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EDGAR W. CAMP AND JOHN F. CROWE

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TABLE OF TITLES.

ASSENT.

By James M. Kerr.

I. INTRODUCTORY.

1. Differentiation. — "Assent" is primarily an act of the understanding,[1] and is distinguishable from *consent,* which is distinctly an act of the will and denotes a willingness that something about to be done, shall be done;[2] also from *acceptance,* which is a compliance with or receipt of, something offered; from *acquiescence,* which is an act or state of quiet submission to decision, or the prevalence of an opinion, because it is near enough to one's wishes, or not worth resisting, or impossible to resist, but not because it is entirely *acceptable;* from *approval,* which is an expression of satisfaction with some act done for the benefit of another besides the party approving it; from *concurrence,* which is the running of the mind in the same channel, or agreement in opinion or decision; and from *ratification,* which is an act rendering valid something done without authority previously given.

2. Scope of Treatment. — The word "assent" properly used, indicates an after, and not a simultaneous or concurrent, action of the mind. In this title the treatment will be confined, so far as possible in the confused state of the cases, to that phase of the word.

3. Kinds of Assent. — A. GENERALLY. — Assent is of two kinds

1. **In Practice,** the term "assent" is often used in the sense of acceptance and approval. An offer is said to be assented to, though correctly speaking, an offer and acceptance complete an agreement; but a request, assent, and concurrence of the party requesting, complete a contract as fully as an offer and an acceptance. See Tindale C. J., in Jackson *v.* Galloway, 5 Bing. N. C. 71, 35 Eng. C. L. 34.

2. **"Assent Is an Act of the Mind,** that intelligent power in a man by which he conceives, reasons and judges, and of which it is a primary, invariable and most familiar law that it cannot act with reference to external objects, until, through the medium of the senses, it is impressed with, or knows their existence. Hence, without such impression or knowledge, there can be no assent—no *actus contra actum;* and to presume it in opposition to the fact, is to presume that which is impossible." Welch *v.* Sackett, 12 Wis. 243-254.

or classes, to wit: 1. Active assent,[3] and 2. Passive assent. Proof of either active or passive assent has the same effect in consummating a binding contract; but they differ in modes of proof.

B. PASSIVE ASSENT. — "Silence gives consent." Silence is said to raise a presumption of assent, when under such circumstances as to import acquiescence.[4]

4. Communication Necessary. — Proof that a person determined in his own mind to assent, is not sufficient; the proof must show that he made that determination known to the other party by appropriate act, or that he put the manifestation thereof in the proper way of reaching the other party.[5]

II. HOW PROVED.

1. In General. — Assent, whether active or passive, is to be established in the same manner as any other question of fact; by proof of facts showing assent, or by proving acts and circumstances from which the law infers assent.

2. Burden of Proof. — The burden of proof is on him who puts forth the claim of assent.[6] If such claimant is the assenting party,

3. The Supreme Court of the United States, in the case of Mutual Life Ins. Co. *v.* Young, 23 Wall. 85, in discussing the validity of an insurance contract under the state of facts shown, use the word "assent" in the sense of "acceptance." The court say: "The obligation in such a case is correlative. If there is none on one side there is none on the other. The requisite *assent* must be the work of the parties themselves. The law cannot supply it for them." See Darnley *v.* Proprietor, etc., London, C. & D Ry., 2 L. R. H. L. 43.

4. Presumption Of Assent.—Evidence that the plaintiff delivered his money to the defendant upon conditions stated by him at the time, and that the defendant received it in silence, is *prima facie* evidence of assent to the conditions. Hall *v.* Inhabitants of Holden, 116 Mass. 172.

Where the Petitioner Was Ignorant of the Contents of the Instrument prepared by the defendant, and was known to be so by the defendant's agent, and he expressly declared, in good faith, that he set his mark to it as a receipt for the damage to his land alone, and the defendant's agent thereupon accepted the instrument in silence, or with words importing an assent to that declaration, such conduct would be a representation that the instrