W. 185; Lewis *v.* People, 37 Mich. 518.

44. *Arkansas.* — Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17.

Iowa. — State *v.* Bauerkemper, 95 Iowa 562, 64 N. W. 609; State *v.* Curran, 51 Iowa 112, 49 N. W. 1006; State *v.* Hayes, 105 Iowa 82, 74 N. W. 757; State *v.* Hughes, 106 Iowa 125, 76 N. W. 520, 68 Am. St. Rep. 288; State *v.* Wycoff, 113 Iowa 670, 83 N. W. 713.

Mississippi. — Ferguson *v.* State, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492.

Missouri. — State *v.* Witworth, 126 Mo. 573, 29 S. W. 595.

New Jersey. — State *v.* Brown, 65 N. J. L. 687, 51 Atl. 1109.

New York. — Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177; Armstrong *v.* People, 70 N. Y. 38.

North Carolina. — State *v.* Ferguson, 107 N. C. 841, 12 S. E. 574.

Texas. — Spenrath *v.* State (Tex. Crim.), 48 S. W. 192.

45. People *v.* Clark, 33 Mich. 112.

(2.) Mode. — Intercourse. — Ocular evidence of sexual intercourse is seldom obtainable, and, as to this, while evidence other than the prosecutrix's testimony is necessary,[46] slight corroboration is sufficient, and need be only such as to justify the belief that the incriminating testimony given is true.[47] Circumstantial evidence is here competent,[48] and may consist of the conduct of the defendant toward the seduced, the age, nature, and circumstances of the woman,[49] the fact that she, though unmarried, became pregnant.[50] The conduct and statements of the parties are considered part of the *res gestae*.[51]

Evidence That Defendant Procured, or attempted to procure, an abortion, is also admissible.[52]

Means of Procuring Consent. — Other circumstances may be shown in evidence, such as the correspondence between the parties subsequent to the time of the alleged seduction,[53] or prior thereto, as an

46. Must be evidence other than prosecutrix's testimony. State *v.* McGinn, 109 Iowa 641, 80 N. W. 1068; State *v.* Hill, 91 Mo. 423, 4 S. W. 121; Cooper *v.* State, 90 Ala. 641, 8 So. 821; Munkers *v.* State, 87 Ala. 94, 6 So. 357; Mills *v.* Com., 93 Va. 815, 22 S. E. 863; McCullar *v.* State, 36 Tex. Crim. 213, 36 S. W. 585, 61 Am. St. Rep. 847.

47. State *v.* Lauderbeck, 96 Iowa 258, 65 N. W. 158; State *v.* Brassfield, 81 Mo. 151, 51 Am. Rep. 234; State *v.* Eisenhour, 132 Mo. 140, 33 S. W. 785.

She Need Not Be Corroborated by Direct and Positive Independent Testimony upon the principal facts, but her testimony upon such facts should be supported by evidence of circumstances and other facts which substantiate the main fact to be established. Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837; Munkers *v.* State, 87 Ala. 94, 6 So. 357; State *v.* Timmens, 4 Minn. 325; State *v.* Brinkhaus, 34 Minn. 285, 25 N. W. 642; Boyce *v.* People, 55 N. Y. 644; State *v.* Ferguson, 107 N. C. 841, 12 S. E. 574; Wright *v.* State, 31 Tex. Crim. 354, 20 S. W. 756, 37 Am. St. Rep. 822.

48. Circumstantial evidence in corroboration. State *v.* Lauderbeck, 96 Iowa 258, 65 N. W. 158; State *v.* Brassfield, 81 Mo. 151, 51 Am. Rep. 234; State *v.* Eisenhour, 132 Mo. 140, 33 S. W. 785; State *v.* Brown, 64 N. J. L. 414, 45 Atl. 800; Bailey *v.* State, 36 Tex. Crim. 540, 38 S. W. 185; Wright *v.* State, 31 Tex. Crim. 354, 20 S. W. 756.

49. Age, nature, and circumstances of woman should be considered, as what would overcome one woman's will would have no effect whatever upon another. People *v.* Gibbs, 70 Mich. 425, 38 N. W. 257; State *v.* Higdon, 32 Iowa 262; Hall *v.* State, 134 Ala. 90, 32 So. 750; State *v.* Hemm, 82 Iowa 609, 48 N. W. 971; Flick *v.* Com., 97 Va. 766, 34 S. E. 39; State *v.* Cochran, 10 Wash. 562, 39 Pac. 155; State *v.* Carter, 8 Wash. 272, 36 Pac. 29.

50. Pregnancy a Circumstance. State *v.* Coffman, 112 Iowa 8, 83 N. W. 721; Armstrong *v.* People, 70 N. Y. 38; State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613.

Birth of Child. — Cunningham *v.* State, 73 Ala. 51; State *v.* McGinn, 109 Iowa 641, 80 N. W. 1068; People *v.* Kearney, 110 N. Y. 188, 17 N. E. 736; State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613.

51. Lewis *v.* People, 37 Mich. 518; Wood *v.* State, 48 Ga. 192, 15 Am. Rep. 664; State *v.* Curran, 51 Iowa 112, 49 N. W. 1006; State *v.* Bess, 109 Iowa 675, 81 N. W. 152.

52. People *v.* Orr, 92 Hun (N. Y.) 199, *affirmed* 149 N. Y. 616, 44 N. E. 1127, 52 Am. St. Rep. 707.

53. People *v.* Orr, 92 Hun (N. Y.) 199, 149 N. Y. 616, 44 N. E. 1127, 52 Am. St. Rep. 707; Armstrong *v.* People, 70 N. Y. 38; Rice *v.* Com., 100 Pa. St. 28; State *v.*

indication of a promise to marry.[54] Upon this point the love of the seduced may be shown by her own testimony, and by that of witnesses to such conduct as would indicate her love for the defendant at the time,[55] and conversations and other circumstances from which her consent to marry are to be implied may be shown,[56] as well as admissions of the defendant that he had had, or intended to have, intercourse with her, and the circumstances surrounding such admissions.[57]

Witnesses may testify to admissions of the defendant that he had promised to marry her,[58] and a wide range of circumstantial evidence is usually allowed, it being rarely possible to obtain positive proof outside the testimony of the woman herself,[59] though corroboration must come from evidence outside her testimony.[60]

Preparations For a Wedding,[61] or the possession of an engagement ring[62] is not evidence that the defendant promised to marry her.

Bell, 79 Iowa 117, 44 N. W. 244; Bracken *v.* State, 111 Ala. 68, 20 So. 636, 56 Am. St. Rep. 23.

Correspondence, conduct, etc., of defendant toward the prosecutrix after seduction competent for corroboration. Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837; Webb *v.* State (Miss.), 21 So. 733; Bracken *v.* State, 111 Ala. 68, 20 So. 636, 56 Am. St. Rep. 23; McTyier *v.* State, 91 Ga. 254, 18 S. E. 140.

54. Circumstantial Evidence of Promise. — Rice *v.* Com., 100 Pa. St. 28; Com. *v.* M'Carty, 2 Pa. L. J. 351, 4 Pa. L. J. 136.

55. Love of woman for defendant at time of alleged seduction is consistent with a marriage agreement. Absence of evidence of this kind may raise a doubt as to its existence, as a woman would not be likely to submit under a promise of marriage, to some person for whom she cared nothing. State *v.* Burns, 119 Iowa 663, 94 N. W. 238.

Evidence of defendant's engagement to another woman is also admissible in rebuttal by defendant. State *v.* Brown, 86 Iowa 121, 53 N. W. 92.

56. Other circumstances of engagement, showing pure intentions, are competent, but intentions consistent only with lustful designs are of course adverse. Rice *v.* Com., 100 Pa. St. 28; Com. *v.* M'Carty, 2 Pa. L. J. 351, 4 Pa. L. J. 136.

57. State *v.* Hill, 91 Mo. 423, 4 S. W. 121; Flick *v.* Com., 97 Va. 766, 34 S. E. 39; as to intent, see Baily *v.* State (Tex.), 30 S. W. 669; Hausenfluck *v.* Com., 85 Va. 702, 8 S. E. 683; State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202.

58. Hearsay testimony in corroboration of promise of marriage. State *v.* Eisenhour, 132 Mo. 140, 33 S. W. 785.

59. *Arkansas.* — Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17.

Iowa. — State *v.* Curran, 51 Iowa 112, 49 N. W. 1006; State *v.* McClintic, 73 Iowa 663, 35 N. W. 696; State *v.* Bell, 79 Iowa 117, 44 N. W. 244.

New York. — People *v.* Orr, 92 Hun 199, *affirmed* 149 N. Y. 616, 44 N. E. 1127, 52 Am. St. Rep. 707; Armstrong *v.* People, 70 N. Y. 38; People *v.* Kearney, 110 N. Y. 188, 17 N. E. 736.

Pennsylvania. — Rice *v.* Com., 100 Pa. St. 28.

60. Cooper *v.* State, 90 Ala. 641, 8 So. 821, 24 Am. St. Rep. 934; Cunningham *v.* State, 73 Ala. 51; State *v.* Kingsley, 39 Iowa 439; State *v.* Lenihan, 88 Iowa 670, 56 N. W. 292; State *v.* McGinn, 109 Iowa 641, 80 N. W. 1068; State *v.* Enke, 85 Iowa 35, 51 N. W. 1146.

61. Cooper *v.* State, 90 Ala. 641, 8 So. 821, 24 Am. St. Rep. 934; State *v.* Lenihan, 88 Iowa 670, 56 N. W. 292; State *v.* Buxton, 89 Iowa 573, 57 N. W. 417. *Contra,* State *v.* Timmens, 4 Minn. 326.

62. Com. *v.* Walton, 2 Brews. (Pa.) 487.

Promise After Arrest. — It has been decided that a promise by the defendant after his arrest is not corroborative of testimony that such a promise was made prior to the alleged intercourse.[63]

2. Defenses. — A. In General. — The defense depends much upon the local statutes which define and limit the issues establishing the constituents of a proper case in their respective jurisdictions. Under the immutable rule that seduction must be proven *technically*,[64] of course the absence of an element is a good defense.[65]

Thus the defendant may show that the prosecutrix consented because of her own desire to gratify her passion, or that she entertained merely a slight reluctance, or physical resistance; in which case, of course, the intercourse would not amount to seduction.[66] And that she submitted for the gratification of lust[67] may properly be shown against the element wherein the use of arts, wiles or persuasions has been alleged. Again, he may show that she yielded for a pecuniary consideration, or promise of future payment.[68] That defendant has already been tried for adultery cannot be shown.[69]

Rape. — It has been held in some jurisdictions that when the evidence shows that force was used, such as to constitute rape, the jury must acquit.[70]

Conspiracy. — Defendant may show that there was a plan to inveigle him into marriage, and, that failing, to prosecute him.[71]

Alibi. — In some states, it is held that if the defendant relies upon an alibi, the burden is upon him to prove it.[72]

63. State *v.* Eisenhour, 132 Mo. 140, 33 S. W. 785; White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100; Spenrath *v.* State (Tex. Crim.), 48 S. W. 192.

64. Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17.

65. People *v.* Clark, 33 Mich. 112; Mrous *v.* State, 31 Tex. Crim. 597, 21 S. W. 764; State *v.* Clemons, 78 Iowa 123, 42 N. W. 562.

66. Keller *v.* State, 102 Ga. 506, 31 S. E. 92; People *v.* De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863; People *v.* Clark, 33 Mich. 112; State *v.* Ferguson, 107 N. C. 841, 12 S. E. 574; Flick *v.* Com., 97 Va. 766, 34 S. E. 39; O'Neill *v.* State, 85 Ga. 383, 11 S. E. 856. Jones *v.* State, 90 Ga. 616, 16 S. E. 380.

67. Submission for gratification, see People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592; Keller *v.* State, 102 Ga. 506, 31 S. E. 92; People *v.* De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863; O'Neill *v.* State, 85 Ga. 383, 11 S. E. 856.

68. State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202; People *v.* Gibbs, 70 Mich. 425, 38 N. W. 257.

69. Smith *v.* Com., 17 Ky. L. Rep. 541, 32 S. W. 137.

70. State *v.* Kingsley, 39 Iowa 439; State *v.* Lewis, 48 Iowa 578, 30 Am. Rep. 407; People *v.* De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863; People *v.* Gibbs, 70 Mich. 425, 38 N. W. 257; Barnes *v.* State, 37 Tex. Crim. 320, 39 S. W. 684; Croghan *v.* State, 22 Wis. 444. See also title "Consent."

In Canada the courts require that immediately upon satisfactory proof of the use of force, the trial upon a charge of seduction must cease. Walsh *v.* Nattrass, 19 U. C. C. P. 453; Williams *v.* Robinson, 20 U. C. C. P. 255; Brown *v.* Dalby, 7 U. C. Q. B. 160.

71. Conspiracy of Parents. People *v.* Clark, 33 Mich. 112.

72. State *v.* McClintic, 73 Iowa

B. Character. — The question of character is very important in determining whether or not the prosecutrix was seduced.[73] Evidence of specific acts of immorality will be admitted,[74] but must relate to a time immediately preceding the period covered by the indictment.[75] Evidence of reputation is inadmissible for this purpose,[76] character itself being directly in issue when the question arises,[77] though the complaining witness will be allowed to rebut such evidence by her own testimony,[78] and by the testimony of witnesses who knew her,[79] to the fact that she was a woman of good character, or of good reputation.[80]

Evidence of the Lewd Disposition, or lascivious nature of the woman is admissible.[81]

So also is evidence admissible of such acts or statements as tend to show want of virtue,[82] association with men of bad character[83] late at night,[84] or that indecent language in her presence caused no indignation on her part.[85]

Defendant may show that no pain was inflicted upon the complaining witness by the alleged first act, and that no laceration was

663, 35 N. W. 696; Caldwell *v.* State, 69 Ark. 322, 63 S. W. 59.

73. State *v.* Andre, 5 Iowa 389, 68 Am. Dec. 708; Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17; State *v.* Deitrick, 51 Iowa 467, 1 N. W. 732.

74. Specific Acts. — Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17; Crozier *v.* People, 1 Park. Crim. (N. Y.) 453; Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177.

75. Mann *v.* State, 34 Ga. 1; Keller *v.* State, 102 Ga 506, 31 S. E. 92; State *v.* Wycoff, 113 Iowa 670, 83 N. W. 713; and in *Texas*, acts subsequent to seduction are admitted. Davis *v.* State, 36 Tex. Crim. 548, 38 S. W. 174. That prosecutrix was previously raped is no evidence of unchastity (People *v.* Gibbs. 70 Mich. 425) nor that her standard of propriety was so low that she had previously permitted indelicate acts or familiarities, provided she preserved her purity. People *v.* Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52; State *v.* Brinkhaus, 34 Minn. 285, 25 N. W. 642.

76. State *v.* Reinheimer, 109 Iowa 624, 80 N. W. 669; State *v.* Prizer, 49 Iowa 531, 31 Am. Rep. 155.

77. When character is in issue, the prosecution may introduce evidence of general character. Smith *v.* State, 107 Ala. 139, 18 So. 306; Suther *v.* State, 118 Ala. 88, 24 So. 43; Smith *v.* State, 118 Ala. 117, 24 So. 55; Lewis *v.* State, 89 Ga. 396, 15 S. E. 489; State *v.* Lenihan, 88 Iowa 670, 56 N. W. 292; State *v.* Reinheimer, 109 Iowa 624, 80 N. W. 669.

78. Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177.

79. State *v.* Bryan, 34 Kan. 63, 8 Pac. 260; State *v.* Deitrick, 51 Iowa 467, 1 N. W. 732; State *v.* Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362; People *v.* Samonset, 97 Cal. 448, 32 Pac. 520; State *v.* Lockerby, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656; Carroll *v.* State, 74 Miss. 688, 22 So. 295, 60 Am. St. Rep. 539.

80. That witness never heard anything against her. State *v.* Patterson, 88 Mo. 88, 57 Am. Rep. 374; People *v.* Samonset, 97 Cal. 448, 32 Pac. 520; People *v.* Wade, 118 Cal. 672, 50 Pac. 841.

81. Keller *v.* State, 102 Ga. 506, 31 S. E. 92; O'Neill *v.* State, 85 Ga. 383, 11 S. E. 856.

82. Parks *v.* State, 35 Tex. Crim. 378, 33 S. W. 872.

83. State *v.* Bige, 112 Iowa 433, 84 N. W. 518.

84. State *v.* Clemons, 78 Iowa 123, 42 N. W. 562.

85. State *v.* Bige, 112 Iowa 433, 84 N. W. 518.

produced, and no blood ensued, as, while this is not in every instance evidence of previous unchastity, yet it is the general rule.[86]

Evidence that the girl was a minor residing with her mother, in a house of ill-fame, is irrelevant, as it does not affect the character of the girl.[87]

Under a Statute Requiring Previous Chastity of the Woman, unchaste character will defeat her action,[88] as will bad repute, where good repute is made a statutory requirement to recovery.[89]

Reputation. — Evidence of mere reputation, upon the impeachment of character by introducing specific acts, has been held inadmissible;[90] except where evidence of good reputation or good repute,[91] is proper. Neighbors of the woman may testify that they *never heard anything against* her character,[92] and she may herself testify regarding her virtue.[93]

86. Barnes *v.* State, 37 Tex. Crim. 320, 39 S. W. 684. (See Elliott on Ev. § 3145).

87. Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177.

88. *Alabama.* — Suther *v.* State, 118 Ala. 88, 24 So. 43.

Arkansas. — Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17.

California. — People *v.* Hough, 120 Cal. 538, 52 Pac. 846, 65 Am. St. Rep. 201; People *v.* Wallace, 109 Cal. 611, 42 Pac. 159.

Georgia. — Keller *v.* State, 102 Ga. 506, 31 S. E. 92; Washington *v.* State, 124 Ga. 423, 52 S. E. 910.

Iowa. — State *v.* Whalen, 98 Iowa 662, 68 N. W. 554.

Kentucky. — Com. *v.* Hodgkins, 23 Ky. L. Rep. 829, 64 S. W. 414.

Michigan. — People *v.* Hubbard, 92 Mich. 322, 52 N. W. 729.

Minnesota. — State *v.* Abrisch, 41 Minn. 41, 42 N. W. 543.

Mississippi. — Norton *v.* State, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. Rep. 538.

Missouri. — State *v.* Thornton, 108 Mo. 640, 18 S. W. 841.

New York. — People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592.

Oklahoma. — Harvey *v.* Territory, 11 Okla. 156.

Oregon. — State *v.* Adams, 25 Or. 172, 35 Pac. 36, 42 Am. St. Rep. 790, 22 L. R. A. 840.

Texas. — Gorzell *v.* State, 43 Tex. Crim. 82, 63 S. W. 126.

Virginia. — Mills *v.* Com., 93 Va. 815, 22 S. E. 863.

Wisconsin. — West *v.* State, 1 Wis. 209.

89. Phillips *v.* State, 108 Ind. 406, 9 N. E. 345; State *v.* McClain, 49 Kan. 730, 31 Pac. 790; State *v.* Sharp, 132 Mo. 165, 33 S. W. 795; State *v.* Wheeler, 108 Mo. 658, 18 S. W. 924; State *v.* Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362; State *v.* Brown, 64 N. J. L. 414, 45 Atl. 800, 65 N. J. L. 687, 51 Atl. 1109; Bowers *v.* State, 29 Ohio St. 542; Oliver *v.* Com., 101 Pa. St. 215, 47 Am. Rep. 704.

90. State *v.* Prizer, 49 Iowa 531, 31 Am. Rep. 155; People *v.* Clark, 33 Mich. 112; Hussey *v.* State, 86 Ala. 34, 5 So. 484; State *v.* Wheeler, 94 Mo. 252, 7 S. W. 103, holding that "repute" is not limited to female's reputation for chastity among associates.

91. People *v.* Samonset, 97 Cal. 448, 32 Pac. 520; Smith *v.* State, 107 Ala. 139, 18 So. 306; State *v.* Deitrick, 51 Iowa 467, 1 N. W. 732; State *v.* Dunn, 53 Iowa 526, 5 N. W. 707.

92. People *v.* Samonset, 97 Cal. 448, 32 Pac. 520; People *v.* Wade, 118 Cal. 672, 50 Pac. 841. And that they never heard her talked about. State *v.* Bryan, 34 Kan. 63, 8 Pac. 260; State *v.* Deitrick, 51 Iowa 467, 1 N. W. 732; State *v.* Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362. Also, that they never knew of or saw anything improper in her conduct. State *v.* Brinkhaus, 34 Minn. 285, 25 N. W. 642.

93. Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177.

Proof of Other Acts of Unchastity with other men must relate to occurrences prior to the alleged date of the seduction in question,[94] though in Texas it has been held that promiscuous intercourse with other men after such date might serve to shed light upon her character.[95] Her conduct eight years before the trial,[96] or the use of profane or vulgar language,[97] are not evidence of *physical* unchastity at the time of the alleged seduction, and are inadmissible. It is proper to ask her whether she has not had illicit intercourse with other men.[98] Witnesses may be sworn to testify that they have had such intercourse with her.[99]

C. Promise of Marriage. — In those jurisdictions where a promise of marriage is necessary, the defendant may properly show that he was, to the knowledge of the complainant, a married man at the time the intercourse occurred,[1] or that he had illicit intercourse with her before the promise of marriage was made.[2]

Seduction being accomplished through promise of marriage, the honest intention of defendant at the time of making such promise, is no defense,[3] though in Arkansas it was held that if a seduced

94. *Alabama.* — Bracken *v.* State, 111 Ala. 68, 20 So. 636, 56 Am. St. Rep. 23.

Arkansas. — Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17.

Georgia. — Mann *v.* State, 34 Ga. 1; Killer *v.* State, 102 Ga. 506, 31 S. E. 92.

Iowa. — State *v.* Clemons, 78 Iowa 123, 42 N. W. 562; State *v.* Dunn, 53 Iowa 526, 5 N. W. 707; State *v.* Wells, 48 Iowa 671.

Michigan. — People *v.* Brewer, 27 Mich. 134; People *v.* Clark, 33 Mich. 112.

Missouri. — State *v.* Brassfield, 81 Mo. 151, 51 Am. Rep. 234.

New York. — Boyce *v.* People, 55 N. Y. 644.

That prosecutrix had illicit intercourse with another than the defendant subsequent to the alleged seduction cannot be shown. Com. *v.* Hodgkins, 23 Ky. L. Rep. 829, 64 S. W. 414.

95. Davis *v.* State, 36 Tex. Crim. 548, 38 S. W. 174.

96. State *v.* Dunn, 53 Iowa 526, 5 N. W. 707.

97. State *v.* Hemm, 82 Iowa 609, 48 N. W. 971.

98. State *v.* Sutherland, 30 Iowa 570. *Contra* Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17. See also Bamfield *v.* Massey, 1 Camp. (Eng.) 460; Dodd *v.* Morris, 36 Camp. (Eng.) 519, 14 R. R. 832; Bate *v.* Hill, 1 Car. & P. 100, 11 E. C. L. 329.

99. Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17; and also as to admissions of seduced regarding her prior conduct. State *v.* Clemons, 78 Iowa 123, 42 N. W. 562.

1. State *v.* Brown, 64 N. J. L. 414, 45 Atl. 800, 65 N. J. L. 687, 51 Atl. 1109; Price *v.* State, 61 N. J. L. 500, 39 Atl. 709.

So if she relies on promise of marriage, knowing defendant to be a married man. State *v.* Brown, 86 Iowa 121, 53 N. W. 92; Callahan *v.* State, 63 Ind. 198, 30 Am. Rep. 211; Wood *v.* State, 48 Ga. 192, 15 Am. Rep. 664.

2. State *v.* Brassfield, 81 Mo. 151, 51 Am. Rep. 234; Bowers *v.* State, 29 Ohio St. 542; Jinks *v.* State, 114 Ga. 430, 40 S. E. 320; O'Neill *v.* State, 85 Ga. 383, 11 S. E. 856; Wilson *v.* State, 58 Ga. 328; Wright *v.* State, 31 Tex. Crim. 354, 20 S. W. 756, 37 Am. St. Rep. 822; Merrell *v.* State, 42 Tex. Crim. 19, 57 S. W. 289.

3. People *v.* Samonset, 97 Cal. 448, 32 Pac. 520; State *v.* Bierce, 27 Conn. 318; State *v.* Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362.

woman subsequently refuses to marry the defendant, there can be no conviction.[4]

Circumstantial evidence, such as the engagement of defendant to another woman,[5] previous intercourse between the parties,[6] and letters containing no reference to an engagement,[7] are admissible as tending to refute the existence of a promise of marriage.[8]

D. Marriage of Parties. — In many jurisdictions a subsequent marriage of the defendant and prosecutrix will constitute a bar to any proceedings upon seduction,[9] though a marriage of the prosecutrix to another man will not furnish grounds for a defense.[10] Although the weight of authority is otherwise[11] it is frequently held, too, that an offer of marriage, though not accepted by the prosecutrix, will satisfy the requirements.[12] Courts have held that marriage of the prosecutrix by the defendant, and immediate desertion of her, sufficiently satisfies the law, and that a conviction for seduction cannot be had,[13] but others have differed from this theory.[14]

4. In Arkansas. — Caldwell *v.* State, 69 Ark. 322, 63 S. W. 59.

5. State *v.* Brown, 86 Iowa 121, 53 N. W. 92.

6. State *v.* Brassfield, 81 Mo. 151, 51 Am. Rep. 234; Bowers *v.* State, 29 Ohio St. 542.

7. State *v.* Thomas, 103 Iowa 748, 73 N. W. 474.

8. State *v.* Baldoser, 88 Iowa 55, 55 N. W. 97; State *v.* Brown, 86 Iowa 121, 53 N. W. 92; State *v.* Brock, 186 Mo. 457, 85 S. W. 595, 105 Am. St. Rep. 625; People *v.* Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52.

9. *California.* — People *v.* Hough, 120 Cal. 538, 52 Pac. 846, 65 Am. St. Rep. 201; People *v.* Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52.

Georgia. — O'Neill *v.* State, 85 Ga. 383, 11 S. E. 856; Wilson *v.* State, 58 Ga. 328.

Kentucky. — Com. *v.* Hodgkins, 23 Ky. L. Rep. 829, 64 S. W. 414.

Missouri. — State *v.* O'Keefe, 141 Mo. 271, 42 S. W. 725.

New York. — Cook *v.* People, 2 Thomp. & C. 404; People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592.

North Carolina. — State *v.* Garland, 95 N. C. 671.

Oregon. — State *v.* Wise, 32 Or. 280, 50 Pac. 800.

Texas. — Wright *v.* State, 31 Tex. Crim. 354, 20 S. W. 756, 37 Am. St. Rep. 822. *Contra,* State *v.* Bierce, 27 Conn. 318.

In California the marriage must take place before finding of an indictment or filing information. People *v.* Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52; Cal. P. C. § 269.

10. Dowling *v.* Crapo, 65 Ind. 209.

11. People *v.* Hough, 120 Cal. 538, 52 Pac. 846, 65 Am. St. Rep. 201; State *v.* Mackey, 82 Iowa 393, 48 N. W. 918; State *v.* Thompson, 79 Iowa 703, 45 N. W. 293; Cook *v.* People, 2 Thomp. & C. (N. Y.) 404; State *v.* Wise, 32 Or. 280, 50 Pac. 800, and is so expressed by statute in Missouri. State *v.* O'Keefe, 141 Mo. 271, 42 S. W. 725.

12. Com. *v.* Hodgkins, 23 Ky. L. Rep. 829, 64 S. W. 414; Com. *v.* Wright, 16 Ky. L. Rep. 251, 27 S. W. 815.

13. Com. *v.* Eichar, 4 Pa. L. J. 326, 1 Am. L. J. 551. See Wright *v.* State, 31 Tex. Crim. 354, 20 S. W. 756, 37 Am. St. Rep. 822.

14. In Georgia marriage will not bar prosecution, unless defendant shall have lived with the prosecutrix for a period of five years. Duke *v.* Brown, 113 Ga. 310, 38 S. E. 764; Ga. P. C. §§ 388, 389; Acts Ga. 1893, p. 39.

E. Death of Prosecutrix. — The death of the prosecutrix shortly before the trial will not prevent conviction.[15]

15. Death of posecutrix before trial has no effect, unless it be shown to be very probable that a promise of marriage, in good faith, existed at the time of her death. Merrell *v.* State, 42 Tex. Crim. 19, 57 S. W. 289.

SEISIN.—See Title.

SELF-DEFENSE.—See Assault and Battery; Homicide.

SEQUESTRATION.

I. DEFINITION.

In Civil Law the only sequestration known is when two or more persons lay claim to the same property, in which case the judge orders that, *pendente lite*, the property in dispute shall remain in the hands of sequestrators.[1]

In Equity, sequestration is a remedy or process by which property is taken possession of by the court in order to enforce obedi-

1. See Bouv. L. Dict., title "Sequester."

"**According to the Laws of Spain** when a creditor proves his demand, and shows to the satisfaction of the judge that the debtor is wasting his goods, so that there is danger that, without some summary relief, the property of the debtor will be destroyed or removed out of the reach of the creditor before in the ordinary course of business judgment may be obtained, the judge orders the debtor's property to be sequestered unless he gives surety to the creditor. This sequestration is not a proceeding *in rem*. It creates no lien in favor of the person who obtains it. It is not always an original process; it is a mere provisional order, which may be obtained at any stage of the suit." Pitot *v.* Elmes, 1 Mart. (La.) 79; Bank of Alabama *v.* Hozey, 2 Rob. (La.) 150.

Where a suit is commenced by a writ of sequestration in parish where goods are found and defendant's residence is in another parish, the judgment of the court should be *in rem* alone, reserving to the plaintiffs their right to an action *in personam*. Peterson *v.* Willard, 17 La. Ann. 93.

Where the goods of third persons are placed, with their consent, in a leased house or store, they become subject to the pledge of the lessor, and subject to sequestration. Twitty *v.* Clarke, 14 La. Ann. 503.

ence to its decree,[2] or to preserve its integrity during the progress

2. Anderson's Law Dict., title "Sequestration;" Roberts *v.* Stoner, 18 Mo. 481. And see Martin *v.* Kerridge, 3 P. Wms. (Eng.) 241; Kildare *v.* Eustace, 1 Vern. (Eng.) 405; Hide *v.* Pettit, Ch. Cas. (Eng.) 91; Earl of Athol *v.* Derby, Ch. Cas. (Eng.) 220.

But, upon common bills, as soon as they are filed, process of subpoena is taken out, which is a writ commanding the defendant to appear and answer to the bill, on pain of £100. But this is not all; for if the defendant, on service of the subpoena, does not appear within the time limited by the rules of the court, and plead, demur, or answer to the bill, he is then said to be in contempt, and the respective processes of contempt are in successive order awarded against him. First, an attachment in the nature of a capias, and on return of *non est inventus*, an attachment with proclamations issues, then a commission of rebellion, then a sergeant-at-arms is sent in quest of him; and if he eludes the sergeant-at-arms a sequestration issues to seize all his personal estate, and the profits of his real, and to detain them subject to the order of the court. "Sequestrations were first introduced by Sir Nicholas Bacon, lordkeeper in the reign of Queen Elizabeth, before which the court found some difficulty in enforcing its process and decrees. After an order for a sequestration issued, the plaintiff's bill is to be taken *pro confesso*, and a decree to be made accordingly. So that the sequestration does not seem to be in the nature of process to bring in the defendant, but only intended to enforce the performance of the decree. If the defendant is taken upon any of this process, he is committed to the Fleet or other prison till he puts in his appearance or answer, or performs whatever else this process is issued to enforce, and also clears his contempts by paying the costs which the plaintiff has incurred thereby. . . . The ordinary process before mentioned cannot be sued out till after the service of the subpoena, for then the contempt begins; otherwise he is not presumed to have notice of the bill, and therefore by absconding to avoid the subpoena a defendant might have eluded justice till the 5 Geo. II, c. 25," which provides for service by publication. 3 Bl. Com. 444-445; Storer *v.* Great Western R. Co., 1 Younge & C. (Eng.) 180.

"In the court of chancery, there is a process of contempt called a sequestration, of which there are two species. One being in *mesne* process, merely to ground a further proceeding. The other for a *duty*, which, as is said in Attorney General *v.* Mayor of Coventry, 1 P. Wms. 306, is the execution, and life of a court of equity, and the fruit of a long suit, and is *ad satisfaciendum*, and not bailable. . . . Sequestrations were at first laid on the thing in question, and afterwards extended to the effects in general of the contemnor. Sequestrations for duty decreed are ancient, as will appear from Tothil, p. 273, where there is a long list of sequestrations for duty, but none in *mesne* process, which are more modern. To ground a sequestration, there is a certain line of process to be pursued: An attachment. An attachment with proclamation. A commission of rebellion. An order for the sergeant-at-arms to go. If on either of these, the contemnor is taken, he is brought into court and turned over to the Fleet (prison); if in contempt for a duty, a sequestration will then issue; if in *mesne* process, the defendant is brought into court, first on an *habeas corpus*, etc., an *alias habeas corpus*, and a *pluries habeas corpus*, and an *alias pluries habeas corpus*, and the plaintiff's clerk is ordered then to attend with the record of the plaintiff's bill; and if he persists in his contempt, the court will decree the bill to be taken *pro confesso* against him; and thereupon he is discharged as to that contempt, paying the costs of it." Rowley *v.* Ridley, 2 Dick. (Eng.) 622; Francklyn *v.* Colhoun, 3 Swan (Eng.) 276; Simmonds *v.* Kinnaird, 4 Ves. (Eng.) 735.

of some litigation which is pending concerning it in the same court.[3]

Distinguished From Execution. — Sequestration is not an execution, either in form or in substance, but is founded on a default of performance of the decree of the court, and gives no right in the property sequestered to the party securing it.[4]

Origin of Writ. — Sequestration is said to have been first introduced as a process in chancery practice by Sir Nicholas Bacon, lord-keeper in the reign of Queen Elizabeth.[5] And it is still resorted to in England.[6]

In the United States, sequestration was adopted as part of the system of chancery practice and for a long time recognized and resorted to by our courts of chancery.[7]

A Writ of Sequestration Is a Process for Contempt used by chancery courts to compel performance of their orders or decrees. When there is a decree against a party for the payment of money or to do any other act, this process cannot issue until he is put in contempt, or it is shown that process cannot be served. When an attachment is served and a party refuses to comply, he is then in contempt. It would seem that a sequestration merely to compel the payment of money cannot now issue, as imprisonment for debt is abolished. As process against the body for the non-payment of a debt cannot now issue, there would be no means of putting a party in contempt. These remarks are only intended for decrees for the mere payment of money. When the decree is for the performance of acts within the power of a party, he may be compelled by sequestration. Such a process may have been proper if it had been shown that Stoner had the money in his possession and refused to deliver up. Roberts *v.* Stoner, 18 Mo. 481.

3. Steele *v.* Walker, 115 Ala. 485, 21 So. 942; Angel *v.* Smith, 9 Ves. Jr. (Eng.) 335. See also Steam Stone Cutter Co. *v.* Sears, 9 Fed. 8; Steam Stone Cutter Co. *v.* Jones, 13 Fed. 567; Steam Stone Cutter Co. *v.* Sears, 23 Fed. 313.

A bill was brought against the defendant for a discovery. As the material part of the case depended upon the discovery, the defendant would not answer, but stood out the whole process of contempt to a sequestration, and the bill was taken *pro confesso*, and there was a decree against the defendant *ad computandum*. It was moved on behalf of the defendant that the sequestration may be discharged on paying the costs of the contempt. Lord Chancellor: "Paying the costs of the several processes, ten shillings for one or twenty for another, is not clearing the contempt, for the contempt is the not putting in his answer, which is not in the defendant's power to do now, after the cause has been set down and the decree made. . . . I shall not discharge the sequestration, but keep it on foot as a security to the plaintiff for the defendant's appearing before the master to take the account." Maynard *v.* Pomfret, 3 Atk. (Eng.) 468.

4. Brune *v.* Robinson, 42 N. C. (7 Ired. Eq.) 188. See also Burdet *v.* Rockey, 1 Vern. (Eng.) 58; Hawkins *v.* Crook, 3 Atk. 594, 2 P. Wms. (Eng.) 556; Hyde *v.* Greenhill, 1 Dick. (Eng.) 106; Sutton *v.* Stone, 1 Dick. (Eng.) 107; Hyde *v.* Forster, 1 Dick. (Eng.) 102; Wharam *v.* Broughton, 71 Dick. (Eng.) 137; Rowley *v.* Ridley, 2 Dick. (Eng.) 622; Bligh *v.* Earl of Darnley, 2 P. Wms. (Eng.) 619; White *v.* Hayward, 2 Ves. (Eng.) 464.

5. 3 Black. Com. 444; Kildare *v.* Eustace, 1 Vern. (Eng.) 405.

6. See Snow *v.* Bolton, 17 Ch. Div. (Eng.) 433.

7. Steele *v.* Walker, 115 Ala. 485, 21 So. 942, where the court said: "The sequestration of property, the subject-matter of a suit in equity, that it may be preserved in its in-

And although in great measure superseded and but little used since the statute allowing a court of equity to issue an execution against the real as well as the personal property of a party to enforce payment of a money decree, this process has not been prohibited or abolished, but may be resorted to whenever it may be deemed necessary.[8]

II. PROCUREMENT OF WRIT.

1. Necessity of Affidavit. — In the absence of any statute providing to the contrary, the general rule is that the writ of sequestration may be applied for either by petition,[9] or by motion supported by affidavit.[10]

In Louisiana, the statute provides that an affidavit setting forth the grounds on which the order for the sequestration is asked must be attached to the petition.[11]

In Texas, the statute requires an application for a writ of sequestration to be accompanied by an affidavit.[12]

2. Sufficiency of Affidavit. — A. In General. — The affidavit, on which the order of sequestration is awarded, must state positively the existence of the facts on which the application is grounded, or if only matter of belief, the grounds of the belief.[13]

tegrity pending the making of future orders in reference to it or pending the suit is not unusual; it lies within the inherent jurisdiction of the court." See also Clymer *v.* Willis, 3 Cal. 363, 58 Am. Dec. 414; Hayes *v.* Hayes, 4 Del. Ch. 20; Keighler *v.* Ward, 8 Md. 254; Grew *v.* Breed, 12 Met. (Mass.) 363, 46 Am. Dec. 687; Roberts *v.* Stoner, 18 Mo. 481; McDaniel *v.* Stoker, 40 N. C. (5 Ired. Eq.) 274; Steam Stone Cutter Co. *v.* Jones, 13 Fed. 567.

8. Steele *v.* Walker, 115 Ala. 485, 21 So. 942; Hosack *v.* Rogers, 11 Paige (N. Y.) 603; White *v.* Geraerdt, 1 Edw. Ch. (N. Y.) 336. *Contra,* Bayard's Appeal, 72 Pa. St. 453.

The sequestration of property, the subject-matter of a suit in equity, that it may be preserved in its integrity, pending the making of future orders in reference to it, or pending the suit, is not unusual; it lies within the inherent jurisdiction of the court. The sequestration is *in rem,* drawing the property into the custody and control of the court, and binds the property, though there may not be jurisdiction of all the persons having rights or interests in it." Steele *v.* Walker, 115 Ala. 485, 21 So. 942.

9. Lewis' Estate, 170 Pa. St. 376, 32 Atl. 1046; French *v.* Winsor, 36 Vt. 412.

10. Snow *v.* Bolton, 17 Ch. Div. (Eng.) 433; Hayes *v.* Hayes, 4 Del. Ch. 20.

11. Blanc *v.* Wallace, 26 La. Ann. 42; McClendon *v.* Bennett, 16 La. Ann. 335; Ohio Ins. Co. *v.* Edmondson, 5 La. (O. S.) 295.

Where a Supplemental Petition Is Filed, an affidavit must accompany it in order to maintain a writ of sequestration granted under the original petition, and to preserve the *status quo* after the dismissal of the original petition. Egan *v.* Fush, 46 La. Ann. 474, 15 So. 539; Lemann *v.* Truxillo, 32 La. Ann. 65.

12. Texas Rev. Stat., art. 4865; Bemis *v.* Wells, 10 Tex. Civ. App. 626, 31 S. W. 827. And see May *v.* Ferrill, 22 Tex. 340.

13. This is necessary in order that the court may judge whether it was a rational and well-founded belief or an idle and vain one. Edwards *v.* Massey, 8 N. C. (1 Hawks) 359. See also Clagan *v.* Veasey, 42

B. Rule in Louisiana. — In Louisiana, the affidavit required by statute must state the facts justifying the issuance of the writ.[14] The affidavit may state the facts in the alternative language of the statute.[15]

Amount of Debt. — The affidavit must state with certainty the amount of the debt due the applicant.[16]

Privilege or Ownership. — The affidavit must state either that the

N. C. (7 Ired. Eq.) 173; Lehman *v.* Logan, 42 N. C. (7 Ired. Eq.) 296; Sutton *v.* Craddock, 36 N. C. (1 Ired. Eq.) 134; Howell *v.* Howell, 38 N. C. (3 Ired. Eq.) 522; Mercer *v.* Bryd, 57 N. C. (4 Jones Eq.) 358; Brantley *v.* McKee, 58 N. C. (5 Jones Eq.) 332.

The Fears and Apprehensions of a Remainder Man, that property in the hands of a tenant for life will be destroyed or carried out of the state, are not sufficient grounds upon which to grant a sequestration or *ne exeat;* but the facts must be set forth and proved, to enable the court to see that those fears and apprehensions are well founded. Lehman *v.* Logan, 42 N. C. (7 Ired. Eq.) 296.

14. Pasley *v.* McConnell, 37 La. Ann. 552; Gumbel *v.* Beer, 36 La. Ann. 486; Blanc *v.* Wallace, 26 La. Ann. 492; Mabry *v.* Tally, 15 La. Ann. 562; Johnston *v.* Cammack, 13 La. Ann. 594; Wells *v.* St. Dizier, 9 La. Ann. 119; Bres *v.* Booth, 1 La. Ann. 307.

Compare Allen *v.* Whetstone, 35 La. Ann. 846. In this case the judge granted an order of judicial sequestration of the property *pendente lite,* without affidavit or bond, which it was claimed was wrongful because issued "at the request of the parties." The court says: "The fact that parties suggested or requested it did not deprive the court of the power to order the sequestration *ex officio,* under C. P. 273, without affidavit or bond."

A Prospective Insolvency affords no ground for proceeding by injunction and sequestration against a debtor. The remedy of sequestration being a rigorous one cannot be extended by implication to cases not contemplated by the law maker. Barriere *v.* Feste, 9 La. Ann. 535.

An Affidavit Verifying the Facts Charged in the Petition is sufficient to maintain the writs of sequestration and injunction. Tannes *v.* Courege, 31 La. Ann. 74.

In Gumbel *v.* Beer, 36 La. Ann. 484, an action to recover, with lien, the price of cotton, attached and sequestered within five days after the day of sale, in the hands of third persons who, by intervention and answer, assert adverse title thereto, it was held that an affidavit that the petitioner has sold cotton, the price of which is unpaid and on which there exists a lien, and that the purchaser is about to convert the cotton thus sold into money or evidence of debt, with intent to place it beyond the reach of his creditors, is amply sufficient to authorize a writ of sequestration, which will be maintained if executed within five days after the delivery of the cotton.

In a sequestration if the defendant desires to rely on the title of a third person he must plead it; otherwise evidence to support same is inadmissible. Wells *v.* St. Dizier, 9 La. Ann. 119. See also Tucker *v.* Musselman, 6 La. Ann. 226.

15. Kuhn *v.* Embry, 35 La. Ann. 488; Wells *v.* St. Dizier, 9 La. Ann. 119.

16. Wilson *v.* Churchman, 4 La. Ann. 452, *holding* insufficient a statement that defendant was indebted to plaintiff "in about the sum of $4950." *Compare* Blanchard *v.* Luce, 19 La. Ann. 46.

Where a party sequesters a slave, on the ground that she has an hypothecary right upon such slave, and believes that the slave is about to be carried out of the state, *held,* that the sequestration will be set aside if the affidavit does not set forth the amount of the mortgage, and affiant does not therein aver positively that she has grounds to

petitioner has a privilege on the property, or that he is the owner of it.[17]

Agency. — An affidavit by an agent must show that the affiant had authority to make the affidavit.[18]

Effect of Affidavit as Evidence. — An affidavit made to secure a writ of sequestration is *prima facie* evidence of the facts authorizing the writ.[19]

C. Rule in Texas. — In Texas, the statute requires the affidavit to set forth the grounds on which the application is based.[20]

The Simple Fact That There Is an Indebtedness is no ground for sequestering property.[21]

Description of Property. — The statute also requires the affidavit so to describe the property to be sequestered that it may be identified and distinguished from other property of like kind.[22]

Value of Property. — The affidavit must also state positively and definitely the value of each article sought to be sequestered.[23]

suppose that the slave is about to be carried out of the state. Johnston *v.* Cammack, 13 La. Ann. 594.

17. Baer *v.* Kopfler, 19 La. Ann. 194.

In sequestration of movable property based on a vendor's privilege, an affidavit to the debt, to the privilege, and to the fear that "the defendant will conceal, part with or dispose of the movable in his possession during the pendency of the suit," fills all the requirements of the law; and the party is not bound to swear to or to prove any other grounds of fear than the simple facts that he has a privilege and that it lies in the power of the defendant to defeat or destroy it by doing some of the acts which he swears he fears he may do. Lowden *v.* Robertson, 40 La. Ann. 825, 5 So. 405; Wells *v.* St. Dizier, 9 La. Ann. 119; Anderson *v.* Stille, 12 La. Ann. 669; Mabry *v.* Talley, 15 La. Ann. 562.

18. Lithgow *v.* Byrne, 17 La. Ann. 8. See also Hawley *v.* Tarbe, 14 La. (O. S.) 92.

Compare Stewart *v.* Clark, 11 La. Ann. 319. In this case the plaintiff brought suit to recover the price of 145 cords of wood sold and delivered to the defendants, the master and owners of the steamer Natchez No. 2, at the rate of $2.50 per cord. He also claimed a privilege on the steamer and caused her to be sequestered. Defendants admitted the purchase but alleged that $1.75 per cord was the price agreed on. The court found for plaintiff but ordered the sequestration set aside on the ground that the authority of plaintiff's agent was insufficient to bind him on the bond. The court says: "In relation to the sequestration it is shown that the plaintiff enclosed his account to the firm of Payne & Harrison, with instructions to take all necessary steps for the collection of the same, we think the judge *a quo* erred. Either of the partners was competent to act for plaintiff in the matter."

19. American Furn. Co. *v.* Grant-Jung Furn. Co., 50 La. Ann. 931, 24 So. 182; Cypress Shingle Mfg. Co. *v.* Lorio, 46 La. Ann. 441, 15 So. 95; McRae *v.* Creditors, 16 La. Ann. 306.

20. Texas Rev. Stat., art. 4865; Bemis *v.* Wells, 10 Tex. Civ. App. 626, 31 S. W. 827. See also Cahn *v.* Jaffray, 12 Tex. Civ. App. 324, 34 S. W. 372.

21. Vela *v.* Guerra, 75 Tex. 595, 12 S. W. 1127.

22. Texas Rev. Stat., art. 4865; Mills *v.* Hackett, 65 Tex. 580; Huckins *v.* Kapf (Tex. Civ. App.) 14 S. W. 1016; Halbert *v.* San Saba Springs L. & L. S. Assn. (Tex. Civ App.), 34 S. W. 636; Boykin *v.* Rosenfield, 69 Tex. 115, 9 S. W. 318.

23. Morgan *v.* Turner, 4 Tex. Civ. App. 192, 23 S. W. 284. See also Endel *v.* Norris, 15 Tex. Civ. App. 140, 39 S. W. 608.

Situs of Property. — It must also state the county in which the property is situated.[24]

III. CLAIMS OF THIRD PERSONS.

Where a right adverse to sequestration is set up by a third person, the claimant may apply for an examination *pro interesse suo*,[25] or the party benefited by the sequestration may compel the claimant to appear and show cause why he should not be examined *pro interesse suo*.[26]

A Claimant Asking for Such Examination ordinarily does so by motion supported by affidavit, showing the fact on which his claim is based.[27]

IV. DISSOLUTION OF SEQUESTRATION.

On a motion to dissolve an injunction and sequestration, where the mischief, arising from the act complained of, would be irreparable, the settled practice is for the plaintiff to read affidavits in opposition to the answer.[28]

24. Bemis *v.* Wells, 10 Tex. Civ. App. 626, 31 S. W. 827; McSpadden *v.* La Force (Tex. Civ. App.), 39 S. W. 163.

25. Foster *v.* Townshend, 2 Abb. N. C. (N. Y.) 29; Gordon *v.* Ingraham, 32 Pa. St. 214; Angel *v.* Smith, 9 Ves. Jr. (Eng.) 336; Anonymous, 6 Ves. Jr. (Eng.) 287.

26. Foster *v.* Townshend, 2 Abb. N. C. (N. Y.) 29; Bird *v.* Littlehales, 3 Swanst. (Eng.) 299, note *a;* Hamlyn *v.* Ley, Seaton on Decrees 413; Johnes *v.* Claughton, Jac. (Eng.) 573; Hunt *v.* Priest, 2 Dick. (Eng.) 540; Brooks *v.* Greathed, 1 Jac. & W. (Eng.) 176.

27. Hunt *v.* Priest, 2 Dick. (Eng.) 540.

28. Swindall *v.* Bradley, 56 N. C. (3 Jones Eq.) 353; Lloyd *v.* Heath, 45 N. C. (Busb. Eq.) 39; McDaniel *v.* Stoker, 40 N. C. (5 Ired. Eq.) 274; Griffin *v.* Carter, 40 N. C. (5 Ired. Eq.) 413; Mercer *v.* Byrd, 57 N. C. (4 Jones Eq.) 358.

In Swindall *v.* Bradley, 56 N. C. (3 Jones Eq.) 353, by the will of Mary Kelly, a negro slave, Tenah, and her child Lucy were bequeathed to Mary Swindall for life; at her death, to her son, the plaintiff. Mary Swindall married William Bradley, the defendant. The bill alleges that the defendant Bradley is about to sell his perishable property, and, as plaintiff believes, is about to leave the state and carry off the slaves, etc. "The mere fears and apprehensions of the remainder-man will not entitle him to an injunction, unless he can allege such facts and circumstances as will show that his fears and apprehensions are well founded. The fact that the defendant was about to sell his perishable property, and the rumor that he was about to leave the state, were, we think, calculated to excite the plaintiff's fears that he would carry off the slaves, and required explanation. The answer denies distinctly and positively that the defendant intended to leave the state, or that he had any design to remove the slaves beyond the jurisdiction of the court, but it is altogether silent in respect to the charge that he was about to sell his perishable property. This silence is, to say the least of it, suspicious, and makes the answer obnoxious to the imputation of being evasive. In this state of the pleadings we think the plaintiff had the right to read affidavits in support of the allegations of his bill, and to insist upon them in opposition to the motion to dissolve his injunction and sequestration."

On the trial of a rule to dissolve

V. WRONGFUL SEQUESTRATION.

1. Burden of Proof. — Where the defendant asserts that the sequestration was wrongful, it is incumbent upon him to make a *prima facie* case before the plaintiff is required to disprove it.[29]

2. Damages. — Burden of Proof. — Upon the question of damages, the party claiming to be injured by the wrongful issuance of the writ of sequestration has the burden of proving that he has sustained actual damages, and that they flowed proximately from the suing out of the writ.[30]

The Inquiry in Regard to the Injury which the party may sustain by the deprivation of the use of his property should be limited to the actual value of the use,[31] as, for example, the rent of real estate, the hire or services of slaves, or the value of the use of any other species of property in itself productive. Where the property is not of that character, the injury from being deprived of its use should be restricted to the interest on the value thereof. If, however, the property is damaged, or if, when returned, it should be of less value than when seized, in consequence of a depreciation of price, or from any other cause, for such difference the plaintiff would be entitled to recover. For any injury beyond that, the damages would be con-

a sequestration, the allegation of the sequestrator in his affidavit, that the goods sequestered belonged to the succession of which he was curator, will be assumed as true, although it may be without foundation in fact. Property purchased with the identical money stolen by the purchaser from a succession belongs to the succession, and may be sequestered in the hands and recovered from the possession of the purchase by the curator of the succession. Pirtle *v.* Price, 31 La. Ann. 357.

29. "The fact, then, that the plaintiffs in this case have established their debt and the validity of their lien upon the goods sequestered does not preclude the defendants from establishing that the suing out of the writ was wrongful, by negativing on the trial the truth of the ground upon which it was issued, as required in the affidavit, which was that the party applying for it feared that the defendants would waste and remove out of the county the property mortgaged. This the court required the defendant to do. And it was certainly incumbent on the defendant to make out a *prima facie* case by evidence before the plaintiffs were required to disprove it." Harris *v.* Finberg, 46 Tex. 79; Offutt *v.* Edwards, 9 Rob. (La.) 90.

In a suit for damages wrongfully and maliciously suing out a writ of sequestration, and against the constable for levying the same, the plaintiff must show what affidavit was made by the plaintiff in the sequestration suit, and negative the truth of them, or if no such affidavit was made that fact should be shown, so as to put in issue the wrongfulness or illegality of the writ. Rountree *v.* Walker, 46 Tex. 200.

Where a master of a vessel issues a bill of lading for goods received by him for delivery at another distant place, and goods are sequestered on a vendor's privilege, and he bonds the goods and is reinstated in the possession, the burden is on him to prove that he has delivered the merchandise, or that it is still in his possession; otherwise he will be responsible for its value. Wilson *v.* Churchman, 4 La. Ann. 452.

30. Broxton *v.* Bloom, 15 La. Ann. 618; Carson *v.* Texas Installment Co. (Tex. Civ. App.), 34 S. W. 762. See also Bumpass *v.* Morrison, 70 Tex. 756, 8 S. W. 596.

31. Pettit *v.* Mercer, 8 B. Mon. (Ky.) 51; Carson *v.* Texas Install-

jectural, indefinite, and uncertain. But this rule, as to the depreciation of the price, would not be applicable to every species of property.[32]

Evidence of the Value of Defendant's Time, while attending court, or any such incidental expense, cannot be received as a proper element of actual damage where the suing out and levy of a writ of sequestration is merely wrongful.[33]

Exemplary Damages. — Where the evidence shows that the suing out and levy of a writ of sequestration is malicious, exemplary damages can be awarded, but where it is only wrongful, without malice, actual damages only can be awarded.[34]

ment Co. (Tex. Civ. App.), 34 S. W. 762.

32. Pettit *v.* Mercer, 8 B. Mon. (Ky.) 51; Tompkons *v.* Toland, 46 Tex. 584.

To justify the admission of evidence to show the depreciation in the market price of goods seized under sequestration it must be alleged as a ground of special damage. Harris *v.* Finberg, 46 Tex. 79; Bumpass *v.* Morrison, 70 Tex. 756, 8 S. W. 596.

33. Harris *v.* Finberg, 46 Tex. 79.

34. Harris *v.* Finberg, 46 Tex. 79; Walcott *v.* Hendrick, 6 Tex. 406; Peiser *v.* Cushman, 13 Tex. 390; Wiley *v.* Traiwick, 14 Tex. 662; Castro *v.* Whitlock, 15 Tex. 437; Haldeman *v.* Chambers, 19 Tex. 1, 52; Reed *v.* Samuels, 22 Tex. 114, 73 Am. Dec. 253; Punchard *v.* Taylor, 23 Tex. 424; Clark *v.* Wilcox, 31 Tex. 322; Clardy *v.* Callicoate, 24 Tex. 170; Portier *v.* Fernandez, 35 Tex. 535.

This suit was brought by E. G. Hanrick against Ike Casey to recover fifty acres of land, with the rents therewith accruing. At the commencement of the suit a writ of sequestration was sued out, and Casey's possession of the land temporarily interrupted by virtue thereof; he afterwards replevied and claimed damages for the wrongful and malicious suing out and execution of the writ, etc. The court says: "It was alleged, that the sheriff, in executing the writ of sequestration, by direction of Goodrich, and also of Hanrick, refused to allow Casey a reasonable time to make a replevy bond, which he was able to make and afterwards did make, and that the sheriff threw his household goods out of doors, and forced Casey's daughter also to leave while it was raining without any necessity therefor, to gratify the malice of Goodrich, and that said acts were ratified by Hanrick. This, if true, was a gross abuse of process of the court for which the sheriff would be liable, also Hanrick, if he ratified them." Casey *v.* Hanrick, 69 Tex. 44, 6 S. W. 405.

Where personal property is seized under a writ of sequestration sued out upon a debt paid, no pretense of mistake being made on the part of the plaintiff in the sequestration, such facts authorize the finding of exemplary damages at suit of the owner of the property. Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787.

SERVICE.

I. UNOFFICIAL RETURN.

1. Presumptions. — In those states where service may be made by any qualified person, the courts will indulge presumptions in favor of the affidavit of service when properly proven.[1] An affidavit of personal service of summons, by a person other than the sheriff being otherwise regular, will be presumed to have been made on the day the jurat bears date,[2] where the time is not stated in body of affidavit. And where defendant makes default upon a service by private person, it will be presumed, where the affidavit states defendants were served in a certain county, that they resided in the county in which they were served,[3] and that the requisite authority was obtained according to statute for service by an unofficial person.[4]

1. Reid *v.* Cuttin, 49 Wis. 686, 6 N. W. 326; Calderwood *v.* Brooks, 28 Cal. 151; Pellier *v.* Gillespie, 67 Cal. 582, 8 Pac. 185; Hess *v.* Smith, 16 Misc. 55, 37 N. Y. Supp. 635.
2. Reed *v.* Catlin, 49 Wis. 686, 6 N. W. 326.
3. Calderwood *v.* Brooks, 28 Cal. 151. See Pellier *v.* Gillespie, 67 Cal. 582, 8 Pac. 185.
4. Where by statute, service may be made by a person other than a marshal when first authorized by the justice, and the justice has rendered judgment upon proof of service made by a person other than a marshal,

2. Impeachment or Contradiction. — The affidavit of personal service made by a private citizen is not exclusive evidence of service and may be impeached or contradicted by parol evidence.[5]

II. OFFICIAL RETURN.

1. Presumptions. — A. In General. — Either in a direct proceeding to set aside the judgment obtained, or when the judgment is collaterally attacked because of insufficient proof of service, the courts will indulge every legal intendment in favor of the officer's return.[6]

it must be presumed that the justice gave the requisite authority, or otherwise it must be presumed that he illegally performed his duty, where the inference is that everything required to be done by him to make his acts legal was done. Hess *v.* Smith, 16 Misc. 55, 37 N. Y. Supp. 635.

5. Wallis *v.* Lott, 15 How. Pr. (N. Y.) 567; Van Rensselaer *v.* Chadwick, 7 How. Pr. (N. Y.) 297; Crosby *v.* Farmer, 39 Minn. 305, 40 N. W. 71; Campbell *v.* Donovan, 111 Mich. 247, 69 N. W. 514; Detroit Free Press Co. *v.* Bagg, 78 Mich. 650, 44 N. W. 149.

The return of personal service not being made by an officer, but by a private person, his affidavit of such service is open to contradiction by the defendant, and the latter is at liberty to show that no such service was made upon him. Detroit Free Press Co. *v.* Bagg, 78 Mich. 650, 44 N. W. 149. See also Campbell *v.* Donovan, 111 Mich. 247, 69 N. W. 514.

"To hold the affidavit of service conclusive and drive the defendant to an action, would inflict upon him a grievous, and in many cases, a remediless, wrong; a judgment obtained without notice and by a false return might be so large, . . . and the remedy for damage lie only against an irresponsible third person who made the affidavit." Van Rensselaer *v.* Chadwick, 7 How. (N. Y.) 297.

Compare McKechnie *v.* McKechnie, 39 N. Y. Supp. 402, where it was held that the person served being an interested party, his testimony is not admissible to overthrow an affidavit which had been on record for more than thirty years of the service of a notice of sale in a statutory foreclosure.

6. *United States.* — New River Miss. Co. *v.* Roanoke Coal & Coke Co., 110 Fed. 343, 49 C. C. A. 78; Knowles *v.* Gaslight & Coke Co., 19 Wall. 58.

Alabama. — Snelgrove *v.* Branch Bank of Mobile, 5 Ala. 295; Cantley *v.* Moody, 7 Port. 443.

Arkansas. — Henry *v.* Ward, 4 Ark. 150; Dawson *v.* State Bank, 3 Ark. 505.

California. — Crane *v.* Brannan, 3 Cal. 192; Calderwood *v.* Brooks, 28 Cal. 151; Pellier *v.* Gillespie, 67 Cal. 582, 8 Pac. 185.

Georgia. — Jones & Alford *v.* Tarver, 19 Ga. 279; Reid *v.* Jordan, 56 Ga. 282.

Illinois. — Butterfield *v.* Johnson, 46 Ill. 68.

Indiana. — Union Tract. Co. *v.* Barnett, 31 Ind. App. 467, 67 N. E. 205; Baltimore & O. R. Co. *v.* Brant, 132 Ind. 37, 31 N. E. 464; Ohio & Mo. R. Co. *v.* Quier, 16 Ind. 440.

Iowa. — Davis *v.* Burt, 7 Iowa 56.

Kansas. — Ingraham *v.* McGraw, 3 Kan. 520.

Louisiana. — Whiting *v.* Hagerty, 5 La. Ann. 686; Kendrick *v.* Kendrick, 19 La. (O. S.) 23.

Maryland. — Abell *v.* Simon, 49 Md. 318.

Michigan. — Howell *v.* Shepard, 48 Mich. 472, 12 N. W. 661.

Mississippi. — Sanders *v.* Dowell, 7 Smed. & M. 206.

Missouri. — Crowle *v.* Wallace, 12 Mo. 143.

Nebraska. — Gilbert *v.* Brown, 9 Neb. 90, 2 N. W. 376.

B. Execution by Proper Officer. — Thus it will be presumed that the process was executed by the legal and proper officer.[7]

C. Competency of Officer. — And it will be presumed that the officer executing the process was competent and disinterested.[8]

D. Place of Service. — So also it will be presumed that the service was made within the limits of the officer's bailiwick.[9]

New York. — Hess *v.* Smith, 16 Misc. 55, 37 N. Y. Supp. 635.

Texas. — Jones *v.* Jones, 60 Tex. 451; Blain *v.* McManus, 2 Posey Unrep. Cas. 314; Calvert, W. & B. V. R. Co. *v.* Driskill, 31 Tex. Civ. App. 200, 71 S. W. 997; Tobar *v.* Losano, 6 Tex. Civ. App. 698, 25 S. W. 973.

Virginia. — Smithson *v.* Briggs, 33 Gratt. 180.

Washington. — North Western & P. H. Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 139.

Wisconsin. — Reed *v.* Catlin, 49 Wis. 686, 6 N. W. 326.

7. It is not essential that the sheriff's return should show that he is the sheriff of the county in which the writ is served, for he will be presumed to be the legal and proper sheriff. Whiting *v.* Hagerty, 5 La. Ann. 686.

Judicial Notice. — Courts take judicial notice of the sheriff of the county in which court is sitting. Davis *v.* Burt, 7 Iowa 56.

Where a process issued to the sheriff of a particular county is returned executed by S. B., as sheriff, generally, the court will recognize him as the person of that name who is sheriff of that county. Snelgrove *v.* Branch Bank of Mobile, 5 Ala. 295.

When a Deputy Sheriff Says in the return that the service was made by him, it cannot be presumed that the writ was executed by his principal, or that the latter was present and cognizant of what was done, or the manner in which service was actually made. O'Conner *v.* Wilson, 57 Ill. 226.

8. Jones *v.* Jones, 60 Tex. 451. A judgment was rendered against defendant in county court, and a stay of execution taken. A transcript was afterwards filed in the district court, and an execution issued and a sale of real estate had. On a motion to confirm the sale, objection was made that service of summons in the original case was not made by party authorized to serve process. *Held*, that it will be presumed after judgment that the party serving process had authority to do so. Gilbert *v.* Brown, 9 Neb. 90, 2 N. W. 376.

9. *United States.* — Knowles *v.* Gaslight & Coke Co., 19 Wall. 58.

Arkansas. — Henry *v.* Ward, 4 Ark. 150.

California. — Crane *v.* Brannan, 3 Cal. 192.

Indiana. — Baltimore & O. R. Co. *v.* Brant, 132 Ind. 37, 31 N. E. 464; Ohio & Mo. R. Co. *v.* Quier, 16 Ind. 440.

Kansas. — Ingraham *v.* McGraw, 3 Kan. 520.

Louisiana. — Whiting *v.* Hagerty, 5 La. Ann. 686; Kendrick *v.* Kendrick, 19 La. O. S. 26.

Massachusetts. — Richardson *v.* Smith, 1 Allen 541.

Missouri. — Crowley *v.* Wallace, 12 Mo. 143.

Nebraska. — Gilbert *v.* Brown, 9 Neb. 90, 2 N. W. 376.

It is not necessary for the sheriff to state, in his return, that he executed the process in his own county. The law requires him to state how, but not where he executed it. If he states that he executed it, the presumption is that he executed it within his own county. Henry *v.* Ward, 4 Ark. 150.

If the place where the writ is served is not stated, the court should assume, as the writ was directed to the sheriff of San Francisco, and returned by him served, that it was served within his jurisdiction. Crane *v.* Brannan, 3 Cal. 192.

Where the return of service of summons of an officer fails to show in what county it was served, it will be presumed that the officer served the party in the county for which he was elected. Gilbert *v.* Brown, 9 Neb. 90, 2 N. W. 376.

E. Parties Upon Whom Served. — It will be presumed that service was made upon the proper parties,[10] and all of them.[11]

F. Time of Service. — It will also be presumed that service was made within the time required by law,[12] and upon the day of the

Constable. — If no place of service is named in a return of service by a constable, the presumption is *prima facie* that it was within his precinct. Richardson *v.* Smith, 1 Allen (Mass.) 541.

The failure of a constable to specify in his return that the writ was served in his township will not vitiate all the subsequent proceedings had upon it, so that they may be pronounced void on a collateral proceeding. Crowley *v.* Wallace, 12 Mo. 143.

In an action before a justice of the peace, against a railway company, where the writ was served upon a conductor of the railway company who constantly passed through the county, it will be presumed that the officer did not depart from the limits of his jurisdiction, in the absence of a showing to the contrary; and the return need not show that the officer made the service within his own county. Baltimore & O. R. Co. *v.* Brant, 132 Ind. 37, 31 N. E. 464; Ohio & M. R. Co. *v.* Quier, 16 Ind. 440.

10. Union Tract. Co. *v.* Barnett, 31 Ind. App. 467, 67 N. E. 205; Dawson *v.* State Bank, 3 Ark. 505; Butterfield *v.* Johnson, 46 Ill. 68; Davis *v.* Burt, 7 Iowa 56; Sanders *v.* Dowell, 7 Smed. & M. (Miss.) 206.

In Davis *v.* Burt, 7 Iowa 56, the sheriff's return to a notice issued to Luther Burt, showed service on L. Burt, and it was held that the court could infer that the person returned served by sheriff was person named in notice.

If a summons against A. B., senior, is returned by the sheriff served, "on the within named A. B., junior," the law presumes that the sheriff has done his duty and not an illegal act; and the addition of the letters "junior" will not falsify his statement that he has served the writ on the person named in it. Dawson *v.* State Bank, 3 Ark. 505.

Where the addition of "junior" is affixed to the name of a party against whom process is issued, and the officer returns the process served upon the nomination of the party, omitting only the addition of "junior," in the absence of any proof showing that the process was in fact served upon the wrong individual, the presumption is that the officer did his duty and executed the process upon the right person. Sanders *v.* Dowell, 7 Smed. & M. (Miss.) 206.

Defendant Named in Complaint. The return not showing upon whom summons was served, it will be presumed, in the absence of evidence to the contrary, that service was had upon the defendant named in complaint. Union Trac. Co. *v.* Barnett, 31 Ind. App. 467, 67 N. E. 205.

As Between Petition and Writ. In Butterfield *v.* Johnson, 46 Ill. 68, one of the defendants was named Butterfield and his christian name was spelled in the bill both "Sylvius" and "Sylvanus." The summons was against Sylvanus H. Butterfield, and was returned served on S. H. Butterfield. It was held that the presumption, if any presumption was to be indulged, must be that the service was on a person named "Sylvanus" and not one named "Sylvius." A sheriff could only know who were the defendants by his writ, and the meaning of his return must be judged by an inspection of the writ as it stood in his hands.

Where a process issues against A. S. & A. L. setting out their names at length, and is returned executed on S., merely stating his surname, it will be intended that he is the person of that name designated in process. Snelgrove *v.* Branch Bank of Mobile, 5 Ala. 295.

11. The return of a writ, issued against three defendants, "executed," will be intended by the court to have been executed on all the defendants. Cantley *v.* Moody, 7 Port. (Ala.) 443.

12. Reid *v.* Jordan, 56 Ga. 282; Crane *v.* Brannan, 3 Cal. 192; Cosby *v.* Bustard, 16 Ky. 137; Fleming *v.* Conrad, 11 Mart. O. S. (La.) 301;

date of the jurat, or of the official certificate of the service.[13]

G. Place of Defendant's Residence. — It will be presumed that the defendant's residence was at the place named in the return,[14] and in the county where he was served.[15]

H. Diligence of Officer. — And an officer charged with the execution of process is presumed to have used due diligence, in the absence of evidence to the contrary.[16]

Calvert W. & B. V. R. Co. *v.* Driskill, 31 Tex. Civ. App. 200, 71 S. W. 997; Tobar *v.* Losano, 6 Tex. Civ. App. 698, 29 S. W. 973.

A sheriff's return, which is ambiguous as to the time when he executed the process, will be construed in favor of the plaintiff, because it must be presumed that the sheriff did his duty, unless the contrary appears. Cosby *v.* Bustard, 16 Ky. 137.

In Proper Time for Default. — If the sheriff's return shows that the petition and citation were served on the defendant, it will be presumed that they were served as the law required, in proper time for default to have been taken. Fleming *v.* Conrad, 11 Mart. O. S. (La.) 301.

A citation will be presumed to have been returned in due time, when the court has acted on it by taking judgment by default, although it does not appear by the citation, return, file mark, or otherwise, when it was returned. Calvert W. & B. V. R. Co. *v.* Driskill, 31 Tex. Civ. App. 200, 71 S. W. 997.

Where the return of service by an officer is not dated, the presumption is that service was perfected within time prescribed by law. Reid *v.* Jordan, 56 Ga. 282.

Citation by Publication. — The return on a citation by publication showing that the time elapsing from the date of its issuance and the return day was less than the requisite time, does not render the citation void when the officer's return recites it was published the required time previous to return thereof. Tobar *v.* Losano, 6 Tex. Civ. App. 698, 29 S. W. 973.

13. Reed *v.* Catlin, 49 Wis. 686, 6 N. W. 326.

14. Smithson *v.* Briggs, 33 Gratt. (Va.) 180; Ingraham *v.* McGraw, 3 Kan. 520.

An officer's return recited "served this writ on the within named defendant, by leaving a copy at his usual place of residence in said county." *Held,* on motion to set aside the service, that it will be presumed that the place where the copy was left the usual place of residence of the defendant at the time. Ingraham *v.* McGraw, 3 Kan. 522.

The officer's return recited that defendant not being found at his usual place of abode, a true copy of the citation was left with his daughter at his residence. *Held,* it will be presumed that the word "residence" was used as synonymous with his "usual place of abode," and that the notice was sufficient. Smithson *v.* Briggs, 33 Gratt. (Va.) 180.

15. Where default judgment is entered, and the return shows that the defendants were served in a certain county, it will be presumed, in the absence of any evidence to the contrary, that they resided in the county in which they were served. Calderwood *v.* Brooks, 28 Cal. 151. See Pellier *v.* Gillespie, 67 Cal. 582, 8 Pac. 185.

16. Livar *v.* State, 26 Tex. App. 115, 9 S. W. 552. In this case the sheriff returned two of the jurors named in the special venire as not found. The defendant's bill of exceptions to the action of the court holding the return sufficient failed to disclose the diligence used by the sheriff to execute the process, and it was held that the presumption must obtain in favor of the officer.

The diligence used in serving an original notice need not be set out in the officer's return. Where an officer returns that the defendant is not found in his county, he is presumed to have used the necessary diligence; and if he did not, and defendant is injured thereby, he has his remedy; but such failure cannot vitiate the return. Neally *v.* Redman, 5 Iowa 386.

Under a Statute providing that

2. Effect as Evidence. — A. In General. — The return of service of summons or citation, when properly made, is always *prima facie* evidence to establish service.[17]

B. Conclusiveness. — a. *Direct Proceeding.* — **(1.) Before Judgment.** — The officer's return is not conclusive evidence of service when such return of service is attacked by a special appearance for that purpose.[18]

where the defendant is an infant under fourteen years of age, the service must be upon him and his father or guardian; and where the infant is over fourteen service upon him is sufficient, it has been held, in a proceeding against an infant where nothing appears in the record to show the age of infant, or whether he had a guardian or not, the sheriff's return upon the summons that he executetd the same by delivering the infant a copy thereof, will be taken as sufficient, and it will be presumed that the officer performed his duty as required by the statute. Webber *v.* Webber, 58 Ky. 18.

17. *Alabama.* — Dunklin *v.* Wilson, 64 Ala. 162.

Connecticut. — Williams *v.* Cheesebrough, 4 Conn. 356; Butts *v.* Francis, 4 Conn. 424; Watson *v.* Watson, 6 Conn. 334; Sanford *v.* Nichols, 14 Conn. 324.

Georgia. — News Print Co. *v.* Brunswick Pub. Co., 113 Ga. 233, 38 S. E. 853; Welch *v.* Butler, 24 Ga. 445.

Illinois. — Newman *v.* Greeley State Bk., 92 Ill. App. 638; Harper *v.* Mangel, 98 Ill. App. 726; Owens *v.* Ranstead, 22 Ill. 161; Spellmyer *v.* Gaff, 112 Ill. 29.

Indiana. — Pope *v.* Anthony, 5 Blackf. 212; Williams *v.* Stevenson, 103 Ind. 243, 2 N. E. 728; Birch *v.* Frantz, 77 Ind. 199; State *v.* Caldwell, 115 Ind. 6, 6 N. E. 185.

Iowa. — Shehan *v.* Stuart, 117 Iowa 207, 90 N. W. 614; Webster *v.* Hunter, 50 Iowa 215; Buck *v.* Hawley & Hoops, 129 Iowa 406, 105 N. W. 688.

Kansas. — Schnack *v.* Boyd, 59 Kan. 275, 52 Pac. 874.

Kentucky. — Utter *v.* Smith, 80 S. W. 447.

Louisiana. — Baham *v.* Stewart Bros. & Co., 109 La. 999, 34 So. 54; Skilliman *v.* Jones, 3 Mart. N. S. 686; Leverich *v.* Adams, 15 La. Ann. 310.

Massachusetts. — Wardell *v.* Etter, 143 Mass. 19, 8 N. E. 420; Brewer *v.* Holmes, 1 Metc. 288.

Maine. — Augusta *v.* Windsor, 19 Me. 317.

Michigan. — Detroit Free Press Co. *v.* Bogg, 78 Mich. 650, 44 N. W. 149.

Minnesota. — Crosby *v.* Farmer, 39 Minn. 305, 40 N. W. 71.

Missouri. — Newcomb *v.* New York Cent. R. Co., 182 Mo. 687, 81 S. W. 1069; Madison Co. Bk. *v.* Suman, 79 Mo. 527; Reid, Murdock & Co. *v.* Mercurio, 91 Mo. App. 673.

Nebraska. — Baldwin *v.* Burt, 96 N. W. 401; Goble *v.* Brenneman, 106 N. W. 440; Campbell Print. Press Co. *v.* Marder, 50 Neb. 283, 69 N. W. 774.

New Hampshire. — Wendell *v.* Mugridge, 19 N. H. 109.

New Jersey. — Vigers *v.* Mooney, 3 N. J. L. 909.

New York. — Wheeler *v.* New York & H. R. Co., 24 Barb. 414; McKechnie *v.* McKechnie, 39 N. Y. Supp. 402; Szerlip *v.* Baier, 21 Misc. 331, 47 N. Y. Supp. 133.

Oklahoma. — Richardson *v.* Penney, 10 Okla. 32, 61 Pac. 584 (Rehearing denied).

Pennsylvania. — Benwood Iron Works *v.* Hutchinson, 101 Pa. St. 359; Sheets *v.* Chesapeake & Ohio R. Co., 25 Pa. Co. Ct. 25.

Tennessee. — Insurance Co. *v.* Webb, 106 Tenn. 191, 61 S. W. 79; Leonard *v.* O'Neal, 16 Lea 158.

Washington. — Krutz *v.* Isaacs, 25 Wash. 566, 66 Pac. 141.

West Virginia. — Rader *v.* Adamson, 37 W. Va. 582, 16 S. E. 808; Stewart *v.* Stewart, 27 W. Va. 167.

Vermont. — White River Bank *v* Downers, 29 Vt. 332.

18. *Alabama.* — Thorn *v.* Kemp, 98 Ala. 417, 13 So. 749.

(2.) After Judgment. — (A.) Facts Within Officer's Knowledge. The right of a party to contradict the officer's return of service, as to facts within the officer's knowledge, in a direct proceeding to set the judgment aside, has been the occasion of a marked conflict among the authorities. Many of the courts hold to the strict rule that even on a direct proceeding the return of service imports absolute verity, and hence cannot be contradicted.[19]

California. — Raker *v.* Bucher, 100 Cal. 214, 34 Pac. 654, 849. See next note, *infra.*

Connecticut. — Butts *v.* Francis, 4 Conn. 424; Watson *v.* Watson, 4 Conn. 334. See next note, *infra.*

Georgia. — Dasher *v.* Dasher, 47 Ga. 320.

Iowa. — Browning *v.* Gosnell, 91 Iowa 448, 59 N. W. 340; Webster *v.* Hunter, 50 Iowa 215. See next note, *infra.*

Louisiana. — Grant *v.* Harris, 16 La. Ann. 323.

Michigan. — Lane *v.* Jones, 94 Mich. 540, 54 N. W. 283. See next note, *infra.*

Minnesota. — Knutson *v.* Davies, 51 Minn. 363, 53 N. W. 646; Jensen *v.* Crevier, 33 Minn. 372, 23 N. W. 541; Crosby *v.* Farmer, 39 Minn. 305, 40 N. W. 71. See next note, *infra.*

New York. — Boynton *v.* Keesville Elec. L. & P. Co., 5 Misc. 118, 25 N. Y. Supp. 741, 28 Hun 609, 28 N. Y. Supp. 1117. See next note, *infra.*

Texas. — Kemper *v.* Jordan, 26 Tex. Civ. App. 870, 26 S. W. 870.

The sheriff's return of a summons upon the defendant may for good cause be set aside on motion supported by affidavit. If the summons is served by leaving a copy thereof at the wrong place, the defendant, on motion to set the summons aside, made before, answering to writs, may be allowed to disprove the officer's return. Grady *v.* Gosline, 48 Ohio St. 665, 29 N. E. 768.

Sheriff Must Be Made a Party to Traverse. — Though an affidavit of illegality upon the ground that the defendant had not been served and a traverse filed in the entry of service by the sheriff are tried together, it is error to allow the defendant to testify, over proper objection, that the entry of service was untrue, if the sheriff is not a party to the traverse. The mere filing of the traverse and service of a copy of the same upon the sheriff by a private individual does not make the sheriff a party thereto; nor does the taking of his interrogatories by the plaintiff in *fi. fa.* and the introduction of them in evidence on the trial constitute him a party. Parker *v.* Medlock, 117 Ga 813, 45 S. E. 61.

19. Officer's Return Conclusive.

Illinois. — Fitzgerald *v.* Kimball, 86 Ill. 396; Batsford *v.* O'Conner, 57 Ill. 72. *Contra,* Newman *v.* Greeley State Bk., 92 Ill. App. 638.

Indiana. — Birch *v.* Frantz, 77 Ind. 199. *Contra,* Nietert *v.* Trentman, 104 Ind. 390, 4 N. E. 306; Cully *v.* Shirk, 131 Ind. 76, 30 N. E. 882.

Kansas. — Eastward *v.* Carter, 9 Kan. App. 471, 61 Pac. 510; Goddard *v.* Harbour, 56 Kan. 744, 44 Pac. 1055.

Louisiana. — Skilliman *v.* Jones, 3 Mart. N. S. 686; Leonard *v.* O'Neal, 16 Lea 158.

Tennessee. — Ins. Co. *v.* Webb, 106 Tenn. 191, 61 S. W. 79.

Missouri. — Madison Co. Bk. *v.* Suman, 79 Mo. 527; State *v.* O'Neall, 4 Mo. App. 221; Newcomb *v.* New York Cent. R. Co., 182 Mo. 687, 81 S. W. 1069.

Oklahoma. — Richardson *v.* Penney, 10 Okla. 32, 61 Pac. 584 (Rehearing denied).

Pennsylvania. — Shietz *v.* Chesapeake & O. R. Co., 25 Pa. Dist. R. 25, but see *contra,* 18 Pa. St. 605.

Vermont. — White River Bank *v.* Downers, 29 Vt. 332.

West Virginia. — Reder *v.* Adamson, 37 W. Va. 582, 16 S. E. 808; Stewart *v.* Stewart, 27 W. Va. 167.

Wisconsin. — Frederick *v.* Clark, 5 Wis. 191.

Any Other Rule Would Be Attended With So Much Uncertainty, resting upon proof *in pais,* as to produce delays, conjectures and collateral inquires, to the infinite hurt of litigants, to say nothing of its effect upon the just responsibility of the

Other courts, however, while regarding the officer's return of service as strong evidence of the facts to which the law requires him to testify,[20] nevertheless hold that it is not conclusive evidence, but may be impeached or contradicted by extrinsic evidence.[21]

officers charged with the duty of this important service in the administration of justice. Madison Co. Bk. *v.* Suman, 79 Mo. 527.

The return of a sheriff that he has served a summons on the defendant personally, being a matter as to the truth or falsity of which he has personal knowledge, is conclusive between the parties, and cannot be questioned in an action afterwards brought to enjoin the enforcement of a judgment based on such service on the ground that the court was without jurisdiction of the person of the defendants. Goddard *v.* Harbour, 56 Kan. 744, 44 Pac. 1055; Eastwood *v.* Carter, 9 Kan. App. 471, 61 Pac. 510.

A return of service of process, indorsed on it by the sheriff, or coroner acting in his stead, being the performance of an act in the discharge of his official duty, is presumed to have been made under oath, and until set aside by the court, or disproved in a proper case, imports absolute verity like any other part of the record. Dunklin *v.* Wilson, 64 Ala. 162.

By Reference to Copy. — An officer's return cannot be contradicted by reference to a copy of writ left by him in serving, as a copy is extraneous and requires proof of identity, nor by parol evidence. White River Bank *v.* Downers, 29 Vt. 332.

A Judgment Cannot Be Impeached or Reviewed by Certiorari, and *supersedeas* upon the ground that the petitioner was not served with process, where it appears from the return of an officer in the original record that he was served with process. The return of the officer cannot be impeached or contradicted in such proceedings. The petitioner's remedy, if return is false, is by bill in equity or by action against the officer. Ins. Co. *v.* Webb, 106 Tenn. 191, 61 S. W. 79.

20. Strong Evidence, but Not Conclusive. — The sheriff's return of service of an original notice in a suit is not conclusive, but upon grounds of public policy it must be regarded as strong evidence of the facts to which the law requires him to testify. Where an original notice duly signed by plaintiff's attorney is served by a deputy sheriff, a return by the sheriff that a true copy was delivered is overcome by an affiadavit of the person served, that the copy delivered did not show the original, to have been so signed. Hoitt *v.* Skinner, 99 Iowa 360, 68 N. W. 788.

21. Extrinsic Evidence Is Admissible to Contradict. — *Alabama.* — Thorn *v.* Kemp, 98 Ala. 417, 13 So. 749.

California. — Baker *v.* Bucher, 100 Cal. 214, 34 Pac. 849.

Connecticut. — Williams *v.* Cheesebrough, 4 Conn. 356; Butts *v.* Francis, 4 Conn. 424; Watson *v.* Watson, 6 Conn. 334; Stanford *v.* Nichols, 14 Conn. 324.

Georgia. — Welch *v.* Butler, 24 Ga. 445; Dasher *v.* Dasher, 47 Ga. 320.

Iowa. — Shehan *v.* Stuart, 117 Iowa 207, 90 N. W. 614; Webster *v.* Hunter, 50 Iowa 215; Buck *v.* Hawley & Hoops, 129 Iowa 400, 105 N. W. 688; Hoitt *v.* Skinner, 99 Iowa 360, 68 N. W. 788.

Illinois. — Newman *v.* Greeley State Bk., 92 Ill. App. 638.

Indiana. — Nietert *v.* Trentman, 104 Ind. 390, 4 N. E. 306; Pope *v.* Anthony, 5 Blackf. 212; Cully *v.* Shirk, 131 Ind. 76, 30 N. E. 882.

Massachusetts. — Brewer *v.* Holmes, 1 Metc. 288.

Michigan. — Luton *v.* Sharp, 94 Mich. 202, 53 N. W. 1054; Lane *v.* Jones, 94 Mich. 540, 54 N. W. 283; Campbell *v.* Donovan, 111 Mich. 247, 69 N. W. 514.

Minnesota. — Jensen *v.* Crevier, 33 Minn. 372, 23 N. W. 541; Knutson *v.* Davies, 51 Minn. 363, 53 N. W. 646; Crosby *v.* Farmer, 39 Minn. 305, 40 N. W. 71.

Nebraska. — Campbell Print Co. *v.* Moulder, 50 Neb. 283; 69 N. W. 774; Goble *v.* Brenneman, 106 N. W. 440.

New York. — Wheeler & Wilson Co. *v.* McLaughlin, 54 Hun 639, 8 N. Y. Supp. 95; Wheeler *v.* New York

& H. R. Co., 24 Barb. 414; Boynton *v.* Keeseville Elec. L. & P. Co., 5 Misc. 118, 25 N. Y. Supp. 741, 78 Hun 609, 28 N. Y. Supp. 1117; Hubbard *v.* Chapin, 28 How. Pr. 407.

North Carolina. — Godwin *v.* Monds, 106 N. C. 448, 10 S. E. 1044.

Ohio. — Grady *v.* Gosline, 48 Ohio St. 665, 29 N. E. 768.

Pennsylvania. — Stauffer *v.* Beetum, 18 Pa. Co. Ct. 605.

Rule Stated. — "The rule of the English common law is that, as between the parties to the process or their privies, a sheriff's return is conclusive, and that the court will not try the truth of it on motion to set aside the proceedings or allow any averment against it to be taken in pleading; that if false, the only remedy is against the sheriff by action. The reason usually given for the rule is that, it is necessary to secure the rights of parties and give validity and effect to the acts of ministerial officers. In England the process could only be served by the sheriff, who was the only ministerial officer known to the courts for that purpose, moreover, under the common-law practice which obtained there, it was almost impossible for judgment to be rendered against a party without actual personal notice to him. Under such a system, the rule might be convenient and without much danger of working injustice. But under the practice which obtains in this and other states, most of the old safe-guards have been removed; and the necessity for modifying the rule and adapting it to the changed condition of the law, has been often felt and frequently acted upon, especially in the case of *original* process by which the court acquires jurisdiction. In the District Court a summons may be served by any person not a party to the action, and his affidavit of service is placed virtually on the same footing as the return of a sheriff. . . . The remedy by action for false return, under such a system, would often be inadequate or wholly fruitless. Again, the manner of service has been in other respects so materially changed that actual personal service is unnecessary and the officer making service must often as to facts not within his personal knowledge, return, but in the determination of which he must frequently rely upon information received from others. . . . There are very good reasons why the return of a ministerial officer should be held conclusive in all collateral proceedings, but we can see none, either upon principle or considerations of policy, why it may not be impeached for falsity in direct proceedings in the action; assuming always, of course that no rights of third parties have intervened. Any evils or inconvenience which can possibly arise from permitting this to be done would in our judgment be greatly outweighed by the injustice that would often result from prohibiting it. The general tendency, especially in states having a code practice like ours, is to allow the return to be impeached by affidavit on motion or other direct proceedings to vacate. Crosby *v.* Farmer, 39 Minn. 305, 40 N. W. 71.

The return as to *mesne*, as well as final process, is held to be only *prima facie* evidence. Williams *v.* Cheesebrough, 4 Conn. 356; Butts *v.* Francis, 4 Conn. 424; Watson *v.* Watson, 6 Conn. 334; Sanford *v.* Nichols, 14 Conn. 324.

Defendant May Show, as an Excuse for Not Appearing to the action in which he was defaulted, that the summons was not in fact served upon him, and that he had no notice of the pendency of the action, or of the rendition of judgment, notwithstanding the fact that the sheriff's return shows service by reading. Nietert *v.* Trentman, 104 Ind. 390, 4 N. E. 306.

Proof of No Service on One as Evidence of Falsity of Whole Return. — Evidence that an original notice was not served on one of two defendants, as recited in the return, is admissible to show the falsity of the return as a whole. Buck *v.* Hawley & Hoops, 129 Iowa 406, 105 N. W. 688.

Recital Not Conclusive of Official Character. — The fact that one who signs the return of service of an original notice styles himself a deputy sheriff, is not conclusive of his official character, and a default judgment based thereon may be set aside upon a showing that the person making the return was not in fact an

(B.) Collateral Facts and Those Not Within Officer's Knowledge. In those jurisdictions where the rigid rule with reference to the officer's return of service obtains, it is by most of the courts conceded that parol evidence is admissible to prove the existence of collateral facts independent of the return and as to which the return is silent; and to attack the return with reference to matters which are not peculiarly within the officer's knowledge.[22]

officer and that the process was not served as therein stated. Buck *v.* Hawley & Hoops, 129 Iowa 406, 105 N. W. 688.

Return of Constable May Be Shown To Bear Wrong Date. Welch *v.* Butler, 24 Ga. 445.

Judgment Absolutely Void. — It is the settled law in Nebraska that a false return of service of process may be impeached by extrinsic evidence, and that where the attempted service fails to reach the party to be served in any way, a judgment founded thereon is absolutely void and open to collateral attack. Baldwin *v.* Burt (Neb.), 96 N. W. 401; Campbell Print. Press Co. *v.* Marder, 50 Neb. 283, 69 N. W. 774, 61 Am. St. Rep. 573; Eayrs *v.* Nason, 54 Neb. 143, 74 N. W. 408; Holliday *v.* Bowen, 33 Neb. 657, 50 N. W. 1042.

22. *Kansas.* — Eastwood *v.* Carter, 9 Kan. App. 471, 61 Pac. 510; Schnack *v.* Boyd, 59 Kan. 275, 52 Pac. 874; Bond *v.* Wilson, 8 Kan. 228, 12 Am. Rep. 466.

Louisiana. — Baham *v.* Stewart Bros. & Co., 109 La. 999, 34 So. 54.

New Hampshire. — Lewis *v.* Blair, 1 N. H. 68; Wendell *v.* Mugridge, 19 N. H. 109; Angier *v.* Ash, 26 N. H. 99.

New Jersey. — Vigers *v.* Mooney, 3 N. J. L. 909.

Wisconsin. — Carr *v.* Commercial Bank of Racine, 16 Wis. 52.

Rule Stated. — "The sheriff not only executes the original process by service upon the defendant personally, but by leaving a copy at his usual place of residence. The sheriff also determines whether a minor is over fourteen years of age, and serves accordingly. He also determines who is president, mayor, chairman, or chief officer of a board of directors; and also what is the usual place of business of a corporation, and who has charge thereof, and serves his process accordingly. Is his determination of such questions final? Must the defendant suffer the judgment to stand in such cases, and resort to his remedy against the officer? . . . We find upon examination that the courts have generally held the sheriff's return an *mesne* and *final* process conclusive between the parties and privies, though this is by no means a rule of universal application, but that in cases of *original process* there has been a general disposition to let in the truth. . . . We know of no statute that makes a sheriff a final and exclusive judge of where a man's residence is, or what is the age of a minor, or who are the officers of a corporation, or where the place of business is; and when the statute made it the duty of the sheriff to ascertain these facts, it did not make his return of such facts *conclusive*. Of his own acts, his knowledge ought to be absolute, and himself officially responsible. Of such facts as are not in his special knowledge, he must act from information which will often come from interested parties, and his return thereof ought not to be held conclusive. Bond *v.* Wilson, 8 Kan. 158, 12 Am. Rep. 466. See also Crosby *v.* Farmer, 39 Minn. 305, 40 N. W. 71.

Parol Evidence Is Admissible To Prove the Existence of Collateral Facts Independent of the Return, and as To Which the Return Is Silent. — Where sheriff's return shows service upon B. by delivering copies of the petition at a certain time to Mrs. B., B. himself being absent, parol evidence is admissible to show that B. had only one residence, the place where service was made; that B. was married and that his wife was over fourteen years of age, and that she resided with him. Baham *v.* Stewart Bros. & Co., 109 La. 999, 34 So. 54.

Residence. — The extent of the

(C.) Supplying and Explaining Return, and Explaining Manner of Service. — With a few exceptions,[23] even in those jurisdictions

rule as to the conclusiveness of an officer's return is, that it cannot be contradicted so as to defeat any right or title acquired under it. The return upon a writ that the officer left a summons at the defendant's last and usual place of abode within the state, is not conclusive upon the question of residence, so that evidence is admissible that the defendant at the time of the service, was absent from the state, and had not then, in fact, any last and usual place of residence. Wendell *v.* Mugridge, 19 N. H. 109. Affidavit held admissible on *certiorari* to prove that the summons was served on a person who was not living with defendant. Vigers *v.* Mooney, 3 N. J. L. 909.

In an action for equitable relief against a judgment which had been rendered without the court's having acquired jurisdiction of defendant's person because of a failure to properly serve him with process, the return of sheriff that he made such service by leaving a copy with a person of suitable age at the residence of the defendant, is subject to attack upon the question of residence, since a sheriff's return is conclusive only as to the matters peculiarly within his own knowledge. Krutz *v.* Isaacs, 25 Wash. 566, 66 Pac. 141.

To Show That Defendant and Another Had the Same Initials. — A party may show that he was not served; but not merely that, for that would contradict the return; but in connection therewith, he may show that he and another man of the same initials resided in M. County and that process or summons was served on that other man. Slingluff *v.* Gainer, 49 W. Va. 7, 37 S. E. 771.

An officer, who had a writ of summons directed to a person by a certain name and two individuals are known in the community by that name, may point out, in giving testimony, the person he served, and such testimony does not contradict his return. Reid, Murdock & Co. *v.* Mercino, 91 Mo. App. 673.

Proper Officer of Corporation. We are not aware of any statute which makes it the duty of the sheriff to ascertain and certify whether a person is an officer of a corporation; and on this ground alone the return ought not to be held conclusive of that fact. Carr *v.* Commercial Bank of Racine, 16 Wis. 52, *citing* Angier *v.* Ash, 6 Foster 99; Lewis *v.* Blair, 1 N. H. 69. See also Carr *v.* Commerical Bank of Racine, 16 Wis. 52, 687, 81 S. W. 1069, *holding* that evidence was admissible to show that a party served had ceased to be an officer of the bank for some months before the summons, and complaint were served upon him. But see Newcomb *v.* New York Cent. R. Co., 182 Mo. 687.

In a proceeding To Enforce Stockholders Individual Liability. — It is competent to show that the person served in the original action was not an officer of the corporation. The secretaryship of the corporation is not a matter within the knowledge of the sheriff, and his return of service upon the particular person as secretary of the corporation, may be overthrown in a collateral proceeding of this kind. Schnack *v.* Boyd, 59 Kan. 275, 52 Pac. 874.

Compare. — Newcomb *v.* New York Cent. R. Co., 182 Mo. 687, 81 S. W. 1069, where it is held that the statements of the sheriff showing service of the summons on the agent of the defendant, are, for the purposes of the suit, conclusive on the parties to it; and that the court should ignore affidavits contradicting the statements in that return to the effect that the person therein recited to be the agent of defendant were in fact not such.

23. White River Bank *v.* Downer, 29 Vt. 332.

Proof of service of citation is not a matter *in pais*, but must appear by the sheriff's return. The court can presume nothing with regard to a party being cited. Wooldridge *v.* Monteuse & Hedrick, 27 La. Ann. 79.

The return of citation cannot be explained by parol, not even by the sheriff or his deputy. The remedy in such case is to call on the officer to amend. Skilliman *v.* Jones, 3 Mart. N. S. (La.) 686.

where the return is not permitted to be contradicted by parol evidence, it is held competent to supply omitted facts therein and to explain the return and manner of service by extrinsic evidence.[24]

After Death of Officer parol evidence is not admissible to show when process was served, where return is silent.[25]

(D.) Fraud or Mistake. — Upon an original bill in equity, or cross-complaint, seeking equitable relief against a false return on account of fraud or mistake, extrinsic evidence is admissible to defeat the officer's return.[26]

The return can neither be contradicted nor explained by extrinsic evidence as by reference to copy of writ left when serving. White River Bank *v.* Downer, 29 Vt. 332.

Foreign Corporation. — Failure of Return To Show Character of Agent Served. — Under a statute providing that in a suit against a foreign corporation, process may be served upon any officer or agent of such corporation, a return of service upon a foreign corporation which omits to set forth the character of the agent served, is only *prima facie* evidence of a good service, and may be rebutted by proof to the contrary. Hagerman *v.* Empire Slate Co., 97 Pa. St. 534.

24. Supplying Omitted Facts. Brusie *v.* Gates, 80 Cal. 462, 22 Pac. 284; Smith *v.* DeKock, 81 Iowa 535, 46 N. W. 1056.

Explaining Return. — Johnson *v.* State, 80 Ind. 220; Leonard *v.* O'Neal, 16 Lea (Tenn.) 158; King *v.* Russell, 40 Tex. 124.

Ambiguities. — Ware *v.* Wilson, 22 La. Ann. 102.

Contradictions. — Weaver *v.* Stacy, 105 Iowa 657, 75 N. W. 640.

The sheriff's testimony in explanation of what was meant by his return is competent and properly admitted, where it does not contradict such return. Leonard *v.* O'Neal, 16 Lea (Tenn.) 158.

In State *ex rel.* Maggard *v.* Caldwell, 115 Ind. 6, 6 N. E. 185, an action on a constable's bond for breach of official duty in permitting a bastardy prisoner to escape, the defendant without objections from the plaintiff testified to a state of facts showing that he had made the arrest, and it was held proper to permit him to testify, in explanation of the apparent contradiction between the testimony and his return on the warrant, that his return showing the arrest and escape of the defendant was made in that manner at the request of the relatrix's attorney.

In Wardell *v.* Etter, 143 Mass. 19, 8 N. E. 420, an action to recover the possession of a certain tenement where the notice fixed the "6th of July current by 12 o'clock noon" as the time when the tenant was required to vacate the premises, it was important for the plaintiff to show that his writ was not sued out and served before that time. The writ was dated July 6th, and the officer returned that he served it on July 6th. For the purpose of showing that it was issued and served the afternoon of that day, it was held competent for the officer to testify that he served it in the evening; that this testimony did not contradict nor vary his return, but was consistent with it.

Explaining Manner of Service. While proof may not be admissible for the purpose of contradicting a sheriff's return on a writ of restitution, it is not error to admit evidence as to the manner in which the writ was executed, and to show that, while the sheriff did technically give possession to the plaintiff, the defendants in fact retained actual possession and kept the plaintiff out after the sheriff had made his return. Richardson *v.* Penney, 10 Okla. 32, 61 Pac. 584.

25. Wilson *v.* Greathouse, 2 Ill. 174.

26. Ownes *v.* Ranstead, 22 Ill. 161. In Harper *v.* Mangel, 98 Ill. App. 526, the bill in equity alleged that the return indorsed on the summons had been served on appellee was false, untrue, or a mistake, and that the

b. *Collateral Attack.* — As to matters which the officer is required by law to state in his return, not only the courts leaning to the liberal rule as to the effect of the officer's return, but also those holding to the strict verity of the return, hold that the return is inviolable, even for fraud or mistake of fact, in a collateral proceeding.[27]

c. *As to Third Persons.* — The absolute verity of an officer's return does not obtain as against a stranger to the record, he is not estopped from impeaching or contradicting such return.[28]

C. Sufficiency of Evidence to Impeach Return. — a. *At Law.* — In order to overcome an officer's return of service, clear

writ was never served upon the appellee in any manner. The court said: "We cannot doubt that it is unjust and unconscientious to enforce a judgment so obtained. We think in all cases where a sheriff or other officer by fraud and collusion with a party or by mistake makes a false return a court of equity has full power and jurisdiction to interpose and give the appellee relief and to permit the party injured, so that the remedy may be effective, to aver against the truth of the return and show it to be false, although it is a matter of record."

In States Where the Legal and Equitable Jurisdictions Are Concurrent, and where an equitable defense is good to an action at law, the officer's return may be averred against as fraudulent in a proceeding on cross-bill to set aside a judgment by default, and parol evidence contradicting the return will be heard. Randall *v.* Collins, 58 Tex. 231.

Great Latitude Allowed. — In an action which involves the question of simulation, great latitude is permitted in the introduction of proof, and officers may be called upon to state anything which does not directly contradict their return, although the same may be connected with other and extraneous proof which shall have the effect of showing that the officer was mistaken in such return. Leverich *v.* Adams, 15 La. Ann. 310.

27. *United States.* — Brown *v.* Kennedy, 15 Wall. 591; Miller *v.* United States, 11 Wall. 268, 294.

Arkansas. — Newton *v.* State Bank, 14 Ark. 9, 58 Am. Dec. 363.

Georgia. — Tillman *v.* Davis, 28 Ga. 494, 73 Am. Dec. 786.

Illinois. — Rward *v.* Gardner, 39 Ill. 125; Harrison *v.* Hart, 21 Ill. App. 348.

Indiana. — Burger *v.* Becket, 6 Blackf. 61; Rowell *v.* Klein, 44 Ind. 290, 15 Am. Rep. 235.

Kentucky. — Utter *v.* Smith, 80 S. W. 447.

Massachusetts. — Campbell *v.* Webster, 15 Gray 28.

Maine. — Grover *v.* Howard, 31 Me. 546; Huntress *v.* Tiney, 39 Me. 237.

Missouri. — Hallowell *v.* Page, 24 Mo. 590.

Nebraska. — Johnson *v.* Jones, 2 Neb. 126; Baldwin *v.* Burt, 43 Neb. 245, 61 N. W. 601.

New Hampshire. — Bolles *v.* Bowen, 45 N. H. 124.

New Jersey. — Castner *v.* Styer, 23 N. J. L. 236.

New York. — Bovmer *v.* Laine, 10 Wend. 525.

Pennsylvania. — Paxson's Appeal, 49 Pa. St. 195; Hill *v.* Grant, 49 Pa. St. 200; Rice *v.* Groff, 58 Pa. St. 116.

Texas. — Rutledge *v.* Mayfield (Tex. Civ. App.), 26 S. W. 910.

Vermont. — Wood *v.* Doane, 20 Vt. 612.

Wisconsin. — Carr *v.* Commercial Bank of Racine, 16 Wis. 52.

The return of the officer is a part of the record and cannot be impeached collaterally. It is as much a part of the record as the pleadings and the judgment in the case. The return of the officer is conclusive as to the facts recited as to the parties to the suit, and the party injured has his remedy against the officer and his sureties. It is like the acknowledgment of a deed. Madison Co. Bk. *v.* Suman, 79 Mo. 527.

28. *United States.* — Fife *v.* Bohlen, 22 Fed. 878.

Alabama. — Crow *v.* Hudson, 21 Ala. 560.

and satisfactory evidence must be adduced, since the return affords strong evidence of service. The unsupported testimony of one witness is insufficient.[29]

b. *In Equity.* — In order to contradict the officer's return for fraud or mistake in equity, the evidence must be clear and satisfactory, and two witnesses or one witness with strong corroborating

Arkansas. — Tucker *v.* Bond, 23 Ark. 268.

Georgia. — Gray *v.* Cole, 20 Ga. 203.

Indiana — Butler *v.* State, 20 Ind. 169.

Iowa. — Kingsbury *v.* Buchanan, 11 Iowa 387.

Kansas. — Schnack *v.* Boyd, 59 Kan. 275, 52 Pac. 874.

Maine. — Kendall *v.* White, 13 Me. 245.

Michigan. — Nall *v.* Granger, 8 Mich. 450, 77 Am. Dec. 462.

Minnesota. — Tullis *v.* Brawley, 3 Minn. 191.

Missouri. — State *v.* Rainey (Mo. App.), 73 S. W. 250.

New Hampshire. — Angier *v.* Ash, 26 N. H. 99.

New York. — Cornell *v.* Cook, 7 Cow. 310; Henderson *v.* Cairns, 14 Barb. 15.

Ohio. — Phillips *v.* Elwell, 14 Ohio St. 240, 84 Am. Dec. 373.

Pennsylvania. — Paxson's Appeal, 49 Pa. St. 195.

Rhode Island. — Dowell *v.* Goodwin, 22 R. I. 287, 47 Atl. 693, 84 Am. St. Rep. 873, 51 L. R. A. 872.

Vermont. — Hathaway *v.* Goodrich, 5 Vt. 65.

29. *Georgia.* — Davant *v.* Carlton, 53 Ga. 491.

Illinois. — Sullivan *v.* Niehoff, 27 Ill. App. 421; Callender *v.* Gates, 45 Ill. App. 374.

Kansas. — Stenkle *v.* Holland, 4 Kan. App. 478, 46 Pac. 416; Starkweather *v.* Morgan, 15 Kan. 274.

Maryland. — Abell *v.* Simon, 49 Md. 318.

Nebraska. — Wilson *v.* Shipman, 34 Neb. 573, 52 N. W. 576.

Texas. — Gatlin *v.* Dibrell, 74 Tex. 36, 11 S. W. 908.

Testimony of the Defendant Is Not Sufficient. — Paul *v.* Malone, 87 Ala. 544, 6 So. 351.

An officer's return of service cannot be impeached by means of equivocal and evasive affidavits; and to set aside and vacate a judgment on the ground that such a return is false, the proof of its untruthfulness must be positive, satisfactory and convincing. Osman *v.* Wisted, 78 Minn. 295, 80 N. W. 1127.

The positive testimony of one against whom a decree was entered, that no service of notice was ever made upon him, and the testimony of the sheriff who made the service and the return that he would have been likely to remember it if he had made it, and that he did not remember making it, was, in the absence of the return, sufficient to overcome the presumption of service arising from recitals of personal service contained in the decree, supported only by entries of such service in appearance docket and fee books. Shehan *v.* Stuart, 117 Iowa 207, 90 N. W. 614.

When the original process is lost and cannot be found, and the appearance docket recites that a summons was issued and returned "served," the presumption is that such return was regular and the service valid. To overthrow the presumption of the validity of the service of original process and the return thereof, where the original papers are lost and cannot be found, positive testimony must be introduced to show that S. was not in fact legally served and that service was irregular. Evidence which merely casts doubt upon such service or return is not sufficient. Stunkle *v.* Holland, 4 Kan. App. 478, 46 Pac. 416.

The presumption in favor of jurisdiction from the recitals of personal service in the default judgment and return of the officer, is not overcome by testimony tending to show that defendant was absent from the state at time of alleged service of summons. Mosher *v.* McDonald & Co, (Iowa), 102 N. W. 837.

circumstances, equivalent to the testimony of another witness, are required.[30]

III. SUBSTITUTED SERVICE.

1. Service by Publication. — A. In General. — Proof of service by publication is generally provided for and regulated by the statutes of the several states, which usually read, — "that proof of publication may be shown by the affidavit of the publisher, proprietor, printer, principal clerk or other employe familiar with the publication of the notice."[31]

B. Sufficiency of Affidavit. — a. *As to Affiant.* — An affidavit made by a clerk in a newspaper office, where it appears from the affidavit that he is the only clerk, is sufficient.[32] A statute requiring the affidavit to be made by the printer, is complied with when made by the proprietor.[33] The affidavit of an editor is not equivalent to that of the printer and the proprietor, as required[34] the affidavit of the book-keeper is considered *prima facie* evidence of publication where proof may be made by the printer, his foreman or principal clerk, or other person knowing the publication.[35]

30. Driver *v.* Cobb, 1 Tenn. Ch. 490.

"It is not like an ordinary issue of fact to be determined by a mere preponderance of testimony. . . . 'Nor will one witness alone suffice to successfully impeach the return, for that would only be oath against oath. In analogy to the denials or averments of a sworn answer upon the defendant's knowledge, there should be two witnesses, or one witness with strong corroborating circumstances, and without reference to the rule; upon general principles it would seem essential to the peace and quiet of society that these solemn official acts should not be set aside with the same ease as an ordinary act *in pais.*'" Randall *v.* Collins, 58 Tex. 231.

31. See following cases.

32. Gray *v.* Palmer, 9 Cal. 616.

33. Printer and proprietor are the same in the sense of the statute. Quivey *v.* Porter, 37 Cal. 458. A publisher is presumed to be the printer in the absence of a showing to the contrary. People *v.* Thomas, 101 Cal. 571, 36 Pac. 9.

34. Bowen *v.* Woods, 29 Ky. 11; Butler *v.* Cooper, 29 Ky. 29; Hay *v.* McKinney, 30 Ky. 441.

35. Taylor *v.* Coots, 32 Neb. 30; 48 N. W. 964.

Proxy, Affidavit of, Not Sufficient. The editor of the paper and not his proxy, must certify to the publication. Miller *v.* Hall, 19 Ky. 242.

Editor's Name Signed by Another. Certificate of publication to which editor's name is signed by another, is no evidence of publication. Nicholas *v.* Gratz, 25 Ky. 486.

Effect of Decree When Affidavit Defective. — A decree against unknown heirs obtained upon the certificate of the "editor" of publication should not be deemed void merely because the certificate had not described himself as "printer," according to the letter of statute. Such a certificate, imparting as it does in this case, the fact of such a publication as the statute requires, the decree rendered therein cannot surely be void, only because the court had admitted other evidence of the fact than that literally prescribed as sufficient. In such a state of the case, this court cannot presume that there had been no constructive notice, as it might do had the record exhibited no certificate or other evidence of a statutory publication. If the court erred in admitting insufficient or incompetent proof of a fact necessary to give him jurisdiction, nevertheless the fact, appearing in the record, its non-existence cannot be presumed, although for want of the prescribed form of proof, the decree might be erroneous. Hardin *v.* Strader, 40 Ky. 286.

b. *As to Recitals of Affidavit.* — The affidavit of publication must show either by an express averment, or by a recital that the affiant occupies the requisite position with the newspaper,[36] although it has been held that a certificate imperfect in this respect may be cured by other proof of publication.[37] The affidavit must further show the name of the paper,[38] and that the publication appeared the length of time directed by the statute,[39] and that the newspaper was one authorized to publish legal notices,[40] and other provisions of the

36. Steinbach *v.* Leese, 27 Cal. 295; Riely *v.* Barton, 32 Ill. App. 524; Miller *v.* Hall, 19 Ky. 242; Evans *v.* Benton, 19 Ky. 389; Bambridge *v.* Owen, 25 Ky. 463; Nicholas *v.* Gratz, 25 Ky. 486; Hopkins *v.* Claybrook, 5 J. J. Marsh (Ky.) 234.

Certificate of publication must purport on its face to be given by proper person connected with the newspaper. Bainbridge *v.* Owen, 25 Ky. 463.

In Farmers Nat. Bank *v.* Fonda, 65 Mich. 533, 32 N. W. 664, where affiant in the affidavit of publication describes himself as printer, but did not directly aver such fact, it was held that the recital was equivalent to such allegation.

The Simple Certificate of the Name of an Individual is not sufficient to authenticate an order of publication. The simple signature "J. J. P." does not authenticate it. "The court does not know that he had any authority to certify the publication of the order, nor does the court know that a paper of the style of that described in the certificate was authorized to publish the order." Brown *v.* Mahan, 27 Ky. 59.

37. Riely *v.* Barton, 32 Ill. App. 524.

Where a defect in the affidavit of service by publication is urged as ground for setting aside a judgment by default, a second affidavit may be allowed in evidence to clear away any possible doubt which there might be about the meaning of the first, and to show that the service by publication was sufficient in fact. Howard *v.* McChesney, 103 Cal. 536, 37 Pac. 523.

38. The certificate of publication must show in what paper the order of publication was published. Hopkins *v.* Claybrook, 5 J. J. Marsh. (Ky.) 234.

39. The certificate of the publication of an order must show in what successive months the order was published. Miller *v.* Hall, 19 Ky. 242.

Certificate of publication must show when the order was published. Hopkins *v.* Claybrook, 5 J. J. Marsh. (Ky.) 234.

Statement of Last Day of Publication. — Where the certificate of publication fails to state the last date it was inserted, there is no legal evidence that publication was made, and a judgment cannot be had. Hemingway *v.* Chicago, 60 Ill. 324.

40. An affidavit stating that a warning order, required to be published once a week for four successive weeks, was published four times in a certain newspaper, naming it, and giving the date of the first and last insertion, but without stating that the newspaper was authorized by statute to publish legal notices, or that the affiant was its editor, publisher, proprietor, or principal accountant, is fatally defective. Cross *v.* Wilson, 52 Ark. 312, 15 S. W. 576.

In obtaining and publishing a warning order, the statute must be strictly and substantially followed. The order must contain all the recitals required by law, and the affidavit of publication must be made by the editor or publisher and show publication for four consecutive weeks. Lawrence *v.* State, 30 Ark. 719.

Under an order of publication of summons requiring a mailing of copies to each of the defendants, an affidavit setting forth that a copy of said summons attached to copy of complaint, directed to numerous defendants, was deposited in the post-office, does not show complete service on any of the defendants, mailing being as much a part of service as publication. The service is not complete unless a copy of the summons and complaint was deposited in post-

statute the proceeding being wholly statutory must be strictly pursued.[41]

C. Proof of Service Otherwise Than by Affidavit of Publisher. — The statutory method of proving service of publication is not exclusive of all other modes of proving such substituted service. The files of the paper in which an order of appearance was published are competent evidence of such publication,[42] and evidence of the publisher or proprietor of paper may be admitted.[43] But in a collateral proceeding the service must appear from the affidavit and other evidence is not admissible to prove the publication.[44]

D. Sufficiency of Publication. — Under statute requiring publication of summons to be made not less than once a week for six consecutive weeks, six publications are sufficient if made once in each week of six consecutive weeks,[45] but proof of publication for "six successive weeks" does not show the publication to have been made "once in each week" for the period named.[46]

2. Proof of Service by Mail. — The deposit of a copy of complaint and summons in postoffice may be proved by the affidavit of the attorney for plaintiff, or any other competent witness.[47]

office for each defendant and directed to each. Harris *v.* Morris (Cal. App.), 84 Pac. 678.

41. A certificate of publication reciting that the newspaper in which the notice was published "was a weekly newspaper published at W.," but failing to state the newspaper was of general circulation in that county, is insufficient in law to give the court jurisdiction of the defendant. Spalding *v.* Fahrney, 108 Ill. App. 602.

Proof of publication may be made in some other mode than by a certificate of the printer or publisher, but when the latter mode is adopted, it must conform to the requirements of the statute. The certificate of a person not appearing to be the printer or publisher of a newspaper, does not comply with the statute; nor will any presumption be indulged, but the fact must appear. Haywood *v.* Collins, 60 Ill. 328.

42. Colton *v.* Ruport, 60 Mich, 318, 27 N. W. 520.

By Code. — The fact that publication for a non-resident to appear and plead to or answer a bill was made in pursuance to an order by the clerk and master, may (under code) be proven by affidavit of the printer, or by the production of the newspaper in court. Claybrook *v.* Wade, 47 Tenn. 555.

43. Robinson *v.* Hall, 33 Kan. 139, 5 Pac. 763.

44. Collateral Proceeding. Where there has been an effort to procure service by publication, and the publisher's certificate is insufficient, the judgment reversed and the defendant files a bill to set aside sales under the judgment as a cloud on his title, the judgment which was void for want of proof of service cannot be rendered valid by the evidence of the printer or publisher that the publication was legally made; that must appear from the certificate of the printer or publisher, or by the findings of the court. It cannot be shown by parol in a collateral proceeding. To permit it, would be violation of all rules of evidence, would destroy all the safeguards to purchasers at judicial sales, render records useless, and open wide the door to fraud and perjury. Haywood *v.* Collins, 60 Ill. 328.

45. State *v.* Superior Court, 6 Wash. 352, 33 Pac. 827.

46. Godfrey *v.* Valentine, 39 Minn. 336, 40 N. W. 163; Ullman *v.* Lion, 8 Minn. 338; Golcher *v.* Brisbin, 20 Minn. 407.

47. Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

The publication of summons is proved by the affidavit of proprietor, etc., of newspaper, and the fact that

IV. RECITAL OF SERVICE IN JUDGMENT.

1. Domestic Judgment. — A. PRIMA FACIE. — The entry of a judgment or decree by a court of necessity presupposes the fact that the court has found that due service has been had or an appearance has been entered, and a recital of service in such judgment or decree, is by all the decisions declared to be at least *prima facie* evidence thereof.[48]

B. CONCLUSIVENESS. — a. *In Direct Proceeding.* — The recital of

a copy of the summons had been duly deposited in the postoffice, properly directed, is proved by the affidavit of a competent witness, and a *return of such facts* indorsed upon the summons by a constable or sheriff is not necessary in such cases. Seaver *v.* Fitzgerald, 23 Cal. 85.

Where Clerk Fails To Make Entry of Mailing. — Where, in a suit for partition, the clerk of the court mails newspapers, containing notices of the pendency of the suit, addressed to the non-resident defendant's but does not make an entry thereof upon the appearance docket, parol evidence is competent to show that such papers were sent. English *v.* Monypeny, 6 Ohio Co. Ct. 554.

48. *United States.* — Hartley *v.* Boynton, 5 McCrary C. C. 453, 17 Fed. 873.

Alabama. — Talladega Ins. Co. *v.* Woodward, 44 Ala. 287.

Arkansas. — McLain *v.* Duncan, 57 Ark. 49, 20 S. W. 597.

California. — Leese *v.* Clark, 28 Cal. 26; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; Vasault *v.* Austin, 36 Cal. 691; Reily *v.* Lancaster, 39 Cal. 354; Treeman *v.* Robinson, 44 Cal. 623; *Ex parte* Ah Men, 77 Cal. 198, 19 Pac. 380; People *v.* Harrison, 84 Cal. 607, 24 Pac. 311.

Connecticut. — Coit *v.* Haven, 30 Conn. 190, 79 Am. Dec. 244.

Illinois. — Barnett *v.* Wolf, 70 Ill. 76; Senichka *v.* Lowe, 74 Ill. 274; Osgood *v.* Blackmore, 59 Ill. 261; Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457; Haywood *v.* Collins, 60 Ill. 328; Andrews *v.* Bernhardi, 87 Ill. 365; Logan *v.* Williams, 76 Ill. 175.

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

Iowa. — Mosher *v.* McDonald & Co., 102 N. W. 837; Schee *v.* La-Grange, 78 Iowa 101, 42 N. W. 616.

Kentucky. — Sears Heirs *v.* Sears Heirs, 95 Ky. 173, 25 S. W. 600, 44 Am. St. Rep. 213.

Massachusetts. — Rand *v.* Hanson, 154 Mass. 87, 28 N. E. 6, 26 Am. St. Rep. 210, 12 L. R. A. 574.

Minnesota. — Kipp *v.* Fullerton, 4 Minn. 366.

Mississippi. — Miller *v.* Ewing, 8 Smed. & M. 421; Wright *v.* Weisinger, 5 Smed. & M. 210.

Where a court of general jurisdiction is authorized, in a proceeding, either statutory or at law or in equity, to bring in, by publication or other substituted service, non-resident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record; and the judgment of the court, so far as it affects such property, will be valid. Applegate *v.* Lexington & C. C. Min. Co., 117 U. S. 255.

An order *pro confesso*, reciting that: "It appearing to the court that the defendant is a non-resident, and that publication had been duly made, requiring him to appear and plead, answer and demur to complainant's bill, within the first three days of the term, etc.," in the absence of proof to the contrary, the court will presume that the publication was made in the newspaper designated by the order, and that it was made subsequent to and in pursuance of the order. Every presumption in civil causes is in favor of the regularity of such proceedings. Claybrook *v.* Wade, 47 Tenn. 555.

service in a domestic judgment is, upon principle, not conclusive, but subject to rebuttal by competent evidence.[49]

b. *Collateral Proceeding.* — **(1.) Contradiction by Other Parts of Record.** — Opposing views are to be found among the decisions as to the effect of a recital of service in the judgment, when contradicted by other portions of the record. There is one line of cases holding that the recital of service in the judgment will prevail over contradictory statements in other portions of the record.[50] Another line, however, holds that the presumption of service from the recital thereof in the judgment arises only when other portions of the record are silent.[51]

49. "This presumption, however, does not prevent a party from showing in a proper proceeding, that in fact he had not been properly served, and, therefore, is not bound by a given judgment or decree. This right to question the jurisdiction of the court at the time the decree or judgment against him was rendered, is not barred by a recital in the decree that the court has examined the service and finds it to be according to law. If the defendant was not in fact before the court by being properly served, when the court makes examination in regard to the service, the finding of the court upon that question cannot bind the defendant. The question, therefore, of jurisdiction is open to investigation, notwithstanding the recitals in the decree." Hartley *v.* Boynton, 5 McCrary, C. C. 453, 17 Fed. 873.

50. Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; Truman *v.* Robinson, 44 Cal. 623; Branson *v.* Caruthers, 49 Cal. 374; Telladega Ins. Co. *v.* Woodward, 44 Ala. 287; Barnett *v.* Wolf, 70 Ill. 76. See *contra,* Goudy *v.* Hall, 30 Ill. 109; McLain *v.* Duncan, 57 Ark. 49, 20 S. W. 597.

"In view of this direct statement (in the judgment that service of process had been made according to law and the order of the court), as to a matter which the court was as competent to determine as any other matter involved in the case, we would be bound to presume, as already shown, that proof of publication by the proper person was in fact made, notwithstanding that part of the roll denominated proof of service, showed a state of facts from which a want of jurisdiction would be apparent." Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; Vassaul *v.* Austin, 36 Cal. 691.

In Reily *v.* Lancaster, 39 Cal. 354, a judgment reciting that "all owners and claimants of the property have been duly summoned," was held to be of absolute authority, although it appeared from the judgment roll that the name of one of the claimants was not in the published summons. The court said: "We must presume that the court had sufficient proof of service on the party though it does not appear in judgment-roll."

51. *United States.* — Settlemier *v.* Sullivan, 97 U. S. 444.

Connecticut. — Coit *v.* Haven, 30 Conn. 190, 79 Am. Dec. 244.

Illinois. — Goudy *v.* Hull, 30 Ill. 109; Bannon *v.* People, 1 Ill. App. 496.

Indiana. — Coan *v.* Clow, 83 Ind. 417.

Iowa. — Mayfield *v.* Bennett, 48 Iowa 194.

Missouri. — Cloud *v.* Pierce City, 86 Mo. 357; Laney *v.* Garbee, 105 Mo. 355, 16 S. W. 831; Milner *v.* Shipley, 94 Mo. 106, 7 S. W. 175; McClanahan *v.* West, 100 Mo. 309, 13 S. W. 674; Adams *v.* Cowles, 95 Mo. 501, 8 S. W. 711; Raley *v.* Guinn, 76 Mo. 263.

Texas. — Treadway *v.* Eastburn, 57 Tex. 209.

Virginia. — Wilcher *v.* Robertson, 78 Va. 602.

Judgment Entry Must Be Construed in the Light of the Entire Record. — Coan *v.* Clow, 83 Ind. 417; Mayfield *v.* Bennett, 48 Iowa 194; Treadway *v.* Eastburn, 57 Tex. 209; Settlemier *v.* Sullivan, 94 U. S. 444.

Return of Sheriff. — The return of the sheriff is a part of the record itself, and may when radically defective, be used to rebut the presumption

(2.) Contradiction by Extrinsic Evidence. — According to the weight of authority, the recital of service in a domestic judgment imports

arising from recital of service contained in other portions of the record. As concerns courts of general jurisdiction, it matters not whether such recitals be of record or not. Goudy *v.* Hall, 30 Ill. 109.

In Coan *v.* Clow, 83 Ind. 417, the court said: "That recitals in the record of a judgment rendered by a court of general jurisdiction, showing the service of process, cannot be disputed in a collateral way, but the record in this case . . . shows affirmatively that the appellee was not notified of the pendency of the action, and therefore the judgment rendered does not bind her."

In Dickison *v.* Dickison, 124 Ill. 483, 16 N. E. 861, a decree taken at the return term showed a finding that there was due service on all the defendants, but the sheriff's return on the summons showed a service on certain named defendants, and that two of the defendants were not found, and as to all the rest, being minor defendants there was no return. *Held,* that the sheriff's return on the writ, rebutted the presumption of service arising from the recital in the decree.

In Mayfield *v.* Bennett, 48 Iowa 194, the papers in the case showed that the service was by publication, and it was held that the adjudication must be understood to be in harmony with the whole record in the case. The court said: "It would be a most violent and unwarrantable presumption to hold that the court found that the defendant was personally served in face of the fact that the affidavit that defendant's residence was unknown and could not with reasonable diligence be ascertained, and the proof of publication with the original notice attached, were made and filed on the very day that judgment was entered."

In Settlemier *v.* Sullivan, 97 U. S. 444, a judgment of state court was collaterally attacked in federal court. The court said: "The recital in the judgment of service must be read in connection with that part of the record which gives the official evidence prescribed by statute. This evidence must prevail over the recital as the recital, in the absence of an averment to the contrary, the record being complete, can only be considered as referring to the former. We do not question the doctrine that a court of general jurisdiction acting within the scope of its authority, that is, within the boundaries which the law assigns to it with respect to subjects and persons — is presumed to act rightly and to have jurisdiction to render the judgment it pronounces, until the contrary appears. But this presumption can only arise with respect to jurisdictional facts, concerning which the record is silent. It cannot be indulged when the evidence respecting the facts is stated, or averments respecting them are made. If the record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge. But if the record give the evidence or make an averment with respect to a jurisdictional fact, it will be taken to speak the truth, and the whole truth in that regard; and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred."

The Entry of Judgment Upon Default by Clerk. — Being the action of the court, the clerk's decision as to the sufficiency of proof of service of summons is of equal validity with that of the judge and binding upon the parties till set aside or reversed, by a direct proceeding in the same action. Kipp *v.* Fullerton, 4 Minn. 366.

Non-Resident Defendant. — The record of a judicial proceeding stating the manner in which the summons was served (by publication) against a non-resident defendant, who was personally beyond the jurisdiction of the court, it will not be presumed that other proof of service was made to the court than that shown in the record and recited in judgment, nor that the court acquired jurisdiction unless that is affirmative-

absolute verity, and cannot in a collateral proceeding be contradicted by evidence outside of the record.[52]

ly shown. Godfrey *v.* Valentine, 39 Minn. 336, 40 N. W. 163.

Presumption From Lapse of Time Where Record Does Not Affirmatively Show Notice. — It will be presumed after the lapse of twenty years, in favor of the validity of judicial proceeding that the parties concerned had due notice although the record does not affirmatively show that fact. Wilson *v.* Holt, 83 Ala. 528, 3 So. 321.

52. *United States.* — Galpin *v.* Page, 1 Sawy. 309; Swift *v.* Meyers, 37 Fed. 37.

California. — *Ex parte* Ah Men, 77 Cal. 198, 19 Pac. 380; People *v.* Harrison, 84 Cal. 607, 24 Pac. 311; Reily *v.* Lancaster, 39 Cal. 354.

Connecticut. — Coit *v.* Haven, 30 Conn. 190, 79 Am. Dec. 244.

Illinois. — Osgood *v.* Blackmore, 59 Ill. 261; Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457; Haywood *v.* Collins, 60 Ill. 328; Senichka *v.* Lowe, 74 Ill. 274; Donlin *v.* Hettinger, 57 Ill. 348; Logan *v.* Williams, 76 Ill. 175.

Kansas. — Goddard *v.* Harbour, 56 Kan. 744, 44 Pac. 1055; Warren *v.* Wilner, 61 Kan. 719, 60 Pac. 745; Orchard *v.* Peake, 69 Kan. 510, 77 Pac. 281; Thomas *v.* Owen, 58 Kan. 313, 49 Pac. 73.

Kentucky. — Sears Heirs *v.* Sears Heirs, 95 Ky. 173, 25 S. W. 600.

Maine. — Blaisdell *v.* Pray, 68 Me. 269.

Mississippi. — Miller *v.* Ewing, 8 Smed. & M. 421; Wright *v.* Weisinger, 5 Smed. & M. 210.

Missouri. — Nevatt *v.* Springfield Normal School, 79 Mo. App. 198.

Montana. — Edgerton *v.* Edgerton, 12 Mont. 122, 29 Pac. 966, 33 Am. St. Rep. 557, 16 L. R. A. 94.

New Hampshire. — Carlton *v.* Patterson, 29 N. H. 580.

North Carolina. — Sledge *v.* Elliott, 116 N. C. 712, 21 S. E. 797; Brickhouse *v.* Sutton, 99 N. C. 103, 5 S. E. 380, 6 Am. St. Rep. 497.

Oregon. — Heatherly *v.* Hadley, 4 Or. 1.

South Carolina. — McCullough *v.* Hicks, 63 S. C. 542, 41 S. E. 761.

Tennessee. — Wilkins *v.* McCorkle, 112 Tenn. 688, 80 S. W. 834; Howard *v.* Jenkins, 5 Lea 176.

Texas. — Cooper *v.* Mayfield, 94 Tex. 107, 58 S. W. 827; Tennell *v.* Breedlove, 54 Tex. 540; Mills *v.* Terry, 22 Tex. Civ. App. 277, 54 S. W. 780.

Utah. — Hoagland *v.* Hoagland, 19 Utah 103, 57 Pac. 20.

Virginia. — Pugh *v.* McCue, 86 Va. 475, 10 S. E. 715.

Washington. — Kizer *v.* Canfield, 17 Wash. 417, 49 Pac. 1064.

Contra. — Griffin *v.* State, 37 Ark. 437; Thelen *v.* Thelen, 75 Minn. 433, 78 N. W. 108; Kingsborough *v.* Tousley, 56 Ohio St. 450, 47 N. E. 541.

The record of a judgment showing the service of a summons, whether actual or constructive, imparts absolute verity and the judgment is conclusive until vacated or reversed in some direct proceeding. A judgment rendered pursuant to a warning order made by the clerk in due form will not be declared void in a collateral proceeding merely because the jurat of the affidavit for the warning was not signed by an officer. Sears *v.* Sears, 95 Ky. 173, 25 S. W. 600, 44 Am. St. Rep. 213.

The sheriff's return of personal service of summons embraced in the record of a judgment is conclusive between the parties. Goddard *v.* Harbour, 56 Kan. 744, 44 Pac. 1055; Warren *v.* Wilner, 61 Kan. 719, 60 Pac. 745.

Fourteenth Amendment of Constitution Not Violated by the Application of Rule and enforcement of judgment, and the judgment debtor is not deprived of property without due process of law. Warren *v.* Wilner, 61 Kan. 719, 60 Pac. 745.

A return that personal service of a summons upon a defendant has been made is not open to contradiction, or to be disproved by extrinsic evidence, after rendition of judgment. Orchard *v.* Peake, 69 Kan. 510, 77 Pac. 281; Goddard *v.* Harbour, 56 Kan. 744, 44 Pac. 1055, 54

2. Judgment of Sister State. — A. PRIMA FACIE. — The recital of service in a judgment of a sister state, when brought in question in a collateral proceeding, is made at least *prima facie* evidence of service by the "full faith and credit" clause of the United States Constitution and Act of Congress based thereon.[53]

Am. St. Rep. 608; Thomas *v.* Owen, 58 Kan. 313, 49 Pac. 73; Warren *v.* Wilner, 61 Kan. 719, 60 Pac. 745.

In Mastin *v.* Gray, 19 Kan. 458, 27 Am. Rep. 149, the court takes this view: A judgment rendered with jurisdiction can never be impeached in a collateral proceeding, but a judgment rendered without jurisdiction may. To say that the record of a judgment can conclusively prove that any person was a party to the action in which it was rendered, and then to say that the judgment is conclusively valid because he was a party, is to reason illogically even in finding that H. was served with notice and shows in fact a party to the suit, could not make any difference; for a court cannot make a finding against a person until after the court has obtained jurisdiction of such person. (There is a dissent to case.) See Mickel *v.* Hicks, 19 Kan. 578, 27 Am. Rep. 161.

In Equity. — "The powers of a court of equity being vested in our courts of law, and equitable defenses being allowable, there is no reason why, to an action upon a judgment, the defendant should not be permitted to set up by way of defense, any matter which would be ground of relief in equity against the judgment; and it is conceded in those states where the record is held conclusive, that when the judgment has been obtained by fraud, or without bringing the defendant into court, and the want of jurisdiction does not appear on the face of the record, relief may be obtained in equity. The technical difficulty arising from the conclusiveness of the record is thus obviated. In the present case, the judgment is set up by the defendant as a bar to the plaintiff's action, . . . being for the foreclosure of a mortgage. The defendant set up the foreclosure in the McFarquahar case as a bar; but being in a court of equity, the plaintiff had a right to set up any matter showing that the defendants ought not in equity to avail themselves of that judgment. They offered to show that it was entered *ex parte* on forged papers. It does not appear that the plaintiff ever had any knowledge of it, and it is not pretended that he was legally summoned. Such a judgment would never be upheld in equity, even in favor of one ignorant of the fraud and claiming *bona fide* under it. He stands in no better position than any other party claiming *bona fide* under the forged instrument." Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589.

Distinction Between No Service and Defective Service is made in Hobby *v.* Bunch, 83 Ga. 1, 10 S. E. 113, where it is held that a defective or irregular service renders the judgment voidable only. Although a notice may be irregular, the judgment cannot be collaterally attacked, when the court holds it sufficient. Stout *v.* Woods, 79 Ind. 108.

Where the record shows that an irregular service was adjudged sufficient by the court, the judgment cannot be collaterally attacked. Schee *v.* LeGrange, 78 Iowa 101, 42 N. W. 616. See further Webster *v.* Daniel, 47 Ark. 131, 14 S. W. 550.

53. *United States.* — Mills *v.* Duryee, 7 Cranch. C. C. 481; Thompson *v.* Whitman, 18 Wall. 457; Knowles *v.* Gaslight & Coke Co., 19 Wall. 58.

Kansas. — Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145.

Missouri. — Warren *v.* Lusk, 16 Mo. 102.

New York. — Starbuck *v.* Murray, 5 Wend. 148, 21 Am. Dec. 172; Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589.

Tennessee. — Chaney *v.* Bryan, 15 Lea 589.

B. CONCLUSIVENESS. — Although there are cases to the contrary,[54] the prevailing opinion is that the recital of service in a judgment of a sister state is only *prima facie* evidence upon collateral attack, and may be contradicted by extrinsic evidence.[55]

3. Foreign Judgments. — The recital of service in a judgment or

54. Mills *v.* Duryee, 7 Cranch C. C. (U. S.) 481; Warren *v.* Lusk, 16 Mo. 102.

"It is manifest, however, that the constitution contemplated a power in congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of congress (giving full faith and credit to judgment of the several states) unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision." Mills *v.* Duryee, 7 Cranch C. C. (U. S.) 481; *modified* in Thompson *v.* Whitman, 18 Wall. (U. S.) 457.

Foreign judgment reciting that defendant had appeared by attorney is conclusive. Warren *v.* Lusk, 16 Mo. 102.

55. *Connecticut.* — Coit *v.* Haven, 30 Conn. 190, 79 Am. Dec. 244.

Georgia. — McCauley *v.* Hargroves, 48 Ga. 50, 15 Am. Rep. 660.

Iowa. — O'Rourke *v.* C., M. & St. P. R. Co., 55 Iowa 332, 7 N. W. 582.

Illinois. — Zepp *v.* Hager, 70 Ill. 223.

Kansas. — Thorn *v.* Salmonson, 37 Kan. 441, 15 Pac. 588; Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145.

Massachusetts. — Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88; Wright *v.* Andrews, 130 Mass. 149; Folger *v.* Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747.

Maryland. — Grover & Baker S. M. Co. *v.* Radcliff, 66 Md. 511, 8 Atl. 265.

New York. — Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129.

Pennsylvania. — Noble *v.* Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66.

Tennessee. — Barrett *v.* Oppenheimer, 12 Heisk. 298.

In an action on a judgment rendered in another state the defendant, notwithstanding the record showing a return of the sheriff that he was personally served with process, may show the contrary, namely, that he was not served with process, and that the court never acquired jurisdiction of his person. Knowles *v.* Gaslight & Coke Co., 19 Wall. (U. S.) 58, *affirming* and *following* Thompson *v.* Whitman, 18 Wall. (U. S.) 456.

A decree of divorce granted by courts of a sister state urged in bar of the rights of the wife, may be shown by her to be wanting in jurisdictional fact, although the existence of the fact is recited in the record. Chaney *v.* Bryan, 15 Lea (Tenn.) 589. See also Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145.

"We take it to be now well settled in this commonwealth, that although the judgment of a court of one state of the Union against a citizen of another state is *prima facie* evidence both of the jurisdiction of the court and of the merits, and notwithstanding the United States statute of 1790, providing that full faith and credit shall be given to each state to the judicial proceedings of another, yet such judgment is not conclusive; but it is competent for the defendant, when suit is brought against him on such judgment, to show by proof that the court which rendered the judgment in the original suit, in point of fact had no jurisdiction over the persons of the parties and the subject-matter of the controversy. Carleton *v.* Bickford, 13 Gray (Mass.) 591, 74 Am. Dec. 652.

Non-Residence of Defendant in State Where Judgment Against Him Was Obtained. — "It is always a good defense against a suit brought on a judgment recovered in another state to show that the defendant was not a resident of that state and that

decree of one country, is but *prima facie* evidence of service in the courts of another country, and is open to impeachment or contradiction in either a direct proceeding or a collateral attack.[56]

V. RECORD EVIDENCE ESSENTIAL.

1. In General. — Service of summons or citation is a matter of record and must be shown by record evidence.[57]

2. Secondary Evidence. — The testimony of the officer who made the service is admissible where the original return is lost.[58]

no proper service was made upon him there." Rand *v.* Hanson, 154 Mass. 87, 28 N. E. 6.

56. *England.* — Douglas *v.* Forist, 4 Bing. 703; Schibsby *v.* Westenholz, L. R. 6 Q. B. 155; General Steam Nav. Co. *v.* Guillou, 11 Mees. & Welsb. 877.

United States. — Bischoff *v.* Wethered, 9 Wall. 812; Thompson *v.* Whitman, 18 Wall. 457.

Kansas. — Thorn *v.* Salmonson, 37 Kan. 441, 15 Pac. 588.

Maine. — Rankin *v.* Goddard, 54 Me. 28, 89 Am. Dec. 718; Middlesex Bank *v.* Butman, 29 Me. 19.

Massachusetts. — Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88.

Missouri. — Corby *v.* Wright, 4 Mo. App. 443.

57. Pendexter *v.* Carleton, 16 N. H. 482; Bridges *v.* Arnold, 37 Iowa 221.

No other evidence than the sheriff's return can be received to prove the service of a copy of petition, which must be of record. Harris *v.* Alexander, 1 Rob. (La.) 30.

58. Bridges *v.* Arnold, 37 Iowa 221.

The docket of the justice of the peace in whose court a judgment is rendered ought to furnish the evidence of the service of a summons on the defendant as required by statute but the next best evidence is the production of summons, if that can be found; but if that cannot be found after due search and inquiry, then parol evidence of proof of service is admissible. Gray *v.* McNeal, 12 Ga. 424; see also Battle *v.* Braswell, 107 Ga. 128, 32 S. E. 838.

In Battle *v.* Braswell, 107 Ga. 128, 32 S. E. 838, after the defendant had testified that he had not been served, it was held competent to prove in rebuttal by the officer that he made such personal service where it appeared that the original summons had been lost, and in the justice's docket introduced in evidence showing an entry of the copy of the service thereon as required by law, there was no trace of the officer's return.

SET-OFF AND COUNTER-CLAIM.

I. PRESUMPTION AND BURDEN OF PROOF.

1. In General. — A. Set-Off. — In pleading a set-off as a defense, the defendant becomes a plaintiff to the extent of the matters set up in such a plea, and it devolves upon him to prove the allegations thereof.[1]

B. Counter-Claim. — The burden of proof is upon the defendant to prove all the facts necessary to be considered in determining the amount due him on his counter-claim.[2]

C. Recoupment or Reconvention. — In order to establish a defense of recoupment, or reconvention, the burden resting on the defendant is the same as that which is incumbent on the plaintiff

1. *Alabama.* — Clarke *v.* M'Elroy, 1 Stew. 147; Crayton *v.* Clark, 11 Ala. 787; Gross *v.* Van Wick, Minor 7.

Illinois. — Laird *v.* Warren, 92 Ill. 204.

Mississippi. — Freeland *v.* Man & Moody, 1 Smed. & M. 531.

New York. — Heidenheimer *v.* Wilson, 31 Barb. 636; Blake & Johnson *v.* Krom, 13 N. Y. Supp. 335; Deller *v.* Staten Island Club, 51 Hun 644, 4 N. Y. Supp. 311.

Pennsylvania. — Smith & Co. *v.* Ewer & Peck, 22 Pa. St. 116.

South Carolina. — Godley *v.* Barnes, 13 Rich. L. 161.

"In pleading a set-off the defendant as to it assumes the attitude of a plaintiff, and is bound to prove, in reference to it, the same facts as if he had instituted his action upon it." Kelly *v.* Garrett, 6 Ill. 649.

Bonds offered in evidence as offsets were properly rejected, when the assignment or receipt of same is not proved. Turberville *v.* Self, 4 Call (Va.) 580.

Where, in an action for labor and materials furnished, the plea of general issue is filed, and a notice that it would be insisted on the trial that the work was performed under a written contract set out in the notice, defendant must prove the averments of the notice before the burden is thrown on plaintiff to prove the abandonment of the contract. Robinson *v.* Parish, 62 Ill. 130.

2. Callender *v.* Drabelle, 73 Iowa 317, 35 N. W. 240; Blake & Johnson *v.* Krom, 13 N. Y. Supp. 335; Deller

while he held the affirmative position in the case. He must establish every essential element of his cause of action.[3]

2. As Affecting Burden of Plaintiff. — A plea of set-off, counter-claim, or recoupment, does not relieve the plaintiff of his burden, in the first instance, of making out a *prima facie* case.[4]

3. Demand Must Exist at Commencement of Action. — It is incumbent upon the defendant to show that the debt, demand or claim,

v. Staten Island Club, 51 Hun 644, 4 N. Y. Supp. 311.

3. Sheppard *v.* Dowling, 103 Ala. 563, 15 So. 846; Falkner *v.* Behr, 75 Ga. 671.

Recoupment of damages arising out of the same transaction is in the nature of a cross-action, and the defendant is held to the same requirements as to evidence in support of such a plea had he brought a distinct action against the plaintiff. The burden is upon defendant to establish all the essential elements of his cause of action. Mendel *v.* Fink, 8 Ill. App. 378; Hedstrom *v.* Baker, 13 Ill. App. 104; Winship *v.* Wineman, 77 Ill. App. 161.

Where, in an action to recover the purchase price of a commodity, the answer does not deny the sale and delivery, but avers that there was a special contract that the article should be of a special quality, and that it did not correspond to the contract and was of no value, the burden is upon the defendant to prove the contract and the breach. Lothrop *v.* Otis, 7 Allen (Mass.) 435.

In an action on a note, the defendant admits the making of the note, but pleads payment, and further alleges that the note was secured by a mortgage on realty; that the plaintiff sold the premises by auction and purchased the same under a power contained in the mortgage; that he so negligently and fraudulently conducted the sale that the estate brought less than the amount due on the note; and that if the sale had been properly managed, the note would have been fully discharged. *Held,* that after plaintiff had put the note in evidence, it devolved upon the defendant to prove the payment, and the fraud in the sale of the property. Wadsworth *v.* Glynn, 131 Mass. 220.

In order for the defendant to avail himself of a reduction of damages for breach of warranty by way of set-off in the return of a cross-action, and as a substitute therefor, the burden of proof rests upon him. Dorr *v.* Fisher, 1 Cush. (Mass.) 271. See also Noble *v.* Fagnant, 162 Mass. 275, 38 N. E. 507.

Reconvention. — "Where a defendant in an attachment suit pleads in reconvention, claiming actual damages against the plaintiff for wrongfully suing out writ, and exemplary damages for maliciously suing it out without probable cause, the burden is upon him to establish, by competent evidence, the facts that authorize recovery." Dwyer *v.* Testard, 1 White & W. Tex. Civ. App. § 1228.

4. See articles "ANSWERS," and "BURDEN OF PROOF."

Where, in an action for labor performed and material furnished, the plea of general issue is filed, and a notice that it would be insisted on the trial that the work was performed under a written contract set out in the notice, the plaintiff must prove his cause of action under the common counts, and the defendant must prove the performance of the work under the written contract. Robinson *v.* Parish, 62 Ill. 130. See Kelly *v.* Garrett, 6 Ill. 649; Burgwin *v.* Babcock, 11 Ill. 28.

Limitation Also Set Up. — In an action on an account, to which the defendant claimed a set-off, and that plaintiff's demand was barred by the statute of limitations, it was held that a charge was correct in stating that the burden of proof was on the defendant to establish the set-off, but was defective where it put out of view the fact that the burden of proof was in the first instance on the plaintiff to make out not only the original indebtedness, but also to establish the new promise in order to

which he pleads in set-off or by way of counter-claim, existed at the time of the commencement of the action,[5] unless by some rule of law, the right or title is presumed to be in defendant at beginning of suit.[6]

II. MODE OF PROOF.

In proving a set-off, counter-claim or recoupment, the defendant

take the case from the operation of the statute. Nolan *v.* Vosburg, 3 Ill. App. 596.

5. Jefferson Co. Bank *v.* Chapman, 19 Johns. (N. Y.) 322.

The set-off must be a subsisting demand at the commencement of suit, as contradistinguished from demands purchased or acquired afterwards. "The plaintiff has no right to recover demands arising from causes of action after bringing of suit, nor can a defendant set off similar demands." Kelly *v.* Garrett, 6 Ill. 649.

Assigned Account. — Where an account alleged to have been assigned to defendant is offered in evidence as a set-off, he must show the assignment to have been made to him before suit was begun. Heidenheimer *v.* Wilson, 31 Barb. (N. Y.) 636; Freeland *v.* Man & Moody, 1 Smed. & M. (Miss.) 531.

Possession of Note.— The mere possession of a note, on its face negotiable, indorsed in blank, which is introduced as a set-off, is not evidence that it belonged to defendant at commencement of action; but the burden is upon the defendant to show that he acquired it before action was begun. Smith & Co. *v.* Ewer & Peck, 22 Pa. St. 116. See article "BILLS AND NOTES." See *contra,* Griffin *v.* Evans, 23 Ga. 438.

Assignment of Note.— Defendant cannot claim, as a set-off, a note of plaintiff's, in his hand as assigned unless he prove that the assignment was made to him before the commencement of suit. "In effect the defendant has affirmed that the assignment had been made and that the note of plaintiff's was due to him when plaintiff brought his action. The time of the assignment to him is to be presumed within his knowledge and not within that of plaintiff." Gross *v.* Van Wick, Minor (Ala.) 7.

In an action against the maker by the bearer, payable to G. P. or bearer, a note of W. H. & G. P., payable to defendant, or bearer, may be given in evidence as a set-off, without proof of the signature of W. H., or that defendant was in possession of the note when action was brought. Clarke *v.* M'Elroy, 1 Stew. (Ala.) 147.

Note Payable to Third Person, or Bearer. — Defendant offering in evidence as set-off a promissory note, payable to a third person or bearer, must show that the title to the note was in him at the commencement of the action. As the note set up in discount was not given to the defendant but to a third person the presumption would be that the right remained in him, until proof to the contrary. Godley *v.* Barnes, 13 Rich. L. (S. C.) 161.

To entitle the defendant to set off a note payable to a third person, he must prove its genuineness, and that it was indorsed by him previous to commencement of action; the mere appearance of the payee's name written on the paper does not warrant the inference that the defendant is its legal proprietor. Crayton *v.* Clark, 11 Ala. 787.

6. The presumption is that the defendant was the holder of negotiable notes which he offers as a set-off at the commencement of action, and the burden rests upon the plaintiff to show the contrary. Griffin *v.* Evans, 23 Ga. 438. See also Godley *v.* Barnes, 13 Rich. L. (S. C.) 161. *Contra.* — That possession of negotiable notes by defendant is not presumptive evidence of ownership by him at commencement of action, see Smith *v.* Ewer & Peck, 22 Pa. St. 116.

is not confined to the proof introduced by him, but may avail himself of evidence in his favor introduced by plaintiff.[7]

III. SUFFICIENCY OF EVIDENCE.

Preponderance of evidence is all that is required to establish the defenses of set-off, counter-claim and recoupment.[8]

7. "Any evidence by whom introduced, tending to make for the defendant, would be evidence for him, and by which he would have a right to sustain that part of his defense to which it was pertinent. . . . The defendant is not limited to the proofs which he introduces, but can have the benefit of evidence making in his favor introduced by the plaintiff." Laird *v.* Warren, 92 Ill. 204.

8. Hedstrom *v.* Baker, 13 Ill. App. 104; Winship *v.* Wineman, 77 Ill. App. 161; Laird *v.* Warren, 92 Ill. 204.

Defendant is held to the same requirements as to sufficiency of evidence as he would have been had he brought an original action. Mendel *v.* Fink, 8 Ill. App. 378.

It is not necessary that the proof to establish the plea of recoupment should be established beyond reasonable doubt, but only by preponderance of evidence, according to the ordinary rules of testimony in civil cases. Falkner *v.* Behr, 75 Ga. 671.

SETTLEMENT.—See Accord and Satisfaction; Accounts, Accounting and Accounts Stated; Compromise; Payment; Release.

SEXUAL INTERCOURSE.—See Adultery; Fornication; Incest; Rape.

SHIPS AND SHIPPING.

CROSS-REFERENCES:

Admiralty;
Carriers;
Salvage.

I. PENALTY FOR VIOLATING REGULATIONS.

In a proceeding to enforce a penalty for an alleged violation of the navigation laws, the burden of proof is upon the prosecution to establish the facts constituting the violation alleged.[1]

II. TITLE TO OR OWNERSHIP OF VESSEL.

1. In General. — Title or ownership in a ship, except perhaps for registration purposes, may be proved by parol evidence.[2]

Documentary Evidence Is Not Necessary unless the asserted ownership is denied, and the party has been called on to produce such documents.[3]

Possession by the party in whom the title or interest is alleged to be, and acts of ownership by him, are presumptive evidence of title.[4]

Presumption of Clear Title. — Where a person is shown to be the owner of a ship, or has an interest therein, and conveys the ship with an agreement to warrant the title as free and unincumbered, there is a presumption, in the absence of other evidence, that the title is unincumbered.[5]

2. Register and Certificate. — The register of a ship has been held not admissible in favor of the party claiming to be the owner.[6] Even against the person in whose name it is made, the rule seems

1. The Pope Catlin, 31 Fed. 408.

2. Lyman *v.* Redman, 23 Me. 289; Vinal *v.* Burrill, 16 Pick. (Mass.) 401; Truett *v.* Chaplin, 11 N. C. (4 Hawks) 178; Richardson *v.* Montgomery, 49 Pa. St. 203; Bixby *v.* Franklin Ins. Co. 8 Pick. (Mass.) 86.

3. Bas *v.* Steele, 3 Wash. (C. C.) 381, 2 Fed. Cas. No. 1,088. See also Stacy *v.* Graham, 3 Duer (N. Y.) 444.

4. Lyman *v.* Redman, 23 Me. 289; Bas *v.* Steele, 3 Wash. (C. C.) 381, 2 Fed. Cas. No. 1,088; Stacy *v.* Graham, 3 Duer (N. Y.) 444; Badger *v.* Bank of Cumberland, 26 Me. 428, where the court said: "Where one is called upon as the supposed owner of a vessel for the payment of a charge upon it, the vessel having formerly belonged to another, the possession of the vessel and the receipt of her earnings, unexplained, is a kind of proof of ownership, which may be highly satisfactory, and is proper for the consideration of a jury upon the question of title. Such evidence is by no means conclusive. It may not always be of so unequivocal a character as to amount to proof of ownership; or it may be qualified or entirely controlled by other evidence, but by no rule of law can it be excluded from the case."

"**The Rule of Law That Possession of Property Is Prima Facie** evidence of ownership, is uniform in its application. The question of the ownership of a vessel forms no exception." Bailey *v.* Str. New World, 2 Cal. 370.

5. Insurance Co. of North America *v.* Johnson, 70 Fed. 794, 17 C. C. A. 416.

6. Bradbury *v.* Johnson, 41 Me. 582, where it was held that the register is no evidence at all in favor of the person claiming as owner, because it is nothing more than his own declaration. *Compare* Brooks *v.* Minturn, 1 Cal. 481, where it was held that the register was admissible in favor of the person claiming to be the owner.

In Woods *v.* Courter, 1 Dall. (U. S.) 141, the register of a ship, made by one of the defendants, stating that the ship belonged jointly to him and other persons, was allowed after argument to be read in evidence

to be that the register is not evidence of itself,[7] except as it is confirmed by auxiliary circumstances showing that it was made by the authority or assent of the person so sought thereby to be charged as owner;[8] and when so confirmed is not conclusive.[9]

In England a ship's register is, by express statutory provision, *prima facie* proof of ownership in the person or persons named therein.[10]

3. Enrolment. — Nor is the certificate of enrolment even *prima facie* evidence of title in favor of the party in whose name it is made;[11] nor against him, except in the latter case, with the same auxiliary proof as is necessary in the case of registry.[12]

4. Bill of Sale Intended as Mortgage. — Parol evidence may be received for the purpose of showing that a bill of sale of a ship,

against the defendants; but the question seems not to have been finally settled because the bill of exceptions taken by the defendants' counsel was never prosecuted, the plaintiffs eventually suffering a non-suit.

7. Bas *v.* Steele, 3 Wash. (C. C.) 381, 2 Fed. Cas. No. 1,088.

8. Scudder *v.* Calais Steamboat Co. 1 Cliff. 370, 21 Fed. Cas. No. 12,565, *reversed* on other grounds, 2 Black (U. S.) 372. See also United States *v.* Brune, 2 Wall. Jr. 264, 24 Fed. Cas. No. 14,677; McIver *v.* Humble, 16 East (Eng.) 169; Bradbury *v.* Johnson, 41 Me. 582; Ward *v.* Bodeman, 1 Mo. App. 272; Bryan *v.* Bowles, 1 Daly (N. Y.) 171.

9. Colson *v.* Bonzey, 6 Me. 474; Bixby *v.* Franklin Ins. Co. 8 Pick. (Mass.) 86; Bryan *v.* Bowles, 1 Daly (N. Y.) 171; Ward *v.* Bodeman, 1 Mo. App. 272; Bradbury *v.* Johnson, 41 Me. 582, where the court said: "For an equitable title in one person may well consist with the documentary title, at the custom house, in another."

The Registry of a Vessel at the Custom House, although accompanied by the oath required by law of the person in whose name registration is made, is not conclusive evidence that the ownership of the vessel is in him. Ring *v.* Franklin, 2 Hall (N. Y.) 1. See also Card *v.* Hines, 35 Fed. 598.

Recital in Custom House Document. — The statement of the title or ownership of a ship in the Custom House documents, whatever may be the rule as between the respective parties to those documents, is not conclusive as against third persons who claim adversely thereto. In such case they are at liberty to show the true title to be different from that stated in the documents. Chickering *v.* Hatch, 1 Story 516, 5 Fed. Cas. No. 2,671.

In Vinal *v.* Burrill, 16 Pick. (Mass.) 401, an action by a ship's husband for supplies furnished to the vessel, it was held that parol evidence was admissible to show that all the defendants were jointly interested in the vessel, although she was registered in the name of one only.

10. British Merchants Shipping Act, 17 & 18 Vict., chap. 104, § 107.

In Tinkler *v.* Walpole, 14 East (Eng.) 226, the court said that the registering of a vessel by an owner in his own name may be *prima facie* evidence for him that he is owner, because he thereby publicly challenges all persons that he is so; and they distinguish such a case from one where a person is sued as owner, and the claim is attempted to be supported by such evidence made without his knowledge and which he has not adopted.

11. The Nancy Dell, 14 Fed. 744.

12. Dyer *v.* Snow, 47 Me. 254. *Compare* Jordan *v.* Young, 37 Me. 276, where it was held that the enrolment is evidence of ownership, but not conclusively so. See also Hacker *v.* Young, 6 N. H. 95, where it was held that as against the defendants, alleged to be owners of the vessel in question, the enrolment, purporting to have been made under oath of the defendants, was

professing and purporting to be evidence of an absolute ownership, was in reality merely a security for a loan.[13]

III. CHARTERS AND CHARTER PARTIES.

1. Presumptions and Burden of Proof. — A. In General. — On a proceeding in admiralty to recover damages for breach of a charter party, the libelants have the burden of proving a performance of the charter party entered into by themselves.[14]

So, too, if they would recover more than nominal damages, they must show actual damages suffered.[15]

Where a Charterer Has, Without Justification, Refused To Accept the vessel and is sued therefor, the law imposes upon him the burden of proving in mitigation of damages that the vessel owner could, with reasonable diligence, have reduced or prevented the damage occasioned.[16]

Injuries to Vessel. — In an action by a vessel owner against a charterer to recover for injuries to the vessel, the burden is on the libelant to establish the negligence of the charterer resulting in the injuries set up.[17]

B. Delay in Loading or Discharging. — When the charter is silent as to the time of loading and discharge, the burden is on the owner, in order to recover for detention of the vessel, to prove that the charterer did not exercise reasonable diligence.[18] But proof

evidence of ownership; that "having made oath that they were then the owners — that was an admission which was at least good evidence against themselves."

13. Morgan *v.* Shinn, 15 Wall. (U. S.) 105; Howard *v.* Odell, 1 Allen (Mass.) 85; Blanchard *v.* Fearing, 4 Allen (Mass.) 118; Champlin *v.* Butler, 18 Johns. (N. Y.) 169; Bryan *v.* Bowles, 1 Daly (N. Y.) 171; Ring *v.* Franklin, 2 Hall (N. Y.) 1. *Compare* Henderson *v.* Mayhew, 2 Gill (Md.) 393.

14. Beecher *v.* Bechtel, 19 Betts D. C. MS. 63, 3 Fed. Cas. No. 1,220*a*.

15. Chadwick *v.* The Adelaide, Hoff. Op. 459, 5 Fed. Cas. No. 2,571, so holding notwithstanding the charter party bound the parties to a penalty for its breach.

In Bloomingdale *v.* Wilsons & Furness-Leyland Line, 105 Fed. 384, an action for damages for breach by the vessel owner, of contract for the transportation to a foreign market of a stipulated quantity of hay weekly. It was held that the shipper could not recover damages for the failure of the vessel owner to carry the full stipulated quantity in some shipments unless it was shown that the vessel owner had neglected or refused to take hay tendered by the libelant under the contract, in consequence of which the libelant thereafter transported at an additional expense, or sold at a loss in market price. In this case there was no proof of such tender or refusal, the proof showing only some delay in carrying what was tendered. The libel also alleged a loss on the sale of the hay not carried, but there was no evidence of this and it was held that even if there was it would not have been material without proof that the hay was offered for transportation.

16. Cornwall *v.* J. J. Moore & Co., 132 Fed. 868, *affirmed* 144 Fed. 22.

17. W. H. Beard Dredg. Co. *v.* Hughes, 113 Fed. 680.

18. Empire Transp. Co. *v.* Philadelphia & R. Coal & I. Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623; United States Shipping Co. *v.* United States, 146 Fed. 914.

that the vessel was delayed in unloading beyond the customary time for loading or unloading such cargoes at the port of her delivery, throws upon the charterer the burden of excusing the delay by proof of the actual circumstances of the delivery and his reasonable diligence thereunder.[19]

Where the Charter Fixes the Number of Lay-Days, and the charterer seeks to excuse the delay on the ground that it was through the fault or with consent of the vessel owner or master, the burden is on the charterer to establish his assertion.[20]

Waiver. — Where the charterer asserts that the vessel owner waived an express provision in the charter for lay-days and fixing the rate of demurrage for overtime, he must establish such waiver by clear evidence.[21]

C. SEAWORTHINESS. — In a controversy between the owner and the charterer, who seeks to justify an alleged breach of the charter on the ground of unseaworthiness, the presumption is ordinarily in favor of seaworthiness.[22] But this presumption of seaworthiness may be overcome and is not conclusive against the char-

When the Charter Party Is Silent on the question of liability of the charterer for delay in loading or discharging, the vessel owner, in order to recover for demurrage, must show either that the charterer was negligent in promptly loading or unloading the vessel, or that he unreasonably violated the period allowed for loading or discharging in the ordinary course of business of the port. Williscroft *v.* Cargo of the Cyrenian, 123 Fed. 169.

19. Empire Transp. Co. *v.* Philadelphia & R. Coal & I. Co., 77 Fed. 919, 23 C. C. A. 564, 23 L. R. A. 623; United States Shipping Co. *v.* United States, 146 Fed. 914.

On a libel to recover for demurrage for detention of a vessel chartered to carry cargo and entitled under the charter to be loaded in turn, where it is shown that other vessels arriving after her were loaded first, the respondent in order to avail himself of exceptional conditions or particular circumstances as a defense, whereby it was not considered practicable to load earlier, must clearly prove such conditions and circumstances. Harding *v.* Cargo of 4698 Tons of New River's Steam Coal, 147 Fed. 971.

20. Hagar *v.* Elmslie, 107 Fed. 511, 46 C. C. A. 446.

21. Henningsen *v.* Watkins, 110 Fed. 574.

22. Work *v.* Leathers, 1 Woods 271, 29 Fed. Cas. No. 17,415, *affirmed* 97 U. S. 379.

On a libel in admiralty for damages for breach of a charter party by the charterer, it is held that the ordinary presumption is that the ship was seaworthy and her machinery in good order when she undertook the voyage. Pyman *v.* Von Singen, 3 Fed. 802. In this case the charterer sought to justify his refusal to load on the ground that the ship was not seaworthy; and the court held as stated. The respondents, to rebut this presumption, endeavored to show that the machinery broke down soon after she got to sea, without any sufficient stress of weather or any extraordinary circumstance to account for it. On the voyage to Baltimore the steamer was carrying ballast merely. The weather was moderate for 24 hours, and during that time the machinery worked well. Then ensued a strong gale, with heavy seas, and the steamer being light her propeller was constantly lifted clear of the water, and meeting no resistance it revolved rapidly, commonly called racing, and when it struck the water again its velocity was suddenly checked. The effect of this, constantly repeated, was to bring an irregular strain upon the shaft, tending to loosen the bolts of the

terer.[23] Where the charterer refused to furnish a cargo on the ground of unseaworthiness, the burden is then upon the owners to prove seaworthiness.[24]

2. Parol Evidence. — A. In General. — Of course, as in the case of other written instruments, parol evidence is not admissible for the purpose of varying or contradicting, or adding to, the terms of a charter party.[25]

B. Usage or Custom. — Evidence of usage is admissible to explain an ambiguous charter party,[26] but such evidence is not ad-

couplings; and when they were once loosened the testimony showed that the wear both upon the bolts and holes was very rapid. This was the explanation given by the officers of the steamer of the cause of the disabling of the machinery, which delayed her. The court said: "I am not at all inclined to think that an examination in port, such as is usually made before starting, would have disclosed any looseness or defect, and I am not satisfied that under all the circumstances I should be justified in holding that the presumption of seaworthiness has been overcome." See also McCann *v.* Edward Conery & Son, 11 Fed. 747, where it was held that as the charter party declared that the "vessel was in good order" the presumption was in favor of seaworthiness, and that the burden of showing unseaworthiness was upon the charterer.

23. If a Defect Develops in a Ship Without Any Apparent Cause, it is to be presumed that it existed when the service began. Work *v.* Leathers, 97 U. S. 379, *affirming* 1 Woods 271, 29 Fed. Cas. No. 17,415.

24. The Vincennes, 3 Ware 171, 28 Fed. Cas. No. 16,945.

25. Parol evidence is not admissible to show what the parties meant by the use of certain words employed in the charter party, which are not ambiguous, and have a well-known and understood meaning, and to enlarge the scope and construction of the written contract beyond the language and terms thereof. Sorensen *v.* Keyser, 51 Fed. 30, 2 C. C. A. 92.

Parol Evidence of Prior Representations by the owner as to the speed of the vessel is not admissible in the absence of fraud or mutual mistake. Matthias *v.* Beeche, 111 Fed. 940.

26. The Delaware, 14 Wall. (U. S.) 579. See also Donnell *v.* Amoskeag Mfg. Co., 118 Fed. 10, 55 C. C. A. 178.

In Continental Coal Co. *v.* Birdsall, 108 Fed. 882, 48 C. C. A. 124, the court in speaking of the admissibility of evidence of the usage to control a charter party, said: "The grounds upon which testimony as to usage is admissible in a case of this kind is that such evidence is necessary to place the court in the situation in which the parties were when they contracted, and thus enable it to understand the meaning of their language. Whether such usage be called a 'custom,' or by any other name, if it is one of the circumstances surrounding the parties to the transaction, and was presumably in their minds when the contract was written, then, in contemplation of the law, such usage is written into the contract. But to have that effect there must be no room to doubt the existence of such a custom, and it must be reasonable, certain, consistent with the contract, uniformly acquiesced in, and not contrary to law. The existence of such a custom as would control the charter party — that is to say, that would be tacitly incorporated in it on the ground that the parties must be presumed to have contracted with reference to it, and to have had it in mind when making the contract, and for that reason be required to conform to it — must be so ancient, uniform, notorious, and reasonable that all parties doing business of this kind at the port of Baltimore are conclusively presumed to have been acquainted with it, and impliedly

missible, however, to vary or contradict what is not ambiguous.[27]

C. Subsequent Agreement. — It is competent for one of the parties to show that subsequent to the execution of the written instrument a new verbal agreement was made between the parties in substitution of the written agreement; but the burden of proof is upon him to show that fact.[28]

3. Refusal of Insurance as Proof of Unseaworthiness. — The warranty of seaworthiness in the charter does not imply a warranty of insurability at the usual rates, and the refusal of insurance, while it may be considered as evidence of unseaworthiness more or less convincing according to the circumstances of the case, is never of itself conclusive evidence thereof, but is a fact to be considered in connection with evidence of the actual condition of the vessel.[29]

annex it to the language and terms of any contract made which is to be performed at that port. Any usage of such doubtful authority as to be known only to a few has not this character. The witnesses for the appellant have entirely failed to prove facts essential to make out a custom, in the sense of the law.

They are all dealers in coal, and all testify, in substance, that it was the custom at the port of Baltimore that strikes at the mines relieved the charterers, yet none of them knew of a single instance where a charterer had been so relieved. This amounts to nothing more than a self-serving opinion of parties engaged in the coal business that they have certain rights, with no evidence that such right has ever been acknowledged or acquiesced in; while the witnesses for the libelant, of much longer and larger experience and greater opportunities of knowledge respecting charter parties, testify that there is no such usage or custom. It is incredible that a uniform, long-established, notorious usage, such as those who make shipments from that port are presumed to have knowledge of, and therefore to be bound by, should exist, if such witnesses as the libelant produced were ignorant of it, and it is only such notorious, reasonable, and well-defined custom that the courts can presume to have been in the minds of the contracting parties, and therefore to prevail over the express words of the contract."

To Establish a Port Custom requiring vessels to be entered at the custom house before they can be tendered as ready to save a canceling date, it must be shown to be so general and notorious that persons dealing in the market should be presumed to have been aware of it. Bonanno *v.* Tweedie Trading Co., 117 Fed. 991.

27. Turnbull *v.* Citizens Bank, 16 Fed. 145; Holloway *v.* McNear, 81 Cal. 154, 22 Pac. 514.

A Local Custom That Freight Prepaid should not be returned in case of the loss of the vessel upon the voyage cannot be received to overcome the settled rule of commercial law that freight prepaid but not earned is to be refunded unless there is a special agreement to the contrary. De Sola *v.* Pomares, 119 Fed. 373.

When the Charter Fixes the Duties of the Master of the vessel as to inland freight, evidence of a custom or practice inconsistent with the provision of the charter should not be received for the purpose of changing that provision. The Clintonia, 104 Fed. 92.

28. Wheelwright *v.* Walsh, 42 Fed. 862.

29. J. J. Moon & Co. *v.* Cornwall, 144 Fed. 22, 75 C. C. A. 180, *affirming* 132 Fed. 868; The Vesta, 6 Fed. 532; Card *v.* Hine, 39 Fed. 818; Hughes *v.* Hardie, 132 Fed. 61.

IV. MASTER, SEAMEN, ETC.

1. Contract of Employment. — A. Presumptions and Burden of Proof. — One suing to recover wages as master of a vessel under an alleged contract of employment, must establish the contract as alleged.[30] But the person described as master of a vessel must be deemed master for every legal purpose.[31] And a person once a master is presumed to continue to be such until shown to have been displaced by some overt act or declaration of the owner.[32]

Seamen. — So, too, seamen suing for wages must prove all the controverted facts except as to shipping articles and log-book.[33]

B. Mode of Proof. — a. *Shipping Articles.* — **(1.) Generally.** Shipping articles are in admiralty always admitted in evidence to establish the contract of hire and its terms.[34] But they are not regarded as conclusive except in the case of fraud or mistake, as in the case of other contracts.[35]

(2.) Secondary Evidence. — In an action based upon shipping articles, seamen are not bound to produce them; and after notice to the respondent to produce them, secondary evidence of their contents may be received.[36] And where the originals, proved before a commissioner, have been given up to the vessel, and she has departed, a copy certified by the commissioner may be received.[37]

(3.) Parol Evidence. — Parol evidence cannot be received to vary the articles as to the terms of employment,[38] nor as to the voyage described.[39] But an independent oral agreement in addition to that embodied in the articles may be shown.[40] And seamen may show by parol evidence that the wages fixed by the articles were not correct or are invalid,[41] or that a rate was fixed by oral agreement greater than that specified in the articles.[42]

30. Donovan *v.* Salem & P. Nav. Co., 142 Fed. 985. See also Jones *v.* Davis, 1 Abb. Adm. 446, 13 Fed. Cas. No. 7,460.

31. The Dubuque, 2 Abb. Adm. 20, 7 Fed. Cas. No. 4,110.

32. The Tribune, 3 Sumn. 144, 24 Fed. Cas. No. 14,171.

33. Orne *v.* Townsend, 4 Mason 541, 18 Fed. Cas. No. 10,583.

34. The Exile, 20 Fed. 878; Ketland *v.* Libering, 2 Wash. C. C. 201, 14 Fed. Cas. No. 7,744; Willard *v.* Dorr, 3 Mason 161, 29 Fed. Cas. No. 17,680.

35. The Elvine, 19 Fed. 528; Willard *v.* Dorr, 3 Mason 161, 29 Fed. Cas. No. 17,680; The Ringleader, 6 Ben. 400, 20 Fed. Cas. No. 11,850.

36. The Osceola, Olcott 450, 18 Fed. Cas. No. 10,602.

37. Henry *v.* Curry, Abb. Adm. 433, 11 Fed. Cas. No. 6,381.

38. Veacock *v.* McCall, Gilp. 329, 28 Fed. Cas. No. 16,904.

39. The Triton, 1 Blatchf. & H. Adm. 282, 24 Fed. Cas. No. 14,181; The Quintero, 1 Lowell 38. 20 Fed. Cas. No. 11,517. See also Thompson *v.* The Oakland, 23 Fed. Cas. No. 13,971.

40. Page *v.* Sheffield, 2 Curt. 377, 18 Fed. Cas. No. 10,667; Sheffield *v.* Page, 1 Spra. 285, 21 Fed. Cas. No. 12,743.

41. The Elvine, 19 Fed. 528; The Lola, 6 Ben. 142, 15 Fed. Cas. No. 8,468.

42. The Tarquin, 1 Lowell 358, 23 Fed. Cas. No. 13,755; The Ringleader, 6 Ben. 400, 20 Fed Cas. No. 11,850.

Omission. — So, too, parol evidence may be received to show an amount of wages not specified in the articles.[43]

2. Discharge. — On a libel for wages due the libelant as master,[44] or other officer,[45] or seaman,[46] where the defense is incompetency of the libelant, desertion,[47] or other default,[48] in order to sustain such defense the evidence should be clear and satisfactory; the burden of proof, as a matter of course, being on the vessel owner.

A Log-Book Stating a Desertion by a seaman, while admissible in evidence, is not conclusive.[49]

V. COLLISION.

1. Presumptions and Burden of Proof. — A. In General. — The libelant has the burden of showing not only the fact that there was a collision, and the identity of the colliding vessel, but also that the collision was the cause of the injuries complained of.[50]

B. Fault or Negligence. — a. *In General.* — Ordinarily, the mere fact of a collision between two vessels raises no presumption of fault or negligence against either of them.[51] And it is accordingly held that the libelant has the burden of proving fault on the part of the libeled vessel contributing to the injuries complained of,[52] unless the circumstances surrounding the collision are such as to raise the presumption of fault.[53]

b. *Vessels in Tow.* — When a vessel in tow of a tug collides

43. Wickham *v.* Blight, Gilp. 452, 29 Fed. Cas. No. 17,611.

44. Lombard S. S. Co. *v.* Anderson, 134 Fed. 568, 67 C. C. A. 432.

45. On a libel to recover wages under a contract by which the libelant was employed as chief engineer on the respondent's vessel, where the respondent defends on the ground that the libelant became incompetent and irresponsible from excessive use of intoxicating liquors, the burden is on the respondent to establish that defense. Caffyn *v.* Peabody, 149 Fed. 294.

46. The Belle, 6 Ben. 287, 3 Fed. Cas. No. 1,271.

47. Where it appears that the libelant was one of the crew and that he did his work well, and that the defense is that he has forfeited his right to wages by reason of desertion, the burden is on the claimant to establish the forfeiture. The Topsy, 44 Fed. 631.

48. Forfeiture of Wages. — On a libel by discharged seamen to recover wages where the libelants have shown the contract of shipping and that their discharge was without fault, the burden is cast on the vessel to show that the libelants were in fault and were discharged for good cause. The Villa y Herman, 101 Fed. 132.

49. Orne *v.* Townsend, 4 Mason 541, 18 Fed. Cas. No. 10,583. See also Jones *v.* The Phoenix, 1 Pet. Adm. 201, 13 Fed. Cas. No. 7,489.

50. The City of Chester, 18 Fed. 603; The Amanda Powell, 14 Fed. 486.

The Ownership of the Injured Vessel must be shown. The Ship Havre, 1 Ben. 295, 111 Fed. Cas. No. 6,232.

51. The W. H. Simpson, 80 Fed. 153, 25 C. C. A. 318; The B. B. Saunders, 25 Fed. 729; The Bridgeport, 7 Blatchf. 361, 4 Fed. Cas. No. 1,861.

52. The Clara, 102 U. S. 200; The W. H. Simpson, 80 Fed. 153, 25 C. C. A. 318; The Joseph W. Gould, 19 Fed. 785; The David Dows, 16 Fed. 154; Corks *v.* The Belle, 6 Fed. Cas. No. 3,231*a*.

53. The Granite State, 3 Wall

with a vessel at anchor, which the tug has passed safely, the presumption as between the tug and the tow is that the tow was in fault.[54] But in the case of a collision with another vessel not in fault, the presumption of fault is against the tug.[55]

c. *Steamers Colliding.* — The general rule is that any steamer not taking the requisite diligent precautions to avoid colliding with another steamer, will be deemed at fault, and must show not only that probably her fault did not contribute to the disaster, but could not have done so.[56] And where a steamer collides squarely with another, negligence in not porting her helm will be presumed upon the part of the colliding steamer.[57]

d. *Collision With Moored Vessel.* — Where a vessel properly moored at a dock, or not in motion, is injured by a vessel in motion, the presumption is that it was the fault of the vessel under way;[58] and it is presumptively liable until the contrary is shown, the burden of doing which is upon the vessel under way.[59]

The Vessel in Motion Must Exonerate Herself From Blame by showing that it was not in her power to prevent the injury by adopting any practicable precautions.[60]

e. *Collision With Pier.* — Negligence in the navigation of a steamship will be presumed from the fact of its colliding with a pier.[61]

f. *Steamer Colliding With Sailing Vessel.* — A steamer colliding with a sailing vessel is presumed to have been negligent.[62]

g. *Sailing Vessels Colliding.* — A sailing vessel with wind free is presumed negligent in colliding with one closehauled.[63]

h. *Violating Rules of Navigation.* — The vessel guilty of violat-

(U. S.) 310; The Oregon, 158 U. S. 186; The Bridgeport, 7 Blatchf. 361, 4 Fed. Cas. No. 1,861.

54. The Albert N. Hughes, 92 Fed. 525, 34 C. C. A. 516, *reversing* 79 Fed. 383.

55. The Belknap, 2 Lowell 281, 3 Fed. Cas. No. 1,244.

56. *United States.* — The Umbria, 166 U. S. 404; The Breakwater, 155 U. S. 252; The Britannia *v.* Cleugh, 153 U. S. 130; The Servia, 149 U. S. 144; The Manitoba, 122 U. S. 97; The America, 92 U. S. 432; The Continental, 14 Wall. 345; The Chesapeake, 1 Ben. 23, 5 Fed. Cas. No. 2,642.

57. The America, 92 U. S. 432; The Galatea, 92 U. S. 439; The Johnson, 9 Wall. (U. S.) 146.

58. The Oregon, 158 U. S. 186; The Virginia Ehrman, 97 U. S. 309; Culbertson *v.* The Southern Belle, 18 How. (U. S.) 584; The Bridgeport, 14 Wall (U. S.) 116; The Bulgaria, 74 Fed. 898; The St. John, 54 Fed. 1,015, 5 C. C. A. 16.

59. The Rotherfield, 123 Fed. 460; The Morrisania, 13 Blatchf. 512; 17 Fed. Cas. No. 9,838; The Drew, 22 Fed. 852; The Ogeman, 32 Fed. 919; The New York, 34 Fed. 757.

60. The Virginia Ehrman, 97 U. S. 309.

61. Pennsylvania R. Co. *v.* Ropner, 105 Fed. 397. See also The Henry Clark, *v.* O'Brien, 65 Fed. 815.

62. *United States.* — The Martello, 153 U. S. 64; The Nacoochee, 137 U. S. 330; The Belgenland, 114 U. S. 355; The Abbotsford, 98 U. S. 440; The Carroll, 8 Wall. 302; The Fannie, 11 Wall. 238; The J. D. Peters, 42 Fed. 269; The Wenona, 8 Blatchf. 449, 29 Fed. Cas. No. 17,411.

63. The Ann Caroline, 2 Wall. (U. S.) 538; The Mary Eveline, 16

ing the rules of navigation has the burden of proving not only that such violation did not contribute to the collision,[64] but also that it could not have contributed to it.[65]

i. *Lights, Lookouts, Signals, Etc.* — Where a vessel at night does not show the lights required by law, or shows wrong lights, in case of a collision with another vessel, it is incumbent upon the former to show that her fault did not contribute to the collision.[66]

In the absence of proof to the contrary, the presumption is that passing signals were made the proper distance.[67]

A Vessel Failing To Give the Requisite Signal has the burden of showing that her failure did not contribute to the collision.[68]

The Absence of a Competent Lookout raises a presumption of negligence and imposes upon the vessel the burden of showing by clear evidence that such omission did not contribute to the collision.[69]

j. *Freedom From Contributory Fault.* — *At Common Law* a vessel owner suing for an injury from a collision has the burden of proving that his vessel was free from contributory fault.[70]

In Admiralty, however, the rule as laid down by the United States Supreme Court is that the libelant need not show freedom from fault on the part of his vessel, except for the purpose of sustaining a claim for entire damages,[71] although there are circuit decisions

Wall. (U. S.) 348; Carll *v.* The Erastus Wiman, 20 Fed. 245.

64. The St. Louis, 98 Fed. 750.

65. The Britannia *v.* Cotton, 153 U. S. 130; The Belden *v.* Chase, 150 U. S. 674; The Martello, 153 U. S. 64; The Clara, 102 U. S. 200; The Glendale *v.* Evich, 81 Fed. 633, 26 C. C. A. 500; The Lansdowne, 105 Fed. 436; The Martinez *v.* The Steamboat Anglo Norman, Newb. Adm. 492, 16 Fed. Cas. No. 9,174; Taylor *v.* Harwood, 1 Taney 437, 23 Fed. Cas. No. 13,794.

66. The Roman, 14 Fed. 61; The Oregon, 27 Fed. 751; The Hercules, 17 Fed. 606; The U. S. Grant, 7 Ben. 195, 28 Fed. Cas. No. 16,803; The M. M. Hamilton, 1 Hask. 489, 17 Fed. Cas. No. 9,685.

67. The Charles Morgan, 115 U. S. 69.

68. The Zouave, 90 Fed. 440, *holding* that in the absence of such proof she will be deemed in fault, even although it is not otherwise shown that such failure did contribute to the collision.

A Vessel Failing to Respond to a signal by another vessel has the burden of showing that such omission did not contribute to the collision. The Mary Ida, 20 Fed. 741.

69. The Propeller Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443; The George W. Childs, 67 Fed. 269; The Flushing, 32 Fed. 334; The John Fretter, 13 Fed. Cas. No. 7,342; The Northern Indiana, 3 Blatchf. 92, 18 Fed. Cas. No. 10,320; The A. G. Brooks, 1 Lowell 299, 1 Fed. Cas. No. 98.

70. Griswold *v.* Sharpe, 2 Cal. 17; Drew *v.* The Steamboat Chesapeake, 2 Dougl. (Mich.) 33.

71. The Clara, 102 U. S. 200; The Haverton, 31 Fed. 563.

Where a vessel is clearly shown to have been guilty of a fault sufficient in itself to account for the collision, but attacks the management of the other vessel, the presumption is in favor of the latter vessel; and in order to rebut this presumption it is not sufficient merely to raise a doubt as to such management; it can be rebutted only by clear proof of a contributing fault. The Ludvig Holberg, 157 U. S. 60; The Oregon, 158 U. S. 186; The City of New York, 147 U. S. 72; The Wenona, 19 Wall. (U. S.) 41.

imposing upon the libelant the burden of proving freedom from fault on his part.[72]

2. Mode of Proof. — A. In General. — **Evidence of a Custom of Navigation** may be received for the purpose of establishing negligence in navigation.[73]

The Finding of a Board of Local Inspectors is not admissible in a collision case.[74]

B. Declarations and Admissions. — Although statements by the master of the libeled vessel as to the cause of the collision may be admitted as against the vessel or her owner, those made by other officers of the vessel, or by her crew are not so admissible.[75]

C. Testimony of Experts. — The testimony of experts is admissible in a collision case to show the bearing of a steamer's rate of speed on her navigation.[76] So, also, it may be shown by expert testimony whether the special circumstances of the case rendered necessary a departure from the statutory sailing rules.[77] And competent seamen on board the colliding vessel may testify whether she was managed with skill and prudence.[78]

VI. BOTTOMRY AND RESPONDENTIA.

Presumptions and Burden of Proof. — Ordinarily the presumptions are in favor of bottomry bonds.[79]

Necessary Advances for Repairs and supplies in a foreign port ordered by the master are presumed to have been made on the credit of the vessel.[80] And where a vessel owner urges against a bottomry bond the objection that the supplies might have been obtained on the personal credit of the owner, the burden is upon him

72. The Ashford, 44 Fed. 703; The New Champion, 1 Abb. Adm. 202, 18 Fed. Cas. No. 10,146; Ward *v.* Fashion, 6 McLean 152, 29 Fed. Cas. No. 17,154; McGrew *v.* The Melnotte, 1 Bond. 453, 16 Fed. Cas. No. 8,812.

73. The City of Washington, 92 U. S. 31.

74. The Charles Morgan, 115 U. S. 69.

75. The City of Augusta, 80 Fed. 297, 25 C. C. A. 430; The Roman, 14 Fed. 61.

76. The Blackstone, 1 Lowell 485, 3 Fed. Cas. No. 1,473.

77. The Alaska, 33 Fed. 107.

78. The Northern Warrior, 1 Hask. 314, 18 Fed. Cas. No. 10,325.

79. O'Brien *v.* Miller, 168 U. S. 287.

80. The Emily Souder, 17 Wall. (U. S.) 666; The Lulu, 10 Wall. (U. S.) 12; The Acme, 7 Blatchf. 366, 1 Fed. Cas. No. 28; The Metropolis, 9 Ben. 83, 17 Fed. Cas. No. 9,503.

In the case of a lien asserted against a vessel supplied in a foreign port, necessity for credit must be presumed where it appears that the supplies for which a lien is asserted were ordered by the master and were necessary for an intended voyage, unless it is shown that the vessel had funds or the owners had sufficient credit, and that the furnisher or lender knew these facts. The Wyandotte, 145 Fed. 321, 75 C. C. A. 117, *affirming* 136 Fed. 470; The Valencia, 165 U. S. 264; The Bertha M. Miller, 79 Fed. 365, 24 C. C. A. 641; The Iris, 100 Fed. 104, 40 C. C. A. 301.

to show that he had credit or funds at the port where the master procured the supplies or executed the bond.[81]

VII. PERSONAL INJURIES.

1. Assault. — A master seeking to justify an assault and battery committed upon a seaman has the burden of proof.[82] But a seaman suing a vessel for an assault committed upon him by the master must show that the master acted within the scope of his authority.[83]

2. Negligence. — So, too, ordinarily one suing a vessel to recover damages for personal injuries resulting from the alleged negligence of the vessel or those in charge has the burden of proof.[84]

Presumption of Negligence From Fact of Accident. — The presumption of negligence is often raised by the circumstances of an accident.[85]

81. The Wyandotte, 145 Fed. 321, 75 C. C. A. 117, *affirming* 136 Fed. 470; The Virgin, 8 Pet. (U. S.) 538; O'Brien *v.* Miller, 168 U. S. 287; The Grapeshot, 9 Wall. (U. S.) 129.

82. Treadwell *v.* Joseph, 1 Sumn. 390, 24 Fed. Cas. No. 14,157.

83. Spencer *v.* Kelley, 32 Fed. 838.

84. The Meta, 88 Fed. 21, *holding* that a person injured by a tug in freeing barges for tow has the burden of proving the negligence of the tug.

On a libel against a vessel for personal injuries to a servant resulting from alleged defective appliances, the burden is upon the libelant to give evidence from which the inference of the ship's negligence may be satisfactorily drawn. The Tresco, 128 Fed. 780 (the alleged negligence consisting in failing to perform the duty of proper inspection).

In Nikolai II, 102 Fed. 174, an action for personal injuries, the libelant was one of a stevedore's gang employed by the shipper to load the vessel. The libelant was lawfully on the ship and was injured by falling into the hold. The question was, did his injuries result from the negligent failure of the officers of the ship to perform a duty necessary for his safety, and it was held that there must be reasonable evidence of negligence on their part. *Citing* The Max Morris, 137 U. S. 1, 24 Fed. 860; The Saratoga, 94 Fed. 221, 36 C. C. A. 208; The Louisiana, 74 Fed. 748, 21 C. C. A. 60; The Jersey City, 46 Fed. 134; The Gladiolus, 22 Fed. 454; The Germania, 9 Ben. 356, 10 Fed. Cas. No. 5,360.

On a libel for injuries received by the libelant, while engaged in loading a vessel as gangwayman for the stevedores, alleged to have been caused by the disobedience of orders by the winchman employed by the ship, the libelant has the burden of proof. Calise *v.* The Cairnstrath, 124 Fed. 109.

The fact that the vessel alleged to have been negligent was under charter to the respondent and used only in his service is not sufficient to establish the liability of the respondent; there must be some evidence warranting a finding of negligence in her care and management. Blakeslee *v.* New York, C. & H. R. R. Co., 139 Fed. 239, 71 C. C. A. 365, *reversing* 132 Fed. 153.

85. The France, 59 Fed. 479, 8 C. C. A. 185, was an action to recover for personal injuries received while assisting in the removal of ashes from the vessel. The decision in the trial court proceeded upon the ground that the negligence was to be presumed from the circumstances of the accident; the judge saying: "The evidence does not show anything out of the usual course that should cause the handle of the ash bag to break while it was hoisting up. Its weak and insufficient condition must be inferred from its breaking under such circumstances. I

VIII. CARRIAGE OF GOODS.

1. Receipt and Delivery of Cargo By Vessel. — Where no bill of lading was given, a shipper suing for the loss of, or injury to, the cargo has the burden of proof to show that the goods were received on board the ship.[86]

A Bill of Lading issued by the master of a vessel is *prima facie* evidence of the receipt on board of the goods listed;[87] and in the absence of proof to the contrary establishes that fact,[88] the burden of proof being on the vessel to prove the contrary by clear evidence.[89]

A Bill of Lading Is of Twofold Character: It is a receipt for goods and a contract to carry. As a receipt it makes a *prima facie* case only and is undoubtedly open to explanation.[90] But as a contract of affreightment it stands in the same position as other written agreements, and accordingly cannot be varied or altered by parol evidence.[91]

can not regard the general testimony that the bag was sound and sufficient as overcoming that fact." But the Circuit Court of Appeals in reversing the case said: "The presumption of negligence is often raised by the circumstances of an accident, and it may be a legitimate presumption that an appliance which gives out while it is being used for its proper purpose, in a careful manner, is defective or unfit. How far that presumption may go, in an action by an employe against an employer, to shift the burden of proof from the former to the latter, must depend upon the circumstances of the particular case. The mere fact that the appliance is shown to have been defective is not enough to do so; it must appear that the defect was an obvious one, or such as to be discoverable by the exercise of reasonable care. In the present case we think the circumstances of the accident do not show that the bag gave way because it was not reasonably adequate for the occasion, but they show that it gave way because a violent and unnecessary strain was put upon it." See also article "Negligence," Vol. VIII.

86. Checking Off Goods Coming Aboard Ship, in the usual way, by the ship's officers whose customary duty this was, is received as evidence of great importance on the question whether the goods in question came aboard ship. Kelley *v.* Cunard S. S. Co., 120 Fed. 536.

87. The Titania, 131 Fed. 229, 65 C. C. A. 215, *affirming* 124 Fed. 975; Nelson *v.* Woodruff, 1 Black (U. S.) 156; The T. A. Goddard, 12 Fed. 174. *Compare* Kelley *v.* Cunard S. S. Co., 120 Fed. 536.

88. The Titania, 131 Fed. 229, 65 C. C. A. 215, *affirming* 124 Fed. 975.

89. The Titania, 131 Fed. 229, 65 C. C. A. 215, *affirming* 124 Fed. 975.

90. Planters' Fertilizer Mfg. Co. *v.* Elder, 101 Fed. 1001, 42 C. C. A. 130.

The bill of lading describing the goods shipped and stating their quantity is competent evidence against the ship owner that goods of that kind and amount were shipped. But it is not conclusive. The ship owner may show that the bill of lading was incorrect, whether the claim be by the consignee, on whose account the shipment was made, or by endorsees of the bill of lading. American Sugar Refining Co. *v.* Maddock, 93 Fed. 980, 36 C. C. A. 42.

A bill of lading is not conclusive as to the quantity of goods on board; it is a simple receipt open to explanation as between the consignee and the owner or master. The latter may, as against the former, ordinarily show any mistake as respects the quantity shipped. The Alonzo, 1 Hask. 184, 1 Fed. Cas. No. 257.

91. The Delaware, 14 Wall. (U. S.) 579; The Presque Isle, 140 Fed. 202; De Sola *v.* Pomares, 119 Fed. 373, where the bill of lading showed prepayment of the freight and it was held that the respondents

Constructive Delivery By Vessel. — Delivery on Wharf. — In order to show a valid constructive delivery by the vessel which will relieve it from liability, it is necessary to show that the goods in question were landed on the wharf, segregated from the general cargo so as to be conveniently accessible to the consignee, that notice was given of their arrival and location, and a reasonable time allowed for their removal.[92]

2. Loss of or Injury to Cargo. — A. In General. — When a vessel owner receives goods in good condition and delivers them in a damaged condition, there is a *prima facie* presumption that the carrier was at fault[93] and he has the burden of proof to show that the loss was caused by a risk excepted.[94]

(the ship owners) could not show that, prior to the delivery of the goods, there was a specific understanding between the parties, that a rule made by the respondents that they would not receive goods otherwise than upon freight being paid in advance and not to be returned in any event should apply to these shipments.

92. The Titania, 131 Fed. 229, 65 C. C. A. 215, *affirming* 124 Fed. 975, where the court quoting with approval from The Eddy, 5 Wall. (U. S.) 481, said: "Delivery on the wharf in the case of goods transported by ships is sufficient under our law, if due notice be given to the consignees and the different consignments be properly separated, so as to be open to inspection and conveniently accessible to their respective owners. Where the contract is to carry by water from port to port an actual delivery of goods into the possession of the owner or consignee, or at his warehouse, is not required in order to discharge the carrier from his liability. He may deliver them on the wharf; but to constitute a valid delivery there the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods, or put them under proper care and custody. When the goods, after being so discharged and the different consignments properly separated, are not accepted by the consignee or owner of the cargo, the carrier should not leave them exposed on the wharf, but should store them in a place of safety, notifying the consignee or owner that they are so stored, subject to the lien of the ship for the freight and charges, and when he has done so he is no longer liable on his contract of affreightment."

93. The Frey, 106 Fed. 319, 45 C. C. A. 309.

94. The Presque Isle, 140 Fed. 202; The Giava, 56 Fed. 243; The Mascotte, 51 Fed. 605, 2 C. C. A. 399; The Lak Kroma, 138 Fed. 936; The Patria, 132 Fed. 971, 68 C. C. A. 397, *affirming* 125 Fed. 425.

If goods are lost after their reception and before their delivery by the vessel, the presumption is that the loss was occasioned by the fault of the vessel, and the burden is on her to show that the loss was occasioned by a cause for which she is not responsible. Christie *v.* The Craigton, 41 Fed. 62. In this case the defense set up was that the loss came under the exception in the bill of lading, "perils of the sea." The claimant proved the encountering by the ship of water sufficiently heavy to warrant the conclusion that the immediate cause of the loss in question was the motion of the ship in the heavy water, and it was held that this proof from the claimant shifted the burden to the libelant to show that this result would have been prevented by the exercise of due care in the stowage of the cargo.

Where a vessel receives a cargo in good order and delivers it in bad order, it is incumbent upon her to show that the damage was the result of a sea peril. Having proved a sea peril, for the results of which

B. SEAWORTHINESS. — a. *Generally.* — A shipowner seeking the protection of the immunity afforded by the Harter act[95] cannot rely on the presumption of law that the vessel was seaworthy at the beginning of the voyage.[96] But in order to have the benefit of the

the vessel is not responsible, she must then show that it was the sea peril which caused the damage to the cargo. This may be done by negative as well as positive proof. The Dunbritton, 73 Fed. 352, 19 C. C. A. 449.

When goods in the custody of a common carrier are damaged after their reception, and before their delivery, there is a *prima facie* presumption that the injury is occasioned by the carrier's default, and the burden is upon him to prove that it arose from a cause for which he was not responsible. If it appears that the injury has been caused by the dangers of navigation, or some other cause within the exception of the bill of lading, then it devolves upon the shipper to make out that the damage might have been avoided by the exercise of reasonable care and skill upon the part of the carrier. No loss which is the result of ordinary wear and tear, or a necessary consequence of the employment of the vessel in the usual course of navigation, is a loss by "perils of the seas." The Warren Adams, 74 Fed. 413, 20 C. C. A. 486.

Where the bill of lading contained the usual printed clause exempting the vessel from liability for breakage or for loss or damage arising from the nature of the goods or insufficiency of packages, and also an indorsement by the shipper exempting the vessel from loss or damage for chafage or breakage to insufficiently protected property, and it was shown that the packages were frail, upon proof of breakage, the vessel, relying on the clause of exemption, has the burden to establish that the damage was due to insufficient protection. Doherr *v.* Houston, 128 Fed. 594, 64 C. C. A. 102, *affirming* 123 Fed. 334.

Where the fact of damage to the cargo and its extent are fully shown, the burden is then upon the vessel owner to sustain its claim that the damage was within the exceptions in the bill of lading. The Beeche Dene, 55 Fed. 525, 5 C. C. A. 207.

Where goods are shipped in apparently good order and are received in bad order, the burden of proof is upon the owner of the vessel to show that the injury was occasioned by some cause for which he was not liable. Pacific Coast S. S. Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135.

95. It is expressly provided by an act of Congress that an owner who has exercised due diligence to make the vessel seaworthy and properly man, equip and supply it, is not liable for damage or loss resulting from "faults or errors in navigation or in the management of said vessel, nor shall the vessel . . . be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." U. S. Rev. Stat. §§ 4281-4284; Comp. Stat. 1901, p. 2946; 4 Fed. Stat. Anno. p. 837; the statute commonly known as the Harter act.

96. The Wildcroft, 201 U. S. 378. The court said: "This construction of the law is opposed to the terms and policy of the act and contrary to the decisions of this court heretofore announced, from which we see no occasion to depart. The relief afforded by the third section of the Harter act to the owner of a vessel, transporting property, is purely statutory. In the case at bar there could be no question as to the liability of the vessel owner from the established facts of the case, but for the immunity afforded by that act. To permit a cargo of sugar to

exemptions provided in this act, it is incumbent upon the shipowner to prove that the vessel was seaworthy at the beginning of the voyage, or that due diligence had been used to make her so.[97]

be injured by the introduction of fresh water in the manner shown, but for the provisions of this act, would have made a case of clear liability against the owner, and where the statute has given immunity against such loss by reason of error in navigation or management, it does so upon the distinct condition that the owner shall show that the vessel was in all respects seaworthy and properly manned, equipped and supplied for the voyage; or, if this can not be established, that he has used due diligence to obtain this end. The discharge of this duty is not left to any presumption in the absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act. The reason for requiring this proof by the owner is apparent. He is bound to furnish a seaworthy and properly equipped ship for the purpose of the voyage. Whether he has done so is a matter peculiarly within his own knowledge. The inspection which he can give, but which the shipper can not give for lack of opportunity, will establish whether this duty has been complied with. The whole matter is in the control of the owner. The law says, in substance, that when the owner can show that he has discharged this duty he shall be relieved from errors of navigation and management on the voyage, over which he has not such direct control. It is not a case where there is either the necessity or propriety of resorting to presumptions. It is only when he has discharged the burden which the law imposes upon him, and shown that he has furnished a vessel, fit and seaworthy, or has used due diligence to that end, that the law relieves him of the liability which he would otherwise incur." This case affirms the decree in 130 Fed. 521, 65 C. C. A. 145, but disaffirms the ruling of the circuit court of appeals on this particular point.

97. The Wildcroft, 201 U. S. 378, *affirming* 130 Fed. 521, 65 C. C. A. 145; The Oneida, 128 Fed. 687, 63 C. C. A. 239, *reversing* 108 Fed. 886; The Marechal Suchet, 112 Fed. 440; The Aggi, 93 Fed. 484; The Edwin I. Morrison, 153 U. S. 199; The Warren Adams, 74 Fed. 413, 20 C. C. A. 486; The Kensington, 88 Fed. 331; The Colima, 82 Fed. 665; The British King, 89 Fed. 872; The Fri, 140 Fed. 123.

In The Warren Adams, 74 Fed. 413, 20 C. C. A. 486, it was insisted by the cargo owner that, under the implied condition of seaworthiness, incorporated by the law in every contract of affreightment between the cargo owner and a common carrier by ship, the burden of proof is upon the carrier to show that at the commencement of the voyage the vessel was in a suitable condition to encounter all common perils and dangers with safety, and was free from any latent defect impairing her ability in this respect. The court said: "To this we agree, but without intending to imply that the burden of affirmative proof can not be satisfied by general evidence of seaworthiness. It has never been supposed—certainly, it has never been decided—that there is a more stringent presumption or rule of evidence in respect to proof of seaworthiness when the question arises under a bill of lading, or other contract of affreightment, than when it arises under a policy of marine insurance. In such policies the implied warranty of seaworthiness is a condition precedent to the obligation of insurance."

The vessel owner has the burden of proving seaworthiness at the time of sailing; and in the absence of a sufficient inspection to show that fact he has the burden of proving that a leak, from which damage to the cargo by seawater resulted during the voyage, arose from some cause occurring after the vessel had sailed. The Phoenicia, 90 Fed. 116.

The burden of proving seaworthiness requires that there shall be

In order to come within the exemption of the Harter act, it is not enough for the vessel owner to show that he exercised due diligence to make her in all respects seaworthy, if as matter of fact she was unseaworthy at the commencement of the voyage.[98]

In seeking to be relieved from liability under the exception of the perils of the sea, the vessel owner must prove that the injuries to the cargo were the result of such untoward circumstances as would not have been anticipated and guarded against by the exercise of ordinary care and prudence.[99]

The burden imposed upon a vessel owner to show that the injury to the cargo was due to an excepted cause may be sustained by circumstantial evidence.[1]

Notwithstanding the provisions of the Harter act, the parties

proof not only of due inspection, but of actual repair, if repair be found necessary. The Aggi, 93 Fed. 484.

Where there is general proof of seaworthiness at the inception of the voyage and an adequate cause is shown for the defect on the voyage, the burden of proving seaworthiness is deemed fulfilled. The Aggi, 93 Fed. 484.

The fact that a vessel had been for a sufficient time subject to the conditions calculated to test her seaworthiness in the respect wherein she subsequently showed defect, without any evidences of such defect, and that thereafter an adequate cause for the defect was present, is sufficient evidence that the ship was seaworthy at the beginning of the voyage. The Aggi, 93 Fed. 484.

98. The C. W. Elphicke, 122 Fed. 439, 58 C. C. A. 421, *affirming* 117 Fed. 279.

The owner must show now, as he was obliged to show prior to the passage of the Harter act, more than due diligence; he must show that the ship was in fact seaworthy, that is to say, really fit for the purpose. Insurance Co. *v.* North German Lloyd Co., 106 Fed. 973.

99. The Westminster, 127 Fed. 680, 62 C. C. A. 406, *affirming* 116 Fed. 123.

Where the cargo owner seeking to hold the vessel owner liable for injury to the cargo from fire, claims that the origin of the fire was an overheated flue from which the cargo was ignited, he has the burden of proving the fact of the overheated flue and that the fire was caused thereby. The Strathdon, 101 Fed. 600, 41 C. C. A. 415.

1. The Wildcroft, 130 Fed. 521, 65 C. C. A. 145, *affirming* 124 Fed. 631, 126 Fed. 229, *affirmed* 201 U. S. 378. The court said: "We see no reason, however, why circumstantial evidence should be excluded from the consideration of the court, in its determination of the issue before it. Its probative force in this case could not be disregarded. It is certainly very strong, if not absolutely conclusive, and when considered in the connection with other testimony in the case, fully warranted the learned judge in the conclusion at which he arrived. The gravamen of complainant's contention seems to be, that the court were not justified in relying upon such testimony. He objects that the claimant has not proved 'a single fact as to the cause of damage, but he had a theory which the court accepted as a fact.' But if all the facts in a case are consistent with one theory, explaining the ultimate fact sought to be proved, and are inconsistent with every other theory attempting such explanation, we have the very foundation upon which all circumstantial evidence rests, by which the most important issues involving life or property may be and are every day determined. And so the learned judge of the court below says: 'I adopt the theory propounded by the ship to account for the presence of the water; indeed, I can not conceive of any other theory that is consistent with the facts, while this agrees with

may, by contract, impose upon the cargo owner the burden of proving unseaworthiness and unfitness of the vessel.[2]

b. *Staunchness.* — Seaworthiness will be presumed where the vessel was strong and staunch in the perils of the sea for a considerable time.[3] So, also, where she is found seaworthy upon a careful preliminary survey by the charterer.[4]

c. *Improper Manning.* — Unseaworthiness will be presumed from the fact of the vessel's not being properly manned.[5]

d. *Leakage.* — Unseaworthiness will be presumed where the fessel springs aleak before encountering the perils of the sea.[6]

them all and is in conflict with none.'"

Upon the question whether a vessel was subjected to extraordinary perils of the sea in a storm of unusual violence, evidence that another vessel leaving the same port two days earlier encountered the same storm and delivered her cargo in good order is irrelevant. The Hyades, 118 Fed. 85. The court said: "One difficulty with the contention is that the Michigan did not by any means encounter the same perils that the Hyades was subjected to. She left Galveston September 3d, two days in advance of the Hyades and though she was doubtless in the outer extremity of the cyclonic hurricane and suffered therefrom in the shifting of her cargo and a consequent list, it is not shown that she was exposed to such extremely severe weather as the Hyades met with in passing through the center of the storm. Moreover, if the vessels had been side by side throughout the storm, the escape of one from damage would not afford evidence of much persuasiveness in determining whether the other was subjected to sea perils. The power and destruction of waves which cause wreckage on one vessel, can not be measured by the absence of injury from other waves to another vessel. Even in the absence of any injury to the other one, the question would still remain whether the injured vessel was subjected to extraordinary marine perils."

2. The Tjomo, 115 Fed. 919; The Southwark, 104 Fed. 103, *s. c.* 108 Fed. 880.

Where the bill of lading releases the ship owner from liability for absolute seaworthiness provided due diligence is exercised, the ship owner in order to avail himself of that exemption has the burden of proving due diligence, including the exercise of requisite care and diligence in inspection. The Friesland, 104 Fed. 99.

Where the bills of lading exempt the ship from liability for damage to the cargo from a particular cause not due to some act or omission or defect for which the owner, master, agent or some other person in the service of the ship might be held to be blameworthy, the burden of proof is upon the cargo owner to show such blameworthy act, omission or defect. The Guy C. Goss, 53 Fed. 826.

Where the charter party and bill of lading exempt the vessel from liability from breakage and leakage and dangers of the sea, but the cargo owner asserts that the true cause of the injury to the cargo was improper stowage at the port of lading, the burden of proof is on the cargo owner. Crowell *v.* Union Oil Co., 107 Fed. 302, 46 C. C. A. 296.

3. The Warren Adams, 74 Fed. 413, 20 C. C. A. 486; The Millie R. Bohannon, 64 Fed. 883; The Marlborough, 47 Fed. 667.

4. The Piskataqua, 35 Fed. 622.

5. Holland *v.* 725 Tons of Coal, 36 Fed. 784.

6. Pacific Coast S. S. Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135; The Gulnare, 42 Fed. 861. See also The Phoenicia, 90 Fed. 116; Farr & Bailey Mfg. Co. *v.* International Nav. Co., 98 Fed. 636, 39 C. C. A. 197.

Where a vessel soon after leaving port becomes leaky without stress of weather or other adequate cause

C. Negligence. — a. *Generally.* — Where the evidence shows that the injury was occasioned by one of the causes for which the vessel is exempted from liability, in the absence of some fault, such as negligent stowage, the burden is upon the libelant to show that it might have been prevented by reasonable skill and diligence on the part of those employed by the vessel.[7]

of injury, the presumption is that she was unseaworthy before sailing. The Aggi, 93 Fed. 484.

Where a vessel, soon after leaving port, becomes leaky, without stress or weather, or other adequate cause of injury, the presumption is that she was unsound before setting sail. The law will intend the want of seaworthiness, because no visible or rational cause other than a latent or inherent defect in the vessel, can be assigned for the result. But, where it satisfactorily appears that the vessel encountered marine perils which might well disable a staunch and well-manned ship, no such presumption can be invoked. And where, for a considerable time, she has encountered such perils, and shown herself staunch and strong, any such presumption is not only overthrown, but the fact of her previous seaworthiness is persuasively indicated. The Warren Adams, 74 Fed. 413, 20 C. C. A. 486.

Where a Vessel Springs Aleak and Founders Soon After Starting upon her voyage without having encountered any storm or other peril to which the leak can be attributed, the presumption is that she was unseaworthy when she sailed. The Arctic Bird, 109 Fed. 167, *citing* The Planter, 2 Woods 490, 19 Fed. Cas. No. 11,207*a*; Work *v.* Leathers, 97 U. S. 379, where the court said: "If a defect without any apparent cause be developed it is to be presumed it existed when the service began."

7. Lazarus *v.* Barber, 136 Fed. 534, 69 C. C. A. 310, *affirming* 124 Fed. 1007.

In determining whether or not an injury to goods is of such a character as to come within an exception of liability which is provided for in the bill of lading, the burden of proof is imposed upon the vessel owner; but after it is once determined that the injury is of a nature or has occurred from a cause from which liability is excepted, it devolves upon him who claims damages to show that the loss occurred through the negligence of the vessel, or those for whom the owner is responsible. The Henry B. Hyde, 90 Fed. 114, 32 C. C. A. 534. See also The Delhi, 4 Ben. 345, 7 Fed. Cas. No. 3,770; Vaughan *v.* 630 Casks of Sherry Wine, 7 Ben. 506, 28 Fed. Cas. No. 16,900; Wolff *v* Vaderland, 18 Fed. 733; The New Orleans, 26 Fed. 44; The Timor, 67 Fed. 356, 14 C. C. A. 412; Clark *v.* Barnwell, 12 How. (U. S.) 272; Transportation Co. *v.* Downer, 11 Wall. (U. S.) 129.

If the damage is manifestly of the kind excepted, the vessel owner is under no obligation to show the promoting cause; it is then incumbent on the cargo owner to show negligence on the part of the vessel. The Patria, 132 Fed. 971, 68 C. C. A. 397, *affirming* 125 Fed. 425. The court said: "To illustrate, if the exception is 'damage caused by peril of the sea,' and the cargo is landed drenched with salt water, it will be for the ship to show that the salt water found access to the cargo through a peril of the sea; but if the exception is 'damage by breakage,' and the article arrives broken, the ship is not required to show how it got broken—although the libelant may show that negligence of those on the ship, or of those who stowed her or discharged her, caused the break, and, showing that, may recover. If the sole damage to the cargo in the case at bar were manifestly decay, and the language of the exception were, as the respondent states it in his brief, 'for decay caused by inherent defect,' the ship would have the burden of showing that the decay was caused by inherent defect. If, however, the sole

Where a cause is shown sufficient to account for the damage, even if the ship were seaworthy, she will be presumed to have been so.[8]

b. *Care of Shipper.* — The shipper is presumed to have used proper care in packing the injured cargo.[9]

c. *Negligence Presumed From Circumstances of Injury.* — Negligence upon the part of the vessel may, however, arise from the circumstances of the injury, as from a leak in the vessel,[10] breaking of packages,[11] or from the gnawing of rats.[12]

d. *Improper Stowage.* — Negligence upon the part of the vessel will be presumed from the fact of improper stowage,[13] and the

damage was manifestly decay, and the language of the exception were, as given in the bill of lading, 'not responsible for damage occasioned by decay of any kind,' the appellant would be right in his contention, and, the cause of the decay not being shown to be negligence on the part of the ship, the libel should be dismissed."

When it has been shown that during the voyage the vessel encountered storms of such violence as reasonably to account for the opening of the seams in her decks and the consequent damage to her cargo, the burden of proof is then upon the cargo owner to establish the fact of improper stowage, contributing to the strain upon the vessel's deck and the resulting injury thereto. The Musselcrag, 125 Fed. 786, *citing* The Neptune, 6 Blatchf. 193, 17 Fed. Cas. No. 10,118; The Polynesia, 30 Fed. 210; The Fern Holme, 24 Fed. 502; The Burswell, 13 Fed. 904.

8. The Sandfield, 79 Fed. 371.

Where the loss is fully accounted for by sea perils, that is to say, where it is proved that sea perils caused the injury, the ship owner may not be called upon to show seaworthiness. The Aggi, 93 Fed. 484.

Where it satisfactorily appears that the vessel encountered marine perils which might well disable a staunch and well-manned ship,— where it appears that the loss has been caused by the dangers of navigation, it then devolves upon the cargo owner to show that the loss might have been avoided by the exercise of reasonable care and skill on the part of the vessel owner. The Tjomo, 115 Fed. 919; Christie *v.* The Craighton, 41 Fed. 62; The Warren Adams, 74 Fed. 413, 20 C. C. A. 486.

9. English *v.* Ocean Steam Nav. Co., 2 Blatchf. 425, 8 Fed. Cas. No. 4,490.

10. The Samuel E. Spring, 29 Fed. 397.

11. In The Asiatic Prince, 103 Fed. 676, it was held that the breaking of an unusual number of bags in which the cargo was shipped, in discharging it, raised the presumption of a lack of care on the part of the ship owner in handling the cargo.

12. The Italia, 59 Fed. 617; The Isabella, 8 Ben. 139, 13 Fed. Cas. No. 7,099.

In The Timor, 46 Fed. 859, a libel to recover for damage to cargo by rats, it appeared that special liability to damage by rats was well known both as respects the cargo and the place of loading, and that the amount of damage was extraordinary and almost unheard of. It was held that the inference was irresistible and overwhelming in the absence of any sufficient explanation why this extraordinary damage occurred; that it could only have arisen from some failure of the ship to take the usual precautions against rats, either in the inspection or preparation of the ship beforehand, or in the number of cats taken on board, or in the facilities afforded them to keep down such an invasion of rats.

13. *United States.* — The Star of Hope, 17 Wall. 651; The Delaware, 14 Wall. 579; The Frey, 92 Fed. 667; The Earnwood, 83 Fed. 315; The

burden is, therefore, upon the vessel to overcome the presumption.[14]

3. Notice of Claim. — Where the bill of lading exempts the vessel, owner or agents from liability for any claim, notice of which is not given before the removal of the goods, and the want of such notice is set up in defense of a claim for loss or injury to the cargo, it is incumbent upon the libelants to prove it as a condition to the right to recover.[15]

4. Baggage. — Where it appears that the vessel encountered on the voyage extraordinarily rough weather which may account for the damage to the baggage for which recovery is sought, the onus is on the passenger to establish carelessness or negligence on the part of the master or owner of the vessel leading to the loss in question.[16]

This does not, however, dispense with the usual proof of good stowage necessary to be made by the ship; and this proof of good stowage cannot rest upon mere inference.[17]

A Passenger Suing for the Value of Baggage Stolen on the vessel during the voyage has the burden of proving the loss by theft as alleged.[18]

IX. GENERAL AVERAGE.

In order to constitute a case for general average three facts

Aspasia, 79 Fed. 91; The Gloaming, 46 Fed. 671; The Keystone, 31 Fed. 412; The Sloga, 10 Ben. 315, 22 Fed. Cas. No. 12,955.

14. The Burgundia, 29 Fed. 607; The Nith, 36 Fed. 86; The Maggie M., 30 Fed. 692.

In determining the question of what is proper stowage of a cargo, the customs and usages of the place of shipment are to be taken into consideration. The Tjomo, 115 Fed. 919; The Titania, 19 Fed. 101.

15. The Westminster, 127 Fed. 680, 62 C. C. A. 406, *affirming* 116 Fed. 123, so holding because the giving of the notice is an affirmative fact peculiarly within the knowledge of the libelant, both with regard to the time when, and the agent of the vessel owner to whom it was given. See also The St. Hubert, 107 Fed. 727, 46 C. C. A. 603.

16. The Neptune, 6 Blatchf. 193, 17 Fed. Cas. No. 10,118. See also The Fern Holme, 24 Fed. 502; The Portuense, 35 Fed. 670.

In The Majestic, 56 Fed. 244, a libel for damage to a passenger's baggage, it was held that the finding of two or three feet of water in the compartment where the baggage was stored was so extraordinary an occurrence that the burden of proof was upon the ship to satisfy the court with a reasonable degree of certainty that this occurred without her fault.

17. The Kensington, 88 Fed. 331, where the court said: "To assume proper stowage upon mere inference and to throw upon a shipper or passenger the burden of proving the contrary without any proof by the ship seems unreasonable and inequitable, considering that proof upon this subject is peculiarly within the power of the ship to produce, and comparatively easy for her, but difficult, if not impossible, for the passenger or shipper."

18. Smith *v.* North German L. S. S. Co., 142 Fed. 1032.

In Weinberger *v.* Compagnie Generale Transatlantique, 146 Fed. 516, an action to recover for injury to baggage, it was held that proof that the baggage was in good condition when taken aboard ship, that at the end of the voyage it was found to be wet with salt water, was held sufficient to entitle to a recovery.

must be established: First, a common imminent danger to be overcome by voluntarily incurring the loss of a portion of the whole to save the remainder; and second, a voluntary casting away of some portion of the joint concern for the purpose of saving the residue; and third, that the attempt was successful.[19] And it is incumbent upon the libelants in such case to make out their case by a preponderance of credible evidence.[20]

X. LIMITING LIABILITY OF SHIPOWNER.

Presumptions and Burden of Proof. — The right of a shipowner to limit its liability under the provisions of the Harter act is dependent upon its want of complicity in the acts causing the disaster,[21] and the burden of proof rests upon him to show affirmatively that he has properly officered and equipped the vessel for the contemplated service.[22]

19. Ven den Toorn *v.* Leeming, 79 Fed. 107, 24 C. C. A. 461, *affirming* 70 Fed. 251. See also Barnard *v.* Adams, 10 How. (U. S.) 270; Dupont de Nemours *v.* Vance, 19 How. (U. S.) 162; Star of Hope, 9 Wall. (U. S.) 203.

20. The Santa Anna Maria, 49 Fed. 878.

21. On a proceeding to limit the liability of a vessel owner under the provisions of the Harter act (§4282) exempting such owner from liability for loss of, or damage to, cargo by reason of fire on board the vessel unless the fire was caused by the design or neglect of such owner, the cargo owner must show the fact of such design or neglect before the vessel owner can be deprived of the exemption thus provided. *In re* Old Dominion S. S. Co., 115 Fed. 845.

In The Cygnet, 126 Fed. 742, 61 C. C. A. 348, the Circuit Court of Appeals for the First Circuit held that the analogous provisions of the Harter act can not be invoked to relieve a vessel from liability for a loss occurring from errors in navigation on the part of the master sufficiently negligent to raise a presumption of his incompetency merely upon a showing that the owners had no knowledge or reason to believe that he was incompetent. The court said: "There is no evidence in the record that the owners of the tug, either the record owners or the owner *pro hac vice*, had made any particular inquiries as to his competency. The petitioners seem to think it is sufficient to maintain their case that the owner or owners had no knowledge or reason to believe that the master was not competent; but this form of statement is not sufficient, because it does not comply with the statute, which requires 'due diligence.'" Referring to the negligent act of the master in failing to observe whether his tow was straightened out on its course, the court said: "An omission so gross as this raises so strong a presumption of fact that the master was not competent as practically to throw the burden on the petitioners to establish the proposition that they used due diligence with reference to his selection, whether the statute does or not impose such a burden."

22. McGill *v.* Michigan S. S. Co., 144 Fed. 788, 75 C. C. A. 518, *reversing* 133 Fed. 577. See also Parsons *v.* Empire Trad. & Transp. Co., 111 Fed. 202, 49 C. C. A. 302; The Main *v.* Williams, 152 U. S. 122; The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366; *In re* Myers Excursion Co., 57 Fed. 240; The Republic, 61 Fed. 109, 9 C. C. A. 386; Quinlan *v.* Pew, 56 Fed. 111, 5 C. C. A. 438; The Colima, 82 Fed. 665.

In proceeding for limitation of liability under the Harter act, the petitioner must prove the facts necessary to entitle him to the relief

sought. But the proof required in support of the petition that any liability incurred was "without the privity or knowledge of the petitioner" does not reach the subsequent issue of liability. As to this issue the claimant is required to prove a cause of action as in an original suit, the right being reserved to the petitioner to contest it under admiralty rule 56. *In re* Davidson S. S. Co., 133 Fed. 411.

The Harter act can not be invoked to relieve a vessel from liability for loss of cargo resulting from the gross fault or negligence of the master, sufficient to raise a presumption of his competency, merely upon a showing that the owners had no knowledge or reason to believe that he was incompetent, that being insufficient to establish the "due diligence" required by the statute, the burden of proving which, under such state of facts, rests on the vessel. The Cygnet, 126 Fed. 742, 61 C. C. A. 348.

In The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366, a proceeding under §4283 of the United States Revised States it was urged that the trial court had erred in holding a conclusion of law, in effect, that the burden was upon the claimants to prove that the petitioner had privity or knowlege of the defective condition of the boiler, whose explosion had caused the damage sought to be compensated, and of the negligence of using the same; and it was contended that the trial court should have held that the burden of proof rested upon the petitioners to show that the loss occurred without their knowledge or privity. This allegation was found in the petition, but denied in the answers. Its truth, so far as concerned the officers of the petitioners, which were corporations, was not established by any direct evidence. Nor was there in the opinion of the trial court, nor in any ruling upon the trial, any express holding that the burden of proof rested upon one or the other of the parties to the suit. The court did not rule expressly as to which of the parties had the burden of proof, but took the position that so far as the appellate court was concerned it was only necessary for them to determine whether it was sufficiently shown that the negligence was without the knowledge or privity of the petitioners. They did, however, hold that it was not necessary for the officers of the petitioning corporations to testify directly to such want of knowledge.

SIDEWALKS.—See Highways.

SIGNATURES.—See Acknowledgment; Handwriting; Records; Subscribing Witnesses; Written Instruments.

SILENCE.—See Admissions; Principal and Agent.

SIMILAR TRANSACTIONS.

By Clark Ross Mahan.

I. GENERAL RULE OF EXCLUSION.

1. Rule Stated. — It is an established rule of the law of evidence that the evidence offered must correspond with the allegations and be confined to the question in issue. This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in issue.[1]

Hence it is, that as a general rule, evidence of other similar acts of a party, or of those who are mere strangers, to the controversy, or of events or occurrences, independent of, and having no connection with, the act or event in controversy, is regarded as inadmissible.[2]

1. See generally on this question, article "RELEVANCY," this volume.

2. *Alabama.* — Andrews *v.* Tucker, 127 Ala. 602, 29 So. 34; Singleton *v.* Thomas, 73 Ala. 205.

California. — Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380.

Colorado. — Denver & R. G. R. Co. *v.* Glasscott, 4 Colo. 270.

Illinois. — Kelly *v.* Dandurand, 28 Ill. App. 25.

Indiana. — Ramsey *v.* Rushville & Ill. G. R. Co., 81 Ind. 394.

Maine. — McIntire *v.* Talbot, 62 Me. 312.

Massachusetts. — Durkee *v.* India Mut. Ins. Co., 159 Mass. 514, 34 N. E. 1133; Hill Mfg. Co. *v.* Providence & N. Y. S. S. Co., 125 Mass. 292.

New York. — Whintringham *v.* Dibble, 66 N. Y. 634.

Texas. — Ross *v.* Moskowitz (Tex. Civ. App.), 95 S. W. 86.

Vermont. — Whitney *v.* First Nat. Bank, 55 Vt. 154, 45 Am. Dec. 598, and see cases cited in succeeding notes.

"**The Maxim That a Transaction Between Two Persons Ought Not To Operate to the Disadvantage of a Third**, though somewhat obscure in its application, because it does not show how unconnected transactions should be supposed to be relevant to each other, and though failing in its literal sense, because it is not true that a man cannot be affected by a transaction to which he is not a

Numerous Instances of the illustration of this rule are set out in the note below.[3]

party, is nevertheless one of the most important and most practically useful maxims of the law of evidence. It means, as Mr. Justice Stephen says, that you are not to draw inferences from one transaction to another that is not specifically connected with it merely because the two resemble each other; that they must be linked together by the chain of cause and effect in some assignable way before you can draw your inference." Steph. Dig. Ev. 198, note vi.

In Linn *v.* Gilman, 46 Mich. 628, 10 N. W. 46, the court said: "That collateral facts are often relevant and proper will not be denied. But it is always necessary to regard their relation in the question to be settled. There must always be some known and ordinary connection between the fact proposed and the facts to be proved, and the former must have some fair tendency to establish the truth of the latter, and when the collateral facts consist of the conduct of strangers, the law usually applies the maxim of *res inter alios acta,* because there is no such general connection between such acts and the matters to be established as will justify an inference such as may properly be relied on in judicial investigations. But whether these foreign facts are or are not the acts of strangers, if they are incapable of affording any reasonable presumption or inference as to the final subject, they ought not to be admitted. They are likely to lead to the multiplication of issues as to cause confusion and misjudgment."

3. In Port Townsend S. R. Co. *v.* Coleman, 15 Wash. 77, 45 Pac. 670, according to the terms of a subsidy bond, the obligee was given until September 1, 1890, to complete and operate a certain railroad a specified distance, and upon an action brought upon said bond after that date, the court permitted testimony to be given as to the condition of the road on the first of July, 1890. It was held such evidence was inadmissible.

In an action for personal injuries received by plaintiff by reason of a collision of two of defendant's cars, the defendant offered to show that no other passenger had complained to them of having been injured and that no other action for damages for such injury had been brought against them. *Held,* that these were matters collateral to the main issue and the evidence bearing thereon was properly excluded on the ground of remoteness. Foss *v.* Portsmouth, D. & Y. R., 73 N. H. 246, 60 Atl. 747.

In an action to recover certain money alleged to have been deposited in the defendant bank, it was sought by plaintiff to prove that on another occasion two years previously the president of said bank had given a paper signed in his private capacity and similar to the one at issue, and that said paper had been returned to the bank and the cashier thereof had paid the same. In holding this evidence inadmissible, the court said: "Evidence of other transactions than that under consideration is sometimes admissible. . . . But even where such evidence is admissible, it is usually confined to transactions at or near the time at which the principal transaction occurred, and which are part of a general plan or scheme to defraud." Patterson *v.* First Nat. Bank (Neb.), 102 N. W. 765.

Upon an Issue as to the Settlement of Accounts, evidence of the settlement of another controversy is inadmissible where the parties are not the same and one settlement did not influence the other. Collins *v.* Denny & Co., 41 Wash. 136, 82 Pac. 1012.

In Philadelphia Co. *v.* Park Co., 138 Pa. St. 346, 22 Atl. 86, an action brought to recover for illuminating gas on a contract to supply natural gas for use as a fuel only, the defendant, for the purpose of contradicting the testimony of plaintiff, that they made or attempted to make the charge for illuminating gas at the same price charged for gas used for fuel, proposed to establish the market value of gas during 1888 by

2. Reasons for Exclusion. — A. Unfair Surprise. — One of the reasons assigned for the exclusion of evidence of other similar acts or transactions, is unfair surprise, — that is to say, the party opposing the reception of such evidence is unprepared to meet it.[4]

B. Confusion of Issues. — Another ground assigned as a reason for excluding such evidence, and perhaps the one most frequently assigned and regarded as the most potent reason, is that the introduction of such evidence tends to confuse the issues, by introducing new and minor issues to be tried, thereby unduly prolonging the trial, and in case the trial is to a jury, tending to draw their minds away from, and cause them to lose sight of, the main issue.[5]

a contract for fuel gas entered into in 1887. It was held that such evidence was incompetent and the admission thereof properly refused.

In Newhall *v.* Appleton, 102 N. Y. 133, 6 N. E. 120, defendants agreed to pay plaintiff "$4.00 an order for subscriptions obtained by him," for certain serials published by defendants. In this action upon the contract for $4.00 for every *bona fide* subscription obtained by plaintiff, defendants contended and were permitted to prove, by their books of account with other canvassers, that subscriptions obtained for them were separated into proved and unproved subscriptions, and credit given for "proved" subscriptions only, or those on which serials should be delivered and accepted. It not appearing that plaintiff was cognizant of the transactions with others or knew of the usage, it was held that the evidence was incompetent, as being *res inter alios acta.*

In Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380, an action for malicious prosecution, defendant offered evidence of certain transactions between the parties and their relations ten years before his arrest. *Held,* that "evidence of another offense cannot be given, unless there is some clear connection between the two offenses by which it may be reasonably inferred that if guilty of the one, the defendant is guilty of the other," and that "what took place so long ago was too remote, and, besides, was collateral and not relevant to any issue before the court."

In an action for personal injuries occasioned to the plaintiff by the caving in of earth on the side of a trench upon which he was employed by the defendants, who were performing the work under a written contract with a city, such contract is *res inter alios* and inadmissible to prove that it was the duty of the defendants to brace the trench. Gilhooley *v.* Sanborn, 128 Mass. 485.

In Holy Cross Gold Min. & Mill. Co. *v.* O'Sullivan, 27 Colo. 237, 60 Pac. 570, an action for personal injuries alleged to have been caused by the negligence of the defendant, it was held error to permit an officer of the defendant corporation to be asked, on cross-examination, as to whether other suits for damages had been brought against the defendant, and as to whether or not they had been settled.

4. Western Ins. Co. *v.* Tobin, 32 Ohio St. 77, where the court excluded previous instances of steamboat disasters from snags, etc., and without any shock or other coincident warning. The court said: "This class of testimony was incompetent, because calculated to surprise, and take undue advantage of defendant at the trial. Ordinarily, he could not be prepared to meet and contest the merits of each particular case of loss, from unknown cause, introduced. To deprive him of this privilege would be the denial of a legal right, and to admit them would overwhelm the case with collateral issues of fact — distract judicial investigation — leading to no valuable legal result."

5. *England.* — Metropolitan Asylum Dist. *v.* Hill, 47 L. T. N. S. 29.

Alabama. — Alabama Lumb. Co. *v.* Keil, 125 Ala. 603, 28 So. 204; Spiva *v.* Stapleton, 38 Ala. 171.

3. Discretion of Trial Court. — In answering these objections to the admission of such evidence, however, and in their endeavors to reach the true solution to the difficulties surrounding the question, the courts, while of course realizing that the propriety of the action of the trial judge in admitting or rejecting the evidence depends much upon the facts of the particular case, have in the main treated his ruling as a matter of discretion.[6]

California. — Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380.

Connecticut. — Gorham *v.* Gorham, 41 Conn. 242.

Massachusetts. — Hill Mfg. Co. *v.* Providence & N. Y. S. S. Co., 125 Mass. 292; Reeve *v.* Dennett, 145 Mass. 23, 11 N. E. 938.

New Hampshire. — Amoskeag Co. *v.* Head, 59 N. H. 332; Foss *v.* Portsmouth, D. & Y. R., 73 N. H. 246, 60 Atl. 747.

Ohio. — Western Ins. Co. *v.* Tobin, 32 Ohio St. 77.

Pennsylvania. — Haworth *v.* Truby, 138 Pa. St. 222, 20 Atl. 942.

Vermont. — Bateman *v.* Rutland, 70 Vt. 500, 41 Atl. 500.

Wisconsin. — O'Dell *v.* Rogers, 44 Wis. 136.

Mayhew *v.* Sullivan Mining Co., 76 Me. 100, where the court said: "One substantial ground for excluding evidence of collateral facts, is that it is seldom that such identity in all essentials, is found, that a legitimate inference respecting the one case can be drawn from the other, and a host of collateral issues are brought in to district the attention of the jury from the real point. The fear of this has sometimes, perhaps, produced decisions excluding evidence, which might throw light upon the issue; but the present case well illustrates the absurdity that would attend an indiscriminate admission of it."

Phillips *v.* Willow, 70 Wis. 6, 34 N. W. 731, where the court said: "So issue after issue would be raised, and facts collateral to the main issue made by the pleadings would multiply; the main issue forming new ones, and the suit itself expanding like the banyan trees of India, whose branches drop shoots to the ground which take root and form new roots and form new stocks till the tree itself covers great space by its circumference."

In Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253, where the question was as to the mental capacity of a testator, a witness for the proponent had testified that the decedent had given a deposition before him and that at that time she had appeared sane, and it was held that the contestants could not prove that other persons, while inmates of an insane asylum, had given intelligent depositions and had been permitted to testify in court. The court said that such testimony did not relate directly or indirectly to the decedent's condition at the time she gave the deposition; that it was also open to an objection, that it raised a new and immaterial issue in the case and that if admitted, it involved the inquiry into a controversy over the precise mental condition of the other persons referred to at the time they gave their depositions and the character of the depositions, which might result in establishing that they were not insane when they gave their depositions, or if then insane, that their insanity was of a character entirely different from the alleged insanity of the decedent.

6. Mayhew *v.* Sullivan Min. Co., 76 Me. 100. And see cases cited in preceding notes.

"**Whenever a Line of Inquiry Will Give Rise to Collateral Issues** of such number or difficulty that they will be likely to confuse and distract the jury, and unreasonably protract the trial, it should not be permitted. But the mere fact that a collateral issue may be raised is not of itself enough to justify the exclusion of evidence which bears upon the issue on trial. Most circumstantial evidence introduces collateral issues, and ordinarily it is a practical question, depending upon its relation to the other facts and circumstances in the case, whether it

II. APPLICATION OF AND EXCEPTIONS TO RULE.

1. In General. — In the practical application of this rule of exclusion, however, the courts have frequently found themselves confronted with cases in which the proof of the main fact or transaction in controversy is almost, if not wholly, circumstantial, and have found it necessary to resort to evidence of relevant facts whose probative force lies wholly in the inference to be drawn therefrom; in short, the courts, while adhering to this rule of exclusion, have come to recognize that there are cases in which the strict application of the rule would result in the sacrifice of otherwise useful evidence.[7]

should be received. It may be remote from the real issue, or closely connected with it, and in many cases its competency depends upon the decision of questions of fact affecting the practical administration of justice in the particular case such that a court of law will refuse to revise the ruling of the presiding judge, but will treat his ruling as a matter of discretion." Bemis *v.* Temple, 162 Mass. 342, 30 N. E. 970.

7. In Steele *v.* McTyer, 31 Ala. 667, 70 Am. Dec. 516, it was held that evidence that the owners of a boat had been in former years engaged as common carriers in the transportation of property by such boats on the same river, was admissible, although not conclusive evidence to show that the owners were acting in the same capacity in the particular contract in controversy.

In an action against the sureties upon an official bond, to recover money received by the officer in his official capacity, which he neglected to pay to the state, where the plaintiff introduced account books required to be kept by the secretary of the board, of which the officer was a member, for the purpose of showing he had not paid the money as required because the books did not contain any account of such payment, which they should have contained if such payment had been made, the defendants may show that the books were incorrectly kept, and that there were many other omissions therein which were false and fraudulent, for the purpose of discrediting the books in evidence. People *v.* Fairfield, 90 Cal. 186, 27 Pac. 199.

In an action to recover the price of labor of a gang of Chinamen alleged to have been furnished to defendants by plaintiff under an agreement, a rescinded agreement in writing between the plaintiff and another party may be offered in evidence as explanatory of his agreement with defendants. Chew Farng *v.* Keefer, 103 Cal. 46, 36 Pac. 1032.

In an action upon a note sold by the defendant to the plaintiff at a large discount, it is not error to allow evidence that the defendant, who was impecunious at the time, but had great expectations, had sold other notes about the same time at a great discount; such evidence is admissible in order to account for the discrepancy between the face of the note and the amount paid for it. Turner *v.* Luning, 105 Cal. 124, 38 Pac. 687.

In Chicago Anderson Pressed Brick Co. *v.* Reininger, 41 Ill. App. 324, a personal injury action, where the defendant's witnesses had testified that it was impossible for the plaintiff to have sustained the injury in the manner in which he stated it was done, it was held proper to permit the plaintiff in rebuttal to produce other witnesses to testify that they had sustained injuries in the manner stated.

In an action for breach of contract to supply water for irrigation purpose on account of which failure a great number of grape cuttings were alleged to have died, the defendant offered to prove that witness had planted 15,000 cuttings from the lot from which plaintiff's were obtained and had set them out on lots similar to plaintiff's and that said cuttings had been well watered and

For Purposes of Classification, in treating the question of the application of, and exceptions to, this rule of exclusion, the cases are divided generally into first, those in which the main issue involves an act of human conduct, and second, those not involving, strictly speaking, an act of human conduct, but rather the existence or non-existence of facts pertaining to inanimate objects, as for example, the tendency, quality, capacity, etc., of a thing.

2. Matters Pertaining to Human Conduct. — A. In General. The courts lay it down as a general rule that it will not be inferred or presumed that a person has done a certain act because he has done the same or a similar act at another time, and accordingly refuse to permit proof of such other act as a basis for any such inference or presumption.[8]

cared for and notwithstanding such facts had nearly all died. The court, in an opinion by Temple, J., in holding said evidence relevant and material, says: "That the evidence was upon a collateral issue is not conclusive against its relevancy. The question was whether the fact it tended to establish would prove or disprove the fact at issue. Evidence is relevant not only when it tends to prove or disprove the precise fact in issue, but when it tends to establish a fact from which the existence or non-existence of the fact in issue can be directly infered." 1 Remy *v.* Olds (Cal.), 34 Pac. 216.

Testimony cannot be excluded as irrelevant, which would have a tendency, however remote, to establish the probability or improbability of the fact in controversy. Trull *v.* True, 33 Me. 367; Tucker *v.* Peaslee, 36 N. H. 167; Huntsman *v.* Nichols, 116 Mass. 521.

Assumpsit by Plaintiffs for Twenty Barrels of Oil Lost at Sea. — Plaintiffs had previously made sales to defendants through agent Carlow. This sale was made by Emery, who succeeded Carlow. The defense set up was that the contract of sale called for insurance by the plaintiffs, instructions having been given to Carlow always to insure oil shipped to them by vessel. "In this case, while the fact of whether there had been insurance effected on previous sales or not, might not be conclusive as to what was done in this particular instance, it was admissible on the probability or improbability of the contract being as claimed by plaintiff." Wood *v.* Finson, 91 Me. 280, 39 Atl. 1007.

In Tallman *v.* Kimball, 26 N. Y. Supp. 811, it was held that evidence of transactions similar to that under investigation was admitted only where criminal or fraudulent acts are under investigation.

8. *Alabama.* — Andrews *v.* Tucker, 127 Ala. 602, 29 So. 34.

Georgia. — Central of Ga. R. Co. *v.* Duffey, 116 Ga. 346, 42 S. E. 510.

Illinois. — Jewell Fitter Co. *v.* Kirk, 200 Ill. 382, 65 N. E. 698; Burroughs *v.* Comegys, 17 Ill. App. 653.

Indiana. — Diamond Block Coal Co. *v.* Edmonson, 14 Ind. App. 594, 43 N. E. 242.

Iowa. — Lee *v.* Cresco, 47 Iowa 499

Maine. — Dodge *v.* Haskell, 69 Me. 429.

Massachusetts. — Howe *v.* Whitehead, 130 Mass. 268.

Missouri. — Smart *v.* Kansas City, 91 Mo. App. 586.

South Carolina. — Benedict *v.* Rose, 24 S. C. 297.

Tennessee. — Massengill *v.* Shadden, 1 Heisk. 357.

Texas. — Kingsbury *v.* Waco State Bank, 30 Tex. Civ. App. 387, 70 S. W. 551.

Wisconsin. — Sprenger *v.* Tacoma Trac. Co., 15 Wash. 660, 47 Pac. 17, 43 L. R. A. 706.

Upon an issue as to whether an assignee for the benefit of creditors has paid a preferred creditor, evidence tending to show that the assignee has not paid another preferred

creditor in the same class, is incompetent. Whintringham *v.* Dibble, 66 N. Y. 634.

In an action to recover for wrongful ejection from a street car for alleged non-payment of fare it is not error to refuse the admission of evidence on the part of defendant that plaintiff had been put off another train for non-payment of fare, for the purpose of showing that he was in the habit of avoiding payment of car fares. Sprenger *v.* Tacoma Trac. Co., 15 Wash. 660, 47 Pac. 17, 43 L. R. A. 706.

In an action brought by plaintiff to recover commissions alleged to be due for services performed as broker for defendant in securing a loan, which was thereafter rejected by the party who had agreed to make it, it being claimed by plaintiff that such rejection was caused by defendant's acts, evidence that a prior application for a loan on the same security had been rejected, was clearly improper and inadmissible. Duckworth *v.* Rogers, 95 N. Y. Supp. 1089.

In Faucett *v.* Nichols, 64 N. Y. 377, an action against an innkeeper to recover for the loss of plaintiff's horses, carriage, harness, etc., which were burned up in defendant's barn, plaintiff being at the time his guest, the defense attempted to be established was that the fire was the work of an incendiary, and that it occurred without defendant's negligence. The defendant introduced a witness to prove that on the next street west, within forty rods of the barn which was burned, an attempt was made during the same night to fire a building, at a point where the buildings were close and compact, and that kerosene, paper and other combustibles were used in the attempt. This evidence was excluded by the judge as immaterial. The court says: "I am of the opinion that the evidence offered was admissible. The offer was to show an actual attempt on the same night to burn another building in the same village, by the use of similar means, as the evidence on the part of the defendant tended to show, were used in firing the barn."

In Sharp *v.* Emmet, 5 Whart. (Pa.) 288, 34 Am. Dec. 554, an action against a factor to recover the amount of a balance alleged to be due to the principal abroad and remitted by a bill of exchange indorsed by defendant, which was protested for non-payment, where the question was, whether, by receiving a certain percentage for "commission and guaranty" the validity of the remittance was guaranteed, it was held, that letters of defendant to another mercantile person abroad, and accounts sent by defendant to him, showing his transactions of a similar nature with said other person, were not admissible on the part of plaintiff, the same being *res inter alios acta.*

The condition in a policy of insurance that the instrument shall not be binding until actual payment of the premium, may be waived by a general agent of the company by delivering the policy without exacting payment; but evidence that the agent of the company frequently waived the condition of prepayment in other cases is not admissible to raise an inference of waiver in the absence of other proof. Wood *v.* Poughkeepsie Mut. Ins. Co., 32 N. Y. 619.

In Gorham *v.* Gorham, 41 Conn. 242, an action of ejectment, the plaintiff, for the purpose of showing that certain acts by the defendant on the premises claimed by him as acts of possession and ownership were not such, but were mere trespasses, was permitted to show that he had unlawfully committed like acts about the same time upon other land owned by other persons and not near, nor connected with, the premises in dispute. It was held that this was error. The court said: "It opened a collateral question as to the title and possession of other tracts of land, which the court could not then legitimately investigate, and one, too, which, when investigated and decided, would furnish no rule, no aid, in determining the real question to be decided. Here were two distinct and independent questions; one was before the court and the other was not. Each should be decided according to law and the facts applicable to it, and each at its appropriate time. The evidence offered as to a matter not before the court, and which, however it might be decided, could

And *a fortiori* is this rule of exclusion to be applied where it is sought to show that a person did a certain act by proving that other persons have done a similar act.[9]

Time Required To Do an Act. — Where the question is as to the

have no legal bearing on the question which was before the court should have been excluded."

In Cutter *v.* Demmon, 111 Mass. 474, where it was claimed that the defendant had procured certain shares of stock from the plaintiff at a certain price and sold them to third persons at a higher price, contrary to his agreement with the plaintiff, it was held that evidence that the defendant procured other shares of the same stock from other persons at the same price as he had paid to the plaintiff was inadmissible.

In Nones *v.* Northouse, 46 Vt. 587, an action to recover damages caused by the defendant's driving his carriage against the plaintiff's carriage whereby the plaintiff and his wife were thrown out and injured, the plaintiff was permitted to introduce testimony of a witness that he saw the accident and that the defendant was driving at a fast rate at the time. But it was held that that part of the witness's testimony to the effect that he saw the defendant driving on the same highway before the accident at a very fast gait, and that he was driving at the same gait at the time of the accident, was inadmissible; that the effect of such testimony was simply getting into the case inadmissible evidence that the defendant was driving improperly on an occasion not in issue on the trial.

On the hearing of a libel for divorce on the ground of adultery committed with a certain person, evidence of acts of adultery by the libellee with that person out of the commonwealth and after the filing of the libel is competent to show the nature of the intercourse between them at the time when the adultery is alleged in the libel to have been committed. Thayer *v.* Thayer, 101 Mass. 111.

Upon an Issue as To Whether a Person Did Inferior and Defective Work on a Particular House, evidence tending to show that he did inferior and defective work of a similar kind on another house, is inadmissible. Schaffer *v.* Lehman, 2 McArthur (D. C.) 305.

In an action to enjoin a change of an easement for a flume upon public land by the construction of a ditch upon plaintiff's land after he had acquired a patent thereto, evidence is not admissible to show what the defendants had done in the construction of their ditch upon other land adjoining that of plaintiff. Vistal *v.* Young, 147 Cal. 721, 82 Pac. 383.

9. *United States.* — Cylinder Cup Co. *v.* Williams Powell Co., 38 Fed. 600.

Maine. — McIntyer *v.* Talbot, 62 Me. 312; Harmon *v.* Wright, 65 Me. 516.

Maryland. — Treiber *v.* Lanahan, 23 Md. 116.

Massachusetts. — McDowell *v.* Connecticut F. Ins. Co., 164 Mass. 394, 41 N. E. 669; Gilhovley *v.* Sanborn, 128 Mass. 485.

North Carolina. — Durham D. Co. *v.* Golden B. H. Co., 126 N. C. 292, 35 S. E. 586.

Vermont. — Whitney *v.* First National Bank, 55 Vt. 154, 45 Am. Dec. 598.

In Ross *v.* Moskowitz (Tex. Civ. App.), 95 S. W. 86, an action to recover for commissions due for the alleged sale of stock, it was held that evidence that after the sale in controversy other persons had bought shares of the same stock, and the price paid therefor, and also what the stock sold for on the market, was inadmissible.

In Linn *v.* Gilman, 46 Mich. 628, 10 N. W. 46, an action by a firm of merchants against their traveling man to recover money overpaid to him in refunding his traveling expenses, the action being based on the theory that he had reported his expenses as larger than they actually were, it was held proper to exclude evidence of the actual expense of other traveling men over the same

time it took to do a particular act, it has been held proper to show the time it took to perform a contemporaneous similar act.[10]

Former Joint Transactions are competent evidence on the question of joint liability, in an action on a subsequent contract.[11]

B. Alteration of Instruments. — Where the question is whether a written instrument has been altered since its execution, evidence of the alteration of other instruments executed at the same time is not admissible.[12]

route in the same year, and that they were much less than were charged by defendant. Such matters are *res inter alios acta*, and if their circumstances are not identical, they cannot be relevant.

In Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979, evidence as to what it cost another person for supplies and to put in logs the next season after the one in controversy was held inadmissible as tending to raise collateral issues which would tend to confuse and complicate the case instead of elucidating it.

In an action for damages for the loss of life, alleged to have been caused by the negligence of defendant's servants in not giving the signal of the approach of a train by which the deceased was killed, it is not competent to show that other trains did not give the signal as they approached the place of the accident, or that trains did not usually do so. The court, in reference to the admission of such evidence, says: "Whether a signal was given at approach of a train to a station or crossing on any particular occasion, is a question of fact that cannot be affected one way or another by showing the conduct of subordinate officers or servants in charge of some other train or trains, who may or may not be mindful of their duty." Eskridge *v.* Cincinnati, N. O. & T. P. R. Co., 89 Ky. 367, 12 S. W. 580.

In Spiva *v.* Stapleton, 38 Ala. 171, where the question involved was the carelessness or wastefulness on the part of the plaintiff while in the defendant's employ as overseer, it was held that evidence showing the quality of grain raised in the neighborhood during the time in question, unaccompanied by evidence of any general cause affecting the crops of that neighborhood, or that in respect of quality of soil and mode of cultivation, the defendant's plantation corresponded with the lands in the neighborhood generally was too remote and uncertain, and hence was not admissible. The court said, however, that for the purpose of raising the presumption of the bad quality of the crop of the defendant's plantation when the plaintiff took charge, it was possible that evidence showing that the crop raised in the neighborhood on lands of the same description and similarly cultivated, was generally of bad quality, would have been admissible.

10. Sias *v.* Munroe, 134 Mass. 153.

11. Trego *v.* Lewis, 58 Pa. St. 463, assumpsit for 115 hogs, which the plaintiff alleged he had bought for the defendants, and for feed which he furnished whilst they were in his care. The court says: "We think there was abundant evidence of the joint relation between Trego and Henderson in purchasing the hogs, to carry the case to the jury. The argument of the plaintiff in error that because a man may be jointly concerned in five transactions, and yet not in the sixth, therefore the prior purchases of the plaintiff by both the defendants in 1856 and 1857, were no evidence of their joint relation in the last purchase of 1857, is not convincing."

12. Winter *v.* Pool, 100 Ala. 503, 14 So. 411; Pearson *v.* Hardin, 95 Mich. 360, 54 N. W. 504; Booth *v.* Powers, 56 N. Y. 22. *Compare* Rankin *v.* Blackwell, 2 Johns. Cas. (N. Y.) 198, *holding* that if there are strong circumstances to support the inference that a writing has been fraudulently altered, evidence of the alteration of other papers between

C. Intoxication. — Where the question is whether a person was intoxicated at a particular time, evidence of his general intemperate habits is not of itself competent.[13]

D. Skill, Capacity, Etc. — Evidence of a lack of capacity in one line of employment has sometimes been admitted as tending to show such lack in another similar line of employment.[14]

But evidence showing skill a long time after the time and occasion in controversy, has no tendency to show skill at the time in question, and should be excluded.[15]

Earning Capacity. — So, too, where the question is as to a person's earning capacity, it has been held proper to show what he had

the same parties and a part of the series to which the one in controversy belongs, is admissible.

Where an Alteration, Although Fraudulent, is alleged to have been made by one of the parties to a contract, evidence showing that he had made similar alterations in similar contracts made about the same time with other persons is not admissible to prove the alteration in question. Cotharin *v.* Davis, 2 Mackey (D. C.) 230.

In Paramore *v.* Lindsey, 63 Mo. 63, an action on a promissory note in which the words "after maturity" printed in the interest clause had been erased, it was held that the defendant could not introduce other notes made by himself in the same transaction containing the same phrase for the purpose of showing that those words were in the note in suit at the time of its execution. The court said: "Because other notes given to different parties did not bear interest till after they became due, did not furnish any necessary or sufficient connection to show that the note in question was made with interest payable at the same time. The agreement might have been wholly different between the respective parties as to the payment of interest; and the difference in the manner in which the notes were drawn wo ld not be a presumption that one was right more than the other."

13. Edwards *v.* Worcester, 172 Mass. 104, 51 N. E. 447; Lane *v.* Missouri Pac. R. Co., 132 Mo. 4, 33 S. W. 1128; Carter *v.* Seattle, 19 Wash. 597, 53 Pac. 1102. See also Cosgrove *v.* Pitman, 103 Cal. 268, 37 Pac. 232, *holding* that proof of reputation of intemperance is not proof of such habit, and will not warrant an inference of intoxication at a particular time.

Where an issue is raised as to whether a person was drunk or sober at a certain time, evidence that he became intoxicated at other times is inadmissible. Senecal *v.* Thousand Island Steamboat Co., 79 Hun 574, 29 N. Y. Supp. 884; Warner *v.* New York Cent. R. Co., 44 N. Y. 465; Cleghorn *v.* New York Cent. & H. R. R. Co., 56 N. Y. 44, 15 Am. Rep. 375.

In Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732, plaintiff was injured by falling on the street covered with a thin film of ice, caused by rain falling and freezing the previous night, and in the course of the trial the defendant asked a witness, called by him, if the plaintiff was a man of intemperate habits. Plaintiff objected and the court sustained the objection. The court said: "We do not think the court erred. If the plaintiff was sober when he fell, the fact that he was of intemperate habits would not preclude his recovering; and we do not think the mere proof that he was of intemperate habits would warrant the inference that he was not sober."

14. Morrow *v.* St. Paul City R. Co., 74 Minn. 480, 77 N. W. 303.

15. Leighton *v.* Sergent, 31 N. H. 119, 64 Am. Dec. 323.

earned or was capable of earning in the various pursuits in which he had engaged.[16]

And it has also been held competent on such an issue, to show what others of equal ability had earned in a similar employment.[17]

E. To Prove Contracts. — a. *The Fact.* — The cases are generally to the effect that no reasonable inference or presumption can be raised as to whether or not a party has made an agreement with one person from the fact that, or the mode in which, he has made similar contracts with other persons. Transactions which fall within this class are termed in law *res inter alios acta,* and evidence thereof is uniformly rejected.[18]

16. Christian *v.* Columbus & R. Co., 90 Ga. 124, 15 S. E. 701; Wimber *v.* Iowa Cent. R. Co., 114 Iowa 551, 87 N. W. 505; Chicago R. I. & T. R. Co. *v.* Long (Tex. Civ. App.), 65 S. W. 882.

17. St. Louis, A. & T. R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104; Bessemer Land & Imp. Co. *v.* Campbell, 121 Ala. 50, 25 So. 793. *Compare,* Simonson *v.* Chicago, R. I. & P. R. Co., 49 Iowa 87, where the court said that there is a great difference in the earnings of men of similar age and conditions of life; that some earn more, some less, some nothing.

18. Aiken *v.* Kennison, 58 Vt. 665, 5 Atl. 757; Cotharin *v.* Davis, 2 Mackey (D. C.) 230; Stevens *v.* McLachlan, 120 Mich. 285, 79 N. W. 627; Bonynge *v.* Field, 81 N. Y. 159.

The making of a contract cannot be shown by the evidence of other contemporaneous ones. Harris *v.* Howard, 56 Vt. 695, where the question was whether the plaintiff was entitled to recover for the use of a horse, and it was held that evidence that he permitted other persons to use the same horse about the same time and charged them nothing, was not admissible.

In Phelps *v.* Conant, 30 Vt. 277, where the question was whether or not the defendants had agreed to pay the debt of another, evidence that he had under similar or identical circumstances promised another person to pay his claims against the same debtor was held inadmissible as having no legal tendency to prove the promise in controversy. The court said: "It is a matter wholly *inter alios.* There was no legal connection between the two cases. It did not follow by any means, that because the circumstances of the two cases were similar or identical even, that the defendants, by assuming one debt, were bound to assume the other. Nor is there any legal probability that he would pay one, because he agreed to pay the other. We are apt to think because the cases are alike, that the one helps prove the others. But they have no more legal connection than the giving a note to one man has with proving that the same party also gave his note to another. If the man bought on credit once, it is more probable perhaps that he will again, but one such case could not be shown to establish the others, for the reason that there is no necessary connection between them. To have one fact prove another, there must be a necessary or probable connection between the two."

Warranty. — Where the fact in controversy is whether or not a vendor warranted the article sold, evidence that he had at about the same time warranted the same article in other sales, is irrelevant. Moody *v.* Peirano (Cal. App.), 84 Pac. 783.

In Singleton *v.* Thomas, 73 Ala. 205, an action on an account, the defendant asserted that the plaintiff had compromised for a part of the claim by accepting certain paper, which the plaintiff claimed; and it was held that the defendant could not show that he had made similar settlements with other creditors, plaintiff not being shown to have had any connection therewith; being *res inter alios acta,* the evidence

Nor is it competent, upon such an issue, to resort to evidence of similar transactions between other persons.[19]

did not conduce to prove that plaintiff had agreed to do the same thing, nor did it furnish any reasonable inference that the compromise in issue had been made.

In Green *v.* Disbrow, 56 N. Y. 334, an action where the question at issue was whether credit was given to defendant or to his son, the reception of evidence that defendant had paid debts of other persons against his son was held to be error.

In Shall *v.* Old Forge Co., 96 N. Y. Supp. 75, an action for the foreclosure of a mechanic's lien on defendant's property, on the issue whether a person employed to improve a building was to receive a certain compensation per day and also, 10% commission on the pay roll in addition to such percentage, it was held that evidence to prove that for previous work performed by said person for the defendant he had received commissions in addition to his wages, and that for work performed for a third person, the said employe had been paid wages and commissions, was inadmissible.

In Hughes *v.* McHan, 121 Ga. 499, 49 S. E. 590, an action where the issue was whether, as contended by plaintiff, he had sold goods to defendant, a married woman, to whom he had delivered the same, or whether, as she insisted, credit therefor was extended to her husband, it was held prejudicial error to allow the plaintiff to testify that, contracting on her own account, defendant had rented some rooms from him.

19. In an action against an officer for storage of goods attached by him and left on the plaintiff's premises, evidence of other officers is not admissible to show that in similar cases no charge for storage had ever been made to them. Fitchburg R. Co. *v.* Freeman, 12 Gray (Mass.) 401.

In an action against a husband to recover compensation for boarding his wife and child, the plaintiff, after establishing the fact that she had provided boarding for the defendant's wife, offered in evidence the record of a former recovery for boarding her at a former period of time, not covered by the present action. *Held,* that the judgment of a court of competition, directly upon the point, is conclusive between the same parties on the same matter directly in question in another court; but it is not conclusive evidence as to any matter incidentally cognizable therein, or of any matter to be inferred by argument from the judgment and that such evidence was not admissible. Lentz *v.* Wallace, 17 Pa. St. 412, 55 Am. Dec. 569.

In Lucia *v.* Meteh, 68 Vt. 175, 34 Atl. 695, the evidence of the plaintiff tended to show that the defendant had taken his horse to pasture without any special contract as to risk, and that the horse had escaped through a defect in the fence at a particular point, and had been killed. *Held,* that evidence that the condition of the fence around other parts of the pasture was good, that the defendant was reported to be a prudent agistor of horses and was intrusted with money, valuable horses and pasture, and that, in particular instances, she had refused to assume the risk (as tending to show a general custom on her part) was inadmissible.

In an action for damages for alleged breach of contract in refusing to take certain fire hose furnished by plaintiff according to contract, testimony was offered by defendant to show at what rates other persons offered or undertook at another time to make hose for the defendant, and what bids were offered where another contract was made. *Held,* this "could have had" no "legitimate bearing upon the questions presented. If the city was liable at all to plaintiff, clearly its liability can be measured only by the contract made with him. The extent of its obligation is not to be found in another contract made with another party." The evidence was properly excluded. Chicago *v.* Greer, 9 Wall. (U. S.) 726.

In an action brought by plaintiff against defendant to recover damages alleged to have been caused by

Implied Promise. — Where the contract sought to be enforced, however, is not an express contract, but is a contract implied from the conduct of the parties, necessarily, of course, circumstantial evidence is resorted to; and there are numerous cases in which evidence of similar transactions has been held relevant and admissible.[20]

defendant's breach of a contract made with plaintiff, whereby they hired him for one year and had broken the contract before the expiration of said time, the defendant offered evidence of certain witnesses to prove they never hired men by the year and to prove how defendants did hire their men. *Held*, that such evidence was properly excluded. Ham *v.* Wheaton, 61 Minn. 212, 63 N. W. 495.

20. In Wood *v.* Brewer, 73 Ala. 259, the issue was whether the contract of employment under which the plaintiff claimed was made with the defendant as the owner or with a tenant, and it was held proper to receive evidence that another person had been employed on the plantation during the time in question by the defendant who had paid him therefor, not as tending to show that the defendant had hired the plaintiff and agreed to pay him, but as an act of control or proprietorship, furnishing some evidence that the services had been rendered for the benefit of the defendant, thereby implying a promise to pay.

In Moody *v.* Tenney, 3 Allen (Mass.) 327, an action to recover for work done, the issue was, whether or not the defendant had acted merely as agent for another, on whose credit the work had in fact been performed, it was held proper to permit the plaintiff to show that the defendant had paid to other workmen employed by him in the same service the amount of their bills, which were made out against him personally. The court said: "If he employed other persons about the same work, or purchased materials for it on his own credit and in his own name, and paid bills in which he was charged personally therefor, the inference is fair and reasonable that the whole work was done on his account and credit, and that he is responsible to all who were engaged by him to furnish labor or materials in like manner."

In Dwight *v.* Brown, 9 Conn. 83, it was held that, in order to prove a debt of the plaintiff against the defendant for the board of one of the defendant's workmen in a factory, evidence showing that the defendant procured and paid for the board of other persons employed in his factory and that such was his ordinary course of business as to those so employed was admissible as affording satisfactory presumptive evidence that the board supplied by the plaintiff was at the procurement of the defendant.

In Fleming *v.* Hill, 65 Ga. 247, where the issue was whether the goods sued for were to be paid for by defendant or another, it was held that evidence was admissible for plaintiff showing that on the same day defendant went to another store to buy goods of the kind sued for, to fill an order for persons with whom he was dealing, but was to pay for the same himself.

Where it was sought to charge a son for necessary medical treatment of his parents, alleged to have been rendered at his request, evidence that other persons had furnished his parents with other necessaries at his request is not admissible against him. Becker *v.* Gibson, 70 Ind. 239. The court said: "The facts proposed to be shown did not in any manner tend to establish the express promise relied on by the plaintiff. At common law, a son is under no legal obligation to support his parents, and we are not aware of the existence of any statute of this state, changing that rule. A son may be charged for necessaries furnished to his parents at his request but such request must be proven. It cannot be inferred from his natural duty to provide for his parents, or from any merely collateral fact." *Compare* Hufford *v.* Neher, 15 Ind. App. 396, 44 N. E. 61.

In Lake Shore Cattle Co. *v.* Modoc

b. *Terms of Contract.* — Where the question is as to the terms of an oral agreement, evidence of the terms of similar agreements with other persons is not admissible.[21]

Nor is evidence of the terms of other contracts between the same parties admissible upon such an issue.[22]

Land & L. Co., 130 Cal. 669, 63 Pac. 72, it was averred in the complaint that the appellant, acting by and through its agent, bought the cattle in question of respondent; and it was not disputed that the superintendent of respondent sold the cattle to the superintendent of the appellant. The court says: "Many of appellant's objections were to evidence introduced by respondent to show that Nelson had made similar purchases of other persons; and we think that such evidence was entirely proper."

In Grand Forks Lumb. & C. Co. *v.* Tourtelot, 7 N. D. 587, 75 N. W. 901, plaintiff sued defendant for a balance due for fuel delivered by plaintiff to the Dual City Gas Co. from November 1st to December 19, 1896, for which it was alleged defendant promised and agreed to pay. When the manager of plaintiff was on the stand, he was permitted to identify the bills for September and October, and they were introduced in evidence. The court says: "There was no error in this. It was not an effort to prove a disconnected, and therefore irrelevant, fact of a similar nature. The principal issue in the case was whether or not defendant did agree to pay the bills for fuel furnished. Plaintiff claimed that he did so agree late in August, 1896, and that no other agreement was made until December 19, 1896, and the fact that he paid the bills for September and October certainly had a tendency to establish such a contract."

21. *Indiana.* — Evans *v.* Koons, 10 Ind. App. 603, 38 N. E. 350.

Iowa. — McKivitt *v.* Cone, 30 Iowa 455.

Kansas. — Roberts *v.* Dixon, 50 Kan. 436, 31 Pac. 1083.

Kentucky. — Palmer *v.* Hamilton, 24 S. W. 613.

Michigan. — Davis *v.* Kneale, 97 Mich. 72, 56 N. W. 220.

Minnesota. — Plummer *v.* Mold, 22 Minn. 15.

Pennsylvania. — Potts *v.* Dunlop, 110 Pa. St. 177, 20 Atl. 413.

Oregon. — Thompson *v.* New York L. Ins. Co., 21 Or. 466, 28 Pac. 628.

Wisconsin. — Posey *v.* Rice, 29 Wis. 93.

A landlord cannot, for the purpose of establishing the terms of the tenancy, show that he had during the same period rented other premises on similar terms, and that it was his custom to rent on such terms. McKivitt *v.* Cone, 30 Iowa 455.

In Geremia *v.* Mayberry, 14 Nev. 199, where the controversy was as to what the plaintiff was to receive per cord for cutting wood, it was held that evidence that the defendant let contracts to other persons at so much a cord, was inadmissible. The court said that, the only tendency of such evidence was to prove that others were willing to cut wood at that rate, but that it had no tendency to prove that the plaintiffs had agreed to do so.

In an action on a promissory note which the defendant alleged was obtained by false and fraudulent representations, it was properly held, that evidence as to the difference between the contract in question and those with others on the same subject is incompetent and irrelevant. Burns *v.* Goddard, 72 S. C. 355, 51 S. E. 915.

In Lowenstein *v.* Lombard, A. & Co., 164 N. Y. 324, 58 N. E. 44, an action against a carrier where the defense is that its agent had no authority to make the contract without requiring a declaration of the value of the goods, evidence that the agent had made contracts with other parties, dispensing with such declaration, before and at the time of the alleged contract with plaintiff, is admissible as *direct evidence* for the purpose of defining the contract as actually made.

22. Boynge *v.* Field, 81 N. Y. 159; Graham *v.* Eiszner, 28 Ill. App.

But where the contract in controversy refers to the terms of another contract, evidence as to the terms of the latter may be received.[23]

c. *Interpreting Ambiguous Language.* — For the purpose of aiding in the interpretation of ambiguous language used by the parties, evidence of previous similar transactions between the parties has been held admissible.[24]

F. AGENCY. — Where the question is whether one person acted as agent for another on a particular occasion, evidence that such person so acted on other similar occasions is deemed relevant as tending to establish the agency.[25]

Single Transaction. — It has been held, however, that evidence of

269; Stevens *v.* McLachlan, 120 Mich. 285, 79 N. W. 627.

Where the question is as to the terms of a contract of employment, evidence as to the terms of the contracts of other employes is not admissible. Lichtenhein *v.* Fisher, 6 App. Div. 385, 39 N. Y. Supp. 553.

23. Gardner *v.* Crenshaw, 122 Mo. 79, 27 S. W. 612. See also Davis *v.* Teachout, 126 Mich. 135, 85 N. W. 475; McQuown *v.* Cavanaugh, 14 Colo. 188, 23 Pac. 341.

In an action for damages for alleged breach of contract by the defendant, it is not error to receive in evidence a contract between plaintiff and a third party, and which was referred to in the contract on which the action was based, for the purpose of fixing certain of its conditions. Hewes *v.* Germain Fruit Co., 106 Cal. 441, 39 Pac. 853.

24. Richards *v.* Millard, 56 N. Y. 574. See also, Gray *v.* Gannon, 4 Hun 57, 6 Thomp. & C. (N. Y.) 245.

25. Hitchens *v.* Ricketts, 17 Ind. 625; Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 154; Lake Shore Cattle Co. *v.* Modoc Land & L. Co., 130 Cal. 669, 63 Pac. 72; Beattie *v.* Delaware, L. & W. R. Co., 90 N. Y. 643; Merchant's Bank *v.* State Bank, 10 Wall. (U. S.) 604; Hill *v.* Nation Trust Co., 108 Pa. St. 1, 56 Am. Rep. 189.

In Moore *v.* Schrader, 14 Ind. App. 69, 42 N. E. 490, where the question was whether goods purchased by the defendant's wife were bought by her as agent for her husband and on his credit, or upon the credit and for use of a concern of which he was manager, it was held proper to show that defendant and his wife had made purchases of goods of other persons in his own name and on his own credit.

Evidence that the assumed agent had previously signed the name of his principal in similar transactions, and that the latter, with knowledge that his name had been so signed, recognized the signature as his, is competent. Hammond *v.* Varian, 54 N. Y. 398.

In Bucknam *v.* Chaplin, 1 Allen (Mass.) 70, an action to recover the value of goods obtained by the defendant by a purchase for cash from the plaintiffs' agent, it was held that evidence of the agent's agreement and general course of dealings with a former firm, consisting of two of the three present plaintiffs, was admissible for the purpose of proving the agent's authority to sell and deliver the goods for cash, provided there was evidence that such former agreements and dealings were referred to in the agreement with the plaintiffs and as a part thereof.

In Greenfield Bank *v.* Crafts, 2 Allen (Mass.) 269, it was held that proof that in one instance a father had known of and acquiesced in the use by his son of his name upon negotiable paper, discounted at a bank, did not authorize the introduction in evidence of subsequent similar acts for the purpose of showing an implied authority in the son to sign his father's name, without proof that such subsequent acts were known to and acquiesced in by the father.

a single isolated transaction of a similar character is not admissible.[26]

G. Other Actions or Judgments for Same or Similar Transactions. — Frequently the courts have been called upon to determine the admissibility of evidence of other actions or judgments in other actions growing out of the same or similar transactions. Of course, where the action is between the same parties for the same cause of action, the usual rules as to *res adjudicata* govern.[27]

In a libel suit the defendant cannot mitigate the damages by showing that the plaintiff has begun an action against other persons for a contemporaneous publication of the same charge.[28]

So, too, in an action to recover damages for the sale of intoxi-

26. Morris *v.* Bethell, L. R. 4 C. P. 765, L. R. 5 C. P. 47. *Compare,* Wilcox *v.* Chicago, M. & St. P. R. Co., 24 Minn. 269, where the court said: "A single act of the agent, and a recognition of it by the principal, may be so unequivocal and of so positive and comprehensive a character as to place the authority of the agent to do similar acts for the principal beyond any question."

27. See articles "Former Adjudication," Vol. V, "Judgments," Vol. VII.

A judgment in a former action between the same parties to an action for libel, for malicious prosecution based on the same false accusation, is competent for the defendant on the question of damages. Sheldon *v.* Carpenter, 4 N. Y. 579, 55 Am. Dec. 301.

Compare, Tillotson *v.* Cheetham, 3 Johns. (N. Y.) 56, 3 Am. Dec. 459, where it was held that defendant in such an action could not show a recovery by the plaintiff in an action for a previous publication of the same libelous charge.

In Rose *v.* Klinger, 8 Watts & S. (Pa.) 178, an action for ejectment, the plaintiff offered in evidence the proceeedings of an action between one Becktel and defendant Rose before the board of property to prove his title to the land in question. *Held,* that the admission of such evidence was error.

28. Smith *v.* Sun Print. Pub. Co., 55 Fed. 240, 5 C. C. A. 91; Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6, where the court said: "The admissibility of the testimony is urged both to show the jury that whatever injury the plaintiff has sustained in his reputation was not caused by the defendant alone, and that he has received from others an amount which would go to compensate him for his injury. We are aware that it is possible for a plaintiff in a case like this, where many parties are liable for practically the same libel, to recover sums which, in their total amount, may exceed a fair compensation for his injury. But this is a possibility which cannot be avoided in cases where there is no pecuniary standard for the assessment of damages, and where the matter must be left to the discretion of a jury. Moreover, an adoption of the defendant's view would be open to the equally serious objection that a jury might consider the amount recovered of others to be so large that its verdict would be made smaller than it otherwise would be, and so other parties might be made to pay for an injury for which a defendant was equally, or even more largely responsible. The evidence offered must have been intended to produce this result, or else it could have been of no benefit to the defendant. The rule is unquestionable that each defendant is responsible for the injury which is the natural result of his own wrong, and for nothing more or less than that, except as the wrong may have been aggravated by his conduct. Whatever may be the opinion of a court or a jury as to the total amount of judgments, we are bound to assume that the damages in each case have been assessed in accordance with the well settled rules of law."

cating liquors to the plaintiff's husband, it has been held that the defendant cannot show that the plaintiff has commenced an action against another person, for the same grounds.[29]

Again in a libel suit, it has been held that the defendant cannot mitigate the damages by showing that the plaintiff has recovered judgment against other persons for publishing the same libelous charge.[30]

On the other hand, in an action to recover damages for the sale of intoxicating liquors to plaintiff's husband, it has been held it is error to exclude evidence of judgments obtained against other persons by the plaintiff for like sales during the time in controversy.[31]

H. Care, Negligence, Etc. — One of the lines of cases furnishing numerous instances in which this rule of evidence of similar acts and transactions is involved, is that in which the question of a person's care or negligence upon a particular occasion is in issue; and, as in other cases, the courts hold to the general rule of exclusion, that is, that a person's negligence upon one occasion can not be established by evidence of other and previous acts of negligence, although at times and places near the time and place in question.[32]

29. Ward *v.* Thompson, 48 Iowa 588. The court said: "The mere bringing of an action cannot be regarded as having the force of an admission, so far as the amount sought to be recovered is concerned, which is the only material consideration. An action is brought for all the plaintiff thinks it is possible to recover. The allegations of the petition are designed to be broad enough, and more than broad enough, to cover all the evidence which can be advanced in their support. This plaintiff may have averred in her petition in the other case that she received more injury from the acts of that defendant, during the time in question, than she can show in the case at bar that she received altogether during the same time. But she may utterly fail in her proofs in the other case. The averments, then, made in her petition in that case, as to the extent of her injuries, must be considered as made merely for the purposes of the trial of that case, and should not affect her in any other. The mere fact that she claims that she received injuries to *some extent* not yet ascertained, for which the defendant in the other case is liable, is not such that if the jury in this case had knowledge of it, it would aid them in determining the extent of the injuries caused by the defendant."

30. Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6.

31. Engleken *v.* Webber, 47 Iowa, 558, where it was thought by a majority of the court, that the taking of such judgment by the wife to be an admission that she had received injuries during the time in question other than those caused by the defendant and that if such were the fact, the jury would have been aided, by knowing it, in determining the extent of the defendant's liability. Beck and Adams, J. J. *dissenting*.

32. Little Rock & M. R. Co. *v.* Harrell, 58 Ark. 454, 25 S. W. 117. *Compare*, Central of Ga. R. Co. *v.* Bernstein, 113 Ga. 175, 38 S. E. 394.

In an action against a railroad company for damages on account of personal injuries sustained by plaintiff by reason of the derailment and overturning of a car which the plaintiff was in, evidence that another car of defendant was overturned on a nearby but different track, three months prior to the time the plaintiff's injuries were received, was not relevant to prove negligence on the part of defendant at the time and place alleged. Central of Ga. R.

Nor can a party ordinarily show that he was not negligent on one occasion by proving that he was careful and prudent on other occasions.[33]

It has been held competent, however, to show that the party charged with negligence had performed or omitted the same act in the same way before, as tending to show that he did or omitted the act at the time in question.[34]

Co. *v.* Duffey, 116 Ga. 346, 42 S. E. 510.

In an action against a railroad corporation under certain statutes, for causing the death of the plaintiff's intestate at a crossing of a grade of a highway in a town by the railroad, evidence that twelve years before the accident, the defendant's lessor, another railroad corporation, had, in compliance with an oral application of the selectmen, maintained a flagman at the crossing, had no tendency to show that due care on the part of the defendant required that one should be maintained there at the time of the accident and such evidence was properly excluded. Tyler *v.* Old Colony R. Co., 157 Mass. 336, 32 N. E. 227.

Compare, Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, an action to recover damages for personal injuries sustained from the tipping over of a stage-coach in which the plaintiff was a passenger, where evidence was admitted touching the manner and character of the driving of the stage before and after the accident in question. The court said: "We do not think this was unwarranted. It related to the driver's knowledge of the road and his skill in his employment, and for this purpose was not impertinent, although incompetent to prove his conduct in this particular instance in producing the accident. The want of skill of the driver may be shown, at the time of the accident or at any prior time; but his good or bad conduct can only be looked at, at the same time the accident occurred, or as connected with the accident. Peck *v.* Neil, 3 McLean 26. And evidence that some distance further on the road the same night, the driver got outside the road and into a gully made by a recent washout, and that the passengers had to get out and assist in extricating the stage and team, and getting them back on the road, was admissible for the purpose of showing the degree of darkness of the night, the character and condition of the road, and the consequent necessity for proper lights on the vehicle."

In Higley *v.* Gilmer, 3 Mont. 90, 35 Am. Rep. 450, an action to recover damages for personal injuries received by the upsetting of a stage-coach, it was held that evidence of former accidents occurring under the same driver, was admissible to prove the bad character of the roads or the driver's want of familiarity with them, but not to establish his negligence at the time of the accident.

In Dearborn *v.* Union Nat. Bank, 61 Me. 369, it was held that evidence of the loss or misplacing of other bonds in a bank and their afterwards being found, was admissible to show the manner in which the business of the bank was conducted and as bearing upon the question of care.

33. Laufer *v.* Bridgeport Tract. Co., 68 Conn. 475, 37 Atl. 379.

34. *Connecticut.* — State *v.* Hoyt, 46 Conn. 330.

Massachusetts. — Shailer *v.* Bumstead, 99 Mass. 112, 130.

New Hampshire. — State *v.* Boston & Maine R., 58 N. H. 410; State *v.* M. & L. R., 52 N. H. 528, 549; State *v.* Colston, 53 N. H. 483; Hall *v.* Brown, 58 N. H. 93, 96; Plummer *v.* Ossipee, 59 N. H. 55; Nutter *v.* Railroad, 60 N. H. 483; Parkinson *v.* Railroad, 61 N. H. 416; Lyman *v.* Boston & M. R., 66 N. H. 200, 20 Atl. 976.

Davis *v.* Concord & M. R., 68 N. H. 247, 44 Atl. 388, was an action for negligently causing the death of the plaintiff's intestate, who was struck by a locomotive while driving over a highway crossing of the de-

Where the Act in Question Is Not Negligence Per Se, it is competent to show that other persons, experienced in the performance of that act, under similar circumstances, performed it as it was performed by the person in question.[35]

Carelessness of an Employe on Several Previous Occasions has been held competent on the question of unfitness for service, when accompanied by proof of notice of the employer.[36]

But carelessness on a single previous occasion is not so admissible.[37]

I. OTHER WRONGFUL ACTS. — a. *In General.* — Where the controversy is whether a person did a certain wrongful act evidence that he did other similar wrongful acts at other times is not admissible.[38]

fendant's railroad. Several witnesses testified, subject to the defendant's exception, that during the three years preceding the death of the plaintiff's intestate, they often saw him drive over the crossing in question, and that he always drove slowly and watched for trains. The court says: "It has repeatedly been held in this state that such evidence is competent, upon the ground that 'a person is more likely to do or not to do a thing, or to do it or not to do it in a particular way as he is in the habit of doing or not doing it.'"

In Shea *v.* Lowell, 8 Allen (Mass.) 136, an action to recover damages for injuries sustained by falling upon an icy sidewalk, where the question was whether or not the defendant city had taken reasonable care to remove the ice, it was held proper to permit the plaintiff to show that in other places on the same sidewalk similarly situated, the ice had been removed with a shovel only.

In an action for damages for the destruction of plaintiff's property by fire, alleged to have been caused by defendant's servant in negligently repairing a telephone wire and setting fire to the woodwork, the defendant offered the testimony of said witness to show that he had not so burned the woodwork and that he had performed a similar job the same day, previously to doing plaintiff's work, for one S. and had not burned said S.'s woodwork. *Held*, that in order to test the accuracy of said servant's statements as to how he had done the work at plaintiff's house, the testimony of S. on cross-examination, that said employe had, in fact, burned the woodwork in performing the work for him was admissible. The court by Morris, J., says: "It is quite true that the proof of the fact he had at other times been careless or unskillful, would not be competent testimony to show he was careless or negligent at the plaintiff's house, but by cross-examination any inconsistency in his testimony could be exhibited and the fact stated by him that the heated iron would not burn a window frame was a fact which was directly pertinent to the issue and could be contradicted. This fact was directly pertinent to the question of the possibility of the fire originating from the use of the soldering iron, the defendant having adduced testimony to show its impossibility." Southern Bell Tel. & Tele. Co. *v.* Watts, 66 Fed. 460, 13 C. C. A. 579.

35. Prosser *v.* Montana Cent. R. Co., 17 Mont. 372, 43 Pac. 81.

36. Baulec *v.* New York & H. R. R. Co., 59 N. Y. 356, 17 Am. Rep. 325. See also Baltimore & Elev. Co. *v.* Neal, 65 Md. 438, 5 Atl. 338.

37. Lacy *v.* Kossuth County, 106 Iowa 16, 75 N. W. 689. See also Baltimore *v.* War, 77 Md. 593, 27 Atl. 85.

38. Cotharin *v.* Davis, 2 Mackey (D. C.) 230; Scott *v.* Seaver, 52 Wis. 175, 8 N. W. 811; Newhall *v.* Appleton, 102 N. Y. 133, 6 N. E. 120; Franklin *v.* Franklin, 90 Tenn. 44, 16 S. W. 557.

b. *Fraud, Fraudulent Conveyances, Etc.* — **(1.) Generally.** — The general rule is that, for the purpose of proving the fraudulent character of a transaction, evidence of another independent fraudulent transaction at another time and place is not admissible.[39]

In Keith *v.* Taylor, 3 Vt. 153, an action on a note purporting to have been witnessed, the issue was whether or not the person whose name appeared thereon as a subscribing witness, had actually witnessed the note. It was held that the defendant could not show that a former holder of the note had forged another note with the same subscribing witness' signature for the purpose of raising the inference that such person had also forged the note in question.

In Matthews *v.* Hershey Lumb. Co., 65 Minn. 372, 67 N. W. 1008, the correctness of certain tally cards which were the basis of the scale bills received in evidence was in issue, and for the purpose of impeaching the integrity of the tallyman who made the cards and their correctness the defendant offered to prove subsequent particular acts of misconduct on the part of the tallyman occurring two years after the cards were made, from which it was claimed that an admission that the cards were fraudulent might be implied. *Held*, that such evidence was not admissible without first laying the foundation therefor by proof sufficient in the opinion of the trial court to establish the fact that the tallyman was acting for or in collusion with the plaintiff as to such alleged acts.

Evidence of Lending at a Usurious Rate of Interest to other persons is not competent to prove a usurious rate in the case on trial. Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 810; Ross *v.* Ackerman, 46 N. Y. 210; Ottillie *v.* Woechter, 33 Wis. 252.

In an Action for Divorce, Alleging Specific Acts of Adultery, evidence that defendant on three occasions prior to those specified visited another house of prostitution and tending to prove that on two such occasions he had committed adultery with another party, is inadmissible. "The furthest that the cases go, . . . is to hold that improper familiarities and acts of adultery other than those charged in the complaint, committed with the *particeps criminis* named in the complaint, may be proved to show adulterous intent on the part of the defendant toward such *particeps criminis.*" Goldie *v.* Goldie, 79 N. Y. Supp. 357.

Where the Defense to an Action on a Note Is Forgery, it is not admissible to exhibit other writings for the purpose of showing that the alleged forger has committed other forgeries, unless the papers offered present similitudes of the whole or some part of the note in question. Dodge *v.* Haskell, 69 Me. 429.

Forgery. — In an action brought against defendants to recover balance due on a note claimed to have been forged, evidence of forgery of other obligations and on other persons by the party charged with this, was not admissible. Knowledge and intention were not here in issue, as in criminal prosecutions where similar testimony is admitted. Kingsbury *v.* Waco State Bank, 30 Tex. Civ. App. 387, 70 S. W. 551.

In an action brought by a company of persons who had purchased a number of lottery tickets, it was claimed the defendants, the agents of a lottery company, had fraudulently substituted another ticket for a ticket winning a prize, in the package, said agents knowing before the package of tickets was delivered that the ticket so abstracted had won a prize, evidence was offered to show that defendant Graves had been guilty of altering his book account to defraud a certain lodge about a year prior to this occurrence. *Held*, that such testimony was inadmissible and that particular acts of bad conduct cannot be proved, even to rebut evidence of general good character. Townsend *v.* Graves & Bostwick, 3 Paige (N. Y.) 453.

39. Staples *v.* Smith, 48 Me. 470; Huganir *v.* Cotter, 92 Wis. 1, 65 N. W. 364; Holinesly *v.* Hogue, 47 N.

C. 391; Dial *v.* Farrow, 1 Spear (S. C.) 114; Oram *v.* Rotheruel, 98 Pa. St. 300; Smith *v.* Adair, 61 Ga. 281; Henderson *v.* Miller, 36 Ill. App. 232; Jordan *v.* Osgood, 109 Mass. 457, 12 Am. Rep. 731.

Evidence Showing Fraud and Bad Faith in the Sale of Chattels wholly disconnected with the subsequent sale of realty, is not admissible to prove fraud and bad faith in the sale of the realty. Sutter *v.* Lackmann, 39 Mo. 91.

In Keating *v.* Retan, 80 Mich. 324, 45 N. W. 141, a suit between the holder of a chattel mortgage and an attaching creditor of the mortgagor, who attacked the mortgage as fraudulent as to creditors, it was held that testimony tending to prove that the mortgagor entered into a fraudulent arrangement with certain other creditors, with respect to other personal property, was not admissible.

In Huganir *v.* Cotter, 92 Wis. 1, 65 N. W. 364, the question being whether defendant had induced plaintiff to enter into a logging contract by false representations as to the quantity of timber on certain lands, evidence that defendant had made statements, similar to those alleged, to third persons before and after the making of the contract, was held inadmissible. Cassoday, C. J., says: "Of course, there is a class of cases in which evidence has been received of facts which happened before or after the principal transaction and which had no direct or apparent connection with it, but they are cases in which the knowledge or intent of the party was a material fact, on which the evidence, apparently collateral, and foreign to the main subject, had a direct bearing and was therefore admissible."

In Martin *v.* Smith, 116 Ala. 639, 22 So. 917, an action upon a promissory note, it was held that evidence that shortly before the execution of the instrument sued on the defendant had, by the fraudulent representations of the payee's agent, been induced to sign a similar paper to the same payee, which had no connection with the paper in suit, was not admissible, there being no proof of false representations by the payee or his agent concerning the note in suit. The court said: "It matters not how many other frauds may have been committed; if there was none in the transaction under review, they avail nothing. It may be conceded that if there had been proof of fraud inducing the execution of the contract, other similar frauds perpetrated by the same party, near the same time, might have been received, within proper limitations, as circumstances in aid of such proof; but they could not be received for the purpose of making out, independently, a case of fraud in a transaction with which they had no connection."

Evidence that a party has been guilty of other like frauds is not admissible for the purpose of showing his bad character and the greater probability on that account of his having committed the fraud in question. Edwards *v.* Warner, 35 Conn. 517.

In Burnham *v.* Strafford, 58 Vt. 194, 2 Atl. 126, the question was, whether the plaintiff, while selectman, borrowed and paid to the defendant's treasurer, for its benefit, the sum of $300. The treasurer denied it, and, to strengthen his testimony, his book of accounts was introduced, on which there was no entry of such payment. *Held,* that evidence was not admissible in rebuttal to prove other discrepancies in the treasurer's accounts independent of, and collateral to, the question in issue.

In an action upon a promissory note, evidence that shortly before the execution of the note sued on, the defendant had been induced by fraudulent representations to sign a similar paper to the payee which had no connection with the note in suit, is inadmissible in the absence of proof of false representations made by the payee concerning the instrument sued on. Martin *v.* Smith, 116 Ala. 639, 22 So. 917.

In an action to rescind a contract for the sale of certain land, evidence that the defendant had sold another tract to another party a year or two before the sale to plaintiff, and of his having to take it back on account of a misrepresentation as to the number of acres, was incompetent for the purpose of showing that a like deceit had induced plaintiff to enter into

And this is the rule also in respect of conveyances, the fraudulent character of which is in issue.[40]

(2.) Intent, Purpose, Etc. — But where the fraudulent intent or purpose of the actor in the transaction in controversy is in issue, evidence of other similar transactions tainted with such fraudulent purpose occurring at about the same time and under such circumstances as may fairly support the inference that the act or transaction in controversy was done or took place with the same intent and purpose, is admissible.[41]

So, too, upon an issue as to the fraud of the grantor in a convey-

his contract. Claus *v.* Evans (Ky.) 33 S. W. 620.

In an action on the case against husband and wife to recover damages sustained by the plaintiff upon an exchange of a farm belonging to him for one owned by the wife, fraudulent representations made by the wife several months after the exchange was completed, cannot be given in evidence on the ground of their being similar to representations made by the husband previous to the exchange, and for the purpose of supporting an averment of a joint fraudulent representation by husband and wife. Nor are such representations legitimate evidence by way of admission, to prove that the wife had made similar representations previous to the exchange; or that she authorized her husband to make any; or that she had any knowledge of his having made any. Birdseye *v.* Flint, 3 Barb. (N. Y.) 500.

40. Uhler *v.* Adams, 73 Miss. 332, 18 So. 654.

In an action of trespass against the sheriff for levying on certain goods as the property of Goldstein & Co., which the plaintiff claimed to have purchased prior to the levy, the defendant offered evidence to show that under similar circumstances plaintiff had purchased goods of Goldstein & Co. about a year before, which evidence was rejected. *Held*, the rule allowing distinct frauds to be proven in such cases is limited to frauds which are contemporaneous, or nearly so, and does not embrace dealings at a remote time. Cohn *v.* Mulford, 15 Cal. 50.

41. *United States.* — Lincoln *v.* Claflin, 7 Wall. 132; New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 591; Jack *v.* Mutual Reserve F. & L. Assn., 113 Fed. 49, 51 C. C. A. 36.

Alabama. — Davidson *v.* Kahn, 119 Ala. 364, 24 So. 583.

Illinois. — Lockwood *v.* Doan, 107 Ill. 235.

Kansas. — Elerick *v.* Reid, 54 Kan. 579, 38 Pac. 814.

Minnesota. — Moline-Milburn Co. *v.* Franklin, 37 Minn. 137, 33 N. W. 323; Manwaring *v.* O'Brien, 75 Minn. 542, 78 N. W. 1.

New York. — Hall *v.* Naylor, 18 N. Y. 588, 75 Am. Dec. 269.

Pennsylvania. — Helfrich *v.* Stem, 17 Pa. St. 143; Striker *v.* McMichael, 1 Phila. 89.

South Carolina. — Brown *v.* Newell, 64 S. C. 27, 41 S. E. 835.

Vermont. — Bradley Fertilizer Co. *v.* Fuller, 58 Vt. 315, 2 Atl. 162.

Washington. — Stack *v.* Nolte, 29 Wash. 188, 69 Pac. 753.

To Show That a Note Given in Payment for Merchandise Bought Was Fraudulent in Conception, and that the design was not to deliver the property sold, it is admissible in an action upon the note to show that the party who procured it had substantially similar transactions about the same time with other persons in which the property was not delivered.

Nicholas *v.* Baker, 75 Maine 334. The court said: "It is generally true that contemporaneous frauds may be proved when they tend to show a fraudulent intent in the particular transaction under investigation. In the numerous cases in which this question has been considered, there may be slight differences, in result, not entire uniformity in deciding in what cases one fraud may properly

be said to make manifest the intention which pervades another transaction; but the rule of evidence certainly goes to this extent, as stated in Jordan *v.* Osgood, 109 Mass. 461, that another act of fraud is admissible to prove the fraud charged, when there is evidence that the two are parts of one scheme of fraud, committed in pursuance of a common purpose. This rule seems sufficient to justify the admission of the testimony to which exception is taken." But see dissenting opinion.

In Pierce *v.* Hoffman, 24 Vt. 525, an action of trespass for property which the defendant claimed was fraudulently purchased by the plaintiff, it was held that evidence of other fraudulent dealings between the parties about the same time as the one in question, was admissible. The court said that: "In cases of this kind, there is a probable connection in a series of sales, nearly at the same time, the result of which is to strip himself of his available property and enable him to leave the country. It would be impossible generally to show the object and intention of the parties without allowing everything to come into the case, which might fairly be supposed to have a connection with the general design to be ultimately accomplished. A fraudulent transaction between the same parties which had no connection with the particular failure, might not be competent evidence. But all which regarded the very failure and absconding, and it would seem the testimony objected to had such connection, should go before the jury. If this were not so, it would be in the power of parties by subdividing such transactions to altogether destroy the force of the evidence resulting from their general character."

In Brown *v.* Schock, 77 Pa. St. 471, an action of assumpsit brought by an indorsee, against the defendant as the maker of a note fraudulently obtained by one Simpson, to whom it was payable, the defense introduced a number of witnesses from whom the said Simpson at about the same time had obtained similar notes in a similarly fraudulent manner, by whom it was sought to prove that a person by the name of M. Brown had accompanied the said Simpson at the time of the obtaining of said note and was cognizant thereof and a party thereto, and that he and the plaintiff were one and the same person. The plaintiff, having been informed of these facts by his counsel and having refused to appear at the trial and convince the witnesses that they were wrong as to his being the party who had traveled with Simpson; *Held*, that the said evidence was properly admitted, it being a question of fact for the jury, and might be proved by circumstances just as any question of identity.

In Blalock *v.* Randall, 76 Ill. 224, an action of malicious prosecution in having procured the arrest and imprisonment of plaintiff on a charge of forgery of a note, the defendant claiming that the plaintiff had by fraud procured his signature to the note, whereas he thought he was signing a contract of agency, it was held, that evidence that at about the same time as the transaction with the defendant, and in the same neighborhood, other persons had the same kind of transactions with the plaintiff, which resulted in their pretended notes having been fraudulently procured from them in the same way by the plaintiff, was admissible as characterizing the employment of the plaintiff, and illustrating the manner in which the alleged fraud upon the defendant might have been accomplished, and also as tending to corroborate the testimony of the defendant.

Where a person is charged with having fraudulently purchased goods, knowing his insolvency and inability to pay for them, it is competent to show false representation by him to other creditors for the purpose of obtaining credit, at or about the same time he made similar representations to the creditor in question. Lockwood *v.* Doane, 107 Ill. 235.

In Castle *v.* Bullard, 23 How. (U. S.) 172, an action against defendants as copartners alleging that they sold certain goods belonging to

ance alleged to have been executed in fraud of creditors, evidence of other fraudulent conveyances made by him about the same time and as part of the same scheme to defraud, is admissible.[42]

The Reason assigned for the admission of such evidence is that where transactions of a similar character, executed by the same parties, are closely connected in time, the inference is reasonable that they proceed from the same motive.[43]

Limitations Upon Competency. — Some of the courts limit the competency of such evidence to cases of conspiracy to commit fraud.[44]

Common Purpose Necessary. — Where two transactions are claimed to be fraudulent, only one of which, however, is being controverted, it must be shown that they are so connected as to evince a common purpose, before the uncontroverted transaction can be admitted in

plaintiff to one Edward S. Castle, charging that Castle at the time of the sale was insolvent and that defendants knew it, evidence that they had committed similar fraudulent acts at or about the same time was allowed with a view to establish their alleged intent with respect to the matters in issue. The court said: "Similar fraudulent acts are admissible in cases of this description, if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration."

In an action to recover goods sold by the plaintiff to another party, and by his directions delivered to defendant, the plaintiffs claiming that the sale had been procured by fraud, and on that account had been rescinded by them, it was held, that evidence of a transaction by which defendants and the said other party had obtained goods from other persons by means similar to those used in the case in question, was admissible for the plaintiffs. Bancroft & Co. *v.* Heringhi, 54 Cal. 120.

42. Thomas *v.* Beck, 39 Conn. 241; Krolik *v.* Geaham, 64 Mich. 266, 31 N. W. 307; Brink *v.* Black, 77 N. C. 59; Sarle *v.* Arnold, 7 R. I. 582.

In a suit brought against a sheriff for levying on a store of goods and selling them as the property of another than the plaintiff, the sheriff, alleging fraud in the purchase of the goods by the plaintiff, from the debtor, the sheriff may show there were creditors to be cheated, and that their claims were so large as to furnish a probable motive to cheat; that the vendor was insolvent and vendee knew it; that other property, besides that levied on, was included in the sale, that, by the declarations of the vendee or otherwise, upon the sale a fraudulent reservation was made in favor of the vendor; and apart from any direct proof of connection in the sale of the two properties, if there be evidence that the vendor was largely in debt, and that the vendee knew it, it is evidence of fraud in one sale, if it be shown that the other was fraudulent and took place very near the same time, and to the same person. Helfrich *v.* Stein, 17 Pa. St. 143.

43. In West Florida L. Co. *v.* Studebaker, 37 Fla. 28, 19 So. 176, an action for fraud and deceit in the sale of lands, the court said: "In cases of fraud large latitude is allowed in the admission of evidence, and where fraud in the purchase or sale of property is in issue, other frauds of like character committed by the same parties at or near the same time are admissible. The admissibility of such evidence 'is placed on the ground that where transactions of a similar character, executed by the same parties, are closely connected in time, the inference is reasonable that they proceed from the same motive.'"

44. The object of such evidence is to show, first, the fact of a conspiracy of the party with others to

evidence for the purpose of establishing the fraudulent character of the other.[45]

Falsity of Other Transaction Must Be Shown. — And there must be proof of the falsity of such other representations.[46]

(3.) As Part of Fraudulent Scheme. — But evidence of other fraudulent transactions is admissible if the nature of the whole transaction and the relations of the parties show that they were all parts of one scheme and executed for one purpose.[47]

commit frauds similar to the fraud in question, and second, as an inference that the fraud in question was part of the same conspiracy. Knotwell *v.* Blanchard, 41 Conn. 614; Edwards *v.* Warner, 35 Conn. 517; Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240. And see Raby *v.* Frank, 12 Tex. Civ. App. 125, 34 S. W. 777.

45. White *v.* Beal & F. Groc. Co., 65 Ark. 278, 45 S. W. 1060; Jordan *v.* Osgood, 109 Mass. 457, 12 Am. Rep. 731; McKay *v.* Russell, 3 Wash. St. 378, 28 Pac. 908; Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200. And in Hood *v.* Chicago & N. W. R. Co., 95 Iowa 331, 64 N. W. 261, it was held that the fact that plaintiff, in an action for personal injuries, had made fraudulent claims for personal injuries upon insurance companies, was not admissible to show that he was exaggerating his damages, because there was no proof that the claims fraudulently made and the action were based upon a common design.

46. New York & H. Cigar Co. *v.* Bernheim, 81 Ala. 138, 1 So. 470; West Florida L. Co. *v.* Studebaker, 37 Fla. 28, 19 So. 176 (fraud in the sale of other lands); Kline *v.* Baker, 106 Mass. 61; Blake *v.* White, 13 N. H. 267; Tarkington *v.* Brunett (Tex. Civ. App.), 51 S. W. 274.

47. *United States.* — Smith *v.* Schwed, 9 Fed. 483.

Alabama. — Loeb *v.* Flash, 65 Ala. 526.

Massachusetts. — First Nat. Bank *v.* Goodsell, 107 Mass. 149; Lynde *v.* McGregor, 13 Allen 172; Jordan *v.* Osgood, 109 Mass. 457, 12 Am. Rep. 731; Haskins *v.* Warren, 115 Mass. 514; Fowle *v.* Child, 164 Mass. 210, 41 N. E. 291.

Minnesota. — Berkey *v.* Judd, 22 Minn. 287.

Nebraska. — Barber *v.* Martin, 67 Neb. 445, 93 N. W. 722.

New York. — Angrave *v.* Store, 45 Barb. 35.

Pennsylvania. — White *v.* Rosenthal, 173 Pa. St. 175, 33 Atl. 1027.

Where sundry notes of like character were obtained of different persons by a series of fraudulent acts, the whole being done under a conspiracy to defraud, held that, for the purpose of proving the fraud as to one of the notes, evidence was admissible of the fraudulent proceeding with regard to the others. Knotwell *v.* Blanchard, 41 Conn. 614.

Fraud. — In trover for goods sold by the plaintiff to a vendee under whom the defendant derived his title, it was held, that the testimony of persons who had sold goods to the same vendee about the same time, showing that he was then insolvent, and that he knew it, and that he had no reasonable expectation of paying for the goods purchased by him, is competent evidence to prove that his purchase from the plaintiff was fraudulent. Rowley *v.* Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607.

In Stockwell *v.* Silloway, 113 Mass. 384, upon a trial under Gen. Stats., ch. 124, §§ 31-34 of a charge that a debtor had fraudulently conveyed his estate with a design to defraud his creditors, it was held competent, upon the question of design, to show that other fraudulent conveyances had been made by him at about the same time and as a part of the same fraudulent scheme; and that a record of his former conviction upon similar charges at the suit of the same creditor upon an arrest upon another execution was conclusive evidence that the conveyances then found to be fraudulent were so in fact.

On the Question of a Person's Fraudulent Purchase of property, evidence of his obtaining or attempting to obtain other property, under color of a purchase, without paying for it, so connected in time and circumstances as to afford proof of a general scheme of fraud, is admissible.[48]

J. As Part of Plan, Scheme, Etc. — a. *In General.* — Another exception to this rule of exclusion is to be found in those cases where the other acts or transactions comprise part of a system, or plan, or scheme, or method, having a tendency to show the method and purpose of the party concerning the act or transaction in controversy; and when this is the case, the courts very generally admit evidence of the various acts and transactions.[49]

b. *Course of Business.* — And where the question is whether a thing was done or not, the existence of a course of office or business, according to which it naturally would or would not have been done, is a relevant fact.[50]

K. As Part of Res Gestae. — And another apparent exception

In replevin for goods alleged to have been purchased by an insolvent, with intent not to pay therefor, *evidence* that as part of the same fraudulent scheme, he gave another person an order which was so much larger than usual that he refused to fill it, is not incompetent because it relates to a transaction with a person not a party to the suit, or because it was not shown to have occurred before the purchase from the plaintiff. Katzenberger *v.* Leedom, 103 Tenn. 144, 52 S. W. 35.

In Wiggin *v.* Day, 9 Gray (Mass.) 97, replevin of two wagons, attached by the defendant, as a deputy sheriff on mesne process against Hiram E. Barstow, plaintiff testified that he sold the wagon to Barstow for cash, and that by reason of non-payment of the price the property had not passed. Also as evidence that Barstow bought the wagons with the intent not to pay for them plaintiff offered to show that, about the same time of this sale, Barstow was insolvent, and purchased large amounts of personal property of third persons, and got them into his hands by fraud, and then secreted them in various places. *Held,* rightly admitted.

48. Hovey *v.* Grant, 52 N. H. 569; Haines *v.* Republic F. Ins. Co., 52 N. H. 467.

49. *Connecticut.* — Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240.

Illinois. — Stolp *v.* Blair, 68 Ill. 541.

Maine. — Eaton *v.* New England Tel. Co., 68 Me. 63.

Michigan. — Ayres *v.* Hubbard, 71 Mich. 594, 40 N. W. 10.

Nebraska. — Barber *v.* Martin, 67 Neb. 445, 93 N. W. 722.

New York. — Costello *v.* Herbst, 38 N. Y. Supp. 1123.

Pennsylvania. — Lelar *v.* Brown, 15 Pa. St. 215; Snyder *v.* Wertz, 5 Whart. 163.

50. Aiken *v.* Kennison, 58 Vt. 665, 5 Atl. 757.

When it is sought to establish a course of dealings between two persons, with a view to showing that one of them was in the habit of sending his servant to the other for the purpose of purchasing goods, for which payment was uniformly made, evidence tending to show a similar course of dealings between the alleged principal and other persons is not admissible. Conyers *v.* Ford, 111 Ga. 754, 36 S. E. 947; Anglin *v.* Barlow (Tex. Civ. App.), 45 S. W. 827.

In an action against a national bank for money deposited at the bank with its cashier, upon the agreement that the money should be invested by the bank in stocks and bonds, if the issue is whether the

to the general rule excluding evidence of other transactions is to be found in those cases where the other transaction is part and parcel of the transaction in controversy, although it may not itself be in issue or dispute, and would otherwise be excluded. And whenever such other transaction is such part of the main transaction, a part of the *res gestae*, as it is usually expressed, evidence thereof is generally regarded as admissible.[51]

plaintiff dealt with the cashier as an individual or as the representative of the bank, evidence of former transactions similar in kind are competent. L'Herbette *v.* Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368; Pierson *v.* Atlantic Nat Bank, 77 N. Y. 304.

In assumpsit for goods sold and delivered defendant in order to prove that the sales were made on a credit of six months offered in evidence certain promissory notes payable in six months from date made by him to same parties together with certain bills of parcels. All these notes were given on account of other goods than those sued for. *Held,* evidence was competent. Tibbetts *v.* Sumner, 19 Pick. (Mass.) 166.

Action of assumpsit to recover $4,000 paid by plaintiff to redeem the schooner Alert and cargo, which had been seized as forfeited, in Curacoa, for violation of the laws of that place, by short entries of the cargo taken in there for the homeward voyage. It having been proved that the usual course of trade to Curacoa was to enter and clear by short invoices, so as to evade the payment of duties, and that this course was winked at by the revenue officers of the place, the plaintiff offered evidence that the defendant Veitch had given him orders to that effect, in former voyages, in order that the jury might draw an inference that similar orders had been given to plaintiff in the present case. *Held,* relevant. Peyton *v.* Veitch, 2 Cranch C. C. 123, 19 Fed. Cas. No. 11,057.

51. Aiken *v.* Kennison, 58 Vt. 665, 5 Atl. 757; Klein *v.* Hoffheimer, 132 U. S. 367.

Negligence Case. — In Austin & N. W. R. Co. *v.* Duty (Tex. Civ. App.), 28 S. W. 463, a personal injury action, the plaintiff was charged with contributory negligence in attempting to drive across the track, and it was held that, as evidence tending to explain his conduct, he could show that another vehicle crossed immediately before he attempted to cross, and that just as he reached the crossing some one standing there told him to "come on," or words to that effect, which he did; that such evidence fell within the rule of *res gestae.*

Transfers to Same Party. — Successive. — In Erfort *v.* Consalus, 47 Mo. 208, an action to set aside as fraudulent a conveyance of real estate, it was held that evidence of a transfer by the grantor to the grantee of all the grantor's personal property a short time prior to the conveyance of the real estate, was admissible as part of the *res gestae.* The court said: "The two transactions were so blended in time, place, parties and circumstances, that an inquiry into the good faith of one involved an examination of the other."

Other Conveyances. — In Thomas *v.* Beck, 39 Conn. 241, an insolvent debtor had conveyed real estate to his wife, and at the same time and place conveyed other property to his daughter, the two conveyances embracing substantially all the debtor's property; and it was *held,* in an action to set aside the conveyances to the daughter as fraudulent, that evidence of the conveyance to the wife was admissible.

In Home Ins. Co. *v.* Adler, 71 Ala. 516, where an agreement related to insurance on goods in the storehouse of the party seeking the insurance, and he had previously obtained two annual policies on merchandise in the same storehouse, from the same agent and in the same in-

L. HABITS. — The habits of one whose conduct is in question cannot be proven by evidence that he previously did the same thing.[52]

And *a fortiori*, evidence of what others did or were in the habit of doing should be excluded.[53]

surance company, it was held, that as these former dealings between the parties showed the house in which the merchandise covered by the policies was kept, the rate of premium, the time for which the insurance had been obtained, and the many stipulations and details embodied in the policies, proof thereof would authorize the inference, that when the insurance was applied for, and the agent agreed to issue the policy, all the previous terms were impliedly understood and adopted, except in so far as they were modified by the express terms of the verbal agreement; and hence, in a suit on the agreement to insure, after a loss of fire, the two former policies were admissible in evidence in aid of the agreement.

52. Dowling *v.* State, 5 Smed. & M. (Miss.) 664; Dalton *v.* Chicago R. I. & P. R. Co., 114 Iowa 257, 86 N. W. 272, action to recover damages for wrongful death, due to the alleged negligence of the defendant. Witnesses were permitted to testify, over plaintiff's objections, to isolated instances when plaintiff's intestate was found asleep in his buggy. The court says: "This evidence was admitted on the theory, we suppose, that it would tend to show he was asleep at the time he was struck by the train, or perhaps to show his habit in this respect. Such evidence was clearly inadmissible. . . We are not to be understood as holding that the habits of one whose conduct is in question may not be shown in certain cases, but such habits are not to be proven by evidence that he previously did the same thing."

It is inadmissible to show plaintiff's method or manner of driving horses on other occasions to establish his negligence at the time of the accident. Langworthy *v.* Green Twp., 88 Mich. 207, 50 N. W. 130.

Proof That a Defendant Was in the Habit of Making Prompt and Punctual Payment of demands against him is only admissible in aid of a presumption of payment arising from lapse of time. Parker *v.* Parker, 52 Ill. App. 333.

In an action for damages for injuries caused through the alleged negligence of the defendant's foreman the court said: "The plaintiff desired further to put in testimony as to certain specific acts of carelessness on the part of the foreman, while engaged on the same job, and before the accident happened. This was properly excluded. Because a servant may have been guilty of negligence, on certain specified occasions, it by no means follows that he was on the occasion in question, or that he might not ordinarily be a careful and skillful workman, and properly employed as such." Hatt *v.* Nay, 144 Mass. 186, 10 N. E. 807; Robinson *v.* Fitchburg & W. R. Co., 7 Gray (Mass.) 92; Maguire *v.* Middlesex R. Co., 115 Mass. 239.

In an action for personal injuries received by a collision at a railroad crossing, evidence will not be received to show the general character and habits of the traveler for carefulness, as bearing upon the question of due care, on his part, though the injuries occasioned death before he could tell how the accident happened, and no one saw him at the time of the collision. Chase *v.* Maine Cent R. Co., 77 Me. 62, 52 Am. Rep. 744.

In Chicago & A. R. Co. *v.* Gibbons, 65 Ill. App. 550, an action on the case to recover for the use of the widow and next of kin of Thomas Comeford, killed on a crossing of appellant's railroad at Dwight, while driving in front of freight cars being switched on a side track, the court said: "The testimony offered by the defendant that Comeford was habitually reckless in making crossings in front of moving trains, was properly rejected, because there were eye-witnesses to the injury."

53. Chicago, R. I. & P. R. Co. *v.* Clark, 108 Ill. 113. An action by an administratrix to recover for negligently causing the death of her intes-

So, too, that a person is in the habit of doing a particular thing at a particular time, has no tendency to show that he did not do some other thing at some other time.[54]

M. CRIMINAL CASES. — a. *In General.* — So, too, upon the trial of a prosecution for crime, the general rule is that evidence tending to prove a distinct and independent crime, although it may be similar

tate. The court says: "He (deceased) was bound to use care, or no recovery can be had, and what others did or were in the habit of doing, did not tend to prove that issue. Such a course may have been careless, or even reckless, and if so, it did not justify him in omitting the observance of care. We, therefore, think that such evidence did not tend to prove care on the part of deceased, and the court erred in its admission."

54. In State *v.* Wilkins & Blow, 66 Vt. 1, 28 Atl. 323, defendant was charged with rape. The court on appeal says: "The evidence offered relative to Wilkins' singing and his habit of singing while his sister played accompaniments upon the organ was wholly material. It might have been true that he was in the habit of singing with his sister every evening, and that he in fact sang with her on that evening; yet that fact had no tendency to show that he was not absent from the house at the particular time in question."

In Clark *v.* Smith, 72 Vt. 138, 47 Atl. 391, the plaintiff claimed that his intestate was a passenger on the defendant's train; that when the train reached Jamaica, orders were given to change cars; that intestate arose from her seat for that purpose and stood in or near the door of the car; that the train had stopped, and was then so suddenly started and again stopped, that in consequence, she was thrown through the door to the ground and so injured that she died. Testimony was admitted to show how the train was handled on the way from Battleboro to Jamaica, and that the train was jerked violently at other stations. The court says: "How the train was managed at other stations had no tendency to show how it was managed at Jamaica."

In a suit for damages for being ejected from a train, the defendant introduced evidence that prior to his removal from the train, plaintiff used vile, obscene and profane language. Plaintiff introduced two witnesses to show that he was not in the habit of using obscene or profane language. *Held,* that such evidence is incompetent. Atchison T. & S. F. R. Co. *v.* Gants, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780.

In Gulf C. & S. F. R. Co. *v.* Hamilton, 17 Tex. Civ. App. 76, 42 S. W. 358, an action for damages resulting from a collision with a train at a crossing. The court says: "On the trial of the case, one Reed, who was traveling in the wagon, with appellee, when the accident occurred, testified that he was in the habit of looking for cars when about to go on the railroad track. He had previously testified that he did look for an approaching train and discovered none. The testimony as to his habits was objected to. We are of opinion that admitting this testimony was error."

In Outlaw *v.* Hurdle, 46 N. C. 150, 165, an action to probate a writing as the last will and testament of David Outlaw, the caveators offered to exhibit to the jury a large number of letters in the handwriting of the deceased for the purpose of showing that the deceased always used the contraction "its," for "it is," as evidence to be considered by the jury in determining whether the said paper was in the handwriting of the deceased or not. On appeal, held proper.

In Gulf C. & S. F. R. Co. *v.* Johnson (Tex. Civ. App.), 42 S. W. 584, an action against a railroad company for injuries to a boy ten years of age, the court says: "The 29th assignment of error complains of the testimony of Rogers Johnson to the effect that he was not in the habit of crawling under the cars before he was injured. Ordinarily the habit of the person injured is not admis-

to that for which the defendant is on trial, is not admissible for the purpose of raising an inference or presumption that he committed the particular crime for which he is on trial.[55]

sible, but in this particular instance it was not error to permit Rogers Johnson to testify to this fact. It was a theory of defendant, and one which it sought to prove, that Rogers Johnson was in the habit of loitering around the railroad tracks and crawling under the cars. This evidence was offered evidently in rebuttal.

55. *Alabama.* — Gassenheimer *v.* State, 52 Ala. 313.

California. — People *v.* Lane, 100 Cal. 379, 34 Pac. 856; People *v.* Walker, 142 Cal. 90, 75 Pac. 658; People *v.* Tucker, 104 Cal. 440, 38 Pac. 195.

Illinois. — Parkinson *v.* People, 135 Ill. 401, 25 N. E. 764.

Iowa. — State *v.* Sterrett, 71 Iowa 386, 32 N. W. 387; State *v.* Gordon, 3 Iowa 410.

Maryland. — World *v.* State, 50 Md. 49.

Massachusetts. — Com. *v.* Ryan, 134 Mass. 223; Com. *v.* Jackson, 132 Mass. 16; Com. *v.* Abbott, 130 Mass. 472.

Michigan. — People *v.* Jacks, 76 Mich. 218, 42 N. W. 1134.

Nebraska. — Davis *v.* State, 54 Neb. 177, 74 N. W. 599; Morgan *v.* State, 56 Neb. 696, 77 N. W. 64; Berghoff *v.* State, 25 Neb. 213, 41 N. W. 136.

Pennsylvania. — Shaffner *v.* Com., 72 Pa. St. 60, 13 Am. Rep. 649.

Vermont. — State *v.* Smalley, 50 Vt. 736.

Logically the Commission of One Offense Is Not Proof, of itself, of the commission of another independent crime. Yet it cannot be said to be without influence on the mind, for certainly, if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged. It, therefore, predisposes the mind of the juror to believe the prisoner guilty. It is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but is detrimental to justice to burden a trial with multiplied issues that serve to confuse and mislead a jury. Shaffner *v.* Com., 72 Pa. St. 60, 13 Am. Rep. 649; Janzen *v.* People, 159 Ill. 440, 42 N. E. 862.

"It is true that the commission of one offense is not evidence of the commission of another and independent offense, yet the proof of the one cannot be said to be without influence on the mind of the juror, convincing him that the defendant may be guilty of the other." Janzen *v.* People, 159 Ill. 440, 42 N. E. 862.

Evidence of another separate and distinct robbery committed by the same defendant upon another person, although in the same neighborhood, in much the same manner, and about the same time, is not admissible in evidence on a prosecution for a robbery. The testimony of the separate offense must have some tendency to prove the offense charged. It is admissible only on the ground that it has some logical connection with the offense charged. It is clearly not admissible on the theory that if a person will commit one offense, he will commit another. State *v.* Spray, 174 Mo. 569, 74 S. W. 846.

In State *v.* Fitchette, 88 Minn. 145, 92 N. W. 527, defendant was convicted of the offense of taking a reward to procure an appointment of a person to a public office. After proving the crime alleged, the state introduced evidence to show that six months before the incident in question, defendant bargained for an appointment to a position on the police force with another applicant, and accepted $100.00 to procure it for him. *Held,* improper and prejudicial.

In Cowan *v.* State, 22 Neb. 519, 35 N. W. 405, defendant was convicted of receiving money by false pretenses, in having mortgaged certain live stock to a bank which he did not own and obtained $200.00. The state was permitted to intro-

b. *Motive.* — While the general rule is as just stated, the courts have generally held that evidence establishing the motive of the defendant in doing the act charged is always admissible, even though such evidence proves an independent crime.[56]

duce testimony to show that the accused had in two other cases, entirely distinct and separate from that under consideration, obtained goods under false pretenses. The court says: "This was entirely unauthorized. Except in cases where it is necessary to show guilty knowledge, it is not admissible to prove that at another time and place the accused committed or attempted to commit, a crime similar to that with which he stands charged, as it cannot be expected the accused will be prepared to disprove collateral attacks of this character."

When a defendant is put upon trial for a crime he is presumed to be ready to meet the specified crime charged against him, but he is not presumed to be ready to defend against a charge not made against him in the indictment, nor does the law require him to meet such a charge. Janzen *v.* People, 159 Ill. 440, 42 N. E. 862.

Where a maximum penalty for a felony is required to be imposed upon a second conviction, and the second conviction does not change the grade of the offense nor require the imposition of a different punishment, proof of the former conviction and sentence is not only not necessary, but should not be permitted, since its admission would naturally tend to the prejudice of the defendant, as in effect tending to prove bad character. McWhorter *v.* State, 118 Ga. 55, 44 S. E. 873.

56. *Alabama.* — Gray *v.* State, 63 Ala. 66.

California. — People *v.* Walters, 98 Cal. 138, 32 Pac. 864; People *v.* Wilson, 117 Cal. 688, 49 Pac. 1054; People *v.* Gleason, 127 Cal. 323, 59 Pac. 592.

Connecticut. — State *v.* Watkins, 9 Conn. 47, 21 Am. Dec. 712; State *v.* Green, 35 Conn. 203.

Florida. — West *v.* State, 42 Fla. 244, 28 So. 430.

Idaho. — State *v.* McGann, 8 Idaho 40, 66 Pac. 823.

Indiana. — Cross *v.* State, 138 Ind. 254, 37 N. E. 790.

Iowa. — State *v.* Dooley, 89 Iowa 584, 57 N. W. 414.

Kentucky. — O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471 (where the court said that "even evidence tending to prove a distinct offense is, therefore, admissible, if it shows facilities or motives for the commission of the one in question").

Michigan. — Templeton *v.* People, 27 Mich. 501.

New York. — Pontius *v.* People, 82 N. Y. 339.

North Dakota. — State *v.* Kent, 5 N. D. 516, 67 N. W. 1052.

Pennsylvania. — Kramer *v.* Com., 87 Pa. St. 299; Com. *v.* Ferrigan, 44 Pa. St. 386.

Texas. — Barkman *v.* State, 52 Tex. Crim. 105, 52 S. W. 73; Miller *v.* State, 31 Tex. Crim. 609, 21 S. W. 925.

Vermont. — State *v.* Bradley, 67 Vt. 465, 32 Atl. 238.

Wyoming. — Keffer *v.* State, 12 Wyo. 49, 73 Pac. 556.

Evidence is admissible on the part of the commonwealth, on a trial for murder, of an adulterous intercourse between the wife of the deceased and the prisoner, continuing down to or near the time of the homicide, as tending to show a motive for the act, though independent acts of adultery, disconnected from other evidence in the case, could not have been shown. Com. *v.* Ferrigan, 44 Pa. St. 386.

On a trial for murder, evidence of the prisoner's illicit intercourse with the deceased is admissible, if such criminal conduct becomes in any way a link in the chain of circumstances which connects him with the murder. Turner *v.* Com., 86 Pa. St. 54, 27 Am. Rep. 683.

In Doolittle *v.* State, 93 Ind. 272, a prosecution for assault and battery

c. *Intent, Guilty Knowledge, Etc.* — Where the intent of the defendant in a criminal prosecution is not material, evidence of other offenses is not admissible.[57]

But where intent is a material ingredient of the offense charged, evidence tending to show that fact is admissible, even though it involve proof of other similar offenses by the defendant,[58] as for ex-

with intent to commit murder upon Louisa Doolittle by her husband, the evidence showed that he overtook his wife on the street at eight o'clock in the evening, as she was on her way to her mother's house; that he then, as he had on several previous occasions, urged her to live with him, which she declined to do on account of his failure to support her; that he became angry, indulged in threats and struck her on the head with a blunt instrument, making a severe wound and rendering her unconscious until the following day. She was permitted to testify as to their domestic relations and difficulties from the time of their marriage in July, 1881, up to the time of the assault, November 11, 1882. That he had married her under an assumed name, his failure to support her, her leaving him on that account, that he was not engaged in business in June, 1882, and to conversations between them.

57. Chipman *v.* People, 24 Colo. 520, 52 Pac. 677; People *v.* O'Brien, 96 Cal. 171, 31 Pac. 45, where the court said: "While it is true that in certain cases, like forgery and embezzlement, it is permissible to introduce evidence concerning other acts of the same nature, for the purpose of establishing a guilty intention, no such rule applies in cases of this kind, where the very ground upon which the prosecution relies for a conviction is, that a performance of the acts mentioned in the statute constitutes a crime, regardless of any fraudulent intention."

Defendant is charged with incest. Convicted and now appeals. The court says: "The indictment contains a single charge of incest, which was proved to have been committed on the first of December, 1856; and having thus proved the charge as laid, the State propounds the inquiry whether defendant had sexual intercourse with the witness at any subsequent time. We perceive no reason why this question should have been deemed legitimate. The crime perpetrated on the day named was fully proved by the evidence, was an entire transaction, and could not, therefore, be held as connected with any subsequent sexual intercourse, involving another distinct offense. Nor is the present a case in which actual proof of guilty knowledge is at all incumbent on the prosecution." Judgment *reversed.* Lovell *v.* State, 12 Ind. 18.

58. *California.* — People *v.* Wilson, 117 Cal. 688, 49 Pac. 1054.

Florida. — Wallace *v.* State, 41 Fla. 547, 26 So. 713; Roberson *v.* State, 40 Fla. 509, 24 So. 474.

Indiana. — Thomas *v.* State, 103 Ind. 419, 2 N. E. 808.

Maryland. — Archer *v.* State, 45 Md. 33.

Missouri. — State *v.* Myers, 82 Mo. 558, 53 Am. Rep. 389.

Texas. — Barker *v.* State (Tex. Crim.), 26 S. W. 400.

"In all cases where the guilt of the party depends upon the intent, purpose, or design with which the act is done, or upon his guilty knowledge thereof, I understand it to be a general rule, that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design, purpose or knowledge." Bottomley *v.* United States, 1 Story (U. S.) 135.

On the Trial of a Defendant for the Malicious Burning of a building on a certain day, it is competent for the government to show, on the question of the intent with which the defendant burned the building on that day, that the defendant set fire to the same building three days before. Com. *v.* Bradford, 126 Mass. 42.

ample, in cases of prosecutions for embezzlement,[59] false pre-

Wood *v.* United States, 16 Pet. (U. S.) 342, was an information filed by the United States claiming a forfeiture of twenty-two pieces of cloth valued at $2500.00. The government claimed the goods were not invoiced according to their actual cost at the port of exportation, with design to evade the duties thereon. For the purpose of showing the fraudulent intent of the libellee, the government introduced evidence of other fraudulent invoices, etc. Story, J., in delivering the opinion said: "The question was one of fraudulent intent or not, and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive, in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but taken in connection with others of a like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty." *Held,* competent.

On a Trial of Burglary, it is no valid objection to evidence tending to characterize the burglarious intent of the acts charged, that the circumstances offered to be proved, would, upon the trial of another and distinct offense, tend to convict the prisoner of such latter charge; but the intent with which the prisoner entered may be determined by proof of circumstances tending to show felony committed in an adjoining store. Osborne *v.* People, 2 Park. Crim. (N. Y.) 583.

59. *United States.* — United States *v.* Russell, 19 Fed. 591.

Alabama. — Lang *v.* State, 97 Ala. 41, 12 So. 183.

California. — People *v.* Van Ewan, 111 Cal. 144, 43 Pac. 520; People *v.* Ward, 134 Cal. 301, 66 Pac. 372; People *v.* Neyce, 86 Cal. 393, 24 Pac. 1091; People *v.* Gray, 66 Cal. 271, 5 Pac. 240; People *v.* Cobler, 108 Cal. 538, 41 Pac. 401.

Minnesota. — State *v.* Holmes, 65 Minn. 230, 68 N. W. 11.

Ohio. — Brown *v.* State, 18 Ohio St. 496.

In Coin *v.* Tuckerman, 10 Gray (Mass.) 173, the court referring to evidence which was admitted respecting acts of alleged embezzlement of property belonging to the Eastern Railroad Company, other and distinct from those set forth and charged in the indictment, said: "To form a correct opinion upon the question whether this evidence was admissible, it is necessary to take notice, in the first place, that it was confined to a special and designated class of facts, having, as it was alleged, and as it was understood by the court, a peculiar and intimate, if not also an inseparable, connection with, and tending to explain and characterize, the material act in issue which was charged against the defendant; and secondly, that it was allowed to be laid before the jury for the sole purpose of showing that the money alleged to have been embezzled was taken and appropriated by him with a fraudulent intent. . . . It had already appeared in the progress of the trial, from the testimony of Hooper, that the defendant, in giving an account of his dealing with the funds of the corporation, produced and delivered to him a detailed statement in writing of the various sums of money which he had, after receiving them in his official capacity, wrongfully abstracted from the treasury, and for which he was then a defaulter. This paper had been produced in evidence. One of the items found upon it was the same sum of $5000, the embezzlement of which was set forth and charged against the defendant in the indictment. This item and all the items contained in the paper were explained by him to Hooper to be a statement of the different amounts of the property of the corporation

tenses,[60] forgery,[61] and also in prosecutions where the offence

which he had appropriated to his own use. All these various circumstances appeared to the court below to have a tendency to prove that the misappropriation of this sum of $5000 was one of a series of connected transactions, and that the whole series would tend to show the intent of the defendant in doing the particular act which is made the subject of accusation against him in the indictment. There may be a difference of opinion as to the effect of this evidence, of the inferences to be drawn from it, and of its sufficiency to prove the occurrence of a series of connected transactions, and the guilty intent of the defendant in them all, which it was the object of the government to establish by its introduction. But it is enough that it had a tendency to show these important facts."

60. *California.* — People *v.* Wasservogle, 77 Cal. 173, 19 Pac. 270.

Indiana. — Strong *v.* State, 86 Ind. 208, 44 Am. Rep. 292.

Missouri. — State *v.* Sarony, 95 Mo. 349, 8 S. W. 407; State *v.* Jackson, 112 Mo. 585, 20 S. W. 674; State *v.* Turley, 142 Mo. 403, 44 S. W. 267.

Michigan. — People *v.* Summers, 115 Mich. 537, 73 N. W. 818.

Massachusetts. — Com. *v.* Coe, 115 Mass. 481; Com. *v.* Jeffries, 7 Allen 548, 83 Am. Dec. 712; Com. *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596.

Ohio. — Bainbridge *v.* State, 30 Ohio St. 264; Tarbox *v.* State, 38 Ohio St. 581.

Rhode Island. — State *v.* Letourneau, 24 R. I. 3, 51 Atl. 1048.

Tennessee. — Rafferty *v.* State, 91 Tenn. 655, 16 S. W. 728.

Compare, State *v.* Bokien, 14 Wash. 403, 44 Pac. 889. And see article "False Pretenses," Vol. V.

In a trial under an indictment for obtaining money by false pretenses, where the transactions were of a complicated nature, it was competent for the defendant to show the course of dealing between the parties, both before and after the alleged crime; as reflecting upon the intent of the defendant, or throwing light upon the question whether the party was in fact deceived, or tending to show whether the creditor was using the criminal law to enforce the collection of a debt. State *v.* Rivers, 58 Iowa 102, 12 N. W. 117.

In the trial of an indictment for obtaining money under false pretenses, it is competent, in order to show scienter and intent, to prove other similar transactions by the defendant. State *v.* Walton, 114 N. C. 783, 18 S. E. 945.

61. People *v.* Sanders, 114 Cal. 216, 46 Pac. 153; Burlingim *v.* State, 61 Neb. 276, 85 N. W. 76; Smith *v.* State, 29 Fla. 408, 10 So. 894; Howard *v.* State, 37 Tex. Crim. 494, 36 S. W. 475; Com. *v.* White, 145 Mass. 392, 14 N. E. 611. See article "Forgery," Vol. V.

Upon the trial of a defendant indicted for forgery, there is no error in the admission in evidence, with the forged instrument alleged to have been uttered, of other forged writings uttered by the defendant in connection with the perpetration of the crime charged. Harding *v.* The State, 54 Ind. 359.

At the trial of an indictment for forging and uttering certain receipted bills of parcels, evidence is admissible, on the question of defendant's knowledge that the bills were forged, that he fabricated certain other unreceipted bills of a like character, and uttered them to the same person to whom he uttered the receipted bills by a continuous series of transactions, extending some months later than the latest forgery mentioned in the indictment. Com. *v.* White, 145 Mass 392, 14 N. E. 611.

There having been evidence on the trial, that the note in suit had been given for the purchase price of a certain chattel, and that the defendant had, immediately previous to the forgery charged, forged but destroyed a promissory note on a third person for the same purchase price, the defendant asked the court to instruct the jury to disregard the evidence as to the previous forgery,

charged against the defendant is counterfeiting,[62] receiving stolen goods,[63] murder,[64] etc.

but the court, in giving the same, modified it by adding that such previous forgery, "if proved beyond a reasonable doubt, may be taken into consideration for the purpose of showing guilty intent" in the forgery charged in the indictment. *Held*, that the modification was proper. Robinson *v.* State, 66 Ind. 331.

Indictment for Forgery. — The court permitted proof, to show knowledge on the part of the defendant of the falsity of the bill described in the indictment, that on the day said defendant passed the bill and on the day following he passed to other persons counterfeit bills on the same and other banks, for the passing of which other indictments had been found, some of which were pending, and on one of which he had been tried and acquitted. The court says: "The law is well settled that the uttering of other counterfeit notes of the same kind with that charged in an indictment, and about the time that it was passed, may be given in evidence, on the trial of the indictment, to prove guilty knowledge." McCartney *v.* State, 3 Ind. 353.

62. Com. *v.* Price, 10 Gray (Mass.) 472; Com. *v.* Hall, 4 Allen (Mass.) 505; Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767; Com. *v.* Edgerly, 10 Allen (Mass.) 184; People *v.* Molins, 10 N. Y. Supp. 130; Langford *v.* State, 33 Fla. 233, 14 So. 815; People *v.* Clarkson, 56 Mich. 164, 22 N. W. 258. And see article "Counterfeiting," Vol. III.

Indictment for passing counterfeit money. A witness was permitted to testify that the wife of the defendant had sold him a counterfeit twenty dollar bill belonging to defendant, in his absence, but that the defendant was subsequently advised of the transaction and sanctioned it. This was not the bill for which he was indicted; but the transaction was about the time of the offense alleged. *Held*, that the testimony was admissible as tending to show knowledge on the part of the defendant that the bill passed by him was counterfeit. Bersch *v.* State, 13 Ind. 434, 74 Am. Dec. 263.

On the trial of a person accused of uttering and publishing a forged deed for the conveyance of real estate, other deeds including deeds of trust, made to a trustee to secure the payment of promissory notes or bonds, found in his possession, or proved to have been uttered and published by him, are competent testimony to show the guilty knowledge of the accused. Lindsey *v.* State, 38 Ohio St. 507.

On the trial of a person charged with passing counterfeit bank notes, it is competent to prove he has passed other counterfeit paper, without producing it, if it be out of the jurisdiction of the court, to show guilty knowledge. Reed *v.* State, 15 Ohio 217.

But proof tending to connect another party with the defendant as a *particeps criminis*, will not justify the introduction in evidence of counterfeit bills found upon such other party fifty days after the sale charged, though such bills be of the same manufacture with those proved to have been sold by the defendant; there being no evidence of any intercourse or association between the defendant and such other party during the intervening time. Griffin *v.* State, 14 Ohio St. 55.

63. Koerner *v.* State, 98 Ind. 7; Copperman *v.* People, 56 N. Y. 591; State *v.* Feuerhaken, 96 Iowa 299, 65 N. W. 299; State *v.* Habib, 18 R. I. 558, 30 Atl. 462; State *v.* Ward, 49 Conn. 429; Goldsberry *v.* State, 66 Neb. 312, 92 N. W. 906; Morgan *v.* State, 31 Tex. Crim. 1, 18 S. W. 647. And see article, "Receiving Stolen Property," Vol. X.

64. Com. *v.* Birriolo, 197 Pa. St. 371, 47 Atl. 355; State *v.* Nugent, 71 Mo. 136; Medina *v.* State (Tex. Crim.), 49 S. W. 380. And see article "Homicide," Vol. VI.

The defendant was charged with the murder of Ira Wall. On the trial, evidence was admitted over the defendant's objection, to the effect that at the time of the homicide, Ira Wall and his mother were together, and immediately after shoot-

d. *As Part of Res Gestae.* — So, too, in a criminal prosecution, the commission of a crime by the defendant other than that for which he is on trial, may be shown where the two crimes are so connected that evidence of one cannot be given without tending to prove the other;[65] and this is the rule regardless of whether such other crime is of similar or the same character or different.[66]

ing and killing Ira Wall with one barrel of his shotgun, the defendant fired with the other barrel upon Mrs. Wall and wounded her. The court says: "It is true that in trying a person charged with one offense, it is ordinarily inadmissible to offer proof of another and distinct offense, but this is only because the proof of a distinct offense has ordinarily no tendency to establish the offense charged. But whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it tends to prejudice the defendant in the minds of the jurors is no ground for its exclusion. It showed the malice which is an essential ingredient of the crime charged, and tended strongly to disprove the claim of self defense. People *v.* Walters, 98 Cal. 138, 32 Pac. 864.

65. *Alabama.* — Franklin *v.* State, 42 Ala. 532.

California. — People *v.* Smith, 106 Cal. 73, 39 Pac. 40; People *v.* Teixeira, 123 Cal. 297, 55 Pac. 988; People *v.* Jones, 123 Cal. 65, 55 Pac. 698.

Colorado. — Piela *v.* People, 6 Colo. 343.

Florida. — Killins *v.* State, 28 Fla. 313, 9 So. 711.

Illinois. — Hickam *v.* People, 137 Ill. 75, 27 N. E. 88; Parkinson *v.* People, 24 N. E. 772.

Indiana. — Starr *v.* State, 160 Ind. 661, 67 N. E. 527.

Louisiana. — State *v.* Porter, 45 La. Ann. 661, 12 So. 832.

Michigan. — People *v.* Saunders, 25 Mich. 119; People *v.* Marble, 38 Mich. 117; People *v.* Foley, 64 Mich. 148, 31 N. W. 94.

Massachusetts. — Com. *v.* Sturtevant, 117 Mass. 122, 19 Am. Rep. 401.

Missouri. — State *v.* Perry, 136 Mo. 126, 37 S. W. 804.

Pennsylvania. — Brown *v.* Com., 76 Pa. St. 319.

South Dakota. — State *v.* Halpin, 16 S. D. 170, 91 N. W. 605.

Texas. — Wilkerson *v.* State, 31 Tex. Crim. 86, 19 S. W. 903; Crews *v.* State, 34 Tex. Crim. 533, 31 S. W. 373; McMahon *v.* State, 16 Tex. App. 357; Hamilton *v.* State, 41 Tex. Crim. 644, 56 S. W. 926; Conley *v.* State, 21 Tex. App. 495, 1 S. W. 454; Robinson *v.* State (Tex. Crim.), 48 S. W. 176.

Utah. — People *v.* Coughlin, 13 Utah 58, 44 Pac. 94.

Virginia. — Heath *v.* Com., 1 Rob. 796.

Washington. — State *v.* Craemer, 12 Wash. 217, 40 Pac. 944.

"**Proof of a Different Crime From the One Charged,** though generally objectionable, is admissible when both offenses are closely linked or connected, especially in the *res gestae.*" State *v.* Vines, 34 La. Ann. 1079.

Receiving Stolen Goods. — In People *v.* McClure, 148 N. Y. 95, 42 N. E. 523, it was held that the admission on the trial of a prosecution for receiving stolen goods, knowing them to have been stolen, all evidence of the receiving of other goods by the defendant did not constitute error, inasmuch as such evidence tended to identify the goods covered by the indictment, and it appeared that the proof in relation thereto warranted the inference by the jury that all the goods were taken from the same place, by the same person, at the same time, and were received by the defendant from the same person, at the same time.

66. *Alabama.* — Seams *v.* State, 84 Ala. 410, 4 So. 521; Oakley *v.* State, 135 Ala. 15, 33 So. 23.

Arkansas. — Doghead Glory *v.* State, 13 Ark. 236.

Iowa. — State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.

Michigan. — People *v.* Ascher, 126 Mich. 637, 86 N. W. 140.

e. *As Part of Plan, Scheme, Etc.* — So, also, the general rule excluding evidence of other crimes does not apply where the crimes are of such nature as to show, or permit the inference of, a system or plan.[67]

Evidence of Previous Unsuccessful Attempts to commit the same crime for which a respondent is on trial, is admissible.[68]

Antecedent Acts Rendering Commission of Crime Easier, safer, more certain, and more effective to accomplish an object, if done with that intention or purpose, are so connected with the crime as to be

Missouri. — State *v.* Taylor, 118 Mo. 153, 24 S. W. 449.

New York. — People *v.* Pallister, 138 N. Y. 601, 33 N. E. 741.

Pennsylvania. — Brown *v.* Com. 76 Pa. St. 319.

Texas. — English *v.* State, 34 Tex. Crim. 190, 30 S. W. 233.

In State *v.* Burton, 27 Wash. 528, 67 Pac. 1097, a prosecution for burglary, evidence tending to show larceny by the defendant was held admissible as part of the *res gestae,* for the purpose of showing an entry effected and the circumstances attending the entry.

In Hayes *v.* State, 36 Tex. Crim. 146, 35 S. W. 983, a prosecution for burglary, it was held proper to permit the introduction of evidence showing that other property was taken at the same time and place, notwithstanding those items of property were not alleged in the indictment.

67. *California.* — People *v.* Bidleman, 104 Cal. 608, 38 Pac. 502; People *v.* Sternberg, 111 Cal. 3, 43 Pac. 198.

Iowa. — State *v.* Lee, 91 Iowa 499, 60 N. W. 119.

Massachusetts. — Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81; Com. *v.* Blood, 141 Mass. 571, 6 N. E. 769.

Missouri. — State *v.* Greenwade, 72 Mo. 298.

In Card *v.* State, 109 Ind. 415, 9 N. E. 912, an indictment for forgery of a promissory note, the court says: "Appellant's counsel next complain of the admission in evidence of thirteen promissory notes, other than the one set out in the indictment, purporting to have been executed by different persons, but all payable apparently to the same John Hall. We are of opinion that the court did not err in the admission of such other notes in evidence, although they were shown to have been forged by appellant. . . . In order to prove purpose on the defendant's part, system is relevant, and in order to prove system, isolated crimes are admissible from which system may be inferred. Conspiracy cases give signal illustration of the rule here stated. The acts of each conspirator emanate from him individually, yet when they are part of a system of conspiracy, they are admissible in evidence against his co-conspirators, although each component act may constitute an independent offense. The reason for the rule in this and similar cases is that when once system is proved, each particular part of the system may be explained by the other parts which go to make up the whole."

When a man is charged with one crime, it is not competent to prove that he has committed others; but a co-conspirator may state the whole plan or purpose of the conspirators to rob several parties, though it does not appear that they executed their plan except as to the one for the murder of whom the defendant is indicted. Ford *v.* State, 34 Ark. 649.

68. In State *v.* Ward, 61 Vt. 153, 17 Atl. 483, an indictment for arson, the buildings burned were situated in the town of Walden, about twenty miles from the village of St. Johnsbury, where the respondent resided. The evidence tended to show that during the afternoon before the fire, respondent hired a team of one Clutier in St. Johnsbury, that said team was seen in the respondent's barn about seven or eight o'clock that same evening, and that respondent returned with it at about four o'clock the following morning; that the

admissible at the trial of an indictment therefor, although themselves criminal.[69]

f. *To Rebut Claim of Accident, Mistake, Etc.* — There is another class of cases in which evidence of other offenses has been held admissible, and that is where the purpose of the introduction of such evidence is to rebut the claim of accident, mistake, etc., asserted by the actor in the transaction in controversy, and show that in fact the doing of the act was by design on his part.[70]

horse appeared tired. The buildings were burned on the morning of January 27, 1886. On the 29th of the December previous, an attempt had been made to burn these buildings. On the evening before this attempt the respondent had hired the same team, and driven with it into the vicinity where the buildings were. The fact of previous attempt was shown.

69. Com. *v.* Robinson, 146 Mass. 571, 16 N. E. 452; Com. *v.* Choate, 105 Mass. 451.

70. *England.* — Rex *v.* Mogg, 4 Car. & P. 420; Rex. *v.* Voke, 1 Russ. & Ry. 531; Rex. *v.* Winkworth, 4 Car. & P. 465; Reg. *v.* Garner, 3 Fos. & F. 681; Reg. *v.* Dossett, 2 Car. & K. 306.

United States. — King *v.* United States, 112 Fed. 988, 50 C. C. A. 647.

California. — People *v.* Craig, 111 Cal. 460, 44 Pac. 186.

Indiana. — Turner *v.* State, 102 Ind. 425, 1 N. E. 869.

Michigan. — People *v.* Seaman, 107 Mich. 348, 65 N. W. 203.

Maine. — State *v.* Plunkett, 64 Me. 534; State *v.* Neagle, 65 Me. 468.

Massachusetts. — Com. *v.* Bradford, 126 Mass. 42.

Nebraska. — Knights *v.* State, 58 Neb. 225, 78 N. W. 508.

New York. — People *v.* Wood, 3 Park. Crim. 681.

Ohio. — Shriedley *v.* State, 23 Ohio St. 130.

Pennsylvania. — Com. *v.* Johnson, 133 Pa. St. 293, 19 Atl. 402; Com. *v.* Birriolo, 197 Pa. St. 371, 47 Atl. 355; Com. *v.* Bell, 166 Pa. St. 405, 31 Atl. 123; Com. *v.* House, 6 Pa. Super. Ct. 92; Com. *v.* Tadricks, 1 Pa. Super. Ct. 555.

Rhode Island. — State *v.* McDonald, 14 R. I. 270.

Texas. — Hall *v.* State, 31 Tex. Crim. 565, 21 S. W. 368.

Wyoming. — Edelhoff *v.* State, 5 Wyo. 19, 36 Pac. 627.

In Knights *v.* State, 58 Neb. 225, defendant was convicted of the crime of arson. It was contended that the court erred in admitting evidence tending to show that on the night the building in question was burned, the defendant set out other fires in adjacent buildings. It was held that the testimony was properly received, not for the purpose of showing the commission of distinct crimes, but to establish a criminal design on the part of the defendant; that the state was not only required to show that the defendant ignited the Unland store, but it was required to go further and satisfy the jury that the act was intentional and not an accident.

In Zoldoske *v.* State, 82 Wis. 580, 52 N. W. 778, defendant was convicted of murder in the first degree. She gave poisoned candy to deceased containing strychnine. *Held,* that the fact that a member of the family in which the defendant lived had died from strychnine poisoning previous to the poisoning in question, might properly be considered by the jury in determining whether the poisoning in question was accidental or not.

A prisoner being on trial for the alleged murder of his wife, by poisoning her with arsenic, the prosecution offered to prove that the prisoner's wife's mother had died by poison administered to her by him, a few days before the death of his wife; that the arsenic thus administered was of the same kind as that administered to his wife, that the two acts were part of a preconcerted scheme on the prisoner's part to obtain the money of his wife and his wife's mother, and also to rebut the theory that the death of the pris-

3. Matters Pertaining to Things, Conditions, Etc. — A. In General. — And as a general rule the courts have held that evidence of events or occurrences, independent of, and having no direct connection with, the transaction in controversy[71] cannot be received as a basis for the inference that the transaction or event in controversy happened as contended.[72]

oner's wife was the result of accident, or suicide, or of the negligent or ignorant use or administering of arsenic as a medicine. *Held*, that the evidence was clearly admissible. Goersen *v.* Com., 99 Pa. St. 388.

In Reg. *v.* Richardson, 2 F. & F. 343, the prisoner was indicted for embezzlement. In rendering account to his employer, the prisoner made it exceed the sum of his actual expenditures from one to three pounds. For the purpose of showing that the act for which he was indicted was not a mistake, the prosecution introduced evidence of instances both before and after the act in question of similar returns. *Held*, competent.

In Reg. *v.* Francis, 1 Cent. L. Jour. 481, the prisoner obtained money by pretending that a certain ring contained diamonds, when in fact it was composed only of crystals. To sustain the charge of criminal fraud, evidence was given by the crown that on a prior occasion the prisoner obtained money by falsely representing that a chain only coated with gold was made of pure gold. Lord Coleridge, C. J. who delivered the judgment, said: "It seems clear on principal that when the act charged is proved, and the only remaining question is whether, the time he did it, he had guilty knowledge of the quality of his act, or acted under mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake."

71. *United States.* — District of Columbia *v.* Armes, 107 U. S. 519; Plummer *v.* Granite Mt. Min. Co., 55 Fed. 755.

Alabama. — Singleton *v.* Thomas, 73 Ala. 205; Williams *v.* Glover, 66 Ala. 189.

California. — Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380; Cohn *v.* Mulford, 15 Cal. 50; Martinez *v.* Planel, 36 Cal. 578.

Georgia. — Branch *v.* DuBose, 55 Ga. 21.

Illinois. — Smith *v.* Kahill, 17 Ill. 67; Kelly *v.* Dandurand, 28 Ill. App. 25; Burroughs *v.* Comegys, 17 Ill. App. 653.

Indiana. — Ramsey *v.* Rushville & M. G. R. Co., 81 Ind. 394; Moore *v.* Schrader, 14 Ind. App. 69, 42 N. E. 490.

Kentucky. — Claus *v.* Evans, 17 Ky. L. Rep. 1085, 33 S. W. 620.

Massachusetts. — Tyler *v.* Old Colony R. Co., 157 Mass. 336, 32 N. E. 227; Durkee *v.* India Mut. Ins. Co., 159 Mass. 514, 34 N. E. 1133; Hathaway *v.* Tinkham, 148 Mass. 85, 19 N. E. 18.

Mississippi. — Merchants' Wharf B. Assn. *v.* Smith, 3 So. 249.

New York. — Doyle *v.* Levy, 89 Hun 350, 35 N. Y. Supp. 434; Tallman *v.* Kimball, 74 Hun 279, 26 N. Y. Supp. 811; Townsend *v.* Graves, 3 Paige 453.

Pennsylvania. — Haworth *v.* Truby, 138 Pa. St. 222, 20 Atl. 942.

Texas. — Anglin *v.* Barlow (Tex. Civ. App.), 45 S. W. 827.

Vermont. — Pierce *v.* Hoffman, 24 Vt. 525.

Virginia. — Ellis *v.* Harris, 32 Gratt. 684.

Wisconsin. — O'Dell *v.* Rogers, 44 Wis. 136.

72. In Denver & R. G. R. Co. *v.* Glasscott, 4 Colo. 270, where the defendant claimed that the plaintiff owed it for money collected by him as passenger conductor but not turned in nor accounted for, it was held that the defendant could not prove its claim by a comparison of daily returns extending over a period of several months by the plaintiff and a fellow conductor running on alternate days over the same route. The court said: "The possibility that there might be an exact equality

in the receipts of the two conductors is so remote, and subject to so many disturbing influences, that we cannot believe that it can justly be considered as the foundation of legal liability. One conductor may be more attentive to the patrons of the road, and therefore more popular than another. The current of travel may be very unequal on two successive days, and this may continue for weeks. Excursion trains, crowded with passengers, may have been run on certain days, which might materially increase the receipts on such days. On one day every passenger getting on board at Denver might be provided with a ticket, and the receipts at this point in consequence be nothing. The next day one or a dozen passengers may have boarded the train and have forgotten to buy tickets. The same thing is liable all along the line, so that even if the number of passengers carried by each conductor during the period of eleven months, or any shorter period, should be the same, it is by no means, in our judgment, a fair inference that the receipts will be the same, or approximately so."

In Wilmington Dental Mfg. Co. *v.* Adams Express Co., 8 Houst. (Del.) 329, 32 Atl. 250, an action to recover the value of goods alleged to have been lost by the defendant, it was held that if proof of delivery of the goods to the defendant was in doubt, the fact that an agent of plaintiff, who had been accustomed to take goods to the defendant, had been convicted of larceny of other goods from plaintiff, might be considered by the jury as a possible explanation of the loss; but that if there was no doubt of the delivery, it could have no weight.

In Burroughs *v.* Comegys, 17 Ill. App. 653, where the issue was whether or not the defendant had fraudulently placed sand in certain oats which he had sold the plaintiff, it was held that evidence that another person to whom the defendant had sold oats found sand therein, was not admissible; that the two transactions were separate and distinct, and that proof of the character of one was no proof of the character of the other.

In Hill Mfg. Co. *v.* Providence & N. Y. S. S. Co., 125 Mass. 292, where the question was as to whether certain piers in New York had been properly constructed, it was held that evidence that piers in Boston were similarly constructed, was rightly excluded as tending to raise collateral issues upon the question how far the circumstances of those cases corresponded to those of the case on trial.

In Jamieson *v.* Kings County El. R. Co., 147 N. Y. 322, 41 N. E. 693, an action against an elevated street railroad for injury to the rental value of abutting property, it was held that, for the purpose of proving the evil effect of the road in diminishing values, it was improper to permit proof of what particular premises in the vicinity rented for before the road was built and what thereafter.

In Ziehn *v.* United Light & Elec. P. Co. (Md.), 64 Atl. 61, an action to recover for injuries sustained as the result of the alleged negligence of the defendant in the construction and maintenance of its electric wires, whereby the plaintiff came in contact therewith to his injury, the negligence consisting of improper insulation, it was held proper to refuse to permit the plaintiff to introduce evidence as to the insulation of other wires than those in use by the defendant company.

Where the question is whether or not certain goods shipped by steamer from one city to another had been wet with rain while in the custody of the carrier, evidence that other lots of the same kind of goods shipped between the same cities by other steamers about the same time were wetted is not admissible. Darling *v.* Stanwood, 14 Allen (Mass.) 504.

The Amount of Hay Raised on a farm in a given year cannot be proved by showing the average acreage of grass and its yield in other years. Patrick *v.* Howard, 47 Mich. 40, 10 N. W. 71.

Upon an Issue as To Whether Goods Lost in weight from natural causes incident to shipping, or through the fault of the carrier, evidence that about the same time other persons had like goods stolen from

B. Tendency, Capacity, Quality, Etc., of Material Objects. a. *In General.* — An exception to this rule of exclusion, however, is to be found in a line of cases involving the tendency, capacity or quality of a material object, and in these cases it is very generally regarded as proper to prove the tendency, capacity or quality in question by showing the apparent operation of the object under similar conditions, and sometimes by showing the operation of other similar things under similar conditions.[73]

the place of shipment by the carrier's employes, is not admissible to show that the carriers' agents stole the goods in question. Central R. Co. *v.* Brunson, 63 Ga. 504.

Flowage Cases. — In Ellis *v.* Harris, 32 Gratt. (Va.) 684, an action to recover damages for flowing the plaintiff's land, it was held that evidence of the effect of another dam on other lands in another county was clearly inadmissible. See also Lynn *v.* Thompson, 17 S. C. 129.

In Alabama Lumb. Co. *v.* Keel, 125 Ala. 603, 28 So. 204, an action by a riparian land owner to recover damages from an overflow, alleged to have been caused by the defendants floating too great a quantity of timber down the stream, resulting in a jam at a crossboom just below plaintiff's property, it was held, that evidence as to the washing of other lands belonging to different people and located on the same stream some above the jam and others below the boom, but none having the same relation to either as the land of the plaintiff, was irrelevant; that "this line of inquiry would have opened upon an unlimited number of issues, collateral to the issues in this case, and the solution of which could have shed only a very dim and uncertain and confusing ray of light on the question before the jury."

In an action for Injuries to Land by Changing a Canal, it is incompetent to show the effect of the change on the land of an adjoining landowner. Bullock *v.* Lake Drummond Canal & Water Co., 132 N. C. 179, 43 S. E. 1004.

Transactions Subsequent To Suit Brought. — In Stein *v.* Burden, 24 Ala. 130, an action by a mill owner to recover damages for diverting water from his mill, the plaintiff was permitted to show that at divers times since the commencement of his action, his mill was compelled to shut down for want of water, due in part to the diversion of water by defendant. It was held, that while, of course, such evidence could not be the basis for the recovery of damages, yet it was admissible for the purpose of showing the effect at those particular times of the diversion of water, with the view of affording the jury information of the consequences of the diversion, under similar circumstances before the suit. See also Polly *v.* McCall, 37 Ala. 20.

In an action by appellee against appellant for damages to appellee's property caused by the overflow of the same by reason of the insufficiency of a sewer maintained by appellant, it was held, that, while damages caused by overflow other than the one complained of in the complaint are not recoverable in this action, yet evidence of other overflows before the suit was commenced, but after the defendant began the maintenance of the sewer, was competent as affording the jury information of the consequences of the overflow or backing of the water under similar circumstances. Central of Ga. R. Co. *v.* Keyton (Ala.), 41 So. 918.

73. In an action to recover damages for injuries to a brick wall caused by the dripping from the eaves of an adjoining house, evidence of the bad condition of other brick walls from dampness in the immediate vicinity, against which there were no drippings from the eaves of any house, is admissible for the defendant. Lotz *v.* Scott, 103 Ind. 155, 2 N. E. 560.

Where the question is the speed at which a horse was being driven at a

As, for example, where a thing is claimed to be a nuisance and injuriously affecting property or persons, evidence of its injurious effects upon other property and persons similarly circumstanced has been held admissible.[74]

The qualities of an object in dispute may be shown by a comparison thereof with the known qualities of some object not in dispute; and evidence directed to such a comparison is not to be rejected as irrelevant or as tending to raise collateral issues.[75]

particular time and occasion, evidence as to the speed at which he had been driven on other occasions is admissible as tending to show his capacity for speed, and as bearing upon the reasonableness and probability of the evidence as to his actual speed upon the occasion in question. Whitney *v.* Leominster, 136 Mass. 25.

In Sixth Avenue R. Co. *v.* Metropolitan El. R. Co., 56 Hun 182, 9 N. Y. Supp. 207, an action to recover for injuries to property by the erection and maintenance of an elevated railroad in the street, it was held error to permit proof of the manner and extent of injury sustained by other property on the same street, but in no manner connected with the property in controversy. The court said that what this evidence tended to prove was the injuries and losses sustained by other persons, and those injuries and losses may have been precisely what they were stated to be without in any way advancing or affecting the right to compensation claimed in the controversy; that this evidence introduced in the controversy, distinct and independent subjects, in no way, either directly or indirectly, relating to the issues in the action.

74. Cooper *v.* Randall, 59 Ill. 320; Hoadley *v.* Seward & S. Co., 71 Conn. 640, 42 Atl. 997; Hughes *v.* General Elec. L. & P. Co., 107 Ky. 485, 54 S. W. 723.

75. Isbell *v.* New York & N. H. R. Co., 25 Conn. 556. In this case, "a witness having testified as to the condition at a former time of a certain fence, its condition at such former time being the subject of controversy, was asked on cross-examination as to the present condition of a certain neighboring fence, for the purpose of instituting a comparison between the present condition of the one and the former condition of the other. *Held,* that such inquiry was within the foregoing rule and proper." The court said: "Testimony is not irrelevant because it is comparative. This may be and often is the very best and only evidence the case admits of; and if otherwise, yet, it may be entirely appropriate and satisfactory. The judge will see that the inquiry is properly restricted, and put in the proper stage of the trial, and then there is no danger of its leading to any abuse, or raising unnecessary and collateral issues."

Upon an Issue as to the Germinating Quality of Certain Seed, sold by plaintiff to the defendant, evidence that other seed of the same kind, had by the plaintiff at the same time, and kept in the same manner as that sold to defendant, would not germinate, is competent and relevant. Buchanan *v.* Collins, 42 Ala. 419.

Upon an Issue as to the Worthlessness of a Chemical Compound to be used in dentistry to allay pain, evidence that various dental operations in which the compound had been used, were practically painless, is admissible. Reeve *v.* Dennett, 145 Mass. 23, 11 N. E. 938. The court said: "The objections made to it are, that it introduces the trial of collateral issues, and that the fact may admit of being explained by other causes than the conclusion sought to be established. In some cases, at least, it would seem that the painful fillings were performed by other dentists, so that it might be argued that the evidence was only a testimony to the skillfulness of the defendant's hand. But no special objection of this sort was taken or argued, and, so far as the introduction of collateral issues goes, that

b. *Machinery.* — Many cases involve the question of the tendency, capacity or quality of machinery, in respect of its operation, and it is accordingly held proper to receive evidence of the manner of operation of the machinery under similar circumstances.[76]

And evidence of the operation of other similar machinery under similar conditions has also been received.[77]

objection is a purely practical one, a concession to the shortness of life. When the fact sought to be proved is very unlikely to have any other explanation than the fact in issue, and may be proved or disproved without unreasonably protracting the trial, there is no objection to going into it. If a dozen patients should testify that, when the defendant used his naboli, he filled their teeth without hurting them, and that he hurt them a good deal when he did not use it, supposing the testimony to be believed, and not to be explained by fancy and a general disposition on the part of the witnesses to think well of new nostrums, it would go far towards proving that naboli had some tendency to deaden pain. Indeed, the same thing is true in a less degree, if the painful operations were by another hand. Filling teeth, however skilfully done, is generally unpleasant. If it is found to be wholly painless when a certain compound is used, as the witnesses testified, probably the compound is at least in part the cause."

76. Upon an Issue as To Whether a Mill Threw Chaff, dirt and other impurities upon particular premises, evidence that it threw such impurities upon other premises in the same vicinity is admissible. Cooper *v.* Randall, 59 Ill. 317. The court said: "A majority of the court are of the opinion that this evidence was admissible, for the reason that it tended to show the extent and character of the injury sustained by appellant; that while it was not direct as to the amount of impurities actually deposited, it tended to show that the mill was capable of inflicting the injury complained of by appellant. If the deposit was general in the immediate neighborhood, and large quantities were deposited in other buildings similarly situated, it would be a just inference that the same was true of appellant's house. It would, if admitted, have tended to strengthen and lend weight to the other evidence appellant had already introduced. When it is considered that the issue in the case was, whether smut, dirt, etc., was deposited on appellant's house, and this was the question controlling the case, the pertinency of this evidence becomes obvious. Had it related to a collateral question, or had it been but incidentally involved, it might have been otherwise. The evidence was, therefore, improperly rejected."

Where the issue is whether a certain machine sold under a warranty would perform in the manner and place as specified in the warranty, evidence as to the manner in which it performed at another place tends to prove the capacity of the machine to perform at the place specified in the warranty. Baber *v.* Rickart, 52 Ind. 594.

77. Blackman *v.* Collier, 65 Ala. 312; National B. & L. Co. *v.* Dunn, 106 Ind. 110, 6 N. E. 131; Davis *v.* Sweeney, 80 Iowa 391, 45 N. W. 1040; Shute *v.* Exeter Mfg. Co., 69 N. H. 210, 40 Atl. 391; Carpenter *v.* Cornith, 58 Vt. 214, 2 Atl. 170.

In Avery *v.* Burrall, 118 Mich. 672, 77 N. W. 272, plaintiff guaranteed the heating capacity of certain boilers sold by him to defendant when operated with soft coal. In an action for the purchase price, defendant claimed that the boilers required hard coal to be used, and sought to recoup her damages. Plaintiff contended that the failure of the boilers to give satisfaction was due entirely to mismanagement on the part of defendant, and introduced, as bearing upon this issue, the testimony of witnesses who were successfully operating the same kind of boilers with soft coal. The trial court admitted this testimony only for the purpose of showing the kind and character of fuel neces-

Upon an Issue as to the Safety of Any Machinery or work of man's construction intended for practical use, the manner in which it has served that purpose when put to that use, is a matter material to the issue, and ordinary experience of that practical use, and the effect of that use, bear directly upon such issue. It no more presents a collateral issue than any other evidence that calls for a reply bearing on the main issue.[78]

sary to be used, and the kind and character of management necessary. *Held,* that it was competent for the purpose offered.

Where the issue is whether a mechanical attachment worked successfully, evidence is admissible that another machine, with substantially the same mechanical arrangements as the one in question, differing only in details to some extent, had worked successfully when put to use on another machine. Brierly *v.* Mills, 128 Mass. 291.

Upon an Issue as To Whether a Filter Performed the Work which it was guaranteed to perform, evidence that other filters of the same make used at other places for the purpose of filtering the same kind of water did their work to the satisfaction of the parties and without objection from them, is not admissible. Jewell Filter Co. *v.* Kirk, 200 Ill. 382, 65 N. E. 698. The court said: "What was expected of the filters, under the guaranty in those cases, does not appear. Was the water furnished for use in boilers? That other parties were satisfied, or their failure to make objection, does not tend to prove that the water furnished to them was like that which appellant guaranteed to furnish appellees. The offer was not to show that another filter, constructed exactly like these, for the purpose of filtering water under identical conditions obtaining in appellee's establishment, so purified the water that it was made suitable for boilers. That all filters are not constructed alike is shown even by the evidence in this case. There are different kinds of water, requiring different filtration. It also appears that the river water at the factory of appellees 'was the worst of any place in the city,' being near the lake and near the outlet of two large sewers. The sole question in this case being, as before stated, whether the filters constructed for appellees fulfilled the requirements of the guaranty, we are satisfied the offered testimony was merely collateral, and had not such a bearing upon the issue as to justify its admission."

In an action brought by plaintiff against defendant for the price of a stone, the defendant claimed that the stone was worthless and introduced evidence of third parties to show that a stone of the same pattern and trademark purchased by them from the plaintiff was entirely worthless. *Held,* such testimony was incompetent and should not have been admitted. Lauder *v.* Sheehan, 32 Mont. 25, 79 Pac. 406.

78. Bloomington *v.* Legg, 151 Ill. 9, 37 N. E. 696; Chicago *v.* Powers, 42 Ill. 170; Fort Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743; City of Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933; District of Columbia *v.* Armes, 107 U. S. 519; Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55.

In Georgia Cotton Oil Co. *v.* Jackson, 112 Ga. 620, 37 S. E. 873, where the issue was whether or not a machine by which the plaintiff had been injured was at the time out of order and operating in a dangerous manner, it was held, that evidence tending to show that shortly thereafter, and while in substantially the same condition, the machine operated in a similar manner resulting in other persons being injured, was admissible.

The proposition is well established that it is competent to prove as to a structure not apparently dangerous and which has been in use a considerable time, that no accident has occurred from its use or maintenance prior to the time of an accident,

Upon an issue as to the tendency of gases to injuriously affect property or persons, evidence that property or persons have been similarly affected has often been received.[79]

c. *Drugs, Poisons, Etc.* — The tendency of drugs, poisons, etc., in respect of their effect upon animals or human beings, may be established by evidence of their effect upon other animals or human beings similarly situated.[80]

resulting in an injury to a person and attributable to it, although such person was at the time a passenger of the party sought to be charged with liability for the injury. Dougan *v.* Transportation Co., 56 N. Y. 1; Cleveland *v.* Steamboat Co., 68 N. Y. 306; Kelly *v.* New York & S. B. R. Co., 109 N. Y. 44, 15 N. E. 879; Ryan *v.* Manhattan R. Co., 121 N. Y. 126, 23 N. E. 1131.

In Wilder *v.* Metropolitan St. R. Co., 10 App. Div. 364, 41 N. Y. Supp. 931, where a passenger had been thrown from her seat on to the floor of the car when it was rounding a curve, and it appeared that at the time of the accident the car was running at its usual speed and in its usual manner, it was held competent to inquire whether similar accidents had occurred at the same place. It was argued that it was incompetent to prove what had occurred on other occasions because the question was whether or not, at the time of the accident, the car was being negligently operated upon the curve. But the court said: "If the conditions to which the accident could be attributable were those produced by the manner in which the road was operated, and in that want of uniformity, the results arising previously to a stated time would be likely to be deemed incompetent, as the cause for them in the operation of the road may not have been such as those to which that in question might be attributable. But in the present case, the curve in the railroad track was a structural condition properly existing for the purposes of the use given by the operation of the road in the running of the cars by means applied to propel them; and there was evidence tending to prove that at the time in question the car was run in the usual manner and with no greater speed than the cars had uniformly been run upon this curve before then."

79. Ottawa G. L. & C. Co. *v.* Graham, 35 Ill. 346; Edit *v.* Cutter, 127 Mass. 522; Hunt *v.* Lowell Gas Light Co., 1 Allen (Mass.) 343; Koplan *v.* Boston Gas Light Co., 177 Mass. 15, 58 N. E. 183.

In Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, an action to recover for the destruction of shade trees alleged to have been caused by the negligent escape of gas from a main in the adjoining street, it was held that evidence tending to show that other trees in the immediate vicinity upon the same street, although beyond the plaintiff's premises, were similarly and simultaneously affected, was competent upon the issue of whether escaping gas would account for the injury to the plaintiff's trees.

In Bateman *v.* Rutland, 70 Vt. 500, 41 Atl. 500, an action against a city for negligently constructing its sewer so that the gas escaped therefrom into the plaintiff's house, making his family and himself sick, it was held that the defendant was not entitled to show that gas had not been detected in neighboring houses connected with the same sewer, either by odor or by any injurious effect upon the health of the occupants. The court said that the fact that the people in other houses were not injuriously affected in the manner those in the plaintiff's house were, was clearly collateral and would raise the issues whether the persons were affected to any extent, and if so, whether in the same manner; whether the persons in the other houses had immunity from such disease, and similar issues.

80. Epps *v.* State, 102 Ind. 539, 1 N. E. 491; Shea *v.* Glendale, E. F.

d. *Tendency of Object to Frighten Animals.* — Where the question is as to the tendency of an object to frighten animals, evidence that other animals have been frightened by it has frequently been admitted.[81]

Co., 162 Mass. 463, 38 N. E. 1123; State *v.* Isaacson, 8 S. D. 69, 65 N. W. 430; *Compare,* Willett *v.* St. Albans, 69 Vt. 330, 38 Atl. 72.

81. *England.* — Brown *v.* Eastern & M. R. Co., 22 Q. B. Div. 391.

Connecticut. — Knight *v.* Goodyear Mfg. Co., 38 Conn. 438, 9 Am. Rep. 406; Tomlinson *v.* Derby, 43 Conn. 562.

Kansas. — Topeka Water Co. *v.* Whiting, 58 Kan. 639, 50 Pac. 877.

Minnesota. — Nye *v.* Dibley, 88 Minn. 465, 93 N. W. 524.

New Hampshire. — Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55.

New York. — Champlin *v.* Penn Yan, 34 Hun 33.

Pennsylvania. — Potter *v.* Natural Gas Co., 183 Pa. St. 575, 39 Atl. 7.

Rhode Island. — Stone *v.* Pendleton 21 R. I. 332, 43 Atl. 643. *Compare,* Bloor *v.* Delafield, 69 Wis. 273.

In Hill *v.* Portland & R. R. Co., 55 Me. 438, 92 Am. Dec. 601, an action for personal injuries caused by being thrown from a carriage, in consequence of the horse becoming frightened at the sound of the whistle on the engine at a railroad crossing, it was held competent for the plaintiff to show that the sound of the whistle produced a similar effect upon other horses at the same time and place; that this was pertinent to the issue and bore directly on the nature, extent and actual effect of the noise made by defendant's engine.

In Crocker *v.* McGregor, 76 Me. 282, 49 Am. Rep. 611, where the personal injury had been caused by the fright of the horse by steam escaping from defendant's mill situated along side a public highway, it was held that evidence that other horses, ordinarily safe, when driven by it on other occasions a short time before and after, the construction and size of the mill being the same as at the time of the injury in controversy, were frightened by it, was admissible. The court said: "We think the competency of the evidence rests upon the same principle as evidence, in actions against railroad corporations for damage by fire alleged to have been set by coals or sparks from a passing locomotive that the same locomotive, or others similarly constructed and used, have emitted sparks and coals, and set fire at other places and on other occasions. It tends to show the capacity of the inanimate thing to do the mischief complained of."

In House *v.* Metcalf, 27 Conn. 631, where the plaintiff had been injured by being thrown from a buggy while driving past the plaintiff's mill, his horse having become frightened by the wheel, and run away, it was held, that evidence of other instances in which horses were frightened in passing the plaintiff's mill was admissible for the purpose of showing that the wheel was such an object as would naturally frighten horses, and, therefore, a nuisance. The court said: "The plaintiff's claim was, that the wheel in motion was an object naturally calculated to frighten horses traveling on the public road, and was, therefore, a public nuisance. And we think he had a right not only to show the facts regarding its size, form, location, exposure to view, and mode of operation, from which the jury might infer what facts it would naturally, necessarily, or probably produce, but also to prove what effects it had produced in fact. A single instance would indeed be of little avail standing alone. A number of instances might afford satisfactory, if not demonstrative, evidence, and the inquiry in every such case is not whether the evidence offered is sufficient to prove the fact claimed, but whether it tends to prove it."

In Elgin *v.* Thompson, 98 Ill. App. 358, where the plaintiff had been injured by the horse which he was driving, being frightened by a steam

Where the question is whether an ordinarily safe and gentle horse would be frightened by an object placed in a street, evidence is admissible to show ordinarily safe and gentle horses have been frightened by it on other occasions.[82]

e. *Tendency of Locomotive Engines to Set Fires.* — Where the question is whether a particular locomotive engine caused a fire along a railroad track, evidence that the engine in question had set other fires about the same time, is admissible.[83]

So, too, it is competent, upon such an issue, to show that the engine caused fires on other occasions, both prior and subsequent to that in controversy.[84]

But evidence of previous fires is not admissible where it appears that in the interval the engine has been put in good order.[85]

roller, it was held, competent to give evidence that other horses had been frightened by the roller as it stood in the street, as tending to show that the roller was dangerous and unsafe.

82. Bemis *v.* Temple, 162 Mass. 342, 38 N. E. 970, the court said: "To ascertain the truth the jury must either use such knowledge as they happen to have on the subject without the aid of testimony, or experts must be called to give their opinions if the subject is one in regard to which experts can be found, or witnesses must be permitted to state particular facts which they have observed, each one of which is an illustration and example of the general fact in dispute. The only objection to testimony of the last kind in such a case is that in testing it collateral issues may be raised. Such an objection in many cases is a sufficient reason for excluding the testimony. Whenever a line of inquiry will give rise to collateral issues of such number or difficulty that they will be likely to confuse and distract the jury, and unreasonably protract the trial, it should not be permitted. But the mere fact that a collateral issue may be raised is not of itself enough to justify the exclusion of evidence which bears upon the issue on trial. Most circumstantial evidence introduces collateral issues, and ordinarily it is a practical question, depending upon its relation to the other facts and circumstances in the case, whether it should be received. It may be remote from the real issue, or closely connected with it, and in many cases its competency depends upon the decision of questions of fact affecting the practical administration of justice in the particular case such that a court of law will refuse to revise the ruling of the presiding judge, but will treat his ruling as a matter of discretion."

83. Cleveland *v.* Grand Trunk R. Co., 42 Vt. 449; Webb. *v.* Rome, W. & O. R. Co., 49 N. Y. 420, 10 Am. Rep. 389; Lake Erie & W. R. Co., *v.* Gould, 18 Ind. App. 275, 47 N. E. 941; Lanning *v.* Chicago, B. & Q. R. Co., 68 Iowa 502, 27 N. W. 478; Patton *v.* St. Louis & S. F. R. Co., 87 Mo. 117, 56 Am Rep. 446; Brown *v.* Benson, 101 Ga. 753, 29 N. E. 215; Baltimore & O. R. Co. *v.* Tripp, 175 Ill. 251, 51 N. E. 833.

84. Jacksonville, T. & K. U. R. Co., *v.* Peninsular L. T. & Mfg. Co., 27 Fla. 1157, 9 So. 661; Ireland *v.* Cincinnati, W. & M. R. Co., 79 Mich. 163, 44 N. W. 426; Henderson *v.* Philadelphia & R. R. Co., 144 Pa. St. 461, 22 Atl. 851.

In an action for damages for burning of plaintiff's house, alleged to have been caused by sparks from defendant's smokestack, evidence that sparks escaping from said smokestack had previously set fire to trees and other property in the vicinity of plaintiff's house was held to be admissible. Carpenter *v.* Laswell, 23 Ky. L. Rep. 686, 63 S. W. 609.

85. Menominee R. S. & D. Co. *v.* Milwaukee & N. R. Co., 91 Wis. 447, 65 N. W. 176.

And sometimes the evidence has been confined to fires in the same vicinity as the fire in controversy.[86]

Other Engines. — So, too, where a fire is shown to have been caused by some passing engine, which cannot be fully identified, evidence of fires by other engines, not only about the same time, but also prior or subsequent to the fire in controversy, has been held admissible.[87]

But where the engine which caused or is alleged to have caused the fire is identified, evidence of other fires by other engines is held to be inadmissible.[88]

f. *Similar Injuries to Other Persons.* — Another class of cases furnishing an exception to the general rule of exclusion is that holding it proper to admit evidence of other injuries prior or subsequent to, or about the same time as, in the injury in question, caused by the same or similar instrumentality or agency as that alleged to have caused the injury in question, not for the purpose of showing inde-

86. Henry *v.* Southern Pac. Co., 50 Cal. 176.

87. Gulf, C. & S. F. R. Co. *v.* Johnson, 54 Fed. 474, 4 C. C. A. 447; Dunning *v.* Maine Cent. R. Co., 91 Me. 87, 39 Atl. 352; Campbell *v.* Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936; New York P. & N. R. Co. *v.* Thomas, 92 Va. 606, 24 S. E. 264.

In an action to recover damages for the destruction of certain buildings and property by fire alleged to have been communicated by a locomotive engine of the defendant, evidence was offered by plaintiff that, at various times during the summer before the fire in question occurred, the defendant's locomotives scattered fire when going past the buildings, without showing that either of those which he claimed communicated the fire in question was among the number, or was similar to them in make, state of repair, or management. In holding this testimony admissible, the court by Mr. Justice Strong, says: The question is, "whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of plaintiff's property, were caused by any of the defendant's locomotives. The question has often been considered in this country and in England; and such evidence has we think, been generally held admissible, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company." (Here follows a long citation of cases). "There are, it is true, some cases that seem to assert the opposite rule. It is, of course, indirect evidence, if it be evidence at all. In this case it was proved that engines run by defendant had crossed the bridge not long before it took fire. The particular engines were not identified; but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us, that, under the circumstances, this probability was strengthened by the fact that some engines of the defendant at other times during the same season, had scattered fire during their passage." Grand Trunk R. R. Co. *v.* Richardson, 91 U. S. 454.

88. Inman *v.* Elberton Air Line R. Co., 90 Ga. 663, 16 S. E. 958; First Nat. Bank *v.* Lake Erie & U. R. Co., 174 Ill. 36, 50 N. E. 1023; Atchison, T. & S. F. R. Co. *v.* Osborn, 58 Kan. 768, 51 Pac. 286; Ireland *v.* Cincinnati, W. & M. R. Co., 79 Mich. 163, 44 N. W. 426; Erie R Co. *v.* Decker, 78 Pa. St. 293; Norfolk, & W. R. Co. *v.* Briggs, 103 Va. 105, 48 S. E. 521.

pendent acts of negligence,[89] but as tending to show that the common cause of the injuries is a dangerous and unsafe thing.[90]

Thus in an action against a city or town for an injury to a traveler on a highway, it is held proper to permit the plaintiff to give evidence of other similar accidents occurring at the same place, for the purpose of proving that the way was defective.[91]

Other courts, however, have held such evidence of other injuries to be inadmissible.[92]

89. Evidence That Other Persons Had Stumbled Over a Stake projecting from a sidewalk, is admissible not for the purpose of showing independent acts of negligence, but as tending to show that the common cause of the accidents is a dangerous and unsafe thing. Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624.

In Central of Ga. R. Co. *v.* Duffey, 116 Ga. 346, 42 S. E. 510, where the injury was sustained from the derailment and overturning of a car, it was held that evidence that another car was overturned on a nearby but different track several months prior to the time in question, was not relevant to prove negligence on the occasion in question.

Evidence That Other Boys Had Been Injured by Similar Machines in the same shop as the injury in question, is not competent; *non constat* that they were not injured entirely by their own fault or carelessness. Kolb *v.* Chicago Stamping Co., 33 Ill. App. 488.

90. Bloomington *v.* Legg, 151 Ill. 9, 37 N. E. 696; Scott *v.* New Orleans, 75 Fed. 373, 21 C. C. A. 402; Shea *v.* Glendale Elas. F. Co., 162 Mass. 463, 38 N. E. 1123. See also, Walker *v.* Westfield, 39 Vt. 246.

In an action for damages for injuries received by plaintiff, alleged to have been caused by defendant's failure to properly guard and protect certain cogwheels in defendant's saw mill, the plaintiff offered evidence, that other accidents had happened in the same mill upon these same cogwheels, and others similarly situated, prior to the time of the injury complained of in this case. The court said: "This evidence was introduced and admitted for the avowed purpose of showing the defective and dangerous condition of the cogwheels, and that appellant knew thereof. We think it was admissible for that purpose; especially, in view of the fact that the complaint alleged that prior to the time of the accident the cogwheels were left open, exposed, and unprotected, and that appellant knew of the dangerous condition of said cogs, which allegation was denied by the answer . . . The condition was of a fixed and permanent character, made so by the will of the appellant." Hansen *v.* Seattle Lumb. Co., 41 Wash. 349, 83 Pac. 102.

91. District of Columbia *v.* Armes, 107 U. S. 519, Morse *v.* Richmond, 41 Vt. 435, 98 Am. Dec. 600; Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55; Calkins *v.* Hartford, 33 Conn. 57, 87 Am. Dec. 194; Quinlan *v.* Utica, 11 Hun (N. Y.) 217, *s. c.* 74 N. Y. 603; Delphi *v.* Lowery, 74 Ind. 520, 39 Am. Rep. 98; Chicago *v.* Powers, 42 Ill. 169, 89 Am. Dec. 418; Moore *v.* Burlington, 49 Iowa 136; Augusta *v.* Hafers, 61 Ga. 48, 34 Am. Rep. 95.

In a suit against a municipal corporation to recover damages for injuries received from a fall caused by a defective sidewalk, which was in an unguarded condition, it is competent for the plaintiff to show that whilst it was in that condition other like accidents had occurred at the same place. District of Columbia *v.* Armes, 107 U. S. 519.

92. Collins *v.* Dorchester, 6 Cush. (Mass.) 396; Hall *v.* Lowell, 10 Cush. (Mass.) 260; Aldrich *v.* Pelham, 1 Gray (Mass.) 510; Kidder *v.* Dunstable, 11 Gray (Mass.) 342; Hinckley *v.* Barnstable, 109 Mass. 126; Schoonmaker *v.* Wilbraham, 110 Mass. 134; Merrill *v.* Bradford, 110 Mass. 505.

In an action for damages for injuries from falling in a passageway charged to have resulted from the

C. Cause and Effect. — Another line of cases furnishing an exception to the rule of exclusion under consideration is to be found in those involving the question of cause and effect; that is to say, where the question to be determined is whether a certain thing or condition produced the result claimed, evidence of other instances of the same or similar results having been produced from the same cause, is very generally received by the courts.[93]

Thus where the question is as to whether a defect in a sidewalk or highway was the cause of an injury, evidence of other injuries from the same cause has been frequently received.[94]

Many of the courts have, however, refused to permit the introduction of such evidence,[95] for the reason as stated that it tends to introduce collateral issues.[96]

So, too, upon the issue of cause and effect, it is competent to show other instances where effect did not follow the fact alleged to have been the cause.[97]

And To Rebut the Effect of Such Evidence, it is competent to permit the other party to give evidence of other instances where, although the cause claimed was present, the effect was not.[98]

So, too, it is competent for the same purpose to permit evidence

negligent failure of the defendant to have the same properly lighted, whereby it was rendered dangerous, a witness's testimony that he had fallen in the same passageway some six weeks before the injury sustained by plaintiff was incompetent and was *res inter alios acta.* Martinez *v.* Planel, 36 Cal. 578.

The happening of a similar injury prior to that for which compensation is claimed, at the same place and under like circumstances, cannot be shown as tending to prove the injury in controversy. Hudson *v.* C. & N. W. R. Co., 59 Iowa, 581, 13 N. W. 735; Frohs *v.* Dubuque, 109 Iowa 219, 80 N. W. 341; Mier *v.* Phillips Fuel Co., 130 Iowa 570, 107 N. W. 621, where it was held that evidence that a coal operator has encroached upon one neighbor's land, furnishes no evidence that he has taken coal from that of another.

93. Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424; Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677; Crocker *v.* McGregor, 76 Me. 282, 49 Am. Rep. 611; Meyer *v.* Wolnitzek (Tex. Civ. App.), 63 S. W. 1058.

94. *Alabama.* — Birmingham U. R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525; Southern R. Co. *v.* Posey, 124 Ala. 486, 26 So. 914.

Iowa. — Frohs *v.* Dubuque, 109 Iowa 219, 80 N. W. 341.

Kansas. — Madison Twp. *v.* Scott, 9 Kan. App. 871, 61 Pac. 967; City of Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933.

New Hampshire. — Dow *v.* Weare, 68 N. H. 345, 44 Atl. 489; Cook *v.* Durham, 64 N. H. 419, 13 Atl. 650.

Vermont. — Cheney *v.* Ryegate, 55 Vt. 499.

Washington. — Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674.

95. Bremner *v.* New Castle, 83 Me. 415, 22 Atl. 382; Branch *v.* Libby, 78 Me. 321, 5 Atl. 71; Schoonmaker *v.* Wilbraham, 110 Mass. 134; Kidder *v.* Dunstable, 11 Gray (Mass.) 342.

96. Ramsey *v.* Rushville & M. G. R. Co., 81 Ind. 394; Parker *v.* Portland Pub. Co., 69 Me. 173, 31 Am. Rep. 262; Goble *v.* Kansas City, 148 Mo. 470, 50 S. W. 84; Barrett *v.* Hammond, 87 Wis. 654, 58 N. W. 1053.

97. Avery *v.* Burrell, 118 Mich. 672, 77 N. W. 272.

98. Hodgkins *v.* Chappell, 128 Mass. 197; Shirley *v.* Keagy, 126 Pa. St. 282, 17 Atl. 607.

of other cases where, although the cause asserted was not present, the effect was.[99]

Discretion of Court. — But even though the courts recognize this exception to the general rule, yet it is regarded as discretionary with the trial judge how far the inquiry may be permitted to extend.[1]

D. CONDITION OF THING OR PLACE. — Again, upon the question of the probable condition of a thing or place at a particular time, evidence of its condition both prior and subsequent to the time in question is admissible[2] where it is shown that there has been no change in the meantime,[3] as where it appears that the condition is a permanent one in its nature and not subject to change,[4] or that it is of such a nature as to warrant the inference that no change has taken place.[5]

And there are a number of cases where evidence of condition at another place has been admitted.[6]

Weather. — Where the question is whether the weather at a particular time was cold enough to freeze an article, it is proper to show that another article of the same kind froze.[7]

99. Remy *v.* Olds (Cal.), 34 Pac. 216; Lotz *v.* Scott, 103 Ind. 155, 2 N. E. 560.

1. Hunt *v.* Lowell Gas Light Co., 8 Allen (Mass.) 169, 85 Am. Dec. 697.

2. Erickson *v.* Barber, 83 Iowa 367, 49 S. W. 838; Martn *v.* Richards, 155 Mass. 381, 29 N. E. 591; Swadley *v.* Missouri Pac. R. Co., 118 Mo. 268, 24 S. W. 140; Elster *v.* Seattle, 18 Wash. 304, 51 Pac. 394; Green *v.* Ashland Water Co., 101 Wis. 258, 77 N. W. 722.

In an action for damages caused by a defect in a street, evidence showing the condition of the barricades around the excavation on the day after the accident was properly excluded by the court. Port Jervis *v.* First Nat. Bank of Port Jervis, 96 N. Y. 550.

3. *Alabama.* — Birmingham U. R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525.

Illinois. — Chicago *v.* Dalle, 115 Ill. 386, 5 N. E. 578.

Iowa. — Mackie *v.* Central R. Co., 54 Iowa 540, 6 N. W. 723; Munger *v.* Waterloo, 83 Iowa 559, 49 N. W. 1028.

New York. — Yates *v.* People, 32 N. Y. 509; Holden *v.* New York C. R. Co., 54 N. Y. 662.

Tennessee. — Rosenbaum *v.* Shoffner, 98 Tenn. 624, 40 S. W. 1086.

Wisconsin. — Schuenke *v.* Pine River, 84 Wis. 669, 54 N. W. 1007.

4. Marston *v.* Dingley, 88 Me. 546, 34 Atl. 414.

5. Hoyt *v.* Des Moines, 76 Iowa 430, 41 N. W. 63; Mackie *v.* Central R. Co., 54 Iowa 540, 6 N. W. 723.

6. Alabama G. S. R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722 (defective condition of other rails and ties in same neighborhood); Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616 (defective condition of sidewalk in immediate vicinity); Ledgewood *v.* Webster City, 93 Iowa 726, 61 N. W. 1089 (other loose planks in same part of side walk); Taylor B. & H. R. Co. *v.* Taylor, 79 Tex. 104, 14 S. W. 918 (general condition of railroad track); Belton *v.* Turner (Tex. Civ. App.), 27 S. W. 831 (defective condition of sidewalk in same neighborhood). And see articles: "HIGHWAYS," Vol. VII; "NEGLIGENCE," Vol. VIII; "RAILROADS," Vol. X.

In an action to recover damages alleged to have been caused by the negligence of defendant, *held*, that evidence as to the condition of defendant's road and switches at places other than the place where the accident occurred, was not competent to prove negligence at the latter place. Grant *v.* Raleigh & G. R. Co., 108 N. C. 462, 13 S. E. 209.

7. Hodgkins *v.* Chappell, 128 Mass. 197.

4. Similarity of Conditions. — The necessary and logical requisite is, however, that when the main transaction is to be established by evidence of similar instances, the conditions and circumstances of the latter must be substantially the same as those attending the transaction under investigation.[8]

8. Lake Erie & W. R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 564; Emerson *v.* Lowell Gas Light Co., 3 Allen (Mass.) 410; Hunt *v.* Lowell Gas Light Co., 8 Allen (Mass.) 169, 85 Am. Dec. 697.

The rule is clear that in order to render evidence of similar accidents resulting from the same cause admissible it must appear, or at least the evidence must reasonably tend to show, that the instrument or agency which caused the injury was in substantially the same condition at the time of such other accidents as at the time of the accident in question. Bloomington *v.* Legg, 151 Ill. 9, 37 N. E. 696.

Where the question is as to the extent of the injury to land from flowage, evidence as to the amounts paid by the mill owner a few years previously to other land owners for flowing other land situate on the other side of the stream opposite the land in question and on about the same level, is inadmissible. Kelliher *v.* Miller, 97 Mass. 71. The court said: "The circumstances in the other case may have been very dissimilar and the amount of damages paid to the other land owner may have been greater or less than adequate compensation to him." See also Tyler *v.* Mather, 9 Gray (Mass.) 177.

In Hawks *v.* Charlemont, 110 Mass. 110, an action to recover damages for removing stones from the plaintiff's land adjoining a river, in consequence of which the river washed away part of the land, it was held that, evidence that the removal of stones at another place on the river produced the same effect as that at the plaintiff's land, was not admissible, inasmuch as it did not appear that all the conditions of the two events were the same, although witnesses testified that the two places were alike, so far as they could tell by the eye. The court said: "The evidence of what occurred from the action of the water at another locality and at another time would have a tendency to mislead the jury, unless the forces and conditions which combined to produce this injury were the same. Similarity in situation would not be enough, and the witnesses offered were unable to state with certainty the actual condition of things on either occasion."

In Mitchell *v.* Mitchell, 10 Md. 234, an action of trespass for mesne profits, it was held that evidence of the net profits made by the owner of an adjoining farm was not admissible for the purpose of showing what was made upon the land in controversy; that, "it is no very unusual thing that thriving and industrious farmers find themselves neighbors to those who are not so distinguished for those qualities; and hence what one man might make upon his farm would be no criterion as to what his neighbor had made, even conceding the quality and quantity of the land of each to be equal, which is by no means universally true." See also Keedy *v.* Newcomer, 1 Md. 241.

In Gillrie *v.* Lockport, 122 N. Y. 403, 25 N. E. 357, an action to recover damages for personal injuries alleged to have been sustained by the plaintiff from falling upon a sidewalk claimed to be out of repair, in consequence of which ice had accumulated thereon, a witness for the plaintiff was permitted to testify that about two years prior to the accident in question, he fell upon ice at the same place and that there was then about the same amount of ice as when the plaintiff fell; but it did not appear that the prior accumulation of ice was caused by defects in the sidewalk. It was held that the reception of the evidence was error. The court said that if the plaintiff had confined her proof, so far as it

related to the falling of others, during the continuance of the amount of ice, it would have come within the protection of the rule established by the decisions of which the cases cited by her were a type; but that mere proof of a fall occasioned by the existence of ice two years before was not competent for any purpose; that it was not pertinent upon the question of notice to the defendant, because that ice was not the occasion of the injury sued for; and that it did not tend to show that, tested by actual use, the walk was in an improper condition if the ice complained of had disappeared, and as a result, the walk had been restored to its usual condition nearly two years before.

Where a tenant claims that her landlord failed to supply steam to the premises as agreed, in consequence whereof the premises became untenantable and the tenant was unable to carry on business and she was compelled to vacate the premises, she cannot show that after her removal into another building she had no trouble with machines and supplement this with proof of the number of machines she had in use and that they were the same machines used in the other building. Trenkmann *v.* Schneider, 17 Misc. 299, 40 N. Y. Supp. 375. The court said that the condition under which the machines were operated in the new building may have been quite different and because those machines were operated to the satisfaction of the tenant in the new building, did not justify the conclusion that the landlord had failed to discharge his obligations as they were defined by the lease.

In Harroun *v.* Brush Elec. Light Co., 12 App. Div. 126, 42 N. Y. Supp. 716, where the death of the plaintiff's intestate was caused by electric wires being crossed, it was held that the defendants could not prove that no accident had happened previously on the same wires without showing that the same conditions existed.

In Congdon *v.* Howe Scale Co., 66 Vt. 255, 29 Atl. 253, where the question was whether the defendant had properly guarded an emery wheel by the bursting of which the plaintiff had been injured, it was held that evidence that other factory owners did not use guards with similar wheels, was not admissible, inasmuch as it did not appear that the conditions as to the speed, etc., were not the same.

In Morawetz *v.* McGovern, 68 Wis. 312, 32 N. W. 290, the question being whether the ice-box for the price of which the action was brought was properly constructed to fulfil its purposes, and the plaintiff, having testified that, as on all other ice-boxes, his work was done in a good, substantial and workmanlike manner, but there being no evidence of any other similarity in the boxes, it was held not competent to ask if the plaintiff ever got or asked for his pay for one of the *other* boxes, or to show how one of the *other* boxes turned out.

In Konold *v.* R. G. W. R. Co., 21 Utah 379, 60 Pac. 1021, an action for damages caused by the explosion of an alleged defective boiler, the defendant offered to prove by an expert mechanical engineer certain experiments he had made for the express purpose of determining the cause of the explosion, which evidence the court refused to permit to be submitted to the jury. *Held,* experiments are not competent as evidence unless the conditions under which they are made are the same as those which attended the event in regard to which the experiments are made and the admissibility of such evidence is discretionary with the trial judge.

Evidence of acts by others than a party in court, offered to show that the results claimed did not result from the acts complained of, must be similar in nature and extent and performed under similar conditions to those on which action is based. Crossen *v.* Grandy, 42 Or. 282, 70 Pac. 906.

In an action for injury to rafts passing over a new dam which had replaced an old one, evidence comparing the dams is not admissible, unless the similarity in their construction and dimensions be very decided. Newbold *v.* Mead, 57 Pa. St. 487.

In an action brought by appellee against appellant to recover damages for the death of her husband, who was in the employment of appellant

as a locomotive engineer, caused by the derailment of his engine by reason of sand and gravel deposited on the track in a cut, one of the witnesses for defendant, having testified that a culvert would have added to the safety of the cut, was asked by defendant: "You said you thought the culvert would make it much safer, but is not that cut constructed there and the water run out of it exactly as the cuts are ordinarily constructed on roads running through such places?" Upon objection by plaintiff, this question was excluded. The United States supreme court, in an opinion by Mr. Justice Miller, said: "The court did not err in its exclusion, because railway cuts are not made upon any recognized pattern, and the testimony offered would have been no aid to the jury without further testimony showing that the surroundings of other cuts were substantially *similar* to those of the cut where the accident happened, which would have involved collateral issues tending to confuse and mislead." Union Pac. R. Co. *v.* O'Brien, 161 U. S. 451.

In Decatur Car W. & Mfg. Co. *v.* Mehaffey, 128 Ala. 242, 29 So. 646, an action to recover damages for personal injuries caused by being thrown from a hanging scaffold as a result of alleged negligence on the part of the defendant's superintendent, the court permitted the plaintiff, against the defendant's objection, to introduce evidence of tests made upon the scaffold two years after the alleged accident, for the purpose of showing to what extent the scaffold could be made to swing. The evidence showed that the scaffold at the time of the tests, had been removed from the place of the accident, having been put away for future use, and that it was not in the same condition as it was at the time of the accident. It was held, that the evidence was calculated to prejudice the minds of the jurors, and should not have been admitted.

In Pensacola & A. R. Co. *v.* Atkinson, 20 Fla. 450, where the plaintiff sought to recover money paid out for expenses by the plaintiff as engineer for the defendant under an agreement calling for reimbursement for necessary expenses, it was held, that evidence as to what expenses were necessary to be incurred by an engineer upon another section of the road was not competent to show whether or not the outlay by plaintiff was proper, there being no evidence that conditions were the same in both sections.

Upon an issue as to the soundness of telegraph poles, evidence of the condition of other poles some distance, unaccompanied by any evidence that they were the same kind, put up at the same time, and equally exposed, is not admissible. Western U. T. Co. *v.* Levi, 47 Ind. 552. The court said, however, that, if in connection with this evidence there had been an offer to show that the poles alluded to by the witness and those which fell were all of one kind, and put up at the same time, and equally exposed to the elements, the evidence might have been competent, inasmuch as it might be inferred that like causes would equally affect like matters. But no such connecting evidence was offered.

Upon an issue as to whether a gas company had failed to furnish gas as agreed, evidence that other persons supplied from the same main had, during the time in question, received an insufficient supply of gas, is not admissible, it not being shown that the conditions as to connections were the same. Washington Twp. F. Coop. F. & G. L. Co. *v.* McCormick, 19 Ind. App. 663, 49 N. E. 1085. *Compare* Indiana Nat. & Illum. Gas Co. *v.* Anthony (Ind. App.), 58 N. E. 868, where, because there was evidence of similar conditions, it was held that the evidence was proper.

Without proof that trolley cars on all the lines of a street railway system are of the same character and operated under the same condition, it cannot be shown how far a car on one line could be heard by evidence as to how far cars on another line could be heard. Wilkins *v.* Omaha & C. B. R. & B. Co., 96 Iowa 668, 65 N. W. 987.

In Bach *v.* Iowa Cent. R. Co., 112 Iowa 241, 83 N. W. 959, where the injuries were received by the derailment of an engine, caused by the sinking of the roadbed under its

This similarity need not always, however, be precise in every detail; but it must at all events embrace such conditions and circumstances as will probably have weight in producing the result in question.[9]

weight, it was held that evidence that another engine, after the accident, was run over the same track and was derailed in the same way, was not admissible, for the reason that the engines were not alike, and the track was not in the same condition.

In Campbell *v.* Russell, 139 Mass. 278, 1 N. E. 345, where the question was as to whose fault it was that certain timbers in a house had sagged and floors settled, whether the builder or architect whose directions the former claimed to have followed, it was held that evidence that in a house similar, planned by the same architect, in which some of the timbers and spans were the same and some different from those in the house in question, the timbers had not sagged and floors had not settled, was not admissible. The court said that "what happened to another house would not aid the jury, unless it were shown that the two houses were identical, and subject to the same forces and conditions."

Upon the question as to the quantity of feed a sick horse will eat in a given time, evidence as to the quantity a well horse will eat, is not admissible. Carlton *v.* Hescox, 107 Mass. 410.

9. Baxter *v.* Doe, 142 Mass. 558, 8 N. E. 415, where for the purpose of showing that a sailor's illness on board a vessel was due to the owner's failure to supply medicine and the proper kind of food, it was sought to show that others of the crew suffered similar sickness. The court said: "It is difficult to find a case where all the conditions and circumstances affecting all the crew were so similar. As suggested by the plaintiffs in the argument, the crew lived together in the same quarters, on the same vessel, for the same length of time, worked in the same employment, were subjected to the same climatic influences, hardships, deprivations, and manner of life, partook of the same food at substantially the same time, were deprived of anti-scorbutics for the same length of time, and, of the crew of twelve, eight were affected at about the same time with the same symptoms of disease. This evidence presented but one issue to the jury, excluded all separate and collateral issues, and tended directly to prove that the provisions served to the crew were unsuitable and insufficient, and that the sickness was occasioned by the want of anti-scorbutics. Upon the offer of proof made, the superior court was justified in admitting the testimony."

SMUGGLING.—See Forfeitures.

SODOMY.

I. BURDEN OF PROOF.

To warrant a conviction the prosecution must show beyond a reasonable doubt that the act was committed by the defendant substantially as charged in the indictment or information.[1]

1. "What has been observed (referring to rape) especially with regard to the manner of proof, which ought to be more clear in proportion as the crime is the more detestable, may be applied to another offense of a still deeper malignity, the infamous crime against nature, com-

Sufficiency of Evidence. — The evidence must exclude every reasonable hypothesis except that of guilt.[2]

II. CARNAL KNOWLEDGE.

1. Penetration. — To establish the fact of carnal knowledge, the evidence must show that the male sexual organ entered into the private part (per anum) of the male, female or beast, to some extent; the slightest penetration is sufficient.[3]

mitted either with man or beast; a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But in an offense of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out." 4 Black. Com. 215.

2. Mullins *v.* State, 45 Tex. Crim. 465, 76 S. W. 560. McKeever testified, for the state, that he and witness Coker had gone down into the pasture after a horse belonging to Herald. He went to the residence of Mullins and called for appellant, and was informed by Mrs. Mullins that appellant was in the pasture. They rode down in the pasture and laid down on the ground and looked around to see if they could discover any horses, as the mesquite timber was so thick and large it was necessary to do so in order to see any distance; and while lying on the ground they saw appellant from 100 to 150 yards away, with a brindle bitch pulled up against him. Their attention was called in that direction by hearing a dog hallooing or barking. He further testified they rode up within about fifty steps of appellant before he saw them or before they called. When he first saw appellant he and the dog were facing witness. He further testified that he and Coker rode around and came up on the back of, or more to the side of appellant and the dog. Tom Coker testified as did the other witness, but he states, as they were riding along they heard a noise, made by a dog or cow, and got down and looked, and saw appellant as described aforesaid. They then got on their horses and rode around to where he was. This witness fixes the distance at within twenty steps of appellant, when he, appellant first observed them, instead of fifty yards as fixed by the other witness. He corroborates the other witness in most respects but says appellant turned his back on them as they rode up, and around in front of him, etc. There was some discussion between McKeever and Coker at the time as to whether the noise was the lowing of a cow or the barking of a dog. This witness places the dog and appellant facing him as they rode to where the appellant was, etc. This witness admitted that about three or four weeks after this alleged transaction appellant and his brother came to where he was at work, and had him sign a paper denying the whole transaction, which he says, "I understood was a lie-bill." He accounts for this by stating the parties were armed. Morgan Coker was present when this was signed, but was not introduced as a witness. Tom Mullins put in evidence his character for chastity and uprightness, which is shown to be good. He denied the whole transaction, stating that he was down in the pasture chasing a rabbit with the dogs, and he was trying to twist the rabbit out of a prairie dog hole with a switch when the witnesses Coker and McKeever rode up, and denied that the dog was tied.

On motion for a new trial newly discovered evidence is alleged. The court says: "This record, in our judgment, does not exclude every reasonable hypothesis except that of guilt. Reversed and remanded."

3. At Common Law. — It is not sodomy unless the act be in the part where sodomy is usually committed, for the act in a child's mouth does not constitute the offense. Rex *v.* Jacobs, R. & R. (Eng.) 331. See

2. How Proved. — Penetration may be proved by direct or circumstantial evidence like any other fact.[4]

Expert Evidence. — A physician may testify as to whether in his opinion there has been penetration or not.[5]

3. Emission. — In England and nearly all of the United States it is not necessary to prove emission, as it is not an essential element of the crime.[6] Proof of emission was made unnecessary by statute

also People *v.* Boyle, 116 Cal. 658, 48 Pac. 800.

Sodomy is an offense in this state, and being undefined, we must look to the common law for the elements of the crime. The evidence discloses the act relied on in this case was committed in a child's mouth. However vile and detestable the act proved may be, and is, it can constitute no offense, because not contemplated by the statute, and is not embraced in the crime of sodomy. Prindle *v.* State, 31 Tex. Crim. 551, 21 S. W. 360, 37 Am. St. Rep. 833.

"As the law is now, if there was penetration, the capital offense is completed." Rex *v.* Cozins, 6 Car. & P. 351, 25 E. C. L. 434.

The learned judge left it to the jury to say whether there had been penetration, stating that, if so, the crime was complete under the new act. Rex *v.* Reekspear, 1 Moody C. C. (Eng.) 342.

4. Carnal knowledge is as essentially an element of the offense of sodomy as it is of the offense of rape proper, and the rules of evidence which apply to rape cases should be observed in prosecutions for sodomy. Penetration, as in rape, must be proved, though to no particular depth. The jury, however, are authorized to infer penetration from circumstances, without direct proof. Cross *v.* State, 17 Tex. App. 476.

Bestiality. — "In a case of bestiality, penetration may be proved by circumstances, and need not necessarily be shown by an eye-witness thereof." Collins *v.* State, 73 Ga. 76.

5. The indictment being for sodomy committed upon a child by a boy under fourteen years of age, and the question of guilt, as between the complete offense and an attempt only, depending in a great degree upon the opinion of two physicians, one of whom made a personal examination and stated the facts, but stated that he did not know whether to give an opinion as to whether there was a penetration or not, and that he could not say there was any actual penetration, and the other having heard the testimony, gave a decided opinion that there was no penetration, a verdict of guilty was unwarranted by the evidence. Hodges *v.* State, 94 Ga. 593, 29 S. E. 758.

6. In John Duffin's Case, 1 East P. C. (Eng.) 437, it was held that proof of penetration and emission was necessary to sustain an indictment for sodomy. "It must be allowed that penetration may be without emission; and it is easy to conceive that it would in some cases be difficult to prove emission where it has in fact been. It seems, then, a little strange to make the proof of emission necessary to the proof of sodomy. It is, indeed, said, in one of the books cited by Mr. Sergeant Hawkins, that emission is an evidence of buggery; but it is not said, that the proof of emission is necessary upon an indictment for buggery." 4 Bacon's Abr. (5th Ed.) 569.

"Whereas, upon trials for the crimes of buggery and rape, offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes. . . . It shall be necessary in any of those cases to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only." 9 Geo. IV, Ch. 31, § 18, Year 1828.

Proof of Emission Unnecessary in the Following States By Statute:

Alabama. — § 4643 Penal Code.

Arizona. — § 252 Rev. Stats., 1901.

passed in Michigan[7] in 1841, but such statute was repealed in 1846.

III. CONSENT.

1. Generally. — Consent or non-consent is not material to the offense.[8]

2. Testimony of Person Consenting. — One who consents is an accomplice, whose evidence must be corroborated to warrant a conviction.[9]

Arkansas.—§ 1901 Rev. Stats., 1894.
California. — § 287 Penal Code, 1907.
Idaho. — § 4703 Penal Code, 1901.
Illinois. — § 48, p. 681, Rev. Stats., 1905.
Minnesota. — § 4950 Laws, 1905.
Montana.—§ 497 Penal Code, 1895.
North Dakota. — § 8922 Penal Code, 1905.
Ohio. — § 7297 Bates Anno. Ohio Stats., Vol. 3.
Oklahoma. — § 2278 Statutes 1903.
Oregon. — § 1405 B. & C. Ann. Codes and Statutes.
South Dakota. — § 352 Rev. Code, 1904.
Utah. — § 4229 Rev. Stats., 1898.
Wisconsin. — § 4591 Statutes, 1898.

Proof of emission unnecessary in Louisiana and Virginia by judicial decision. State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273; Thomas' Case, 1 Va. Cas. 307.

7. We think that the repeal of this statute evinces a purpose to revive the common law rule as it was then understood to obtain in this state, and should be given force in determining what the common law rule in this state then was, prior to the enactment of that statute. We think, therefore, that proof of emission was a necessary ingredient of the offense, and, while it may be inferred from proof of penetration and the other circumstances of the case, yet it is a fact which the prosecution must make out before a conviction can be claimed. People *v.* Hodgkin, 94 Mich. 27, 53 N. W. 794.

8. Reg. *v.* Jellyman, 8 Car. & P. 604, 34 E. C. L. 547.

9. Reg. *v.* Jellyman, 8 Car. & P. 604, 34 E. C. L. 547

Werner, the only witness for the state, was evidently consenting; but if the evidence should leave this in doubt, it would then become a question for the jury, and not the court, to determine under the proper instructions, whether the person was or was not consenting, and the jury should in such a case be instructed that if they found that he was consenting, then they must find that he was corroborated before they could convict. Medis *v.* State, 27 Tex. App. 194, 11 S. W. 112.

In Com. *v.* Snow, 111 Mass. 411, Smith testified to the commission of the crime at a certain time in the defendant's rooms, and that he heard a noise at an outer door at the foot of the stairs to the rooms; that the defendant went down and unlocked the door, and said to some one, that he had locked it because he was having a nap; and that he saw a woman pass by the door of the defendant's rooms, and go up stairs. A woman who lived over defendant's rooms testified that she came at said time to the outer door, which was always kept open and found it locked; that the defendant came down and said he locked the door because he was having a nap; and that she went up stairs past the door of his rooms. A physician testified that he was called to Smith, who had taken poison, and that after his return the defendant came to the office of the witness and asked if Smith had said why he took poison. A boy testified that the defendant, a week after the alleged crime, solicited him to commit a like offense, and said he had done it with other boys. *Held*, that this was sufficient evidence in corroboration of Smith to warrant a conviction even if Smith was an accomplice.

People *v.* Miller, 66 Cal. 468, 6 Pac. 99. In this case it is contended that the complaining witness, a boy

In Louisiana it is held that the jury may convict on testimony of accomplice alone, but the judge should caution them not to return a verdict of guilty unless such evidence is corroborated.[10] In Wisconsin, also, it is held that the jury may convict on testimony of accomplice alone.[11]

3. Question of Consent Is for the Jury. — A. GENERALLY. Where question of consent is an open one, it should be submitted to the jury.[12]

B. CHILDREN OF TENDER YEARS are presumed incapable of the intent necessary to the crime, and so, where the act is committed upon such a child, it is presumed not to have been an accomplice.[13]

IV. CORROBORATIVE EVIDENCE.

1. Complaint Made by Prosecuting Witness. — After the prosecuting witness has testified to the commission of the acts constituting the offense, in some jurisdictions it has been held to be competent for the prosecution to prove in corroboration of his testimony as to the main fact, either by the prosecuting witness or other witnesses, that shortly after the perpetration of the offense charged he made complaint to those to whom complaint of such an occurrence would naturally be made, but this proof must be confined to the bare

thirteen years old, was an accomplice, whose testimony required corroboration; and as he was not corroborated, the conviction of the defendant was erroneous. But the uncontradicted testimony of the boy shows that he acted under threats and coercion of the defendant. He was, therefore, not an accomplice; and as the evidence in the case was sufficient to sustain the verdict, the judgment and order must be affirmed. See Territory *v.* Mahaffey, 3 Mont. 112.

10. While the jury may convict on the testimony of an accomplice alone, the judge should caution them, in prudence, not to return a verdict of guilty unless such evidence is corroborated. State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273.

11. Means *v.* State, 125 Wis. 650, 104 N. W. 815.

12. People *v.* Hickey, 109 Cal. 275, 41 Pac. 1027. From all the facts here disclosed, we conclude the question of consent was an open one, which should have been presented to the jury; and, also, that the case was such that the question of simple assault likewise should have been submitted to the jury. See Medis *v.* State, 27 Tex. App. 194, 11 S. W. 112.

13. Means *v.* State, 125 Wis. 650, 104 N. W. 815.

Plaintiff in error was convicted for inducing a boy seven years of age to insert his male organ in the mouth of the plaintiff in error. He claims that as the boy was incapable of penetration in the sense in which that word is used in rape, and incapable of emission, there was no crime, etc., but only an indecent assault. There is sufficient authority to sustain a conviction in such a case. Reg. *v.* Allen, 1 Den. C. C. (Eng.) 364.

It is said that the boy is an accomplice, and that no conviction can be sustained upon his uncorroborated evidence. Such is not the law in this state. Moreover, an accomplice is one who consents, and a boy of such tender years is not capable of legal consent, and hence is not an accomplice. Kelly *v.* People, 192 Ill. 119, 61 N. E. 425.

In some jurisdictions the uncorroborated testimony of an accomplice is never sufficient to convict one of a crime. But that is not the rule in this state. Besides, consent on the part of the boy in this case cannot be presumed, he being incapable of understanding the nature of the act. He was incapable of committing a

fact of complaint; the details of the occurrence cannot be proved.[14]

2. Particulars of Complaint. — In Louisiana it is held that the fact that the party injured made complaint immediately or soon after may be proven, but the particulars or circumstances narrated cannot be given, except to confirm or corroborate the testimony of such party when impeached.[15] In Ohio it is held that the fact that the party injured made complaint cannot be shown.[16]

3. Delay in Making Complaint. — It is held in Illinois and Louisiana that a delay in making complaint for one year will not cast doubt upon the truth of the charge.[17] In a recent case in Virginia, where it appeared defendant was under twelve years of age,

crime. See Honselman *v.* People, 168 Ill. 172, 48 N. E. 304.

In Mascolo *v.* Montesanto, 61 Conn. 50, 23 Atl. 714, the assault consisted of a foully immoral act committed on the body of the plaintiff's son, who was but twelve year's of age. *Held*, that he could not be regarded as consenting to the act, as he was under the age of consent; and that if he submitted without resistance, the act was still done by force.

14. People *v.* Swist, 136 Cal. 520, 69 Pac. 223. "It is urged that the court erred in permitting the mother of the boy to testify relative to a complaint made by him to her. What occurred was as follows: District Attorney: Q. State whether or not when the little boy came to you he made any complaint to you? A. He did. Q. How soon after he came to you did he make the complaint? A. Immediately. Q. What kind of complaint did he make? (The objection was here interposed.) District Attorney: I dont propose to ask for the conversation or the details. I think we are within the line though in asking the question. The Court: Objection overruled to the question. Mr. S. (for Deft.): We will take an exception. The Court: I will state to the witness, you must not state anything he said about any person, must not mention any person. The answer was. 'He said somebody . . . ' using an expression which would be unintelligible, except for the fact that the prosecuting witness used it on the witness-stand and explained its meaning. The answer was not responsive to the question, and was given in violation of the avowed purpose of the district attorney and the express caution of the trial judge. It should have been stricken out, and no doubt would have been had defendant made a motion to have the court so order. It was admissible to show that a complaint was made. People *v.* Figueroa, 134 Cal. 159, 66 Pac. 202; People *v.* Baldwin, 117 Cal. 244, 49 Pac. 186." Both rape cases.

15. The fact that the party injured made complaint immediately or soon after may be proven, but the particulars or circumstances narrated cannot be given, except to conform or corroborate the testimony of such party when impeached. Such statements out of the presence of the accused are hearsay, and are admissible at the proper time as corroborative evidence to show that the injured party made them just after the occurrence. State *v.* Gruso, 28 La. Ann. 952.

16. While it is the clear rule of law that in prosecutions for the crime of rape the declarations of the injured female, made shortly after the alleged criminal act as to the commission thereof, are competent evidence for certain purposes, this being an exception (founded on necessity) to the general rule as to hearsay evidence, there is strong ground for holding that it must not be extended to prosecutions under the sodomy statute,— the reasons which exist for the rule in the one case, not existing in the other. Foster *v.* State, 1 Ohio, C. C. 467.

17. A delay of over a year by the prosecuting witness before making complaint will not of itself cast

and no complaint was made for two years, conviction was set aside.[18]

4. Confessions. — Confessions are *prima facie* inadmissible, and must be voluntary; and are only admissible when *corpus delicti* is proven *aliunde*.[19] To render a confession or declaration admissible, it is not necessary that it should be minute or explicit in its reference to the subject-matter; but if it refer to that which is on trial it is admissible.[20] Whether a confession or declaration applies to the alleged offense on trial may be inference of fact to be drawn by the jury.[21]

5. Defendant's Propensity. — It is not permissible to show that defendant has a general disposition, or natural inclination to commit the same kind of offense as that charged against him.[22]

doubt upon the truth of the charge, where, at the time the crime was committed upon him, the witness was but a boy of fourteen years. Honselman *v.* People, 168 Ill. 172, 48 N. E. 304.

Where the accused is a man of mature age, and the prosecuting witness is a boy between fourteen and fifteen years of age, the delay in bringing the charge against the former is not unreasonable, where such charge is brought within a year. State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273.

18. Sufficiency of Evidence. When defendant, charged with buggery, was under twelve years of age, and no complaint was made for two years, a conviction will be set aside. Williams *v.* Com. (Va.), 22 S. E. 859.

19. A conversation between witness and defendant which was objected to was as follows: Witness, "When the defendant came out of the stable I showed him, and asked him what he had been doing, and he said, 'Well, you have caught up with me.'" Court erred in not requiring satisfactory proof that the confession was voluntary. Confessions are *prima facie* inadmissible, and are never so without proof of the *corpus delicti aliunde*, though direct proof is not required. Bradford *v.* State, 104 Ala. 68, 16 So. 107.

20. To render a confession or declaration admissible for the consideration of the jury, it is not necessary that it should be minute or explicit in its reference to the subject-matter. It cannot be excluded because it does not in express terms, define the time and place, or the person with whom the transaction spoken of occurred; nor because it is so general or indefinite as to be applicable to other occurrences than the one under investigation, as well as to that. If it refers to other like occurrences exclusively, it must be rejected as incompetent. But if it may refer to that which is on trial, its indefiniteness or remoteness affects its weight only, and not its admissibility. It is so with the whole class of circumstantial evidence. Com. *v.* Snow, 111 Mass. 411. See State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273.

21. The declaration in this case is that he "had done it with the other boys." It was made one week only after the alleged offense for which he was on trial. As it was of such a character as to be applicable to that supposed occurrences, it was an inference of fact to be drawn only by the jury from the declaration itself, from its relation in point of time, and all the circumstances of the case, whether it did so apply or not. Com. *v.* Snow, 111 Mass. 411.

Confession of defendant to father of boy is admissible in evidence in a prosecution charging him with having committed the offense with one of the persons named by him, it being a question for the jury whether the confession, general in terms, applied to the particular offense charged. State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273.

22. Rex *v.* Cole, 3 Russ. C. & M. (Eng.) 251.

V. DEFENSIVE EVIDENCE.

1. Generally. — The defendant may show any and all matters of fact which will tend to disprove the evidence introduced by the prosecution.[23]

2. To Show Good Character. — The defendant may introduce evidence to show his good character, which, when proven, is itself a fact in the case.[24]

3. To Show Insanity. — The defendant may have testimony introduced to show that he was insane at the time the alleged offense was committed.[25]

VI. ASSAULT WITH INTENT TO COMMIT SODOMY.

1. Generally. — The assault is only involved in an attempt to commit sodomy when committed upon a human being, and the prosecution must prove all the elements of the crime except the actual accomplishment of it.[26]

2. Evidence of Prior Assault. — In a prosecution for an assault with intent to commit sodomy, perpetrated on a moving train, evidence is admissible of a prior assault committed upon same train shortly before in another state.[27]

3. Competency of Child as Witness. — In an action for assault with intent to commit sodomy, a boy six years old may be competent to testify as a prosecuting witness.[28]

23. Mullins *v.* State, 45 Tex. Crim. 465, 76 S. W. 560.

24. Mullins *v.* State, 45 Tex. Crim. 465, 76 S. W. 560; People *v.* Raina, 45 Cal. 292.

25. Where defendant pleads not guilty, he is entitled under this plea to have testimony introduced on his behalf to show his insanity at time alleged offense was committed. People *v.* Olwell, 28 Cal. 456.

26. An assault is only involved in an attempt to commit the crime against nature when committed upon a human being. People *v.* Oates, 142 Cal. 12, 75 Pac. 337.

The defendant may be convicted of an attempt to commit sodomy under an indictment charging him with sodomy. State *v.* Frank, 103 Mo. 120, 15 S. W. 330.

27. In a prosecution for an assault with intent to commit sodomy upon the person of another, perpetrated upon a moving train, evidence is admissible of a prior assault committed upon the same train a couple of houre before, although made in another state, for the purpose of showing the defendant's real intention in making the second assault. State *v.* Place, 5 Wash. 773, 32 Pac. 736.

28. The competency of a young boy six years old as prosecuting witness, upon a charge of an assault with intent to commit the infamous crime against nature, is for the trial court to determine, after a preliminary examination without the hearing of the jury to test his intelligence, and where such examination disclosed his capacity to understand what was done to him, and to relate it truly, the discretion of the trial court cannot be said to be abused in allowing his testimony. People *v.* Swist, 136 Cal. 520, 69 Pac. 223.

SOLVENCY.—See Bankruptcy; Insolvency.

SPACE AND DISTANCE.

By George W. Crouch.

I. JUDICIAL NOTICE.

The courts will usually take notice of established geographical distances between well known places, whether within[1] or without[2]

1. Bruson *v.* Clark, 151 Ill. 495, 38 N. E. 252; Hinckley *v.* Beckwith, 23 Wis. 328.

In *In re* Rebman, 41 Fed. 867, it was held that judicial notice may be taken of geographical distances, and of the fact that a Virginia statute imposing a charge of one cent per pound on all fresh meats offered for sale at 100 miles or more from the place of slaughter applies to meats brought from all other states of the union; and that as to the cities of Virginia having 15,000 inhabitants, imposes the charge upon meats from nearly all that portion of the state lying west of the Blue Ridge mountains.

In Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837, the court took judicial notice that a place about eight miles southeast of the town of Lexington was in Cleveland county.

The courts of Washington will take judicial notice of the distance between two cities in the state. Blumenthal *v.* Pacific Meat Co., 12 Wash. 331, 41 Pac. 47.

A court may take judicial notice of the map of a city in order to determine the distance between certain points on a railroad track within its limits. Wainright *v.* L. S. & M. S. R. Co., 11 Ohio C. D. 530.

The court may take notice of the distance between station towns on a certain railroad. Johnson *v.* Atlantic Coast Line R. Co., 140 N. C. 574, 53 S. E. 362.

2. State *v.* Seery, 95 Iowa 652, 64 N. W. 631; Park *v.* Larkin, 1 Overt. (Tenn.) 17; Bartholomew *v.* First Nat. Bank, 18 Wash. 683, 52 Pac. 239.

Judicial notice may be taken of the distance between well known

the state, or the jurisdiction, but not in those cases where the distance may be in dispute or there is an element of doubt to resolve.[3]

II. EXPERIMENT.

1. Generally. — Evidence of experiments made with a view to establishing probable distance has generally been held admissible where all conditions are shown to have been similar, but excluded in those cases which, from their very nature, would render such proof vague and uncertain.

2. In Criminal Practice. — The question of the possibility of identifying a particular person, on trials for homicide, presents a feature in which it is often impossible to produce other evidence than that of experiments made by a competent person. The value of such testimony, of course, depends upon the care with which they were made, the character of the case and the similarity of all attending circumstances.[4] If not made under conditions that are

cities of the United States, and the ordinary speed of railway trains between the same. Pearce *v.* Langfit, 101 Pa. St. 507, 47 Am. Rep. 737.

Judicial notice will be taken by a federal court that the distance between Dubuque, Iowa, and Asheville, North Carolina, is more than 100 miles. Mutual Ben. L. Ins. Co. *v.* Robison, 58 Fed. 723, 7 C. C. A. 444.

The court knows judicially the distance between a place in Oregon and the place of trial. Pettit *v.* State, 135 Ind. 393, 34 N. E. 1118.

Relative Distances. — The courts of Indiana will take judicial notice of the relative distances from a certain place to another part of the same state, and to neighboring states. Jamieson *v.* Indiana, N. G. & O. Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652.

In Osborne *v.* Chicago & N. W. R. Co., 48 Fed. 49, the court took judicial notice that the distance from a given point on a line of railroad to a given point of destination is greater than from a third point on such line to such point of destination.

3. In North Chicago St. R. Co. *v.* Cheetham, 58 Ill. App. 318, it was held that the courts of Illinois would not take judicial notice of the distance between the various streets of Chicago.

It was held in Goodwin *v.* Appleton, 22 Me. 453, that the court would not take judicial notice of the distances of places within a county from each other.

When the distances between certain cities are established by statute, the courts of the state will take judicial notice thereof. Hegard *v.* California Ins. Co. (Cal.), 11 Pac. 594.

4. In Rebuttal. — In Starr *v.* People, 28 Colo. 184, 63 Pac. 299, the defendant offered for the purpose of impeaching the testimony of one of the witnesses for the state proof of an experiment calculated to show that it was impossible to have overheard a certain conversation which he testified to, from where he stood. This evidence was rejected, although the conditions at the time of the experiment were the same as those existing at the time of the conversation. On appeal, the court held that it should have been allowed. See also Richardson *v.* State, 90 Md. 109, 44 Atl. 999.

In Smith *v.* State, 2 Ohio St. 511, on a trial for malicious shooting, the prosecuting witness declared that he had been fired on in the night while standing near the window of a tavern. That just before he was shot, he saw a man outside whom he thought to be defendant pointing a pistol at him; that by the flash of the pistol he clearly recognized the defendant. In support of this the

practically identical with those existing in the case on trial, the tendency is to confuse and mislead the jury.[5]

Likewise, it often becomes material to determine at what distance a shot was fired from a gun, and the distance at which such a gun would be capable of taking human life,[6] or the distance at which it would produce powder marks upon the body or other object;[7] and, within the above mentioned limitations, evidence of a person who has made a proper experiment is admissible. Such testimony, however, is looked upon with suspicion by many courts, and, as a general rule, experiments are not competent as evidence unless they are conducted under circumstances very similar to those connected with the act to be illustrated.[8]

state's witnesses testified as to experiments made at the same place under similar conditions. In rebuttal, the defense offered to prove similar experiments, made under similar conditions, but in another place and before a different window. This testimony was ruled out. The appellant court by unanimous decision reversed this ruling. But see Sealy *v.* State, 1 Ga. 213, 44 Am. Dec. 641.

5. In Yates *v.* People, 32 N. Y. 509, the court, in overruling the admission of evidence of an experiment made to determine how far the rays of light from a street lamp extended, where all the conditions did not appear to be substantially similar, said: "This ruling may have misled the jury; it doubtless did, and I think it was an erroneous ruling. First, because at that time there had been no reliable evidence that the lamp was lighted on the night of the homicide, but on the contrary; Second, there was no proof of the difference in the shades or degrees of darkness between the night of the homicide and the night of the witness' experiment; Third, there was no evidence of the difference in the eyes of the witness, and the eyes of the prisoner, as to their focal point; and, Fourth, more than all, this was not rebutting evidence, but was evidence which the defendant could not be expected to meet at that stage of the trial." People *v.* Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833; Jones *v.* State, 71 Ind. 66.

6. State *v.* Jones, 41 Kan. 309, 21 Pac. 265.

A gunsmith who has studied and experimented for years to ascertain how far guns and muskets will carry shot compactly, and who states that he is able to tell how far a person killed by a charge of shot from a musket must have been from the musket when it was fired, is competent to testify to that fact as an expert. Vaughan *v.* State, 3 Smed. & M. (Miss.) 553.

7. Head *v.* State, 40 Tex. Crim. 265, 50 S. W. 352.

When there is a material inquiry as to the distance of the deceased from the defendant at the time of the homicide, as bearing upon the question of whether the deceased was near enough to strike the defendant, and it appears in evidence that no powder marks were found upon the clothing or body of deceased, it is proper to allow expert testimony for the prosecution, by a witness who made the experiment under like conditions, as to the farthest distance which clothing could or would be powder marked with a rifle such as was used by defendant. People *v.* Clark, 84 Cal. 573, 24 Pac. 313.

In Quigley *v.* Com., 84 Pa. St. 18, a physician was called as an expert, during the trial of a prisoner for murder, to establish by the effect of powder marks the probable distance of a pistol shot by experiments which he had made with a muslin cloth. On appeal the court held that the testimony was properly admitted.

8. State *v.* Justus, 11 Or. 178, 8 Pac. 337.

3. Personal Injury Cases. — This method of proof is sometimes resorted to in accident cases, more frequently, of course, in railway accident cases, as indicative of the distance a person or object may be seen, whether it relate to the vision of a party injured,[9] or to the distance at which the person causing his injury might reasonably have become aware of his presence in a position of danger. In suits for damages growing out of railway accidents, where it is sought to establish the distance at which the engineer or motorman could have seen an object upon the track, it is essential that circumstances under which such experiments are performed practically coincide with those that existed at the time of the accident, and if, in this respect, they fail in any important particular, such evidence should be rejected.[10]

Likewise, in cases bearing upon the question of the negligence of the engineer, evidence of experiments has been admitted to determine the distance at which the same or similar trains could have been stopped.[11]

4. As to Hearing. — The distance at which the sound of the voice,[12] or other means of communication,[13] can be understood and distinguished may be proven by a witness who has made a proper experiment, but the conditions must be shown to correspond.[14]

III. OPINION EVIDENCE.

1. Opinions of Ordinary Witnesses. — A. GENERALLY. — The

9. In Nosler *v.* Chicago, B. & Q. R. Co 73 Iowa 268, 34 N. W. 850, an action against a railroad company for negligently colliding with plaintiff's team, the evidence showed that at one point plaintiff could have seen a certain distance up the track, but that between this point and the crossing his view was obstructed. An experiment made by timing the train between the points where it could be seen, and the place where the accident occurred, and also a team of horses walking from this point to the crossing, was held competent on the question of negligence, since it appeared that the experiment was carefully made, and that there was no doubt as to the point where the train could last have been seen by the plaintiff. Elgin, Joliet & E. R. Co. *v.* Reese, 70 Ill. App. 463.

10. Alabama G. S. R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169; Chicago & A. R. C. *v.* Logue, 47 Ill. App. 292; Chicago & E. I. R. Co. *v.* Crose, 113 Ill. App. 547.

In Young *v.* Clark, 16 Utah 42, 50 Pac. 832, it appeared that plaintiff, a child, was run into and injured by a train while crossing defendant's bridge. On the question of the negligence of the engineer in failing to see the plaintiff, evidence of an experiment was offered to show that similar objects, or children, could be seen on the bridge from the nearest curve of the railroad. The admission of the evidence was held proper. See also Cox *v.* Norfolk R. Co., 126 N. C. 103, 35 S. E. 237; Baltimore & O. R Co. *v.* Hellenthal, 88 Fed. 116, 31 C. C. A. 414.

11. Burg *v.* Chicago, R. I. & P. R. Co., 90 Iowa 106, 57 N. W. 680; Byers *v.* Nashville, C. & St. L. R. Co., 94 Tenn. 345, 29 S. W. 128.

12. Wilson *v.* State (Tex. Crim.), 36 S. W. 587; People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500.

13. Missouri Pac. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607.

14. Lawrence *v.* State, 45 Fla. 42,

general rule, of course, is that witnesses are to testify to facts and not individual opinions. This rule, however, has its exceptions, some of which are as well settled as the rule itself; among them being questions relating to space, distance, height, etc.[15] And where the witness has had the means of personal observation, and the facts and circumstances which lead the mind of the witness to a conclusion are incapable of being detailed and described so as to enable anyone but the observer himself to form an intelligent conclusion from them, the witness is generally allowed to add his opinion or the conclusion of his mind.[16]

Questions as to space and distance, where there has been no measurement, always involve an estimate, and to that extent an opinion; but there is no objection to asking a witness who is acquainted with the position of two objects how far one is from the other, or to his answering that it is his judgment that it is a certain distance, although he has never measured the distance.[17] The witness may tes-

34 So. 87; Starr *v.* People, 28 Colo. 184, 63 Pac. 299.

15. The opinion of an ordinary witness as to time, distance and space is legitimate. International & G. N. R. Co. *v.* Satterwhite, 19 Tex. Civ. App. 170, 47 S. W. 41.

That a hole in a sidewalk in which plaintiff was injured was big enough for witness' foot to go in was a fact of which he might testify without being an expert. City of San Antonio *v.* Talerico (Tex. Civ. App.), 78 S. W. 28.

In a case of collision, after a witness had testified concerning the position of the vessels and the character of the night, he was asked whether a vessel on such a night and in such a place could be seen at a considerable distance from a vessel approaching the shore, and if so, how far. *Held*, that the question should have been allowed. Innis *v.* Steamboat Senator, 4 Cal. 5, 60 Am. Dec. 577.

In an action where plaintiff was struck by a horse-car, a witness who stood on the front platform at the time of the accident might testify that at the distance outside the track where the person injured stood, the car could have passed safely. McDermott *v.* Third Ave. R. Co., 44 Hun (N. Y.) 107.

In an action by a passenger for wrongful expulsion from a train soon after it left the station, a fellow-passenger was permitted to testify as to how far the train had gone from the station when plaintiff was ejected. St Louis & S. F. R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225.

In Chicago City R. Co. *v.* Rohe, 118 Ill. App. 322, however, it was held that questions which inquire of witnesses concerning the distances which they could, at the time of the accident, see objects of the size and color of a wagon, call for evidence of facts and not of opinions.

16. Town of Cavendish *v.* Troy, 41 Vt. 99, *quoting* Clifford *v.* Richardson, 18 Vt. 620.

Where it is impracticable to lay before the jury all the details bearing on the distance a horse can be seen along a railroad track, the opinion of witnesses may be received. East Tennessee, V. & G. R. Co. *v.* Watson, 90 Ala. 41, 70 So. 813.

17. Baldwin *v.* Parker, 99 Mass. 79, 96 Am. Dec. 697.

It is not necessary that a witness testifying that the spot where a murder was committed was within five hundred yards of the boundary line of the county in which the defendant was indicted, should have measured the distance. People *v.* Alviso, 55 Cal. 230.

Where it is shown that a witness was in a position and had the means of forming an intelligent estimate, his opinion as to questions of space, distance and the like may be admissible. Sabine & E. T. R. Co. *v.*

tify that certain distances are to be estimated in a particular way, and it is immaterial that such testimony may contain an implied expression of opinion, as it can necessarily be but his judgment based upon facts within his observation.[18] It is frequently the case that no better evidence can be obtained, or the facts cannot otherwise be presented to the tribunal.

B. As to Vision. — The same rule as to opinion evidence applies as to how far the headlight of an engine, the rear lights of a train, or switch-lamps may be seen.[19]

It is also proper to receive in evidence the opinions of ordinary witnesses, familiar with the situation, as to how far an engineer or other person could have seen an object in the path of the train,[20] or

Brousard, 69 Tex. 617, 7 S. W. 374.

Witnesses may testify to the depth of a hole in a city street, although they estimated the depth by mere visual observation, instead of actually making mechanical measurements. Miller *v.* New York, 104 App. Div. 33, 93 N. Y. Supp. 227.

A witness not an expert may testify as to how far a boy would be visible, though he had never himself made the experiment. Illinois Cent. R. Co. *v.* Swisher, 53 Ill. App. 411.

18. Hackett *v.* B. C. & M. R. Co., 35 N. H. 390; Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201; Fulsome *v.* Concord, 46 Vt. 135.

A witness who has testified that he does not know the distance between two places may nevertheless be permitted to tell the distance according to his best judgment. Linnehan *v.* State, 116 Ala. 471, 22 So. 662.

19. A non-expert witness may give his opinion or judgment, in an action against a railway company for killing plaintiff's live stock, as to how far the headlight of an engine throws a light forward and to the right and left of the track. St. Louis & S. F. R. Co. *v.* Thomason, 59 Ark. 140, 26 S. W. 598. See Chicago, St. P. & K. C. R. Co. *v.* Chambers, 68 Fed. 148, 15 C. C. A. 327.

In an action against a railroad company for the killing of cattle in the night-time, testimony of a witness that he had never ridden on an engine, but that he knew how far a common headlight lights up a track from standing by the side of engines in the night-time, and that such a light would light up for a specified distance, was competent. St. Louis, M. & S. E. R. Co. *v.* Shannon, 76 Ark. 166, 88 S. W. 851.

Distance Rear Lights of a Train May Be Seen. — Chicago, R. I. & P. R. Co. *v.* Martin, 59 Kan. 437, 53 Pac. 461.

Distance Switch Targets May Be Seen. — Illinois Cent. R. Co. *v.* Swisher, 53 Ill. App. 411.

20. Southern Indiana R. Co. *v.* Osborn (Ind. App.), 78 N. E. 248.

Evidence as to the distance it is possible to see a child the size of decedent, along or on the railroad track, in the direction from which the train by which she was killed was coming, is admissible in an action against the railroad company to recover for her death. Bias *v.* Chesapeake & O. R. Co., 46 W. Va. 349, 33 S. E. 240. *Contra.* — Hermes *v.* Chicago & N. W. R. Co., 80 Wis. 590, 50 N. W. 584.

A witness familiar with a railroad track may testify how far in each direction cattle on the track may be seen from a certain point by an engineer or other person. Gulf, C. & S. F. R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286; Gulf, C. & S. F. R. Co. *v.* Campbell, 49 Fed. 354, 1 C. C. A. 293; Gulf, C. & S. F. R. Co. *v.* Elledge, 49 Fed. 356, 1 C. C. A. 295; Gulf, C. & S. F. R. Co. *v.* Childs, 49 Fed. 358, 1 C. C. A. 297.

As to how far one could see a horse along the railroad track where it is impracticable to lay all the details before the jury, see East Ten-

the distance which a person upon or crossing a railroad track could have seen an approaching train.[21]

C. As to Hearing. — In determining the question as to whether a person was near enough to have overheard a conversation, the testimony of a witness who was present, giving his opinion in that regard, is properly admitted.[22]

D. Stopping Trains. — Distance Within Which a Train Can Be Stopped. — It is also held competent for witnesses, although not experts, to state their own observation and experience as to the distance within which a train or other conveyance[23] can be stopped, and indirectly, of course, the question of speed, as bearing upon negligence.[24] This is not permitted for the purpose of expressing an opinion, but to allow such witnesses to state their judgment based upon their own observation and knowledge.

nessee, V. & G. R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813.

21. Witnesses familiar with the situation at the time of a crossing accident are competent to state how far the track could be seen by one standing where the plaintiff stood, under the conditions that existed at the time of the accident. Chicago & E. I. R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865.

In Kansas City, M. & B. R. Co. *v.* Weeks, 135 Ala. 614, 34 So. 16, it was held that a question asked a witness, suing for injuries received at a crossing, "Where was the first point at which the train could be seen, on account of the bushes there at that point?" was not objectionable as calling for a conclusion.

22. Birmingham L. & P. Co. *v.* Mullen, 138 Ala. 614, 35 So. 701.

A witness who was sitting beside the agent of defendant in a buggy may testify as to declarations made by the vendor plaintiff, while the former was appearing to give his attention to the conversation, that in his opinion defendant's agent was within such distance that he might have overheard the conversation. Raymond *v.* Glover, 122 Cal. 471, 55 Pac. 398.

In McVay *v.* State, 100 Ala. 110, 14 So. 862, during a prosecution for using obscene and indecent language in the presence and hearing of the wife and daughter of the prosecuting witness, it was held proper to permit the prosecuting witness to give his opinion that from the distance the women were from the defendant at the time, they could have heard the language.

Distance an Engine Bell Can Be Heard. — A witness who has testified that he heard no bell rung on a locomotive on approaching a crossing, may also testify as to the distance he could hear a bell if rung. Seeley *v.* New York Cent. & H. R. R. Co., 8 App. Div. 402, 40 N. Y. Supp. 866.

23. Harmon *v.* Columbia & G. R. Co., 32 S. C. 127, 10 S. E. 877, 17 Am. St. Rep. 843.

As bearing upon the question of the motorman's control of his car, evidence as to the distance a car ran after it struck a person is properly admitted. Gray *v.* St. Paul City R. Co., 87 Minn. 289, 91 N. W. 1106; Chicago City R. Co. *v.* Tuohy, 196 Ill. 410, 63 N. E. 997.

On the question of negligence in failing to stop a car in time to prevent a collision, opinion evidence is admissible to show within what distance cars so propelled at such rate of speed had previously been stopped. Chicago City R. Co. *v.* McLaughlin, 146 Ill. 353, 34 N. E. 796.

24. McDonald *v.* Brooklyn Heights R. Co., 51 App. Div. 186, 64 N. Y. Supp. 480.

In St. Louis & S. F. R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225, it was held that a witness, though not an expert as to the speed of trains, may give his opinion as to the distance within which a train

2. The Opinions of Experts. — The distance within which trains, street-cars or other vehicles may be stopped or within which an object may be seen upon their path is a matter of science and skill upon which opinion evidence of duly qualified experts is clearly admissible.[25] This method of proving distance is more often met with in railway accident cases than in any other class of litigation. It must always appear that the proposed expert is not only familiar with the particular branch of science, but with the class of train, car or other subject under consideration.[26]

had run before it stopped, although he was unable to observe external objects.

25. Electric Cars. — The manner of running electric cars, their rate of speed, and the facility with which they can be stopped or handled, is not a matter of such common knowledge that a jury could judge as intelligently as one skilled in their use. It was therefore proper to resort to expert evidence. Howland *v.* Oakland Consol. St. R. Co., 110 Cal. 513, 42 Pac. 983.

Alabama. — Wallace *v.* North Alabama T. Co., 40 So. 89.

Georgia. — Atlanta R. & Power Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494.

Indiana. — Indianapolis St. R. Co. *v.* Seerley, 35 Ind. App. 467, 72 N. E. 169, 1034.

Kentucky. — South Covington, etc. St. R. Co. *v.* Weber, 26 Ky. L. Rep. 922, 82 S. W. 986.

Missouri. — Meng *v.* St. Louis & S. R. Co., 108 Mo. App. 553, 84 S. W. 213.

New Jersey. — Atlantic Coast E. R. Co. *v.* Rennard, 62 N. J. L. 773, 42 Atl. 1041.

New York. — Tholen *v.* Brooklyn City R. Co., 10 Misc. 283, 30 N. Y. Supp, 1081; McDermott *v.* Third Ave. R. Co., 44 Hun 107.

Texas. — Brown *v.* Rosedale St. R. Co. (Tex. App.), 15 S. W. 120.

Utah. — Riley *v.* Salt Lake R. Co., 10 Utah 428, 37 Pac. 681.

Virginia. — Norfolk R. & Light Co. *v.* Corletto, 100 Va. 355, 41 S. E. 470.

Washington. — Traver *v.* Spokane St. R. Co., 25 Wash. 225, 65 Pac. 284.

Steam Cars. — An expert witness may be asked, in an action for the death of a track repairer, while walking on or along to his place of labor, for his opinion as to the distance within which the engine could have been stopped when running at the rate of speed at which it is shown to have been running when it struck the deceased, to show not only the speed at which the engine was going, but also to show that the engineer did not exercise due care in trying to avert the injury after he discovered the dangerous position of deceased. Schlereth *v.* Missouri Pac. R. Co., 115 Mo. 87, 21 S. W. 1110; Maher *v.* Atlantic R. Co., 64 Mo. 267; Eckert *v.* St. Louis R. Co., 13 Mo. App. 352; O'Neil *v.* Dry-Dock, E. B. & B. Co., 129 N. Y. 125, 29 N. E. 84; Mantel *v.* Chicago, M. & St. P. R. Co., 33 Minn. 62, 21 N. W. 853; Meagher *v.* Cooperstown & C. V. R. Co., 75 Hun 455, 27 N. Y. Supp. 504; Grimmell *v.* Chicago & N. W. R. Co., 73 Iowa 93, 34 N. W. 758.

26. A witness was not properly qualified to testify as an expert as to the time and distance within which a particular car could be stopped, where it is not shown that he had at any time any experience with, or made any observation of a car similarly equipped. Columbus R. *v.* Connor, 27 Ohio C. C. 229; Wise Terminal Co. *v.* McCormick, 104 Va. 400, 51 S. E. 731; Bliss *v.* United Traction Co., 75 App. Div. 235, 78 N. Y. Supp. 18; Geist *v.* Detroit City R., 91 Mich. 446, 51 N. W. 1112.

It is error to permit a witness who is not a railroad man and who has no special experience in the matter to testify as to the distance within which a train can be stopped. Louisville & N. R. Co. *v.* Foard, 20 Ky. L. Rep. 646, 47 S. W. 342; Boring *v.* Metropolitan St. R. Co., 194

3. Relative Weight of Expert and Ordinary Opinion. — The opinions of both experts and non-experts should have weight according to their opportunities and qualifications.[27]

Mo. 541, 92 S. W. 655; Alabama G. S. R. Co. *v.* Burgess, 119 Ala. 555, 25 So. 251; Mammerberg *v.* Metropolitan St. R. Co., 62 Mo. App. 563.

Vision. — A witness experienced in railroading as an engineer, and who knew the train which caused a collision resulting in the death of plaintiff's intestate, and was familiar with the track and grade of the crossing, may give his opinion as to such grade, the distance an object can be seen in front of a headlight, and the distance within which the train can be stopped. Olson *v.* Oregon Short Line R. Co., 24 Utah 460, 68 Pac. 148; Missouri. K. & T. R. Co. *v.* Jones, 35 Tex. Civ. App. 584, 80 S. W. 852.

A seaman familiar with a certain harbor may be asked how far a bright light in the window of a ship's cabin can be seen. Case *v.* Perew, 46 Hun 57.

It has been held not improper to ask an experienced engineer as to how far a headlight could be seen. Southern R. Co. *v.* Bonner, 141 Ala. 517, 37 So. 702.

Generally. — In New York C. & St. L. R. Co. *v.* Grand Rapids I. R. Co., 116 Ind. 60, 18 N. E. 182, it was held that a competent expert may give an opinion as to the distance at which it is safe to stop before going upon a crossing.

O'Neil *v.* Dry-Dock E. B. & B. R. Co., 129 N. Y. 125, 29 N. E. 84. It is competent for a witness who has driven loaded trucks for years to state within what time and space a loaded truck could be stopped, the court, however, observing that this class of testimony was not to be encouraged.

It is proper in an action for damages to a bicycle from a collision with a wagon, to permit a witness who owns a bicycle which he brought into court, to give his opinion as an an expert as to the space required in which to run a bicycle and the distance within which it would be possible to stop it. Taylor *v.* McGrath, 9 Ind. App. 30, 36 N. E. 163.

Evidence that a witness has been a physician and surgeon for seventeen years, has seen a great many gun-shot wounds and powder marks, and knew the distance between the weapons and the body hit, entitles him to speak as an expert as to the distance from which a given pistol would produce powder marks on the skin. People *v.* Hawes, 98 Cal. 648, 33 Pac. 791. But see, *contra*, People *v.* Lemperle, 94 Cal. 45, 29 Pac. 709.

27. The mere opinion of a locomotive engineer that a heavy passenger train, made up of a locomotive and six cars, and running down grade at the rate of forty-five miles an hour, could be stopped within a distance of 100 yards, is not sufficient to overcome the positive and uncontradicted evidence of the engineer and fireman upon the identical train that everything was done which possibly could be done to stop it, and that notwithstanding such efforts it was not stopped within a distance of over four hundred yards. Atlanta & C. Air-Line R. Co. *v.* Gravitt, 93 Ga. 369, 20 S. E. 550; Truesdell *v.* Erie R. Co., 114 App. Div. 34, 99 N. Y. Supp. 694.

SPANISH GRANTS.—See Public Lands.

SPECIAL ASSESSMENT.

By Glenda Burke Slaymaker.

I. THE ASSESSMENT PROCEEDINGS.

1. Presumptions and Burden of Proof. — A. In General. — In a proceeding for the confirmation of an assessment, the municipality has the burden to establish that the assessment is not in excess of the benefits received.[1] It is generally provided, however, that the reports, findings, or other records made by the proper officers are *prima facie* evidence of such fact,[2] and of the compliance with cer-

1. Chicago & N. P. R. Co. *v.* Chicago, 172 Ill. 66, 49 N. E. 1006; Fagan *v.* Chicago, 84 Ill. 227.

2. **Report of Commissioners.** — A *prima facie* case is made out by the introduction of the commissioners' report specifying the assessments against each particular property. Chicago & N. P. R. Co. *v.* Chicago, 172 Ill. 66, 49 N. E. 1006; Chicago, R. I. & P. R. Co. *v.* Chicago, 139 Ill. 573, 28 N. E. 1108; Chicago & N. P. R. Co. *v.* Chicago, 172 Ill. 66, 49 N. E. 1006; Lovell *v.* Drainage Dist., 159 Ill. 188, 42 N. E. 600.

Failure to assess a street railway occupying the street improved will not alone impeach the assessment unless such railway be shown to be benefited. Chicago, R. I. & P. R. Co. *v.* Chicago, 139 Ill. 573, 28 N. E. 1108.

Though in a proceeding to assess benefits and damages from a street extension the city has the burden to show the correctness of the assessment, the report of the commissioners in that regard makes out a *prima facie* case and casts upon the objectors thereto the burden of proving its

tain formal preliminary requirements of the statute.[3] All reasonable presumptions in the ascertaining of the benefits accruing to the property assessed and as to the regularity of the proceedings[4] will be indulged in favor of the municipal authorities.

incorrectness, and they must show by a preponderance of the evidence that a part of the property assessed was charged with a disproportionate part of the cost of the improvement. Fagan *v.* Chicago, 84 Ill. 227.

3. Recommendation of Board of Local Improvements. — When the statute provides that the recommendation of the board of local improvements that an improvement shall be made is *prima facie* evidence that all preliminary requirements have been complied with, the objector, on confirmation, has the burden to show a non-compliance with the statutory requirements preliminary to the passage of the ordinance. Wells *v.* Chicago, 202 Ill. 448, 66 N. E. 1056.

Appointment of Surveyors. — When a court is given jurisdiction in the matter of laying out a highway, to appoint surveyors, if the proceedings are in conformity with the statutes relating to this subject-matter, jurisdiction will always be presumed to be vested in such court, and the burden is upon him by whom such proceedings are attacked to establish the want of jurisdiction. Garretson *v.* Baker, 65 N. J. L. 184, 46 Atl. 705.

Notice of Hearing. — When the statute provides that the recommendation of a public improvement by the board having charge thereof shall be *prima facie* evidence of a compliance with the preliminary requirements of the statute, it will be presumed, in the absence of evidence to the contrary, that notice of the public hearing on the necessity for the proposed improvement was given as by the statute required, and that the other requirements of the statute have been observed. Harrigan *v.* Jacksonville, 220 Ill. 134, 77 N. E. 85.

4. Laying Out Assessment District. — When the city council is given the authority to define by its ordinance the district benefited by a proposed improvement, a reasonable presumption will be indulged in favor of such determination. When, in such circumstances, the court is given jurisdiction on appeal to review the reasonableness of such ascertainment, the court may not, without evidence, determine that any property in the ascertained district was not benefited. In such a case the court says: "The legislature, in which the taxing power is vested, has delegated to the common council of the City of Kansas exclusive power to prescribe and establish the districts in which the property may be benefited by grading streets and alleys, and the courts have no power to enlarge or contract them. No such power is given by the charter, and none exists independent of it. The discretion is intrusted to the council alone. Keith *v.* Bingham, 100 Mo. 300, 13 S. W. 683; Kansas City Grading Co. *v.* Holden, 107 Mo. 305, 17 S. W. 798; Johnson *v.* Duer, 115 Mo. 366, 21 S. W. 800. The only supervising control over the action of the council given to the courts, under the foregoing proviso, is to declare the district unreasonable, and to nullify the whole proceedings. This power the court doubtless had, under its general jurisdiction, and in a direct proceeding for that purpose. This charter provision grants the power and jurisdiction in connection with the proceedings for the assessment of damages, but the jurisdiction is limited to declaring the district unreasonable, and it has no power to establish another, either directly or indirectly. It does not follow that every piece of property within a district, as established by ordinance, is conclusively bound for even nominal benefits. The charter provides that 'no piece of private property shall be assessed with benefits in any amount in excess of the actual benefits which the same will receive by reason of the proposed improvement.' The question whether any piece of such property received benefits is one to be determined by the jury, under proper instructions from the court. The

B. On Appeal or Review. — Upon an appeal to the courts from the municipal assessing authorities for the revision of an assessment the objector has the burden to show his assessment to be in excess of the benefits received or relatively disproportionate to other assessments for the improvement.[5] And it would seem that clear proof is required to overcome the assessment made by the local assessing authorities.[6] When the proceedings are brought into re-

duty of the court in instructing the jury, under the proceedings, is the same as in other jury trials; and if it appears conclusively, from the evidence, that any property is not benefited, the jury should be instructed to assess no benefits against it. The district will not necessarily be unreasonable simply for the reason that certain property may not be benefited by the improvement. Its unreasonableness is a matter for the direct and special finding and determination of the court. We think the court committed error in refusing to hear evidence as to whether or not any particular piece of property was benefited. The court had no right to assume, without evidence, that any property in the district was not specially benefited. The presumption, on the contrary, was in favor of the action of the council in prescribing the district. If the evidence had been admitted, and had shown conclusively, and without conflict, that the property excluded by the court from assessment was not in fact benefited, there would have been no substantial objection to the instruction." *In re* Wyandotte & Central Sts. (Mo.), 23 S. W. 127.

Omission To Assess Part of Undivided Tract. — When part only of an undivided tract of land has been assessed it will be presumed, to sustain the assessment, that this was because only the part assessed was benefited. Mock *v.* Muncie (Ind.), 32 N. E. 718.

As to Omitted Property — To support the validity of an assessment the burden is not on the city to show the ground upon which other property on the line of the particular improvement is exempt from assessment. It will be presumed that it was properly omitted, until the contrary is shown. Storrs *v.* Chicago, 208 Ill. 364, 70 N. E. 347.

In the absence of evidence to show the location of different streets upon which sidewalks are built, the fact that property on one street was assessed for a part of the cost of constructing the walks upon the other will not overcome the presumption of proper official action. Storrs *v.* Chicago, 203 Ill. 364, 70 N. E. 347.

Omission of Condemned Portion of Land. — Where a part of a lot is condemned for a street it will be presumed that, in estimating the benefits to the lot, the portion taken for a street was excluded. Waggeman *v.* North Peoria, 155 Ill. 545, 40 N. E. 485.

5. On Appeal — Dickson *v.* Racine, 65 Wis. 306, 27 N. W. 58.

The assessment roll is *prima facie* evidence to sustain an assessment on appeal in a confirmation proceeding, and the objector has the burden to show his assessment of benefits to be excessive or relatively disproportionate. Lovell *v.* Drainage Dist., 159 Ill. 188, 43 N. E. 600.

Revision of Assessment. — On revision of a betterment assessment the petitioner has the burden to show, by a fair preponderance of the evidence, that the assessment against him is unjust. Beals *v.* Brookline, 174 Mass. 1, 54 N. E. 339.

6. Clear Proof Required To Overcome Assessment. — Only clear proof of great force will justify the court on appeal from commissioners who have assessed benefits in concluding that the assessment is erroneous. It must appear that injustice has been done or that the assessment is wrong. In one case the court says: "The other reasons urged by these prosecutors for setting aside these assessments may be grouped together for the purposes of consideration. They are that the assessments are for a greater amount than the benefits received; that they are unequal, and

view by *certiorari* or other similar proceedings the complainant has the burden to show, to warrant the granting of relief, that some rule of law has been violated or that injustice has been done him.[7]

disproportionately made; and that the commissioners did not adopt a just, uniform, and proportional rule of assessment. The result contended for is that the prosecutors are compelled to bear more than their just share of the improvement, or, in other words, they are assessed to a greater amount than the benefits received by them. The report of the commissioners sets out distinctly 'that they have considered that each of the said lots or parcels, and the proportion of assessable benefits that each of said lots or parcels were actually benefited by the improvement, and that each were benefited by said improvement to the amount assessed upon it, and that they have assessed each in proportion to the benefit received, and no more than it was benefited by the improvement.' As against this official declaration, formally made in accordance with the statutes regulating the making of this assessment, only clear proof of great force will justify the court in concluding that the assessment is erroneous. The assessment cannot be interfered with unless the evidence against it be such as clearly carries conviction that it is wrong, and that an injustice has been done. Raymond *v.* Rutherford, 55 N. J. L. 441, 27 Atl. 172; Simmons *v.* Passaic, 55 N. J. L. 485, 27 Atl. 909. A review of the evidence shows very clearly the great difficulties which beset the commissioners in making this assessment, but it does not, in any part, successfully assail and overthrow the judgment of the commissioners. The evidence on the part of the prosecutors, giving full force and effect to it, does not reach this result. It consists, mainly, in the expression of opinion that the property values have not been enhanced to the amount of the assessment; but these opinions are not at all sustained by the facts stated in any of the evidence. It is needless to state that this evidence is not of the character to induce the court to declare the assessment invalid." Moran *v.* Jersey City, 35 Atl. 950, 58 N. J. L. 653.

The judgment of commissioners of assessment as to the area benefited by an improvement, and the amount of such benefits, can only be overcome by clear and convincing evidence. Jelliff *v.* Newark, 48 N. J. L. 101, 2 Atl. 627; Jelliff *v.* Newark, 49 N. J. L. 239, 12 Atl. 770.

7. On Certiorari. — It will be presumed that the board of public works has exercised its proper judgment in levying an assessment for any particular local improvement. Until something appears in the record itself which amounts to and demonstrates a mistake of fact, and of an affirmative nature by way of evidence to the contrary, the action of the board is final and conclusive except in case of fraud or when it appears that an illegal principle or erroneous rule of law has been applied. State *v.* District Court, 80 Minn. 293, 83 N. W. 183.

Rule of Law Violated or Injustice Done. — It requires more than a preponderance of evidence, when the report of commissioners has been ratified by the city council upon objections made and heard by them, to set it aside for doubtful benefits. It must appear that some rule of law has been violated or that injustice has been done. Said the court in such a case: "The further reason that the majority of the common council did not consider the assessments against the lands of the prosecutors to be just is contradicted by their votes in confirmation of the reports of the commissioners; and those who have testified to these secret opinions, in opposition to their votes, are in the position of jurors, who will not be allowed to give evidence to impeach their deliberate official action. The policy of such exclusion has long been decided, and for obvious reasons." The court also says: "The objections that the assessments are in excess of the benefits received, and are not in pro-

C. Origination of Proceedings. — When under the statute a board of local improvement alone has the power to originate an improvement, the presumption is a conclusive one that the board in originating a scheme of improvement and adopting an ordinance therefor acted on its own motion, and evidence to the contrary is therefore incompetent.[8]

D. Petition for or Consent to Improvement. — When the consent of the owners of the property affected by an improvement, or of a certain proportion of them, that an improvement shall be made, is required, as a jurisdictional fact, in a proceeding for the confirmation of an assessment for the improvement, the municipal authorities have the burden affirmatively to prove such statutory

portion to benefits, and that all the lands benefited have not been assessed, are founded on the opinions of witnesses who testify on these points. These are met by the unanimous report of the three commissioners, and the testimony of witnesses who substantially agree with them. The assessments made on High street and Ascension street appear to have been made for doubtful benefits, in some cases, if not in all. But the opening of a direct thoroughfare to Main street may be an advantage to these streets which are not in the direct line of the improvement. The commissioners appointed under the statute to determine these matters have acted under their solemn obligation; the common council have ratified their action; and they are sustained by witnesses who have had experience in selling real estate, and estimating its value and advantages of location. It requires more than a mere preponderance of proof, under these circumstances, to set aside the report of commissioners, and the action of the common council thereon. It must appear that some rule of law has been violated, or that the assessments are so excessive or so unreasonable that some rule of law must have been disregarded, through prejudice or misjudgment. It must be shown clearly that some injustice has been done before an assessment will be set aside on the facts." Hegeman *v.* Passaic, 51 N. J. L. 109, 16 Atl. 62.

Assessment Presumed To Be on Basis of Benefits. — It is presumed that an assessment is made on the basis of benefits rather than arbitrarily upon a front-foot basis. Nor will this presumption be overturned by evidence that the improvement included paving the street intersections on one-half of the work. State *v.* District Court, 80 Minn. 293, 83 N. W. 183.

See *infra*, this article, "Relief from Assessments."

8. Board Conclusively Presumed To Have Originated Proceedings. In such a case the court says: "It was contended that the improvement originated with the city council and not with the board of local improvements, and the appellants upon the hearing, to sustain such contention, sought to make proof that the city council, by resolution, ordered the board to prepare and present an ordinance for the improvement, and that in pursuance of said order proceedings for the improvement were set in motion by the board. No power is conferred upon the city council to direct, by resolution or otherwise, the board to originate an improvement, or to prepare and present to the city council for its consideration an ordinance for a local improvement, and such resolution of the city council was absolutely void. The board has power to originate a scheme for a local improvement without petition and of its own motion (Givins *v.* Chicago, 186 Ill. 399, 57 N. E. 1045), and all ordinances for local improvement to be paid for, wholly or in part, by special assessment or special taxation, must originate with said board. The presumption, therefore, is conclusive that the board, in originating the scheme for this improvement and in originating

consent.[9] If a paper, purporting to be a written consent, be signed by the agent of a property owner, the agency must be proved.[10] Nor is such consent, when not otherwise established, aided by the fact that the municipal authorities acted upon such a paper as constituting consent, or by the consent of the city proper, the action of the city being independent of the citizen.[11] Under the Illinois statute a *prima facie* case for the confirmation of an assessment is made out by the introduction of copies of the ordinance for the improve-

the ordinance therefor, acted upon its own motion or treated the resolution of the city council as a mere petition, and not as a binding order from the city council which required the board to act, and that the improvement and ordinance were originated by the board, and not by the city council, and the court did not err in excluding said proof." Walker *v.* Chicago, 202 Ill. 531, 67 N. E. 369.

9. Municipality Has Burden To Prove Statutory Consent of Property Owners. — In Thorn *v.* West Chicago Park Comrs., 130 Ill. 594, 22 N. E. 520; Cummings *v.* West Chicago Park Comrs., 181 Ill. 136, 54 N. E. 941.

10. Proof of Agency. — Burden on City. — Thorn *v.* West Chicago Park Comrs., 130 Ill. 594, 22 N. E. 520.

Where Subsequent Act Made Prima Facie Proof of Precedent Acts. — Want of authority in an agent to sign a petition for an improvement will not be presumed as against a statute making a subsequent step in the proceedings *prima facie* evidence of the compliance with preliminary requirements. But if such fact be relied upon it must be proved by the party relying upon it. In the case cited the court says: "Appellants admitted that the owners of 6953.48 feet signed the petition and gave the required consent, but as to the remainder objected that the signers were either not the owners or had no authority to sign the petition. One of these signers was the Peoria & Eastern Railroad Company, the owner of property abutting on the street a distance of 481 feet. The petition was signed in the name of the railroad company, 'J. A. Barnard, General Manager.' There was no evidence of a want of power in Mr. Barnard, who was proved to be the general manager of the railroad company, to sign the name of the company; and the only claim was that he had no implied power, as a matter of law, to do such an act, in the absence of proof of express authority from the company. The court was asked to presume that the signature to the petition was unauthorized, while the presumption created by the statute is to the contrary. It is not necessary that the authority of the agent to sign such a petition should accompany the petition or appear upon the face of it. Tibbetts *v.* Railway Co., 153 Ill. 147, 38 N. E. 664. Appellants took upon themselves the burden of proof to show a want of authority, and if it is true that express authority in the by-laws, or otherwise, was required, it was incumbent upon appellants to prove that it did not exist. Adding this frontage of 481 feet to the conceded frontage, as above stated, the petition embraced more than half the frontage on the street, and was sufficient." McVey *v.* Danville, 188 Ill. 428, 58 N. E. 955.

11. In such a case the Illinois court says: "The burden was upon the commissioners to show consent of the required number of owners, and to do this, in this case, it was necessary to show that authority to execute the consent was given by the owner on whose behalf it purported to be executed. Henderson *v.* Mayor, etc., 8 Md. 352. Nor is the consent of all aided by the fact that the park commissioners acted upon the paper introduced in evidence, or by the consent of the city of Chicago that the parts of the streets named might be taken by the commissioners for a boulevard. The action of the city is wholly independent of that of the property owners. And while the park commissioners must, in the first

ment, the recommendation thereof by the board of local improvements and of the estimate of the cost of the improvement. Thereupon the burden of proof to show that a petition for the improvement, upon which the proceedings rest, was not presented, is put upon the objector to the confirmation of the assessment.[12]

E. Improvement Ordinance or Resolution. — It is necessary for a municipal corporation, in order to obtain a judgment of confirmation of an assessment, to prove that an ordinance,[13] or a reso-

instance, pass upon the fact of consent by the owners of abutting property, and determine for themselves whether those owning a majority of such property have consented to their appropriation of the street for the purposes contemplated by the act, such determination can have no effect when their jurisdiction is challenged in endeavoring to carry out the powers conferred by the statute. The power conferred upon the park board affects and impairs the right of the citizens, and may (and in the case of the minority of holders of abutting property does) incumber his property without his consent, and may arbitrarily impose onerous burdens for which there is no relief or redress. The legislature has interposed the safeguard of requiring the consent of the owners of more than one-half of the property to be affected, upon the presumption, no doubt, that what will be of benefit to the greater portion will not unduly prejudice the lesser part. And, when the commissioners sought confirmation of their assessment upon appellant's property under the power conferred by the statute, it was incumbent upon them to show compliance with the law, by which alone they obtained jurisdiction to impose the burden. This they have not done. Rex *v.* Mayor, 4 Burrows 2244; Smith *v.* Madison, 7 Ind. 86; Clark *v.* Washington, 21 Wheat. 40; and *supra*." Thorn *v.* West Chicago Park Comrs., 130 Ill. 594, 22 N. E. 520.

12. Hammond *v.* Leavitt, 181 Ill. 416, 54 N. E. 982; Richards *v.* Jerseyville, 214 Ill. 67, 73 N. E. 370; McVey *v.* Danville, 188 Ill. 428, 58 N. E. 955.

13. Proof of Ordinance by City Is Required. — Springer *v.* Chicago, 159 Ill. 515, 42 N. E. 868; Lindsay *v.* Chicago, 115 Ill. 120, 3 N. E. 443; Cook *v.* Independence (Iowa), 110 N. W. 1029.

In Lindsay *v.* Chicago, 115 Ill. 120, 3 N. E. 443, the court, considering the proposition stated in the text, says: "This is an appeal from a judgment of the county court of Cook county, confirming a special assessment. In the petition presented in the county court, in which the city of Chicago asks to have the assessment confirmed, it is alleged that on the thirteenth day of November, 1882, the city council passed an ordinance providing that Canalport avenue, from Canal street to Halstead street, be paved with a certain specified pavement. What purports to be a copy of the ordinance is attached to the petition. On the day fixed by the court for those interested to file objections to the confirmation to the assessment, appellant appeared and objected in writing to the confirmation of the assessment, upon the alleged ground that no ordinance was ever passed by the city council of Chicago directing or authorizing the paving of Canalport avenue, as alleged in the petition. On the hearing, the petitioner offered in evidence a certified copy of the ordinance set out in the petition, and the appellant objected to the reading of the certified copy in evidence because there was no evidence that the ordinance had been passed by the city council of Chicago. The court overruled the objection and entered a judgment of confirmation. It was essential for the city, in order to obtain a judgment of confirmation, to aver and prove that an ordinance, authorizing the improvement had been passed. Section 19 of article 9 of the city and village act provides:

lution[14] where it is authorized in lieu of the ordinance, has been adopted authorizing the improvement, as the ordinance or such a resolution is the very foundation of the proceeding.

F. Location of Improvement Within Corporate Limits. Though the ordinance does not so state, it will be presumed that a proposed improvement is located within the city limits.[15]

G. Grade of Street Improved. — In a proceeding for the confirmation of an assessment for a street improvement, the city has the burden to show the establishing by the proper authority of the grade of the street so improved.[16]

H. Approval of Report of Commissioners. — In a proceeding for the confirmation of an assessment, wherein the report of commissioners appointed to estimate the cost of the improvement is required to be approved by the board of trustees, before proceedings in court for assessment are begun, the approval of the report of

'Whenever such local improvements are to be made wholly or in part by special assessment, the said council in cities . . . shall pass an ordinance to that effect, specifying therein the nature, character, locality, and description of such improvement.' Rev. St. 1874, p. 234. An ordinance providing for the improvement was the foundation of the proceeding, and the passage of an ordinance could not be dispensed with."

14. Cook *v.* Independence (Iowa), 110 N. W. 1029.

15. Philadelphia & R. C. & I. Co. *v.* Chicago, 158 Ill. 9, 41 N. E. 1102; Stanton *v.* Chicago, 154 Ill. 23, 39 N. E. 987; Chytraus *v.* Chicago, 160 Ill. 18, 43 N. E. 335; Meadowcraft *v.* Kern, 154 Ill. 416, 40 N. E. 442.

16. Brewster *v.* Peoria, 180 Ill. 124, 54 N. E. 233; Claflin *v.* Chicago, 178 Ill. 549, 53 N. E. 339; Chicago & N. P. R. Co. *v.* Chicago, 174 Ill. 439, 51 N. E. 596.

Establishment of Grade Subsequently. — In Chicago & N. P. R. Co. *v.* Chicago, 174 Ill. 439, 51 N. E. 596, the court said: "Upon the trial, however, of the case, the appellant proved that no ordinance was ever passed by the city council of the city of Chicago fixing the grade of West Taylor street along the line of the proposed improvement. Whether it devolved upon the appellee, the city of Chicago, to prove, in the first place, the existence of the ordinance establishing the grade, as referred to in the ordinance providing for the improvement, or whether it was the duty of the appellant to show the absence of such ordinance, it is not necessary here to inquire. It is sufficient to say that the proof showing such absence was made by the appellant. To rebut this proof, appellee introduced in evidence an ordinance, passed by the city of Chicago on June 21, 1897, and approved June 21, 1897, by the mayor. This ordinance provided that the grade of West Taylor street, between Kedzie and California avenues, in Chicago, should be on certain lines; and it recited in its body that it was intended thereby to remove any ambiguity that might exist in the ordinance passed by the city council in January, 1897, being the same ordinance providing for the improvement, and heretofore designated as having been passed on March 15, 1897. The introduction of the ordinance of June 21, 1897, was objected to by the appellant, upon the ground that it was passed subsequently to the passage of the ordinance of January or March, 1897, when the ordinance providing for the pavement of the portion of West Taylor street above indicated was passed. The common council has no power to cure a defect in the original ordinance by creating after its passage a street grade which did not exist at the time of its passage."

the commissioners may be presumed from the fact that the trustees ordered brought and did bring suit for the confirmation of the assessment.[17]

2. Admissibility of Evidence. — A. THE PROCEEDINGS IN GENERAL. — a. *The Improvement Ordinance.* — On an appeal to the circuit court from an assessment by the city commissioners, the ordinance authorizing the improvement is not only competent but necessary evidence to the confirmation of the assessment.[18]

b. *Recitals in Ordinance or Other Proceedings. — Effect as Evidence.* — The recital in an ordinance providing for an improvement, that commissioners having control of the improvement had submitted to the corporate authorities a petition of the requisite number of owners of the lands abutting on the improvement, and that they had found the petition to be subscribed by the requisite number is competent and sufficient *prima facie* evidence that the proper petition for the improvement was before the corporate authorities.[19]

17. Ewart *v.* Western Springs, 180 Ill. 318, 54 N. E. 478.

18. Mock *v.* Muncie (Ind.), 32 N. E. 718.

19. Farrell *v.* West Chicago Park Comrs., 182 Ill. 250, 55 N. E. 325; Thorn *v.* West Chicago Park Comrs., 130 Ill. 594, 22 N. E. 520.

In Cummings *v.* West Chicago Park Comrs., 181 Ill. 136, 54 N. E. 941, the court says: "The effect of the proviso hereinbefore quoted was to prohibit such corporate authorities from passing the ordinance in question unless petitioned to do so by the owners of a majority of the land fronting on the proposed improvement. Such petition was a prerequisite to the power of the corporate authorities to enact the ordinance. It was, therefore, of necessity, the official duty of such corporate authorities to ascertain, before assuming to act on the question of the adoption of the ordinance, whether a petition which fulfilled the requirements of the statute was before them. It appears from the recitations of the ordinance that a petition purporting to be that which the law demanded was laid before the corporate authorities and that that body entered upon an official investigation in order to ascertain whether the petition met the requirements of the law, and the ordinance sets forth the result of such official action taken by such authorities. The ordinance recites that said corporate authorities, upon such official investigation, found the petition contained the signatures of the owners of a majority of the land fronting on said Douglas boulevard so proposed to be improved. This recitation we think properly receivable in evidence as *prima facie* proof of the facts recited. The corporate authorities of the town were by the statute invested with sole power in the premises, and were erected by the statute into an official body charged with the duty of acting impartially, in their official capacity, as between the park commissioners and the owners of private property which would be subject to the burden of special assessments in the event the improvement as proposed by the park commissioners should be carried into completion. The official duty first devolving upon the corporate authorities was to ascertain whether the owners of a majority of the land fronting on the proposed improvement had petitioned for the improvement. They discharged that duty. The clerk of the town was by said section 3 of the act expressly authorized and required to keep a record of the proceedings of said corporate authorities, and record the ordinances adopted by them. In the same extent the clerk of a city or village is required and authorized to keep the records of the official acts

Until the absence of such a petition is accounted for, secondary evidence of its contents is not competent.[20] Recitals in the appropriate proceedings of the assessing authorities are likewise competent evidence of the giving of the notice required by the statute.[21] The recital in the judgment of confirmation of a compliance with the statute as to the giving of notice is not conclusive of the fact but may be overcome, in a proceeding to review the confirmation, by evidence showing notice not to have been in fact given.[22]

of the city council or the village board in proceedings for making improvements to be paid for by special assessments."

20. Best and Secondary Evidence. — Farrell *v.* West Chicago Park Comrs., 182 Ill. 250, 55 N. E. 325.

21. Supervisors *v.* Magoon, 109 Ill. 142; Wells *v.* Hicks, 27 Ill. 342. In Shinkle *v.* Magill, 58 Ill. 422, the court says: "It is made the duty of the commissioners, before determining to lay out any new road or to alter or discontinue any old one, to fix upon a time and place to hear any reasons which may be offered for or against the establishment or discontinuance of such road. Three notices of the time and place must be posted in three of the most public places in the town at least eight days previous to the time of meeting. There is no evidence of such notice in this record, except the recital in the final order establishing the road. The posting of these notices is a positive requirement of the statute, and must be complied with. The question is, what is sufficient evidence of compliance? The final order, signed by the commissioners and deposited with the town clerk, does particularly specify that three notices were posted in three of the most public places in the town eight days previous to the time of meeting. As we construe the statute, there can be no higher or better evidence of the fact."

In Chicago Union Trac. Co. *v.* Chicago, 202 Ill. 576, 67 N. E. 383, the court says: "Counsel for the appellants contend that the record of the proceedings before the board of local improvements should contain recitals of fact showing that notices had been given of the time and place of the public hearing, as is required by the provision of section 7 of the Act of 1897 (Laws 1897, p. 104). The record of the board in the case at bar recites that upon evidence submitted, the board found that notices of said public meeting had been mailed pursuant to statute. The recommendation of the board of local improvements for the passage of the ordinance, by force of the statute, established *prima facie* that all of the preliminary requirements of the statute had been performed. Laws 1897, Par. 9, p. 105. One of such requirements was the giving of notices to property owners of the time and place of the public hearing, and the recital in the record made by the board had no tendency whatever to overcome such *prima facie* evidence that notices as required by the statute had been given, but, on the contrary, served to strengthen such statutory presumption. It is not essential that the record of the board of local improvements should record the facts relative to the giving of notice to each property holder."

22. Recital as to Notice Not Conclusive. — In the case of White *v.* Chicago, 188 Ill. 392, 58 N. E. 917, the court on this question says: "In the judgment of confirmation it is recited that it appeared to the court that 'all of the requirements of the law as to posting and sending notices to the owners of property assessed has been complied with, and that due notice as required by law had been given of the application, and of the making and return of the assessment, and of the time of the final hearing.' This is a direct, not a collateral, attack upon the judgment, and the mere recital in the judgment of compliance with the

c. *Custom and Usage. — To Render Ordinance Definite.* — When an improvement ordinance is on its face indefinite in prescribing the material for an improvement, parol evidence may be received to show that in the local community the term used has a definite and well understood meaning with reference to such an improvement.[23]

d. *Proceedings for Re-Assessment.* — In a proceeding for a supplemental assessment the original ordinance providing for the improvement may not be impeached.[24] Upon assessment the question whether the original confirmation proceeding is still pending is one of fact to be shown by the evidence.[25]

In a Proceeding for the Additional Assessment of benefits resulting from a drainage improvement, the petition in the prior proceedings for the assessment of benefits to the same lands from the same improvement and the orders made thereto are incompetent on behalf of the objectors.[26]

e. *Competency of Subsequent Amendatory Ordinance.* — Upon the hearing of a petition for the confirmation of a special tax levied under an invalid ordinance, to which objections are made, an amendatory ordinance, passed after the cause is heard, to conform such ordinance to the law, is not admissible.[27]

statute as to the posting of the notices cannot prevail as against the affirmative proof in the record to the contrary. Law *v.* Grommes, 158 Ill. 492, 41 N. E. 1080. A material distinction to be drawn between the case cited and the case of Bradley *v.* Drone, 187 Ill. 175, 58 N. E. 304, 79 Am. St. Rep. 214, is that in the latter case the decree there involved was attacked collaterally."

23. Thus it may be shown that the expression "flat stones," is well understood and perfectly definite in the local community. Chicago *v.* Holden, 194 Ill. 213, 62 N. E. 550.

It may be shown that the word "stone" is in the local community understood to mean "limestone." Shannon *v.* Hinsdale, 180 Ill. 202, 54 N. E. 181.

Sufficiency of Evidence. — Evidence examined and held to show that the term "flat stones" as used in an improvement ordinance describing the material for bedding the curbstones was understood by contractors, at the place of the improvement, to mean limestone blocks about six inches thick and twelve to sixteen inches square and as nearly uniform as are obtainable, so as to render certain the term "flat stones," and thereby sustain the ordinance. Beckett *v.* Chicago, 218 Ill. 97, 75 N. E. 747.

24. Thus evidence to show that, in the first and original resolution for the improvement passed prior to the passage of the first ordinance, there was no itemized estimate of the cost of the improvement incorporated therein, is incompetent. Conway *v.* Chicago, 219 Ill. 295, 76 N. E. 384.

25. Cratty *v.* Chicago, 217 Ill. 453, 75 N. E. 343.

26. Records and Papers in Prior Proceedings Not Competent. — Lovell *v.* Drainage Dist., 159 Ill. 188, 42 N. E. 600.

27. In the case of Western Springs *v.* Hill, 177 Ill. 634, 52 N. E. 959, where such proof was offered, the court says: "It is claimed, however, that the difficulty was cured by the passage of an amendatory ordinance, making section 4 of the original ordinance conform to the law. The objections filed in this case, and the argument of counsel thereupon, were heard by the court on December 4, 1897, and the matter was taken under advisement by the court until December 13, 1897. On December 11, 1897, the president and board of trus-

f. *Parol Evidence to Support Defective Records.* — If the ordinance providing for an improvement omit to provide for the connecting of the improvement with another so as to render it of utility, parol evidence may be received to show the purpose of the municipal authorities to render the improvement of use by the taking of proper action in the matter.[28]

The Report of a Committee of those designated under an ordinance to make an estimate and report, in writing, of the cost of a proposed improvement, must show the presence and action of all three. If there is a mere majority report, this fact should be shown by the report as the signatures of two only of the committee will not on *a direct attack* raise the presumption that the third one was present and acting.[29] The court, after a judgment of confirmation of an assessment, can not at a subsequent term hear evidence of, and remedy, the defect in such a report.[30]

g. *Proof of Service.* — It is the fact, and not the formal proof, of notice that is material in a special assessment proceeding, and evidence, apart from the formal statutory proof, unless the statutory proof is made exclusive,[31] may be received for such purpose, unless

tees of the village passed the amendatory ordinance above referred to; and on December 13, 1897, such amendatory ordinance was admitted in evidence by the court, over the objections of the appellees. This evidence was clearly incompetent, and should not have been admitted. The issues were tried upon objections made to the original ordinance. Section 22 of article 9 of the city and village act requires that the petition to be filed in the county court shall recite the ordinance for the proposed improvement. The petition thus reciting the ordinance is necessary to be filed in order to give the court jurisdiction. It is plain that the amendatory ordinance passed on December 11, 1897, was not, and could not have been, recited in the petition, because it was passed long after the petition was filed."

28. Where an ordinance originating a local improvement consisting of the construction of lawn hydrants for sprinkling lawns, and electric light cables, did not provide for connecting the water mains with the hydrants or for connecting the electric cables and any source of electric current, it may be shown that such connections will be made so that the property owners will obtain the benefit contemplated. Lingle *v.* West Chicago Park Comrs., 222 Ill. 384, 78 N. E. 794.

29. Hinkle *v.* Mattoon, 170 Ill. 316, 48 N. E. 908.

30. In Hinkle *v.* Mattoon, 170 Ill. 316, 48 N. E. 908, the court says: "The attempt in this case was really to amend the records and proceedings of the city council, and to make a good petition out of the defective one after the judgment. If the report was invalid when presented to the city council, the county court had no power to hear evidence, and remedy its defects, or those of the petition, at that time. It was not an attempt to make the record truly state what was before the court at the time judgment of confirmation was entered, but to make a new record in the case, and this could not be done. Ogden *v.* Lake View, 121 Ill. 422, 13 N. E. 159; Springer *v.* Chicago, 159 Ill. 515, 42 N. E. 868."

31. Parol Evidence of Notice. When Competent. — If the statute does not provide that the certificate of the publisher of a notice of the confirmation of an assessment shall be the exclusive evidence of the publication, parol evidence may be received to prove the publication of the notice. In Lingle *v.* Chicago,

in cases in which the particular proof of service, as well as the fact of service, is made jurisdictional.[32]

h. *Oath of Commissioners. — Necessity for. — When.* — If commissioners for the making of an assessment are sworn when they make the assessment, it is immaterial that they are not sworn at the time when evidence relating to the assessment is heard by them.[33]

i. *Character of Municipal Officer or Board.* — Upon an application to confirm an assessment the question of the qualifications of an officer,[34] or the legality of the organization of a municipal board,[35] having to do with the assessment can not be questioned.

j. *Lack of Petition. — When Question Raised.* — In a proceeding for the confirmation of an assessment, the property owner is not required to wait until the trial before the jury to introduce evidence of the non-presentation of the petition of owners for the improvement, but may move to dismiss the proceeding and then present the evidence of such defect in the proceedings, as the jury can only decide whether the objector is benefited to the amount assessed.[36]

k. *Competency of Assessment Rolls.* — In a proceeding for the confirmation of an assessment, the roll showing the assessment recommended or approved by the proper authority is generally, by statute, made competent *prima facie* evidence of benefits specially accruing to the property therein stated or found to be benefited.[37]

172 Ill. 170, 50 N. E. 192, citing earlier decisions from the same court, it was said: "The object and purpose of a publication of this character is to give notice to the parties named therein of the pendency of the proceedings, and this notice, it is provided by the statute, may be proven by the certificate of the publisher. It has uniformly been held in this state that the certificate of the publisher is not the only evidence that may be had with reference to proof of the publication. Parol evidence may be received to prove the notice was published. Harris *v.* Lester, 80 Ill. 307; Rue *v.* Chicago, 66 Ill. 256; Pierce *v.* Carlton, 12 Ill. 358. The court heard extrinsic proof that the notice was published for five successive days in the Chicago Dispatch, which went to the establishment of the same facts as coulld be established by a certificate of publication in absolutely correct form. Such extrinsic proof may be had in cases where the appearance of defendant is limited, for the purpose of making the objection. It was not error to allow such oral evidence."

32. Proof of Service. — Proceedings for Laying Out of Highway. Krenik *v.* Supervisors, 95 Minn. 372, 104 N. W. 130.

33. Trigger *v.* Drainage Dist. No. 1, 193 Ill. 230, 61 N. E. 1114.

34. Qualifications of City Engineer May Not Be Inquired Into. Heiple *v.* Washington, 219 Ill. 604, 76 N. E. 854.

35. Legality of Organization of Board. — Betts *v.* Naperville, 214 Ill. 380, 73 N. E. 752.

36. Hammond *v.* Leavitt, 181 Ill. 416, 54 N. E. 982.

37. Report of Commissioners. The report of commissioners, empowered to estimate the cost of an improvement and to apportion the same between the city and the interested property owners is, under the Illinois statute, competent *prima facie* evidence of a valid assessment and is conclusive unless proved to be incorrect or invalid. Other evidence may, of course, be received on the question of benefits. Green *v.* Springfield, 130 Ill. 515, 22 N. E. 602; Walters *v.* Lake, 129 Ill. 23, 21 N. E. 556.

The assessment roll made in a prior proceeding for assessment for the same improvement is likewise admissible.[38] But where, on an appeal from the local assessing board to the circuit court from an assessment, the proceeding is tried *de novo,* the reports of the local assessing authorities or their proceedings in that regard, setting forth the assessment appealed from, are not competent.[39]

1. *Impeachment of Assessment by Testimony or Declarations of Assessing Authorities.* — The municipal authorities having to do with the making of an assessment are not competent to impeach their own official acts in that regard. They may explain their acts but they will not be heard to impeach them.[40] Nor are the declara-

38. Competency of First Assessment Roll in Subsequent Assessment Proceedings. — In a proceeding for the levy of an additional assessment for the construction of a levee, it is proper to admit in evidence the assessment rolls of a prior special assessment relating to the same improvement. Lovell *v.* Drainage Dist., 159 Ill. 138, 42 N. E. 600.

When the statute expressly makes an assessment roll competent evidence, the fact that a second assessment makes the cost of collection much higher than the first one did, which was abandoned, does not make the second roll incompetent as evidence. Philadelphia & R. C. &. I. Co. *v.* Chicago, 158 Ill. 9, 41 N. E. 1102.

39. Appeal-Proceedings De Novo. When Appeal Heard De Novo Proceedings Below Incompetent. Chandler *v.* Beal, 132 Ind. 596, 32 N. E. 597; Mock *v.* Muncie (Ind.), 32 N. E. 718; Coyner *v.* Boyd, 55 Ind. 166; Frick *v.* Christian, 55 Ind. 320; McKinsey *v.* Bowman, 58 Ind. 88; Turley *v.* Oldham, 68 Ind. 114.

40. Commissioners who have made and reported an estimate of the cost of an improvement may not be called as witnesses to impeach their own report after it has been accepted and approved by the board of trustees. Wright *v.* Chicago, 48 Ill. 285.

In Quick *v.* River Forest, 130 Ill. 323, 22 N. E. 816, the court says: "The three commissioners who were appointed by the village under this section of the statute made out and signed a report in writing as required by the statute, which was filed and approved by the board of trustees of the village. And the question presented by the offered evidence is whether the commissioners can be called as witnesses to impeach their own report, after it has been accepted and approved by the board of trustees. The law required the commissioners to meet and act together in estimating the costs of the improvement, and the costs of making and levying the assessment. Their duties required investigation, deliberation, and a final determination of the subject referred to them by the board of trustees, and we are aware of no authority which would sanction the calling of such persons to stultify themselves. It may be true that the statute does not, in terms, require such commissioners to be sworn, but their acts are none the less obligatory and binding. Their duty requires as much honesty and fidelity where they are not sworn as it would if they were acting under oath; and we think it would be establishing a dangerous rule to allow such persons to come upon the witness stand, and impeach their voluntary action, after such action has been approved and acted upon by the board of trustees. We are not, however, without authority on the question. In Wright *v.* Chicago, 48 Ill. 285, it was expressly held that such evidence was not admissible."

On the hearing of objections to a special assessment the testimony of one of the commissioners appointed to report an estimate of the proposed improvement may be received to explain but not to impeach the report

tions of the commissioners of assessment, tending to impeach their assessments, competent in the objector's behalf.[41]

m. *Identity of Party Making Estimate of Cost of Improvement.* On objection to an assessment of benefits resulting from an improvement, evidence as to who made the estimate of the cost of the improvement is immaterial where the estimate was made and filed as required by the statute, this for the manifest reason that the cost is not based on the estimate but upon the plans and specifications and the cost of actual labor and materials.[42]

n. *Interest of Assessment Commissioners.* — Where the confirmation of an assessment is in issue, it may be shown, in opposition to the confirmation, what interest the commissioners had who spread the assessment.[43]

o. *Persons in Favor of or Against Assessment.* — Where it is sought to set aside an assessment, evidence showing who were in favor of, or opposed to the assessment, is incompetent in the objector's behalf, as being wholly an immaterial circumstance.[44]

p. *Introduction of Original Evidence on Appeal.* — When an appeal is allowed to the courts from the action of the municipal council on the written objections of a property owner to the assessment,

which was approved by the proper authorities. Thus it may not be shown that an item for "administration charges" includes an item for attorneys' fees. Brethold *v.* Wilmette, 168 Ill. 162, 48 N. E. 38.

The members of a city council are not competent as witnesses to contradict their votes in confirmation of the report of the commissioners who assess benefits. In Hegeman *v.* Passaic, 51 N. J. L. 109, 16 Atl. 62, the court says: "The further reason that the majority of the common council did not consider the assessments against the lands of the prosecutors to be just is contradicted by their votes in confirmation of the report of the commissioners; and those who have testified to these secret opinions, in opposition to their votes, are in the position of jurors, who will not be allowed to give evidence to impeach their deliberate official action. The policy of such exclusion has long been decided, and for obvious reasons."

Limitations of Rule. — While the courts will not inquire into the motives of the municipal authorities in adopting a particular method of improvement and the extent thereof, this only does not preclude an investigation of the question whether the requirements of the improvement statutes have been complied with, and for such purpose it would seem that the municipal authorities may be called to testify to their doings and the grounds upon which they acted. Nelson *v.* Chicago, 196 Ill. 390, 63 N. E. 738.

41. In Quick *v.* River Forest, 130 Ill. 323, 22 N. E. 816, where such evidence was offered the court says: "The objector also offered to prove the declarations of the commissioners, for the purpose of impeaching their report. They were not parties to the suit, and what they may have said could not be binding on the village; and if they were not competent to testify to what they did, as we have seen they were not, clearly resort could not be had to their declarations."

42. Betts *v.* Naperville, 214 Ill. 380, 73 N. E. 752.

43. Murr *v.* Naperville, 210 Ill. 371, 71 N. E. 380. Thus it may be shown that the commissioner was the same person who was appointed the civil and sanitary engineer to design and construct the improvement, a waterworks system, and to make all estimates thereon.

44. Peyton *v.* Morgan Park, 172 Ill. 102, 49 N. E. 1003.

the court being given the power to confirm, correct, annul, or modify the assessment against the appellant, the party appealing may submit any competent evidence in support of his objections without regard to whether such evidence was heard and considered by the municipal body or not.[45]

45. In Ahrens *v.* Seattle, 39 Wash. 168, 81 Pac. 558, where this question was presented, the court says: "Appellants are the owners of certain real estate in the city of Seattle, and the city sought to assess said property for the purpose of paying the costs and expenses of regrading Pike and East Pike streets. They filed with the city council written objections to the assessment roll. The objections were overruled, and the objectors appealed to the superior court. When the matter came on for hearing in that court, it was urged by the city that in the consideration of the appeal the superior court was restricted to matters appearing upon the face of the transcript certified by the city clerk. This view was adopted by the trial court and all evidence offered in support of the objections to the assessment was rejected. Judgment was entered confirming the assessment roll, and from that judgment this appeal is prosecuted. It is contended by appellants that the court erred in refusing to hear testimony on the appeal. This subject involves an examination of chapter 118, p. 240, of the Session Laws of 1901, which is an act authorizing the levy and collection of special assessments for local improvements in cities of the first class. Section 2 of the act provides for filing with the city council written objections to the assessment roll, and also that the decision of the council or other legislative body may be reviewed by the superior court on appeal thereto. It is provided that the court shall hear and determine the appeal without a jury, and shall confirm, correct, modify, or annul the assessment in so far as the same affects the property of the appellant. The superior court appears to have construed the statute as conferring upon that court only the ordinary review powers of an appellate court, with no power to hear and consider evidence that was not heard by the subordinate tribunal and duly certified by it. We do not believe that such was the intention of the Legislature. If such were the case, a protestant would be compelled to fully and at length introduce his evidence before the city council, preserve the same, and take it to the superior court, or he could not secure a review upon the facts. The statute provides no method whereby a protestant can compel the attendance of an unwilling witness before the city council, and no other method is provided for obtaining his testimony. There is neither provision for administering oaths to witnesses who may appear before the council, nor for certification to the superior court of any testimony taken. The statute specifies a copy of the notice of appeal, a transcript of the assessment roll, a copy of the objections filed with the city clerk and of the order of the council confirming the assessment roll as necessary to be certified on appeal, and then adds; 'and the record of the council or other legislative body with reference to said assessment.' The term 'record' as used, cannot reasonably be said to include the testimony, but rather refers to such record as the minutes of proceedings of the council upon the subject. Doubtless the purpose of the written objections is to bring to the attention of the council the fact that the correctness of the assessment is challenged, and the reasons therefor. An opportunity is thus given for further and more complete investigation by the council if it shall be disposed to enter upon it. But the statute evidently did not contemplate that a protestant can demand the hearing of testimony as a matter of right, together with a full and exhaustive investigation of a judicial nature before a nonjudicial body. That right should, however, be accorded him somewhere, and we think the statute contemplates that he shall have it in the superior court, a tribunal possessing all the necessary

q. *Order of Proof.* — If the objector to an assessment does not offer to make proof concerning the notice of the public hearing, required to be given by the board of local improvements, until after the case has been closed, it is not error then to refuse to hear such evidence.[46]

B. Benefits Assessed. — a. *Elements To Be Considered. — In General.* — In determining the benefits that will accrue to the property sought to be assessed for a local improvement, the assessing authorities may and should consider the location and general character of the property, its proximity to the improvement, and all the facts and attendant circumstances.[47] They must take into consid-

attributes and powers for judicial determination. When, therefore, an objector has properly, in writing, called the attention of the city council to his reasons for protesting against the assessment, and has duly appealed, he is entitled to submit and have considered on the appeal all competent evidence he may offer in support of his objections."

46. Betts *v.* Naperville, 214 Ill. 380, 73 N. E. 752.

47. Attending Facts and Circumstances. — In determining the amount of an assessment for the opening of a street, the location of the property assessed, and all the surrounding facts and circumstances are competent evidence. Woggeman *v.* North Peoria, 155 Ill. 545, 40 N. E. 485.

Benefits Based Upon Superficial Area. — Upon the hearing of objections to the confirmation of a tax for an improvement authorized to be levied upon property contiguous to the improvement, evidence that certain property was assessed more than its proper share, basing such opinion upon the superficial area of the property, instead of its frontage, is immaterial. In Green *v.* Springfield, 130 Ill. 515, 22 N. E. 602, the court says: "The evidence offered on behalf of the appellants consisted of the evidence of six witnesses, who testified that in their opinion the property of the appellants was assessed more than it should be; or, in other words, that the tax on their property was more than their just proportion of the entire cost of the improvement. The witnesses all admit, however, in substance, that the tax was levied on the appellants' property in proportion to its frontage upon the streets to be improved. The inequality, therefore, of which these witnesses complain, was based, not upon the frontage of the property assessed, but upon the superficial area, its value, or the amount of the benefits resulting to it from the proposed improvement. It is clear that evidence of this character was wholly immaterial. It had no tendency to show that any of the appellants' property was assessed more than its just proportion, basing the estimate upon its frontage; and that was the only inquiry properly open to the appellants. For instance, they might have shown, if they could, that any particular property assessed had a smaller frontage than that estimated by commissioners, and that the assessment was therefore too high, but the testimony offered had no such tendency. It was in the nature of an attack upon the policy of the constitution and statutes authorizing the levying of special taxes upon contiguous property, rather than upon the accuracy or fairness of this particular assessment."

Evidence showing that the lands sought to be assessed on account of a levee improvement are rendered more healthful by the building of the levee, and therefore, are benefited thereby, is competent. Lovell *v.* Drainage Dist., 159 Ill. 188, 42 N. E. 600.

In estimating benefits accruing to a lot from the improvement of a street, it is competent to show that the proposed street connects with another leading to an adjoining city. Woggeman *v.* North Peoria, 155 Ill. 545, 40 N. E. 485.

The improvement of the sanitary condition of the neighborhood is

eration the special use made of the property assessed and the use or uses for which it is well adapted in the future.[48] The evidence must relate, however, to the value, present and enhanced, of the *res*

proper to be considered in assessing benefits for a local improvement (a drainage), if thereby the petitioner's property is made more healthful for occupation. Also the taking of surface water from the owner's property more speedily, no matter from what source it comes, is a proper matter for consideration in assessing benefits. Beals *v.* Brookline, 174 Mass. 1, 54 N. E. 339.

Where it appears that provision has been made by a municipality for the extension of the water service to every part of a constructed sewer, it is proper in determining the benefits conferred by the construction of such a sewer, to compute such benefits on the basis of the complete water service. Reed *v.* Cedar Rapids (Iowa), 111 N. W. 1013.

Latitude in Offering Evidence. Where upon the general objection filed to a confirmation of an assessment, that the assessment is in excess of benefits, the city makes out its *prima facie* case, and the objector introduces his testimony tending to impeach the correctness of the assessment, a considerable latitude, as against the objection that it is merely cumulative, will be permitted to the city in afterwards offering evidence in contradiction of the testimony offered by the objector. In such a case the Illinois court says: "At the hearing of the objections the city made out a *prima facie* case by introducing in evidence the ordinance, assessment roll, and verdict in the original condemnation proceeding and rested. Appellant then introduced his testimony tending to impeach the correctness of the assessment made by the commissioners. The court then permitted the city, over the objections of appellant, to introduce testimony in contradiction of the testimony given by the witnesses for appellant. It is urged that this testimony last adduced by the city was not evidence in rebuttal, but mere cumulative evidence, and that it was error in the court to allow its introduction. The course that was pursued at the hearing of the objections was that which has long, and perhaps uniformly, prevailed in the courts of this state, and it is probably the practice that is most convenient and expeditious and conducive to justice. A general objection filed, that the assessment is in excess of benefits, or more than the relative proportion chargeable against the property of the objector, gives the municipality but little, if any, notice of either the theory or the facts upon which the objector relies. In our opinion there was no error in the rulings upon the admission of testimony." Chytraus *v.* Chicago, 160 Ill. 18, 43 N. E. 335.

View From Property Assessed. Commissioners appointed to make an assessment for a street improvement in determining the value of certain property and the benefits thereto, are entitled to take into consideration the view therefrom. *In re* Lake View Ave. in the City of Seattle (Wash.), 89 Pac. 156.

In an action to recover benefits accruing to land within a drainage district which has connected the district with the outer ditch of another district it is competent to show the relative volume of water carried by the ditches of the two districts and the relative acreage included in the two districts. Drainage Comrs. of Dist. No. 2 *v.* Drainage Comrs. of Union Dist. No. 3, 113 Ill. App. 114, *affirmed* 211 Ill. 328, 71 N. E. 1007.

48. Specific Use of Property Assessed.—*In re* Westlake Ave., 40 Wash. 144, 82 Pac. 279.

The municipal authorities in determining the amount of an assessment for benefits may take into consideration not only the use to which the property is now put, but the uses to which it may be, or is capable of being put (as that it may be divided into lots suitable for suburban residences). Farr *v.* West Chicago Park Comrs., 167 Ill. 355, 46 N. E. 893. See also, Lietch *v.* La Grange, 138 Ill. 291, 27 N. E. 917.

itself, and the benefits accruing thereto, rather than to the benefits that may accrue to the business conducted on the premises.[49] Purely speculative benefits predicated upon future action or legislation are not cognizable in determining the amount of benefits to be assessed upon a confirmation proceeding, and evidence of such matters is incompetent.[50] But when an improvement elsewhere has

49. Benefits to Business Conducted on Premises. — On the hearing of objections to an assessment for the pa ing of a street, testimony as to what benefits would be derived by a business conducted on certain assessed property is not admissible. Such, however, may be a proper subject of inquiry in testing the value of the opinion of the witness. Jones *v.* Chicago, 206 Ill. 374, 69 N. E. 64.

Increase in Value. — "The objection made that witnesses called on behalf of the petitioner were permitted to testify as to the benefits to the property assessed, and not confined to special benefits, must be decided by determining what is meant by the term 'special benefits.' If property is increased in value by an improvement, it is a special benefit to the property. The benefit must be such as affects the market value of the land, and, where its market value is increased as the effect of the work, a special benefit results. As held in Metropolitan U. S. El. R. Co. *v.* Stickney, 150 Ill. 362, 382, 37 N. E. 1098: 'Special benefits are such benefits flowing from the proposed public work as appreciably enhance the value of the particular tract of land alleged to be benefited. As already said, the fact that other property in the vicinity is likewise increased in value from the same cause — that is, also specially benefited by the improvement — furnished no excuse for excluding the consideration of special b nefits to the particular property in determining whether it has been damaged or not, and, if it has, the extent of the depreciation in value;' citing Wilson *v.* Board of Trustees, 133 Ill. 443, 27 N. E. 203; Bohm *v.* Railway Co., 129 N. Y. 576, 29 N. E. 802; Rigney *v.* Chicago, 102 Ill. 64. While in the Stickney Case the question arose under the eminent domain act, yet the same principle was involved as here. The evidence to which appellant objected was as to whether, and the extent to which, the land or lots were increased in value by the proposed improvement. If it was so increased in value from that cause, then it was a special benefit, and it was not error to overrule the opposition to this evidence."

Fahnestock *v.* Peoria, 171 Ill. 454, 49 N. E. 496.

Evidence of the Use to Which Assessed Property Is Put, that such use is intended to be continued and that, as used, no benefit will result to the objector, is incompetent and irrelevant. Thus it may not be shown the assessed property is held for railway purposes under a lease for 999 years, and that the improvement is not used at all, and that, because of such use no benefit whatever will result to the defendant. Chicago Union Trac. Co. *v.* Chicago, 207 Ill. 607, 69 N. E. 803.

On the question of the benefits, by an improvement, to a particular property, the use made of it by the lessee is immaterial, as the proceeding is against the property, and not against the lessee or the use or user of it. Chicago Union Trac. Co. *v.* Chicago, 215 Ill. 410, 74 N. E. 449.

50. Evidence of Speculative Benefits Incompetent. — In Gordon *v.* Chicago, 201 Ill. 623, 66 N. E. 823, the court says: "The second error assigned is that the court erred in excluding from the jury copies of an ordinance authorizing a certain private corporation to construct, maintain, and operate waterworks in the town of Cicero, and of certain contracts between the corporation and the town, and of an ordinance authorizing said contracts. It was sought to be shown by these ordinances and contracts, that they contained a provision by which the private water company could be compelled to lay water pipes in the streets in the territory subject to the special assessment, by petition of the property

been determined upon and provision therefor made, such becomes a proper matter for consideration in its relation to an assessment of benefits for a present improvement.[51] And the same rule has been

owners and ordinances of the town of Cicero; but now, since the annexation of this territory by ordinance of the city of Chicago, this was purely a speculative benefit, predicated upon future action and future legislation. Such benefits cannot be considered by the jury. Hutt *v.* Chicago, 132 Ill. 352, 23 N. E. 1010. Appellants were permitted to show exactly what pipes had already been laid by the private water company, but nobody could tell what might or might not be done by it in the future. The ordinances and contracts were properly excluded."

In determining the benefits property will sustain from an improvement, future and contingent improvements contemplated by the municipality are not proper to be considered. Hutt *v.* Chicago, 132 Ill. 352, 23 N. E. 1010; Edwards *v.* Chicago, 140 Ill. 440, 30 N. E. 350.

51. In Harris *v.* Chicago, 162 Ill. 288, 44 N. E. 437, the court says: "The action of the circuit court in refusing to admit in evidence before the jury the ordinance of July 9, 1894, and, in connection therewith, the condemnation judgment against the railway companies, presents a more serious question. The evidence shows, or tends to show, that the district assessed for opening Sixtieth street extends a quarter of a mile south of Sixty-first street, and half a mile west of Wentworth avenue; that, while the district is populous, it is in a pocket, by reason of the railroad rights of way and tracks which must be crossed in order to reach State street; that the property of most of the objectors and appellants either fronts on Sixty-first street, or is south of it, or west of Wentworth avenue; and that, while Sixty-first street is a through street, yet its crossing over the rights of way and tracks is only by means of a viaduct, and this viaduct is narrow, is occupied by several street-car lines, is crowded, and is so high, and its grade so steep, that it cannot be used by traffic teams. The city relied largely upon the evidence it introduced tending to prove the above facts, in order to show that the property of appellants would be especially benefited by the opening of Sixtieth street between State street and Wentworth avenue, it being the next street north from Sixty-first street. One of the witnesses for appellee testified in express terms that Sixty-first street is the natural outlet for the locality here in question, if it only had proper facilities for crossing the railway tracks, which it had not. The ordinance that was excluded from the jury made provision for a subway, 66 feet wide, under the railroad rights of way and tracks at Sixty-first street, as well as for such a subway at Sixtieth street. And said ordinance, taken in connection with the stipulation and agreement embodied in the condemnation judgment, for the postponement of the time when the city could take possession of the Sixtieth street crossing, tended to prove that there would be ample crossing facilities at Sixty-first street at or about the same time that Sixtieth street could be opened, and that, therefore, the benefits to the property of appellants by the opening of Sixtieth street would be inconsiderable, if any. All natural and probable results that will flow from a contemplated improvement may properly be considered in estimating benefits, and we think that the testimony that was excluded was both competent, and material.

Appellee urges that it was not error to exclude the proffered evidence, because it is improper, in estimating benefits, to take into consideration future action of the municipality making the improvement; and relies upon the cases of Hutt *v.* Chicago, 132 Ill. 352, 23 N. E. 1010, and Edwards *v.* Chicago, 140 Ill. 440, 30 N. E. 350. Said cases do not apply to the case at bar. It was held in those cases that future action of the city in ordering additional improvement could not be regarded either as a probable or natural consequence to

applied to other improvements of the same street contemplated within a reasonable time.[52] Assessments being limited to special benefits, evidence of general benefits is, of course, not competent.[53] On the question of benefits the testimony of persons acquainted with real estate values in the locality of the improvement is competent, regardless of whether they are experts, this latter consideration affecting rather the weight, than the competency of their evidence.[54]

b. *Cost of Improvement.* — **(1.) In General.** — Where the share of the cost to be paid by each abutter is a part of the cost of the whole improvement, the evidence must be restricted to the cost of the improvement as a whole, and evidence, therefore, of the cost of the part of the improvement in front of the particular lots or parcels is inadmissible.[55]

(2.) Best and Secondary Evidence. — Parol evidence of the items

flow from the improvement ordered. In the Hutt case it was said: 'The trouble here is, no bridge has ever been ordered. The improvement ordered is the extension of a street, without any provision whatever being made for the erection of a bridge.' And in the Edwards case it was held that no assessment could be made upon lands lying beyond the terminus of a proposed sewer for benefits that would accrue thereafter, if the sewer should be extended westward by future action of the city. In the case now before us, on the other hand the construction of a subway at Sixty-first street was not and is not contingent upon future action of the city, but full provision was and is made for its construction by the ordinance that was offered in evidence."

52. It is proper to consider the benefit that may result, in assessing benefits for the improvement of a street, from the construction of a bridge across a stream at the end of the street where the improvement is made. Dickson *v.* Racine, 65 Wis. 306, 27 N. W. 58.

53. General Benefits. — Where an assessment is objected to on the ground that the assessing authorities improperly confined the assessment to abutters and that non-abutters also were specially benefited, upon certiorari to review and quash the assessment, evidence that certain estates were benefited in having a shorter and more pleasant avenue to important points is not competent as being not a special, but only a general benefit. Lincoln *v.* Board of Comr's., 176 Mass. 210, 57 N. E. 356.

54. Opinions of Non-Experts. In Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567, the court says: "It is also claimed that the court erred in refusing to exclude the evidence of four certain witnesses who testified in regard to the effect the construction of the proposed improvement would have on the market value of the property assessed, for the alleged reason that the witnesses were not experts, and were incompetent to express an opinion on the matters which they testified about. In a case of this character, the question to be determined is the effect the proposed improvement will have on the market value of the property assessed; and it is competent to prove the market value of the property before the improvement and its market value after the improvement. Any person who has knowledge on the subject is competent to testify. What weight the opinion of a witness may be entitled to is a question for the jury. An expert is not required. Johnson *v.* Railway Co., 111 Ill. 413."

55. In Farrell *v.* West Chicago Park Comrs., 182 Ill. 250, 55 N. E. 325, the court says: "The trial court properly excluded testimony tendered by appellants for the purpose of showing the cost of that portion of the improvement upon which the property of appellants, or some of them, abutted. The proportionate share of the cost of the improvement to be paid by the different pieces of property is the proportionate share

entering into the cost of an improvement, these matters appearing from the report itself, is not competent. The report is, in such circumstances, the best evidence.[56]

(3.) Distribution of Cost. — When the city under its delegated authority has determined what portion of the total cost of a local improvement shall be paid by the public, in a proceeding for the confirmation of an assessment thereunder, evidence on behalf of a property owner, as to what proportion of the total cost of the improvement would benefit the public is irrelevant.[57] It is not perti-

of the cost of the improvement as a whole. The cost of that portion of the improvement which adjoins the property to be assessed has no tendency to show the proportionate part of the cost of the whole improvement to be borne by such property."

In a proceeding for the revision of a betterment assessment, wherein it is sought to reduce the assessment, evidence of the cost of the improvement (a drain) through the petitioner's land alone is immaterial. The evidence must relate rather to the cost of the whole improvement since the benefits are to be determined from the whole, rather than from a part, of the improvement. Beals *v.* Brookline, 174 Mass. 1, 54 N. E. 339.

56. Latham *v.* Wilmette, 168 Ill. 153, 48 N. E. 311.

57. Bigelow *v.* Chicago, 90 Ill. 49; Fagan *v.* Chicago, 84 Ill. 227.

In Watson *v.* Chicago, 115 Ill. 78, 3 N. E. 430, the court says: "The commissioners, under the ordinance, are to assess to the property 'the amount that the same may be legally assessed therefor,' that is, the amount of benefits to the property, as the property may be legally assessed to that amount. If this amount equals the cost of the improvement there is nothing for the public to pay; and so there would be no apportionment to be made by the commissioners under section 139 of the city and village act between the public and the property benefited, so that each should bear its relative equitable proportion; at least, no other than that fixed by the common council. The city council has determined what the public shall pay, and this is binding upon the commissioner. If the amount of the special benefits does not equal the cost of the improvement then the remainder of the cost is to be paid by general taxation; and it is only this remainder which the city council has determined shall be paid by general taxation, and this determination must control the commissioners in their action under section 139, and they cannot add to or lessen such amount by estimate of what proportion of the total cost will be of benefit to the public. The provision of this section in this regard does not apply where the city authorities fix the amount to be paid by general taxation. See Enos *v.* Springfield, 113 Ill. 65. This question was passed upon by this court in Fagan *v.* Chicago, 84 Ill. 231, where there had been an assessment under this form of ordinance, and on the trial, on confirmation of the assessment, the court had excluded the question, what proportion of the total cost of an improvement would, in the opinion of the witness, be of benefit to the public. We there said: 'This question was wholly irrelevant. The court was not trying, nor was it authorized to try, what, if any, benefit the improvement would confer on the public. That was a question which belonged to the city government, and could not be reviewed by the trial court.' The correctness of this decision was recognized in Bigelow *v.* Chicago, 90 Ill. 53; and see Galesburg *v.* Searls, unreported."

The decision of the council as to the proportion of the cost of a local improvement to be paid by the city and the proportion to be paid by abutting owners as a special tax is conclusive as long as the amount assessed to the property owners does not exceed the benefits received. Peru *v.* Bartels, 214 Ill. 515, 73 N. E. 755.

nent to inquire of a witness within what limits an assessment should be laid.[58] When the objector asserts his assessment to be disproportionate to the assessments of others, the evidence on the issue should relate to proportion of the particular assessment to the general assessment rather than to another particular lot.[59]

c. *Basis of Estimate.* — Where the statute does not prescribe the basis for the estimate of benefits, or the estimate of the cost of an improvement, the commissioners to determine such matters are at liberty to adopt such a basis as will effect a just result, and evidence of such basis is immaterial and incompetent.[60]

The assessment roll apportioning the benefits of an improvement between the city and the owners is conclusive and it may not be shown, where no benefits are assessed to the city, that the city in general in fact received benefits. Beckett *v.* Chicago, 218 Ill. 97, 75 N. E. 747.

58. A question propounded to a witness in such a proceeding asking him within what limits assessments for benefits from the improvement should be confined, is too general, the inquiry being whether specific lots are benefited and, if so, how much. Fagan *v.* Chicago, 84 Ill. 227.

59. A party will not be allowed to show that his lot is assessed for more than another particular lot. The inquiry should be confined to a comparison of the assessment objected to with the general assessment against all other lots, the real question being whether the particular lot is assessed greater or less in proportion to the general assessment. Fagan *v.* Chicago, 84 Ill. 227. See also Watson *v.* Chicago, 115 Ill. 78, 3 N. E. 430.

On the issue whether an objector's property was assessed for more than it was benefited, or more than its proportionate share of the cost of the improvement, the question whether the improvement (a water pipe) was there for the benefit of the property on the opposite side of the street, is immaterial. The comparison of the assessment upon the objector's property with that upon other specified property included in the assessment roll furnishes no rule to decide such an issue. The proper inquiry in such a case is what proportion the assessment on the objector's land has to the assessment imposed on all other lands and not how it compares with the assessment on any other lot. Clark *v.* Chicago, 166 Ill. 84, 46 N. E. 730.

60. Latham *v.* Wilmette, 168 Ill. 153, 48 N. E. 311.

In Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567, the court says: "It is also contended in the argument that the assessment was invalid upon the alleged ground that the commissioners 'adopted a system purely arbitrary,— one not founded in any just and proper reason, but wholly the result of whim and conjecture.' The commissioners reported, under oath, that they examined the locality where such improvement was to be made, and the lots, blocks, tracts, and parcels of land which will be specially benefited thereby, and did estimate what proportion of the total costs said improvement will be of benefit to the public, and what proportion thereof will be of benefit to the property to be benefited, and did apportion the same between the city of Chicago and such property so that each shall bear its relative equitable proportion, the amount so estimated and apportioned to said city being the sum of $2483.80, and the amount so estimated and apportioned to property to be benefited being the sum of $815.713; that, having found said amount, they did apportion and assess the amounts so found to be of benefit to the property upon the several lots, blocks, tracts, and parcels of land in the proportion in which they will be severally benefited by said improvements; and that no lot, block, tract, or parcel of land has been assessed a greater amount than it will be actually benefited by said improvement. No attempt was made to show that the commissioners

d. *Damage by Improvement.* — Where an assessment is objected to on the ground that the assessment of benefits is in excess of the special benefits received, evidence relating to the damage to the objector's land by reason of the taking of a part thereof for the improvement is not relevant.[61] Evidence of this nature is to be heard in the proceeding for the taking.[62]

e. *Benefits to Third Party.* — Where a landowner claims, on objection to an assessment against his property, that property owned by another was benefited but not assessed, and offers evidence tending to show the sustaining of such benefit, such other may appear and offer evidence, without filing any pleadings, and introduce evidence in rebuttal to show his property not to be benefited.[63] And especially would this be true where such third party appears on the motion of the attorney for the city in the confirmation proceeding.[64]

f. *Necessity for or Utility of Improvement.* — Whether or not particular property is in need of a local improvement is a question of fact[65] to be determined from the facts, circumstances, and surroundings existing at the time the assessment is made.[66] On the

acted fraudulently in making the assessment, or that they were governed by any improper motive, but the complaint is that in arriving at benefits the wrong method of basis was adopted. In Springfield *v.* Sale, 127 Ill. 359, 20 N. E. 86, it was held that the law has not prescribed what basis for ascertaining the benefits shall be adopted by the commissioners. If the law has prescribed no basis, then it seems to follow that the commissioners are at liberty to adopt such method as may, in their judgment, work out a just result. If, however, a method should be adopted which would impose a greater assessment on any property than it would be benefited, or more than its just proportion of the improvement, the assessment could not be sustained. But the method adopted in this case, did not, so far as appears, produce that result."

61. The petitioner for the revision of an assessment, alleged to be in excess of benefits, may not in such a case show that after a part of his land was taken he was compelled thereby to lay out his lots in such manner, on the lands remaining and assessed, as to make them less valuable, as such evidence relates to the damages from the taking and not to the assessment for benefits received. The court may in its discretion in such a proceeding admit in evidence photographs of the petitioner's premises taken immediately prior to the making of the proposed improvement. Beals *v.* Brookline, 174 Mass. 1, 54 N. E. 339.

Damages Already Allowed as Set-off. — Where damages resulting from the original building of a levee have been allowed as a set-off against prior assessments, in the laying of subsequent additional assessments, only such damages are allowable as result from the completion of the proposed work, and evidence of such damages or lack of damages only is competent. Lovell *v.* Drainage Dist., 159 Ill. 188, 42 N. E. 600.

62. In a proceeding for the assessment of benefits resulting from the opening of a street, evidence of the damages one has sustained by reason of the taking of part of his lands in opening the street is incompetent. This evidence is properly heard only upon a hearing in the assessment of damages from the taking. *In re* Seattle, 42 Wash. 551, 85 Pac. 45.

63. Jones *v.* Chicago, 206 Ill. 374, 69 N. E. 64.

64. Jones *v.* Chicago, 206 Ill. 374, 69 N. E. 64.

65. Necessity for Improvement a Question of Fact. — Cincinnati *v.* Hess, 19 Ohio Cir. Ct. 252.

66. Attending Circumstances and

question of the public necessity for an improvement (a drain) the jury may consider as evidence the facts brought to their knowledge from their actual view of the proposed route, made as provided by statute.[67] On an appeal from a decision of the board of commissioners granting the prayer of a petition for the establishment of a public highway and denying a remonstrance for inutility and damages, the remonstrant may not introduce evidence showing that another route can otherwise be had without departing essentially from the route petitioned for.[68]

g. *View by Jury in Determining Benefits.* — It has been held that, in a confirmation proceeding, the jury's view of the assessed premises and the facts so brought to their knowledge are not evidence to be considered on the question of special benefits derived from an improvement, such view being merely to aid the jury in applying the evidence to the facts of the case, as in civil cases in general.[69]

Surroundings at Time of Assessment To Be Considered. — Cincinnati *v.* Hess, 19 Ohio Cir. Ct. 252.

To determine the public utility of a proposed highway the jury should consider the existing ways, the population, location of markets, soil, physical features, the public convenience, the public needs of the community and other elements pertaining to the local needs. Speck *v.* Kenoyer, 164 Ind. 431, 73 N. E. 896.

67. View of Route of Drain May Be Considered. — Lake Erie & W. R. Co. *v.* Commissioners of Hancock Co., 63 Ohio St. 23, 57 N. E. 1009.

In Williams *v.* Lockoman, 46 Ohio St. 416, 21 N. E. 358, the court, considering the rule stated in the text says: "The county commissioners are required by § 4452 of the Revised Statutes to take to their assistance a competent surveyor or engineer, if in their opinion, his services are necessary, and at once proceed to view the line of the proposed improvement, and determine, by actual view of the premises along and adjacent thereto, whether the improvment is necessary, or will be conducive to the public health, convenience, or welfare. By § 4463 of the Revised Statutes, an appeal may be taken from a final order or judgment of the commissioners, determining whether the ditch will be conducive to the public health, convenience, or welfare. And the appeal to the probate court it is provided by § 4467 of the Revised Statutes that 'the probate judge shall administer to the jurors an oath, faithfully, impartially, and to the best of their ability, and from actual view of the premises along the whole route of improvement, to examine and determine the particular matters appealed from, and to render a true verdict according to the facts appearing to them from actual view of the premises, and the evidence, under the charge of the court.' The provisions of § 4467 manifestly contemplate that, by an actual view of the premises, the jury shall be enabled, not only the better to apply the testimony disclosed at the trial, but shall also be aided by their personal knowledge of the facts as derived from an actual view of the premises, in examining and determining the particular matters appealed from, which, in the present case, embrace the order and finding of the joint board of commissioners that the proposed ditch was necessary, and conducive to the public health, convenience, and welfare."

68. Speck *v.* Kenoyer, 164 Ind. 431, 73 N. E. 896.

69. Jury's View of Premises. In Rich *v.* Chicago, 187 Ill. 396, 58 N. E. 306, the court says: "We are also disposed to agree with appellants that the court erred in giving to the jury this instruction: 'The jury are instructed that their view of the premises assessed in this case, and

h. *Opinion Evidence. — Confirmation of Assessment.* — The opinions of witnesses who profess to be familiar with the subject of inquiry and who have had opportunities of acquiring information on the subject, are competent to show how much lands will be benefited or damaged by a proposed improvement, and this though they do not reside in the immediate neighborhood of such lands.[70] Nor are such witnesses required to be experts to render their testimony competent.[71]

i. *Width of Streets. — Admissibility of Municipal Code.* — The Chicago Municipal Code specifying the width of streets and sidewalks is admissible in evidence, in a proceeding to confirm an assessment for street paving, to show the width of the roadways of the intersecting streets, which were to be paved from the street line to the curb.[72]

the facts that they may have acquired from such view, so far as they pertain to the special benefits that said premises may or may not derive from the proposed improvement, is evidence for them in making up their verdict.' It was within the power of the court to permit the jury to view the premises, as in cases at common law, if the court, in the exercise of a sound discretion, considered such view necessary or proper to enable the jury better to understand and apply the evidence. But such view, or the facts ascertained by the jury upon such view, could not, of itself, or themselves, be considered as evidence in arriving at the verdict. Vane *v.* Evanston, 150 Ill. 616, 37 N. E. 901; Osgood *v.* Chicago, 154 Ill. 194, 41 N. E. 40. The rule is not the same in cases of this character as in condemnation cases, where the statute provides for such view. In the Vane case we said, 'that the only purpose of permitting the jury to inspect and view the *locus in quo* is to better enable them to understand the matter in controversy between the parties, and to clear up any obscurity that may exist in the application of the evidence introduced in the case. . . . They were not authorized to consider any fact bearing upon the merits of the controversy derived from such view.' It is very clear that the instruction in question is in direct conflict with what was said in the Vane Case, and that, as there further said, to allow such a practice would 'introduce great uncertainty in the trial of all common-law causes where a personal view was permitted.' In the case at bar, instead of limiting the effect as evidence in the case by proper instruction, the court instructed the jury to consider as evidence, in making up their verdict, their view of the premises, and the facts they may have acquired from such view. This was error. The statute provides that the trial of such cases shall be conducted as in other cases at law. This instruction violated the rule at law long established. Appellee's counsel cite Maywood Co. *v.* Maywood, 140 Ill. 216, 29 N. E. 704, as a case sustaining such instruction, but we do not so regard it. The instruction in that case was given at the request of the objectors, who were seeking to reverse the judgment; and they could not, of course, complain of it, or of the jury in following it in making up their verdict."

View by Jury Discretionary With Court. — When the statute provides that the hearing of objections to special assessments shall be conducted as in other cases at law, the court may in its discretion permit the jury to view the premises. Vane *v.* Evanston, 150 Ill. 616, 37 N. E. 901.

70. Lovell *v.* Drainage Dist., 159 Ill. 188, 42 N. E. 600.

71. Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567.

72. Topliff *v.* Chicago, 196 Ill. 215, 63 N. E. 692.

j. *Plats.* — An admittedly incorrect plat is not of course competent for any purpose on an issue of benefits,[73] nor would one be relevant which shows on its face that it can not serve to aid in getting at the truth of the matters in issue.[74]

k. *Former Condition of Street Improvement.* — Evidence of the condition of a street, just improved, at a time remotely prior to the improvement is not competent, for the reason that the question in such cases is, what benefits would be conferred, taking into consideration the street as it existed immediately prior to the making of improvement.[75]

l. *Cross-Examination.* — It is error, though held not to be reversible, to permit a witness on cross-examination, who had not in his direct examination given any opinion on the subject of benefits but had only testified to the physical condition of the property, to testify whether he recalled any instances where property was worth more after the improvement than before.[76] Where a witness on cross-examination testifies solely to the value of the objector's property and the benefits resulting to it from the improvement, a question propounded to him on cross-examination as to whether the city would be benefited is improper.[77]

m. *Defenses Against Assessments.* — In a proceeding by park commissioners to levy and collect an assessment for the improvement of a street leading to a public park, a prior assessment proceeding for the construction of which had been declared void, the party against whom such assessment is endeavored to be levied may not introduce evidence to show that the improvement had been paid for by the commissioners.[78] The mere fact of the existence of a

73. On objection to the confirmation of a special tax for an improvement, a plat, admitted by the witness who made it to be incorrect, is of course not admissible. Peru *v.* Bartels, 214 Ill. 515, 73 N. E. 755.

74. A plat offered for the purpose of showing the length of an improvement which upon its face shows that the length of the improvement cannot be computed therefrom is inadmissible. Sheedy *v.* Chicago, 221 Ill. 111, 77 N. E. 539.

75. Wells *v.* Chicago, 202 Ill. 448, 66 N. E. 1056.

76. Jones *v.* Chicago, 206 Ill. 374, 69 N. E. 64.

77. Sheedy *v.* Chicago, 221 Ill. 111, 77 N. E. 539.

78. Payment of Cost of Improvement by Commissioners. — In Sweet *v.* West Chicago Park Comrs., 177 Ill. 492, 53 N. E. 74, the court says: "The court properly refused to permit appellants to introduce proof tending to show the improvement had been paid for by the commissioners. The improvement was made by the commissioners under a prior assessment proceeding which was found and declared by a competent court to be void. Without expressing any opinion on the question whether the fact, if true, that the improvement had been fully paid for by the commissioners would constitute a valid objection to the right of the commissioners to maintain a new assessment proceeding under said § 20, it is sufficient to say in the present instance it is in no sense a proper subject of inquiry for a jury empaneled to determine the question of benefit conferred upon property by the improvement. Section 21 of the act under which the proceeding is prosecuted requires that the commissioners shall place upon the assessment, to the credit of any property sought to be assessed, the

street railway in a street improved, which is not assessed for the cost of improving of the street, is not, without proof of benefits to the railway, sufficient to impeach the assessment of the commissioners charging no part of the cost to the railway.[79] Evidence that the city had accepted work from another property owner different from that contemplated by the ordinance is immaterial and will not invalidate the assessment in a proceeding to confirm it.[80] Nor will an assessment be defeated, as to persons who did not object to a first assessment, because one of the commissioners who levied a second assessment testified as an expert witness on objections to a former proceeding.[81] On an issue whether the ordinance providing for a special assessment is valid on its face, the fact that the improvement thereunder was not constructed in accordance with the ordinance is not material.[82]

3. Sufficiency of Evidence. — A. Objections to Confirmation. Effect on Prima Facie Case. — When upon a hearing for the confirmation of an assessment the petitioner offers in evidence its petition with a properly certified copy of the improvement ordinance attached, together with the assessment roll, affidavit of mailing and posting of notices, and proof of publication, which, under the statute is *prima facie* evidence of the correctness of the assessment, but which "shall not be counted as the testimony of any witness" in the cause, such evidence is sufficient to authorize a confirmation of the assessment regardless of the fact that objections are urged against the assessment and evidence in support thereof is offered.[83] Nor will such fact require necessarily the introduction of any addi-

amount collected from such property by the prior illegal assessment. If complied with, this provision amply protects each property holder against double payments of assessments. It is not complained that the appellee commissioners omitted any proper credit from the rolls, and no question of collections under the former proceedings or payments for the improvement could arise."

79. **Street Railroad. — Failure to Assess.** — Chicago, R. I. & P. R. Co. *v.* Chicago, 139 Ill. 573, 28 N. E. 1108.

80. **Acceptance of Work of Different Character From Another.** — Gage *v.* Chicago, 203 Ill. 26, 67 N. E. 477.

81. **Commissioner of Assessment. Witness in Former Proceeding.** One who has testified as an expert witness upon the hearing of objections to an assessment is not thereby rendered incompetent to act as commissioner in making a second assessment as to persons who did not object to the first assessment. Philadelphia & R. C. & I. Co. *v.* Chicago, 158 Ill. 9, 41 N. E. 1102.

82. Beckett *v.* Chicago, 218 Ill. 97, 75 N. E. 747.

83. In Porter *v.* Chicago, 176 Ill. 605, 52 N. E. 318, the court says: "Upon the hearing the petitioner offered in evidence its petition, with a properly certified copy of the ordinance attached, with the assessment roll, and affidavit of mailing and posting notices, and the proof of publication, and this was all the evidence introduced by it. Appellant insists that, notwithstanding § 49 of the city and village act, concerning local improvements (Laws 1897, p. 119), which provides that these proofs 'shall be *prima facie* evidence of the correctness of the amount assessed against each objecting owner, but shall not be counted as the testimony of any witness or witnesses in the cause,' where objections are urged, and a trial had, such evidence is not sufficient to au-

tional evidence to rebut that so introduced by the objector.[84] The fact that the actual cost of an improvement will be less than the estimated cost made by the proper authority appointed to estimate the cost is no valid objection to the confirmation of an assessment, when the proceedings are regular and no fraud appears, and no part of the assessment has been collected, and evidence of such difference is, therefore, an immaterial circumstance.[85]

thorize a confirmation of the assessment. We are unable to comprehend force in this position. When a party upon a trial has made a *prima facie* case, he is certainly entitled to a judgment unless testimony of some kind is introduced to overcome that case, and no such proof appears to have been offered here."

84. Trigger *v.* Drainage Dist. No. 1, 193 Ill. 230, 61 N. E. 1114.

In Lovell *v.* Drainage Dist., 159 Ill. 188, 42 N. E. 600, the court says: "The appellants claim that it was error for the court to instruct the jury that the assessment roll was *prima facie* evidence to sustain the assessments upon all the tracts of land in controversy, and that, said assessment roll being in evidence, the burden of proof was shifted upon the objectors to establish, by a preponderance of the evidence, either that said tracts of land would not be benefited to the amounts assessed against them, respectively, or that said tracts were assessed for benefits in greater amounts than their proportionate shares of the $150,000 and expenses; and make a like claim of error because the court refused to instruct the jury that, while the assessment roll was *prima facie* evidence of the correctness of the assessment, yet that meant simply that if no evidence whatever was offered on the part of the objectors, then the presumption would be that such assessment roll was correct, but if evidence was offered by the parties upon issues in regard to its correctness, then the jury should not be influenced by such assessment roll, but should base their verdict upon the evidence as introduced. The assignments of error in question are not well grounded. The assessment roll makes out a *prima facie* case, and the commissioners are not required to resort to other evidence, except such as may be necessary to meet the evidence introduced by the objectors to impeach the assessment. Briggs *v.* Drainage Dist. No. 1, 140 Ill. 53, 29 N. E. 721. A *prima facie* case must prevail, unless it be rebutted, or the contrary proved. 1 Starkie, Ev. 544. *Prima facie* evidence of a fact is such evidence as, in judgment of law, is sufficient to establish the fact, and if not rebutted, remains sufficient for the purpose. Kelly *v.* Jackson, 6 Pet. 622."

85. In Danforth *v.* Hinsdale, 177 Ill. 579, 52 N. E. 877, the court says: "Conceding that the work to be done at the prices specified in the contract would not amount to as much as the assessment, would that fact, of itself, authorize the court to refuse to confirm the assessment? The village had appointed three competent persons to estimate the cost of the improvement, as provided by the statute. The persons appointed had discharged their duties, so far as appears, honestly and conscientiously. A report had been made to the village authorities, which had been approved as required by the statute. Indeed, no fraud or misconduct on the part of the persons appointed to estimate the cost of the improvement is claimed or charged. While it was the duty of the persons appointed to estimate the cost of the improvement to agree upon such an amount as would neither exceed nor be less than what the improvement would actually cost, yet the fact that the amount agreed upon might be too small or too large ought not to be a sufficient ground to defeat the assessment in the absence of fraud or misconduct on the part of those appointed to estimate the cost of the improvement. If a rule of that character were adopted, no assess-

B. Preponderance of Evidence. — Number of Witnesses. The fact that, in a special assessment proceeding, a like number of witnesses testifies on each side on the question of benefits does not preclude the finding that there is a preponderance of evidence on the question in favor of the petitioner for the confirmation of the assessment.[86] On the hearing of objections to the confirmation of an assessment the fact that a greater number of witnesses has testified in favor of the objector does not necessarily determine the weight of the evidence, especially where there is added to the testimony of the city the probative force of the commissioners' report and the actual view of the premises taken by the court.[87]

C. On Issue of Benefits. — It is generally provided by statute that in a proceeding to confirm a special assessment for a local improvement the assessment roll is *prima facie* evidence that the property assessed is benefited to the extent of the assessment[88] and that

ment could be sustained, as it would be in many cases impossible for the persons appointed to estimate the cost of the improvement to determine that fact with absolute certainty. Indeed, the fact that the statute requires any and all excess which may be collected above the cost of the improvement to be returned to the property owner would seem to indicate that it was not within the contemplation of the legislation that the exact amount of the cost, of an improvement could be determined before the improvement had been made. After the improvement has been made, and the actual cost has been ascertained, no greater sum can be collected from the property owner, although the estimated cost may be for a larger sum. But in an application to confirm a special assessment, where all the proceedings have conformed to the statute, and no part of the assessment has been collected, we do not think the property owner can interpose as a defense that the actual cost of the improvement will be less than the estimated cost made by the persons appointed to make an estimate of the cost."

86. Conway *v.* Chicago, 219 Ill. 295, 76 N. E. 384.

87. Chytraus *v.* Chicago, 160 Ill. 18, 43 N. E. 335.

88. Philadelphia & R. C. & I. Co. *v.* Chicago, 158 Ill. 9, 41 N. E. 1102; Chicago Union Trac. Co. *v.* Chicago, 207 Ill. 544, 69 N. E. 849.

On an appeal from an assessment made by commissioners, the assessment, if honestly and fairly made, is conclusive. *In re* Wendover, 65 Hun 625, 20 N. Y. Supp. 563.

The judgment of commissioners of assessment, being discretionary, is evidence in the absence of fraud. Latham *v.* Wilmette, 168 Ill. 153, 48 N. E. 311.

The presumption which is indulged in favor of the report of an assessment, which shows that omitted property was not benefited, is not overcome by evidence going only to the fact that such omitted property abuts on the proposed improvement. Sheedy *v.* Chicago, 221 Ill. 111, 77 N. E. 539.

An assessment roll is not rendered inadmissible on confirmation proceedings because, contrary to the statute, the assessment against the city is divided into installments, at least when the objector is not injured thereby. Walker *v.* Chicago, 202 Ill. 531, 67 N. E. 369.

An assessment will not be modified, altered or annulled merely because there is a difference of opinion, as to whether the commissioner exercises sound judgment in spreading it, unless his action was so improper as to amount to fraud. Betts *v.* Naperville, 214 Ill. 380, 73 N. E. 752.

is the benefit to the market value.[89] The testimony of witnesses, as to the benefits land will receive from an improvement, to the effect that no benefits will accrue to it, founded only upon a casual observation of the lands and in some instances, made at times more or less remote from the time of the assessment, will not overcome the *prima facie* effect given to the assessment by the statute.[90] A comparison with other parcels of land not shown to be similarly situated is not sufficient to justify judicial interference with the decision of commissioners of assessment as to benefits which particular property will receive.[91] When the evidence shows that unassessed lands, for the construction of a sewer, do not abut upon it, are not within the district, and are not given the right to drain it, such lands are properly omitted from assessment.[92]

4. Question for Jury. — A. BENEFITS. — The question whether property will be benefited by an improvement, and, if so, how much, are questions of fact for the jury's determination in a proceeding to confirm an assessment therefor.[93]

B. NECESSITY FOR IMPROVEMENT. — The question of the necessity for an improvement is solely for the municipal authorities and may not properly be left for determination by jury in a proceeding to confirm an assessment.[94]

C. QUESTIONS FOR DETERMINATION ON ISSUE OF BENEFITS. — On a hearing on the question of benefits the jury is authorized to pass upon two questions, first, whether particular property is assessed more than it will be benefited, and, second, whether it is assessed more than its proportionate share of the cost of the improvement. The necessity of the improvement may not be questioned, and the evidence must be limited to the foregoing two issues.[95]

5. Right To Open and Close. — The city, on the hearing of ob-

89. Chicago Union Trac. Co. *v.* Chicago, 207 Ill. 544, 69 N. E. 849.

90. Trigger *v.* Drainage Dist. No. 1, 193 Ill. 230, 61 N. E. 1114.

91. *In re* Opening of East 176 St., 85 App. Div. 347, 83 N. Y. Supp. 433.

92. Clark *v.* Chicago, 214 Ill. 318, 73 N. E. 358.

93. Chicago, R. I. & P. R. Co. *v.* Chicago, 139 Ill. 573, 28 N. E. 1108.

Whether particular property will be benefited at all, or has been assessed more than its proportionate cost of a local improvement, are questions of fact. Clark *v.* Chicago, 214 Ill. 318, 73 N. E. 358.

When the question whether property will be benefited by a proposed improvement is raised, the question is one for the determination of the jury. Watson *v.* Chicago, 115 Ill. 78, 3 N. E. 430.

94. Lingle *v.* West Chicago Park Comrs., 222 Ill. 384, 78 N. E. 794.

95. On such a hearing evidence of the existence of an ordinance permitting a railway to use the street improved on condition that it will keep it in repair, and make improvements for the width of its tracks is not competent or material. Wells *v.* Chicago, 202 Ill. 448, 66 N. E. 1056.

In a proceeding to levy an assessment for the improvement of a street the park commissioners need not introduce any proof on the questions whether the benefit derived equaled the assessment and whether the property was assessed more than its proportionate share. Sweet *v.* West

jections to the confirmation of a special tax to pay for a public improvement, is entitled to open and close the case.[96]

II. ENFORCEMENT OF ASSESSMENT.

1. Burden of Proof. — A. Matters in General To Be Proved. In an action on an assessment the proof must show, and on this issue the plaintiff has the burden to prove, that all the conditions upon which the plaintiff's rights depend have been complied with, which, in the absence of a statute giving *prima facie* effect to some record or fact, requires proof by competent evidence of every step in the statutory scheme that leads up to, and clothes the municipal authorities with power to make, a valid assessment.[97] Strict proof

Chicago Park Comrs., 177 Ill. 492, 53 N. E. 74.

96. Objections to Confirmation. Peru *v.* Bartels, 214 Ill. 515, 73 N. E. 755.

97. Merrill *v.* Shields, 57 Neb. 78, 77 N. W. 368.

In a suit to foreclose a lien for an assessment there is no presumption that the statute authorizing the levy and assessment has been complied with and the burden is on the party asserting the lien to establish its validity. Smith *v.* Omaha, 49 Neb. 883, 69 N. W. 402; Leavitt *v.* Bell, 55 Neb. 57, 75 N. W. 524; Equitable Trust Co. *v.* O'Brien, 55 Neb. 735, 76 N. W. 417.

For a case in which there was a failure of proof see Grant *v.* Bartholomew, 58 Neb. 839, 80 N. W. 45.

In Pittsburgh, C. C. & St. L. R. Co. *v.* Fish, 158 Ind. 525, 63 N. E. 454, the court says: "In an action for the enforcement of a right granted by a special statute, not only the complaint, but the proof, must show that all the conditions upon which the right demands have been complied with. Towns have the right to improve streets, and to assess the cost thereof against the abutting property; but the right wholly rests upon an orderly procedure, prescribed by the statute, which gives the property owners a hearing before their lands are charged. The complaint, as against the general denial, proves nothing. The general denial challenges proof of every material averment of the complaint, which means proof, by competent evidence *dehors* the complaint, of every step in the statutory scheme that leads up to, and clothes the board of trustees with power to make a valid assessment. The statute plainly provides the steps that shall be taken in a street improvement to create an enforceable lien, and it can be created in no other way. Van Sickle *v.* Belknap, 129 Ind. 558, 28 N. E. 305; Leeds *v.* De Frees (this term), 61 N. E. 930; Cleveland, C. C. & St. L. R. Co. *v.* Edward C. Jones Co., 20 Ind. App. 87, 50 N. E. 319. Proof that the town attorney was acquainted with the assessment made by the town board for the improvement of Pearl street, and that appellant was assessed therefor $117, was no evidence at all that the assessment alluded to was a valid assessment, or that the plaintiff had any right to its enforcement."

Where the tax bill is not made evidence of the validity of an assessment and this issue is joined, the plaintiff seeking to recover on the bill has the burden to show that the tax was assessed in the manner required by law, by establishing the taking of all essential steps in the assessment proceeding. St Louis *v.* Ranken, 96 Mo. 497, 9 S. W. 910.

Strict performance of all the conditions imposed by the law is necessary to fasten upon property a lien for street improvements abutting thereon. West *v.* Porter, 89 Mo. App. 150.

In an action by a city to enforce the collection of a local assessment a recovery can be had only upon

of a compliance with the merely directory provisions of the ordinances relating to the improvement is not required.[98] The property owner may show, of course, any neglect to comply with even directory ordinances or provisions whereby he is injured.[99] When there has been a deviation from the improvement provided for by the ordinance, in a suit to recover therefor the plaintiff has the burden to show that the change was not material and has not operated to the injury of the property owner against whose property the assessment is levied.[1] A city having authority to let a contract for local improvements, to inspect, accept and pay for the work, and to audit accounts, is not called upon to show that the prices paid are reasonable, or to prove the account, except to show that it has paid for the improvement.[2] But an owner whose property is assessed may show, of course, that the charges are for work not embraced in the ordinance, and that, therefore, they are not payable out of the assessment fund.[3] Where it is contended that the municipal authority converted a road into a street, so as to charge an abutter with the cost of the improvement, it must be made to appear that

proof of a strict compliance with the provision of its charter. Spokane Falls *v.* Browne, 3 Wash. St. 84, 27 Pac. 1077.

The city in its suit to recover a judgment for a special tax for building a sidewalk is required to show affirmatively that the improvement ordinance was complied with. Jeffris *v.* Cash, 207 Ill. 405, 69 N. E. 904; Hoover *v.* People, 171 Ill. 182, 49 N. E. 367.

98. Risley *v.* St. Louis, 34 Mo. 404.

99. If an improvement has been made in a manner satisfactory to the officer intrusted with its supervision and has been received by the corporation and paid for, the city need not, in an action to recover an assessment therefore, prove that all the formalities which the city ordinances prescribe have been observed to make its *prima facie* case. The defendant may show, however, in defense, a neglect of duty on the part of the municipal authorities intrusted with the execution of the work, and the extent of his injury thereby. St. Joseph *v.* Anthony, 30 Mo. 537; Risley *v.* St. Louis, 34 Mo. 404.

1. Church *v.* People, 179 Ill. 205, 53 N. E. 554; Church *v.* People, 174 Ill. 366, 51 N. E. 747.

2. People *v.* McWethy, 177 Ill. 334, 52 N. E. 479.

3. In People *v.* McWethy, 177 Ill. 334, 52 N. E. 479, the court says: "Counsel are correct in their claim that the city is not bound to prove that the prices paid were reasonable, or to prove the account, except to show that it paid the amount in the making of the improvement. It has power, by law, to let the contract, to direct and inspect the work, to audit the accounts, and to accept and pay for the work when complete. These matters are within its exclusive jurisdiction, and, in the absence of fraud, the property owner cannot, in any form of proceeding, call upon the city to justify its action. The city, and not the individual property owner, is the judge whether the contract is complied with; and, unless there is a fraudulent abuse of the power, the property owner is concluded, and in case of fraud a bill in equity is the proper remedy. Ricketts *v.* Hyde Park, 85 Ill. 110; Haley *v.* Alton, 152 Ill. 113, 38 N. E. 750; Fisher *v.* People, 157 Ill. 85, 41 N. E. 615; People *v.* Green, 158 Ill. 594, 42 N. E. 163. The appellee, however, had a right to show, as against the *prima facie* case made by the treasurer, that a part of these charges were for work not embraced within the ordinance, and not payable out of the assessment fund, and expended elsewhere."

the improvement was either authorized or adopted by the municipal authorities.[4]

B. Presumption as to Performance of Official Duty. Within reasonable limits the general presumption of the due and regular performance of official duty obtains in actions to enforce special assessments.[5] Numerous applications of the general rule to the particular question are set forth in the note below. Positive

4. In Harrisburg *v.* Funk, 200 Pa. St. 348, 49 Atl. 992, the court says: "Where it is intended that an improvement to a street had converted that highway from a road into a street, it must be shown that the improvement was either authorized or adopted by the municipal authorities. There is no evidence of any ordinance of the city of Harrisburg authorizing or adopting any formal improvement; neither is any contract in relation thereto shown; and there is, of course, no contention that the municipality ever exercised any statutory authority with respect to the paving of the street prior to the present time. Undoubtedly there might be an acquiescence short of this, but the entire absence of formal municipal action is strong presumptive evidence of lack of municipal intent to adopt the road as a paved street. Municipal adoption or acquiescence cannot be assumed. It must be proven. In so far as the evidence is concerned, the municipal authorities apparently did nothing more than keep the street in repair. This was a duty incumbent upon them under any circumstances, and its discharge is entirely consistent with the absence of purpose or intent to change an ordinary road into a city street. We cannot see in the testimony anything which should properly exempt the abutting owner from liability from his proportionate share of this improvement. Where, as here, the facts are undisputed, the question as to whether or not an original paving is shown, prior to that for which it is sought to recover, becomes a question of law for the court."

5. See generally the article "Officers," Vol. IX.

The violation of an official oath will not be presumed. Shimmons *v.* Saginaw, 104 Mich. 511, 62 N. W. 725.

The regularity of proceedings levying assessments is presumed and can only be overcome by an affirmative showing that something was omitted or improperly done. McAuley *v.* Chicago, 22 Ill. 563.

Filing of Drawings and Specifications. — It will be presumed that the law, requiring drawings and specifications of an improvement ordered by the board of public works, to be on file before the publication of notice of calling for bids, was complied with. Henning *v.* Stengel, 23 Ky. L. Rep. 1793, 66 S. W. 41.

As to Compliance With Void Law. Where an ordinance is void for restricting the hiring of labor to members of a labor union it will not be presumed that it was enforced in the letting of a contract, for an improvement and the levying of assessments therefor, but if such fact is relied upon to defeat an assessment, proof of the fact is required. Grey *v.* People, 194 Ill. 486, 62 N. E. 894.

Making of Contract. — It will be presumed, without evidence to the contrary, that the city authorities have complied with all the legal formalities required to be observed in the making of a contract. New Orleans, to use of Nicholson *v.* Halpin, 17 La. Ann. 185, 87 Am. Dec. 523.

The presumption is that the authorities in making an assessment and levying and collecting the same have done their duty and have not made an illegal assessment or returned an illegal tax therefor, and the burden of proof of showing such matters as will avoid the tax or establish its illegality is upon the person objecting thereto. People *v.* Keener, 194 Ill. 16, 61 N. E. 1069.

Enforcement. — It will be presumed, until the contrary is made to appear, that the part of a street ordered to be repaired, was the only part requiring repair, and that there was no unjust discrimination in the

proof of illegality is required to overthrow the presumption of the proper performance of official duty, so as to avoid assessment.[6]

C. Power Under Which Work Is Done. — General or Special. — If a city has general power under its charter to improve streets without the consent of property holders thereon and has so acted without their consent, it will be presumed to have acted under its general power.[7]

D. Avoidance of Assessment for Irregularity or Invalidity of Proceedings. — The validity of a city ordinance should be presumed and the ordinance upheld unless its invalidity clearly appears.[8] If the property owner complain of irregularities in the proceedings or of the misdeeds of the municipal officers in the matter of the assessment, before he may have relief he must in general establish such as a defense and show that he has been injured by the things of which he makes complaint.[9] When the defendant contests the

ordering of the improvement. Augusta *v.* Taylor, 23 Ky. L. Rep. 1647, 65 S. W. 837.

Presumption of Review and Examination from Confirmation. Where it is the duty of a municipal council to review an assessment made by the city engineer, and thereupon to confirm it, the fact of the confirmation will raise the presumption that the council duly reviewed and examined the assessment. Auditor General *v.* Hoffman, 132 Mich. 198, 93 N. W. 259, 9 Detroit Leg. N. 571.

Estimate. — When Presumed. — In the absence of proof, it will be presumed, from the fact that the corporate authorities levied a park tax upon town property, that the park commissioners made the estimate required by statute in such cases. The return of the county collector to the county clerk, of delinquent lands, is *prima facie* evidence of the legality of the several taxes levied as set forth in such returns. Pike *v.* People, 84 Ill. 80.

When the city charter requires the contractor to receipt the city engineer for the special tax bills issued to pay for an improvement, upon the introduction of the bills in evidence by the contractor it will be presumed, in the absence of evidence to the contrary, that such receipt was taken by the engineer. Also, such a bill being made *prima facie* evidence of the liability of the property therein described, the defendant has the burden to prove that such a receipt was not taken. Keith *v.* Bingham, 100 Mo. 300, 13 S. W. 683.

It is presumed that the cost of constructing a sidewalk was apportioned according to law in the absence of evidence to the contrary. Anderson *v.* Bitzer (Ky.), 49 S. W. 442.

Button *v.* Gast, 24 Ky. L. Rep. 2284, 73 S. W. 1014; Henning *v.* Stengel, 23 Ky. L. Rep. 1793, 66 S. W. 41.

6. It will be presumed that a meeting of council at which an ordinance was adopted was a legally authorized meeting. Dollar Sav. Bank *v.* Ridge, 183 Mo. 506, 82 S. W. 56.

7. Waco *v.* Chamberlain (Tex. Civ. App.), 45 S. W. 191.

8. **Invalidity of Ordinance. Must Clearly Appear.** — Seaboard Nat. Bank *v.* Woesten, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279.

9. McHenry *v.* Selvage, 99 Ky. 232, 35 S. W. 645.

Collusion Between Municipal Officers and Contractors. — A taxpayer, seeking to avoid a local assessment on the ground of fraud and collusion between the municipal officers and the contractors in the passage of the ordinance providing therefor, has the burden to prove that, by letting the work of construction and maintenance to the lowest average bidder, an unauthorized charge was imposed upon his property. Seaboard Nat. Bank *v.* Woesten, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279.

validity of an assessment on the ground that the expense of a part of the improvement should have been assessed against another, the burden is upon the contestant to show that such expense was im-

Lack of Notice. — What To Be Shown To Defeat Assessment. When a property owner has made payments on an assessment levied on the property on account of an adjoining street improvement and sets up that the amount assessed was in excess of the special benefits accruing to the assessed property, and it appears that the owner had received no notice of the proposed improvement and assessment, and had not estopped himself to set up such defense, such owner has the burden to show that the assessment exceeded the special benefit accruing to his property. Yost *v.* Toledo & O. C. R. Co., 24 Ohio Cir. Ct. 169.

Failure to Make Record of Valuations. — The failure to make a record of a valuation of the property charged with an assessment raises no presumption of inequality in the assessment requiring it to be set aside. Ayers *v.* Toledo, 26 Ohio Cir. Ct. 767.

Where notice of the time and place of making an assessment for an improvement is directory only, and not mandatory, in an action to enforce the lien the assessment is not conclusive upon the party whose land is assessed, but he may show any errors or mistakes in the assessment and have them corrected. Erie City *v.* Willis, 26 Pa. Super. Ct. 457.

An assessment will not be disturbed unless it affirmatively appears that under a different and proper method the defendant would have been charged materially less. Button *v.* Gast, 24 Ky. L. Rep. 2284, 73 S. W. 1014; Snyder *v.* Barber Co., 24 Ky. L. Rep. 2348, 73 S. W. 1118; Barrett *v.* Artificial Stone Co. (Ky.), 52 S. W. 947; Chawk *v.* Beville, 21 Ky. L. Rep. 1769, 56 S. W. 414; Schuster *v.* Barber Co. (Ky.), 74 S. W. 226.

A defendant claiming an assessment to have been made in an improper manner has the burden to show that the assessment against him was wrongful. Ithaca *v.* Babcock, 72 App. Div. 260, 76 N. Y. Supp. 49, *affirming* 36 Misc. 49, 72 N. Y. Supp. 519.

Wrong Basis of Assessment. — To enable a party to defend against an assessment on the ground that a wrong basis of apportionment was followed by the municipal authorities, he must prove facts showing that such was the case, and that, under the proper method, he would be required to pay less than upon the basis adopted. Barret *v.* Falls City Artificial Stone Co. (Ky.), 52 S. W. 947.

Effect of Assessment Certificate. Where a recovery is sought upon an assessment certificate which appears regular and valid, the burden is upon the holder to show in the first instance that it was properly issued for the sum named, and it will be treated as *prima facie* evidence of indebtedness, and the burden is upon the party resisting payment to show that the certificate is invalid or defective. Tuttle *v.* Polk, 92 Iowa 433, 60 N. W. 733.

Inclusion of Invalid Items in Special Tax Bill. — The burden is on the defendant sued on a special tax bill, to show that some part of the tax bill was invalid as representing unauthorized items, and, evidence of such fact being offered, to adduce such evidence as will enable the court to separate the invalid from the valid parts of the bill. Haag *v.* Ward, 186 Mo. 325, 85 S. W. 391.

Unauthorized Improvement. What Necessary To Be Shown. — In an action on a special tax bill for reconstructing a sidewalk, an item for removing old pavements and preparing a roadway does not furnish a defense against the assessment on the ground that it was repairs instead of reconstruction, in the absence of evidence concerning what work was included in the item, especially in the face of the fact that the city paid for repairing the concrete foundation. Perkinson *v.* Schnaake, 108 Mo. App. 255, 83 S. W. 301.

properly charged to him and not to such other.[10] The return of commissioners of public works as to what property shall be assessed and what omitted in making an assessment for a public improvement may not be impeached on application for judgment on the assessment, except for fraud.[11] It will be presumed that commissioners of assessment "investigated" the matters of assessment before reporting or assessing benefits.[12] The assessing authorities are presumed to know all the peculiarities of the locality of an improvement and to be familiar with the property affected so that in reporting upon the advisability of an improvement and the benefits to be derived therefrom, they are not required specially to go upon the grounds where the improvement is to be made.[13]

E. Proof of Ordinance. — It is not necessary to a recovery that the improvement ordinance to prove that the ordinance was published as required by law when, under the statute, a *prima facie* case is made by the introduction of the statutory records.[14] And in Arkansas the introduction of a certified copy of the ordinance shifts to the defendant the burden to show that it was not published as required to give validity.[15]

F. Conclusiveness of Certificates. — Generally when an officer is required to certify to the correctness of the proceedings relating to the assessment, though such certificate be made conclusive

10. The mere fact that a railroad occupies part of a street improved does not invalidate the assessment. McVerry *v.* Boyd, 89 Cal. 304, 26 Pac. 885.

11. Wright *v.* Chicago, 48 Ill. 285.

12. Wright *v.* Chicago, 48 Ill. 285.

13. Wright *v.* Chicago, 48 Ill. 285.

14. Illinois Cent. R. Co. *v.* People, 161 Ill. 244, 43 N. E. 1107.

Notwithstanding it must be pleaded, the ordinance authorizing the doing of the work need not, to establish a *prima facie* case, be introduced in evidence in an action on a special tax bill, when the statute provides that the certified tax bill, shall be *prima facie* evidence of the ownership of the lands affected by the person named therein as owner, that the work was done and materials furnished and the amount thereof, and of the owner's liability. The tax bill itself under the statute so far implies a valid ordinance as to shift the burden of proof. Stifel *v.* Dougherty, 6 Mo. App. 441.

In an action to enforce the lien of a tax bill for municipal improvement the defendant has the burden to show that the ordinance providing for the making of the improvement was not legally enacted. Dollar Sav. Bank *v.* Ridge, 183 Mo. 506, 82 S. W. 56.

Publication of Ordinance. — Under the statute providing that a copy of the ordinance authorizing an improvement, a copy of the contract therefor, and of the apportionment of the cost of the same, attested by a designated officer, shall be proof of the due passage, approval and publication of the ordinance, and *prima facie* evidence of every other fact necessary to be established by the plaintiff in such an action, upon the introduction of such evidence proof *aliunde* of the publication of the ordinance under which the work was done, is not necessary to be made. Purdy *v.* Drake, 17 Ky. L. Rep. 819, 32 S. W. 939.

15. Publication of Ordinance. In a suit to foreclose an assessment the defendant, when the plaintiff has introduced a certified copy of the improvement ordinance as provided by the statute, has the burden to prove that the ordinance was not published. Kansas City, P. & G. R. Co. *v.* Waterworks Imp. Dist. No. 1, 68 Ark. 376, 59 S. W. 248.

evidence of the matters certified to, the certificate is conclusive only of the regularity of the municipal proceedings, and not of other matters that can be established only by independent evidence or extrinsic circumstances, or which can only be ascertained by an investigation independent of the record of the proceedings.[16] In an action by a contractor against the city on a contract for the making of an improvement which provides that the contractor shall not be entitled to payment until the work is completed, such completion to be certified by certain of the city's officers, but that the city shall not be estopped by such certificate from showing the true amount and character of the work, the city may show that such certificate is incorrect, but it has the burden of proof in that regard.[17]

G. Petition for Improvement. — In an action for the recovery of an assessment for an improvement, which can be made only upon the petition of property owners, it is incumbent upon the city to make proof of the petition for such improvement, as a jurisdictional fact. The principle, *omnia praesumuntur esse rite acta,* heals only apparent irregularities or omissions where jurisdiction is clearly vested and will not dispense with proof of jurisdictional facts, for such petition goes to the municipal jurisdiction.[18] Authority to sign an application for an improvement and the ownership, by the subscribers, of the lands affected, may be *prima facie* presumed from the application properly approved by the municipal authorities.[19]

H. Approval of Engineer's Report of Assessment. — Where in the settling of an assessment the city engineer is required to make an apportionment of the cost of the improvement, to be submitted to and approved by the city council before it shall become effectual, the city, in a suit on the assessment, has the burden to establish the council's approval of the engineer's report; and such approval must clearly appear in the procedure of the council.[20]

I. Grades and Levels. — Where under the statute certain formal statutory records are given the effect of a *prima facie* case for the recovery of an assessment, the plaintiff is not required, in addition

16. Chapman *v.* Brooklyn, 40 N. Y. 372.

Under the Brooklyn Charter provision, that no warrant for the collection of any assessment shall be issued by the common council until all the proceedings had in levying the assessment shall have been examined and certified as correct by the street commissioner and the attorney and counsel of the city, which certificate, it is provided, shall be entered upon or annexed to the assessment roll and shall be conclusive evidence of the regularity of the proceedings in the matter, does not conclude the parties on the question whether the persons named therein are in fact the owners or occupants of the lands for which an assessment is made. Newell *v.* Wheeler, 48 N. Y. 486.

17. Dean *v.* New York, 45 App. Div. 605, 61 N. Y. Supp. 374.

18. Pittsburg *v.* Walter, 69 Pa. St. 365.

Presentation of Petition. — If a petition is necessary to an improvement, then there must be proof of the presentation of such petition. Grant *v.* Bartholomew, 58 Neb. 839, 80 N. W. 45.

19. Dashiell *v.* Baltimore, 45 Md. 615.

20. Lufkin *v.* Galveston, 56 Tex. 522.

to the statutory evidence to make a *prima facie* case, to prove the establishment of official grades and levels and the construction of the improvement thereon, though of course this fact is essential to a recovery.[21]

J. As to Contract for Improvement. — In an action by a town to foreclose the lien of an assessment for the improvement of a street the plaintiff must show that a contract for the work had been actually entered into. It will not be sufficient merely to show that the municipal council opened bids and awarded the work.[22] When a contract for an improvement may, in certain circumstances, be let to a contractor selected by a majority of the property owners,

21. Proper averments of the steps leading to the creation of a lien, supported by the exhibits to make out a *prima facie* case, entitle the plaintiff to a judgment in the face of a mere denial as to the fixing of the grade of the street. Barfield *v.* Gleason, 23 Ky. L. Rep. 128, 63 S. W. 964, 64 S. W. 959.

In an action by a city on a special tax bill for the improvement of a street, duly authorized by ordinance, which is recognized by the city as being on the established grade, the city is not required to prove independently of its *prima facie* case, made out by the introduction of the tax bill, the existence of a previous ordinance establishing the street grade. Gibson *v.* Zimmerman, 27 Mo. App. 90.

Under the California statute after the plaintiff's *prima facie* case, by the introduction of the statutory evidence in that behalf required, has been made, all the facts necessary to relief are assumed to be proven, including the official establishment of the width and grade of the street improved. Blanchard *v.* Ladd, 135 Cal. 212, 67 Pac. 130.

Under the Kentucky statute, a copy of the ordinance authorizing a street improvement, a copy of the contract therefor, and a copy of the appointment, each duly attested, are *prima facie* evidence that the grade had been established as required by law. Caldwell *v.* Cornell, 21 Ky. L. Rep. 812, 53 S. W. 35 (construing Ky. Stat. § 2838).

It is not necessary in an action for recovery to prove the basis or datum for city levels set forth in the improvement ordinance to have been established by another ordinance of the city. In the case of Chicago Term. Trans. Co. *v.* Chicago, 184 Ill. 154, 56 N. E. 410, considering this question the court says: "Another objection is that the grade of the street as established by the ordinance is insufficient. The ordinance fixes the grade for the entire length of the improvement at certain heights above datum, and provides: 'The above heights as fixed shall be measured from the plane of low water in Lake Michigan of A. D. 1847, as established by the trustees of the Illinois and Michigan Canal and adopted by the late board of drainage commissioners and by the late board of public works of the city of Chicago as the basis or datum for city levels.' The objection is that the ordinance does not show that the datum referred to was established by an ordinance. This datum is the ancient low-water mark in Lake Michigan in 1847. The mark was not created by an ordinance, and it was no more necessary to establish it in that manner than any other object from which a survey might be made or levels run. The ordinance requires the street to be graded to certain heights above that mark, and that is all that was required. Again, it is objected, that, while the city proved the ordinance establishing the grade, it offered no proof that there was such an ancient low-water plane as therein referred to. It was not necessary to prove that the lake was there in 1847, or that there was a time that year when the water was low."

22. Hamilton *v.* Chopard, 9 Wash. St. 352, 37 Pac. 472.

in a suit to recover for work so done, proof of the proper selection of the contractor is requisite to a recovery.[23] If the defendant denies the authority of an agent to enter into a contract on the contractor's behalf for an improvement, he has the burden to prove such lack of authority.[24]

K. Completion and Acceptance of Work. — In an action to enforce an assessment the plaintiff has the burden to show the completion of the work according to the contract under which it was undertaken to be performed,[25] and within a reasonable time,[26] and that it has been accepted by the proper municipal authorities.[27]

L. Notice. — When the municipal council has declared a notice of proposals sufficient, though only by acting upon it, without any formal order, this will support a *prima facie* presumption that sufficient notice was given.[28] No such presumption may be indulged, however, on the question of notice of making the assessment, and if such notice does not appear from the record or by other competent evidence *dehors* the record there can be no judgment enforcing the assessment.[29]

M. Failure of Owner to Comply With Order to Make Improvement. — If after notice to an abutter to improve his sidewalk he undertakes to do so, and the city declares the work done not in conformity to the notice, making a new improvement, in an action to recover therefor, the owner, if he assert in defense that he has complied with the notice, has the burden to show compliance by clear evidence.[30]

N. Assessment of Several Lots as One Parcel. — In the absence of a showing by the owner of several lots adjacent to an improvement, assessed as one parcel, that he has been injured thereby it will be presumed that the lots were so assessed together for some good and valid reason.[31]

23. Selection of Contractor by Owners. — Burden. — Reilly *v.* Philadelphia, 60 Pa. St. 467.

24. Authority of Agent of Contractor. — City St. Imp. Co. *v.* Laird, 138 Cal. 27, 70 Pac. 916.

25. City of New Orleans, to use of Nicholson *v.* Halpin, 17 La. Ann. 185, 87 Am. Dec. 523; Haefgen *v.* State (Ind. App.), 47 N. E. 28.

26. Sparks *v.* Villa Rosa Land Co., 99 Mo. App. 489, 74 S. W. 120.

27. The admission that, after the completion of the work, it was accepted by the proper municipal authority, from whose decision no appeal was taken, is conclusive of the case, and no further proof in the plaintiff's behalf is in such circumstances required as against an objection that the work was not accepted. Shepard *v.* McNeil, 38 Cal. 72.

28. Taber *v.* Ferguson, 109 Ind. 227, 9 N. E. 723.

29. No Presumption of Notice of the Assessment. — Said the Illinois court in Honore *v.* Chicago, 62 Ill. 305: "The entire record of the proceedings was put in evidence, from which it appears there was no competent proof of the notice of making the assessment nor any proof *dehors* that record. This is fatal to the judgment under the objection made to the application. Rich *v.* Chicago, 59 Ill. 286. The collector was unauthorized to apply for judgment. Hills *v.* Chicago, 60 Ill. 86."

30. Defense of Compliance With Order. — Burden. — Degree of Proof. Cincinnati *v.* Longworth, 10 Ohio Dec. 598.

31. Mix *v.* People, 116 Ill. 265, 4

O. Delivery of Tax Bill to Plaintiff. — The plaintiff, in an action on a special tax bill under the statute which requires the bill to be delivered to the contractor within a time stated, is not required to prove the delivery of the bill to him to make his *prima facie* case. This is a matter to be pleaded and proved as a defense.[32] In the absence of evidence to the contrary it will be presumed that a special tax bill for street improvements, issued by the city engineer under the statute, was delivered to the contractor on the day of its date.[33]

P. Defendant's Ownership of Property Assessed. — If the defendant denies ownership of the lot against which an assessment is sought to be enforced, the city will be compelled to prove his ownership under the statute authorizing a suit against the owner for foreclosure.[34] The burden of establishing ownership is upon the plaintiff though the answer allege the title in other persons, one of whom is not a party defendant.[35]

Q. Necessity for Sum Created by Assessment. — It will be presumed that all of the amount assessed against lands for an improvement is needed to pay the cost and expense of constructing the improvement.[36]

R. Demand for Payment of Assessment. — The plaintiff seeking to recover an assessment, in the absence of a statute so providing, is not required to make proof of demand for payment before instituting his action.[37] If the statute requires demand before the property assessed may be sold to pay the assessment against it or recovery otherwise had, then proof of such fact is required to be made and on this issue the plaintiff has the burden.[38]

N. E. 783; Pfeiffer *v.* People, 170 Ill. 347, 48 N. E. 979.

In the absence of evidence to the contrary it will be presumed that lots, assessed for a local improvement as one parcel, were owned and improved as one parcel so as to sustain the assessment under the statutes, when the contrary is not made to appear by the evidence. Ottis *v.* Sullivan, 219 Ill. 365, 76 N. E. 487.

32. Adkins *v.* Quest, 79 Mo. App. 36.

33. St. Louis *v.* Armstrong, 38 Mo. 29.

34. Santa Barbara *v.* Huse, 51 Cal. 217.

Special Tax Bill as Prima Facie Evidence. — A special tax bill under the Missouri statute is *prima facie* evidence of the liability of the defendant named therein as owner of the land affected thereby. Heman *v.* Larkin (Mo. App.), 70 S. W. 907.

35. Robinson *v.* Merrill, 87 Cal. 11, 25 Pac. 162.

36. Hoefgen *v.* State (Ind. App.), 47 N. E. 28.

37. Proof of Demand Not Necessary. — Lewis *v.* Albertson (Ind.), 53 N. E. 1071.

38. Under a New York statute, before property could be sold for an assessment, demand for payment must be twice made upon the owner. It was held under the statute that without evidence of such demand the corporation has no jurisdiction to sell the property for the non-payment of the assessment. Paillett *v.* Youngs, 4 Sandf. (N. Y.) 50.

Return of Contractor as Prima Facie Evidence of Demand. — The verified return of the contractor that he went on the lot and publicly demanded payment of the sum assessed against the same is *prima facie* evidence of such facts, and, if not disputed, shows a proper demand. Ede *v.* Knight, 93 Cal. 159, 28 Pac. 860.

2. Admissibility of Evidence. — A. Best and Secondary Evidence. — a. *In General.* — The best and only competent evidence of the municipal council's action on the appraisement of property appropriated for an improvement is the record of the vote on the motion or resolution proposing its confirmation.[39] The property owner sued on an assessment may not show that the certificate of publication filed in the confirmation proceedings was false.[40] To show the change of the lines and boundaries of a street improved, the recital in a plan of such change that it was adopted by the council is not competent. The ordinance of the council adopting such plan, and establishing the lines and boundaries of the street as set forth therein is the best evidence of such fact.[41] The inspection and reception of an improvement, if not shown upon the records of the proceedings kept by the municipal authorities, may be proved by evidence *aliunde,* like any other fact.[42] When no particular proof

39. In Merrill *v.* Shields, 57 Neb. 78, 77 N. W. 368, the court says: "The evidence relied upon to establish the making and confirmation of the appraisers' report consists of the following recitals contained in the ordinance declaring Twenty-second street open to public travel from the south line of E. V. Smith's addition to the south line of Paul street, extended: 'Whereas, three disinterested freeholders have been appointed by the mayor and council to appraise the value of the property to be appropriated; and whereas, said appraisers, after duly qualifying according to law, and examining the property to be taken, have made their report, and the city council has approved the same,' etc. Manifestly this ordinance is not the primary evidence of the action of the council on the appraisers' report. The recital in relation to the matter is a mere declaration of what the council did on a former occasion. It was not inserted in the ordinance in obedience to any law requiring it to be done. Indeed, the ordinance itself was not an essential step in either the proceeding to establish the street or to levy the tax. It was nothing more than a formal announcement to the public that the street was open, and that the city asserted dominion over it. It was appropriate evidence of such announcement and assertion, but not of the fact that the property described had been duly condemned. It seems to us entirely clear that the best and only competent evidence of the council's action on the appraisement of the freeholders was the record of the vote on the motion or resolution proposing its confirmation. The city authorities might, of course, with propriety declare to the public that the street was open to travel, and there is no reason why the declaration should not be made in the form of an ordinance; but they could not, by recitals in the preamble, create evidence in support of the condemnation proceeding. The rule that the recital of jurisdictional facts in the record of the proceedings of an inferior tribunal is *prima facie* evidence of the existence of such facts has no application here, for the reason that the council was neither called upon to pass the ordinance, nor to then make an inquiry and determination in regard to the action it had previously taken on the appraisers' report."

40. Hertig *v.* People, 159 Ill. 237, 42 N. E. 879, so holding on the ground that the evidence should have been tendered at the hearing of the confirmation proceeding, and that the effect of permitting such evidence in this proceeding would be to attack the jurisdiction of the court collaterally, which was not permissible.

41. Oakdale *v.* Sterling, 8 Pa. Super. Ct. 428.

42. Inspection and Acceptance of Improvement. — Richardson *v.* Mehler, 23 Ky. L. Rep 917, 63 S. W. 957.

of the publication of notice is required by the improvement ordinance, the fact may be established by any competent extrinsic proof under the rules of the common law.[43]

b. *Aiding or Impeaching Records in Assessment Proceedings.* The fact that the superintendent of streets has recorded the documents connected with an assessment for street improvements may be shown, although in his certificate at the close of the record he failed to designate by name one of the documents recorded.[44] In an action on a special tax bill for a street improvement, a protest, which, if signed by a majority of property owners, would deprive the municipal council of jurisdiction to make the improvement, may be impeached by evidence controverting the ownership and authority of the signers.[45] The record, in non-jurisdictional matters, is generally held not to be the exclusive mode of proof of municipal action when not made so by the statute.[46] The records of the proper board concerning the publication of notice of the award of a contract for a street improvement may not be contradicted by parol.[47]

B. Documentary Evidence. — a. *Municipal Records and Proceedings in General.* — In a proceeding by a contractor to collect an assessment for a street improvement the record of the city council providing for such assessment is the basis of the action, and is, hence, admissible in evidence.[48] So also are the precept for collection and the affidavits therefor competent.[49] So also the record of the proceedings of the council containing the notice for bids for the improvement is competent, being one of the steps in the pro-

43. Seattle *v.* Doran, 5 Wash. St. 482, 32 Pac. 105. Taber *v.* Ferguson (Ind.), 9 N. E. 723; State *v.* Council of Elizabeth, 30 N. J. L. 365; Shimmons *v.* Saginaw, 104 Mich. 511, 62 N. W. 725; Wilson *v.* Seattle, 2 Wash. St. 543, 27 Pac. 474 (holding that when the record does not show notice the presumption of due performance of official duty will not overcome the omission even though action dependent on notice follows).

If proof of the publication of notice of a proposed street improvement is defective, parol evidence is admissible to supply the defects. Clinton *v.* Portland, 26 Or. 410, 38 Pac. 407.

44. Perine *v.* Lewis, 128 Cal. 236, 60 Pac. 422.

45. Sedalia *v.* Montgomery, 109 Mo. App. 197, 88 S. W. 1014.

46. The testimony of the city clerk that an improvement was constructed under a particular ordinance, together with the original ordinance, so referred to, is competent evidence of the ordinance under which the improvement was constructed. The certified copy of the ordinance required by the statute to be annexed by the city clerk to his report to the collector of the uncollected assessments is not the exclusive mode of proof of such fact. People *v.* Smith, 201 Ill. 454, 66 N. E. 298.

The records of the board of public works of the city of St. Paul are not conclusive, but only *prima facie* evidence of the facts they recite, so that other evidence of the true proceedings may be received. State *v.* Ramsey Co., 29 Minn. 62, 11 N. W. 133.

47. Dorland *v.* McGlynn, 47 Cal. 47.

48. Fralich *v.* Barlow, 25 Ind. App. 383, 58 N. E. 271.

49. Fralich *v.* Barlow, 25 Ind. App. 383, 58 N. E. 271.

ceedings of this nature required by the statute.[50] Where special tax assessment collector omits from the published notice of the assessment, the name of the owner of the property sought to be charged, the delinquent list of the previous year on the same warrant for the collection of the particular assessment, giving the name of such person as the owner of the particular property, is competent evidence in the owner's behalf to show notice to the collector of such person's ownership of the particular property.[51] The fact that the title of the book, offered by the county collector to make out his *prima facie* case in an action for a tax judgment against land for a delinquent special assessment, does not precisely correspond with the title given in the statute is immaterial where it is not questioned, but the book offered is the one contemplated by the statute and conforms to the requirements of the statute in its contents.[52] Resolutions for the paving of a street, purporting to have been passed by the city council and coming from the proper custody, are admissible as evidence of the acts of the council, though no explanation is given of the interlineations therein.[53]

b. *Failure to Record Documents.* — It is a sufficient ground of objection to the admissibility of the documents constituting substituted proof of the assessment, that they have not been recorded as required by the statute.[54]

c. *Improvement Ordinance.* — The original record of the ordinance authorizing the construction of an improvement, as produced by its proper custodian, is admissible in evidence to prove the ordinance authorizing the improvement.[55] Where an estimate and the assessment on their face appear to include improvements not authorized by, or which are different from, the ordinance, and the discrepancy is unexplained, the ordinance and proceedings may not be introduced in evidence.[56]

50. Fralich *v.* Barlow, 25 Ind. App. 383, 58 N. E. 271.

51. Gage *v.* People, 205 Ill. 547, 69 N. E. 80.

52. McChesney *v.* People, 171 Ill. 267, 49 N. E. 491.

53. Hutcheson *v.* Storrie (Tex. Civ. App.), 48 S. W. 785.

54. Rauer *v.* Lowe, 107 Cal. 229, 40 Pac. 337.

55. Rutherford *v.* Hamilton, 97 Mo. 543, 11 S. W. 249. See also Sheehan *v.* Owen, 82 Mo. 458.

56. In Chicago Terminal Tran. R. Co. *v.* Chicago, 184 Ill. 154, 56 N. E. 410, the court says: "The sixty-third objection was that the estimate of the cost of the improvement was for a different improvement than that authorized by the ordinance. The improvement is on Canal street for a distance of about two miles, and crosses twenty-five intersecting streets. The ordinance excepts from the improvement the intersecting roadways of several of these streets, and parts of the street at many other places,— in some places excepting the east half of the roadway, in others the west half, and in some places the entire roadway. The estimate, on its face, is for the improvement of the whole street for the whole distance. This estimate of the cost of the improvement is the basis for an assessment upon the property benefited, and such assessment may extend to the amount of such estimate. If the estimate includes work not embraced in the ordinance the property owner may be assessed for work not intended to be done. The apparent variance is ad-

d. *Recitals in Ordinance. — Effect as Evidence.* — The recital in an ordinance that the petition of a majority of the owners of the land fronting on an improvement was presented therefor is *prima facie* evidence of the fact recited.[57] The recitals in an ordinance declaring a new street open to public travel are not competent evidence in favor of a tax lien claimant to establish the jurisdiction of the city council to levy a special tax.[58]

e. *Affidavit of Notice.* — When the improvement ordinance provides that the affidavit of notice of the meetings of commissioners of assessment shall be attached to the assessment roll, such affidavit may be received in evidence along with the assessment roll and is competent evidence of the giving of the notice required.[59]

f. *Tax List as Evidence of Assessment.* — In an action to recover a special assessment for a street improvement the county tax list is incompetent to prove the assessment without statutory aid. Direct proof of the assessment is required to authorize a recovery.[60]

g. *Under the Missouri Statute*, though the engineer certifying the validity of an assessment against the property and the liability of the person therein named as its owner did not have immediate charge of the improvement, and does not have personal knowledge of the matters certified, his certificate of such facts is nevertheless

mitted, but appellee makes two answers: The first is that competition among contractors will fix the price of the work, and property owners in the end will pay no more than their proper share, no matter what the estimate is. It is true that property owners will not be obliged, in the end, to pay more than the cost of the improvement, or, if they have paid more, will get it back if they can; yet it is a substantial right that the lien of the special assessment shall not be greater than necessary. From the nature and necessity of the case, the assessment, as spread, is based upon the estimate before the work is done; and it is not intended that there shall be a judgment against the property for more than the probable cost of the improvement intended to be made, as determined from the estimate. The second answer is that by calculating the improvement for its entire length, and then calculating the exceptions contained in the ordinance, and subtracting them, the estimate of the engineer and the terms of the ordinance will coincide, notwithstanding the apparent variance. The record does not furnish data for such an investigation, and there was no evidence on the hearing that the estimate was in fact for no more than the improvement provided for by the ordinance. The objection was specially made, and appellant objected to the introduction in evidence of the ordinance and proceedings on the specific ground that the estimate provided for paving the whole of South Canal street, about two miles in length, when the ordinance provided for paving only part of it. The objection should have been sustained."

57. Presentation of Petition for Improvement. — Cummings *v.* West Chicago Park Com'rs., 181 Ill. 136, 54 N. E. 941; McManus *v.* People, 183 Ill. 391, 55 N. E. 886.

58. Merrill *v.* Shields, 57 Neb. 78, 77 N. W. 368.

59. Goodrich *v.* Minonk, 62 Ill. 121.

60. In Muscatine *v.* Chicago, R. I. & P. R. Co., 88 Iowa 291, 55 N. W. 100, the court says: "The only evidence offered which may be regarded as tending to show an assessment was the county tax list, to which objection was made by defendant, on the ground that it was incompetent. The county tax list is undoubtedly competent evidence for some purposes, but when a right of recovery is sought to be based upon an assess-

prima facie evidence of the matters to which he certifies.[61] The certificate of the city engineer is not rendered inadmissible because of evidence that his survey and field notes, from which the number of cubic yards was estimated in the engineer's office, were made by such engineer before he came into office, where it does not appear but that the person who signed the certificate was the city engineer at the time it was issued.[62] Under the statute making the certificate of the city engineer as to the regularity of the assessment proceedings *prima facie* evidence of the facts certified to, the certificate of an assistant in the regular engineer's office by verbal appointment is not within the meaning or intent of the statute, and such certificate is not competent evidence in the plaintiff's behalf.[63] In an action on an assessment a certificate of the city engineer purporting to show the amount of work done for which the assessment was made, but which only certifies to what is shown by other records in his office, without showing by whom the work was examined, is not admissible in evidence.[64] An assessment certificate is not necessarily inadmissible because the property mentioned therein is indefinitely described.[65]

h. *To Show Completion of Work.* — Extracts and copies from the books of the city controller relating to an assessment for an improvement, in which claims for such improvements are recorded, are admissible, though not conclusive evidence of the completion of the work.[66]

i. *Private Contract Between Contractor and Property Owner.* In an action by a contractor to recover an improvement assessment, a private contract previously entered into between the defendant and the contractor, for the construction of such improvement, so far as it affects his property, which was not performed, is not admissible.[67]

j. *Action on Private Contract With Owners. — Authority for Improvement.* — In a suit on a contract for a street improvement entered into with the abutting property owners by the contractor doing the work, the contract is not rendered inadmissible because the work was not authorized by the board of supervisors, the contract not being otherwise invalid.[68]

k. *Demand for Payment Before Suit.* — Under the California statute the affidavit of demand is competent evidence of the demand

ment regularly made, and not upon the tax list, direct proof of the assessment is required."

61. St. Louis *v.* Oeters, 36 Mo. 456.

62. O'Connor *v.* Hooper, 102 Cal. 528, 36 Pac. 939.

63. Warren *v.* Ferguson, 108 Cal. 535, 41 Pac. 417.

64. Obermeyer *v.* Patterson, 130 Cal. 531, 62 Pac. 926.

65. Hutcheson *v.* Storrie (Tex. Civ. App.), 48 S. W. 785.

66. O'Leary *v.* Sloo, 7 La. Ann. 25.

67. San Francisco Pav. Co. *v.* Dubois, 2 Cal. App. 42, 83 Pac. 72.

68. O'Connor *v.* Hooper, 102 Cal. 528, 36 Pac. 939.

in the suit for foreclosure of an assessment.[69] The return of an agent of the plaintiff endorsed on the warrant for the collection of the assessment, showing a demand for payment of the assessment, is competent evidence of the demand.[70]

l. *Payment by City of Its Part of Cost.* — The record entry of the municipal council showing the allowance and an order of payment to the contractor for the city's portion of the cost of an improvement is not relevant or essential to the plaintiff's action, in a suit by a contractor to recover an assessment, but the reception of such evidence is, if error, harmless.[71]

m. *Plans and Specifications. — Harmless Error.* — If the plans and specifications are not required to be shown in a proceeding to recover an assessment, the admission in evidence of an exhibit purporting to contain such plans, but which in fact is only an imperfect estimate of probable cost, is harmless error.[72]

C. Defenses. — What Not Available. — Where the statute provides that upon an application for judgment upon a special assessment no defenses shall be heard which might have been interposed in the proceedings for the making of the assessment, or upon the application for its confirmation, an ordinance valid upon its face cannot be attacked by collateral evidence tending to show it to be invalid in fact, on an application for a judgment and order of sale for an unpaid assessment.[73] Likewise such a statute will forbid the introduction of evidence to show the assessment excessive.[74] If the record of the proceedings shows the giving of notice to the property owner, evidence that notice was not given is incompetent.[75]

69. Dyer *v.* Brogan, 57 Cal. 234; Deady *v.* Townsend, 57 Cal. 298.

70. Himmelman *v.* Hoadley, 44 Cal. 213.

71. Fralich *v.* Barlow, 25 Ind. App. 383, 58 N. E. 271.

72. Breath *v.* Galveston (Tex. Civ. App.), 46 S. W. 903.

73. In Kunst *v.* People, 173 Ill. 79, 50 N. E. 168, the court considering this question said: "A valid ordinance is the basis of a proceeding to construct a public improvement by special assessment, and is essential to the jurisdiction of the court over the subject-matter of an application for the confirmation of an assessment roll. If, therefore, it should appear in the record of the proceedings for the confirmation of the special assessment that the ordinance was defective and void, that of itself would demonstrate by the record that the court was lacking in jurisdiction to render the judgment. But in the case at bar the record does not disclose that the ordinance was void, and the proposition is that its alleged invalidity may be shown by parol proof. But, as we have seen, the appellants might have presented such proof in defense of the application for confirmation, and, having failed to do so, they are precluded, by the express words of the statute, from the privilege of interposing the same against an application for judgment and order of sale."

74. People *v.* Ryan, 156 Ill. 620, 41 N. E. 180.

75. People *v.* Ryan, 156 Ill. 620, 41 N. E. 180.

In Clark *v.* People, 146 Ill. 348, 35 N. E. 60, the court says: "Sufficient proof was made of the posting and publication of notice by the commissioners, and the only question is whether in this collateral proceeding the appellant will be permitted to impeach the judgment of confirmation by showing that in point of fact no notice was sent by mail to him. The

evidence before the court at the time that judgment was rendered was sufficient, *prima facie*, to show compliance by the commissioners with all the provisions of the statute in relation to notice, and to establish the jurisdiction of the court to render a judgment of confirmation; and we are of the opinion that, after having acted upon such evidence, its judgment is not open to collateral attack. It is the general rule that, where the court has jurisdiction of the parties and the subject-matter in a particular case, its judgment, unless reversed or annulled in a direct proceeding, is conclusive, and is not open to collateral impeachment by the parties thereto or their privies. Black, Judgm. 345. This rule has been applied by this court to judgments confirming special assessments so frequently that it is unnecessary for us to do more than cite the cases where such application has been made. People *v.* Brislin, 80 Ill. 423; Lehmer *v.* People, Id. 601; Prout *v.* People, 83 Ill. 154; Chicago & N. W. R. Co. *v.* People, Id. 467; Andrews *v.* People, Id. 529; Gage *v.* Parker, 103 Ill. 528; Blake *v.* People, 109 Ill. 504; Riverside Co. *v.* Howell, 113 Ill. 256; Schertz *v.* People, 105 Ill. 27; Murphy *v.* People, 120 Ill. 234, 11 N. E. Rep. 202. It is true that in most of the cases here cited the question of the sufficiency of the notice is not raised, the ground upon which the judgment of confirmation is sought to be impeached being some defect in the proceedings in which the assessment was levied, not involving the question of jurisdiction in the court of the persons of the owners of the premises assessed. But that question seems to have been raised and decided in Schertz *v.* People, *supra*. That was an application for judgment for a delinquent assessment, and upon such application a property owner appeared and filed various objections, and among others, that the court had no jurisdiction to enter the judgment of confirmation, and that he, the objector, was not notified, as required by law, of the filing of the report of the commissioners, or of the application for a confirmation thereof. These objections, on motion, were stricken from the files, on the ground that the objector was concluded by the judgment of confirmation. In discussing the propriety of disposing of the objections in that manner we said: 'The record of the entire proceeding, including the previous judgment, upon which the application is founded, was then before the court, and if it appeared from such record that the court had jurisdiction to render the judgment of confirmation, it is clear that the objections were properly stricken from the files. On the other hand, if the proceedings anterior to the judgment confirming the assessment were so defective as not to authorize the court to act at all upon the question of confirmation, then it is equally clear that the objections in question might properly be made upon application for judgment and order of sale of the lots, as well as at any other time; and, if such was the case, the court erred in ordering them stricken from the files. We have examined the proceedings in the case anterior to the order of confirmation with care, and, so far as we are able to discover, they conform substantially to the requirements of the statute on the subject, and we are consequently of opinion that the order in question was and is a valid judgment, and that the defenses which appellant now seeks to make, as set forth in the written objections striken from the files, should have been made on the application to confirm the assessment; and that, not having been so made, he is now concluded.' In Murphy *v.* People, *supra*, we recognized the general rule that a judgment of confirmation is conclusive, but in that case it appeared, as had already been held in the previous case of Murphy *v.* Peoria, 119 Ill. 509, 9 N. E. Rep. 895, involving the same assessment, that the affidavit of the mailing of notices was not sufficient on its face to confer jurisdiction of the persons of those who did not appear, and therefore that the judgment of confirmation did not conclude the property owners who did not appear and contest the right of the city to have the assessment confirmed. In the present case, so far as appears, the proceedings for the confirmation of the assessment

D. Failure to Complete Improvement. — Where a city ordinance provides that the entire cost of constructing sidewalks in front of certain lots should be assessed to such lots, under the statute, in an action to enforce an assessment for such improvement evidence in behalf of a property owner that the city had not built all the improvement ordered by the ordinance is incompetent in the absence of a showing of oppression or unreasonable discrimination against such owner.[76]

E. Necessity for Improvement. — The determination of the municipal authorities of the necessity for an improvement is conclusive in an action to enforce an assessment, in the absence of fraud or collusion.[77]

F. Reduction of Other Assessments by Agreement. — Evidence of the reduction, by agreement, of the assessments against other property is not admissible to defeat the assessment against the defendant's property.[78]

G. Medium of Publication of Notice. — In a proceeding to enforce an assessment, evidence tending to show that the notice of the assessment was published in a paper not the lowest bidder for the publishing is not competent.[79]

H. Defects in Work. — In an action to recover an assessment for an improvement, the action of the proper municipal authorities in accepting the improvement is conclusive of its completion according to the contract under which the improvement is constructed, in the absence of fraud or collusion, and evidence of defects or imper-

were in all respects regular, and the proof of the notice was in strict conformity to the statute, and it must therefore be held that the court had jurisdiction, and that its judgment of confirmation is conclusive. It follows that the court decided correctly in excluding the evidence offered, and in overruling the objections filed. Its judgment will therefore be affirmed."

76. Pierson *v.* People, 204 Ill. 456, 68 N. E. 383.

77. Pierson *v.* People, 204 Ill. 456, 68 N. E. 383. In an action on a special tax bill for the reconstruction of a sidewalk, the property owner cannot defeat the action on the sole ground that the sidewalk was not out of repair and that the reconstruction was not necessary. The determination by the municipal authorities of the necessity for the improvement is conclusive in absence of fraud or corruption, after the improvement has been completed. Heman *v.* Ring, 85 Mo. App. 231.

78. In Thomson *v.* People, 184 Ill. 17, 56 N. E. 383, a case in which such evidence was ruled out, the court says: "Conceding it to be true that no evidence was introduced, as claimed, and that the order reducing the assessment was made by agreement, these facts could not be relied upon to defeat the assessment against appellant's property. If the assessment of the railway company was too large, and the city became satisfied of that fact, no reason is perceived why the amount might not be reduced by agreement, of the parties. At all events, if the witness had testified that the assessment of the railway company was reduced by agreement, as appellant sought to prove, it would not follow that the judgment confirming the assessment against the railway company was fraudulent. The court did not, therefore, err in its ruling on the evidence."

79. Moffit *v.* Jordan, 127 Cal. 622, 60 Pac. 173.

fections in the work is not competent.[80] If, however, an improvement is actually made different in character from that provided to be built, this fact may be shown as a defense against the assessment.[81]

80. Acceptance of Work Is Conclusive of Completion. — Murray *v.* Tucker, 10 Bush (Ky.) 240; Chance *v.* Portland, 26 Or. 286, 38 Pac. 68; Pepper *v.* Philadelphia, 114 Pa. St. 96, 6 Atl. 899; Elma *v.* Carney, 9 Wash. St. 466, 37 Pac. 707. Upon a motion for judgment against the proprietor of lots who is liable for the expenses of paving the street opposite the lots, the court will not hear evidence that the work was badly done, it only being competent to the owner to show that the contract for the work was not fairly made, or fraudulent, or not with good faith. Alexandria *v.* Mandeville, 2 Cranch. C. C. 224, 1 Fed. Cas. No. 184.

81. Limitation. — In Gage *v.* Raymond, 193 Ill. 316, 61 N. E. 1045, a case of this character, the court says: "The ordinance under which the improvement was made provides that the street 'shall be graded, curbed, guttered, macadamized and otherwise improved in accordance with the following plans and specifications.' Then follow specifications which are very full and complete, providing for a thoroughly graded, curbed, guttered, and macadamized roadway. The assessment was confirmed May 16, 1900. The first installment, not having been paid, was returned by the county collector as delinquent, and application was made by him in July, 1901, for judgment and order of sale against appellants' property. They filed several objections, one of which is as follows: 'Objectors say that the work done was not the work provided for in the ordinance, and the alleged improvement is a different and another improvement than the improvement ordered to be made by the ordinance directing the improvement,' etc. To sustain the objections, appellants introduced the evidence of property owners and others, and of two civil engineers. The testimony of some of these witnesses was to the effect that the improvement was merely defectively and improperly constructed under the ordinance, but that of others, especially the civil engineers, we think tended to prove not only that fact, but also that the improvement made was another and different improvement from the one authorized by the specifications in the ordinance. In other words, their testimony, if it had been admitted, would have tended to prove that the roadway was not a macadam roadway, but was, as a matter of fact, no more than a dirt or mud roadway. . . . The proof was refused, and the testimony rejected. This ruling of the court was based upon his understanding of the rule announced in the case of People *v.* Whidden, 191 Ill. 374, 61 N. E. 133. The opinion in that case does not sustain the ruling. The true rule in all cases of this kind is announced by Judge Cooley in his work on Taxation, which we quoted with approval in Church *v.* People, 174 Ill. 366, 51 N. E. 747: 'In general, no defense to an assessment that the contract for work has not been performed according to its terms is allowed. But this doctrine must be confined within the proper limits. It cannot be extended to cover a case in which the authorities, after contracting for one thing, have seen fit to accept something different in its place, for, if this might be done, the statutory restraint upon the action of local authorities in these cases would be of no more force than they should see fit to allow.' This rule is announced in the case of People *v.* Whidden, 191 Ill. 374, 61 N. E. 133, in the following language: 'The rule that objections to the manner in which an improvement is completed are not available on the application for judgment for sale does not extend to cases where the improvement authorized is changed for another, or where the city authorities accept a different improvement from the one for which the assessment was levied.' . . . It is not

I. Irregularities in Adoption of Order. — Nor is it competent to the defendant to show that the order for doing the work was not passed, as a by-law, after the requisite number of readings according to the rules of the municipal council.[82]

J. Sale of Part of Lands Assessed. — In an action of assumpsit for street paving done under contract, evidence is not admissible on the defendant's behalf that, after the date of the contract and before the work was done, he had sold a part of the land fronting on the street improved.[83]

L. Assessment for Improving Ditch. — In an action on an assessment for improving a ditch, the evidence must relate to the benefits resulting from the improvement, and not from the construction of the ditch.[84]

M. Value of Abutting Property Assessed. — Evidence of the value of the abutting property assessed is admissible where a personal judgment is sought, but only for the purpose of showing that the assessment is so flagrant an abuse of legislative power as to render it void.[85] Likewise evidence of value is competent for the same purpose when the statute limits the assessment to a percentage of the value of the land assessed.[86]

N. Owner's Desire to Have Improvement Made. — If the proceedings for a street improvement are sufficient to create a lien for the work done it is not prejudicial error to admit evidence that the owner of the property affected desired the work done, such evidence

always an easy matter to distinguish between the two classes of cases,— that is, to say when the evidence shows merely that the work has been defectively done in pursuance of the contract, and when the defect amounts to the making of a different improvement from the one authorized. If, however, an ordinance should provide for the improvement of a street by being paved with brick or cobblestone, and a contractor should attempt to comply with that ordinance by macadamizing it, there would be no difficulty in holding that the improvement was a different one, and the property holder not liable, under the ordinance, to pay for the same."

82. Alexandria *v.* Mandeville, 2 Cranch C. C. 224, 1 Fed. Cas. No. 184.

83. McDowell *v.* Johnson, 48 Pa. St. 483.

84. Goodrich *v.* Minonk, 62 Ill. 121.

85. When Personal Judgment Sought. — In Hutcheson *v.* Storrie (Tex. Civ. App.), 48 S. W. 785, the court, on this question, says: "The remaining assignments assail the action of the court in excluding the testimony of several witnesses, offered by the appellant, to show that the assessments laid upon her property exceeded its market value. In the exclusion of some of this testimony we think the court erred. But, as the case now stands, there being no personal judgment against appellant, the error, in our opinion, is immaterial. It seems to be settled that a local assessment, such as the one in question, may lawfully exceed the value of the property. Such being the law, evidence as to the value of the property would, it seems, be admissible only in a case where a judgment *in personam* was sought; and then only for the purpose of showing the assessment to be so flagrant an abuse of the exercise of legislative power as would authorize the courts to declare the assessment void."

86. When Assessment Limited to Percentage of Value of Property. Chicago *v.* Burtice, 24 Ill. 489; Burnham *v.* Chicago, 24 Ill. 496.

in the circumstances being immaterial to the validity of the assessment otherwise appearing.[87]

O. When Work Warranted. — Condition During Period of Warranty. — Where the contract requires the contractor to warrant the improvement for a stated period after its completion, in an action by the contractor on the special tax bill to recover for the improvement, if the defendant pleads the defective construction of the work as a defense, evidence of its condition during the period covered by the warranty is under some statutes admissible.[88] Nor will the fact that the contractor is bound to repair the improvement during such period justify the exclusion of such evidence.[89]

P. Statements of Contractor to Third Parties. — Statements by the contractor made to an abutting owner after the completion of an improvement, in compromise of an assessment, are not competent in an action against another abuttor for such improvement.[90]

Q. Actions by Assignees. — In an action against an abutter for the amount of a void street assessment, based on an express promise to pay for the improvement, the written assignment of the assessment to the plaintiff by the contractor is competent as tending to show the assignment of the obligation sued on.[91] In an action by an assignee to enforce an assessment which was against a certain lot, but to an unknown owner, the fact that the assignment, which describes the lot, also states that the assessment was to a certain person as owner, does not render it inadmissible, as the name of the alleged owner may be rejected as surplus usage.[92]

87. King *v.* Lamb, 117 Cal. 401, 49 Pac. 561.

88. Hill-O'Meara Const. Co. *v.* Hutchinson, 100 Mo. App. 294, 73 S. W. 318.

89. In the case of Hill-O'Meara Const. Co. *v.* Hutchinson, 100 Mo. App. 294, 73 S. W. 318, the court says: "To support the defense of defective construction, certain questions were asked of witnesses concerning the condition of the pavement at the time of the trial and during the first year after it was laid. These questions were objected to on the score that its condition at the time of the trial, several years after it was put down, was immaterial, while its condition during the first year, in view of the above stipulation of the contract, was a matter between the city and the contractor. The objections were sustained, but the circuit judge said appellants might show the contractor did not live up to the contract. Those rulings were inconsistent. Evidence of the condition of the pavement when the trial occurred was remote, but its condition during the first year it was down was relevant; because one can readily see that its condition then might have been such as tended to prove, or, indeed, conclusively proved, it was not laid in a good and workmanlike manner. The fact that the construction company was bound to repair during the first year did not justify the exclusion of the testimony in question. That stipulation for the benefit of the city which pays for repairs out of public funds in no way subtracts from a property owner's charter right to plead bad construction in reduction of the amount of a tax bill. Error was committed in refusing appellants' offer to prove the condition of the pavement during the first year it was in use."

90. Fralich *v.* Barlow, 25 Ind. App. 383, 58 N. E. 271.

91. Bernstein *v.* Downs, 112 Cal. 197, 44 Pac. 557.

92. Gill *v.* Dunham (Cal.), 34 Pac. 68.

3. Competency of Witnesses. — The city engineer, in charge of an improvement, is competent to testify to the manner in which the work was done.[93] The commissioners of public works are not competent to testify in impeachment of their own report of the property benefited by, and to be assessed to pay for, an improvement as they act in a quasi judicial capacity.[94]

4. Sufficiency of Evidence. — A. STATUTORY PRIMA FACIE EVIDENCE. —Under the statutes of most of the states the plaintiff, suing on a special assessment, is not required to make proof by common law evidence of all the acts and things essential to the establishment and validity of the assessment. In lieu of this cumbersome method, it is generally provided that the introduction of certain statutory records, as the special tax bill, the certificates of the engineer having charge of the improvement, or the assessment and kindred records, will suffice to make out a *prima facie* case.[95] The fact that within

93. City Engineer. — Manner in Which Work Is Done. — Fralich *v.* Barlow, 25 Ind. App. 383, 58 N. E. 271.

94. Impeachment of Report by Commissioners Making Same. Wright *v.* Chicago, 48 Ill. 285.

95. California. — In an action to foreclose the lien of an assessment for a street improvement, the introduction in evidence of the assessment, diagram, warrant, return, and engineer's certificate makes a *prima facie* case for the plaintiff. Dowling *v.* Hibernia Sav. & L. Soc., 143 Cal. 425, 77 Pac. 141. See also City Street Imp. Co. *v.* Lavid, 138 Cal. 27, 70 Pac. 916; Perine *v.* Erzgraber, 102 Cal. 234, 36 Pac. 585; Dorland *v.* Bergson, 78 Cal. 637, 21 Pac. 537.

Under the statute making certain documents *prima facie* evidence of the validity of a lien and of the plaintiff's right to recovery, if these matters are alleged in the complaint and not denied, the production of such documents is not required. Oakland Bank of Savings *v.* Sullivan, 107 Cal. 428, 40 Pac. 546.

Rule One of Evidence and Not of Pleading. — The statute in relation to street improvements in San Francisco, to the effect that the assessment, warrant and diagram, together with the affidavit of demand and nonpayment, shall be *prima facie* evidence of the defendant's indebtedness, establishes, not a rule of pleading, but a rule of evidence. Himmelman *v.* Danos, 35 Cal. 441.

Under the act no explanation of the fact that the work was done four years before the assessment was levied is required. Williams *v.* Bergin, 129 Cal. 461, 62 Pac. 59.

Certificate of Engineer. — Effect. Contra. — Under the statute making the warrant and other records, with an affidavit of demand and non-payment of the assessment, *prima facie* evidence of the plaintiff's right to recover in an action on the assessment, the affidavit is sufficient alone to warrant the finding of a demand publicly made on the assessed property. So also is the assessment itself sufficient to make out a *prima facie* case that the contractor performed the work to the satisfaction of the officer charged with the duty of accepting the improvement; and the *prima facie* case is not overcome by the certificate of the city engineer to the contrary. Buckman *v.* Landers, 111 Cal. 347, 43 Pac. 1125.

Failure To Record Return to Warrant. — Notwithstanding the plaintiff, suing on an assessment, introduces in evidence the records making a *prima facie* case under the statute, if the return of the warrant show upon its face that it has not been recorded, as by statute required, the fact will overcome the *prima facie* case, otherwise made, and prevent a recovery. Witter *v.* Bachman, 117 Cal. 318, 49 Pac. 202.

Lists of Local Assessments. — The lists of local assessments, which under the statute may be used with

like effect, as evidence, as delinquent tax lists, which latter are evidence of the delinquency, the property assessed, the amount of taxes due and unpaid and that the laws as to levy and assessments have been complied with, are not even *prima facie* evidence that the municipal council has had a survey and estimate made and filed, or that it has fixed a time for the hearing of the proposal or has ordered the improvement. Nor is such a list evidence of the publication of notice soliciting bids, or of the awarding of the contract, or of any of the acts of officers of the municipality which precede the doing of the work. City of Stockton *v.* Dahl, 66 Cal. 377, 5 Pac. 682.

As to Grades. — The presumption of the due performance of official duty in the establishing of a grade of street before the same was improved arising from certain documents, the warrant, diagram, assessment, etc., under the California statute, is not overcome by proof that a street had been graded about twenty years before and that the difference between the official grade and the present grade nowhere exceeded one and three-fourths feet. Fanning *v.* Bohme, 76 Cal. 149, 18 Pac. 158; Fanning *v.* Leviston (Cal.), 21 Pac. 121.

Objections by Majority of Owners. Burden. — Where in an action on a street assessment in San Francisco written objection is seasonably filed by the owners of more than one-half in frontage of the lots fronting on the improvement, under the statute (Acts 1863, p. 525, § 1) this displaces the *prima facie* evidence of regularity made by the statutory warrant, assessment and diagram, and casts upon the plaintiff the burden to show that the bar effected by the objections had been removed. Dougherty *v.* Harrison, 54 Cal. 428.

When a *prima facie* case has been made out by the plaintiff by the production of the statutory evidence in that regard, the case so made is not overcome by the production of a single record, purporting to contain proceedings upon the improvement, where the municipal proceedings are not required to be kept in any one record, the plaintiff producing other records, though imperfectly and loosely kept and preserved, supplying the omissions of the formal book record. The defendant to overcome the *prima facie* case must affirmatively prove the failure on the part of the municipal corporation to perform some act essential to the validity of the proceedings. Edwards *v.* Berlin, 123 Cal. 544, 56 Pac. 432. When the complaint sufficiently states a cause of action for the enforcement of the lien of a street assessment, and the assessment, with the documents connected therewith, and the affidavit of demand and non-payment, are introduced in evidence thereunder, the burden is on the defendant to allege and prove any defect or irregularity in the proceedings subsequent to the ordering of the work, by affirmative evidence. Belser *v.* Allman, 134 Cal. 399, 66 Pac. 492; San Francisco Pav. Co. *v.* Bates, 134 Cal. 39, 66 Pac. 2.

Illinois. — The tax collector's return and filing of the delinquent list of assessed property, with the statutory notice and proof of publication, make out a *prima facie* case in an action by the tax collector for a special assessment and the burden to show the existence of any irregularity in the proceedings for the assessment is upon the defendant. Ogden *v.* Chicago, 22 Ill. 592; McManus *v.* People, 183 Ill. 391, 55 N. E. 886; Gage *v.* People, 163 Ill. 39, 44 N. E. 819.

Effect of Former Judgments. When lands are liable, under the statute, to a drainage assessment, in both the main and the sub-district, in an action to collect an assessment judgments in former actions by the commissioners of the main districts against the defendant, accompanied by no proof that such judgments were in any way connected with the assessment sought to be collected in the present proceeding, are not sufficient to overcome the plaintiff's *prima facie* case so made. People *v.* Keener, 194 Ill. 16, 61 N. E. 1069.

In a suit by a county collector to recover a drainage assessment the plaintiff makes a *prima facie* case upon the introduction of the certificate of levy, the list of delinquent

lands filed with the collector, the list filed by him with the county clerk, and proof of the publication of the delinquent list. People *v.* Keener, 194 Ill. 16, 61 N. E. 1069.

A *prima facie* case for the recovery of a special assessment for a street improvement is made out upon the introduction of the assessment roll and evidence of a witness that the property was benefited to the full extent of the assessment, taking into consideration the uses to which it was put. Chicago Union Trac. Co. *v.* Chicago, 207 Ill. 607, 69 N. E. 803.

Kentucky. — Validity of Statute. The statute giving to certain papers the effect of a *prima facie* case for the recovery of an assessment is not unconstitutional. Richardson *v.* Mehler, 23 Ky. L. Rep. 917, 63 S. W. 957.

When the statute provides that the ordinance and apportionment shall be *prima facie* evidence of every other fact necessary to be established by the plaintiff, upon the making of this proof and in the absence of other evidence, the court is bound to conclude that the apportionment of the benefits in making the assessment has been properly made by the engineer in charge of the matter. Elder *v.* Cassilly (Ky.), 54 S. W. 836.

When the plaintiff makes out his *prima facie* case by introducing the statutory records in that behalf, this will sustain a finding in his favor as against a mere traverse of the averments of the complaint. Bitzer *v.* O'Bryan, 107 Ky. 590, 54 S. W. 951.

Non-Conclusiveness of Warrants, Etc. — The reception of the work on a local improvement by the city engineer, and its approval by the municipal council, followed by the issuing of apportionment warrants for the work do not conclusively establish the liability of the property against which such warrants are issued. Louisville *v.* Gosnell, 20 Ky. L. Rep. 539, 47 S. W. 211.

St. Louis *v.* Coons, 37 Mo. 44; St. Louis *v.* Armstrong, 38 Mo. 29; Neenan *v.* Smith, 60 Mo. 292; Buchan *v.* Broadwell, 88 Mo. 31; Adkins *v.* Chicago, B. & I. R. Co., 36 Mo. App. 652; Springfield *v.* Baker, 56 Mo. App. 637; Nevada *v.* Morris, 43 Mo. App. 586; Heman *v.* Wolff, 33 Mo. App. 200; Herman *v.* Ring, 85 Mo. App. 231; Moberly *v.* Hogan, 131 Mo. 19, 32 S. W. 1014.

Title of Public to Place of Improvement. — Under the Missouri statute a special tax bill is also *prima facie* evidence that the ground on which the work was done was public ground, as against both the defendant and the world. Seibert *v.* Allen, 61 Mo. 482.

When the statute gives to a special tax bill signed by the city engineer, upon proof of his signature, the force of *prima facie* evidence of the validity of the bill, and of other essentials, the admission of the tax bill, duly authenticated, places upon the defendant the burden to prove any fact on which he may rely to show its invalidity. Barber Asphalt Pav. Co. *v.* Ullman, 137 Mo. 543, 38 S. W. 458.

Under the Missouri statute providing that a special tax bill shall be *prima facie* evidence of the regularity of the proceedings, the defendant may show omission of material steps but he (defendant) has the burden in that regard. Sedalia *v.* Montgomery, 109 Mo. App. 197, 88 S. W. 1014.

A certified special tax bill makes out a *prima facie* case for the plaintiff and shifts the burden of proof. Before the bill has this effect under the statute, however, it must be definite and show on its face that it was issued under some competent authority and for some specific purpose. Carroll *v.* Eaton, 2 Mo. App. 479; Heman *v.* Greene, 15 Mo. App. 593; Eyermann *v.* Blaksley, 78 Mo. 145; *affirming* 9 Mo. App. 231; Heman *v.* Payne, 27 Mo. App. 481; Wand *v.* Green, 7 Mo. App. 82; Linneus *v.* Locke, 25 Mo. App. 407.

Special Tax Bill. — As Against Party Not Named Therein. — As against one not named in a special tax bill as the owner of property therein charged, the bill is not *prima facie* evidence of liability under the statute providing generally that it shall have this effect, in an action on it, but only a link in the chain of evidence necessary to establish the validity of the charge against such

property. Vieths *v.* The Planent Prop. & Finan. Co., 64 Mo. App. 207; St. Joseph *v.* Forsee, 110 Mo. App. 127, 84 S. W. 98; Heman Construction Co. *v.* Loevy, 64 Mo. App. 430.

When for Purpose Different From That Authorized. — A special tax bill under the charter of the City of St. Louis purporting to be for the repair of a sidewalk is not *prima facie* evidence of the validity of the charge when the work for which it was issued was the reconstruction of the sidewalk. Farrell *v.* Rammelkamp, 64 Mo. App. 425.

In Linneus *v.* Locke, 25 Mo. App. 407, the court said: "While this statute makes the certified tax bill *prima facie* evidence of a due compliance, on the part of the city, with the pre-requisite steps to an imposition of such a tax it must be such a certificate as is contemplated by the statute, and not any paper which the board of alderman, or the pleader, may choose to designate a tax bill. When the statute substitutes the mere certificate of the party in interest as presumptive evidence of the existence of the tax and the regularity of its due creation, the tax payer certainly has the right yet left to him to demand that this *ex parte* evidence should at least be definite and show on its face that it was issued under some competent authority and for some specific purpose. There is nothing whatever on the face of the certificate in this case, to show that it was predicated on any ordinance for building a sidewalk or that the tax was imposed for building a side walk or anything else. On the contrary it recites that it is a special tax bill for the year 1886 on the lot. For which purpose or on what authority is not even alluded to. It is merely recited that it is a special tax, 'as the same appears on the tax books of said city for said year.'"

Nebraska. — The tax sale certificate and receipts for special assessments are *prima facie* evidence of the validity of the taxes which they represent. Wales *v.* Warren, 66 Neb. 455, 92 N. W. 590; Ure *v.* Richemberg, 63 Neb. 899, 89 N. W. 414.

Pennsylvania. — Under a statute providing that municipal claims for street improvements in suits therein may be read in evidence of the facts therein set forth, material averments contained in a municipal claim filed are *prima facie*, though not conclusive, evidence of the facts contained therein. Brenton *v.* Perry, 1 Phila. 438; Philadelphia *v.* Esan, 32 Leg. Intel. 239; Northern Liberties *v.* St. Johns Church, 1 Harris 104; City *v.* Burgin, 14 Wright 535, 5 Phila. 84.

The defendant may show against such a *prima facie* case that his lot is not so large as shown by the assessment. Thomas *v.* Northern Liberties, 13 Pa. St. 117.

Under the charter of a city providing that a certificate for the cost of an improvement is evidence that all the requirements of the law have been complied with, such certificates are *prima facie* evidence of the regularity of prior proceedings and of the holder's right to recover thereon, so that no other proof in the first instance is required of the performance by the city or the holder of the certificate of the acts severally required of them. But such a certificate is *prima facie* evidence only. The defendant in an action on such a certificate may prevent its being used as evidence against him by showing the non-performance of some act necessary to be done before the cost of the improvement may be imposed upon the property. After it has been introduced in evidence the defendant may, of course, introduce evidence to overcome the *prima facie* case made by the introduction of such a certificate. Texas Transp. Co. *v.* Boyd, 67 Tex. 153, 2 S. W. 364; Taylor *v.* Boyd, 63 Tex. 533.

Contractor's Certificates. — A certificate regular on its face, and in conformity with the city charter, issued by a city to a contractor for work done in improving a street, is *prima facie* evidence of the holder's right to recover the amount therein stated. Taylor *v.* Boyd, 63 Tex. 533.

Washington. — When the charter of a city gives to an assessment a presumption of the regularity of all proceedings connected therewith, the city, in a suit to foreclose an assessment, makes out a *prima facie* case

the time limited by law the municipal officers amend a tax bill, so as to render complete and regular a bill previously void or voidable, does not destroy the statutory effect of such amended bill as *prima facie* evidence of the liability of the party therein charged.[96] If a plaintiff, suing to enforce an assessment desires to avail himself of the statutory privilege to establish his right of recovery by the *prima facie* evidence for which provision is made by the statute, he must offer competent evidence of every portion of the substituted proof.[97] The courts have given full scope to these special statutes, construing them, as their language plainly requires, to establish *prima facie* every element of recovery, such as the proper letting of the contract,[98] the delivery of the warrant and other papers to the contractor before the making of demand,[99] the publication of the resolution of intention to make the improvement,[1] the doing of the work on the recommendation of the proper officer,[2] the proper recording of the contract,[3] the authority of an agent in the doing of any act in the course of the proceedings,[4] the fact that the assessment has not been

by the production of the assessment roll, regular on its face. If there are defects in the proceedings the defendant has the burden to show them. Seattle *v.* Smith, 8 Wash. St. 387, 36 Pac. 280.

96. Vieths *v.* The Planet Prop. & Finan. Co., 64 Mo. App. 207.

97. Warren *v.* Ferguson, 108 Cal. 535, 41 Pac. 417.

98. Making of Contract. — The award, assessment, and diagram, together with the affidavit of demand and non-payment, constitute *prima facie* evidence of a contract with the street superintendent for the improvement. It is, after such proof, however, open to the defendant to introduce any competent and relevant evidence to negative the making of a contract, and thereby defeat the recovery of the assessment. Manning *v.* Den, 90 Cal. 610, 27 Pac. 435.

Where the statute gives to the special tax bill the effect of *prima facie* evidence of the owner's liability thereunder, special proof of the existence of the contract is not required, as the tax bill furnishes presumptive evidence of the existence of the contract. The plaintiff is not under such a statute required to prove the existence of the contract before offering the tax bill in evidence. Ess *v.* Bouton, 64 Mo. 105.

99. Delivery of Warrant, Etc., to Contractor. — The certified return upon a warrant authorizing a contractor to demand and receive an assessment, showing a warrant in proper form signed by the proper officers, of a stated date, and the affidavit of the contractor endorsed thereon, showing a demand under the assessment as of a later date, is sufficient evidence of a compliance with a statute requiring the warrant and other statutory records to be delivered to the contractor before making demand for payment of the assessment. Moffitt *v.* Jordan, 127 Cal. 622, 60 Pac. 173.

1. Publication of Resolution of Intention To Make Improvement. The records made *prima facie* evidence under the California statute of the correctness of prior proceedings are sufficient proof that the resolution of intention to make the particular improvement was properly published, there being no evidence to the contrary and notwithstanding the affidavit of publication is improperly verified. California Imp. Co. *v.* Reynolds, 123 Cal. 88, 55 Pac. 802.

2. Fanning *v.* Leviston, 93 Cal. 186, 28 Pac. 943.

3. Recording of Contract. — Reid *v.* Clay, 134 Cal. 207, 66 Pac. 262.

4. Authority of Agent To Make Demand. — Reid *v.* Clay, 134 Cal. 207, 66 Pac. 262, which case also holds that the authority of the sec-

paid[5] and the establishing of the grade of the street improved.[6] If the proceedings, or any of the records of proof, appear, or are shown to be, defective, they will, in such circumstances, be deprived of their *prima facie* effect so as to require the making of proof otherwise to warrant a recovery.[7]

B. Conclusiveness of Assessment Proceedings. — In an action to enforce an assessment the municipal determination of the property benefited and the amount of benefits accruing from the improvement is in general conclusive when regularly made, and in

retary of a corporation contractor to enter into a contract with the city for an improvement will be presumed when the plaintiff has made out his *prima facie* case by the introduction of the statutory records.

5. Return of Delinquency. — Under the Illinois statute the collector's sworn report of the list of delinquent lands together with proof of the publication thereof, and notice of application, make a *prima facie* case without proof of the delinquency. Upon the making of such proof the burden is upon the one whose land is thus sought to be taken to show that his land was not properly returned as delinquent. The *prima facie* case so made is not overcome by the introduction of docket entries in the county court record which prove nothing except that there was no date on the record to show when the assessment roll and judgment were certified to the city collector. Walker *v.* People, 166 Ill. 96, 46 N. E. 761.

6. Grade of Street. — When the statute gives to certain records when introduced in evidence the effect of a *prima facie* right of recovery, the testimony of the acting city engineer that he had charge of the maps of the engineering department of the city and that there was nothing on these maps which showed the grade of an improved street is not sufficient to rebut the legal presumption made out by the introduction of the statutory *prima facie* evidence that the grade of the street was established at the time of or prior to the improvement. Louisville *v.* Cassady, 20 Ky. L. Rep. 1348, 49 S. W. 194.

Under the Illinois statute, the collector's sworn report of the list of delinquent lands, together with proof of publication thereof and notice of application for judgment and order of sale for a sidewalk assessment make a *prima facie* case and the defendant, after such proof has been made, has the burden to show that the ordinance failed to fix the grade at which the walk was to be laid. Hurd *v.* People, 221 Ill. 398, 77 N. E. 443.

7. When the statute gives to two or more papers the effect of *prima facie* evidence of the legality of the assessment proceeding, the fact that one of such papers or records is erroneous or defective, and has to be corrected, will not deprive them of their evidentiary effect under the statute. Richardson *v.* Mehler, 23 Ky. L. Rep. 917, 63 S. W. 957.

When improvement certificates include a sum due for unauthorized as well as authorized improvements, being thus unlawfully issued, they are not competent evidence against the property owner, and are deprived of their effect as *prima facie* evidence given by the statute, so that proof of all matters in the action for an assessment is required to be made by other evidence to entitle the plaintiff to a recovery. Texas Transp. Co. *v.* Boyd, 67 Tex. 153, 2 S. W. 364.

An assessment roll giving merely the names of owners, descriptions of property, the amount charged against each lot and the residences of the several owners, without anything upon its face to authenticate it, and which shows upon its face the omission of essential jurisdictional steps, is not sufficient to make a *prima facie* case for the plaintiff. Hamilton *v.* Chopard, 9 Wash. St. 352, 37 Pac. 472.

the absence of fraud or collusion.[8] This rule of conclusiveness does

8. Chicago *v.* Burtice, 24 Ill. 489; Burnham *v.* Chicago, 24 Ill. 496; Elliott *v.* Chicago, 48 Ill. 293; Wray *v.* Pittsburgh, 46 Pa. 365.

When Assessment of Benefits Conclusive. — When the local tribunal has been by law invested with power to ascertain and report as matter of judgment what property is benefited by an improvement, and to levy an assessment thereon its action in that behalf is conclusive and cannot be impeached by parol evidence showing that no benefits were in fact received. Carpenter *v.* St. Paul, 23 Minn. 232. See *contra,* Reynolds *v.* Cecorwater, 3 Ohio Dec. 169.

When the action of the municipal authorities in levying an assessment is by statute made conclusive, it must be given this effect in the absence of fraud or mistake. Rogers *v.* St. Paul, 22 Minn. 494.

Under the St. Paul city charter the determination of the Board of Public Works as to the property benefited and the extent of the benefits received is conclusive except in case of fraud or demonstrative mistake. State *v.* Ramsey Co., 33 Minn. 164, 22 N. W. 295; Rogers *v.* St. Paul, 22 Minn. 494; Carpenter *v.* St. Paul, 23 Minn. 232.

Evidence Held To Show Benefit to Property Assessed. — Sweet *v.* West Chicago Park Comrs., 177 Ill. 492, 53 N. E. 74; Hutcheson *v.* Storrie (Tex. Civ. App.), 48 S. W. 785.

When Not Conclusive. — In Louisville *v.* Bitzer, 24 Ky. L. Rep. 2263, 73 S. W. 1115, 61 L. R. A. 434, the court says: "The method of assessment by the foot has been followed so long, and has been so often approved by this court, that it no longer remains an open question. Preston *v.* Roberts, 75 Ky. 570; Nevin *v.* Roach, 86 Ky. 492, 5 S. W. 546. The rule also is that, while these assessments rest upon the basis of benefits or presumed benefits to the property assessed, it is not essential to their validity that actual enhancement in value or other benefits to each owner should be shown; the judgment of the city council being conclusive as to the propriety of the improvement. Pearson *v.* Zable, 78 Ky. 174; Ludlow *v.* Trustees, 78 Ky. 360; Preston *v.* Rudd, 84 Ky. 150; West Covington *v.* Schultz (Ky.), 30 S. W. 410, 660; Allen *v.* Woods (Ky.), 45 S. W. 106; Bullitt *v.* Selvage (Ky.), 47 S. W. 255. On the other hand, it is held when, owing to extraordinary facts, the presumption on which the rule rests does not apply, and to force the owner to make the improvement is to confiscate his property without compensation, this is spoliation, and will not be enforced. Covington *v.* Southgate, 54 Ky. 491; Louisville *v.* Louisville Rolling Mill Co., 66 Ky. 416, 96 Am. Dec. 243; Broadway Baptist Church *v.* McAtee, 71 Ky. 508, 8 Am. Rep. 480; Preston *v.* Rudd, 84 Ky. 150; Frantz *v.* Jacob, 88 Ky. 525, 11 S. W. 654; James *v.* Louisville (Ky.), 40 S. W. 912. In other words, the judgment of the legislative municipal authorities is held conclusive in all cases of doubt as to these matters; but, where the total value of the property taxed after the improvement is made is less or no more than the cost of the improvement, there is no room for difference of opinion—that to enforce the lien is to take from the owner his property without compensation. In no case decided by this court has this been approved, and, while we are unwilling to extend the rule, it has been so often laid down that it cannot now be departed from. It may be objected that logically the rule should be to reject all assessments in excess of the benefits received by the property owners, and not to confine its operation to cases where the assessment equals the value of the property when improved. But in every system of taxation exact equality of benefits among those taxed is never attainable. The rule of assessment by the foot is no less arbitrary than the rule under consideration. In matters of this sort there must be some settled rule, and it is especially important that the rule should be well defined. The proper legislative authority, not the court, must judge

not apply where the municipal authorities have not followed the rule of the statute in determining the benefits to be assessed.[9]

C. Proof Must Conform to Pleadings. — Proof of a joint assessment against the joint owners of abutting property will not support a complaint counting on a several assessment.[10]

D. Nature of Questions Involved. — If the facts are undisputed the question whether an improvement is an original one, so as to render an abutter liable for the cost, is for the court.[11] Whether property sought to be charged with a lien for curbing is urban or rural is a question of fact.[12] Likewise the question, whether the board, charged with the duty, made the computation of the cost of the construction and the apportionment of the cost of an improvement, is, in an action to enforce the lien, a question of fact.[13]

E. As to Ordinance. — The record of the municipal council showing the passage of an ordinance by the two boards at different times is conclusive of that question and cannot be overcome by the recollection of a witness.[14] The certificate of the city clerk under the corporate seal that an ordinance, passed and approved on a certain day, was published in a newspaper in the city on a day stated is sufficient proof of the publication of the ordinance.[15]

F. Opening and Declaring of Bids. — Records. — If the minutes of the municipal authorities do not show that a bid for a public improvement was opened and declared publicly as the statute requires, it is *prima facie* proof that it was not done.[16]

G. Grades and Levels. — The certificate of a county surveyor that he has examined the work of curbs and macadam done on certain streets and finds the curbs to the official grade and line is not sufficient to prove the establishment of an official grade in an action

of the propriety of the improvement, and the benefits to the abutting property owners. But no department of the government can take the property of the citizen for public purposes without just compensation, and when the entire property is taken to pay for a public improvement there is no room for a presumption as to the benefits received, but a case of spoliation is shown."

9. State *v.* Ramsey Co., 29 Minn. 62, 11 N. W. 133. A municipal assessment will be set aside by the court when it clearly appears that authority to make it was wanting or that the prescribed method of assessment contravenes some constitutional principle. Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.

10. New London *v.* Miller, 60 Conn. 112, 22 Atl. 499.

11. Harrisburg *v.* Funk, 200 Pa. St. 348, 49 Atl. 992.

12. Morristown *v.* Fornance, 1 Pa. Super. Ct. 129.

13. Dollar Sav. Bank *v.* Ridge, 183 Mo. 506, 82 S. W. 56.

14. Passage of Ordinance. — The testimony of a witness that an ordinance was passed by the two municipal boards on the same night does not necessarily show that the ordinance was not later adopted by one of the boards so as to preserve its validity as against the statute requiring an ordinance to be passed by the two several boards on different days. Barfield *v.* Gleason, 23 Ky. L. Rep. 128, 63 S. W. 964, 64 S. W. 959.

15. Publication of Ordinances. Pierson *v.* People, 204 Ill. 456, 68 N. E. 383.

16. Edwards *v.* Berlin, 123 Cal. 544, 56 Pac. 432.

to foreclose the lien of an assessment for such curbing and the macadamizing of the roadway.[17] The presumption of the regular establishment of the grade of an improvement may not be overcome by the testimony of a mere employe in the engineering department that the records in that office do not show the proper establishment of the grade.[18]

H. Authenticity of Plans and Specifications. — When the statute provides that the plans and specifications of an improvement shall be furnished to the municipal council by the city engineer, if and when required by the council, but not specifying the mode of requiring them, the fact that they were prepared by the engineer, were approved by the council and on file, is sufficient evidence of their authenticity.[19]

I. Completion and Acceptance of Work. — The acceptance, by the proper municipal authorities, of an improvement is conclusive

17. Dorland *v.* Bergson, 78 Cal. 637, 21 Pac. 537.

See also De Soto *v.* Showman, 100 Mo. App. 323, 73 S. W. 257, where the evidence was held not to show the establishment of the grade of an improved street.

18. In Bernet *v.* Shanks (Ky.), 55 S. W. 690, the court says: "The judgment appealed from in this case was rendered on a street warrant for the making of a sidewalk in front of the property of appellants pursuant to an ordinance directing the improvements to be made, and of a contract therefor between the city of Louisville and appellees. The defense is that no grade has been established for Jefferson street between Jackson and Hancock streets, where the sidewalk was built, previous to the passage of the ordinance and letting of the contract in question, and it is also alleged that there had been no correct apportionment of the cost of this sidewalk improvement. The only proof taken to support the contention that there had been no grade established is the testimony of Mr. Charles C. Roe, a draughtsman in the bureau of engineering of the board of public works of the city of Louisville. He testifies that the grade book of the Eastern district shows the profile of Jefferson street from Third to Baxter avenue, and that it was made by the city engineer about 1873; that this profile shows the construction of Jefferson street between these two points, and that it was made from notes taken on the ground; that the records of his office do not show whether or not that grade was ever established by the city council and approved by the mayor previous to July 9, 1895. Jefferson street is one of the oldest in the city, and it appears that no change has been made in the grade thereof for a great many years, and that during this time it has been often reconstructed, always on the same level, and under these facts, the presumption of regularity must prevail. See Barrett *v.* Stone Co. (Ky.), 52 S. W. 947. Besides, by section 2899 of the Kentucky statutes, which is a provision of the charter of the city of Louisville, the comptroller of the city is made the custodian of the original rolls of ordinances of the general council, and all original contracts and other records and documents of value; and by section 2775 upon his certificate, ordinances, contracts, and apportionments are made competent evidence in court; and as was said by this court in the case of the City of Louisville *v.* Cassidy, 49 S. W. 190, 'the evidence of an employe in the engineering department, who is not made by law the custodian of ordinances,' etc., is insufficient to rebut the legal presumption that the legal steps were complied with."

19. Gill *v.* Dunham (Cal.), 34 Pac. 68.

evidence of its completion, in an action to enforce an assessment, in the absence of fraud or collusion in such acceptance by the authorities.[20] A certificate as to the completion of an improvement, signed by a mere clerk under a general direction of the city engineer to make out such certificates is not sufficient, under the statute requiring such a certificate by the engineer, to create a lien by assessment.[21]

J. Publication of Name of Owner in Delinquent List. Where the collector of special assessments had correctly given the name of the owner of the property sought to be charged in the delinquent list, such fact is sufficient evidence that he had knowledge of the owner's name and was therefore bound to state it in the advertisement as required by the statute.[22]

K. Collector's Warrant and Return. — The collector's warrant and the return thereon are conclusive of the facts stated in them.[23] The admission in evidence without objection of a warrant which shows on its face that the return thereon has not been recorded as required by the statute does not supply, or amount to a waiver of, proof of its having been recorded, and defeats the plaintiff's recovery. The warrant cannot be evidence of matters not shown by it, but only of matters appearing therein.[24]

L. Non-Payment by Municipal Authorities. — In an action under the Indiana Barret law, so called, to foreclose the lien of street improvement bonds, proof in support of an averment in the complaint that the city issuing the bonds failed and refused to pay the amount of the assessment is not required.[25]

20. Haefgen *v.* State (Ind. App.), 47 N. E. 28; Henderson *v.* Lambert, 77 Ky. 24; Barker *v.* Tennessee Pav. Brick Co. (Ky.), 71 S. W. 877; New Orleans *v.* Halpin, 17 La. Ann. 185, 87 Am. Dec. 523.

Acceptance of Improvement. Baldrick *v.* Gast, 25 Ky. L. Rep. 1977, 79 S. W. 212.

Prima Facie Evidence of Completion. — The certificate of the city and county surveyor and deputy superintendent, and the assessment, diagram and warrant signed by such superintendent, and countersigned by the auditor, are *prima facie* evidence that the contract has been duly and fully performed. Ede *v.* Knight, 93 Cal. 159, 28 Pac. 860.

21. Certificate by Clerk of Engineer as To Completion of Work Not Sufficient. — Rauer *v.* Lowe, 107 Cal. 229, 40 Pac. 337.

22. In the absence of evidence that the return of the delinquent special assessments to the county collector contained the owner's name, or that such name was otherwise brought to his knowledge, the collector is not required to publish such owner's name in the advertised notice of the assessment, as the collector is not required by the statute to search the records of other offices than his own to find the names of owners of property assessed. Gage *v.* People, 205 Ill. 547, 69 N. E. 80.

23. Goodrich *v.* Minonk, 62 Ill. 121.

Return of Nulla Bona. — Conclusiveness. — The return of the city collector of no goods found to satisfy an assessment for a local improvement, where requisite to a foreclosure, is conclusive of that question on the collector's application for judgment against the property assessed for the improvement. Ottawa *v.* Macy, 20 Ill. 413.

24. Witter *v.* Bachman, 117 Cal. 318, 49 Pac. 202.

25. In Scott *v.* Hayes, 162 Ind. 548, 70 N. E. 879, on the proposition stated in the text, the court says:

M. Assignment of Contractor's Claim. — In a suit by an assignee of a contractor's right of recovery for an improvement the plaintiff must, of course, prove the assignment to him.[26]

III. RELIEF FROM ASSESSMENTS.

1. Burden of Proof. — A. In General. —In a proceeding to revise, cancel, or avoid an assessment the presumption of the due and regular performance of official duty attaches in favor of the actions of the officers charged with any duties with relation to the assessment proceedings.[27] This presumption, however, will not supply the omission from the record of facts essential to the exercise of the power assumed.[28] An assessment is presumed to be on the basis

"In support of the motion for a new trial, counsel say that there was no proof that the city failed or refused to pay the amount of assessments. None was required. The failure of the city to pay was not a condition precedent, but constituted a situation in which a suit would be necessary. Payment was a defense. The allegation was strictly formal, and it sufficiently appeared from the proceedings that the assessment had not been paid. Lewis *v.* Albertson, 23 Ind. App. 147."

26. Evidence Examined and Held To Show a Due Assignment to the Plaintiff. — Reid *v.* Clay, 134 Cal. 207, 66 Pac. 262; Dickey *v.* Porter (Mo.), 101 S. W. 586.

27. Phillips *v.* Sioux Falls, 5 S. D. 524, 59 N. W. 881.

Providence Retreat *v.* Buffalo, 31 App. Div. 635, 53 N. Y. Supp. 1113, *denying* rehearing 29 App. Div. 160, 51 N. Y. Supp. 654; Wright *v.* Forrestal, 65 Wis. 341, 27 N. W. 52.

Publication of Ordinance. — *In re* Corwin, 14 Hun (N. Y.) 34.

The jurisdiction of the municipal authorities to make an assessment may be assumed, without proof, from the fact of the making of an assessment under a valid law in that behalf; and when the fact of an assessment is admitted by the plaintiff in an action to recover back an assessment paid, proof of jurisdictional facts or of the regularity of the proceedings is not in such circumstances required. Turrell *v.* Elizabeth, 43 N. J. L. 272.

In an action to restrain the sale of property under an assessment it will be presumed that the property was properly assessed, in accordance with a provision of the city charter, in the name of the person in whose name it was assessed at the last annual assessment, the applicants for an injunction against the assessment having been parties to the record on such assessment proceeding. Clinton *v.* Portland, 26 Or. 410, 38 Pac. 407.

When the board invested by law with the construction of an improvement has once acquired jurisdiction of the proceeding, every presumption thereafter is in favor of the legality of the proceedings. Bigelow *v.* Ritter (Iowa), 108 N. W. 218.

Presumption of Regular Discharge of Official Duty. — Certifying Assessment. — It will be presumed, under the express provisions of Code Civ. Proc. § 3266, subd. 15, of Montana, in the absence of a contrary showing, that the city officials did not certify an assessment prematurely to the county officials, but that they performed their duty regularly. Beck *v.* Holland, 29 Mont. 234, 74 Pac. 410.

28. An assessment must on its face show that it was made according to the rule prescribed by the statute, and presumptions cannot supply this. The mode for the exercise of power must be followed. Blanchard *v.* Barre, 77 Vt. 420, 60 Atl. 970.

The failure of the proceedings for a special assessment to show the facts of record essential to jurisdiction will not be aided by presumptions. Morse *v.* Omaha, 67 Neb. 426, 93 N. W. 734.

of special benefits accruing to the property assessed.[29] If the proceedings of the authorities in levying the assessment are valid and regular on their face, they are conclusive of all matters therein appearing in the absence of fraud or collusion or the levying of the assessment upon an illegal basis.[30] As to jurisdictional matters the

Essentials Not Supplied by Presumption. — In levying special taxes or assessments for benefits received, the record of the proceedings must show affirmatively a compliance with all essential conditions to a valid exercise of the taxing power, and any omission of such facts will not be supplied by presumptions. Medland *v.* Linton, 60 Neb. 249, 82 N. W. 866; Smith *v.* Omaha, 49 Neb. 883, 69 N. W. 402; State *v.* Mayor of Paterson, 37 N. J. L. 389; Village of Passaic *v.* State, 37 N. J. L. 538; State *v.* West Orange, 39 N. J. L. 453; Chamberlain *v.* Cleveland, 34 Ohio St. 551.

29. Assessment Is Presumed To Be on Basis of Special Benefits. Medland *v.* Linton, 60 Neb. 249, 82 N. W. 866.

It will be presumed that the municipal authorities in making a special assessment founded their assessments upon the special benefits accruing to the property assessed, and the party asserting the contrary has the burden to prove it affirmatively. City of Denver *v.* Kennedy, 33 Colo. 80, 80 Pac. 122, 467.

30. *Georgia.* — Speer *v.* Mayor of Athens, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402.

Maryland. — Mayor of Baltimore *v.* Johns Hopkins Hospital, 56 Md. 1.

Michigan. — Powers *v.* Grand Rapids, 98 Mich. 393, 57 N. W. 250; Shimmons *v.* Saginaw, 104 Mich. 511, 62 N. W. 725.

Minnesota. — State *v.* District Court, 33 Minn. 295, 23 N. W. 222.

New Jersey. — Simmons *v.* Passaic, 55 N. J. L. 485, 27 Atl. 909.

New York. — LeRoy *v.* New York, 4 Johns. Ch. 352; Lyon *v.* Brooklyn, 28 Barb. 609; *In re* Mead, 13 Hun 349; *In re* Adams, 13 Hun 355, *approved* in 74 N. Y. 216.

Wisconsin. — Wright *v.* Forrestal, 65 Wis. 341, 27 N. W. 52.

After a street improvement has been completed, the legislative determination of the council that the improvement was necessary will not be disturbed except upon a showing of abuse of discretion so conclusive as amply to justify the interference of the court. Barfield *v.* Gleason, 111 Ky. 491, 23 Ky. L. Rep. 128, 63 S. W. 964, 64 S. W. 959.

The question whether property will be specially benefited is one of fact for the local board or officer, and in the absence of fraud, mistake or transgression of authority, will not be reviewed. State *v.* Several Parcels of Land (Neb.), 110 N. W. 753.

The resolution of a city council, under statutory authority, declaring the amount to be assessed on the property in an assessment district, is a legal determination that the benefits conferred are equal to that amount, and when the assessment roll is confirmed by the council it is thereby determined how much each parcel of land is benefited, and such determination is conclusive in the absence of fraud or mistake. Davies *v.* Saginaw, 87 Mich. 439, 49 N. W. 667.

When Assessing Board Lacks Legal Authority. — An assessment is not conclusive in a proceeding where the board levying the assessment is not authorized by the statute to make an assessment. Mayall *v.* St. Paul, 30 Minn. 294, 15 N. W. 170; Armstrong *v.* St. Paul, 30 Minn. 299, 15 N. W. 174.

The determination of the municipal council as to what property is benefited is conclusive except in case of fraud, or such gross misconduct as to preclude the exercise of sound judgment in that regard. Beck *v.* Holland, 29 Mont. 234, 74 Pac. 410.

Where Record Shows Omissions. Notice. — The statutory presumption of regularity arising from the assessment, is, where the proceedings are directly assailed, overcome by the production of the record failing to

decision of the municipal authorities is, it seems, not conclusive unless made so by the statute, but only *prima facie* evidence of the truth of the facts found.[31] To overcome an assessment for invalidity in the proceedings, the plaintiff attacking the proceedings has the burden to establish the ground of invalidity alleged.[32] The courts are not over-zealous to set aside an assessment on merely technical

show the giving of notice of the proceedings. Van Sant *v.* Portland, 6 Or. 395.

When, in assessing property subject to assessment, the proceedings of commissioners are regular, in the absence of proof to the contrary the report is conclusive of the fact of benefits received and of the amount thereof. New Jersey Midland R. Co. *v.* Jersey City, 42 N. J. L. 97.

Where the municipal council determines that the amount of an assessment does not exceed the benefits conferred, its judgment is conclusive in the absence of fraud unless modified before final confirmation in the special proceedings. But where it is alleged that the municipal authorities did not ascertain and apportion the benefits upon the proper basis, parol evidence may be introduced to establish such an averment. Chamberlain *v.* Cleveland, 34 Ohio St. 551.

31. As to Jurisdictional Matters. Fruin-Bambrick Const. Co. *v.* Geist, 37 Mo. App. 509; Miller *v.* Amsterdam, 149 N. Y. 288, 43 N. E. 632; City of Bloomington *v.* Reeves, 177 Ill. 161, 52 N. E. 278; Cummings *v.* West Chicago Park Comrs., 181 Ill. 136, 54 N. E. 941; Sharpe *v.* Speir, 4 Hill (N. Y.) 76; Allen *v.* Portland, 35 Or. 420, 58 Pac. 509.

32. *Kansas.* — City of Argentine *v.* Simmons, 54 Kan. 699, 39 Pac. 181.

Louisiana. — Blanchet *v.* Municipality No. 2, 13 La. 322.

Nebraska. — Lasbury *v.* McCague, 56 Neb. 220, 76 N. W. 862.

New York. — *In re* Bassford, 50 N. Y. 509; Gifft *v.* Buffalo, 8 N. Y. St. 325; *In re* Brady, 85 N. Y. 268; Hooker *v.* Rochester, 30 N. Y. Supp. 297.

Wisconsin. — Wright *v.* Forrestal, 65 Wis. 341, 27 N. W. 52.

Action To Set Aside Assessment. It is presumed that the assessment is fair in the independent proceeding to set it aside. Garratt *v.* Trustees of Canandaigua, 135 N. Y. 436, 32 N. E. 142.

In a suit by a property owner against a city to enjoin it from enforcing a lien for an improvement made pursuant to an ordinance valid on its face, the plaintiff has the burden to show wherein an essential prerequisite was not complied with. Beaumont *v.* Wilkes-Barre, 142 Pa. St. 198, 21 Atl. 888; Auditor General *v.* Maier, 95 Mich. 127, 54 N. W. 640; *In re* Hebrew Benev. Orphan Asylum, 70 N. Y. 476; *In re* Voorhis, 90 N. Y. 668; Lyth *v.* Buffalo, 48 Hun 175; McKeesport *v.* Harrison, 27 Pittsb. Leg. J. 57.

The petitioner to cancel an assessment has the burden to show that improper considerations entered into the assessment. *In re* Ferris, 10 N. Y. St. 480.

Statutory Prima Facie Proof of Assessment. — Under the Louisiana statute making the certificate of the administrator of public improvements and of the city surveyor *prima facie* proof of the contractor's compliance with his contract and his performance of its obligations, and making such contract, when evidenced by a notarial act, *prima facie* proof of the due observance of antecedent forms and requirements, the burden of proof is on the owner whose property is assessed for an improvement to disprove such matters. Barber Asphalt Pav. Co. *v.* Gogreve, 41 La. Ann. 251, 5 So. 848.

Lack of Recommendation by Proper Authority. — A party seeking to restrain the collection of an assessment on the ground that the improvement was not recommended by the proper authority (the board of city improvements) has the burden to establish the fact alleged. Bolton *v.* Cleveland, 35 Ohio St. 319.

objections.[33] If fraud in the proceedings is alleged, the petitioner for relief must show that he, not the city, was defrauded.[34] The complaining party must show that he has been injured by the act or omission of which he complains.[35] Where a special assessment is in itself illegal because resting upon a basis that excludes any consideration of benefits to the property taxed, proof that it is in excess of benefits is not required, in a suit to enjoin its enforcement, this for the reason that in such circumstances the courts must enjoin the whole assessment, leaving local authorities to make a new one according to law.[36] An ordinance, shown to have been adopted, will be presumed to have been passed by unanimous consent where that is necessary under the statute relating to ordinances of this nature.[37]

B. Non-Publication of Ordinance and Resolution. — When it is alleged as a ground of invalidity that the ordinance and resolution authorizing an improvement were not published, as required by law, this must be made affirmatively to appear.[38]

C. Notice. — The party seeking to vacate an assessment for lack of the publication of a notice of the proceedings in a paper employed by the municipality has the burden to establish such fact as a ground

33. In Providence Retreat *v.* Buffalo, 29 App. Div. 160, 51 N. Y. Supp. 654, the court says: "In considering cases of this character, it will be well to have in mind a most salutary rule, and one which is quite general in its application, namely, that the proceedings by which a meritorious assessment is levied for the cost of a public improvement are presumed to be regular; and, when the objections thereto are purely technical in their character, the courts should not, in the absence of evidence of substantial injury, be overzealous to find a reason for declaring the same to be invalid. Gilmore *v.* Utica, 131 N. Y. 26, 29 N. E. 841; Voght *v.* Buffalo, 133 N. Y. 463, 31 N. E. 340."

34. Lawrence *v.* New York, 15 Fed. Cas. No. 8,139*a*.

35. Tifft *v.* Buffalo, 8 N. Y. St. 325.

Prejudice to Complaining Party. In the absence of proof to the contrary the regularity of assessment proceedings will be presumed, and if irregularities appear they must actually prejudice the complaining party, and the burden is upon him to show that he has been prejudiced. Lyth *v.* Buffalo, 48 Hun (N. Y.) 175.

In a proceeding to vacate an assessment the objector has the burden to show affirmatively that his rights have been invaded by the assessment of which he complains, and to bring himself within the provisions of the statute, authorizing relief, by competent proof on all contested questions. *In re* Moore, 8 Hun (N. Y.) 513; *In re* Bassford, 50 N. Y. 509; *In re* Burke, 62 N. Y. 224; *In re* Ingraham, 64 N. Y. 310, *affirming* 4 Hun (N. Y.) 495.

Acquisition of Ownership Subsequent to Assessment. — "It does not follow from the mere fact of ownership acquired subsequent to the confirmation of an assessment that the owner is aggrieved. The presumption is that he was indemnified, and this presumption will control without evidence to the contrary. If it formed part of the consideration, then the presumption is that the prior owner is the one aggrieved because he has made an allowance to recover it in the transfer of the property or is obligated to do so." *In re* Moore, 8 Hun (N. Y.) 513.

36. Village of Norwood *v.* Baker, 172 U. S. 269.

37. City of Lexington *v.* Headley, 5 Bush (Ky.) 508.

38. *In re* Brady, 85 N. Y. 268.

of relief.[39] Where the plaintiff admits that a notice for a street improvement was published in two city papers and there was no evidence that it did not appear for the requisite number of days the court will presume that it was published for the required time.[40] If the record of the proceedings of the municipal body does not show the giving of notice, the recital on certiorari of the clerk of the city that notice was duly given will not, it has been held, support the presumption that notice was given, conformably to the rule, generally obtaining, that presumption will not supply the omission from the record of jurisdictional facts.[41] Where it is sought to restrain the collection of an assessment, if it appear by the record that the municipal body fixed a time for meeting to equalize the assessment and the complainant does not raise the issue of a failure to give notice thereof, it will be presumed that notice of such meeting was given.[42] The designation of a newspaper as the official organ for the publication of the proceedings of council relating to street improvements is an employment by the corporation in the absence of evidence that the service was declined by the paper designated.[43] In the absence of evidence of the revoking of the designation of a newspaper as an official organ for the publishing of notices the employment will be presumed to continue.[44]

D. Presumption as to Number Acting. — When an estimate or assessment is signed by two only of the persons having authority in the premises, it may be presumed that the third was present and acted in the business. The presumption is not conclusive, however, and it may be shown by any extrinsic competent evidence that the third person was not consulted and did not act. And for that purpose one of the assessors who signed the report is a competent witness to testify to the fact.[45]

E. Distribution of Charges. — Charges for an improvement, occasioned by irregularities in the proceedings, which, in the apportionment of the expense of the same, should be charged to the municipal corporation, will be presumed to have been so charged where a division of cost is made between the municipal corporation and the owners of property assessed.[46]

39. *In re* Burke, 62 N. Y. 224.

40. Arnold *v.* Ft. Dodge, 111 Iowa 152, 82 N. W. 495.

41. Wilson *v.* Seattle, 2 Wash. 543, 27 Pac. 474.

Though the record does not show that any proof was made of the giving of notice essential to give the municipal body jurisdiction to proceed in a public improvement, the presumption will obtain, in an action to enjoin the sale of the property assessed for the improvement, that notice was given, when the fact and not the record of notice is vital, and the plaintiff in such a proceeding has the burden to show that legal notice was not given. Hellman *v.* Shoulters (Cal.), 44 Pac. 915.

42. Barkley *v.* Oregon City, 24 Or. 515, 33 Pac. 978.

43. Matter of Phillips, 60 N. Y. 16.

44. Matter of Phillips, 60 N. Y. 16.

45. Doughty *v.* Hope, 3 Denio (N. Y.) 249, 1 N. Y. 79.

46. Youngster *v.* Paterson, 40 N. J. L. 244.

F. Location of Improvement. — Where in making a local improvement the municipal authorities assume that the improvement is within the corporate limits it will be presumed that the improvement is within the corporate limits, and to avoid an assessment this presumption must be overcome.[47]

G. Filing of Specifications. — Where, in an action to restrain the collection of an assessment, it appears that the plans of the proposed improvement were on file when the engineer advertised for bids, it will be presumed also, nothing to the contrary appearing, that the specifications were on file as the law requires.[48]

H. Presumption of Authority of Agent to Sign Petition. When a petition for a public improvement shows on its face that the names of property owners affixed thereto were signed by agents, the authority of such agents will be presumed and need not appear thereon. If the municipal council find that the agency existed it may act, and its determination of that fact is *prima facie* evidence of the truth of the fact found.[49]

I. Recording of Return. — Where the return of the surveyors of public highways, laying out a public road, has been duly made and recorded, it will be presumed to have been recorded by the clerk by order from the court, and the party attacking the validity of the return has the burden to show the contrary.[50]

J. Approval of Assessment. — In the absence of evidence to the contrary the approval by the mayor of a city of the confirmation of a special assessment roll may be presumed to sustain the assessment.[51]

K. Inquiry Into Name of Owner. — Under a statute providing that if the name of the owner of any lands cannot be ascertained such lands may be assessed in the name of a former owner, proof of the making of the proper inquiry is essential to the validity of the assessment. This fact cannot be supplied by presumption.[52]

L. Recovering Back Assessments Paid. — The plaintiff seeking to recover back an assessment paid because of illegality in the proceedings under which the assessment was levied has the burden to prove the illegality on which he relies.[53] He has the burden also,

47. Town of Woodruff Place *v.* Raschig, 147 Ind. 517, 46 N. E. 990.

48. Knell *v.* Buffalo, 54 Hun 80, 7 N. Y. Supp. 233.

49. Allen *v.* Portland, 35 Or. 420, 58 Pac. 509.

50. New Jersey S. R. Co. *v.* Chandler, 65 N. J. L. 173, 46 Atl. 732.

51. President, etc., of Delaware & H. Canal Co. *v.* Buffalo, 39 App. Div. 333, 56 N. Y. Supp. 976.

52. Paillet *v.* Youngs, 4 Sandf. (N. Y.) 50.

53. In Pooley *v.* Buffalo, 124 N. Y. 206, 26 N. E. 624, the court says: "In view of the fact that the burden is upon the plaintiff to prove the facts entitling him to relief, it must be made to appear that he was, or may have been, in some manner prejudiced by the failure of the common council to consider the objections which were made. That may have been dependent upon their nature or pertinency. If they were founded solely upon the supposed prejudice to those making them, and the objections not against the legality of the assessment, it would not necessarily concern the plaintiff. It

to show that he was not aware of the facts establishing the illegality of the assessment at the time payment was made.[54]

2. Admissibility of Evidence. — A. Of Parol. — The fact that plans, maps, etc., of a proposed improvement are filed may be shown by any competent evidence dehors the instruments themselves. It is not necessary that they be marked filed, the only question being whether as a fact they were filed and can be identified certainly.[55] The posting of the proper notices may also be shown by parol.[56] The petition by property owners for an improvement need not show on its face that it is signed by the statutory percentage of the property owners. This fact may be shown by evidence *aliunde*.[57] The authority of an agent to sign a petition for an improvement need not be shown by the municipal records but may be proven by evidence dehors the record.[58] If the charter of a city make no provision as to the manner in which the expense of a local improvement is to be ascertained, for the purpose of laying an assessment, the plaintiff in an action to be relieved from the assessment may by proof dehors the record show the actual cost of the improvement.[59] Not all record omissions, it need not hardly be said, may be sup-

cannot, without some evidence tending to prove what the objections were, be presumed that their nature was such that the consideration of them may have in any view resulted beneficially to the plaintiff."

54. Tripler *v.* New York, 63 Hun 630, 17 N. Y. Supp. 750.

55. In Akers *v.* Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536, the court says: "The plaintiff's contention in part is that the defendant city council, by its ordinance, in building the sewer in question, failed to connect it with a main public sewer; that is to say, it was not connected with a main public sewer established according to law. There is no dispute but what it was connected with a main sewer, but the objection is that such sewer was not established by ordinance, and was not, therefore, a main public sewer. It has been shown that such sewer was built in pursuance of a resolution of the city council, and paid for out of the money in the city treasury provided for that purpose by a vote of the people of said city. It is true that said sewer should have been provided for by ordinance, but the act of the city council, after it was so constructed, in accepting and paying for the same by funds secured for that purpose, constituted it in law as much a public sewer as if it had been originally established by ordinance. Foncannon *v.* Kirksville, 88 Mo. App. 279; Devers *v.* Howard, Id. 253; Dooley *v.* Kansas City, 82 Mo. 444, 52 Am. Rep. 380; State *v.* Cowgill & Hill Mill Co., 156 Mo. 620, 57 S. W. 1008; City of St. Louis *v.* Armstrong, 56 Mo. 298. But we cannot see what difference it would make whether such so-called public sewer was established by ordinance or not, if, prior to the establishment of the district sewer in controversy, it existed as such. For instance, if it had been constructed as the result of private contributions, and turned over to the city for public use, and so accepted, it would have been to all intents and purposes a public sewer. We hold that it was not a matter properly in issue, if it existed as a public sewer, no matter how constructed."

56. Owens *v.* Marion, 127 Iowa 469, 103 N. W. 381.

57. Allen *v.* Portland, 35 Or. 420, 58 Pac. 509.

58. Allen *v.* Portland, 35 Or. 420, 58 Pac. 509.

59. Minnesota Linseed Oil Co. *v.* Palmer, 20 Minn. 424; Ankeny *v.* Palmer, 20 Minn. 431.

plied by extrinsic evidence.[60] Parol evidence is inadmissible to show that the council of a city, in ordering a street improvement, acted upon a report by the officers other than the report shown by the records of the council to have been the basis of the assessment.[61]

B. Recitals in Municipal Records as Evidence. — A recital in the record of a special assessment resolution, that notice was posted as required by the statute, is sufficient evidence of the fact recited.[62]

C. Unavailable Defenses. — If a property owner, assessed for an improvement, does not avail himself of his statutory right to object to or protest against his assessment, testimony tending to show that the property of such person was not benefited, but in fact injured, by the particular improvement, is incompetent in an action to annul the assessment.[63] Nor may it be shown that contract was not let to lowest bidder, in the absence of fraud.[64] It is not a valid ob-

60. Damages From Change of Grade. — Record. — Parol. — Under the charter of the City of Milwaukee, where the grade of a paved street is changed, an assessment which does not show on its face that damages from such change were considered in making the assessment cannot be validated by extrinsic evidence that such fact was considered. This can be shown, only by the record, and the record must show the fact affirmatively. Saunderson *v.* Herman, 95 Wis. 48, 69 N. W. 977.

61. Said the court in Kerr *v.* Corsicana (Tex. Civ. App.), 35 S. W. 694: "In this connection, we will consider appellee's third cross assignment of error, under which is made this proposition: 'The court erred in refusing to permit the city to prove that, before beginning the work of paving, the city council caused an estimate to be made of the probable cost of such improvement, which estimate was legal in all respects.' From the record we gather that appellee offered parol evidence to establish the facts claimed. There are circumstances under which parol evidence would be proper in cases of this kind. Dill. Mun. Corp. 228 *et seq.* But under the facts of this case, we are of opinion that the court did not err in excluding the evidence. Under the charter, it is contemplated that, in order to make said report of any value, it must have been accepted and approved by the city council. The bill of exceptions fails to show any offer to prove that said report was excepted and approved, and that the city council based their action thereon. Again, to have admitted such proof, it would be contradicting the record of the city council, which is not permissible. The transcript shows that the city council accepted and approved the report made March 3, 1891, by a different committee from the one originally appointed, and that they based their action in levying and assessing the taxes herein enjoined upon said last-named report. We take it that the charter contemplates the making of only one report, and that must form the basis for both,— letting the contract, and levying the tax. The minutes of the council showing that that report was accepted and approved and action based thereon, another and different report cannot be shown by parol."

62. Owens *v.* Marion, 127 Iowa 469, 103 N. W. 381.

63. Brown *v.* Drain, 112 Fed. 582, *affirmed s. c.* 187 U. S. 635; City of Denver *v.* Dumars, 33 Colo. 94, 80 Pac. 114.

Failure to object to the amount of an assessment before the proper municipal board in the regular course of the proceedings is a waiver of the right to attack the assessment in the courts, except for fraud. Duncan *v.* Ramish, 142 Cal. 686, 76 Pac. 661.

64. City of Denver *v.* Dumars, 33 Colo. 94, 80 Pac. 114.

jection to an assessment by the city council that the members were tax payers and therefore interested.[65]

D. Source of Information as to Assessment. — When in the matter of laying an assessment no means of procuring information as to the assessment are provided in the statute, the municipal body may receive as evidence information from the law officers of the municipality who had the proceedings in charge, consisting of what purports to be an official communication of the cost of an improvement.[66]

E. Determining Assessment. — When the statute provides that a special assessment shall be in proportion to benefits, but shall not exceed a certain percentage of the actual value of the property assessed, the assessing body is not required to take evidence of the value of the assessed property.[67]

F. As to Frontage of Assessed Property. — In determining the frontage of lots assessable for the improvement of a street, the court may take into consideration a lease of the property or any conveyance containing a description that has been recognized and acted upon by the parties prior to the proceedings which declared the necessity for the improvement.[68] Also the average frontage of other lots in the vicinity assessable for the improvement.[69]

G. Passage of Numerous Ordinances in Apparent Contemplation of New Statute. — If the municipal council has unlimited power under the city charter in respect to street improvements, the mere passage of a large number of ordinances for the macadamizing of many streets in anticipation of a proposed change of law whereby such improvements cannot be made at the expense of property owners unless on petition of a majority of the owners on the line of the improvement, does not of itself constitute proof of fraud on the part of the council in enacting such ordinances, and evidence of the enactment of said several ordinances is, therefore, irrelevant and inadmissible.[70]

65. Fact That Councilmen Are Tax-Payers. — Brown *v.* Saginaw, 107 Mich. 643, 65 N. W. 601.

66. *In re* Ferris, 10 N. Y. St. 480.

67. Owens *v.* Marion, 127 Iowa 469, 103 N. W. 381.

68. City of Cincinnati *v.* James, 2 Ohio N. P. 345.

69. City of Cincinnati *v.* James, 2 Ohio N. P. 345.

70. In Morse *v.* Westport, 136 Mo. 276, 37 S. W. 932, the court says: "The fact that many ordinances were enacted about the same time for improvements similar to those in issue in this case is wholly irrelevant. The learned special judge rightly excluded that fact at the trial. It may well be that the other ordinances were requested by all the property holders affected thereby. Each ordinance may be intrinsically just and necessary. Moreover, the reasonableness of each and every one of said enactments could not, we apprehend, conveniently be gone into in the present suit. Nor does it matter (so far as concerns the right to make this particular improvement) that a change in the charter was impending, so long as the municipal power to make the improvement still remained, and was regularly exercised. Acts of a city no doubt may be shown to be fraudulent by its official enactments where such proof is competent and relevant to some proper issue to be tried. But the

H. Plaintiff's Own Wrongful Acts. — In an action to enjoin the placing of an assessment for drainage upon the duplicates for collection, under the statute authorizing such a suit on the ground of gross injustice in the apportionment, evidence tending to show that the plaintiff by his own acts destroyed the natural drainage, and created the necessity for drainage and increased the cost and expense of securing it, is competent on the issue of the due apportionment of the cost.[71]

I. Cause of Necessity for Improvement. — In an action to revise a betterment assessment in the improving of a brook it is immaterial that the old channel had been obstructed by persons other than the municipal authorities since the construction of the new channel, and evidence of such obstruction is incompetent.[72]

J. Payment of Assessment by Others. — In an action to declare an assessment for a public improvement void, the fact that a large number of persons assessed for the improvement have paid their assessments is no defense to the action if the assessment is invalid, but, if valid, the admission of such evidence is harmless.[73]

K. Judgment in Other Proceedings. — In a proceeding to vacate an assessment an order or judgment made in another such proceeding in which the petitioner was not a party is irrelevant.[74] Nor can such evidence be made relevant because alleged in the pleading of the party attacking the assessment and admitted by the opposite party.[75]

L. Testimony of Public Authorities to Impeach Assessment. — The testimony of one of the assessors as to the principle upon which they acted in making an assessment for a local improvement is competent to show that the assessment was erroneous; such evidence is competent however only when the municipal authorities act upon an erroneous principle. A mere error of judgment whereby certain property is not assessed, acting upon a correct principle, cannot be so impeached.[76]

M. Ratification by Public Officers. — In a suit to declare a special tax bill void, on the ground that the improvement was not lawfully established, evidence of the official ratification of the construction of the improvement is competent.[77]

N. Under the Pleadings. — When in an action to annul tax

mere passage of a large number of ordinances for street improvements in anticipation of a change of law (which would necessitate a change of procedure in regard to those improvements) is not of itself any proof of fraud on the part of these municipal authorities."

71. Cleveland, C., C. & St. L. R. Co. *v.* Logan County Comrs., 17 Ohio C. C. 436.

72. Quinn *v.* James, 174 Mass. 23, 54 N. E. 343.

73. Ferguson *v.* Stamford, 60 Conn. 432, 22 Atl. 782.

74. Crane *v.* New York, 13 N. Y. St. 342.

75. Crane *v.* New York, 13 N. Y. St. 342.

76. Clark *v.* Dunkirk, 12 Hun (N. Y.) 181; Kennedy *v.* Troy, 14 Hun (N. Y.) 308; National Bank *v.* Elmira, 53 N. Y. 53.

77. Akers *v.* Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536.

certificates the plaintiff relies in his complaint upon payment of the taxes for which sales were made and such certificates given, evidence tending to show the invalidity of such taxes is not admissible as not tending to prove the cause of action stated in the complaint.[78]

3. Sufficiency of Evidence. — A. As to Benefits. — Assessments of special benefits levied by the proper authorities are entitled to considerable weight when assailed in an action wherein relief therefrom is sought, and to overthrow them clear and satisfactory evidence is required.[79] The fact that a lot does not need artificial drainage does not necessarily show that the lot should not be assessed for benefits received, since future and indirect benefits from the improvement of its surroundings may be considered.[80] If the opening of a street

78. Stringham *v.* Oshkosh, 22 Wis. 326.

79. The official certificate of commissioners of assessment for an improvement made upon their oath and in the line of their duty is entitled to much weight as evidence and clear proof of great force is required to establish the assessment to be erroneous. Hunt *v.* Rahway, 39 N. J. L. 646.

When the assessing board has made a finding of benefits, and levied assessments thereon, such finding and assessment are *prima facie* correct and should not lightly be disturbed or inquired into in the absence of substantive grounds of relief. Benham *v.* Cincinnati, 26 Ohio C. C. 17.

The provision of a city charter that a certified tax list shall be *prima facie* evidence that the lands and persons named therein are subject to taxation and that the assessment is just and equal, applies with like effect to an assessment for special improvement taxes. Stringham *v.* Oshkosh, 22 Wis. 326.

The assessments of benefits by commissioners who have been upon the ground, examined the premises, and made their report of estimates according to the principle prescribed by the statute will not be set aside upon conflicting evidence of the justice or sufficiency of such assessments. That an injustice has been done must be clearly proved to set aside assessment. Pudney *v.* Passaic, 37 N. J. L. 65.

Failure of Record To Show Benefits To Be Special. — When an improvement has been completed and assessments levied against individual owners of abutting property under a statute authorizing special assessments for special benefits, a court of equity will not declare the assessments void on the ground of its not affirmatively appearing that the benefits assessed were special benefits. Ferguson *v.* Stamford, 60 Conn. 432, 22 Atl. 782.

The statutory presumption of the validity of an assessment roll is not overcome by the failure of the official certificate thereof to show that the assessment was laid on the lands benefited in proportion to the benefits. *In re* Ferris, 10 N. Y. 480.

Discretion honestly exercised and not abused will not be reviewed by the courts. But if it appear that an improvement was not necessary, that during a period of two years after its completion it was not used, and probably will never be, and that property assessed for its payment not only is not benefited but damaged, the collection of the assessment will be enjoined. Oregon & C. R. Co. *v.* Portland, 25 Or. 229, 35 Pac. 452, 22 L. R. A. 713.

The inclusion of real estate in an improvement district by city ordinance is *prima facie* evidence that the property will be benefited by the improvement for which the district is created, and an assessment thereof will not be set aside for want of benefit in the absence of evidence to establish such fact. Matthews *v.* Kimball, 70 Ark. 451, 66 S. W. 651, 69 S. W. 547.

80. Minneapolis & St. L. R. Co.

renders it practicable to open another contemplated street which could not have been opened before, and this fact of itself specially benefits lots adjacent to the new street, such special benefits may properly be considered in estimating the special benefits conferred by the opening of the new street.[81]

B. As to Fraud and Illegality. — Proof of the inequitable character of a special assessment for street improvements does not establish fraud.[82] Merely that an assessment is upon the basis of lineal feet fronting the improvement is not evidence of injustice in the assessment, but this fact, when relied upon, must be shown by independent testimony.[83] Although the agent of the contractor obtaining a contract for a local improvement may have been active and influential in obtaining signatures to the petition for the improvement, in the absence of any proof of fraud or corruption, the assessment for the improvement will not be set aside after the improvement has been completed.[84] If the municipal authorities act within their jurisdiction in making an assessment, evidence that makes it appear to be disproportionate does not necessarily prove that an erroneous rule of assessment was adopted.[85] Proof merely that the municipal authorities in imposing an assessment did not take evidence on the question of benefits does not establish fraud in the imposing of the assessment.[86]

C. Petition for Improvement. — In an action to set aside an assessment for lack of a petition for the improvement signed by three-fourths of the abutters, the petition for an improvement containing the names of the petitioners, certified by the proper officer to be signed by more than the required number of owners, and the ordinance providing for the improvement, containing the like recital, received without objection, constitute *prima facie* evidence to support the assessment.[87]

D. Necessity for Improvement. — The necessity for an improvement is a matter of which the proper municipal authorities are the exclusive judges and their judgment will not be interfered with in a suit to declare a tax bill void, in the absence of fraud or gross abuse of power.[88]

E. Medium of Publication. — To vacate an assessment for nonconformity with the law requiring publication in certain newspapers

v. Lindquist, 119 Iowa 144, 93 N. W. 103.

81. Chamberlain *v.* Cleveland, 34 Ohio St. 551.

82. Owens *v.* Marion, 127 Iowa 469, 103 N. W. 381.

83. Bolton *v.* Cleveland, 35 Ohio St. 319.

84. Field *v.* Barber Asphalt Pav. Co., 194 U. S. 618.

85. Monroe County *v.* Rochester, 154 N. Y. 570, 49 N. E. 139.

86. **Failure of Municipal Authorities To Take Evidence of Benefits.** Owens *v.* Marion, 127 Iowa 469, 103 N. W. 381.

87. City of Argentine *v.* Simmons, 54 Kan. 699, 39 Pac. 181.

88. Field *v.* Barber Asphalt Pav. Co., 194 U. S. 618.

In Brewster *v.* Davenport, 51 Iowa 427, 1 N. W. 737, on this question, in an action to restrain collection of an assessment, the Iowa court says: "It is lastly urged in the petition, and by counsel, that the

of the resolution or ordinance directing the work, it must be shown that a paper in which the publication was not made was not only designated by the proper authority, but that the particular paper accepted such designation.[89] Proof merely that a newspaper is designated to publish the official proceedings, without proof of its acceptance of the appointment, is not sufficient to show that it is an advertising organ of the city in a proceeding to set aside an assessment for a street improvement.[90] The contrary rule has been applied, however, in the same state.[91] Also proof of the official designation of a paper for one year is not sufficient to establish its official selection for a subsequent year,[92] though it has been held that, in the absence of proof of the revocation of the official employment of a newspaper, its public character will be presumed to continue.[93]

F. Municipal Title to Situs of Improvement. — When an assessment for a sewer is sought to be vacated because the municipality had no title to the ground where the sewer is laid, proof merely that another owned the ground where the sewer was laid, without proof that no sufficient permission was procured by the city from the owners to lay the sewer upon their lands, is insufficient, as it will be assumed, until the contrary is established, that such permission was obtained, a reasonable presumption being indulged in favor of the legality of the acts of the municipal authorities.[94]

sidewalk was not demanded by the public wants, but was erected for the convenience of one individual. But these questions are for determination of the city council. Except for the want of authority, or for fraud, the court cannot interfere in the exercise of lawful municipal authority. It is made the duty of the city council to determine whether an improvement of this character is demanded by the public. With their determination, when fairly made in the exercise of competent authority, we cannot interfere."

89. *In re* Anderson, 48 How. Pr. (N. Y.) 279.

90. *In re* Kettelstas, 2 Hun (N. Y.) 221; *In re* Burke, 2 Hun (N. Y.) 281.

91. Matter of Phillips, 60 N. Y. 16.

92. *In re* Burke, 2 Hun (N. Y.) 281.

93. Matter of Phillips, 60 N. Y. 16.

94. In matter of Ingraham, 64 N. Y. 310, the court says: "It is claimed that the assessment was invalid because the corporation never acquired the title to the lands forming Ninety-first street, through the center of which it is alleged the sewer is laid. We are of the opinion that this position cannot be maintained. The appeal papers presented do not show that the sewer is laid on the northerly half of the street to which the petitioner claims title, nor in the center of the street. For anything which appears it may have been laid upon the south half of said street, and upon lands which he has conveyed away to Fanshaw in the deed referred to. It is by no means to be inferred that the sewer was laid upon the petitioner's one-half of the street or in the center of the same; and the party objecting should make it appear by affirmative proof that his rights have been invaded, before he is entitled to avail himself of the objection urged. It may be assumed that sewers are not always laid in the center or upon one side of a street alone; and therefore it by no means follows that in this case the sewer in question was on land claimed by the petitioner. In the petition it is stated that the southerly half of the street is the property of and owned by individuals, and not by the city; and the affidavit of the petitioner shows

G. Right of Lessee to Complain. — Affidavit of Liability. The affidavit of a lessee that he is liable under his lease to pay any assessment against the leased premises is, if not contradicted or questioned, sufficient to enable such party to maintain an action to vacate the assessment.[95]

H. Miscellaneous. — For other cases in which the sufficiency of the evidence to warrant the annulment of the assessment was considered, reference is made to the note.[96]

that the southerly half of the street, so far as he has any knowledge, has never been ceded to the city authorities. These allegations do not interfere with the right of the city to lay down the sewer. A permission from the owner or owners would be sufficient authority for that purpose; and as it is not shown that no such permission was given, and as it does not appear that these owners object, the legal presumption is that the city authorities were acting under a proper license, and had ample power to perform the work. This must be assumed until the contrary is established by sufficient proof. It is for the petitioner to make out that the authorities have acted in violation of law in imposing upon him the assessment which he seeks to avoid. Nor is it enough to establish that in carrying out the improvement, they have committed a trespass upon the lands of another party. That is a matter which rests between the city authorities and the person affected, and is not a valid ground of objection by a party assessed who has no interest in the land in which the sewer is laid."

95. *In re* Burke, 62 N. Y. 224.

96. **Completion of Work Within Reasonable Time.** — Where the evidence shows the lapse of many days without any work being done by the contractor, that he was careless, negligent and shiftless, and spent much of his ime elsewhere tends to show that work was not done within a reasonable time. Schibel *v.* Merrill, 185 Mo. 534, 83 S. W. 1069.

Under the New York statute prohibiting the courts from vacating or reducing an assessment for a local improvement in the city of Brooklyn, except to reduce it to the extent it has been increased by fraud or irregularity, and preventing the disturbance of that part of the assessment which is equivalent to the fair value of the improvement, the courts can grant no relief from an assessment until it is shown by common law evidence that the assessment exceeds the fair value of the work. *In re* Mead, 74 N. Y. 216 (Laws of 1875 Chap. 633, § 13).

A case of fraud or gross abuse of power by the municipal council is not established sufficiently to set aside tax bills for an improvement where it appears that a majority of the abutting owners had petitioned for an asphalt pavement of a street already macadamized, no protest or objection being made during the progress of the work, the evidence tending to show that the old macadam was considerably worn, and that abutting property was enhanced in value by the improvement. Field *v.* Barber Asphalt Pav. Co., 194 U. S. 618.

Evidence not sufficient to set aside an assessment. Wright *v.* Forrestal, 65 Wis. 341, 27 N. W. 52.

When the statute prohibits, in the absence of fraud, the vacating of an assessment for irregularity save for repairing a street when a former assessment has been paid, actual payment of a prior assessment must be proved in order to vacate an assessment for repairing. *In re* Willett, 70 N. Y. 490, a case of this nature where the court says: "This is a proceeding to vacate an assessment for repaving Delancey street, in the City of New York, and under § 7 of chapter 580 of the laws of 1872, the relief in this case can be granted only in case an assessment for paving the same street has once been paid.

"It appears that there was an as-

sessment for paving this street in 1831, but there was no proof that the assessment had ever, in fact, been paid. The petitioner relies entirely upon the presumption of payment from the lapse of time. This will not do. In this proceeding taken by him, seeking affirmative relief, depending upon the fact of payment, he cannot rely upon the presumption, but must show actual payment by competent proof. Lawrence *v.* Ball, 14 N. Y. 477; Morey *v.* Farmers' Loan & Trust Co., *id.* 302; *In re* Serrill, 9 Hun 234."

Evidence held to show notice of the ordering of the construction of a sewer and proof of service of such notice. Walker *v.* Detroit, 138 Mich. 639, 101 N. W. 847, 11 Detroit Leg. N. 709.

The execution of a deed by a city pursuant to the statute conveying land for the non-payment of a special assessment is *prima facie* evidence in a suit to quiet title against the assessment, of the giving of notice to the person in whose name the land was assessed that a deed would be demanded if such notice be required. Kirby *v.* Waterman, 17 S. D. 314, 96 N. W. 129.

When the proceedings in an appropriation assessment merely show upon their face that the aggregate amount of the assessment is placed on benefited property, it will not be presumed conclusively that the assessment has been properly apportioned among the several properties assessed, or that the assessment is limited to special benefits conferred. Chamberlain *v.* Cleveland, 34 Ohio St. 551.

SPECIFIC PERFORMANCE.

By Murray W. Seasongood.

I. PRESUMPTIONS.

1. In General. — Under the rule that to entitle a person to specific performance he must establish his claim clearly, and that ordinarily a bare preponderance of evidence is not enough,[1] presumption will not in general be indulged in to aid one seeking such relief. Thus it is held that equity will not give specific performance when the complainant relies merely on the legal presumption of payment from lapse of time, without proof of actual payment.[2]

2. Presumptions in Aid of Marketable Title. — Nevertheless, a vendor is sometimes given the benefit of presumptions in aid of a marketable title in reference to some collateral fact or event which is perhaps incapable of proof by direct evidence.[3] Thus a vendee will be required to take property, the title to which is based on the presumption arising from adverse possession for the statutory period, where the persons against whom adverse possession is invoked are not under disability.[4]

3. Miscellaneous Presumptions. — In the note are collected a number of cases in which various presumptions are considered.[5]

1. See *infra*, "Weight of Evidence" under notes 88 and 89.

2. Morey *v.* The Farmers Loan & Trust Co., 14 N. Y. 302. But in Rife *v.* Lybarger, 49 Ohio St. 422, 31 N. E. 768, 17 L. R. A. 403, this presumption, enforced by the fact that when the holder of the notes died the notes were not found among his papers, was held sufficient.

3. **Presumptions in Aid of Title.** Emery *v.* Grocock, 6 Mad. 54, 56 Eng. Reprint 1010; Barnwall *v.* Harris, 1 Taunt. (Eng.) 430; Causton *v.* Macklew, 2 Sim. 242, 57 Eng. Reprint 779 (where the validity of a title depended on no execution having been issued between two dates eight months apart; and in the absence of anything proved to the contrary, it was presumed execution had not issued); Prosser *v.* Watts, 6 Mad. 59, 56 Eng. Reprint 1012; Prince *v.* Bates, 19 Ala. 105 (presumption of title from giving bond for title and assuming to sell land); Barger *v.* Gery, 64 N. J. Eq. 263, 272, 53 Atl. 483, (but where the purchaser contracted for a perfect title he was not required to take one dependent upon the presumption of death from seven years' absence); Potter *v.* Ogden, 68 N. J. Eq. 409, 59 Atl. 673; Ferry *v.* Sampson, 112 N. Y. 415, 20 N. E. 387; but see Vought *v.* Williams, 120 N. Y. 253, 258, 24 N. E. 195; Levin *v.* Dietz, 48 Misc. 593, 96 N. Y. Supp. 468.

4. **Title by Adverse Possession.** Foreman *v.* Wolf (Md.), 29 Atl. 837; Kip *v.* Hirsh, 103 N. Y. 565, 9 N. E. 317; Shriver *v.* Shriver, 86 N. Y. 575; Murray *v.* Harway, 56 N. Y. 337; Rife *v.* Lybarger, 49 Ohio St. 422, 31 N. E. 768, 17 L. R. A. 403; Bennett *v.* Pierce, 50 W. Va. 604, 40 S. E. 395.

5. **Miscellaneous. — No Presumption of Wife's Consent Where Husband Sells Land.** — It was formerly presumed when a husband made a contract to sell his wife's land, that he had her consent, and he was compelled to get it (Hall *v.* Hardy, 3 Peere Wms. 187, 24 Eng. Reprint 1023; Emery *v.* Wase, 5 Ves. Jr. 846, 31 Eng. Reprint 889; Downey *v.* Hotckhiss, 2 Day (Conn.) 225); but such is no longer the law (Annan *v.* Merritt, 13 Conn. 478, 487; Martin *v.* Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245; Butler *v.* Buckingham, 5 Day (Conn.) 492, 5 Am. Dec. 174; Squire *v.* Harder, 1 Paige Ch. (N. Y.) 494, 19 Am. Dec. 446).

Presumption, Possession of Deed. In Newsom *v.* Davis, 20 Tex. 419, it was held that where a deed was shown to have been delivered to the

II. BURDEN OF PROOF.

1. Burden of Proving Contract on Plaintiff. — The plaintiff has the burden of proving the existence of the contract and its terms;[6]

ancestor of the plaintiff a presumption arose that the plaintiff had it.

Fraud. — Under certain circumstances fraud will be presumed. Prince *v.* Lamb, 128 Cal. 120, 130, 60 Pac. 689; Beardsley *v.* Duntley, 69 N. Y. 577; Garrett *v.* Goff (W. Va.), 56 S. E. 351; Anderson *v.* Snyder, 21 W. Va. 632.

Gift. — No presumption of purpose to make a gift arises from the facts of possession and improvements made. Young *v.* Crawford (Ark.), 100 S. W. 87.

In Richmond *v.* Foote, 3 Lans. (N. Y.) 244, it was held that where a parol agreement to convey was shown, together with undisturbed possession, payment of purchase money and improvements made, and no other contract is shown, it will be presumed that the acts were done in pursuance of the contract proved.

Consideration and Payment. Statement of consideration in imperfect deed presumed to be the real consideration. South Portland Land Co. *v.* Munger, 36 Or. 457, 54 Pac. 815, 60 Pac. 5. But in Richards *v.* Snyder, 11 Or. 501, 6 Pac. 186, it was held that one claiming to be an innocent purchaser for value was bound to prove that he had paid a consideration by other means than the mere recital of consideration in the deed under which he took. Dreutzer *v.* Lawrence, 58 Wis. 594, 17 N. W. 423.

Recital of consideration in deed *prima facie* proof of payment. Todd *v.* Eighmie, 4 App. Div. 9, 38 N. Y. Supp. 304.

Services Gratuitous. — There is a presumption that services rendered are performed gratuitously and not for pay. Martin *v.* Martin, 108 Wis. 284, 84 N. W. 439, 81 Am. St. Rep. 895.

Abandonment. — No presumption of abandonment of contract arises against one who relying upon his equitable title remains in possession. Thornburgh *v.* Mastin, 93 N. C. 258; Farmer *v.* Daniel, 82 N. C. 152; Mask *v.* Tiller, 89 N. C. 423; Wade's Heirs *v.* Greenwood, 2 Rob. (Va.) 473.

Change of Circumstances From Lapse of Time. — No presumption of change of circumstances which would make specific performance inequitable arises from mere lapse of time. Merchants Bank *v.* Thomson, 55 N. Y. 7, 15, *disapproving* Jackson *v.* Edwards, 22 Wend. (N. Y.) 498, 510. *Contra,* and that such a presumption arises, Sharp *v.* West, 150 Fed. 458.

Writing, Whole Agreement. — It is conclusively presumed in the absence of fraud, accident or mistake, that a written contract contains the whole agreement between the parties. Morgan *v.* Porter, 103 Mo. 135, 15 S. W. 289; State *ex rel.* Yeoman *v.* Hoshaw, 98 Mo. 358, 11 S. W. 759.

6. Contract and Terms. — *United States.* — Purcell *v.* Miner, 4 Wall. 513; Hildreth *v.* Duff, 148 Fed. 676, 78 C. C. A. 410; Pressed Steel Car Co. *v.* Hansen, 128 Fed. 444, *s. c.* 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. 1172.

Colorado. — Hagerman *v.* Bates, 30 Colo. 89, 69 Pac. 526.

Georgia. — Ford *v.* Smith, 121 Ga. 300, 48 S. E. 914; Porter *v.* Allen, 54 Ga. 623.

Illinois. — Wright *v.* Raftree, 181 Ill. 464, 54 N. E. 998.

Indiana. — Boldt *v.* Early, 33 Ind. App. 434, 70 N. E. 271, 104 Am. St. Rep. 255.

Michigan. — Boam *v.* Greenman, 110 N. W. 508; Buhler *v.* Trombly, 139 Mich. 557, 568, 102 N. W. 647, 108 N. W. 343.

Missouri. — Hill *v.* Cheatham, 129 Mo. 71, 31 S. W. 261.

Nebraska. — Greene *v.* Greene, 42 Neb. 634, 60 N. W. 937, 47 Am. St. Rep. 724.

Nevada. — Brandon *v.* West, 28 Nev. 500, 83 Pac. 327.

New Jersey. — Haberman *v.* Kaufer, 61 Atl. 976; Marvel *v.* Fralinger, 65 N. J. Eq. 161, 55 Atl. 818.

New York. — Holt *v.* Tuite, 188 N. Y. 17, 80 N. E. 364.

that he is bound by it;[7] that he has been ready, desirous, prompt and eager,[8] and expected during the whole time of the existence of the contract to have it performed,[9] and that he has fully performed or offered to perform everything required on his part to be done.[10]

A. AGENCY. — The burden of proving the agency of the person who made the contract sought to be enforced is on the plaintiff.[11]

B. TITLE. — A vendor seeking specific performance of a contract for the sale of land has the burden of showing he can give good title.[12]

Ohio.— Walsh *v.* Barton, 24 Ohio St. 28; Schnitzer *v.* Cole, 4 Ohio C. C., N. S. 319.

Pennsylvania. — Cortelyou's Appeal, 102 Pa. St. 576.

Virginia. — Rockecharlie *v.* Rockecharlie, 29 S. E. 825.

West Virginia. — McCully *v.* McLean, 48 W. Va. 625, 37 S. E. 559.

Wisconsin. — Dewey *v.* Spring Valley Land Co., 98 Wis. 83, 73 N. W. 565.

7. Haberman *v.* Kaufer (N. J. Eq.), 61 Atl. 976. In this case the complainant sued to compel the legatees under a will to release the charge of certain legacies on a building, claiming that title was in him under a parol contract with the respondent's decedents, whereby in consideration of services to be rendered by him to them he should have the property free from all incumbrances, and it was held that the burden was upon the complainant to establish the fact that the contract which he set up was actually made and that it was obligatory not only upon the decedents but also upon himself. The court said: "That the services of caretaking of his father and mother (the decedents) and looking after their business were performed by the plaintiff proves no contractual relation. Those services are in the law presumed to have been rendered in recognition of family duty and affection. No implication of an undertaking on the part of the father or mother, to whom such services were rendered, to pay for them will arise. Proof of an express agreement to pay for such services must be exhibited which is sufficient to overcome the presumption that they were voluntarily rendered."

8. **Readiness.** — Wenham *v.* Switzer, 59 Fed. 942, 8 C. C. A. 404; Sharp *v.* West, 150 Fed. 458; Forthman *v.* Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145; Morse *v.* Seibold, 147 Ill. 318, 35 N. E. 369; Tryce *v.* Dittus, 199 Ill. 189, 65 N. E. 220; Murray *v.* Nickerson, 90 Minn. 197, 95 N. W. 898.

9. Alley *v.* Deschamps, 13 Ves. Jr. 225, 33 Eng. Reprint 278.

A plaintiff calling for performance after a great lapse of time must satisfy the court that he did not lie by to take advantage of fortuitous circumstances; that during the whole period he had it in contemplation to perform the contract, and that the other party expected to be called on. Tiernan *v.* Rowland, 15 Pa. St. 429.

10. **Performance.** — Askew *v.* Carr, 81 Ga. 685, 8 S. E. 74; Brink *v.* Steadman, 70 Ill. 241; Williamson *v.* Williamson, 4 Iowa 279; Jones *v.* Tennis Coal Co. (Ky.), 94 S. W. 6; Morey *v.* The Farmers Loan & Trust Co., 14 N. Y. 302; Sherlock *v.* Van Asselt, 34 Wash. 141, 75 Pac. 639.

11. Cochran *v.* Blout, 161 U. S. 350; Murray *v.* Nickerson, 90 Minn. 197, 95 N. W. 898.

In Saunders *v.* King, 119 Iowa 291, 93 N. W. 272, it was held that the fact that a wife permits her husband to manage her farm was not sufficient evidence to establish authority in him to contract for an absolute sale of the farm.

12. *Illinois.* — Pfaff *v.* Cilsdorf, 173 Ill. 86, 50 N. E. 670.

Kentucky. — Tomlin *v.* McChord's Representatives, 28 Ky. 135.

Ohio. — Walsh *v.* Barton, 24 Ohio St. 28.

Tennessee. — Topp *v.* White, 12 Heisk. 165.

Texas. — Maurice *v.* Upton (Tex.

2. Mistake, Fraud or Other Affirmative Defense. — The burden of proving mistake, fraud, accident or other affirmative defense is on the defendant.[13] There are, however, authorities which hold that the requirement that a plaintiff seeking specific performance come with clean hands, obliges him if unequitable conduct or circumstance is suggested, affirmatively to disprove it.[14] And it is undoubtedly true that the court will often refuse specific performance in case of a valid contract on evidence for which it would decline to set aside an executed contract.[15] It is equally well established that less evi-

Civ. App.), 41 S. W. 504; *s. c.* 34 S. W. 642.

Virginia. — Wade's Heirs *v.* Greenwood, 2 Rob. 473.

West Virginia. — Bennett *v.* Pierce, 50 W. Va. 604, 40 S. E. 395; Spencer *v.* Sandusky, 46 W. Va. 582, 33 S. E. 221; Parsons *v.* Smith, 46 W. Va. 728, 34 S. E. 922.

For cases holding under certain circumstances the burden is on the defendant. See Prince *v.* Bates, 19 Ala. 105; Huey *v.* Kroutter, 106 La. 449, 30 So. 892; Barger *v.* Gery, 64 N. J. Eq. 263, 53 Atl. 483.

13. Cathcart *v.* Robinson, 5 Pet. (U. S.) 264; Pike *v.* Underhill, 24 Ark. 124; Thomas *v.* Gottlieb Brew. Co., 102 Md. 417, 62 Atl. 633; The Western R. Corp. *v.* Babcock, 6 Metc. (Mass.) 346; Park *v.* Johnson, 4 Allen (Mass.) 259; Cawley *v.* Jean, 189 Mass. 220, 75 N. E. 614; Chute *v.* Quincy, 156 Mass. 189, 30 N. E. 550.

The code of Montana, § 4417, provides that specific performance cannot be enforced against a party to a contract: (1.) If he has not received an adequate consideration for it. (2.) If it is not as to him just and reasonable. (3.) If his assent was obtained by misrepresentation, concealment, circumvention or unfair practice, or by promise not substantially performed. (4.) If assent was given under influence of mistake, misapprehension or surprise, except where the contract provides for compensation for mistake. It was held in the following case, and declared to be the general rule, that a defendant relying on any of these defenses, has the burden of establishing it. Finlen *v.* Heinze, 28 Mont. 548, 563, 73 Pac. 123.

Beardsley *v.* Duntley, 69 N. Y. 577; Kelly *v.* Johnson, 135 N. C. 650, 47 S. E. 672; Cramer *v.* Mooney, 59 N. J. Eq. 164, 44 Atl. 625; Ives *v.* Hazard, 4 R. I. 14, 67 Am. Dec. 500; Cape Fear Lumber Co. *v.* Matheson, 69 S. C. 87, 48 S. E. 111; Younger *v.* Welch, 22 Tex. 417; Christ Church *v.* Beach, 7 Wash. 65, 33 Pac. 1053.

14. Moon *v.* Crowder, 72 Ala. 79 (*semble*); Prince *v.* Lamb, 128 Cal. 120, 128, 60 Pac. 689. (The California Code, § 3391, says specific performance cannot be enforced against a party, (1) if he has not received adequate consideration for the contract; (2) if it is not as to him just and reasonable. The above case holds that the burden is on the plaintiff to show the contract not obnoxious to the foregoing provision); Morrill *v.* Everson, 77 Cal. 114, 19 Pac. 190; Windsor *v.* Miner, 124 Cal. 492, 57 Pac. 386; Agard *v.* Valencia, 39 Cal. 292; Bruck *v.* Tucker, 42 Cal. 346; Arguello *v.* Bours, 67 Cal. 447, 8 Pac. 49.

See, however, Stanton *v.* Singleton (Cal.), 54 Pac. 587; Moetzel *v.* Koch, 122 Iowa 196, 97 N. W. 1079 (where the defendant claimed to have been drunk at the time of making the contract); Southern Missouri & A. R. Co. *v.* Graves, 182 Mo. 211, 81 S. W. 405; Greene *v.* Greene, 42 Neb. 634, 60 N. W. 937, 47 Am. St. Rep. 724 (In a contract between husband and wife, the burden is on the husband to show that the contract was free from coercion); Cortelyou's Appeal, 102 Pa. St. 576.

15. Stiles *v.* Cain, 134 Cal. 170, 66 Pac. 231; Kuhlman *v.* Wieben, 129 Iowa 188, 105 N. W. 445, 2 L. R. A. 666; Moetzel *v.* Kochs, 122 Iowa 196, 97 N. W. 1079; Clark *v.* Maurer, 77

dence is required for defeating than to enforce specific performance.[16]

3. Miscellaneous. — The burden of proving each of the following defenses is on the defendant: Inability to perform,[17] abandonment of the contract,[18] forfeiture of contract,[19] purchase for value without notice of plaintiff's claim,[20] and claim of homestead.[21]

III. KIND OF EVIDENCE.

1. In General. — The rules relating to evidence in cases of specific performance are the same as those governing all equitable actions, modified simply by the nature of the subject-matter.[22] For example, the ordinary equity rule, that where an answer under oath is not waived the effect of it as evidence must be overcome by complainant by the satisfactory testimony of two witnesses, or one witness with circumstances so corroborative as to be in effect equal to the testimony of an additional witness, prevails in actions for specific performance.[23] This subdivision is elsewhere treated in this work.[24]

Methods of taking testimony may differ in equity, from those used at law, but the rules of evidence, with few exceptions, are the same.[25]

2. Special Rules of Evidence. — A. The Best Evidence Rule. The rule requiring best evidence that the nature of the case admits of, applies with full force to actions for specific performance.[26]

Iowa 717, 42 N. W. 522; Trigg *v.* Read, 5 Humph. (Tenn.) 529, 42 Am. Dec. 447.

16. *In re* Ferguson's Estate, 124 Mo. 574, 583, 27 S. W. 513; Veth *v.* Gierth, 92 Mo. 97, 104, 4 S. W. 432; Vawter *v.* Bacon, 89 Ind. 565; Crane *v.* Gough, 4 Md. 316, 333; The State *v.* Baum's Heirs, 6 Ohio 383.

17. Schreiber *v.* Elkin, 103 N. Y. Supp. 330.

18. Robinett *v.* Hamby, 132 N. C. 353, 43 S. E. 907; House *v.* Beatty, 7 Ohio St. 84; Woodruff *v.* Hargrave, Wright (Ohio) 556; Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998.

19. Eaton *v.* Schneider, 185 Ill. 508, 57 N. E. 421; Thompson *v.* Colby, 127 Iowa 234, 103 N. W. 117.

20. Steele *v.* Robertson, 75 Ark. 228, 87 S. W. 117. *Contra* (*semble*) Coleman *v.* Dunton, 99 Me. 121, 58 Atl. 430.

21. Steele *v.* Robertson, 75 Ark. 228, 87 S. W. 117.

22. Pomeroy on Specific Performance of Contracts, 2d ed. 482.

23. Walcott *v.* Watson, 53 Fed. 429; Marvel *v.* Fralinger, 65 N. J. Eq. 161, 55 Atl. 818.

24. See article "Injunction," Vol. VII.

25. Long *v.* Dooley, 4 Hayw. (Tenn.) 128, 9 Am. Dec. 754; Bispham's Prin. of Eq., 6th ed., § 9, p. 16.

26. **Best Evidence Rule.** — Palo Alto Co. *v.* Harrison, 68 Iowa 81, 26 N. W. 16; Jones *v.* Tennis Coal Co., 29 Ky. L. Rep. 623, 94 S. W. 6; Tomlin *v.* McChord's Reps., 5 J. J. Marsh. (Ky.) 135 (relinquishment of dower provable only by record evidence, not by parol); New Orleans Real Estate etc. Co. *v.* Carrollton Land Co. (La.), 43 So. 641; Montana Min. Co. *v.* St. Louis Min. & M. Co., 20 Mont. 394, 406, 51 Pac. 824 (contents of bond not provable by parol).

Mahaney *v.* Carr, 175 N. Y. 454, 67 N. E. 903, where it appeared on cross-examination that a contract testified to orally was in writing, and it was held in the absence of attempt to produce or account for loss, it was error to have allowed further proof by parol, and to have refused

B. HEARSAY. — Hearsay evidence is in general inadmissible.[27] But courts have occasionally in their desire to be possessed of all the circumstances of the case, relaxed the rule.[28] On the other hand, in one class of evidence the courts seem to be even more rigid than at law; namely, verbal admissions in suits for specific performance of oral contracts to convey or devise. Such testimony is always received with disfavor,[29] and, in some jurisdictions, especially where the person claimed to have made the admissions is dead, will not of itself support a bill for specific performance.[30]

C. PAROL EVIDENCE. — a. *In General.* — The ordinary instances where parol testimony is admitted in actions at law, apply also in cases of specific performance. Thus a contract may be explained by parol,[31] and its subject-matter made certain.[32] Marketable title

to strike out that previously admitted. Newsom *v.* Davis, 20 Tex. 419.

27. Purcell *v.* Miner 4 Wall. (U. S.) 513; Hoover *v.* Binkley, 66 Ark. 645, 51 S. W. 73; Lyons *v.* Bass, 108 Ga. 573, 34 S. E. 721; Murphy *v.* Hussey, 117 La. 390, 41 So. 692; Keene *v.* Lowenthal, 83 Miss. 204, 35 So. 341; Watkins *v.* Robertson, 105 Va. 269, 54 S. E. 33, 5 L. R. A. 1194.

28. Simons *v.* Bedell, 122 Cal. 341, 55 Pac. 3, 68 Am. St. Rep. 35; Lennon *v.* Stiles, 53 Hun 630, 5 N. Y. Supp. 870.

29. *District of Columbia.* — Cherry *v.* Whalen, 25 App. D. C. 537; Whitney *v.* Hay, 15 App. D. C. 164.

Indiana. — Cutsinger *v.* Ballard, 115 Ind. 93, 17 N. E. 206.

Maine. — Grant *v.* Bradstreet, 87 Me. 583, 33 Atl. 165.

Maryland. — Billingslea *v.* Ward, 33 Md. 48.

Michigan. — Boam *v.* Greenman, 110 N. W. 508.

Missouri. — Russell *v.* Sharp, 192 Mo. 270, 91 S. W. 134; Rosenwald *v.* Middlebrook, 188 Mo. 58, 86 S. W. 200, 211; Grantham *v.* Gossett, 182 Mo. 651, 674, 81 S. W. 895.

New Jersey. — Haberman *v.* Kaufer (N. J. Eq.), 61 Atl. 976; Wolfinger *v.* McFarland, 67 N. J. Eq. 687, 54 Atl. 862, 63 Atl. 1119.

Ohio. — Shahan *v.* Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517.

But declarations of the deceased person that he had not agreed to sell his land, were held enough to defeat an alleged oral contract by him to devise it. Ostrom *v.* DeYoe (Cal.), 87 Pac. 811.

30. Unsupported Admissions Insufficient. — Purcell *v.* Miner, 4 Wall. (U. S.) 513; Walcott *v.* Watson, 53 Fed. 429; Hamlin *v.* Stevens, 177 N. Y. 39, 69 N. E. 118; Killian *v.* Heinzerling, 47 Misc. 511, 95 N. Y. Supp. 969; Mahaney *v.* Carr, 175 N. Y. 454, 67 N. E. 903.

Declarations of Abandonment, accompanied, however, by continuous possession, were held not enough in Bowser *v.* Cravener, 56 Pa. St. 132, to prove abandonment.

31. Brewer *v.* Horst Co., 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240; Moulton *v.* Harris, 94 Cal. 420, 29 Pac. 706; Vincent *v.* Larson, 1 Idaho 241.

Description of Property. — The rule is, of course, a familiar one that the subject-matter, the particular land to be conveyed, is an essential term in every agreement for the sale of land, and unless this subject-matter is so described that it can be identified, a court of equity will not undertake to enforce it; but while this is so it is equally well settled that the description need not be so clear and precise as to make unnecessary a resort to extrinsic evidence. Towle *v.* Carmelo Land & Coal Co., 99 Cal. 397, 33 Pac. 1126.

32. Preble *v.* Abrahams, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301; Cusack *v.* Budasz, 187 Ill. 392, 58 N. E. 326; Fowler *v.* Redican, 52 Ill. 405; but see Brix *v.* Ott, 101 Ill. 70, commenting on Fowler *v.* Redican; Whitworth *v.* Harris, 40 Miss. 483;

may also be proved in part by parol,[33] and a contract may be shown by parol testimony to have been abandoned or rescinded;[34] likewise it may be proved by parol that the written contract sought to be enforced was not to take effect unless another contract should be performed by the plaintiff, and that the plaintiff failed to perform such other contract.[35] Although the written contract shows only that the defendant is bound, the plaintiff may supplement the writing by parol evidence showing that he also is bound, proving mutuality of obligation.[36] It has been intimated that aside from the exceptions of accident, fraud, and mistake, actions for specific performance are controlled by and cannot go beyond the ordinary legal rules applicable to this class of testimony.[37] However, greater latitude is undoubtedly exercised by an equity court in actions for specific performance in the reception of parol evidence to add to or subtract from, vary or contradict a writing, than a law court would tolerate.[38] Greater liberality is accorded a defendant than a plaintiff in this regard.[39]

Swallow *v.* Strong, 83 Minn. 87, 85 N. W. 942 (parol evidence in aid of description of land contained in memorandum; see, however, Nippolt *v.* Kammon, 39 Minn. 372, 40 N. W. 266, and Ryan *v.* Davis, 5 Mont. 505, 6 Pac. 339); Casey *v.* Holmes, 10 Ala. 776, where at 786 it is said an equity court will after part performance use its utmost endeavors to arrive at a meaning for the contract.

33. Murray *v.* Harway, 56 N. Y. 337; Smith *v.* Death, 5 Madd. 371, 56 Eng. Reprint 937; Spencer *v.* Topham, 22 Beav. 573, 52 Eng. Reprint 1229, and see notes 91 and 92, *infra.*

34. Herren *v.* Rich, 95 N. C. 500; Falls *v.* Carpenter, 21 N. C. (1 Dev. & B. Eq.) 237, 28 Am. Dec. 592; Lasher *v.* Loeffler, 190 Ill. 150, 60 N. E. 85; Hale *v.* Bryant, 109 Ill. 34; Mahon *v.* Leech, 11 N. D. 181, 90 N. W. 807; Huffman *v.* Hummer, 18 N. J. Eq. 83; Dearborn *v.* Cross, 7 Cow. (N. Y.) 48; Stearns *v.* Hall, 9 Cush. (Mass.) 31.

35. Reynolds *v.* Hooker, 76 Vt. 184, 56 Atl. 988; Redfield *v.* Gleason, 61 Vt. 220, 17 Atl. 1075.

36. Ives *v.* Hazard, 4 R. I. 14, 27, 67 Am. Dec. 500.

37. Morgan *v.* Porter, 103 Mo. 135, 15 S. W. 289; Stoutenburgh *v.* Tompkins, 9 N. J. Eq. 332; Leading Cases in Equity, Vol. II, Pt. 1, p. 514; Long *v.* Dooley, 4 Hayw. (Tenn.) 128, 9 Am. Dec. 754.

In North *v.* Bunn, 122 N. C. 766, 29 S. E. 776, it was held that where the Statute of Frauds is pleaded, parol evidence of a contract is inadmissible without prior proof of improvements or other acts of part performance first shown.

38. Stoutenburgh *v.* Tompkins, 9 N. J. Eq. 332.

39. Quinn *v.* Roath, 37 Conn. 16. In this case the question presented was whether parol evidence offered by the defendant was admissible to prove that the written contract between the petitioner and himself was so varied before it was entirely reduced to writing and executed as to have verbally interpolated into it the provision that if the petitioner failed to pay a stipulated instalment of the purchase money on a day fixed the contract should thereupon be void. The bill sought to compel the respondent to specifically perform the agreement as expressed in the writing alone, and parol evidence of such verbal variation offered by the defendant was excluded by the trial court. The court in holding the rejection of this evidence to be error, said: "The admissibility of the particular species of evidence here offered is restricted to the defence of bills brought for a specific performance, and the courts, in admitting it to repel the attempt of a purchaser or seller of land to oblige the other party to a contract to perform his

b. *Parol Evidence Offered By Defendant.* — **(1.) Contradiction of Recital of Consideration.** — As equity will not specifically enforce an agreement lacking a valuable consideration,. the defendant may show by parol that an instrument under seal, or one reciting a consideration, is in fact wanting in consideration.[40]

(2.) Mistake. — Defendant may show by parol that the writing sought to be enforced does not, by reason of mistake, accident or fraud, represent the true agreement intended to have been made between the parties.[41]

c. *Parol Evidence Offered by Plaintiff.* — **(1.) Plaintiff May Show Fraud or Mistake.** — Although there is authority for the proposition that the plaintiff will not be allowed to vary the writing on which he bases his bill,[42] yet the clear weight of authority in the United States is now to the effect that on a showing of mistake or fraud the plaintiff may, equally with the defendant, ask to have the written agreement between the parties corrected and specifically enforced.[43]

part specifically, have proceeded upon the just ground of inequitableness in the petitioner in striving to enforce the execution of a written contract with parol variations by regarding only the written provisions and entirely disregarding the verbal variations. This is in strict accordance with the spirit of equity, which requires of a party seeking the aid of a court of chancery to come with clean hands and a willingness to do equity; and the most flagrant fraud, though grosser in degree, is not a more certain violation of this spirit, than a deliberate attempt to enforce only the written portion of a contract which contains verbal variations essentially changing its character and rendering it less favorable to the petitioner. The law seems well settled that if a party to a contract for the conveyance of land desires the enforcement of the performance of it, such enforcement must be of the precise contract in terms which the parties in fact made, and it is generally true that he will not be permitted to enforce one resting partly in writing and partly in parol, and if he attempts to compel the performance of a written contract which contains collateral verbal alterations he cannot be allowed the benefit of the written portion without also excepting such parol modifications of it as exist. It is equally well established that a petitioner who brings his bill for a specific performance, is not entitled to the same indulgence in the introduction of parol proof as the respondent may be, who defends against it and offers to prove the existence of verbal stipulations inconsistent with, and varying, and operating as conditions of or limitations to, the writing." See also Stoutenburgh *v.* Tompkins, 9 N. J. Eq. 332.

40. Crandall *v.* Willig, 166 Ill. 233, 46 N. E. 755; Wilson *v.* Simpson, 68 Tex. 306, 4. S. W. 839; Short *v.* Price, 17 Tex. 397; Hanson *v.* Michelson, 19 Wis. 498, 508.

41. Somerville *v.* Coppage (Md.), 61 Atl. 318; Kraft *v.* Egan, 78 Md. 36, 26 Atl. 1082; Philpot *v.* Elliott, 4 Md. Ch. 273; Berry *v.* Whitney, 40 Mich. 65; Chambers *v.* Livermore, 15 Mich. 381; Stoutenburgh *v.* Tompkins, 9 N. J. Eq. 332; Cortelyou's Appeal, 102 Pa. St. 576; Reilly *v.* Gautschi, 174 Pa. St. 80, 34 Atl. 576.

42. Woolam *v.* Hearn, 7 Ves. Jr. 211, 32 Eng. Reprint 86; Long *v.* Dooley, 4 Hayw. (Tenn.) 128, 9 Am. Dec. 754.

43. Correction and Specific Performance Compelled by Plaintiff.

Georgia. — Wall *v.* Arrington, 13 Ga. 88.

Illinois. — Fowler *v.* Redican, 52 Ill. 405.

Massachusetts. — Hall *v.* First

(2.) Plaintiff May Not Contradict Writing by Collateral Agreement. Aside from the instances just mentioned, a plaintiff is not permitted to vary an absolute written agreement by showing a parol contract inconsistent with it.[44]

(3.) Plaintiff's Understanding of a Contract. — Where a specific performance is resisted on the ground of fraud, the plaintiff (vendor) may show his understanding of the contract, not to vary the written agreement, but to rebut the charge of fraud.[45]

d. *When Plaintiff May Prove Contract by Parol, Notwithstanding Statute of Frauds.* — Where an agreement is required by the Statute of Frauds to be in writing, the plaintiff, upon showing possession taken, valuable improvements made or other part performance under the agreement, so that to allow the plea of the Statute of Frauds would amount to a fraud upon him, may prove the contract by parol and have it specifically enforced.[46]

D. Opinion Evidence. — Opinion evidence is inadmissible where it is inadmissible at law. Thus, where a defense of insufficiency of title is made, the opinion of lawyers on the validity of the title is inadmissible.[47]

IV. ADMISSIBILITY OF EVIDENCE.

1. In General. — Great latitude in the introduction of evidence is allowed the parties in view of the fact that whether a specific per-

Nat. Bank, 173 Mass. 16, 53 N. E. 154, 73 Am. St. Rep. 255, 44 L. R. A. 319 (plaintiff cannot prove a parol contract contradictory of the written one, and ask for its specific performance where no other fraud appears on the part of the defendant than merely relying on the rule of law preventing such variations).

Mississippi. — Mosby *v.* Wall, 1 Cushm. 81, 55 Am. Dec. 71.

Nebraska. — Ballou *v.* Sherwood, 32 Neb. 666, 49 N. W. 790, 50 N. W. 1131.

New York. — Beardsley *v.* Duntley, 69 N. Y. 577; Keisselbrack *v.* Livingston, 4 Johns Ch. 144.

Ohio. — Railroad Co. *v.* Steinfield, 42 Ohio St. 449, 457 (plaintiff may offer the original writing and then prove acts which tend to show fraud or mistake).

Tennessee. — Barnes *v.* Gregory, 1 Head 230.

44. Lozier *v.* Hill, 68 N. J. Eq. 300, 59 Atl. 234 (holding evidence by complaint inadmissible to vary absolute conveyance of a deed by showing parol agreement to re-convey.

In Gram *v.* Wasey, 45 Mich. 223, 7 N. W. 84, 762, where an answer to a bill for specific performance relied for defense on breach of an agreement not to cut, complainant was not permitted to show a contemporaneous parol contract allowing such cutting. Whitworth *v.* Harris, 40 Miss. 483.

In Medical College *v.* New York University, 76 App. Div. 48, 78 N. Y. Supp. 673, however, a complainant having executed a deed for a consideration as recited therein of one dollar, was permitted to show that the agreement was also conditioned upon the grantee performing certain acts, and its failure to perform said acts. The court said this was showing a collateral agreement not in conflict with the deed, and that it would be a fraud to let the grantee keep the property without performing its agreement.

45. Sloan v. Rose, 101 Va. 151, 43 S. E. 329.

46. See *infra,* notes 67 and 68.

47. Moser *v.* Cochrane, 107 N. Y. 35, 13 N. E. 442, *affirming* 12 Daly (N. Y.) 292.

formance shall be decreed rests in the sound discretion of the chancellor, guided by all of the facts and circumstances of the particular case.[48] This is equally true in cases of contracts involving real estate, for in that class of cases as well as in all others where appeal is made to the chancellor's discretion, it is only when a contract is in its nature and incidents entirely unobjectionable, possessing no feature to influence the discretion of the court adversely, that it becomes as much a matter of course to give specific performance as for a law court to give damages.[49] In view of the foregoing it is impracticable to formulate any more general fixed rule governing the admissibility of evidence of such facts and circumstances.[50]

2. Plaintiff's Evidence. — The plaintiff's evidence must establish the very contract pleaded in his bill. It is frequently stated that in no other class of cases is correspondence between allegations of the bill and proof produced to establish them more rigidly exacted,[51]

48. Relief Dependent Upon Discretion Guided by Facts and Circumstances. — *England.* — Goring *v.* Nash, 3 Atk. 186, 26 Eng. Reprint 909; Buckle *v.* Mitchell, 18 Ves. 100, 11 R. R. 155; Flint *v.* Brandon, 8 Ves. 159.

United States. — Willard *v.* Tayloe, 8 Wall. 557; Hennessey *v.* Woolworth, 128 U. S. 438; Wenham *v.* Switzer, 59 Fed. 942, 8 C. C. A. 404.

Alabama. — Byars *v.* Stubbs, 85 Ala. 256, 4 So. 755; Moon's Admr. *v.* Crowder, 72 Ala. 79; Casey *v.* Holmes, 10 Ala. 776.

California. — Jackson *v.* Torrence, 83 Cal. 521, 537, 23 Pac. 695.

Connecticut. — Hurd *v.* Hotchkiss, 72 Conn. 472, 480, 45 Atl. 11; Quinn *v.* Roath, 37 Conn. 16, 24.

Idaho. — Vincent *v.* Larson, 1 Idaho 241.

Illinois. — Dreiske *v.* Eisendrath Co., 214 Ill. 199, 73 N. E. 379.

Indiana. — Watson *v.* Mahan, 20 Ind. 223; Ash *v.* Daggy, 6 Ind. 259; The Trustees of the Wabash, etc., Canal *v.* State, 7 Ind. 180; Vawter *v.* Bacon, 89 Ind. 565.

Iowa. — Zundelowitz *v.* Webster, 96 Iowa 587, 65 N. W. 835; University of Des Moines *v.* Polk County Co., 87 Iowa 36, 53 N. W. 1080; Smith *v.* Shepherd, 36 Iowa 253.

Maryland. — Crane *v.* Gough, 4 Md. 316, 331.

Missouri. — Cable *v.* Jones, 179 Mo. 606, 614, 78 S. W. 780; Pomeroy *v.* Fullerton, 131 Mo. 581, 33 S. W. 173; Paris *v.* Haley, 61 Mo. 453.

New York. — Morey *v.* The Farmers Loan & Trust Co., 14 N. Y. 302; Seymour *v.* Delancey, 6 Johns. Ch. 222.

Ohio. — State *v.* Baum's Heirs, 6 Ohio 383.

Oklahoma. — Ferguson *v.* Blackwell, 8 Okla. 489, 58 Pac. 647.

Pennsylvania. — Henderson *v.* Hays, 2 Watts 148; Friend *v.* Lamb, 152 Pa. St. 529, 25 Atl. 577, 34 Am. St. Rep. 672.

Tennessee. — Trigg *v.* Read, 5 Humph. 529, 549, 42 Am. Dec. 447.

Wisconsin. — Engberry *v.* Rousseau, 117 Wis. 52, 93 N. W. 824; Williams *v.* Williams, 50 Wis. 311, 6 N. W. 814.

49. Fowler *v.* Fowler, 204 Ill. 82, 68 N. E. 414; McCabe *v.* Matthews, 155 U. S. 550; Richards *v.* Snyder, 11 Or. 501, 511, 6 Pac. 186; Conaway *v.* Sweeney, 24 W. Va. 643.

50. Lewellen *v.* Mackworth, 2 Atk. 40, 126 Eng. Reprint 421; Henderson *v.* Hays, 2 Watts Pa. 148. Evidence of character is not admissible. Brown *v.* Weaver, 113 Ala. 228, 20 So. 964.

51. *Alabama.* — Westbrook *v.* Hayes, 137 Ala. 572, 34 So. 622; Allen *v.* Young, 88 Ala. 338, 6 So. 747; Gilmer *v.* Wallace, 75 Ala. 220.

Florida. — Maloy *v.* Boyett, 43 So. 243.

Kentucky. — Turner *v.* Trosper, 24 Ky. L. Rep. 813, 69 S. W. 1089.

Maryland. — Shipley *v.* Fink, 102 Md. 219, 62 Atl. 360, 2 L. R. A. 1002; O'Brien *v.* Pentz, 48 Md. 562, 577.

but some courts refuse to allow this requirement to deprive them of their power to allow amendment where the proof does not vary materially from the pleading,[52] and where the amendment would not result in surprise.[53]

A. Consideration. — Plaintiff must affirmatively show a consideration for the contract.[54]

B. Evidence in Aid of Certainty. — If the contract is ambiguous as to subject-matter or terms, plaintiff may offer evidence to make it clear.[55]

C. Agency. — The plaintiff must offer evidence to prove the agency, when questioned, of the person making the contract sought to be enforced.[56]

D. Facts in Aid of Marketable Title. — Plaintiff may offer facts in aid of a marketable title, but no general rule can be laid down as to the nature and amount of evidence necessary to make a title good, as each case rests largely on its own circumstances.[57]

New York. — Lennon *v.* Farrell, 46 App. Div. 621, 61 N. Y. Supp. 370, *holding* that where the bill counts on a parol contract, specific performance cannot be had of a written contract.

Utah. — Price *v.* Lloyd, 86 Pac. 767.

West Virginia. — McCully *v.* McLean, 48 W. Va. 625, 37 S. E. 559; Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998.

52. Zane's Devisees *v.* Zane, 6 Munf. (Va.) 406, 416; Neale *v.* Neales, 9 Wall. (U. S.) 1; Union Cent. L. Ins. Co., *v.* Phillips, 102 Fed. 19, 41 C. C. A. 263; Ashmore *v.* Evans, 11 N. J. Eq. 151.

53. Gelwicks *v.* Todd, 24 Colo. 494, 52 Pac. 788.

54. Morris *v.* Lewis, 33 Ala. 53; Forward *v.* Armstead, 12 Ala. 124, 46 Am. Dec. 246; Windsor *v.* Miner, 124 Cal. 492, 57 Pac. 386; Kirk *v.* Middlebrook (Mo.), 100 S. W. 450; Price *v.* Price, 133 N. C. 494, 45 S. E. 855 (consideration, settlement of family dispute); Stone *v.* Ladd, 40 Or. 606, 67 Pac. 413. But see Forthman *v.* Deters, 206 Ill. 159, 167, 69 N. E. 97, 99 Am. St. Rep. 145, *holding* evidence of consideration unnecessary if contract under seal.

55. *Georgia.* — Askew *v.* Carr, 81 Ga. 685, 8 S. E. 74.

Illinois. — Fowler *v.* Fowler, 204 Ill. 82, 68 N. E. 414.

Minnesota. — Murray *v.* Nickerson, 90 Minn. 197, 95 N. W. 898; First Nat. Bank *v.* Jagger, 41 Minn. 308, 43 N. W. 70; O'Dea *v.* City of Winona, 41 Minn. 424, 43 N. W. 97.

New Jersey. — Claphan *v.* Barber, 65 N. J. Eq. 550, 56 Atl. 370.

North Carolina. — Carson *v.* Ray, 52 N. C. (7 Jones L.) 609, 78 Am. Dec. 267; Farthing *v.* Rochelle, 131 N. C. 563, 43 S. E. 1; Murdock *v.* Anderson, 57 N. C. (4 Jones Eq.) 77.

Oregon. — Knight *v.* Alexander, 42 Or. 521, 71 Pac. 657; Guillaume *v.* Fruit Land Co., 86 Pac. 883.

South Carolina. — Kennedy *v.* Gramling, 33 S. C. 367, 11 S. E. 1081, 26 Am. St. Rep. 676.

Texas. — Brainard *v.* Jordan (Tex. Civ. App.), 60 S. W. 784.

Wisconsin. — Dewey *v.* Spring Valley Land Co., 98 Wis. 83, 73 N. W. 565; Doctor *v.* Hellberg, 65 Wis. 415, 27 N. W. 176, and see cases cited under notes 31 and 32, *supra.*

56. Parmele *v.* Heenan (Neb.), 106 N. W. 662; Washington State Bank *v.* Dickson, 35 Wash. 641, 77 Pac. 1067; Dewey *v.* Spring Valley Land Co., 98 Wis. 83, 73 N. W. 565, and see cases cited under note 11, *supra.*

57. In Barger *v.* Gery, 64 N. J. Eq. 263, 53 Atl. 483, where the court said: "The authorities, I think, establish the rule as a safe one that a title dependent on a fact must be regarded as marketable when (1) the fact is so conclusively proved in the suit for specific performance that a

But when the plaintiff's contract is to furnish an abstract of title, not simply to make a good title, he cannot show that the claims of persons appearing by the abstract to be asserting title, are groundless.[58]

While a contract concerning realty, if unobjectionable, will be specifically enforced as a matter of course independently of the value of the land,[59] contracts whose subject-matter is personalty will be specifically enforced only when by reason of its peculiar value or for other cause the remedy at law in damages would be inadequate,[60] or less sufficient than the equitable remedy.[61]

verdict against the existence of the fact would not be allowed to stand in a court of law, and (2) where there is no reasonable ground for apprehending that the same fact cannot be in like manner proved, if necessary, at any time thereafter for the protection of the purchaser."

58. Smith *v.* Taylor, 82 Cal. 533, 545, 23 Pac. 217.

In Jones *v.* Hanna, 24 Tex. Civ. App. 550, 60 S. W. 279, the defendant resisting a suit for specific performance, brought by a corporation, vendor, where the contract was to make a good marketable title, was not permitted to show that the notary before whom the corporate acknowledgment was taken, was disqualified by reason of being a stockholder, to take it.

59. City of Tiffin *v.* Shawhan, 43 Ohio St. 178, 1 N. E. 581. See cases under note 49. But in Blake *v.* Flatley, 44 N. J. Eq. 228, 10 Atl. 158, 14 Atl. 128, 6 Am. St. Rep. 886, specific performance was refused because the value of the land was too slight.

When Evidence of Value of Land Admissible. — In Brown *v.* Weaver, 113 Ala. 228, 20 So. 964, where the amount of the consideration to be paid was disputed, evidence of the value of the land was admitted. And when despite defects in title of the vendor a vendee seeks specific performance with diminution for the defects, the then value of the land may be shown. Thompson *v.* Colby, 127 Iowa 234, 103 N. W. 117 (wife's dower rights not obtainable); Town of Bristol *v.* Water Works, 25 R. I. 189, 55 Atl. 710.

In Goodrich *v.* Pratt, 114 App. Div. 771, 100 N. Y. Supp. 187, a vendor who had agreed to convey a title free and unincumbered was not permitted to show that a restrictive covenant would increase rather than diminish the value of the land.

A reversioner seeking to have a covenant concerning land specifically enforced, must first show special damage to himself. Johnstone *v.* Hall, 2 Kay & Johns. 414, 69 Eng. Reprint 844.

60. Dowling *v.* Betjemann, 2 J. & Hem. 544, 70 Eng. Reprint 1175; Duke of Somerset *v.* Cookson, 3 Peere Wms. 390, 24 Eng. Reprint 1114; Fells *v.* Read, 3 Ves. Jr. 70, 30 Eng. Reprint 899; Nutbrown *v.* Thornton, 10 Ves. Jr. 159, 32 Eng. Reprint 805; Thorn *v.* Commissioners, 32 Beav. 490, 55 Eng. Reprint 192; Jones *v.* Peebles, 133 Ala. 290, 299, 32 So. 60; Clark *v.* Flint, 22 Pick. (Mass.) 231, 33 Am. Dec. 733.

In Selover *v.* Isle Harbor Land Co., 91 Minn. 451, 98 N. W. 344, an action to compel the specific performance of an agreement to issue stock, evidence was admitted to show there was no means of measuring its value, so that an action at law would afford inadequate relief.

In Whitworth *v.* Harris, 40 Miss. 483, 491, specific performance of a partnership agreement without fixed duration, was decreed as the only way to invest the complainant with his legal rights as a partner.

In Fred *v.* Fred (N. J. Eq.), 50 Atl. 776, specific performance was ordered of an agreement to deliver notes held in escrow by a third person, where the condition on which they were held had been performed. See also Hutchinson *v.* Hutchinson (N. J. Eq.), 58 Atl. 528.

61. Lone Star Salt Co. *v.* Texas

In the analogous instances of "negative specific performance," that is, where a person has contracted to render services for another, and it is sought to enjoin him from performing similar services for any one other than the person with whom he has contracted, it is incumbent upon the latter to show that the services were of extraordinary value and that legal damages could not compensate their loss.[62]

E. Evidence to Disprove Laches. — When laches unexplained would prevent relief, it is open to the plaintiff to show circumstances explaining his seeming neglect.[63]

F. Liquidated Damages no Bar. — The party seeking relief may show that although liquidated damages are provided for in the contract, the remedy of specific performance is not intended to be excluded thereby. The question is one of intention, to be deduced not alone from the instrument but from all the circumstances.[64]

G. Performance Curing Want of Mutuality. — Where objection is made to the specific performance of a contract, on the ground that specific performance could not have been compelled against the party seeking relief, and that there is therefore no mutuality of equitable remedy,[65] the plaintiff may overcome this contention by proving, that although the contract may have had such

Short Line R. Co. (Tex. Civ. App.), 86 S. W. 355.

62. *England.* — Lumley *v.* Wagner, 1 DeG. M. & G. 604, 42 Eng. Reprint 687 (actress); Montague *v.* Flockton, L. R. 16 Eq. 189 (actor).

United States. — Chicago & A. R. Co. *v.* New York, L. E. & W. R. Co., 24 Fed. 516.

Alabama. — Iron Age Pub. Co. *v.* Western Union Tel. Co., 83 Ala. 498, 508, 3 So. 449, 3 Am. St. Rep. 758.

Connecticut. — Wm. Rogers Mfg. Co. *v.* Rogers, 58 Conn. 356, 364, 20 Atl. 467, 18 Am. St. Rep. 278, 7 L. R. A. 779; Dills *v.* Doebler, 62 Conn. 366, 26 Atl. 398, 36 Am. St. Rep. 345, 20 L. R. A. 432.

Maryland. — Hahn *v.* Concordia Society, 42 Md. 460.

Michigan. — Caswell *v.* Gibbs, 33 Mich. 331.

New York. — Carter *v.* Ferguson, 58 Hun. 569, 12 N. Y. Supp. 580.

Ohio. — Port Clinton R. Co. *v.* Cleveland & T. R. Co., 13 Ohio St. 544.

Pennsylvania. — Philadelphia Ball Club *v.* Lajoie, 202 Pa. St. 210, 51 Atl. 973, 90 Am. St. Rep. 627, 58 L. R. A. 227.

Wisconsin. — Chain Belt Co. *v.* Von Spreckelsen, 117 Wis. 106, 94 N. W. 78.

63. Young *v.* Young, 45 N. J. Eq. 27, 16 Atl. 921; Lozier *v.* Hill, 68 N. J. Eq. 300, 59 Atl. 234; Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998; *In re* Ferguson's Estate, 124 Mo. 574, 584, 27 S. W. 513; Libby *v.* Parry, 98 Minn. 366; 108 N. W. 299; Stewart *v.* Yesler Estate (Wash.), 89 Pac. 705.

64. Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. St. Rep. 464; Powell *v.* Dwyer (Mich.), 112 N. W. 499; Lone Star Salt Co. *v.* Texas Short Line R. Co. (Tex. Civ. App.), 86 S. W. 355, 361; Vincent *v.* Larson, 1 Idaho 241; McCurry *v.* Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177; Ropes *v.* Upton, 125 Mass. 258; Black *v.* Maddox, 104 Ga. 157, 30 S. E. 723; Brown *v.* Norcross, 59 N. J. Eq. 427, 45 Atl. 605; Whitney *v.* Stone, 23 Cal. 275; Hull *v.* Sturdivant, 46 Me. 34.

65. Flight *v.* Bolland, 4 Russ. 298, 38 Eng. Reprint 817.

defect, he has fully performed that part of it which he could not have been compelled to perform.[66]

H. PART PERFORMANCE. — When the defendant pleads the statute of frauds in answer to a bill, plaintiff may show such part performance of the contract,[67] or such change of position in reliance

66. *United States.* — Kentucky Dist. & W. Co. *v.* Blanton, 149 Fed. 31, 42.

California. — Thurber *v.* Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536.

Iowa. — University of Des Moines *v.* Polk County H. & T. Co., 87 Iowa 36, 53 N. W. 1080; Minneapolis & St. L. R. Co. *v.* Cox, 76 Iowa 306, 41 N. W. 24, 14 Am. St. Rep. 216.

Kentucky.—Breckenridge *v.* Clinkinbeard, 2 Litt. 127, 13 Am. Dec. 261.

Massachusetts. — Howe *v.* Watson, 179 Mass. 30, 60 N. E. 415; French *v.* Boston Nat. Bank, 179 Mass. 404, 60 N. E. 793.

Michigan. — Welch *v.* Whelpley, 62 Mich. 15, 28 N. W. 744.

Minnesota. — Stellmacher *v.* Bruder, 89 Minn. 507, 95 N. W. 324, 99 Am. St. Rep. 609.

Montana. — Finlen *v.* Heinze, 32 Mont. 354, 387, 80 Pac. 918.

New Jersey. — Cramer *v.* Monney, 59 N. J. Eq. 164, 44 Atl. 625; Green *v.* Richards, 23 N. J. Eq. 32; *Id.* 536.

North Dakota. — Pederson *v.* Dibble, 12 N. D. 572, 98 N. W. 411.

Pennsylvania. — Pugh *v.* Good, 3 Watts & S. 56, 37 Am. Dec. 534.

Texas. — Lone Star Salt Co. *v.* Texas Short Line R. Co. (Tex. Civ. App.), 86 S. W. 355, 362.

67. *England.* — Lindsay *v.* Lynch, 2 Sch. & Lef. 1, 9 R. R. 54; Forster *v.* Hale, 3 Ves. Jr. 712, 30 Eng. Reprint 1226.

Canada. — Nicol *v.* Tackaberry, 10 Grant Ch. (U. C.) 109; Orr *v.* Orr, 21 Grant Ch. (U. C.) 397.

United States. — Williams *v.* Morris, 95 U. S. 444, 456; Townsend *v.* Vanderwerker, 160 U. S. 171; Jaffee *v.* Jacobson, 48 Fed. 21, 1 C. C. A. 11, 14 L. R. A. 352; McCullough *v.* Sutherland, 153 Fed. 418.

California. — Forrester *v.* Flores, 64 Cal. 24, 28 Pac. 107; Moulton *v.* Harris, 94 Cal. 420, 29 Pac. 706; Calauchini *v.* Branstetter, 84 Cal. 249, 24 Pac. 149; Hayden *v.* Collins, 1 Cal. App. 259, 81 Pac. 1120; McCabe *v.* Healy, 138 Cal. 81, 70 Pac. 1008; Owens *v.* McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369.

Connecticut. — Annan *v.* Merritt, 13 Conn. 478, 491.

Florida. — Maloy *v.* Boyett, 43 So. 243; Tate *v.* Jones, 16 Fla. 216, 252.

Georgia. — Maddox *v.* Rowe, 23 Ga. 431, 68 Am. Dec. 535.

Illinois. — Standard *v.* Standard, 223 Ill. 255, 79 N. E. 92; Wright *v.* Raftree, 181 Ill. 464, 54 N. E. 998; Ferbrache *v.* Ferbrache, 110 Ill. 210; Wood *v.* Thornly, 58 Ill. 464.

Indiana. — Watson *v.* Mahan, 20 Ind. 223.

Iowa. — Mills *v.* McCaustland, 105 Iowa 187, 74 N. W. 930.

Kansas. — Baldwin *v.* Baldwin, 84 Pac. 568.

Maine. — Coleman *v.* Dunton, 99 Me. 121, 58 Atl. 430; Bennett *v.* Dyer, 89 Me. 17, 35 Atl. 1004.

Maryland. — Stoddert *v.* Tuck, 4 Md. Ch. 475.

Massachusetts. — Glass *v.* Hulbert, 102 Mass. 24, 3 Am. Rep. 418; Gross *v.* Milligan, 176 Mass. 566, 58 N. E. 471; Low *v.* Low, 173 Mass. 580, 54 N. E. 257.

Michigan. — Wright *v.* Wright, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196.

Minnesota. — Slingerland *v.* Slingerland, 46 Minn. 100, 48 N. W. 605; *s. c.* 39 Minn. 197, 39 N. W. 146; Laird *v.* Vila, 93 Minn. 45, 100 N. W. 656, 106 Am. St. Rep. 420.

Missouri. — Gupton *v.* Gupton, 47 Mo. 37; Sutton *v.* Hayden, 62 Mo. 101.

Montana. — Ducie *v.* Ford, 8 Mont. 233, 19 Pac. 414; Finlen *v.* Heinze, 32 Mont. 354, 80 Pac. 918.

Nebraska. — Kofka *v.* Rosicky, 41 Neb. 328, 59 N. W. 788, 43 Am. St. Rep. 685, 25 L. R. A. 207; Lewis *v.* North, 62 Neb. 552, 87 N. W. 312.

New Hampshire.—Seavey *v.* Drake, 62 N. H. 393.

New Jersey. — Lozier *v.* Hill, 68 N. J. Eq. 300, 59 Atl. 234; Van Dyne

upon a promised gift,[68] that equity will refuse to allow the defense to prevail.

3. Defendant's Evidence. — A. In General. — It is a settled rule to allow a defendant in a bill for specific performance of a contract, to show that it is inequitable or unconscientious, or founded in mistake, or to show other circumstances, leading satisfactorily to the conclusion that granting the prayer of the bill would be inequitable and unjust.[69] It is competent for the defendant to show any circumstance, independently of the writing sought to be enforced, making it inequitable to enforce the same.[70] But evidence of a collateral nature, only remotely bearing on the issues, is received with caution.[71]

v. Vreeland, 11 N. J. Eq. 370; Simonds *v.* Essex Pass. R. Co., 57 N. J. Eq. 349, 41 Atl. 682.

New York. — Rhodes *v.* Rhodes, 3 Sandf. Ch. 279; Miller *v.* Pall, 64 N. Y. 286 (this case is illustrative of the general principle that if the consideration for the contract is services, if the plaintiff counts on part performance, the services must be of a peculiar character which could not be compensated at law); Beardsley *v.* Duntley, 69 N. Y. 577.

Ohio. — Shahan *v.* Swan, 48 Ohio St. 25, 40, 26 N. E. 222, 29 Am. St. Rep. 517.

Oklahoma. — Halsell *v.* Renfrow, 14 Okla. 674, 78 Pac. 118.

Oregon. — West *v.* Washington & C. R. Co., 90 Pac. 666.

Pennsylvania. — Holt *v.* Mc-Williams, 21 Pa. Super. Ct. 137.

South Carolina. — Anderson *v.* Chick, 1 Bailey Eq. 118.

Texas. — Woolridge *v.* Hancock, 70 Tex. 18, 6 S. W. 818.

Utah. — Brinton *v.* Van Cott, 8 Utah 480, 33 Pac. 218; Price *v.* Lloyd, 86 Pac. 767 (*holding* that evidence is admissible to show the improvements made do not exceed the rental value of the property, as indicating that the acts done do not constitute such part performance as will take the case out of the statute).

Virginia. — Franklin *v.* Salem Bldg. Assn., 25 S. E. 97.

West Virginia. — Middleton *v.* Selby, 19 W. Va. 168; Kennedy *v.* Ehlen, 31 W. Va. 540, 8 S. E. 398.

Wisconsin. — Thrall *v.* Thrall, 60 Wis. 503, 19 N. W. 353; Whitmore *v.* Hay, 85 Wis. 240, 249, 55 N. W. 708; Harney *v.* Burhans, 91 Wis. 348, 352, 64 N. W. 1031.

In Rodman *v.* Rodman, 112 Wis. 378, 88 N. W. 218, evidence was admitted to show that the possession in part relied on was not exclusive, and therefore insufficient.

68. *United States.* — Neale *v.* Neales, 9 Wall. 1, 9; Kigles *v.* Erney, 154 U. S. 244; Logue *v.* Langan, 151 Fed. 455.

Arkansas. — Young *v.* Crawford, 100 S. W. 87.

Georgia. — Walker *v.* Neil, 117 Ga. 733, 45 S. E. 387.

Illinois. — Irwin *v.* Dyke, 109 Ill. 528.

Michigan. — Welch *v.* Whelpley, 62 Mich. 15, 28 N. W. 744, 4 Am. St. Rep. 810.

New Hampshire—Roberts *v.* Lord, 67 N. H. 594, 38 Atl. 271.

New York.—Young *v.* Overbaugh, 145 N. Y. 158, 39 N. E. 712.

Pennsylvania. — Moyer's Appeal, 105 Pa. St. 432.

Texas. — Wooldridge *v.* Hancock, 70 Tex. 18, 6 S. W. 818.

69. King *v.* Hamilton, 4 Pet. (U. S.) 311, 328; City of Tiffin *v.* Shawhan, 43 Ohio St. 178, 1 N. E. 581.

70. Stubbings *v.* Durham, 210 Ill. 542, 550, 71 N. E. 586; Tryce *v.* Dittus 199 Ill. 189, 65 N. E. 220; Stoutenburgh *v.* Tompkins, 9 N. J. Eq. 332; Williams *v.* Williams, 50 Wis. 311, 6 N. W. 814; Stokes *v.* Stokes, 155 N. Y. 581, 590, 50 N. E. 342.

71. In Slingerland *v.* Slingerland, 46 Minn. 100, 48 N. W. 605, *s. c.* 39 Minn. 197, 39 N. W. 146, where the above rule was stated, the consideration for a contract was dismissing

B. Special Defenses. — a. *Rescission or Abandonment.* — The defendant may show by circumstances or conduct that a contract, even if written, was rescinded or abandoned.[72]

b. *Delay Accompanied by Change in Value.* — Although time is not ordinarily of the essence in contracts in equity,[73] yet it is competent for the defendant to show such an increase in value of the property sought to be obtained, pending delay by the vendee in performing his part of the contract, that specific performance will be refused him.[74]

c. *Inadequacy of Consideration.* — Inadequate consideration relating to the time of making the contract may always be shown. While not enough of itself to prevent specific performance unless it shocks the conscience and leads to a reasonable conclusion of fraud or mistake,[75] inequality between price and value, when coupled with other inequitable circumstances, is often enough to defeat specific performance.[76]

certain suits against the defendant. Evidence as to whether the party dismissing the suit would have recovered and the amount of the recovery, was rejected.

72. Hale *v.* Bryant, 109 Ill. 34; Phelps *v.* Illinois Cent. R. Co., 63 Ill. 468; Robinett *v.* Hamby, 132 N. C. 53, 43 S. E. 907.

A rescission of abandonment of a contract in writing may be deduced from circumstances or course of conduct clearly evincing an abandonment thereof. Lasher *v.* Loeffler, 190 Ill. 150, 60 N. E. 85.

73. Radcliffe *v.* Warrington, 12 Ves. Jr. 326, 33 Eng. Reprint 124.

74. *United States.* — Brasher *v.* Gratz, 6 Wheat. 528; Twin Lick Oil Co. *v.* Marbury, 91 U. S. 587; McKay *v.* Carrington, 1 McLean 50, 60 (especially if the plaintiff has purchased for a speculation p. 60).

Indiana. — Boldt *v.* Earley, 33 Ind. App. 434, 70 N. E. 271, 104 Am. St. Rep. 255.

Michigan. — Smith *v.* Lawrence, 15 Mich. 499; Van Buren *v.* Stocking, 86 Mich. 246, 49 N. W. 50.

New Hampshire. — Hallett *v.* Parker, 68 N. H. 598, 39 Atl. 433.

New York. — Darrow *v.* Bush, 45 App. Div. 262, 61 N. Y. Supp. 2; Merchants Bank *v.* Thomson, 55 N. Y. 7, 16.

North Carolina. — Herren *v.* Rich, 95 N. C. 500.

75. *England.* — Coles *v.* Trecothick, 9 Ves. Jr. 234, 32 Eng. Reprint 592; White *v.* Damon, 7 Ves. Jr. 30, 32 Eng. Reprint 13.

California. — Morrill *v.* Everson, 77 Cal. 114, 19 Pac. 190.

Massachusetts. — Lee *v.* Kerby, 104 Mass. 420, 428; Western R. Corp. *v.* Babcock, 6 Metc. 346.

Montana. — Finlen *v.* Heinze, 28 Mont. 548, 564, 73 Pac. 123.

New York. — Osgood *v.* Franklin, 2 Johns Ch. 1, *s. c.* 14 Johns. 527, 7 Am. Dec. 513; Seymour *v.* Delancey, 6 Johns. Ch. 222.

Pennsylvania. — Henderson *v.* Hays, 2 Watts 148.

West Virginia. — Conaway *v.* Sweeney, 24 W. Va. 643, 650 (price one-half estimated value not enough alone to prevent specific performance).

Wisconsin. — Conrad *v.* Schwamb, 53 Wis. 372, 10 N. W. 395; Smith *v.* Wood, 12 Wis. 382; Williams *v.* Williams, 50 Wis. 311, 6 N. W. 814.

76. Green *v.* Covilland, 10 Cal. 317, 330, 70 Am. Dec. 725.

In Cathcart *v.* Robinson, 5 Pet. (U. S.) 264, the court stated the rule thus: "The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. It is said that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific performance by showing that under the circumstances the plain-

d. *Mental Condition.* — Evidence of the impaired mental condition of the person against whom specific performance is sought, is admissible to discredit the transaction.[77] Thus it may be shown that the defendant was an habitual drunkard to the extent that his faculties were weakened,[78] or it may be shown that the defendant was drunk at the time the contract was entered into.[79]

e. *Mistake.* — The defendant may show that by reason of mistake, the writing does not express the true agreement of the parties.[80]

f. *Impossibility.* — The defendant may offer evidence to show that the contract is impossible of performance.[81]

g. *Comparative Benefits.* — The defendant may offer evidence to show that the hardship or injury resulting to him from specific performance will be great, in comparison with the benefit which the plaintiff will receive therefrom[82] or the defendant may show that specific performance will operate harshly on a third person.[83]

tiff is not entitled to the relief he asks. If the contract is unconscientious or unreasonable, or there has been an unfairness the court will refuse its aid," and that: "If to any unfairness a great inequality between the price and value be added, a court of chancery will not afford its aid." See also Ferguson *v.* Blackwell, 8 Okla. 489, 58 Pac. 647, where the foregoing quotation was stated with approval.

Inadequacy of Consideration When Combined With Fraud, misrepresentation, studied suppression of the true value of the property or any circumstances of oppression is a material ingredient in the case affecting the description of the court in granting or refusing a specific performance. Conaway *v.* Sweeney, 24 W. Va. 643.

77. Detroit United R. *v.* Smith, 144 Mich. 235, 107 N. W. 922; Sprague *v.* Jessup (Or.), 83 Pac. 145.

78. Seymour *v.* Delancey, 6 Johns Ch. (N. Y.) 222, 232; Henderson *v.* Hays, 2 Watts (Pa.) 148, 155.

79. Faine *v.* Brown, 2 Ves. Sr. (Eng.) 307; Kuhlman *v.* Wieben, 129 Iowa 188, 105 N. W. 445, 2 L. R. A. 666 (less evidence of drunkenness necessary to defeat specific performance than to rescind); Moetzel *v.* Koch, 122 Iowa 196, 97 N. W. 1079.

80. *England.* — Mason *v.* Armitage, 13 Ves. Jr. 25, 33 Eng. Reprint 204.

United States. — King *v.* Hamilton, 4 Pet. 311, 327.

Connecticut. — Cowles *v.* Miller, 74 Conn. 287, 50 Atl. 728.

North Carolina. — Kelly *v.* Johnson, 135 N. C. 650, 47 S. E. 672.

Ohio. — Railroad Co. *v.* Steinfeld, 42 Ohio St. 449. See also cases cited under note 41.

81. Cathcart *v.* Robinson, 5 Pet. (U. S.) 264; Fitzpatrick *v.* Featherstone, 3 Ala. 40; Chartier *v.* Marshall, 51 N. H. 400; Schreiber *v.* Elkin, 103 N. Y. Supp. 330; Waddington *v.* Lane (Mo.), 100 S. W. 1139.

But this will not prevent specific performance of a part of a contract which is capable of performance; Moore *v.* Gariglietti (Ill.), 81 N. E. 826.

82. Clarke *v.* The Rochester R. Co., 18 Barb. (N. Y.) 350; Willard *v.* Tayloe, 8 Wall. (U. S.) 557; Shrewsbury Co. *v.* North Western Co., 6 H. L. Cas. 113, 139, 10 Eng. Reprint 1237; Faine *v.* Brown, 2 Ves. Sr. (Eng.) 307.

83. Zundelowitz *v.* Webster, 96 Iowa 587, 65 N. W. 835, where a contract was uncertain and a third person bought the property (paying a large part of the purchase money before, but some after he knew of the contract), specific performance was refused on the ground that it would result in injustice to him.

Where a bill is brought for the specific performance of a contract,

h. *Concealment.* — The defendant may show concealment,[84] fraud,[85] or coercion.[86]

i. *Other Instances of Misconduct Barring Relief.* — In the notes are collected a number of cases in which the court refused specific performance because of some unconscionable act or conduct of the person seeking relief.[87]

the after acquired rights of third persons are equitable considerations to be regarded in adjudicating the questions before the court. Owens *v.* McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369. See also Curran *v.* Holyoke Water Co., 116 Mass. 90.

84. Shirley *v.* Stratton, 1 Brown Ch. Cas. 440, 28 Eng. Reprint 1226; King *v.* Knapp, 59 N. Y. 462.

85. Sloan *v.* Rose, 101 Va. 151, 43 S. E. 329; Margraf *v.* Muir, 57 N. Y. 155.

86. Southern Missouri & A. R. Co. *v.* Graves, 182 Mo. 211, 81 S. W. 405.

87. Instances of Unconscionable Conduct Barring Relief. — Where the plaintiff tried to enforce only a written contract, and the defendant showed there was also a less beneficial parol contract, specific performance was refused. Quinn *v.* Roath, 37 Conn. 16; McCusker *v.* Spier, 72 Conn. 628, 45 Atl. 1011; Brooks *v.* Wheelock, 11 Pick. (Mass.) 439.

Where plaintiff, although guilty of no actual fraud, indulged in what the court considered sharp practice, that is, in obtaining a contract without disclosing that he had contracted to sell at an advance, and had without defendant's knowledge taken possession and collected the rents, he was refused specific performance. Engberry *v.* Rousseau, 117 Wis. 52, 93 N. W. 824. See also Clark *v.* Maurer, 77 Iowa 717, 42 N. W. 522 (catching bargain with partner).

Fraudulent representations as to the legal effect of an instrument prevented specific performance in Berry *v.* Whitney, 40 Mich. 65.

Where the plaintiff induced the widow of his vendor to make improvements on the land, without advising her of his contract of purchase with the deceased, he was barred from relief; Wolfinger *v.* McFarland, 67 N. J. Eq. 687, 54 Atl. 862, 63 Atl. 1119.

In Cuff *v.* Dorland, 50 Barb. (N. Y.) 438, specific performance was refused where the defendant was a widow in embarrassed circumstances, who had been confined to her house by ill-health and was without counsel in making the bargain, although no fraud, unfairness or undue advantage were shown.

In Bradt *v.* Hartson (Neb.), 96 N. W. 1008, specific performance was refused to a person contracting for land with one who, as he knew, had received the land in fraud of creditors.

Refusal to pay for the lot when a deed was tendered, unless the defendant would convey more than he was entitled to, held enough to prevent relief. Pyatt *v.* Lyons, 51 N. J. Eq. 308, 27 Atl. 934.

In Gannett *v.* Albree, 103 Mass. 372, evidence that the plaintiff used the premises in breach of covenant as a boarding-house, prevented his obtaining a renewal of his lease.

Use of Premises for Improper Purpose. — Where the defendant can show that the person seeking specific performance intends to use the premises for an improper purpose, specific performance will be refused. Reynolds *v.* Boland, 202 Pa. St. 642, 52 Atl. 19; Pasteur Vaccine Co. *v.* Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804; Texas & P. Coal Co. *v.* Lawson, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919. But it cannot be shown by the defendant that the plaintiff intends to use the premises to conduct a lawful business in an immoral manner, as these are mere conclusions of the defendant. Hamilton *v.* Bell (Tex. Civ. App.), 84 S. W. 289 (rehearing denied and writ of error to supreme court refused). See also The Medical College *v.* The New York University, 76 App. Div. 48, 78 N. Y. Supp. 673.

V. WEIGHT OF EVIDENCE.

1. In General. — The person seeking relief must establish the existence and terms of the contract sought to be enforced, with clearness and certainty.[88] As before stated, it requires more evidence to compel than to resist specific performance.[89]

2. Special Kinds of Contracts. — A. Written Contracts. Where the contract is in writing the requisite proof of its existence and terms will ordinarily appear from the writing itself, and no questions of evidence are presented except such as have already been treated.[90]

B. Oral Contracts. — a. *Contracts of Sale or Gift.* — Where a contract within the Statute of Frauds is sought to be established by parol, the evidence must be of a stronger character than when the contract is in writing,[91] and must be clear, satisfactory and conclusive. It is true that the courts have not always used the same language as to the degree of proof that they will require, but almost all of them have uniformly required more than a bare preponderance of the evidence, for a parol contract of sale[92] or of

88. *England.* — Huddleston *v.* Briscoe, 11 Ves. Jr. 583, 591, 32 Eng. Reprint 1215.

United States. — Hennessey *v.* Woolworth, 128 U. S. 438.

Alabama. — Daniel *v.* Collins, 57 Ala. 625; Westbrook *v.* Hayes, 137 Ala. 572, 34 So. 622; Bogan *v.* Daughdrill, 51 Ala. 312.

California. — Smith *v.* Taylor, 82 Cal. 533, 23 Pac. 217; Agard *v.* Valencia, 39 Cal. 301; Magee *v.* McManus, 70 Cal. 553, 12 Pac. 451.

Delaware. — McFarland *v.* Reeve, 5 Del. Ch. 118.

Illinois. — Long *v.* Long, 118 Ill. 638, 9 N. E. 247.

Maryland. — Dixon *v.* Dixon, 92 Md. 432, 48 Atl. 152; O'Brien *v.* Pentz, 48 Md. 562, 577.

Minnesota. — Lanz *v.* McLaughlin, 14 Minn. 72.

Virginia. — Rockecharlie *v.* Rockecharlie, 29 S. E. 825.

See cases cited under notes 51, 54-57.

89. Cathcart *v.* Robinson, 5 Pet. (U. S.) 264, 275; McKee *v.* Higbee, 180 Mo. 263, 296, 99 S. W. 407; Deeds *v.* Stephens, 9 Idaho 332, 79 Pac. 77; Clark *v.* Maurer, 77 Iowa 717, 42 N. W. 522.

90. See III, 2, C, a, and IV, 2, A, B, C, D, and cases cited in the notes thereunder.

91. Morrow *v.* Matthews, 10 Idaho 423, 79 Pac. 196, where the court said: "The courts have quite generally held that, in order to enforce the specific performance of a parol contract, it must be clearly and satisfactorily shown to the trial court as to its execution and the terms and conditions thereof. If the contract has not been reduced to writing, it must of necessity require a greater weight of evidence to establish its existence, and the terms and conditions thereof, and in those respects satisfy the mind of the court, than if the contract were in writing and produced in evidence."

92. *Canada.* — Nicol *v.* Tackaberry, 10 Grant Ch. (U. C.) 109 (clearest evidence must be furnished and mind of court thoroughly satisfied).

United States. — Nickerson *v.* Nickerson, 127 U. S. 668, 676 (proof clear and satisfactory); Purcell *v.* Miner, 4 Wall. 513; McCullough *v.* Sutherland, 153 Fed. 418. *Compare*, however, Neale *v.* Neales, 9 Wall. 1, 12, where it is said that reasonable certainty is all that is necessary, and that any greater degree of proof is unattainable; Logue *v.* Langan 151 Fed. 455, (cogent, clear and unequivocal as to existence, terms and conditions); White *v.* Wansey, 116 Fed. 345, 53 C. C. A. 634; Jones *v.* Patrick, 145 Fed. 440 (need not be

gift,[93] and the courts of Georgia and of Missouri have declared that

proved beyond reasonable doubt, but evidence must be clear, satisfactory and convincing).

Alabama. — Whisenant *v.* Gordon, 101 Ala. 250, 13 So. 914.

Arkansas. — Moore *v.* Gordon 44 Ark. 334, (decided preponderance, in a manner satisfactory to the chancellor); Fielder *v.* Warner, 95 S. W. 452.

California. — Owens *v.* McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369.

Delaware. — Connaway *v.* Wright's Admr., 5 Del. Ch. 472 (clear preponderance).

Idaho. — Rice *v.* Rigley, 7 Idaho 115, 61 Pac. 290 (where the trial court was reversed for charging that a mere preponderance of the evidence would be enough); Deeds *v.* Stephens, 10 Idaho 332, 79 Pac. 77 (clearly established to the satisfaction of the court).

Illinois. — Standard *v.* Standard, 223 Ill. 255, 79 N. E. 92; Wright *v.* Raftree, 181 Ill. 464, 54 N. E. 998 (testimony of an undoubted character); Greer *v.* Goudy, 174 Ill. 514, 521, 51 N. E. 623; Clark *v.* Clark, 122 Ill. 388, 13 N. E. 553; Worth *v.* Worth, 84 Ill. 442 (evidence free from doubt or suspicion).

Iowa. — Briles *v.* Goodrich, 116 Iowa 517, 90 N. W. 354 (clear, definite and conclusive); Dunn *v.* McGovern, 116 Iowa 663, 88 N. W. 938.

Kansas. — Baldwin *v.* Baldwin, 84 Pac. 568 (clear and satisfactory proof).

Kentucky. — Turner *v.* Trosper, 24 Ky. L. Rep. 813, 69 S. W. 1089 (evidence must be sufficient and satisfactory).

Maryland. — Shipley *v.* Fink, 102 Md. 219, 62 Atl. 360, 2 L. R. A. 1002; Horner *v.* Woodland, 88 Md. 511, 41 Atl. 1079.

Missouri. — McKee *v.* Higbee, 180 Mo. 263, 296, 79 S. W. 407, *holding* that where it is claimed the contract was in the form of letters and that the letters were lost, the same degree of proof is required in the parol evidence offered as if the contract had originally been in parol, and that the proof must be clear, cogent and convincing, and not doubtful or uncertain.

Montana. — Finlen *v.* Heinze, 32 Mont. 354, 386, 80 Pac. 918 (clear and unambiguous proof).

Nebraska. — Worthington *v.* Worthington, 32 Neb. 334, 49 N. W. 354.

New Jersey. — Wolfinger *v.* McFarland, 67 N. J. Eq. 687, 54 Atl. 862, 63 Atl. 1119 (satisfactory proof).

New York. — Holt *v.* Tuite, 188 N. Y. 17, 80 N. E. 364 (evidence of a high order); Rosseau *v.* Rouss, 180 N. Y. 116, 72 N. E. 916; Hamlin *v.* Stevens, 177 N. Y. 39, 48, 69 N. E. 118; Shakespeare *v.* Markham, 72 N. Y. 400; Winne *v.* Winne, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647; Sarasohn *v.* Kamaiky, 52 Misc. 394, 103 N. Y. Supp. 320.

Ohio. — Bickett *v.* White, 27 Ohio St. 405 (clear and convincing certainty).

Oregon. — Sprague *v.* Jessup, 83 Pac. 145 (must satisfy court of equity); Odell *v.* Morin, 5 Or. 96.

Pennsylvania. — Van Horn *v.* Munnell, 145 Pa. St. 497, 22 Atl. 985 (most clear and indisputable evidence); Holt *v.* McWilliams 21 Pa. Super. Ct. 137.

Texas. — Kelly *v.* Short (Tex. Civ. App.), 75 S. W. 877 (clear and unequivocal proof).

Virginia. — Lightner *v.* Lightner, 23 S. E. 301 (clear preponderance of proof); Boyd *v.* Cleghhorn, 94 Va. 780, 27 S. E. 574.

West Virginia. — Garrett *v.* Goff, 56 S. E. 351. Gillaspie *v.* James, 48 W. Va. 284, 37 S. E. 598; Harris *v.* Elliott, 45 W. Va. 245, 32 S. E. 176 (clear, full and free from suspicion).

Wisconsin. — Dewey *v.* Land Co., 98 Wis. 83, 73 N. W. 565 (fully and clearly proved in all parts; mere preponderance insufficient).

93. *Arkansas.* — Young *v.* Crawford, 100 S. W. 87, 91 (clearly and conclusively proved).

Michigan. — Fowler *v.* DeLance, 110 N. W. 41.

New Hampshire. — Roberts *v.* Lord, 67 N. H. 594, 38 Atl. 271.

West Virginia. — Meadows *v.* Meadows, 53 S. E. 718 (*holding* that

the evidence shall prove the contract beyond a reasonable doubt.[94]

b. *Agreements to Devise.* — A parol agreement to devise property is regarded with suspicion, and as the alleged contracting party other than the plaintiff will necessarily be dead when the time for performance arises, the contract must be proved by evidence of a very substantial character.[95]

when the transaction is between father and son the evidence must be stronger than if it were between strangers); Harrison *v.* Harrison, 36 W. Va. 556, 15 S. E. 87.

94. In Printup *v.* Mitchell, 17 Ga. 558, 567, 63 Am. Dec. 258, the rule was stated as in the text, but in Schnell *v.* Toomer, 56 Ga. 168, the requirement was stated to be that it clearly satisfy the mind, and the test by proof beyond reasonable doubt was criticised adversely. The case of Warren *v.* Gay, 123 Ga. 243, 51 S. E. 302, sustained a charge requiring the evidence to be "so clear and unequivocal as to satisfy your mind as to a reasonable certainty." This case reviews a number of other Georgia cases, and leaves it fairly in doubt whether the rule in the Printup case, *supra*, will be adhered to in that jurisdiction.

In Missouri the rule is stated thus: "When a court of equity is called upon to exercise this high and delicate function, it asks, as an irreducible minimum of those who seek relief, proof showing beyond reasonable doubt; first, not only that some contract existed, but that the precise contract in suit existed; second, the terms of the contract should be so clear and definite as to leave no doubt in intendment and certainty; third, performance on the part of the promisee should be shown, and that performance must be unequivocal, and must in its own nature be referable alone to the very contract sought to be performed, because it is only by performance (whereby the party to be charged is benefited) that the conscience of the promisor and those claiming under his is bound; and, further, the acts relied on to show performance must point to the contract in suit, and to none other. In short, there must be certainty in the proof beyond a reasonable doubt, and certainty in the pleadings, and from end to end no equivocation in the case." Kirk *v.* Middlebrook (Mo.), 100 S. W. 450. See also Rogers *v.* Wolfe, 104 Mo. 1, 14 S. W. 805.

95. *Canada.* — Walker *v.* Boughner, 18 Ont. 448 (clearest evidence); Orr *v.* Orr, 21 Grant Ch. (U. C.) 397, 415 (contract between father and son, plaintiff's uncorroborated testimony insufficient; must be clear and satisfactory).

United States. — Brown *v.* Sutton 129 U. S. 238.

Arkansas. — Lay *v.* Lay, 75 Ark. 526, 87 S. W. 1026 (agreement between father and son, evidence must be clear and conclusive).

California. — Hayden *v.* Collins, 1 Cal. App. 259, 81 Pac. 1120 (clear and convincing evidence); Knight *v.* Tripp, 121 Cal. 674, 54 Pac. 267.

Illinois. — Whiton *v.* Whiton, 179 Ill. 32, 53 N. E. 722 (clear and positive); Dicken *v.* McKinley, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471 (regarded with suspicion; must be established by clearest and strongest evidence).

Iowa. — Cessna *v.* Miller, 85 Iowa 725, 51 N. W. 50; Eastwood *v.* Crane, 101 N. W. 481.

Kansas. — Flanigan *v.* Waters, 57 Kan. 18, 45 Pac. 56.

Kentucky. — Newton's Exrs. *v.* Field, 98 Ky. 186, 32 S. W. 623.

Michigan. — Defer *v.* Lockwood, 58 Mich. 117, 24 N. W. 634.

Minnesota. — Laird *v.* Vila, 93 Minn. 45, 100 N. W. 656, 106 Am. St. Rep. 420; Newton *v.* Newton, 46 Minn. 33, 48 N. W. 450 (full and satisfactory proof).

Missouri. — Russell *v.* Sharp, 192 Mo. 270, 91 S. W. 134 (mere preponderance not enough; proof must be beyond a reasonable doubt).

Nebraska. — *In re* Peterson, 107 N. W. 993.

New Jersey. — McTague *v.* Finnigan 54 N. J. Eq. 454, 35 Atl. 542

c. *Agreements to Assign Future Inventions.* — A verbal contract between master and employe that the latter will convey to the former all of his future inventions and patents, must be supported by clear and precise testimony.[96]

3. Part Performance. — When the plaintiff claims part performance to take a case out of the Statute of Frauds, he must establish it clearly, definitely and satisfactorily.[97]

4. Proof of Title Dependent Upon Fact. — Where a vendor seeks to compel a vendee to take a title whose marketability is dependent upon a fact, the fact must be so conclusively proved that a verdict against it at law would not be allowed to stand.[98]

5. Mistake. — The court requires a very high order of proof to establish mistake.[99]

6. Proof of Abandonment or Rescission. — Oral evidence of rescission, abandonment or waiver must be clear and above suspicion.[1]

7. Miscellaneous. — In the note are a number of cases where the court required a high degree of proof for a particular fact.[2]

(agreement between foster parent and child, must be clearly established by direct and satisfactory proof); Lozier *v.* Hill, 68 N. J. Eq. 300, 59 Atl. 234 (reasonable certainty).

New York. — Hamlin *v.* Stevens, 177 N. Y. 39, 69 N. E. 118; McGarahan *v.* Sheridan, 106 App. Div. 532, 94 N. Y. Supp. 708 (clear and satisfactory evidence).

Ohio. — Shahan *v.* Swan, 48 Ohio St. 25, 35, 26 N. E. 222, 29 Am. St. Rep. 517.

Oregon. — Richardson *v.* Orth, 40 Or. 252, 66 Pac. 925, 69 Pac. 455 (clearest and most convincing evidence); Rose *v.* Oliver 32 Or. 447, 52 Pac. 176.

Pennsylvania. — Wall's Appeal, 111 Pa. St. 460, 5 Atl. 220, 56 Am. Rep. 288.

Rhode Island. — Spencer *v.* Spencer, 26 R. I. 237, 58 Atl. 766 (strongest evidence necessary).

Wisconsin. — Hibbert *v.* Mackinnon, 79 Wis. 673, 49 N. W. 21; Thrall *v.* Thrall, 60 Wis. 503, 19 N. W. 353.

96. Dalzell *v.* Dueber etc. Co., 149 U. S. 315; Portland Iron Wks. *v.* Willett (Or.), 89 Pac. 421.

Hale & Kilburn *v.* Norcross, 199 Pa. St. 283, 49 Atl. 80, where a judgment for the defendant was sustained, although four witnesses testified to the alleged agreement, and it was denied only by the defendant himself.

97. *United States.* — Whitney *v.* Hay, 181 U. S. 77.

Alabama. — Pike *v.* Pettus, 71 Ala. 98.

Arkansas. — Lay *v.* Lay, 75 Ark. 526, 87 S. W. 1026.

Nebraska. — Bradt *v.* Hartson, 96 N. W. 1008; Lewis *v.* North, 62 Neb. 552, 87 N. W. 312.

Oregon. — West *v.* Washington & C. R. Co., 90 Pac. 666.

Pennsylvania. — Holt *v.* McWilliams, 21 Pa. Super. Ct. 137.

Virginia. — Broughton *v.* Coffer, 18 Gratt. 184.

West Virginia. — Harris *v.* Elliott, 45 W. Va. 245, 32 S. E. 176.

See also cases under notes 67 and 68.

98. Barger *v.* Gery, 64 N. J. Eq. 263, 53 Atl. 483; Shriver *v.* Shriver, 86 N. Y. 575, 584; Hinckley *v.* Smith, 51 N. Y. 21.

99. Philpot *v.* Elliott, 4 Md. Ch. 273 (court must be perfectly satisfied) Hall *v.* Clagett, 2 Md. Ch. 151; Kelly *v.* Johnson, 135 N. C. 650, 47 S. E. 672; and see cases under note 80.

1. Ballard *v.* Ballard, 25 W. Va. 470; Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998; Holden *v.* Purefoy, 108 N. C. 163, 12 S. E. 848; and see cases under note 72.

2. Miscellaneous. — Parol Contemporaneous Agreement. — Guar-

anty Safe Deposit and Trust Co. *v.* Liebold, 207 Pa. St. 399, 56 Atl. 951, *holding* that if the defendant relies upon a parol contemporaneous agreement, he must prove it by clear and convincing evidence. See also Quinn *v.* Roath, 37 Conn. 16, *holding* that a parol contract varying the written contract and making time of the essence, must be established by clear proof.

Charge Against Estate. — If an agreement to apply expenditures for the support of a lunatic against his estate is to be specifically enforced, it must be established by clear and satisfactory evidence. Dulaney *v.* Devries, 102 Md. 349, 62 Atl. 743.

Agency. — Agency Must Be Strongly Established. — Saunders *v.* King, 119 Iowa 291, 93 N. W. 272. And see cases under note 11.

SPEED.—See Expert and Opinion Evidence; Railroads; Space and Distance; Street Railroads.

SPIES.—See Detectives and Informers.

SPIRITUOUS LIQUORS.—See Intoxicating Liquors.

SPOLIATION.

By Sloan Pitzer.

I. THE MAXIM.

The ancient maxim is *omnia praesumuntur contra spoliatorem,* or *omnia praesumuntur in odium spoliatoris,* — all things are presumed against a wrongdoer.[1]

1. Broom's Legal Maxims (7th Am. ed.) 938; Cowper *v.* Cowper, 2 P. Wms. (Eng.) 720, 748; Dalston *v.* Coatsworth, 1 P. Wms. (Eng.) 731 ("for everything shall be presumed *in odium spoliatoris*"); East India Co. *v.* Evans, 1 Vern. Ch. (Eng.) 305.

"The general rule is *omnia praesumuntur contra spoliatorem.* Win-

II. DEFINITION.

1. In General. — Spoliation is the mutilation, eloigning, defacing, fabricating, destruction or suppression of evidence.[2]

2. Distinction Between Spoliation and Alteration. — The term alteration is usually applied to the act of the party entitled under the deed or instrument, and imports some fraud or improper design on his part to change the effect.[3] But the act of a stranger, with-

chell *v.* Edwards, 57 Ill. 41; Livingston *v.* Newkirk, 3 Johns. Ch. (N. Y.) 312.

"The presumption *in odium spoliatoris* is perfectly legitimate. It is so natural and so just that it is a part of every civilized code." Bryant *v.* Stilwell, 24 Pa. St. 314.

"The ascertained overcharges in a very large number of the invoices, and the failure to produce the original bills of the invoices in question, brought the case fairly within the spirit of the maxim, *omnia praesumuntur contra spoliatorem.* Bush *v.* Guion, 6 La. Ann. 797.

This maxim goes hand in hand with another familiar one. See Gartside *v.* Ratcliff, 1 Ch. Cas. 293. "For where deeds or writings are suppressed *omnia praesumuntur in odium spoliatoris,* he who has committed iniquity shall not have equity."

2. This term "legitimately applies to tortious acts of withholding, suppressing, concealing, mutilating, or fabricating evidence, or the instruments of evidence." Harris *v.* Rosenberg, 43 Conn. 227.

3. In Medlin *v.* Platte Co., 8 Mo. 235, 40 Am. Dec. 135, the court says: "A distinction, however, is to be observed, between the alteration and spoliation of an instrument, as to the legal consequences. The term, alteration, is, at this day, usually applied to the act of the party entitled under the deed, or instrument, and imports some fraud or improper design on his part to change the effect. But the act of a stranger, without the participation of the party interested, is a mere spoliation or mutilation of the instrument, not changing its legal operation, so long as the original writing remains legible, and, if it be a deed, any trace of the seal remains. If, by the unlawful act of a stranger, the deed is mutilated or defaced, so that its identity is gone, the law regards the act, so far as the rights of the parties to the instrument are concerned, merely as the accidental destruction of primary evidence, compelling a resort to that which is secondary." Lubbering *v.* Kohlbrecher, 22 Mo. 596.

In Bank of Commerce *v.* Hoeker, 8 Mo. App. 171, the court said: "The spoliation or mutilation of a written instrument by one not entitled under it, and without the participation of the party interested, has never been held to render the instrument void, or to change its legal operation at all, if the original writing remained legible. But if the written instrument is so mutilated or defaced as to destroy its identity, and this is the unlawful act of one not entitled under the instrument, this is regarded by law, so far as those who claim under the instrument are concerned, merely as an accidental destruction of primary evidence, which authorizes a resort to secondary testimony."

In United States *v.* Spalding, 2 Mason (U. S.) 478, Justice Story very strongly condemned the old doctrine that every material alteration of a deed, even by a stranger, and without privity of either party, avoided the deed. He considered the old rule "as repugnant to common sense and justice, as inflicting on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven; and which ought to have the support of unbroken authority, before a court of law was bound to surrender its judgment to what deserved no better name than a technical quibble." It has been strongly doubted whether an *immaterial* alteration in any man-

out the participation of the party interested, is a mere spoliation or mutilation of the instrument, not changing its legal operation, so long as the original writing remains legible, and, if it be a deed, any trace of the seal remains.[4]

III. PRESUMPTIONS OR INFERENCES ARISING FROM SPOLIATION.

1. General Rule. — The general rule deduced from the maxim is that the presumptions are all against the spoliator.[5]

ner, though made by the obligee himself, will avoid the instrument, provided it be done innocently and to no injurious purpose. But if the alteration be *fraudulently made* by the party claiming under the instrument, it does not seem important whether it be a material or immaterial part; for, in either case, he has brought himself under the operation of the rule established for the prevention of fraud. Lubbering *v.* Kohlbrecher, 22 Mo. 596.

4. "According to the modern authorities, the alteration of a writing in such case, is treated as mere spoliation, or mutilation of the instrument, and if done without the participation of the party interested, does not change the legal operation of the instrument, so long as it remains legible. And if the instrument is defaced, so that its identity is gone, the law regards the act, so far as the rights of the parties to the instrument are concerned, merely as the destruction of primary evidence, compelling a resort to secondary." Boyd *v.* McConnell, 10 Humph. (Tenn.) 68; Blair *v.* Bank of Tenn., 11 Humph. 84; Crockett *v.* Thomason, 37 Tenn. 342.

In Drum *v.* Drum, 133 Mass. 566, an action on a note in which changes had been made, the court said that these changes, under the circumstances, rendered the note *prima facie* void, and the burden was upon the plaintiff to explain them. If the changes had been made by the plaintiff, or by his authority or consent, directly or indirectly, the note was absolutely void. But if the changes had been made by a stranger, without the knowledge or consent of the plaintiff, directly or indirectly, the note remained a valid note, according to its original tenor.

In John *v.* Hatfield, 84 Ind. 75, it is said that the insertion by another of the name of an additional grantee without the consent of the original grantee, is a mere spoliation, which does not affect the rights of the latter, even as against a bona fide purchaser from the person whose name was so inserted, unless the real grantee has been guilty of fraud or negligence, whereby the purchaser was misled. See also Henry *v.* Carson, 96 Ind. 412, 422; Cochran *v.* Nebeker, 48 Ind. 459; State *ex rel.* Jackson Tp. *v.* Berg, 50 Ind. 496; Brooks *v.* Allen, 62 Ind. 401; Collins *v.* Makepeace, 13 Ind. 448.

5. *United States.* — Dinning *v.* The Sam Sloan, 65 Fed. 125.

California. — Fox *v.* Hale & Norcross S. M. Co., 108 Cal. 475, 41 Pac. 328.

Illinois. — Tanton *v.* Keller, 167 Ill. 129, 47 N. E. 376.

Iowa. — Turner *v.* Hawkeye Tel. Co., 41 Iowa 458, 20 Am. Rep. 605.

Maryland. — Love *v.* Dilley, 64 Md. 238, 1 Atl. 59, 4 Atl. 290.

Massachusetts. — Stone *v.* Sanborn, 104 Mass. 319, 6 Am. Rep. 238.

Michigan. — Francis *v.* Barry, 69 Mich. 311, 37 N. W. 353.

Missouri. — Hays *v.* Bayliss, 82 Mo. 209.

New York. — Black *v.* Noland, 12 Wend. 173, 27 Am. Dec. 126.

Vermont. — Patch Mfg. Co. *v.* Protection Lodge, 77 Vt. 294, 60 Atl. 74, 107 Am. St. Rep. 668.

Wyoming. — Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581.

In Clifton *v.* United States, 4 How. (U. S.) 242, the defendant was

charged with a deliberate and systematic violation of the revenue laws of the country by means of frauds and perjuries, and the court had pronounced the proof sufficient, unless explained and rebutted by opposing evidence. It was held that under the circumstances, the claimant was called upon by the strongest considerations, personal and legal, if innocent, to bring to the support of his defense the very best evidence that was in his possession, or under his control. The court said: "The evidence was certainly within his reach, and probably in his counting-room, namely, the proof of the actual cost of the goods at the place of exportation. He not only neglected to furnish it and contented himself with the weaker evidence, but even refused to furnish it on the call of the government; leaving, therefore, the obvious presumption to be turned against him, that the highest and best evidence going to the reality and truth of the transaction would not be favorable to the defense. One of the general rules of evidence, of universal application, is, that the best evidence of disputed facts must be produced of which the nature of the case will admit. . . . The meaning of the rule is, not that courts require the strongest possible assurance of the matters in question, but that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind in the party's possession or power; because the absence of the primary evidence raises a presumption, that, if produced, it would give a complexion to the case at least unfavorable, if not directly adverse, to the interests of the party." See also Runkle *v.* Burnham, 153 U. S. 216-225.

In Attorney-General *v.* Halliday, 26 U. C. Q. B. 397, the court reviewed the authorities, among others, Roe *v.* Harvey, 4 Burr. (Eng.) 2484 and Attorney-General *v.* Windsor, 24 Beav. (Eng.) 679, which hold that there is a presumption against persons who keep back documents, and that against them the evidence is to be taken the most strongly. The court then said: "It seems to us puerile to contend, if these passages are a sound exposition of the question, that it is not the duty of the judge to tell the jury so, and to point out to them, that just in proportion to their conviction that the books or documents in the possession of one of the parties contain proof of the transactions they are investigating, and would, if produced, remove all reasonable doubts which of them is right, is the strength of the presumption they may entertain against the party if he withholds them. To tell a jury that a refusal to produce such books, etc., as were called for in this case entitled the Crown, as a matter of law, of legal right to a verdict, would have been wrong; it would have amounted to taking the case out of their hands; but to say to them that such refusal furnished a strong presumption against the defendant, was only what the authorities agree in affirming as the proper view of such conduct. The presumption is to be left to the jury; it is for them to decide on it."

In Diehl *v.* Emig, 65 Pa. St. 320, an action of ejectment brought by Diehl and wife against the wife's brother and others, the action was based upon a lost deed of gift from the wife's father, deceased at the time of action brought, to her. It seemed that while the father and daughter had been living together, the former gave to the latter a paper writing, saying to her at the time that it was a deed to the farm claimed in this suit, that she put the paper away and retained it until some time after and then gave it back to her father at his request for safe keeping. There was evidence showing spoliation of the deed by the plaintiff's brother, one of the defendants in this action, who was also one of the executors of the father's estate. The court said: "If a jury should be convinced of the spoliation, it would be their duty to infer anything in favor of the deed as against the spoiler."

Presumption Stronger Where Transaction to Which Documents Spoliated Related Was of Recent Occurrence. — In Gray *v.* Haig, 20 Beav. (Eng.) 219, the court said: "In a case before me this year, one partner, several years before the in-

The Destruction or Suppression of Documentary Evidence by one party raises a presumption or inference that the contents thereof would make against his contentions and in favor of those of his innocent adversary.[6]

stitution of the suit, and upwards of twenty years after the closing of the partnership business, and when the accounts had been settled between him and his partners by arbitration, and never afterwards opened or disputed, had destroyed the books which contained the accounts of that partnership, I treated lightly the circumstance of that destruction, and did not suffer it to prejudice his case. But the case is very different when the transactions to which they relate are recent, where the accounts arising from them have not been finally adjusted, or the balance ascertained or paid, and still more when that destruction takes place by the person who has actually filed a bill to have the accounts taken of those very transactions to which these books relate. In such a case some very cogent reason must be given to satisfy the court that the destruction was proper and justifiable, and, in the absence of any such satisfactory reason, which is the fact here, I am compelled to act on the principle laid down in the well known case of Armory *v.* Delamirie (1 Stra. 505), and presume, as against the person who destroyed the evidence, everything most unfavorable to him, which is consistent with the rest of the facts, which are either admitted or proved."

6. Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638; Diehl *v.* Eming, 65 Pa. St. 320; Eming *v.* Diehl, 76 Pa. St. 359; Rhodes *v.* Frederick, 8 Watts (Pa.) 448.

"**Where a Party Has Wrongfully Destroyed the Only Written Evidence** of the fact which is in existence, his unsupported evidence, as to the contents of that writing, shall not be allowed to prevail against the testimony of any other witness, for the presumption is, that the paper, if it could be produced, would corroborate the other witness." Downing *v.* Platt, 90 Ill. 268.

When a Party Withholds and Suppresses a Deed to which his adversary has a right, every intendment should be made against him. We think the evidence of the contents of the deed should have been submitted to the jury, with strong intimations that they ought to believe the premises to be included in the deed, as if they were not, the plaintiff, by producing it, could show with certainty how the fact was. Jackson *ex dem.* *v.* McVey, 18 Johns. (N. Y.) 331, 334.

In Gray *v.* Haig, 20 Beav. (Eng.) 219, a bill for an account, the destruction by a party of documents of unsettled accounts was held ground for presuming a condition of the accounts "most unfavorable to him which is consistent with the rest of the facts."

In Armour *v.* Gaffey, 162 N. Y. 652, 57 N. E. 1103, 30 App. Div. 121, 51 N. Y. Supp. 846, a suit against a factor for an accounting, when the plaintiff's agent commenced his investigation, it appears that the factor kept books of account, but after the agent had compared the amount received from the sales of goods, as shown by those books, with the reports, and had discovered a shortage, the factor refused to allow him to have further access to the accounts, and shortly afterwards destroyed them. No explanation whatever of this act consistent with an honest purpose was given. The court said: "We are unable to find the slightest reason or excuse therefor. The wilful destruction by them of their books authorized unfavorable influences by the referee, and subjected the defendants 'to a heavy burden of suspicion, as well as proof' . . . The well settled principle, therefore, applied, that: 'Where it appears that a party has destroyed an instrument or document, the presumption arises that, if it had been produced, it would have been against his interest, or in some essential particulars unfavorable to his claims under it. *"Contra spoliatorem omnia praesumuntur"* . . . The inference is that

The Basis of the Rule is the logical inference that a party in possession of evidence favorable to his contention will preserve and produce the same.[7]

2. Burden of Explaining. — The burden of explaining an apparent spoliation is on the party who is responsible therefor.[8]

the purpose of the party in destroying it was fraudulent.' Joannes *v.* Bennett, 5 Allen 169, 172.' The question arises whether the referee was right in charging the defendants with the same rate of shortage on other goods as to which the plaintiff's accountant was unable to compare the statements theretofore made with the books of the defendants, and unless the finding of the referee in this regard can be sustained, the plaintiffs are remediless as to them, the only record of the sales being contained in the destroyed books; and the evident purpose of the defendants in destroying them will succeed in its object. . . . We think the referee was authorized to reach the conclusion that the shortage on the other goods was at the same rate as on the goods as to which he was permitted to compare the books with the reports."

In Isabella Gold Min. Co. *v.* Glenn (Colo.), 86 Pac. 349, the defendants executed a mining lease to certain persons whose rights plaintiffs acquired. It appeared that plaintiffs were let into the demised premises and that they began to prospect and take ore from veins situate within its limits, but before the expiration of the term of their lease, defendants evicted plaintiffs. This action was brought for breach of a covenant in the lease for quiet enjoyment. There was some difficulty in determining what veins of ore the plaintiffs were entitled to mine. The defendants had in their possession a map from which it would have been easy to determine this fact. The defendants failed to produce the same. The court held that the failure to produce warranted a presumption that if it had been produced it would have militated against the defendants' contentions.

In Lowell *v.* Todd, 15 U. C. C. P. 306, an action on two promissory notes made by defendant, payable to plaintiff, the defendant contended that other notes had been given to plaintiff as collateral security for the first, and that the plaintiff had obtained payment to some extent at least on the notes sued upon. The court said: "The real question is, whether the plaintiff in fact got any, and what notes in collateral security for the notes sued upon, and what amount he collected and should have credited. That some notes were so received by the plaintiff he does not deny, and we think he does not satisfactorily account for them. In whatever book the list of these notes was entered, the defendant's right to see it admits of no doubt, for it probably afforded the best evidence of the real state of the transaction. The plaintiff, when asked about this book, denied he had it, alleging he had torn it up as useless. He now admits he has a book in which entries were made respecting these notes; but he says it is private, and no one has a right to see it. In this he is mistaken. If he does not exhibit it to the court and jury for their satisfaction, they have the right to infer that it contains evidence unfavorable to him in the matters in dispute between him and the defendants."

7. See Wood *v.* Holly Mfg. Co., 100 Ala. 326, 349, 13 So. 948, 46 Am. St. Rep. 56; Western & A. R. Co. *v.* Morrison, 102 Ga. 319, 29 S. E. 104, 66 Am. St. Rep. 173, 40 L. R. A. 84.

8. Rudolph *v.* Lane, 57 Ind. 115, where the court said: "Our understanding of the rule of evidence on this point is this, that where a party purposely and apparently with a fraudulent design, destroys a writing, he will not be permitted to give parol evidence of its contents, without first introducing evidence to rebut the suspicion of fraud arising from his act." Riggs *v.* Tayloe, 9 Wheat. (U. S.) 483.

The Very Fact That a Part of the Paper Had Been Clipped or Cut Off

by a sharp instrument was a suspicious circumstance and the onus was on the respondent to disprove or explain the spoliation. Burton *v.* American Guaranty Fund Ins. Co., 88 Mo. App. 392. See also Stilwell *v.* Patton, 108 Mo. 352, 18 S. W. 1075; Drosten *v.* Mueller, 103 Mo. 624, 15 S. W. 967.

In Blade *v.* Noland, 12 Wend. (N. Y.) 173, where plaintiff deliberately destroyed a note before it fell due, and there was nothing in the case accounting for or explaining the act, consistent with an honest or justifiable purpose, it was held that the plaintiff was bound to give affirmatively evidence to show that the act took place under circumstances that repelled the inference of fraudulent design.

In Joannes *v.* Bennett, 5 Allen (Mass.) 169, an action brought in the name of "The Count Joannes," (born 'George Jones,') for two libels upon him contained in letters to a woman to whom he was then a suitor, and was afterwards married, endeavoring to dissuade her from entering into the marriage. At the trial, it appeared that the defendant had for several years held the relation of pastor to the parents of the woman, as members of his church, and to the daughter, as a member of his choir; and there was evidence tending to show that he was on the most intimate terms of friendship with the parents, and that, on the 18th of May, 1860, being on a visit from his present residence in Lockport, New York, he called upon the father at his place of business in Boston, and was urged by him to accompany him to his residence in South Boston, the father stating that both he and his wife were in great distress of mind and anxiety about their daughter, and that they feared she would engage herself in marriage to the plaintiff. On their way to South Boston, the father stated to the defendant what he and his wife had heard and apprehended about the plaintiff, and their views with regard to his being an unsuitable match for their daughter, who, with a young child by a former husband, was living with them. On reaching the house, it was found that the daughter had gone out; and it was then arranged that the defendant should write a letter, and materials for that purpose were furnished, and the letter set forth in the first count was written, addressed to the daughter, and left open and unsealed with the mother, after the principal portion of it had been read aloud at the tea-table in the presence of the parents and a confidential friend of the family. On leaving, the defendant was further requested to do what he thought best to induce the daughter to break up the match. To sustain the second count, the plaintiff testified that he received the letter therein set forth from his intended wife, and on the 1st of June, 1860, the day before his marriage to her, he burned it and did not take a copy; and he was then allowed under objection to repeat the contents from memory. Bigelow, C. J., said: "In the case at bar, the plaintiff offered no evidence to show the circumstances under which he destroyed the letter referred to in his second count. He was not therefore entitled to offer any proof to show the contents."

In Dunn *v.* Dunn, 133 Mass. 566, which was an action on a promissory note, the plaintiff offered the note in evidence. It appeared that after its delivery to the plaintiff the note had been changed from a note for $100 to a note for $136, or $156, by means of erasures and interpolations. The plaintiff testified that he knew nothing as to such alterations, neither made them himself, nor directly or indirectly authorized the same to be made. The defendant objected that the plaintiff was not entitled to recover upon the note, unless he first explained and accounted for said changes and erasures. The court said: "These changes, under the circumstances, rendered the note *prima facie* void, and the burden was upon the plaintiff to explain them."

In Sweitzer *v.* Allen Bkg. Co., 76 Mo. App. 1, an action by plaintiff, as administrator of the estate of Lewis Frederick, deceased, to recover on two certificates of deposit payable by defendant, one — number 47 — due three months after date and the

3. Spoliation by Third Person. — No presumption arises where the spoliation was by a person not a party to the suit, though he may indirectly benefit by the recovery.[9]

4. Limitations of Rule. — A. In General. — The presumption from the spoliation of material evidence does not arise, unless the spoliation was wilfully done with a fraudulent purpose.[10]

other — number 61 — in six months, each bearing five per cent. interest *until maturity*. The printed words therein, "*No interest after maturity*" were erased. The erasure in the former was with pen and ink, the ink being of a different color from that of the written portion thereof, and in the latter with a pencil. The defendant pleaded *non est factum*. The cause was tried by the court without the aid of a jury. It was admitted by the defendant that the signature to each of the certificates was that of Doveton, their cashier. The plaintiff then offered the two certificates in evidence, to the introduction of which defendant objected for the reason that they showed on their face plainly that the words, "*no interest after maturity*," were stricken out in the one apparently with a pen and in the other with a pencil, which had the effect to vitiate them. The court then announced that it would reserve its decision as to the objections so made until after all the evidence that defendant might offer was in. At the conclusion of all the evidence the court ruled: "The erasures were such on the face of the certificates as to show that in one of them the erasure was in different ink from that used in writing the other written portion of said certificate, and that the erasure in the other was in pencil, and that these facts were apparent on the face of said certificates on inspection independent of the expert evidence aforesaid on that point, and that such erasures had not been explained by plaintiff on whom the burden rested, and therefore the said certificates were excluded." The judgment was affirmed.

9. Blake *v.* Blake, 56 Wis. 392, 14 N. W. 173. This was an action to re-establish a conveyance which had been destroyed by one of the defendants named as a grantor in a deed, but who had never executed it and who did not defend; and it was held that since neither of the defendants who did defend, had anything to do with its destruction, no presumption ought to be made against them because of the destruction of the instrument, notwithstanding a recovery by them in the action may indirectly inure to the benefit of their co-defendant.

10. The maxim will not be applied unless it appears that the party against whom it is sought to be invoked has concealed or destroyed evidence for the purpose of defeating the rights of the adverse party. Lucas *v.* Brooks, 23 La. Ann. 117. See also Miltenberger *v.* Croyle, 27 Pa. St. 624; Drosten *v.* Mueller, 103 Mo. 624, 15 S. W. 967; Welty *v.* Lake Superior Term. & T. R. Co., 100 Wis. 128, 75 N. W. 1022; Lamore *v.* Frisbie, 42 Mich. 186, 3 N. W. 910.

In Williamson *v.* Rover Cycle Co., 2 Ir. 615, Lord Ashbourne, C., said: "The action was brought for breach of contract in relation to the sale of a bicycle to the plaintiff, and was tried before Mr. Justice Andrews and a special jury in Dublin. . . . The plaintiff, who was a trained and experienced cyclist, carefully examined the bicycle before purchasing, used it frequently for several months, and then took it to pieces and went to England. After some months he got over the bicycle to England, when he used it again frequently for two months until the machine broke at the crown (the top of the steering-post or tube). After the accident the plaintiff had the machine examined by experts, when it appeared that the break was a clean one — not the result of a flaw or defect in materials or workmanship. The plaintiff sent the broken bicycle to the defendants for 'inspection.'

Thus secondary evidence may be introduced to establish the contents of papers destroyed by a party from misapprehension and without fraudulent purpose.[11]

B. Destruction After Commencement of Action. — It has been held that the destruction or withholding of letters by the plaintiff after suit brought warrants the court in deducing the inference of fraudulent design from the act of destruction.[12]

The company replaced the broken parts, and threw them away. Under these circumstances the plaintiff instituted his action for damages, and the jury found everything for him. . . . The majority of the Judges in the Queen's Bench Division could see nothing to cast the *onus* on the defendants, but the Lord Chief Baron thought that having thrown away the broken pieces of the bicycle, and not being in a position to produce them at the trial, the maxim applied *omnia praesumuntur contra spoliatorem,* and therefore the onus of proof was shifted. I cannot think that the throwing away of the broken pieces according to custom after repair could subject the defendants to this grave consequence. All the facts and circumstances have to be considered. If motive was necessary there is nothing to indicate that the defendants had the slightest intention of removing damaging evidence."

11. Riggs *v.* Tayloe, 9 Wheat. (U. S.) 483; Bowen *v.* Reed, 103 Mass. 46; Dearing *v.* Pearson, 8 Misc. 277, 28 N. Y. Supp. 714. *Compare* Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401.

In Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547, an action for alleged breach of promise to marry, plaintiff's sister testified that she had advised plaintiff to burn certain letters from the defendant, which was done. It was held that as the letters were admissible in evidence, secondary evidence was admissible to establish contents, since their destruction was shown to be from misapprehension and was without fraudulent purpose, notwithstanding destruction was plaintiff's own voluntary act; also that witness who was present and advised the destruction of the letters might be allowed to state his declarations to the party at the time, to repel the inference of fraud, such declarations being part of the *res gestae.*

In Bagley *v.* McMickle, 9 Cal. 430, Field, J., said: "It is not a matter of course to allow secondary evidence of the contents of an instrument in suit upon proof of its destruction. If the destruction was the result of accident, or was without the agency or consent of the owner, such evidence is generally admissible. But, if the destruction was voluntarily and deliberately made, by the owner, or with his assent, as in the present case, the admissibility of the evidence will depend upon the cause or motive of the party in effecting or assenting to the destruction. The object of the rule of law which requires the production of the best evidence of which the facts sought to be established are susceptible, is the prevention of fraud; for, if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises, that the better evidence is withheld for fraudulent purposes which its production would expose and defeat. When it appears that this better evidence has been voluntarily and deliberately destroyed, the same presumption arises, and unless met and overcome by a full explanation of the circumstances, it becomes conclusive of a fraudulent design, and all secondary or inferior evidence is rejected. If, however, the destruction was made upon an erroneous impression of its effect, under circumstances free from suspicion of intended fraud, the secondary evidence is admissible. The cause or motive of the destruction is then the controlling fact which must determine the admissibility of this evidence in such cases."

12. In Baldwin *v.* Threlkeld, 8 Ind. App. 312, 35 N. E. 841, 34 N. E. 851,

5. Operation and Effect of Rule. — A. In General. — In some jurisdictions it has been held that the presumption arising from spoliation is of itself sufficient to establish the truth of the innocent party's contentions without the necessity of his introducing other evidence of the contents of the document.[13]

the court sustained an objection of the appellee to proving the contents of certain letters testified to by the appellant after he had practically admitted that he voluntarily destroyed the letters after he had commenced the suit on a note against the Bryans. It was held that the court had a right to deduce from the act of destruction after the commencement of such suit, the inference of a fraudulent design to do away with the letters themselves, and that upon this theory the exclusion of the evidence was proper. See also, Speer *v.* Speer, 7 Ind. 178, 63 Am. Dec. 418; Anderson Bridge Co. *v.* Applegate, 13 Ind. 339; Rudolph *v.* Lane, 57 Ind. 115.

In Leeds *v.* Cook, 4 Esp. 256, 4 R. R. 855, an action on the case for breach of promise of marriage, the defendant pleaded the general issue. The plaintiff proved the promise to marry him, made by the defendant's wife before her marriage; and that settlements had been drawn and executed preparatory to it. He then proved that she had eloped with and married the defendant; and there rested his case. The defendant and his wife gave in evidence, in mitigation of damages, that the plaintiff had conducted himself with great impropriety, misconduct, and indifference while he paid his addresses to her; so that he had received no injury, as to his feelings, from her having married, as, in fact, he entertained no serious affection for her; among other matters, that the morning after she had eloped with the defendant, her present husband, he had written a letter to another young woman, of the name of Turpin, to whom he had made proposals of marriage. Miss Turpin had been subpoenaed with a *duces tecum* of the letter. She was called, and asked for that letter. She said, that after the action brought, she had given it to the plaintiff, who said he would send it up to his attorney. The letter was called for from the attorney; and not being produced, the defendant's counsel proposed to give parol evidence of its contents. It was objected to, there not being any notice to produce it. To which it was answered, that it could not be known that it was in the plaintiff's possession, as he had clandestinely procured it since the action brought. Lord Ellenborough said he would admit evidence of its contents. That it belonged to the witness called, and was subtracted in fraud of the subpoena: That as therefore the plaintiff secreted it, and had refused to produce it,— *in odium spoliatoris,* parol evidence of its contents should be admitted.

13. Askew *v.* Odenheimer, Baldw. (U. S.) 380. See Wardour *v.* Berisford, 1 Vern. Ch. 452, 2 P. Wms. (Eng.) 749; Hunt *v.* Matthews, 1 Vern. Ch. (Eng.) 408.

The Wilful Suppression or Destruction of Evidence raises a presumption against the spoliator, where the evidence is relevant to the case, and where the spoliator is the claimant, the fact of *spoliation alone* raises a presumption against his claim. Where a deed, a will, or other paper is proved to be destroyed, or suppressed, or there is a vehement suspicion of its having been done, the presumption applies in favor of the party who claims under such papers, *though the contents are not proved.* But there is great danger that the maxim may be carried too far, and it should be cautiously applied. The mere fact of the destruction of account books of a decedent by one who had been lately in his employ, and who made a claim for a balance due him for services rendered continuously for about fourteen years, is not, in an action brought upon such claim against the executor of the decedent, sufficient to warrant the presumption that the contents of the books were against the interest of the plaintiff,

it not appearing that the contents would have disclosed charges against or settlements with him, or that the books were relevant or material to the case. Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581.

Where a Deed or Other Paper is Proved To Be Destroyed or suppressed, or there is vehement suspicion of its having been done, the presumption in *odium spoliatoris* applies in favor of the party who claims under such paper, though the contents are not proved. Lee *v.* Lee, 9 Pa. St. 169; Miltenberger *v.* Croyle, 29 Pa. St. 170.

If the Will Be Lost, secondary evidence may be given of its contents. If suppressed or destroyed, the same is true; and if necessary, the law will prevent the perpetration of a fraud by permitting a presumption to supply the suppressed proof. *In re* Lambie's Estate, 97 Mich. 49, 56 N. W. 223.

In Cresent City Ice Co. *v.* Erman, 36 La. Ann. 841, an action for ice furnished the defendant, whose defense was that he bought the ice from another person and owed the plaintiff nothing, the plaintiff gave the defendant notice before the trial to produce his check book and the several bills of the plaintiff for the ice, the fact being that if the ice company was selling to such third person these bills would have shown it. The defendant did not produce them, and said he made no effort to get them. The court said: "The presumption is always and inevitably against a litigant who fails to furnish evidence within his reach, and it is stronger when the documents, writings, etc., would be conclusive in establishing his case."

The Spoliation of Documentary Evidence Being Proved Against a Defendant he is held to admit the truth of the plaintiff's allegations; and this upon the ground that the law, in consequence of the fraud practiced, in consequence of the spoliation, will presume that the evidence destroyed would establish the plaintiff's demand to be just. Pomeroy *v.* Benton, 77 Mo. 64, 87. In this case the court said: "We come now to the destruction of evidence by the defendant; of the destruction of the book in which the accounts of his whiskey transactions were kept. . . . Nothing remains to us but to apply to the defendant, the stern rule recognized alike in *equity* and *at law* embodied in the maxim *omnia praesumuntur in odium spoliatoris*. . . . The learned referee appears to have thought, for so he reported to the circuit court, that before the rule can be applied 'secondary evidence' as to the contents or character of the evidence destroyed must first be introduced; must be laid as a basis before the presumption can be invoked. Nothing can be further from the law. It would seem too plain for argument, that if secondary evidence were at hand, all need for the application of the rule would cease, and that if the rule could not be applied unless upon the production of secondary evidence, then the spoiler could assure his success, by cutting off every source of information and every supply of evidence could become successful in proportion to the destruction he had wrongfully wrought. The authorities give no countenance to such an idea. It is because of the very fact that the evidence of the plaintiff, the profits of his claim or the muniments of his title, have been destroyed, that the law, in hatred of the spoiler, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very means he had so confidently employed to perpetrate the wrong."

In Barker *v.* Ray, 2 Russ. Ch. (Eng.) 63, 72, the court says that it is in a great many instances going a great length to uphold the statement of the text, but declines to deviate from the settled course of the courts. The following are the words of the Lord Chancellor: "Now, this court has a peculiar jurisdiction in cases of spoliation; and, whatever may be thought of some decisions which have been made here, the principle, upon which I have endeavored to act, has always been, to follow precedents and the settled course of the court; nor can I charge myself with having, in any instance, extended the jurisdiction. The juris-

In other jurisdictions, however, the courts hold that the spoliation of evidence does not supply a total absence of proof on the part of the innocent party; the presumption does not come into operation until some evidence has been offered by the adverse party in support of his contention.[14] Nor is it sufficient to overcome the

diction of the court in matters of spoliation has gone a long way; indeed, it has gone to such a length, that, if I did not think myself bound by authority and practice, I should have great difficulty in following them so far. To say that, if you once prove spoliation, you will take it for granted that the contents of the thing spoliated are what they have been alleged to be, may be, in a great many instances, going a great length. It is a question of vast importance to decide, upon what grounds and upon what principles you are to take upon yourself to say — what are the contents of a written will, what is the effect of it, what are the expressions that stood part of it, where that writing itself can no longer be produced, and where the writing would be of no avail, unless it were attested and subscribed according to the statute of frauds: And if there be any one case upon which I should lay my finger and say, that a new trial ought to be refused, if it were asked only upon the ground that some evidence had not been given which might have been given, I think it would be where you are obliged in the verdict to look for that which, at best, can be but matter of guess and conjecture."

14. Cartier *v.* Troy Lumb. Co., 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470; Arbuckle *v.* Templeton, 65 Vt. 205, 25 Atl. 1095; Larkin *v.* Taylor, 5 Kan. 433; Patch Mfg. Co. *v.* Protection Lodge, 77 Ver. 294, 60 Atl. 74.

In Fox *v.* Hale & Norcross Silver Min. Co., 108 Cal. 369, 41 Pac. 308, the court says: "The presumption arising from the wrongful destruction or suppression of evidence will not, however, justify a judgment or decree without evidence, nor the substitution of conjecture or allegation for proof; and its legitimate effect is confined to rendering evidence admissible which could not be received under ordinary circumstances, and the deduction of every inference from the evidence actually given in favor of the injured party and against the spoliator." Humphreys *v.* Crane, 5 Cal. 173; Johnson *v.* White, 46 Cal. 328.

"It is undoubtedly true, that a party who destroys the evidence by which his claim or title may be impeached, raises a strong presumption against the validity of his claim. And if the plaintiff destroyed papers of the estate, and especially receipts for taxes, which are important documents, involving, in many instances, the validity of a title, he committed a great wrong; but yet the presumption against him would not be of that conclusive character indicated by the instruction. The jury were told, in effect that if the plaintiff destroyed *any* papers of the deceased, the defendant was entitled to their verdict. The law of nations, as recognized in continental Europe, under certain circumstances, raises a conclusive presumption against the spoliator of papers indicating the national character of a vessel (Kent's Comm., 157, 158); but even that rule does not ordinarily prevail in England and the United States." Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

The Mere Circumstance of a Party Having Destroyed or suppressed a deed, book or paper, will not induce a court of equity to decree a penalty against him to deprive him of what may be his just right, to dispense with such secondary proof of the existence and contents of the paper which has been so suppressed or destroyed as may be in the power of the party injured to produce, or to give a decree in his favor, *without some proof.* Saltern & Melhuish, 1 Sch. & Lef. 222, 2 P. Wms. 750; 1 Amb. 247, 249.

In Gage *v.* Parmelee, 87 Ill. 329, a suit in equity to set aside a settlement had between plaintiff and de-

effect of other positive evidence to the contrary.[15] Its legitimate

fendant upon the dissolution of the co-partnership between them, it appeared that, before the filing of the bill it was exhibited to appellee, and he read it. Thereafter, by appellee's orders all the books and papers of the firm were burned. Appellee's excuse was that appellant had made a statement which had been brought to him that he was going to file a bill for the purpose of exposing his business to the public. The court said: "This culpable act of the destruction of the books justly prejudices the case of the appellee, and we have the inclination to give it the full legitimate effect against him that may be warranted. But we do not see how, under the proofs in the case, it can be made avail of here, to the advantage of appellant, unless there be allowed to it the effect of supplying proof. This we do not think can rightly be done. Proof must be made of the allegations of the bill. The destruction of the books does not make such proof. The presumption of law does not go to that extent."

"There is great danger that the maxim may be carried too far. It cannot properly be pushed to the extent of dispensing with the necessity of other evidence, and should be regarded as merely matter of inference, in weighing the effect of evidence in its own nature applicable to the subject in dispute. . . . The doctrine is, that unfavorable presumption and intendment shall be against the party who has destroyed an instrument which is the subject of inquiry, in order that he may not gain by his wrong." Bott *v.* Wood, 56 Miss. 136; Bridges *v.* Winters, 42 Miss. 135, 2 Am. Rep. 598.

Suppression by one party litigant of a document relied upon as evidence by the opposing party, is not equivalent to an admission of the truth of the claim of the latter respecting its contents, and does not dispense with the necessity of *prima facie* proof of such claim sufficient to sustain a judgment or decree. But when a *prima facie* case is made and doubt is cast upon it by rebuttal evidence, or otherwise, suppression of the document raises a strong inference against the party responsible therefor, and determines the question in favor of his adversary. Stout *v.* Sands, 56 W. Va. 663, 49 S. E. 428. See also Wheeling *v.* Hawley, 18 W. Va. 472; Knight *v.* Capito, 23 W. Va. 639; Hefflebower *v.* Detrick, 27 W. Va. 16; Bindley *v.* Martin, 28 W. Va. 773; Union Trust Co. *v.* McClellan, 40 W. Va. 405, 21 S. E. 1025; Webb *v.* Bailey, 41 W. Va. 463, 23 S. E. 644.

In Arbuckle *v.* Templeton, 65 Vt. 205, 25 Atl. 1095, the court quoting from Wharton on Evidence says "that the presumption arising from non-production cannot be used to relieve the opposing party from the burden of proving his case; but that when a *prima facie* case is proved, sufficient of itself to sustain a judgment, then a party refusing to exhibit books that would, if produced, settle the matter one way or the other, or to give other explanations, not only prejudices his case, but precludes himself from subsequently objecting that the case of the opposing party, though sufficient for judgment, did not introduce all the facts. . . . The remarks of Sir W. D. Evans in volume two of his Pothier, cited in the text of Best Ev., § 414, though referring to written evidence, are applicable here. 'The mere non-production,' he says, 'of written evidence which is in the power of a party, generally operates as a strong presumption against him. I conceive that it has been sometimes carried too far by being allowed to supersede the necessity of other evidence, instead of being regarded as merely matter of inference in weighing the effect of evidence in its own nature applicable to the subject in dispute.' And see Scovill *v.* Baldwin, 27 Conn. 318, where it is held that the non-production of a witness, equally within the control of both parties affords no ground for an unfavorable inference against either party."

15. Bott *v.* Wood, 56 Miss. 136; Rayssiguier *v.* Fourchy, 49 La. Ann. 1627, 22 So. 833; Welty *v.* Lake Sup-

effect is confined to rendering evidence admissible which could not be received under ordinary circumstances, and the deduction of every inference from the evidence actually given is in favor of the injured party and against the spoliator.[16]

B. Estoppel to Produce Secondary Evidence. — The wilful and fraudulent destruction of a document by a party to the action estops him from producing secondary evidence of its contents.[17]

But the destruction of evidence, whether fraudulent or not, will not estop the party from introducing other independent evidence competent in itself.[18]

C. Amount of Secondary Evidence Necessary. — While as previously stated, some of the courts hold that some evidence of the contents of the destroyed writing is necessary, it is impossible to lay down any rule as to what will be sufficient to warrant the presumption and justify a finding against the spoliator.[19] It has been said that slight evidence will suffice.[20] Necessarily the trial court is com-

erior Term. & T. R. Co., 100 Wis. 128, 75 N. W. 1022.

16. Fox *v.* Hale & Norcross S. M. Co., 108 Cal. 369, 41 Pac. 308.

17. See article "Best and Secondary Evidence," Vol. II.

18. Stone *v.* Sanborn, 104 Mass. 319, 6 Am. Rep. 238.

In Stone *v.* Sanborn, 104 Mass. 319, 6 Am. Rep. 238, an action for breach of promise of marriage, Gray, J., said: "The contract of marriage, on which the plaintiff relied to support her action, and to which she testified, was oral. The letters between the parties which were admitted in evidence were not offered by the plaintiff as themselves constituting the contract, but as evidence of the defendant's admissions that it had been made, and of a breach by his refusal to perform it. The only objections taken at the trial to the admissibility of this evidence were, that the plaintiff had voluntarily destroyed part of the correspondence, or, if she had not destroyed it, refused to produce the whole, and should not be permitted to introduce portions of it only; and particularly that she could not put in a letter replying to one which was destroyed or not produced. We are of opinion that neither of the objections can be maintained. . . . A party who wilfully destroys a document cannot indeed be permitted to testify to its contents without first introducing evidence to rebut the inference of fraud arising from his act. Joannes *v.* Bennett, 5 Allen 169. Oriental Bank *v.* Haskins, 3 Met. 336, 337. But it is unnecessary to consider whether the plaintiff's testimony as to the circumstances under which she destroyed some of the defendant's letters was sufficient to rebut any inference of fraud in the present case; for she offered no evidence of the contents of the letters destroyed; and their destruction could not estop her to give in evidence any existing letters in themselves competent."

19. It Is Difficult to Define Precisely What Will Be Deemed Some Proof, as much must necessarily depend on the particular case; but there can be little danger in laying it down as a general rule, that where there is the least positive proof, or where it may be supposed or inferred from appearances out of which such supposition or inference necessarily or naturally arises, proof of spoliation would entitle the opposite party to a decree. Cowper *v.* Cowper, 2 P. Wms. (Eng.) 720.

20. Anderson *v.* Irwin, 101 Ill. 411, where the court said: "In applying this maxim, the rule seems to be well settled that where one deliberately destroys, or purposely induces another to destroy, a written instrument of any kind, and the contents of such instrument subsequently become a matter of judicial inquiry

pelled to rely on evidence which is more vague and indefinite than is ordinarily required.[21]

between the spoliator and an innocent party, the latter will not be required to make strict proof of the contents of such instrument in order to establish a right founded thereon. In such case slight evidence will suffice. Broom's Legal Maxims, 1576." *Approved* in Tanton *v.* Keller, 167 Ill. 29, 47 N. E. 376.

The rule of equity is well established, that where a deed, a will or other paper is proved to be destroyed or suppressed, or there is vehement suspicion of its having been done, the presumption *in odium spoliatoris* applies in favor of the party who claims under such paper, though the contents are not proved. The fact of spoliation, suppression or embezzlement may be proved by the answer or oath of the opposite party, so may the contents of the paper: the same rule applies to matters of account; the mere embezzlement of books or accounts is sufficient to authorize a rejection of claims by the spoiler, though supported by evidence, or the party spoiled may rebut the claim by his *oath.* But where he comes to charge the spoiler in account, in order to raise a debt against him, he must give some evidence beyond the fact of spoliation, his oath would be admissible evidence, its effect depending on the circumstances of the case. If he relies on the other evidence he must make out a *prima facie* case by proof competent for a court of law to give a judgment on a demurrer to the evidence, or a jury to find a verdict in favor of the charge set up. This is what is understood by *some* evidence, it may be slight, yet if it conduces to prove the charge it is legally sufficient; its weight or credibility is a matter of discretion and circumstance. No specific sum can be charged against the spoiler on proof of the mere fact of spoliation, herein the *rule differs* from that which applies to a claim of property under a deed or will on which the right depends *and the thing claimed is ascertained.* Askew *v.* Odenheimer, Baldw. (U. S.) 380.

In Anonymous, 1 Ld. Raym. (Eng.) 731, the court said: "If a man destroys a thing that is designed to be evidence against himself, a small matter will supply" and so "a copy sworn" was admitted to prove a note of defendant torn by him.

21. Love *v.* Dilley, 64 Md. 238, 1 Atl. 59, 4 Atl. 290.

Walterhouse *v.* Walterhouse, 130 Mich. 89, 89 N. W. 585, where it was held that although the secondary evidence of the contents of the deed was somewhat indefinite and technically incomplete, but it might be helped by the application of the maxim "*omnia praesumuntur in odium spoliatoris.*"

In Jones *v.* Knauss, 31 N. J. Eq. 609, a suit to enforce an express trust, the subject of which was a mortgage, it appeared that the complainant and her husband had conveyed a house and lot, belonging to the husband, to one Klan Duyn, for $7,000. In part payment of the purchase money, Mr. Duyn gave a mortgage to the defendant Knauss, for $3,000, payable three years after date, and bearing interest from date. The mortgage was made to the defendant, as trustee of the complainant and her husband. A writing, stating the terms of the trust, was executed in triplicate by the complainant and her husband and the defendant, on the day the mortgage was executed, and one copy delivered to each of the parties, which were afterwards destroyed by the defendant. The court said: "Unless he has justified his conduct, in this respect, by a satisfactory explanation, his act must be regarded as a wrongful attempt to defeat the complainant's right by destroying the evidence whereon it rested." The defendant in justification of his act said that complainant had been paid $500 on account of the $1,000, shortly after the papers were executed, and that she endorsed a receipt for that sum on her copy of the declaration of trust; that an additional $500 was paid to her, in his office, by her husband, in June, 1874, when she

When a Party Refuses To Produce Books in his possession, his opponent may give secondary evidence of their contents; and if such secondary evidence is imperfect, vague and uncertain, every intendment and presumption shall be against a party who might remove all doubt by producing the higher evidence.[22]

gave up her copy of the declaration of trust for cancelation, and all three were then destroyed by him, with the consent of all parties. He further said, the reason all three were destroyed was, because the trust had been executed. The complainant disputed the truth of all the material parts of this statement; she admitted the payment of the sum of $500, but said that was all she had ever received. She denied, with great positiveness, that she surrendered her copy of the declaration of trust for cancelation, or that she consented to its destruction, or that she had the slightest suspicion, when she let the defendant have it, that he intended to destroy it. She further said that the defendant obtained it of her in June, 1874, under a representation that he wanted to copy it; and that, although she afterwards applied to him several times for it, he told her that he had given it to her husband, or destroyed it. The court said: "The defendant's act, in view of the facts, can receive but one interpretation. On his own showing, it was admittedly wrongful against the complainant's husband, and presumably so against the complainant. His position is one where he is liable to the most unfavorable presumptions. He has unquestionably betrayed his trust, and the court is bound to apply to him the maxim *in odium spoliatoris omnia praesumuntur*. If a person is proved to have destroyed a written instrument, a presumption arises that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance, and, accordingly, slight evidence of the contents of the instrument will usually, in such a case, be sufficient. Broom's Max. 940. Independent, however, of the legal presumption, the case is decidedly with the complainant on the question, What were the contents of these papers? Four witnesses swear that the contents of the complainant's copy were substantially what she says they were. . . . The fact that the complainant made the payment is, in my judgment, a strong corroboration of the accuracy of her recollection and that of her witnesses; while the fact that neither the defendant nor his witness mentions this stipulation in attempting to repeat the contents of the agreement, must be regarded as very cogent evidence that their recollection has become so obscured as to be untrustworthy. . . . My conclusion is, that the complainant, by the terms of the trust, is entitled to the whole principal of the mortgage, less what she admits she has been paid."

22. Life & Fire Ins. Co. *v.* Mechanic's Ins. Co., 7 Wend. (N. Y.) 31. The rule is, when a party refuses to produce books and papers, his opponent may give secondary or parol proof of their contents, if they are shown to be in possession of the opposite party; and if such secondary evidence is imperfect, vague and uncertain as to dates, sums, boundaries, etc., every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence. See Rector *v.* Rector, 8 Ill. 105.

Failure or Refusal of a Party To Produce Certain Documents in accordance with a notice by his opponent renders secondary evidence of their contents admissible, and raises a presumption that such secondary evidence, if any is introduced, is less harmful than the original documents would have been, unless some sufficient or reasonable excuse is given for failing to produce them. Schreyer *v.* Turner Flouring Co., 29 Or. 1, 43 Pac. 719.

In Hanson *v.* Eustace, 2 How. (U. S.) 653, the court said: "A party cannot infer from the refusal to

Secondary Evidence Will Be Presumed To Be Correct when the party holding the original writing with full knowledge of such evidence refuses to produce the original.[23]

6. Particular Applications of Rule. — A. Spoliation of Ship's Papers. — Rule in Continental Europe. — The spoliation of papers by a captured ship is held to be conclusive proof of guilt in France, Spain and all the states of Continental Europe.[24]

produce books which have been called for, that if produced they would establish the fact which he alleges they would prove. The refusal to produce books, under a notice, lays the foundation for the introduction of secondary evidence, of the fact sought to be proved by them. The party in such case may give secondary evidence of the contents of such books or papers; and if such secondary evidence is vague, imperfect, and uncertain as to dates, sums, boundaries, etc., every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence. All inferences shall be taken from the inferior evidence most strongly against the party refusing to produce; but the refusal itself raises no presumption of suspicion or imputation to the discredit of the party except in a case of spoliation or equivalent suppression."

23. Secondary evidence introduced by a plaintiff of the contents of books in the possession of defendant, relating to a material matter, will be presumed to be correct, where the defendant, with full opportunity after the knowledge of such evidence, fails to produce the originals. Missouri, K. & T. R. Co. *v.* Elliott, 102 Fed. 96, 42 C. C. A. 188.

24. The spoliation of papers was declared by the ancient law of France to be a substantive ground of condemnation. According to ordinances No. 1543, art. 43, and 1584, Art. 70, the throwing overboard of the charter-party, or other papers, relative to the lading of the vessel, was declared cause of condemnation. In August, 1681, an ordinance entitled Des Prises, art. 6, it provides that all vessels, on board of which no charter-party, bills of lading, or invoices are to be found, are, together with their cargoes, declared good prize. In applying this rule of evidence, some confusion and difference of opinion having arisen, in cases where all the papers were not destroyed or thrown overboard, and where sufficient papers were preserved to prove the ownership, another ordinance was passed on the 5th of September, 1708, which provided, that every captured vessel, from which papers have been thrown overboard, shall be good prize, together with the cargo, upon proof of this fact alone, without its being necessary to examine into the nature of the papers destroyed, nor to inquire whether sufficient papers were found remaining on board, to furnish evidence that the ship and the goods of her lading belong to allies or friends. It seems that this ordinance, being too severe when put in practice, was modified by Louis XIV on the 2nd of February, 1710, in a rescript directed to the Admiral of France, instructing the council of prizes to construe the terms of this ordinance, according to the peculiar circumstances, and the subsidiary proofs in each case. Valin says that evidently this rescript escaped the attention of the framers of the ordinance 21st October, 1744, in which article 6 is almost identical with that of 5th September, 1708, and says that it ought to be applied to temper the rigor of this article, according to circumstances. Valin, *sur l'Ordonnance.* It has also been held by a renowned French jurist that such regulations should always be tempered by wisdom and equity; he says further that the want or suppression of papers is not conclusive. On Dec. 27th, 1779, the council of prizes restored a captured vessel notwithstanding some papers had been thrown overboard, when it was proved that the papers were not of such a nature as to show the prop-

The Rule in England and America. — The suppression or spoliation of the ship's papers is not of itself considered in the American and English courts as a sufficient ground of condemnation or cause of forfeiture of vessel and cargo; it is a circumstance open to explanation, but it raises a strong presumption of fraudulent purposes in those having charge of the ship and papers, which will effect the condemnation of the prize if not satisfactorily explained and accounted for.[25]

B. Partnership Accounts. — The presumption against a spoliator has been held not to apply against a partner who has negligently

erty the enemy's, the master also not being accessory to the spoliation. See cases of The Pigou, The Statira, 2 Cranch 99, note. The Spanish law as to spoliation is practically the same as that of France. The Pizarro, 2 Wheat. (U. S.) 227.

25. The Amiable Isabella, 6 Wheat. (U. S.) 1; The Atlanta, 6 Rob. Adm. (Eng.) 440; The Two Brothers, 1 Rob. (Eng.) 113; The Rising Sun, 2 Rob. Adm. (Eng.) 106. And see article "Admiralty," Vol. I.

Even the total want of papers is not a substantive ground of condemnation; it may be explained. The Betsey, 1 Rob. Adm. (Eng.) 84.

In The Pizarro, 2 Wheat. (U. S.) 227, it is said that spoliation of papers, is not of itself a sufficient ground for condemnation in a prize court. It is, undoubtedly, a very awakening circumstance, calculated to excite the vigilance and justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity, or superior force; and if the party, in the first instance, fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained or the explanation appear weak and futile; if the cause labor under heavy suspicions, or there be a vehement presumption of bad faith or gross prevarication, it is made the ground of a denial of further proof, and condemnation ensues, from defects in the evidence, which the party is not permitted to supply. *Approved* in Olinde Rodrigues, 174 U. S. 510.

In The Mersey, 17 Fed. Cas. No. 9,489, it is said that the English and American prize law regards the act of destroying or mutilating the ship's papers (among which log-books rank as of primary importance) to be proof of *mala fides* in the actors, and to demand the *worst* presumption against those concerned in it.

It will always be inferred that the papers relate to the ship or cargo, and that it was of material consequence to some unlawful interests that the papers should be destroyed or suppressed. The suppression or spoliation of papers is not now considered in the American or English courts, as *per se*, the necessary damnatory cause of forfeiture of vessel and cargo, but it raises a strong presumption of fraudulent purposes in those having charge of the ship and papers which will effect the condemnation of the prize if not satisfactorily explained and accounted for. This case was *reversed* in Fed. Cas. No. 9,490, on the ground that the spoliation had been fully explained.

The spoliation of papers is a still more aggravated and inflamed circumstance of suspicion. That fact may exclude further proof, and be sufficient to infer guilt; but it does not, in England, as it does by the maritime law of other countries, create an absolute presumption *juris et de jure*; and yet a case that escapes with such a brand upon it is saved so as by fire. The Hunter 1 Dods. (Eng.) 480.

Compare The Bermuda, 70 U. S. 514, 550, where it was held that the spoliation was one of unusual aggravation, and warranted the most unfavorable inferences as to ownership, employment and destination.

failed to keep proper accounts,[26] although it has likewise been held to the contrary.[27] And where the business and accounts are managed by one partner, his failure to keep proper accounts warrants unfavorable inferences against him.[28]

C. CRIMINAL CASES. — The rule as to spoliation applies equally in a criminal case[29] except as to the failure or refusal of the defendant

26. In Knapp *v.* Edwards, 57 Wis. 191, 15 N. W. 140, a suit for accounting and adjustment of partnership affairs, it appeared that the defendant had exclusive management and control of all the assets and transactions of the firm and received all moneys, manufactured stock and for work done, without keeping an accurate account of the same. From his negligent manner of keeping said accounts the referee was unable to determine the exact amount of the profits. The court said: "We think this is not a proper case for the application of so severe a rule. The rule in all its rigor is for wrongdoers for those who have been guilty of fraud or wilful disregard of duty, rather than those who have failed in capacity to perform their undertakings."

27. In an action for dissolution of partnership, winding up and settling affairs of partnership, it appeared that one of the partners was entrusted with the entire management and control of the business. He kept the books, for which he was paid a salary, in such a confused and unintelligible manner that it was impossible to get at the real state of the accounts. The court says: "If he kept the books so imperfectly and badly that the true state of the accounts and the transactions of the firm cannot be ascertained from them, it is but fair that every presumption to his disadvantage should be accepted. It is a case where the maxim, *omnia praesumuntur contra spoliatorem*, should be applied for it is wholly his fault that the means of ascertaining the truth are not furnished by the account books themselves. But there is ample evidence tending to show that there were groceries and provisions taken from the store of the firm, for the use of Henderson's family, which were not weighed, measured or charged. Dimond *v.* Henderson, 47 Wis. 172, 2 N. W. 73. *Approved,* Lessel *v.* Zillmer, 105 Wis. 334, 81 N. W. 403.

28. In Hays *v.* Bayliss, 82 Mo. 209, it appeared that the entire business of the partnership was in the hands and under the control of plaintiff. It was held that from the mutilated, torn, erased, scratched condition of the books, every inference favorable to the defendant should have been drawn, and that drawing such inference the referee should have charged to the firm the item which he omitted from his second statement of account. See also Oglebay *v.* Corby, 96 Mo. 285, 9 S. W. 584.

29. United States *v.* Fleming, 18 Fed. 916 (failure to produce books containing the transactions in question); State *v.* Chamberlain, 89 Mo. 134 (destruction or concealment of alleged forged notes); State *v.* Anderson, 89 Mo. 312, 1 S. W. 135. And see article "PRESUMPTIONS," Vol. IX, p. 964.

It is one of the badges of guilt to attempt concealment of the act done; and the probable inference therefore, is where a homicide has been committed and the body is concealed, to connect the individual who conceals it with the crime as author or participator. Burrill Circ. Ev. 83; State *v.* Dickson, 78 Mo. 438, 448.

"**The Falsification of Records,** either by interlineation or erasures, with a reference to matter, in which the party making such falsification is suspected or charged with neglect or wrongdoing, is strong presumptive evidence of guilt." United States *v.* Randall, Deady 524, 27 Fed. Cas. No. 16,118.

In Rex *v.* Smith, 3 Burr. (Eng.) 1475, a prosecution for trading without a license, the refusal to produce it was held to be sufficient evidence.

to testify in his own behalf.[30] But a mere failure to explain a *prima facie* case made against him does not dispense with the necessity of proof beyond reasonable doubt.[31]

7. Suppression of Evidence. — A. In General. — The suppression of evidence is equivalent in legal effect to its spoliation by destruction.[32] Where a party has it peculiarly within his power to produce the best evidence on a controverted point and fails or refuses to do so, it creates an inference or presumption that the suppressed evidence would have been unfavorable to him.[33]

30. See articles "Presumptions," Vol. IX, p. 971, and "Witnesses."

31. It is error to instruct a jury, in an action for penalties for alleged frauds upon revenue, that after the government has made out a *prima facie* case against the defendants, not free from all doubt but one, which disclosed circumstances requiring explanation, if the jury believe the defendants have it in their power to explain the matters appearing against them, and do not do so, all doubt arising upon such *prima facie* case must be resolved against them. The burden rests upon the government to make out its case beyond a reasonable doubt. Chaffee & Co. *v.* United States, 18 Wall. (U. S.) 516.

32. See article "Presumptions," Vol. IX, p. 958.

"If there has been actual spoliation by a party, everything would be presumed against him in favor of those setting up a *prima facie* title; and though there is no actual spoliation proved, yet a complete suppression would, for the purposes of the suit, be equal to a spoliation." Banks *v.* Stewart, 1 Sch. & Lef. (Eng.) 222.

33. Bindley *v.* Martin, 28 W. Va. 773, 789; Frick *v.* Barbour, 64 Pa. St. 120; McIntyre *v.* Ajax Min. Co., 17 Utah 213, 53 Pac. 1124; Choctaw & M. R. Co. *v.* Newton, 140 Fed. 225, 71 C. C. A. 655; Murray *v.* Joseph, 146 Fed. 260; Hunter *v.* Lander, 8 Can. L. J. N. S. 17. And see article "Presumptions," Vol. IX, p. 958.

"If very slender evidence be given against him, then, if he will not produce his books, it brings a great slur upon his cause." Ward *v.* Aprice, 6 Mod. (Eng.) 264.

In Page *v.* Stephens, 23 Mich. 357, a bill filed by receiver of partnership to foreclose a mortgage, the court says: "We are thrown back entirely upon the proof of the accounts. The books are not produced at all; neither the books of original entry nor the ledgers are shown. Every presumption must be made against them when withheld."

In Young *v.* Holmes, 1 Str. (Eng.) 70, an action of ejectment, it being proved that the defendant had the lease in her custody, refusing to produce it, an attorney who had read it was allowed to give evidence of the contents. The court said he would intend it made against the defendant, it being in her power if it was otherwise to show the contrary.

"If it were as defendants contended for, the evidence was accessible to them to show it conclusively. They took the testimony of Jaques Levy under commission, and as he had paid the drafts he had them in his possession, and the best evidence was the drafts themselves. This was not done. His counsel did not ask for them. When effective proofs are within the reach of a party and he fails to produce them, a presumption is raised, that they would if produced, make against him." Johnson *v.* Levy, 109 La. 1036, 34 So. 68.

The Suppression of a Deed Affecting title is "always to be taken most strongly against the persons keeping it back." Attorney General *v.* Dean & Canons of Windsor, 24 Beav. (Eng.) 679, 706.

In Blatch *v.* Archer, Cowp. (Eng.) 63, Mansfield, C. J. said: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted."

In Hampden *v.* Hampden, 3 Bro. P. C. (Eng.) 550, the plaintiff claimed as devisee under the defendant's fa-

The refusal, after notice, to produce books or other documents containing the best evidence warrants the introduction of secondary evidence by the adverse party, and all inferences from such evidence are taken most strongly against the suppressing party.[34]

ther's will. The evidence showed that there was such a will, though no exact account was given of the contents thereof. The court was satisfied that the defendant had suppressed the will and that he could clear himself of the imputation of fraud by producing the same. Therefore, it was decreed that the plaintiff, the party claiming as devisee, should hold and enjoy until the defendant produced the will, the court declaring that the contents of the will thus suppressed ought to be most strongly presumed against defendant and to be taken as stated in the plaintiff's bill. The inference was that the suppressed will, if produced, would have been unfavorable to the defendant.

Failure To Introduce Oral Evidence Raises Presumption Of Negligence. — In Day *v.* Railway Co., 35 La. Ann. 694, where the plaintiff sought to recover for stock killed at night by one of the defendant's trains, — relying, perforce, upon circumstantial evidence only, — it was held that "the failure of a railroad company to introduce the testimony of its employes, who were on the track at the time of the accident raises a presumption of negligence against the company." The defendant knew the particular train which killed the stock, and the names and identity of those of its employes who were on that train and witnessed the occurrence in question; and therefore had it peculiarly within its power to introduce evidence in regard thereto. The plaintiff, on the other hand, was at a great disadvantage; for while the process of the court was at his command, his ability to ascertain the names and whereabouts of the witnesses to the facts was by no means the same as that of the company, which could hardly have been expected to furnish him, in advance of the trial, with any information on the subject. *Compare* Mann *v.* State, 134 Ala. 1, 32 So. 704; Southern R. Co. *v.* Hobbs (Ala.), 43 So. 844.

In Cole *v.* Lake Shore & M. S. R. Co., 81 Mich. 156, 45 N. W. 973, *s. c.* 95 Mich. 77, 54 N. W. 638, the plaintiff absented herself from the trial, although she was the only person able to give direct and positive testimony concerning the effect of a fall she received, which she alleged was the result of the defendant's negligence; and the court held that her unexplained absence authorized an unfavorable inference as to the justice of her cause, since she voluntarily chose to rely on circumstantial in lieu of direct proof that this fall, rather than other natural causes, produced the peculiar affliction from which she suffered.

"Rule Applies in Civil as Well as Criminal Cases." — Western Union Tel. Co. *v.* McClelland (Ind. App.), 78 N. E. 672, where an instruction given by the court, to which appellant excepted, was as follows: "If a party to a suit has evidence peculiarly within his own knowledge and does not produce it, the presumption is that, if it were produced, it would be against them. This rule of law applies alike to civil as well as criminal cases." It was held that this instruction correctly stated an abstract proposition of law.

34. Emerson *v.* Fiske, 6 Me. 200, 19 Am. Dec. 206; Wishart *v.* Downey, 15 Serg. & R. (Pa.) 77 (receipts); Davie *v.* Jones, 68 Me. 393 (account books); Roe *v.* Harvey, 4 Burr. (Eng.) 2484; Rector *v.* Rector, 8 Ill. 105. See Meuvin *v.* Ward, 15 Conn. 377.

"The rule that upon a trial of controverted facts the party having the custody and control of books, documents and papers, shall on notice produce them, and that on refusal to do so, the adverse party may give evidence of their contents, and that all inferences from such secondary evidence shall be taken most strongly against the party refusing to produce them, is a highly reasonable and beneficial rule, tend-

B. Irrelevant, Incompetent or Conditionally Competent Evidence. — This rule has no application to a failure to produce evidence which is not relevant or competent;[35] hence there must be

ing to the discovery of the truth and to the promotion of honesty, frankness and fair dealing, and ought not to be shackled or obstructed by strict constructions or technical niceties." Thayer *v.* Middlesex Mut. F. Ins. Co., 10 Pick. (Mass.) 326.

Non-production of receipts was held as "evidence that these receipts afford inference unfavorable" to that party, in James *v.* Biou, 2 Sim. & St. (Eng.) 600, 606.

In Davis *v.* Alston, 61 Ga. 225, an action where it appeared that a receipt also embodied the terms of a contract in issue, it was insisted that such receipt ought to be produced. The court said: "Ordinarily a receipt is unimportant, and need not be produced, but if it contains the contract it should be. As a general rule, we do not see why counsel should not be allowed to argue on the suspicion caused by the failure of the party and his attorney to produce a receipt under these circumstances. But if the court had ruled that it need not be produced, of course the judge was right to stop counsel arguing on non-production. The error was in not having it produced."

In Wilson *v.* Griswold, 73 Conn. 615, 63 Atl. 659, the plaintiff offered evidence to prove these facts: Shortly prior to February 7, 1905, one George L. Wheeler, who had occupied a farm in West Hartford under a lease from the defendant, became insolvent and abandoned the farm and went to parts unknown. On said 7th of February the defendant, to whom said Wheeler was indebted, brought an action against him, and caused to be attached as the property of said Wheeler certain goods, a part of which goods was a part of the property claimed by the plaintiff in this action, and all of which were in the possession and use of Wheeler upon said farm. After said attachment by the defendant other attachments were placed upon said property by other creditors of said Wheeler. In March, 1905, the plaintiff was by the court of probate duly appointed trustee in insolvency of the estate of said Wheeler, and upon demand by the plaintiff the officers having said goods under attachment delivered the same to the plaintiff, who left them in the custody of the defendant. Upon demand afterward made by the plaintiff, the defendant refused to deliver to him the property, claiming that said described property belonged to him, the defendant, and also refused to show to the plaintiff, when requested so to do, the lease from the defendant to said Wheeler. It was held that the court should have charged the jury upon the question of the effect of the evidence presented by the plaintiff in proof of Wheeler's title to the goods in question; that "if, as the record indicates, the plaintiff offered proper evidence to show that Wheeler was in possession of this personal property, that while in the possession of it he used it and dealt with it as his own, and that the defendant caused it, or a large part of it, to be attached as the property of Wheeler, and there was no evidence of the terms of the lease of the farm to Wheeler, and no claim by the defendant that he was unable to produce the lease or prove its terms, and no explanation was offered by the defendant that he was unable to produce the lease or prove its terms, and no explanation was offered by the defendant of the facts so proved, the court should have charged the jury that proof of these facts was, under the circumstances, such *prima facie* proof of title in Wheeler as entitled the plaintiff to a verdict. The fact that the defendant under the circumstances offered no evidence explaining his attachment of these goods as the property of Wheeler, and neither produced the lease nor offered evidence of it terms, justified the inference that the production of such evidence would not aid his case."

35. Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581. And

some preliminary showing in this regard.[36] Nor does it apply to a claim of privilege at least by a criminal defendant.[37] As to whether it applies to the exclusion of a privileged communication the courts are not agreed.[38]

Where Evidence Is Only Competent by the Consent of the Adverse Party, no unfavorable inference arises from the mere failure to produce it.[39]

Ruling of Trial Court Conclusive. — Where the trial court has ruled certain evidence inadmissible, this is binding for the purposes of the trial and no unfavorable inference can be drawn from the failure to

see article "PRESUMPTIONS," Vol. IX, p. 962.

In Martin Brown Co. *v.* Perrill, 77 Tex. 199, 13 S. W. 975, it appeared that a firm borrowed money belonging to the wife of one of its members, and executed a note to her husband as trustee. The firm failing, the wife sued the firm attaching its goods. Other creditors intervened, seeking to defeat her attachment. There was no evidence of a conspiracy between plaintiff and members of firm against rights of the intervenors. On the trial a member of the firm, called as a witness, was asked by the intervenors to produce the books of the firm. He refused and the court sustained him. The court says: "The controversy in the case is between Mrs. Perrill and the intervenors. The books of Perrill & Fox, though they may have been used as evidence against them upon any issue to which the entries thereon would have been relevant, were not evidence against her. They could not have used the books to defeat her action." And it was further held that, the court having refused to require defendant to produce the books of the firm, it was not error to restrain counsel for intervenors from commenting upon the failure to introduce them in evidence in his argument to the jury.

In Law *v.* Woodruff, 48 Ill. 399, an action for a breach of marriage contract, where the plaintiff read in evidence letters from defendant, and he failed to read those received by him from her, it was held error for the court to instruct the jury that they should draw the strongest inferences from his which they will bear, as the law presumes they contain evidence against him, or he would have produced them or accounted for their non-production; that his letters were his own declarations; so were hers and were inadmissible.

36. "Before any presumption can be made against a party on the ground of refusal to produce, and having the possession of the books and papers, some general evidence of their contents, as applicable to the case, must be given." Cross *v.* Bell, 34 N. H. 82.

37. See articles "PRESUMPTIONS," Vol. IX, p. 963, and "WITNESSES."

38. See articles "PRIVILEGED COMMUNICATIONS," Vol. X, and "PRESUMPTIONS," Vol. IX, p. 963.

In an action on a note, defendant claimed that the payee had sold the note to an innocent purchaser, and repurchased it through the plaintiff, as agent, for the purpose of barring equitable defences, all of which negotiations had been conducted by the payee's attorney. On examination of attorney as witness the court informed counsel that, though the witness would not be compelled to produce the correspondence between himself and the payee, his failure to do so might be commented on to the jury. Battersbee *v.* Calkins, 128 Mich. 569, 87 N. W. 760.

39. "**Where a Party Has in His Possession a Deed** or other instrument necessary to support his title, and he refuses to produce it, and attempts to make out his title by other evidence, such refusal raises a strong presumption that the legitimate evidence would operate against him. But this rule does not apply to such documents, as a party has no right to give in evidence without the consent of his adversary." Merwin *v.* Ward, 15 Conn. 377.

produce the evidence even though the ruling excluding it was error.[40]

C. Personal Property. — Where the character or condition of personal property capable of production is in question, the failure to produce the property for inspection warrants an unfavorable inference against the party responsible for the failure.[41] The early Eng-

Where a Party's Books and Entries Therein cannot be admitted in evidence on his own behalf as primary proof, without the consent of the adverse party, no presumption can arise against him from his failure to produce them. Cartier *v.* Troy Lumb. Co., 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470.

40. In Davis *v.* Alston, 61 Ga. 225, an action upon promissory notes, the court said: "The plea was to the effect that the note sued on was paid by collaterals placed in plaintiff's hands by defendant; and it appeared in the course of the trial that a receipt specifying the terms upon which the collaterals had been furnished, was given to defendant by plaintiff, and it was insisted that such receipt ought to be produced." The court ruled that it need not be. The court said: "We think that where the contract on which the defendant based his defense had been reduced to writing, though in the form of a receipt, it was the best evidence and ought to have been produced. Ordinarily a receipt is unimportant, and need not be produced, but if it contains the contract it should be. This contained the whole of it, except, perhaps, one item under the evidence; it was in the hands of the attorney of the defendant, and no reason is given why it was not at court. It ought to have been there. As a general rule, we do not see why counsel should not be allowed to argue on the suspicion caused by the failure of the party and his attorney to produce a receipt under these circumstances; but if the court had ruled that it need not be produced, of course the judge was right to stop counsel in predicating an argument upon its non-production."

41. See Beecher *v.* Denniston, 13 Gray (Mass.) 354.

In an action for personal injuries received, it appeared that cars loaded with stone were drawn up a track to a crusher by means of a cable attached to the cars by a hook. Plaintiff was working by side of track when the hook broke and a loaded car overtook him and he lost his leg. Defendant refused to produce the hook at the trial. The court says: "It would not have been proper for the court to tell the jury that no inference would arise from a refusal to produce the hook." Momence Stone Co. *v.* Groves, 197 Ill. 88, 64 N. E. 335.

In The Luckenbach, 144 Fed. 980, the libelant sued to recover damages for the death of his intestate, who fell overboard and was drowned while engaged in arranging to cast anchor on the steamship Luckenbach as she was coming into Hampton Roads, near the mouth of the Elizabeth river, preparatory to anchoring at Lamberts Point; the contention being that the accident occurred because of the defective condition of the "trip" line attached to the block used in connection with the lowering of the anchor by the davit to the hawse pipe, as the block and tackle was being drawn back after lowering the anchor. The case turned upon the question of whether or not the respondent furnished to the libelant's intestate, a sound, safe, and suitable rope with which to perform the work required of him. The evidence for the libelant was clear and strong that the attention of the ship's representative had been called prior to the accident, to the defective condition of the rope furnished, that gave way and caused the accident; and that it was unsuitable and unfit for the work. The respondent disputed the correctness of this position, and claimed that the rope was new, and became unfastened, and that there was no defect in it. Upon the whole case, the conclusion reached was that "whatever doubt there is on the question should be solved in favor of the libelant; since the ship failed to

lish rule in actions for the value of chattels was that they would be presumed to be of the highest possible value,[42] but this strict rule is no longer enforced.[43]

produce the rope, which was in her possession, that would have settled the question of its safe or unsafe condition, and whether it broke, or was new and inflexible, and became untied, thus causing the accident."

42. In Armory *v.* Delamirie, 1 Str. (Eng.) 505, plaintiff "a chimney-sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under pretense of weighing it, took out the stones, and calling to the master to let him know it came to three half-pence, the master offered the boy the money, who refused to take it, and insisted to have the thing again, whereupon the apprentice delivered him back the socket without the stones," and on trover brought, "several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth, and the chief justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did."

A case stronger than the celebrated Armory *v.* Delamirie (1 Stra. 505) is Mortimer *v.* Cradock, 7 Jur. 45, 12 L. J. C. P. N. S. 166. Here fifty-six diamonds strung together in one necklace were missed from the premises of the plaintiffs, who were jewelers. The evidence showed that defendant sold to different parties diamonds which had formed part of the necklace, and which were clearly identified. In an action of trover to recover the necklace, the defendants failed to give any satisfactory proof of the mode in which they came into his possession. The jury gave the plaintiff a verdict for the full value of the necklace. The main question was as to whether the jury were warranted in finding the conversion of the whole, upon proof of the possession of a part. Tindal, C. J., said: "As against an evident wrongdoer, a jury may make every possible inference."

43. Berney *v.* Dinsmore, 141 Mass. 42, 5 N. E. 273, 55 Am. Rep. 445, was an action of tort for conversion of a pearl ring. Defendants are common carriers doing business under the name of Adams Express Company. Plaintiff delivered to them a box secured by wrapper, string and seals, which plaintiff said contained a solitaire pearl ring and a diamond ring to be carried to Washington, D. C., to Alfred Berney, the husband, which was done, that the pearl ring was missing. Plaintiff testified as to size and produced two pearls set as eardrops which she said matched the one lost as to size and color. One Foss, an expert in pearls, testified that the two pearls exhibited were worth $175.00 each; that a person owning and wearing pearls, though not an expert, would be able to judge of its general appearance, and would be apt to hit the thing pretty close in trying to match it. The court on appeal said: "We are satisfied that this method of determining the damages is more reasonable, and better supported by modern authority than that laid down in Armory *v.* Delamirie, 1 Str. (Eng.) 505.

SPRINGS.—See Waters and Watercourses.

STAMP ACTS.

I. THE PROVISIONS.

1. Provisions Rendering Unstamped Instruments Inadmissible in Evidence. — Under various federal statutes it has from time to time been provided that unstamped instruments which are subject to a stamp tax, shall not be received in evidence.[1] Enactments of

1. The early stamp acts of the United States provided that certain instruments and writings, not stamped as required by law, should not "be pleaded or given in evidence in any court, or admitted in any court to be available in law or equity," unless or until duly stamped. U. S. Stats. 1797, c. 11, § 13; 1 U. S. Stats. at Large, 531; Repealing Act, see Stats. 1802, c. 19, § 1; U. S. Stats. 1813, c. 53, § 7; 3 U. S. Stats. at Large, 79, continued in force by Stats. 1816, c. 9; Repealing Act, see Stats. 1817, c. 1, § 1.

The next act of this character ap-

like import are to be found in several English statutes.[2]

pears in a proviso to an amendment to the Internal Revenue Act of 1862, Stats. 1862, c. 16 B, § 24, "Provided, however, that no such instrument, document, or paper shall be admitted or used as evidence in any court until the same shall have been duly stamped, nor until the holder thereof shall have proved to the satisfaction of the court that he has paid to the collector or deputy collector of the district within which such court may be held the sum of five dollars, for the use of the United States." The first part of this section will be found quoted in note 4. This section repealed. See Stats. 1863, c. 4, §5. Another statute of the same general nature was enacted in this repealing section. Another statute in the nature of an amendment appears in Stats. 1863, c. 74, § 16.

Stats. 1864, c. 173, § 152, "And be it further enacted, that it shall not be lawful to record any instrument, document, or paper required by law to be stamped, unless a stamp or stamps of the proper amount shall have been affixed: and the record of any such instrument, upon which the proper stamp or stamps aforesaid shall not have been affixed, shall be utterly void, and shall not be used in evidence."

Stats. 1864, c. 173, § 163: "And be it further enacted, that no deed, instrument, document, writing, or paper, required by law to be stamped, which has been heretofore signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded, or admitted, or used as evidence in any court until a legal stamp or stamps, denoting the amount of duty, shall have been affixed thereto, and the date when the same is so used or affixed, with his initials, shall have been placed thereon by the person using or affixing the same; and the person desiring to use or record any such deed, instrument, document, writing, or paper as evidence, his agent or attorney, is authorized in the presence of the court, register, or recorder, respectively, to affix the stamp or stamps thereon required."

Amended Stats. 1866, c. 184, § 9: "And be it further enacted, that section one hundred and fifty-two be amended by striking out all after the enacting clause and inserting in lieu thereof the following: 'That it shall not be lawful to record any instrument, document, or paper required by law to be stamped, unless a stamp or stamps of the proper amount shall have been affixed, and canceled in the manner required by law; and the record of any such instrument, upon which the proper stamp or stamps aforesaid shall not have been affixed and canceled, as aforesaid, shall be utterly void, and shall not be used in evidence.'" Rev. Stats. § § 3421-2. For repealing statute see Stats. 1872, Ch. 315, § 36; Stats. 1898, c. 448, § 7. "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court."

"That hereafter no instrument, paper, or document required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted, or used as evidence in any court until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto, as prescribed by law." Rev. Stats. Title 35, Internal Revenue, c. 11 a, § § 7, 14. For repealing statute see Stats. 1902, April 12, c. 500, § 7, 32 Stats. at Large, p. 96.

2. These statutes will be found

2. Provisions Rendering Unstamped Instruments Invalid. — Other statutes have been passed in the United States, which have not expressly provided for the exclusion of unstamped instruments; but the courts have held that this was to be inferred.[3] The first of these statutes provided that unstamped instruments should be invalid and of no effect.[4] Later statutes declared an unstamped instrument to be invalid and of no effect, if the failure to affix a stamp was with an intent to evade the revenue acts.[5]

consolidated in 1870, Stats. 33 and 34, Vict., c. 97, and in 1891, Stats. 54 and 55, Vict., c. 39, § 14.

3. In Beebe *v.* Hutton, 47 Barb. (N. Y.) 187, the court said: "There is an omission both in the act of 1862 and in that of 1864, (Stats. 1862 and 1864, notes 4 and 5) to declare, in definite and positive terms, all of the consequences which shall ensue from a neglect duly to stamp the instruments referred to; as that they shall not be used by the parties, or read in evidence, unless proper stamps are affixed. Indeed there is no direct and positive injunction that the amount of the duty shall be declared by a stamp, and that such stamp shall be affixed to the instrument. But the amount of the duty is expressly specified, and declared to be payable and collectable; and it is fairly to be inferred that none of the specified instruments are to be read in evidence, or legally enforced against parties, until properly stamped; indeed that the duties are collectable whenever an instrument, subject to stamp duty, comes into existence. I think no practical embarrassment can arise from this construction of the law, in regard to the mode of its enforcement. The instrument when not properly stamped, shall be excluded as evidence until the proper stamps are affixed, either, first because, being liable to stamp duty, it is not legally available to a party until the proper stamp is affixed; or, second, because, appearing to be without a proper stamp, and knowledge of the law being presumed, it may be that an intent to violate the law would be a just presumption, requiring affirmative evidence to repeal it, and to justify the introduction in evidence of the instrument objected to."

4. In 1797, an act was passed to "lay duties on stamped vellum, parchment, and paper." (Stats. at Large, Vol. I, p. 527), by which a stamp duty was laid on a large class of instruments; and the fourth section of the act imposed a penalty for not stamping such instruments, and declared them void.

Stats. 1862, c. 119, § 95: "And be it further enacted, that if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind, or description whatsoever, without the same being duly stamped for denoting the duty hereby imposed thereon, or without having thereupon an adhesive stamp to denote said duty, such person or persons shall incur a penalty of fifty dollars, and such instrument, document, or paper, as aforesaid, shall be deemed invalid and of no effect."

Amended again. Stats. 1863, c. 4, § 5. Amendment of 1862 repealed. Stats. 1863, c. 74, § 16, amendatory in character to § 24, c. 163, Stats. 1862, providing, that no instrument issued prior to the first day of June, 1863, without being duly stamped, shall, for that cause, be deemed invalid and of no effect.

5. Stats. 1864, c. 173, § 158, "And be it further enacted, that any person or persons who shall make, sign, or issue, or who shall cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, or shall accept or pay, or cause to be accepted or paid, any bill of exchange, draft, or order or promissory note, for the payment of money, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the duty chargeable thereon, with intent to evade the provisions of this act, shall, for every such offense, for-

Construction of the Phrase, "With Intent To Evade the Provisions of This Act." — It was held by the weight of authority that the phrase, "with intent to evade the provisions of this act," applied to the clause which rendered unstamped instruments invalid, as well as to the penal clause also set out in the statutes, and so to determine the admissibility of an instrument, it became necessary in several cases to take this clause into consideration.[6] In a few cases it was held, that the element of intent to defraud was essential to vitiate an instrument and thus render it inadmissible in evidence,

feit the sum of two hundred dollars, and such instrument, document, or paper, bill, draft, order, or note shall be deemed invalid and of no effect."

Amended Stats. 1865, c. 78, Stats. 1866, c. 184. The amendments do not substantially change the text of the above statute. For repealing statute see Stats. 1872, c. 315, § 36.

Stats. 1898, c. 448, § 13. To the same effect as statute quoted above. For repealing statute see Stats. 1902, April 12, c. 500, § 7; 32 Stats. at Large, p. 96.

6. *Alabama.* — Whigham *v.* Pickett, 43 Ala. 140; Foster *v.* Holley, 49 Ala. 593.

Colorado. — Trowbridge *v.* Addoms, 23 Colo. 518, 48 Pac. 535.

Maine. — Brown *v.* Thompson, 59 Me. 372.

Maryland. — Black *v.* Woodrow, 39 Md. 194.

Massachusetts. — Tobey *v.* Chipman, 13 Allen 123; Wiley *v.* Robinson, 13 Allen 128; Carpenter *v.* Snelling, 97 Mass. 458; Moore *v.* Quirk, 105 Mass. 49, 7 Am. Rep. 499; Green *v.* Holway, 101 Mass. 243, 3 Am. Rep. 339.

Mississippi. — Morris *v.* McMorris, 44 Miss. 441, 7 Am. Rep. 695.

Missouri. — Boehne *v.* Murphy, 46 Mo. 57, 2 Am. Rep. 485.

New York. — Beebe *v.* Hutton, 47 Barb. 187, *followed* in Howe *v.* Carpenter, 53 Barb. 382; Cagger *v.* Lansing, 57 Barb. 421; Davy *v.* Morgan, 56 Barb. 218; New Haven & N. Co. *v.* Quintard, 37 How. Pr. 29; Burnap *v.* Losey, 1 Lans. 111; Frink *v.* Thompson, 4 Lans. 489; Baker *v.* Baker, 6 Lans. 509; Schermerhorn *v.* Burgess, 55 Barb. 422; Quinn *v.* Lloyd, 1 Sweeny 253.

Pennsylvania. — McGovern *v.* Hoesback, 53 Pa. St. 176.

Texas. — Dailey *v.* Coker, 33 Tex. 815, 7 Am. Rep. 279.

Vermont. — Atkins *v.* Plympton, 44 Vt. 21.

West Virginia. — Weltner *v.* Riggs, 3 W. Va. 445.

Wisconsin. — Grant *v.* Connecticut Mut. L. Ins. Co., 29 Wis. 125; Fenelon *v.* Hogoboon, 31 Wis. 172.

In Mitchell *v.* Home Ins. Co., 32 Iowa 421, Day, C. J., said: "It is next claimed that the court erred in admitting in evidence the assignment from Thompson & Co: to plaintiff, for the reason that the same was insufficiently stamped. In Hugus *v.* Strickler, 19 Iowa 414, it was held, that when the stamp required by the revenue law is omitted, the instrument is invalid, without reference to any intent to defraud the government. The question, however, has recently been considered in the supreme court of the United States, and it has been held by that tribunal that the act of congress which requires promissory notes and other instruments to be stamped, only declares that they shall be deemed invalid and of no effect when the stamp is omitted with intent to defraud the government of the stamp duty. Campbell *v.* Wilcox, supreme court of the United States, December Term, 1870. Western Jurist, vol. 5, page 207. In construing the force and effect of an act of Congress, the supreme court of the United States is the highest and most authoritative tribunal known to our laws, and to it other courts habitually defer. Decisions of that court on the meaning of an act of Congress override those of the supreme court of a state on the same subject. See McGoon *v.* Shiek, supreme court of Illinois, Western Jurist, vol. 5, 163 (166). The decision cited is in con-

flict with the former decisions of this court, and must be regarded as declaring the law applicable to this case." See also Ricord *v.* Jones, 33 Iowa 26.

In Waterbury *v.* McMillan, 46 Miss. 635, the court said: "It appears from the bill of exceptions, that upon the trial the plaintiff offered in evidence the contract, a copy of which has been given, and the same having no United States revenue stamp, the plaintiff at the same time offered to prove the execution of the contract, and that the absence of a revenue stamp upon said contract was accidental and not with a view to defraud the government or evade the law; but the defendants objected to said contract as evidence, and the same was excluded by the court. "The court, in refusing to receive the written contract in evidence, and to permit it to be stamped at the trial, disregarded the uniform decisions of this court, as well as those of the courts of other states of the highest authority. Notes not stamped in accordance with the United States revenue laws may, in the absence of fraud, be stamped at the trial, and then given in evidence."

Rheinstrom *v.* Cone, 26 Wis. 163, 7 Am. Rep. 48. On the trial of this action, in the lower court, the plaintiff offered in evidence what purported to be a promissory note, which was objected to on the ground that it was not sufficiently stamped. The objection was sustained. On appeal Dixon, C. J., after quoting from the act of March 3, 1865, 13 Stats. at Large, p. 481, said: "The language of this clause, or that part of it material to be considered in this case, is the same as that of the 158th section of the internal revenue act, approved June 30, 1864, of which this was an amendment. 13 Statutes at Large, p. 293. The question is, whether the words, 'with intent to evade the provisions of this act,' are connected with and qualify the words declaring the instrument invalid and of no effect, or whether they only qualify those imposing the penalty of fifty dollars. The former is, no doubt, the fair and ordinary grammatical construction; and so we find the courts very generally to have decided, wherever the question has arisen. We hold, therefore, that the note in suit was not invalid unless the requisite stamp was omitted with intent to evade the provisions of the revenue act."

In Perryman *v.* Greenville, 51 Ala. 507, the court said: "All the authorities concur, that when there is no evidence that the omission to stamp was with a design to evade the revenue laws, the instrument is valid, and should be received in evidence." See also Bibb *v.* Bonds, 57 Ala. 509.

In Craig *v.* Dimock, 47 Ill. 308, the court said: "The question may be viewed in this light—is an instrument, unstamped by reason of negligence alone, and with no design to evade the revenue laws, if thereafter stamped, void and of no effect and not to be received in evidence. The original act of 1862, did not contain the qualification in regard to the omission to stamp the paper, that it be, 'with intent to evade the provisions of the act.' This qualification must apply to all sections of the act of 1864, which we have quoted, as they are upon the same subject, and it seems clear to our minds, that the penalty is not only not incurred, unless the neglect to stamp be willful and fraudulent, but the instrument is not designed to be made invalid, unless the omission to stamp is 'with the intent to evade the provisions of the act;' in other words, to defraud the government of the duty. This mortgage, negligently omitted to be stamped, has, in fact, paid double duty to the government, once by the stamp placed on it by Hilborn, on the 21st of June, and again by the collector of the district on the 24th of the same month. Under such circumstances, to declare a forfeiture of the instrument and of the property secured by it, would be monstrous. It is a forced and unnatural construction of the act, to contend, that while the penalty was only incurred for a willful and fraudulent evasion of the duty, the forfeiture of the instrument, a much more serious loss, and falling upon an innocent party, was to apply to a careless and thoughtless omission to fix the proper

even though the instrument under consideration was executed before the statute of 1864 went into effect, which introduced the phrase, "with intent to evade the provisions of this act."[7]

Held Otherwise. — A few cases hold that the words, "with intent to evade the provisions of this act," applied only to the clause of the statute prescribing a penalty for the failure to affix stamps and that, therefore, even an inadvertent omission to affix a stamp rendered

stamp, as well as to an intentional and fraudulent omission. The law reads 'such' instrument, namely: one that has been attempted to be put in circulation by a fraudulent non-compliance with the terms of the act which is 'to be deemed invalid and of no effect,' and not one which, through inadvertence or ignorance, or haste, has been mistakenly, though honestly, issued without a compliance with the law. No court would convict the party failing to affix the stamp on this mortgage under the proof here exhibited, as it is clearly shown, it was omitted with no fraudulent intent; is it not, then, absurd to say the mortagee shall lose the benefit of the mortgage, when no wilful *delictum* is established against either party? Such a judgment would outrage the sense of justice of every man."

In Emery *v.* Hobson, 63 Me. 33, which was an action of assumpsit on an unstamped written instrument, it is said: "To the admission of this instrument in evidence, the defendant seasonably objected upon the ground that it was not stamped as required by the acts of Congress of the United States. The plaintiff testified that, the omission to stamp was with no intent upon his part to defraud the revenue, nor with any other fraudulent intent on his part. The instrument was properly admitted."

Decision Under Act of 1898. — In Cassidy *v.* St. Germain, 22 R. I. 53, 46 Atl. 35, the court said: "The United States internal revenue law of 1898 declares invalid and of no effect instruments from which stamps have been omitted with intent to evade the provisions of the act. There being nothing to show such intent in this case, the assignment in question was not shown to be invalid on that account. An exception was taken on the admissibility of the assignment in evidence because of the omission of a stamp." There was no error in the admission of the assignment as evidence, and the exception is overruled.

7. Mobile & G. R. Co. *v.* Edwards, 46 Ala. 267; Oxford I. Co. *v.* Spradley, 51 Ala. 171.

In Baker *v.* Baker, 6 Lans. (N. Y.) 509, an action was brought on two promissory notes, one of which was not stamped. This note was made on the 30th of March, 1863. The court said: "The only remaining question in the case is whether the revenue stamp upon the note, upon which judgment was recovered, was left off with the intent to evade the act of Congress." . . . "Upon the trial the defendant testified that he told his mother, the payee, that he supposed the note would require a stamp; that she said it need not be stamped; as no one would know it but him, there would be no use of stamping it, and that was the reason it was not stamped. He also told her that there was a fine for not stamping it; and he then assented to the suggestion, that there should be no stamp. As it does not affirmatively and distinctly appear that the defendant's mother was aware of the law, that the omission, although it subjected her to a fine, might affect the validity of the note, and of the consequences arising from the want of a stamp, or that she had any intention of evading the provisions of the act, I am inclined to think that, under the circumstances existing, it does not necessarily follow that there was an actual intention to defraud the government."

the instrument wholly invalid, and consequently inadmissible.[8]

As to the Admissibility of Unstamped Instruments Executed After the Act of 1864 and Before the Act of 1866 Went Into Effect, it will be observed that the only obstacle to the admissibility of such instruments is found in the statute referred to above, in force between those dates, which provided that unstamped instruments were rendered invalid and of no effect if the failure to affix a stamp was with an intent to evade the revenue acts.[9] This was necessarily so, in view of the fact that the statute of 1864, 173 § 163, excluding unstamped instruments from evidence, expressly applied only to instruments executed prior to the passage of that act, and the act of 1866 (14 Stat. at Large p. 142) applied to instruments executed after the adoption of that act.[10]

8. Maynard *v.* Johnson, 2 Nev. 16, 25; Wayman *v.* Torreyson, 4 Nev. 124. It is apparent that this was the construction placed upon the statute in Miller *v.* Morrow, 3 Coldw. (Tenn.) 587, where a deed not bearing the required amount of stamps affixed to it was recorded. It was held that the record could not be used in evidence, the registration being void under the statute. Several Iowa cases might be cited, but they have been expressly overruled by Mitchell *v.* Home Ins. Co., 32 Iowa 421, and since followed in that state. See State *v.* Glucose Sugar Ref. Co., 117 Iowa 524, 91 N. W. 794; Ricord *v.* Jones, 33 Iowa 26; Harvey *v.* Wieland, 115 Iowa 564, 88 N. W. 1077.

9. Howe *v.* Carpenter, 53 Barb. (N. Y.) 382; Gaylor *v.* Hunt, 23 Ohio St. 255; McGovern *v.* Hoesback, 53 Pa. St. 176.

In Tobey *v.* Chipman, 13 Allen (Mass.) 123, the court said: "Section 163 (Stats. 1864, c. 173) provides that 'no instrument heretofore issued' without a proper stamp shall be used or admitted in evidence until a stamp shall be affixed and canceled as required by law, and the party desiring to use such instrument is authorized, in presence of the court, to affix and cancel such stamp. By another clause in the same section it is provided that no instrument made or issued prior to the passage of the act, without being stamped, 'shall for that cause, if the stamp shall be subsequently affixed, be deemed invalid and of no effect.' It will be seen therefore, that if the plaintiff is entitled to treat the note as made at the time it bears date, the Stats. of 1862 being repealed, the note was properly admitted as made valid under § 163 of the Stats. of 1864. If the note is to be regarded as made in August, 1864, as the defendant testified, then there is no evidence in the case which tends to show the note to be void under the Stats. of 1864, c. 173, § 158, as made 'with intent to evade the provisions' of that act. Neither will it avail the defendant that the U. S. Stats. of 1865, c. 78, has provided a different mode of affixing the stamp subsequently to the issue of the note. It has done so only by an amendment of § 158 of the act of 1864. It does not repeal § 163, nor change it, unless by implication. There is no clause in either act expressly forbidding such instrument to be used or admitted in evidence without a stamp, excepting the provisions of § 163 of the act of 1864, recited above; and neither the statute of 1864 nor that of 1865 made the instrument void, except when the omission was 'with intent to evade the provisions' of the act. This was evidently an oversight in those statutes, which has been remedied since in the Stats. of 1866, c. 184."

10. In Rheinstrom *v.* Cone, 26 Wis. 163, 7 Am. Rep. 48, the sourt said: "Another question arises as to the construction of that provision in the act approved July 13, 1866, and found in 14th Stats. at Large, p. 143, which reads as follows: 'That hereafter

II. SCOPE OF STAMP ACTS.

1. As To Admissibility of Instruments in General. — A. Unstamped Instruments Usually Admissible for Collateral Purposes. — Where a document is not the foundation of the action on the trial of which it is offered in evidence, but is introduced for collateral purposes, the stamp acts do not apply and such document is admissible.[11] For example, an instrument may be admissible as

no deed, instrument, document, writing or paper, required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted, or used as evidence in any court, until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto as prescribed by law.' It is argued that under this provision the note in question was not admissible in evidence. The provision is prospective, and not retrospective. The rule with regard to holding statutes prospective, and not retrospective in their operation, unless the latter intent is plainly made to appear, is well known. The language here is entirely consistent with the former construction. The words, 'which has been signed or issued without being duly stamped,' were undoubtedly used prospectively; for, if we give them the contrary effect, we exclude them from the operation of the statute every deed, instrument, etc., signed and issued after the passage of it without being duly stamped, which would be obviously against the intention of Congress."

11. King *v.* Pendleton, 15 East (Eng.) 449; Reed *v.* Deere, 7 Barn. & C. (Eng.) 261, 2 Car. & P. 624; Hawkins *v.* Warre, 3 Barn & C. (Eng.) 690; Reg. *v.* Stewart, 1 Cox C. C. (Eng.) 174.

In Reis *v.* Hellman, 25 Ohio St. 180, the court said: "The parties to this action resided at Cincinnati, and had been partners to a cotton speculation in 1863. In the court below it was claimed by Hellman that Reis had violated the partnership agreement, by entering into a new partnership relation, without his knowledge or consent, with Aaron Hirsch, at Memphis, Tennessee, to trade in cotton, to whom he intrusted the partnership funds, and who absconded and thereby the funds were lost. To recover back his share of the funds thus lost, Hellman brought this action against Reis." The plaintiff then offered in evidence the paper setting out the partnership agreement before mentioned. The court, continuing, said: "The defendant objected to its admission, on the ground that it was not stamped as required by the laws of Congress in force at its date. The objection was overruled and the paper admitted, to which Reis excepted. The ruling of the court, in admitting the paper in evidence, is assigned for error, and is the point to which the argument of counsel on both sides is principally directed. This paper is not the foundation of the action on the trial of which it was offered in evidence. The testimony shows that it had been voluntarily handed to Hellman by Reis, as an explanation, to the extent that it went, of the circumstances under which he had transferred the partnership funds to Hirsch. Hellman was, in no respect whatever, bound or affected by the instrument in any legal or equitable aspect. In his hands, it was simply a written admission by Reis, of the facts that it contained. These facts were pertinent to the issue, and therefore properly allowed to go to the jury as the *admissions* of Reis."

In Israel *v.* Redding, 40 Ill. 362, it was held, that even though a note is not admissible in evidence *per se* because it was unstamped, yet where a suit is brought upon the original consideration for which the note was given, the note may be admitted to explain the testimony of a witness as to the date of settlement between the parties and the amount found due.

State *v.* Young, 47 N. H. 402. This was a prosecution for forgery. The

court said: "The provision that an unstamped instrument shall not be used as evidence cannot be understood as excluding its use for all possible purposes. If this section were construed in the literal sense contended for by the respondent, the unstamped instrument could not be used in evidence for the government in a prosecution to recover the penalty for omitting to affix a stamp. The statute undoubtedly precludes the use of an unstamped instrument as evidence upon which to found a recovery, or enforcement of the debt or liability which the instrument purports to create or secure, but it can not be regarded as prohibiting its use for collateral purposes."

There is much conflict among the English decisions on this subject, due, in a measure, to the fact that the wording of the statutes has been frequently changed. Generally speaking, the English statutes have been much more stringent than the American by way of excluding unstamped instruments from evidence. The Act of 1891 referred to in Note 2 provided, that unstamped instruments, required under the statute to be stamped, should not be received in evidence in any court, except in criminal proceedings or be available for any purpose. The English statute under which most of the cases cited were decided, however, did not go quite so far as the one just mentioned, but provided that an unstamped instrument, required by law to be stamped, should not be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity.

In Matheson *v.* Ross, 2 H. L. Cas. (Eng.) 286, 13 Jur. 307, the Lord Chancellor said: "The question in this case was, whether a document which was stated to be a settled account as to larger sums, leaving a balance of £68, 9s. 4d., and which purported also to be a receipt for that balance, was admissible in evidence in a case where it was not tendered for the purpose of proving the payment of the £68, but for that of proving the state of the account at the time, as set out in the paper which showed such a balance to exist. . . . Where the document purports to be, on the face of it, a receipt, and indeed is so, but also purports to be something else, as in cases where debtor and creditor accounts appear set out between the parties, making a certain balance due, and the paper contains a receipt for the supposed balance, whether that balance was paid in money or only settled in account, if the object of the parties is, not to prove the fact of that particular balance having been paid, but merely to show that the parties to the account acknowledged the state of the account to have been such and such at a particular moment, the paper may be produced for this purpose, whether the money has been paid or not. . . . In this case we have a debtor and creditor account, which must of course have been taken, and which is sworn indeed to have been taken, from the books of the parties. If one of these parties had signed a book instead of signing a paper, acknowledging the state of the accounts, can any one doubt that that would have been evidence against the party signing it? The items of payment occurring in an account do not require a stamp; no one contends that they do. The acknowledgment of the state of the account as it stands in the book is the same as it appears on the face of the paper which is signed, and this document thus made out, and recognized, and acted upon and signed by the parties, is good evidence of the state of the account, and is tendered in evidence for that purpose, and for that purpose only, and for that purpose only is admissible."

Forsyth *v.* Jervis, 1 Stark. (Eng.) 437. "This was an action to recover the value of a gun, sold by the plaintiffs to the defendant. The plaintiffs were gunmakers, and the defendant wishing to have a gun made by them, it was agreed that they should make one for the sum of forty-five guineas, but that they should take a gun of the defendant's, made by Manton, in part payment, at the estimated price of thirty guineas. The Manton gun had accordingly been delivered to the plaintiffs, but had been afterwards borrowed by the defendant; and the former, in order to show that the Manton gun had been merely lent by

an admission, and, therefore, need not be stamped,[12] or to show illegality in a transaction, of which the document formed a part.[13]

Where an instrument is tendered in evidence to prove fraud, it

them to the defendant, proposed to read a letter written to them by the defendant, requesting them to lend him the Manton gun for a few days for the purpose of snipe shooting. The letter also contained instructions as to the making of the new gun. The Attorney-General and Richardson, for the defendant objected, that since the letter had been written before the completion of the new gun, and since the new gun had been in fact made according to the directions contained in the letter, it could not be read in evidence without an agreement stamp, Lord Ellenborough. It cannot be read as evidence of the contract, but the plaintiffs may read that part of it which is necessary in order to show the reason of taking away the Manton gun. It is certainly evidence for that purpose, although it may not be so for any other, and if they had had no other evidence to prove the contract they could not have used it."

Unstamped Deed of Assignment Admissible for a Collateral Purpose. It was held in Squire *v.* Gouldwell, 38 L. J. Bk. (Eng.) 13, L. R. 4 Ch. 47, 19 L. T. 272, that an unstamped deed of assignment of a debtor's property for the benefit of his creditors might be used to show an act of bankruptcy, though not admissible as a deed, in view of the existence of a statute precluding from evidence unstamped deeds, tendered for the purpose of being acted upon as such.

Instrument Not Admissible Even for a Collateral Purpose. — It was held in Hearne *v.* James, 2 Bro. C. C. 309, 29 Eng. Reprint 169, that an unstamped instrument was not admissible, even for collateral purpose. See also, Rex *v.* Smyth, 5 Car. & P. (Eng.) 201, 1 Moody & R. 155.

In Evans *v.* Prothero, 20 L. J. Ch. N. S. (Eng.) 448, 15 Jur. 113, it was held, that a receipt for the purchase price of property, lacking a stamp was inadmissible as a receipt, and further that it was inadmissible to prove an agreement to purchase property. *Reversed* in 1 DeG. M. & G. (Eng.) 572, where Lord Chancellor, Lord St. Leonards' held the receipt to be admissible to prove an agreement to purchase property.

12. Matheson *v.* Ross, 2 H. L. Cas. (Eng.) 286, 13 Jur. 307.

13. In Coppock *v.* Bower, 8 L. J. Ex. (Eng.) 9, the Chief Justice said: "The principal question in the case is, whether the Stamp Acts were intended to apply, where the instrument is used, not as evidence of an obligatory contract between the parties, but to show that the transaction between them is of such a nature as to be void in law; and there are many authorities that for such a purpose it may be received in evidence without a stamp. It is admitted by the learned counsel to have been decided that a party who sets up an usurious contract, may prove it by means of an unstamped instrument, but he says that this is an exception grounded upon the peculiar terms of the statutes against usury. I do not accede to that. The object of both the statutes and common law would be defeated, if a contract void in itself could not be impeached, because the written evidence of it is unstamped, and therefore inadmissible. If that were so, a party entering into such agreement might avoid the consequences of its illegality, by taking care that no stamp should be affixed to it. I think, therefore, that in all cases where the question is, whether the agreement is void at common law or by statute, and the party introduces it, not to set it up and establish it, but to destroy it altogether, there is no objection to its admissibility. As in the case of a conspiracy, or an agreement to commit a robbery, on no principle could it be contended, that a contract between the parties for the commission of such an offence would be inadmissible without a stamp. I think that the Stamp Acts are made for a different purpose; they are made to prevent persons availing themselves of the obligatory force of an agreement, unless that agreement is stamped."

is considered as used for a collateral purpose, and is admissible unstamped.[14]

Unstamped Instrument Admissible in Criminal Proceedings. — It has been almost universally held that where an unstamped instrument constitutes the subject-matter of a crime, as in forgery, to be admissible in evidence it is immaterial that the instrument is unstamped.[15]

B. TIME OF AFFIXING STAMP. — It is held, that the stamp may be placed upon the instrument at any time before it is offered in evidence.[16] And in at least one case it was held, that an unstamped

14. Holmes *v.* Sixsmith, 21 L. J. Ex. (Eng.) 312; Reg. *v.* Gompertz, 16 L. J. Q. B. (Eng.) 121.

15. Reg. *v.* Reculist, 2 East P. C. (Eng.) 956; Reg. *v.* Morton, 2 East P. C. (Eng.) 955; Thomas *v.* State, 40 Tex. Crim. 562, 51 S. W. 242, 46 L. R. A. 454.

In King *v.* Hawkeswood, 2 East P. C. (Eng.) 2, T. R. 606, which was an indictment for forging a bill of exchange, all the judges held that the bill of exchange need not be stamped, on objection being taken that it could not be received in evidence unless it were first stamped, although the Act 23, Geo. III, c. 49 imposing a duty on such instrument, expressly says, that no bill of exchange shall be received in evidence, unless it be first duly stamped.

In People *v.* Frank, 28 Cal. 507, which was a prosecution for forgery, it was held that the forged instrument, though unstamped, was admissible as evidence against the defendant, and that although a compulsory payment by course of law cannot be enforced for the want of a proper stamp, yet that the stamp acts do not make any change in the law of forgery and that an unstamped instrument may be used as evidence for a collateral purpose.

16. Dorris *v.* Grace, 24 Ark. 326; Bumpass *v.* Taggart, 26 Ark. 398, 7 Am. Rep. 623; Corrie *v.* Billin, 23 La. Ann. 250; Foster *v.* Holley, 49 Ala. 593.

"The act of 1898 provides only that no instrument or paper shall be admitted until a stamp shall be affixed thereto, and its very language indicates that the stamp may be affixed at any time before the paper is offered." Harvey *v.* Wieland, 115 Iowa 564, 88 N. W. 1077.

In Foster *v.* Holley, 49 Ala. 593, the court said: "The note on which this suit is founded is not void for want of a proper stamp, but it is required to be stamped. It was not stamped at the time it was signed and issued; but it was stamped by affixing thereto legal stamps denoting the amount of the tax required in such a case, before it was offered in evidence. This, under section 163 of the Act of July 13, 1866, was sufficient. This act of Congress makes such instrument invalid, if not duly stamped when signed, or issued, or negotiated, or paid, 'with intent to evade' the provisions of the Revenue Laws of the United States, and imposes a fine for a disregard of its provision; but it does not take from the instrument its competency as evidence, if it is stamped in good faith before it is offered as evidence."

Instrument To Be Offered in Evidence, May Be Stamped at the Trial. In Harvey *v.* Wieland, 115 Iowa 564, 88 N. W. 1077, the court said: "There is a written lease of the premises in this case, but a revenue stamp was not placed thereon and canceled when it was executed, as required by the act of Congress of June 13, 1898 (30 Stat. 461). Objection was made to the lease when offered in evidence for this reason. The proper stamp was then placed thereon and canceled by the assignee thereof, whereupon the lease was admitted in evidence." The court held, that an instrument might thus be stamped at the trial, because the language of the act in reference to the admissibility of instruments indicated that the instrument might be stamped at any time before offered. See also, First Nat. Bank *v.* Stone (Iowa), 91 N. W. 1076.

instrument might be stamped after verdict but before judgment.[17]

C. Who May Affix Stamp. — Where the statute specifies a particular party by whom the instrument must be stamped, such statute must be strictly complied with before it can be admitted in evidence.[18]

17. In Jauvrin *v.* Fogg, 49 N. H. 340, it was held that an unstamped instrument might be stamped after the verdict but before judgment rendered. It was said that the stamping of the instrument after verdict would raise no new question of fact, nor would it call for any rehearing or refinding of any fact already settled by the jury. It seems the instrument deficiently stamped had been ruled in and allowed to go to the jury, subject to exception so far as the question of stamps was concerned. It was held that the competency of this evidence was a question for the court, and could have no bearing whatever upon the finding of the jury. This evidence of competency was allowed to be supplied by the addition of stamps, without setting aside the verdict.

18. Corrie *v.* Billin, 23 La. Ann. 250. Succession of Bernard 23 La. Ann. 402.

In Whigham *v.* Pickett, 43 Ala. 140, the court said: "This was a suit in the circuit court of Barbour county, and founded upon a promissory note, made in the year 1866, and not stamped at the time it was made. It was offered to be read to the jury in that condition, and was rejected on the objection of the appellants, defendants in the court below. The plaintiff then, against the objection of the defendants, obtained the leave of the court to stamp the note in the presence of the court, and after it was so stamped, again offered to read the note to the jury. The defendants objected, their objection was overruled, the note was read to the jury, and the defendants excepted. These objections were reversed by a bill of exceptions signed and sealed, at the instance of the defendants. By the act of the Congress of the United States, entitled 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes,' approved June 30th, 1864, it is provided in the 163d section of said act that notes unstamped, may be stamped in open court, and thus stamped, may be used as evidence on the trial, provided such notes were made before the passage of said act; but it does not provide for notes made after the passage of said act, if left unstamped at the time of their execution; such notes can only be stamped under the 158th section of said act, which provides that they may be stamped by the collector of internal revenue of the district where they were made." To get the full force of section 158 of the statute as referred to in this case, it is necessary to refer to the amendment thereto as found on page 481 Stats. 1865, since the court, doubtless, had more particular reference to this amendment.

In Mobile & G. R. R. Co. *v.* Edwards, 46 Ala. 267, it was held, that a written agreement, the foundation of an action for damages for a breach of it, made in 1863, and unstamped, was not admissible in evidence. Nor could a party having an interest in it affix the stamp since the 1st day of January, 1867. This should have been done by the collector of the revenue of the proper district. See Stats. 1866, c. 184, p. 143, l. 4.

In Wayman *v.* Torreyson, 4 Nev. 124, the court said: "In the spring of 1865 there was an amendment, which, we think, disposes of this controverted point. Although the language of this amendment is not as clear as it might be, we think it was the intention to make all instruments not properly stamped invalid in the first place, but to allow any person interested to give validity to them by having the proper stamps affixed by a revenue officer, and a note made by such officer of the fact of his having stamped the instrument. It certainly was not the intention of the law to allow the parties themselves to make an invalid instrument valid by their affixing the stamp."

But the supreme court of Arkansas adopted a more liberal rule.[19]

D. Cancellation of Stamps. — To be admissible in evidence, it is not necessary that the stamps on an instrument should be canceled. Although the statute provides a penalty for a failure to have the stamps on an instrument properly canceled, nothing is said as to the admissibility in evidence of such an instrument.[20]

2. For What Courts a Rule of Evidence Is Prescribed. — Upon the question whether under the federal statutes providing for the admissibility of instruments, stamps were necessary prerequisites to the reception of instruments as evidence in state courts, it is held by the weight of authority that the statutes do not expressly purport to make a rule for any but the federal courts;[21] and further,

19. In Dorris *v.* Grace, 24 Ark. 326, the court, in construing a similar statute to the one mentioned in note 17, viz.: Stats. 1866, c. 184, p. 143, l. 4, said: "And now with regard to the proviso of the act of 1865 (Stats. 1865, c. 78, p. 481, l. 51). We think, upon a fair construction of it, that so far from repealing the then existing laws, it was intended to extend to the party who had, from inadvertence, omitted to stamp a deed, or other instrument, additional facilities for complying with the law, by providing an additional tribunal before whom the instrument might be made valid, by affixing to it the proper stamp. Prior to the passage of the act of 1865, the party whose instrument was unstamped, could put the necessary stamp upon it, in the presence of the court, the register, or the recorder; by the *proviso* of the act of 1865, the party may also appear before the collector of the revenue of the proper district, and have a stamp affixed either with or without penal terms as may seem right to the collector."

20. Patterson *v.* Gile, 1 Colo. 200. "The mere failure to cancel the revenue stamp upon an instrument, required by law to be stamped, as it does not defraud the government, does not invalidate such instrument as evidence." Jacobs *v.* Cunningham, 32 Tex. 774.

21. *Colorado.* — Trowbridge *v.* Addoms, 23 Colo. 518, 48 Pac. 535.

Connecticut. — Rockwell *v.* Hunt, 40 Conn. 328.

Massachusetts. — Green *v.* Holway, 101 Mass. 243, 3 Am. Rep. 339; Moore *v.* Quirk, 105 Mass. 49, 7 Am. Rep. 499; Lynch *v.* Morse, 97 Mass. 458.

Mississippi. — Davis *v.* Richardson, 45 Miss. 499, 7 Am. Rep. 732.

Nevada. — Knox *v.* Rossi, 25 Nev. 96, 83 Am. St. Rep. 566, 48 L. R. A. 305.

New York. — Moore *v.* Moore, 47 N. Y. 467, 7 Am. Rep. 466.

North Carolina. — Haight *v.* Grist, 64 N. C. 739.

Ohio. — Stewart *v.* Hopkins, 30 Ohio St. 502.

Texas. — Dailey *v.* Coker, 33 Tex. 815, 7 Am. Rep. 279.

Virginia. — Hale *v.* Wilkinson, 21 Gratt. 75; Talley *v.* Robinson, 22 Gratt. 888.

West Virginia. — Weltner *v.* Riggs, 3 W. Va. 445.

In Carpenter *v.* Snelling, 97 Mass. 452, Chief Justice Bigelow, delivering the opinion said: "But there is another view of this part of the case which leads us to the conclusion that the want of a stamp did not render the written documents offered by the defendant inadmissible. The provision of the statute of the United States already cited does not in terms apply to the courts of the several states. The language of the enactment is only that no instruments or documents not duly stamped shall 'be admitted or used as evidence in any court' until the requisite stamps shall be affixed. This provision can have full operation and effect if construed as intended to apply to those courts only which have been established under the constitution of the United States and by acts of Congress, over which the federal legis-

lature can legitimately exercise control, and to which they can properly prescribe rules regulating the course of justice and the mode of administering justice. We are not disposed to give a broader interpretation of the statute."

The objection that an indenture could not be read in evidence, for want of a stamp, as prescribed by the United States internal revenue act, was held to be untenable. That act, so far as it prescribes a rule of evidence, is operative only in the federal courts, and has no application to the courts of a state. People *v.* Gates, 43 N. Y. 40.

In Griffin *v.* Ranney, 35 Conn. 239, the court, in referring to the Stats. of 1866, c. 184, as quoted in the foregoing notes, said: "So far, then, as the act in question prescribes rules regulating the competency of evidence in courts of justice, it must be presumed that it was intended to apply only to those courts over which Congress had acknowledged and constitutional power, especially as the language of the act is fairly susceptible of that interpretation."

In Duffy *v.* Hobson, 40 Cal. 240, 6 Am. Rep. 617, the court said: "On the trial in the District Court, the plaintiff offered in evidence a written contract, by the terms of which he claimed that the defendant had sold and agreed to convey to him certain lots in the city of Sacramento. This contract was not stamped with United States revenue stamps, denoting the payment of tax to the federal government; and upon that ground the defendant objected to its introduction as evidence, and has renewed the objection here. We think the objection not well taken. The act of Congress cited in its support provides that such a contract as the one now under consideration, unless stamped in the manner therein required, shall not be 'recorded or admitted or used as evidence in any court,' etc. The act, however, does not in terms extend to proceedings had under the laws of the state, and does not, on its face, import any interference with those laws. Upon the settled rules of interpretation, it must be construed to embrace only proceedings had, and acts done, in public offices and courts established under the Constitution of the United States, and by authority of acts of Congress framed in pursuance thereof."

"Since the act then, does not in terms, prescribe such rules to state courts (referring to the act of 1864) we must conclude that the provisions of the act were only intended to apply to the federal tribunals." Craig *v.* Dimock, 47 Ill. 308.

In Clemens *v.* Conrad, 19 Mich. 170, the court said: "We think it a just and reasonable interpretation of the law of Congress, that the courts, which are precluded from receiving unstamped instruments in evidence, are only the federal courts, which are created under the general government, and for which Congress has general power to prescribe rules of evidence. In other words, we think that a rule of evidence laid down in general terms, is to be understood as applicable to those courts only for which the Legislature prescribing it has general power to make rules, and not to other courts not expressly named over which it has no such general power, and with whose proceedings it could interfere, if at all, only in exceptional cases."

Fact That Stamp Was Lacking Does Not Affect Admissibility. — In Sammons *v.* Halloway, 21 Mich. 162, 4 Am. Rep. 466, Halloway in the circuit court, sued Sammons upon a promissory note. Sammons defended on the ground that it was not sufficiently stamped under the United States revenue laws, and consequently was neither admissible in evidence, nor could a recovery be had upon it if admitted. The court ruled otherwise. *Held,* in the supreme court that such an instrument is receivable in evidence and if receivable, it legitimately follows that it was because it had, when received, a bearing upon the issue, which would not be the case if utterly void, thereby affirming the decision of the circuit court.

that Congress has no constitutional power to prescribe rules of evidence in the state courts.[22]

22. *Arkansas.* — Bumpass *v.* Taggart, 26 Ark. 398, 7 Am. Rep. 623.

California. — Bennett *v.* Morris, 37 Pac. 929.

Illinois. — United States Ex. Co. *v.* Haines, 48 Ill. 248; Wilson *v.* McKenna, 52 Ill. 43; Latham *v.* Smith, 45 Ill. 29; Bunker *v.* Green, 48 Ill. 243; Hanford *v.* Obrecht, 49 Ill. 146; Bowen *v.* Byrne, 55 Ill. 467.

Indiana. — Wallace *v.* Cravens, 34 Ind. 534.

Iowa. — Phillips *v.* Hazen, 109 N. W. 1096; State *v.* Glucose Sugar Refining Co., 117 Iowa 524, 91 N. W. 794; Harvey *v.* Wieland, 115 Iowa 564, 88 N. W. 1077.

Kentucky. — Hunter *v.* Cobb, 1 Bush. 239.

Louisiana. — Pargoud *v.* Richardson, 30 La. Ann. 1286; Holt *v.* Hart Bd. of Liquidators, 33 La. Ann. 673.

Massachusetts. — Carpenter *v.* Snelling, 97 Mass. 452.

Mississippi. — Davis *v.* Richardson, 45 Miss. 499, 7 Am. Rep. 732.

Missouri. — King *v.* Phoenix Ins. Co., 195 Mo. 290, 92 S. W. 892; More *v.* Clymer, 12 Mo. App. 11.

Tennessee. — Sporrer *v.* Eifler, 1 Heisk. 633.

Texas. — Schultz *v.* Herndon, 32 Tex. 390.

Virginia. — Hale *v.* Wilkinson, 21 Gratt. 75

In Carpenter *v.* Snelling, 97 Mass. 452, Chief Justice Bigelow, after using the language as quoted in note 20, continued: "We entertain grave doubts whether it is within the constitutional authority of Congress to enact rules regulating the competency of evidence on the trial of cases in the courts of the several states, which shall be obligatory upon them. We are not aware that the existence of such a power has ever been judicially sanctioned. There are numerous and weighty arguments against its existence."

In Craig *v.* Dimock, 47 Ill. 308, the court said: "Can Congress declare what instruments shall be, or shall not be evidence in a state court in a case therein pending, growing entirely out of a domestic transaction, and which the laws of the state declare shall be evidence? We do not think it requires any argument to prove, that Congress, under the constitution, has no such power, and under the pretense of levying taxes, cannot so direct that power as to enter into our state courts and take from them the powers with which the state laws have vested them. It is eloquently remarked by Chancellor Kent that, 'The vast field of the law of property, the very extensive head of equity jurisdiction, and the principal rights and duties which flow from our civil and domestic relations, fall within the control, and we might almost say the exclusive cognizance of the state governments. We look essentially to the state courts for protection to all these momentous interests.' 1 Kent's Com., 483. To hold that Congress, in the exercise of the taxing power, can enter into these courts, and prescribe what shall be evidence therein, is so revolting to all our notions of federal and state power as to compel us to refuse to yield any acquiescence in such a doctrine. By admitting it, the power and sovereignty of the States over legitimate subjects of State power and sovereignty, are at once annihilated. We will not deny the power of Congress to require such instruments to be stamped, nor the consequent power to punish by fine an intentional evasion of the law. By conceding this, we yield all that is necessary to enable the government to carry into full effect the taxing power, and at the same time sustain and uphold in its utmost limit the exclusive power of the state to say what shall be evidence in her own courts of justice, in a domestic transaction, wholly unconnected in every respect with the general government. It is not questioned that the Congress has power to prescribe rules of evidence, and specify what shall be instruments of evidence in the federal courts, but it is powerless to pre-

Contrary to Latter Doctrine Held. — The contrary to the doctrines just stated has been held,[23] although it is difficult to reconcile the

scribe them for the state tribunals, as we think."

In Duffy *v.* Hobson, 40 Cal. 240, 6 Am. Rep. 617, the court, after using the language as quoted in note 20, continued: "But, if the act of Congress under consideration had in terms embraced the state courts within its provisions, and had enacted that upon a trial had in one of those courts, a contract or other instrument of evidence, otherwise admissible, should not be admitted in evidence except upon compliance with its provisions, it would be our duty to declare its provisions in that respect null and void. Congress has no constitutional authority to legislate concerning the rules of evidence administered in the courts of this state."

"The courts of this state will admit a promissory note in evidence, if not stamped at all. The United States must collect her revenue without assuming to regulate the law of evidence in the different states." Jacobs *v.* Spofford, 34 Tex. 152.

Decisions Under Act of 1898. — In People *v.* Fromme, 54 N. Y. Supp. 833, the court said: "It is true that by sections 14 and 15 of the revenue law of 1898 it is provided 'that hereafter no instrument, paper, or document required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted, or used as evidence in any court until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto, as prescribed by law;' and that 'the record, registry, or transfer of any such instruments upon which the proper stamp or stamps aforesaid shall not have been affixed and canceled as aforesaid shall not be used in evidence.' It is apparent that these regulations apply only to records pursuant to United States statutes, and to evidence admissible in courts of the United States. As has already been decided by the court of appeals of this state in regard to provisions of the previous revenue law, the Congress of the United States cannot control the rules of evidence in courts of this state." See also Gregory *v.* Hitchcock Pub. Co., 63 N. Y. Supp. 975.

23. Plessinger *v.* Depuy, 25 Ind. 419; Edeck *v.* Ranuer, 2 Johns. (N. Y.) 423; Mobile & G. R. R. Co. *v.* Edwards, 46 Ala. 267; Muscatine *v.* Sterneman, 30 Iowa 526, 6 Am. Rep. 685; Hoops *v.* Atkins, 41 Ga. 109; Corrie *v.* Billin, 23 La. Ann. 250; Harvey *v.* Wieland, 115 Iowa 564, 88 N. W. 1077.

The supreme court of New York, in an early case (Edeck *v.* Ranuer, 2 Johns. (N. Y.) 423), *held,* that under the act of Congress 1797, c. 11, § 13, a note not stamped as required by that act could not be given in evidence. But this case was submitted without argument, and was decided before the effects of acts of Congress upon the jurisdiction and practice of the state courts had been the subject of thorough judicial examination. To the same effect see Howe *v.* Carpenter, 53 Barb. 382; Davy *v.* Morgan, 56 Barb. 218. The later decisions in New York are in accordance with the weight of authority as stated above. See New York cases cited under notes 20 and 21.

In Chartiers & R. Turnp. Co. *v.* McNamara, 72 Pa. St. 278, 13 Am. Rep. 673, the court, referring to the amendment of the 163rd section of the Act of 1864, contained in the 9th section of the Act of 1866 (p. 149) said: "It seems to us this interpretation of the act of Congress was not well considered, and is contrary to the language and design of the act. The words are 'or used in evidence in *any* court.' Language could not be broader and no exception or qualification is to be found in the act, while the design of Congress makes the meaning perfectly clear. . . . Snelling, *supra,* that Congress cannot pass laws regulating the competency of evidence in the trial of

reasoning upon which these decisions are based with the authorities which declare that a stamp act has no extra territorial effect,[24] or

causes in the several states, the purpose of this provision is incorrectly stated. The abstract proposition is true, but it is misapplied. The purpose of Congress was not to make rules of evidence, but to stamp the instrument of evidence, with a disqualification, which will prevent its use as evidence until the delinquent has paid his tax. If, then, in legislating upon proper subjects of federal power, so as to enforce the execution of the rightful power of Congress, it be said Congress cannot affix to the subject of the exercise of its clearly granted powers, qualities which must be recognized by state courts, I deny the assertion, and oppose to it the second section of the sixth article of the Federal Constitution, which makes such a law the supreme law of the land, binding on the judges in every state. If in legislating on a proper subject of federal power, Congress declare a forfeiture, for instance of smuggled goods, with intent to evade payment of the duties on them, the state courts are clearly bound to recognize the title acquired by forfeiture in whosesoever hands the goods may be. When the subject of a law is fairly within a federal power given in the Constitution, Congress has express power to pass all laws necessary and proper to carry the given power into execution. This is the test of the competency of this evidence. The instrument being a proper subject of the federal power to tax, it is just as clearly competent for Congress to affix a disability to the unstamped paper that will compel the payment of the tax. The propriety, as well as the necessity, of the disability in this case, is so obvious it does not admit of a serious question. . . . It is said, in some of the cited cases, that the exercise of this power enters within the domain of the state, and interferes with its internal affairs. Granted; but what logical consequence follows? Certainly not that the act of Congress is unconstitutional and invalid. From the very nature of the power to lay taxes and excises, its exercise comes right into the heart of the state, and visits its citizens in all their most private relations, estates and property. It is not more searching in its operation than the power to establish a uniform system of bankruptcy, to return fugitives from justice and labor, to call out the militia, to regulate the value of money and fix a standard of weights and measures, and to establish post-offices and post-roads; yet all these, admittedly, enter within the state, and touch most intimately its business and people. Like the taxing power, these are among the express powers of Congress and their rightful exercise within the states is, therefore undoubted. . . . It seems to us very clear that the provision of the Act of 1866, which excludes an unstamped writing or paper from record, and as evidence in any court until the tax be paid, is not a rule for the mere regulation of evidence, but is a disqualification attached to the document, making it incompetent to fulfil its purpose as an instrument of evidence, until the stamp duty is paid; that it is a provision to enforce the payment of the tax of the most necessary kind, and binding on all courts; and that it falls clearly within the express powers of Congress to levy taxes, duties, imposts and excises, and to make all laws necessary and proper to carry the taxing power into execution." Thompson, C. J., dissented, upon the ground that the legislation alters a rule of evidence belonging to the state tribunals. Sharswood, J., dissented.

24. Dicey, on the Conflict of Laws, p. 716, 717. Wharton on the Conflict of Laws, 3d Ed., § 585: "It is sufficient here to say generally that when the object of a stamp act is merely processual, and when the terms of the act go merely to exclude unstamped documents from being received in proof, this restriction will have no extra-territorial effect."

with the doctrine laid down by the courts that, under the constitution which provides that, "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people," Congress has no power to prescribe rules of evidence in a state court, never having been granted such power through the federal constitution.[25]

Question Undecided. — In a few cases the courts have expressly refused to decide this question.[26]

Construction of the Provision Which Prescribes a Rule of Evidence. In other cases, no distinction seems to be drawn between provisions in the statutes rendering unstamped instruments invalid and of no effect, and those expressly excluding unstamped instruments from evidence. But perhaps these decisions are based on a construction of the latter provision to this effect, viz.: that it applies only to instruments which were invalid under the former provision.[27]

"As a question, therefore, of the admissibility of evidence, it seems well settled, that the fiscal laws of another state prescribing the stamping of papers, are not to prevail in our courts." Faut *v.* Miller, 17 Gratt. (Va.) 47.

In the case of James *v.* Catherwood, 3 Dowl. & Ry. 190, 16 E. C. L. 165, receipts required to be stamped by the law of the country where they were executed were received as *evidence* without such stamps. It was said by Abbott, J.: "In the time of Lord Hardwicke, it became a maxim that the courts of this country will not take notice of the revenue laws of a foreign state. There is no reciprocity between nations in this respect. Foreign states do not take any notice of our stamp laws, and why should we be so courteous to them, when they do not give effect to ours?" He adds: "It would be productive of prodigious inconvenience, if in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was in order to ascertain whether the instrument was or was not valid."

25. U. S. Const. Amendments, Art. X. See note 21 and cases cited.

26. Grant *v.* Connecticut Mut. L. Ins. Co., 29 Wis. 125; Morris *v.* McMorris, 44 Miss. 441, 7 Am. Rep. 695.

In Timp *v.* Dockham, 29 Wis. 440, the court said: "Several of the cases cited in the opinions in the two cases in this court above mentioned, hold that the revenue laws of congress, in so far as they prescribe a rule of evidence, have no force in a state court; that their operation in that respect is confined to the federal courts. We do not decide whether this is, or is not, the correct doctrine. The question is an open one in this state, to be determined when a proper case shall arise."

In Perryman *v.* Greenville, 51 Ala. 507, the court said: "There are some well-considered authorities, holding that the provisions of the internal revenue laws, prohibiting the admission in evidence of instruments not stamped, are inapplicable to the courts of the several states, but of force only in the courts established by the constitution and laws of the United States, over which the federal legislature can legitimately exercise control, and to which they can probably prescribe rules of evidence. If the operation of this law is not thus limited, grave doubts of its constitutionality are entertained, and several courts of high authority have declared that it does not conform to the constitution. On these questions we shall pronounce no opinion, until it is necessary to the decision of a cause before us."

27. Schermerhorn *v.* Burgess, 55 Barb. (N. Y.) 422; Atkins *v.* Plympton, 44 Vt. 21; Ricord *v.* Jones, 33 Iowa 26; Mitchell *v.* Home Ins. Co., 32 Iowa 421.

In Black *v.* Woodrow, 39 Md. 194,

III. PRESUMPTIONS AND BURDEN OF PROOF.

1. Presumption That an Unstamped Instrument Does not Require a Stamp. — There is a presumption that an unstamped instrument does not require a stamp, and it is incumbent upon the party objecting to the admission in evidence of an instrument for want of a stamp to show that such instrument is one which is required to be stamped.[28]

2. Presumption That a Stamped Instrument Is Properly Stamped. When an instrument is offered in evidence, bearing the proper stamp, the presumption is that it was stamped at the proper time, and by the proper authority.[29] The burden of rebutting it is on the party against whom it is offered.[30]

3. Where Secondary Evidence of Contents of Instrument Is Introduced. — If secondary evidence is tendered to prove the contents of a lost instrument, the court will presume that the original was duly stamped unless some evidence to the contrary is given.[31] It follows that the burden of proof is upon the party objecting to secondary evidence of the contents of a lost document on the ground of the want of a stamp, to show that it was not stamped.[32]

And Where a Party Withholds an Agreement Under Which He Is chargeable, the presumption is that such instrument was properly stamped.[33]

the court said: "The next question is that presented by the appellant's first exception, and his first and second prayers, embraced in his third exception; and that question is, whether the agreement sued on was void, and therefore inadmissible in evidence, because of the want of a proper United States revenue stamp thereon at the time of its execution? This question has arisen and been decided by several of the highest state courts of the Union, and it has also been before the supreme court of the United States, though not in the form here presented. In the several state courts in which the question has arisen, with one or two exceptions, the decisions have been, upon one ground or another, against holding the instruments void for the want of the stamp. In some of the courts it has been held that the act of congress requiring the stamp, does not apply to the state courts, but to the United States courts alone; while in others of high authority it has been held not to be within the constitutional power of congress to declare a contract between citizens of a state void for the mere omission of a revenue stamp. But in, perhaps, the greater number of cases where the question has arisen, it has been held that instruments, though not duly stamped, are not therefore void, or inadmissible in evidence, if the omission to stamp was without intent to evade the provisions of the act of congress."

28. Chanter *v.* Dickinson, 5 Man. & G. (Eng.) 253; Huddleston *v.* Briscoe, 11 Ves. (Eng.) 583; Phillips *v.* Morrison, 13. L. J. R. N. S. Ex. (Eng.) 212.

29. Union, A. & S. A. *v.* Neill, 31 Iowa 95; Iowa & M. R. Co. *v.* Perkins, 28 Iowa 281; Myers *v.* McGraw, 5 W. Va. 30.

30. Union, A. & S. A. *v.* Neill, 31 Iowa 95.

31. Thayer *v.* Barney, 12 Minn. 406; Marine Invest. Co. *v.* Haviside, 42 L. J. Ch. (Eng.) 173, L. R. 5 H. L. 624.

32. Closmadene *v.* Carrel, 25 L. J. C. P. (Eng.) 216, 18 C. B. 36; Marine Invest. Co. *v.* Haviside, 42 L. J. Ch. (Eng.) 173, L. R. 5 H. L. 624.

33. Crisp *v.* Anderson, 1 Stark. (Eng.) 283, 18 R. R. 744.

4. When Burden of Proof Shifts. — Although in the instances mentioned above, if an instrument is lost or retained by the opposite party after notice to produce, it will be presumed that the original was duly stamped; yet where there is evidence that an instrument unstamped at its execution continued for a considerable time after its execution unstamped, the onus is shifted, and unless evidence is produced to lead to the belief that it was stamped at some time subsequently, the conclusion is that it remained unstamped.[34]

5. Where a Certified Copy Is Offered. — Where a certified copy of an instrument is offered in evidence, and objected to on the ground that the original was not stamped, the court will presume, in the absence of proof to the contrary, that the recorder did his duty and that the law was complied with by the recorder in the matter of affixing the required stamps to the original before registering it.[35]

6. As To Intent. — It has been held that the burden of proof of intent is on the party objecting to the want of a stamp[36] under a statute containing the clause "with intent to evade the provisions of this act." Although this is the rule according to the weight of authority, yet there were two decisions handed down by the supreme

34. In Marine Invest. Co. *v.* Haviside, 42 L. J. Ch. (Eng.) 173, L. R. 5 H. L. 624, the court said: "I take it to be clear that if an instrument is lost, and if there should be no evidence given respecting it on one side or the other, the presumption which ought always to be made, and which always would be made by the court, would be that the instrument was properly stamped. . . . But unless it be the law that after a party has proved that an instrument was unstamped on its execution, and continued unstamped for a considerable time after its execution — unless, I say, it be the law that in such a case the mere possibility that it might have been stamped at a subsequent period is, without more, sufficient, it seems to me your lordships should hold that in this case there is evidence demonstrating that, down to the time to which I have referred, the instrument was unstamped; and there being no evidence to lead us to believe that it was stamped at any time subsequently, the just conclusion is, and must be, that it continued to be, as it was at the beginning, an instrument unstamped."

35. Grand *v.* Cox, 24 La. Ann. 462.

36. *Alabama.* — Whigham *v.* Pickett, 43 Ala. 140; Perryman *v.* Greenville, 51 Ala. 507; Bibb *v.* Bonds, 57 Ala. 509.

Colorado. — Trowbridge *v.* Addoms, 23 Colo. 518, 48 Pac. 535.

Maine. — Sawyer *v.* Parker, 57 Me. 39.

Maryland. — Black *v.* Woodrow, 39 Md. 194.

New York. — Cagger *v.* Lansing, 57 Barb. 421; Burnap *v.* Losey, 1 Lans. 111; Quinn *v.* Lloyd, 1 Sweeney 253.

Rhode Island. — Cassidy *v.* St. Germain, 22 R. I. 53, 46 Atl. 35.

"According to the cases which uphold the doctrine that the stamp must be omitted with the intent to evade the act, the burden of proof is upon the party objecting." Baker *v.* Baker, 6 Lans. (N. Y.) 509.

In Grant *v.* Connecticut Mut. L. Ins. Co., 29 Wis. 125, the court said: "Although the assignment, when offered in evidence, was duly stamped, yet there was some slight evidence in favor of the presumption that the stamp was not on the assignment when the plaintiff received it from the insured. And, this being so, the further question arises upon which party was the burden of showing that, even if the stamp was omitted in the first instance, this was not done with a fraudulent intent.

court of New York in the early history of that state which distinctly held the contrary to the above doctrine.[37]

In Rheinstrom *v.* Cone, the holder of the note voluntarily assumed the burden of showing that the omission to stamp was not with the intent to evade the revenue law; yet the Chief Justice remarks in that case, that probably no presumption of fraudulent intent would arise from the mere omission to affix the proper stamp. And, upon a fuller consideration of the question, we are satisfied that this is a correct view of the law upon the subject. And this conclusion is founded upon the considerations suggested by the Chief Justice in the case last mentioned, viz.: that this enactment is highly penal in its character and must therefore receive a strict construction, and that the presumption of guilt will not be made from a state of facts entirely consistent with innocence. It is obvious that a party may omit to stamp an instrument from mere mistake or inadvertence, and therefore the fact that the instrument is not stamped when issued, is not a circumstance from which fraud or an inference unfavorable to a party can be justly assumed."

Ricord *v.* Jones, 33 Iowa 26. "Action upon a promissory note against Jones, the maker, and Farley, the payee and guarantor. Among other defenses Farley sets up that the guaranty upon which the action against him is based, 'was by the plaintiff received in fraud of the revenue laws of the United States, not having been stamped with an internal revenue stamp and cannot be enforced.' Upon the introduction of the note and guaranty in evidence, defendant, Farley, objected to the latter instrument on the ground that it was not stamped. The objection was overruled and the guaranty received in evidence. No evidence was offered by defendant showing that the stamp was omitted with a fraudulent intent, nor did plaintiff introduce any proof explaining its omission. Judgment was rendered against defendants." Farley appeals. The court said: "The burden rests upon the defendant to support his plea. He must show that the stamp was omitted with intent to evade the provisions of the act of congress providing for stamp duties upon written instruments. There is no escape from this conclusion. If the fraudulent omission of the stamp is available as a defense only when it is pleaded or is properly shown in evidence, it is like all other defenses, and the burden of establishing it rests upon the defendant pleading it. Rev. Stats., § 2942. In the case before us, while this defense, want of a stamp, was sufficiently pleaded, it was not sustained by evidence."

Equivalent of Intent To Evade. In Byinton *v.* Oaks, 32 Iowa 488, the question was as to the admissibility of certain unstamped deeds. The record tended to show that the stamps were purposely omitted, the parties denying the constitutionality of the stamp law. It was held that the intended omission to stamp was equivalent to an "intent to evade," etc., within the meaning of the statute.

Mere Failure To Stamp Not Evidence of Fraud. — It is said in Morris *v.* McMorris, 44 Miss. 441, 7 Am. Rep. 695, that the mere failure to affix a stamp to an instrument required by law to be stamped, is not evidence of an intention to evade the revenue law. See also Waterbury *v.* McMillan, 46 Miss. 635; New Haven & N. Co. *v.* Quintard, 37 How. Pr. (N. Y.) 29.

37. Davy *v.* Morgan, 56 Barb. (N. Y.) 218; Beebe *v.* Hutton, 47 Barb. (N. Y.) 187. In these cases it was held that there was a presumption that a party offering an unstamped instrument in evidence, asserting its validity, intended to violate the law, and that the burden of proof was upon such party to show the contrary.

STATE'S EVIDENCE.—See Accomplices.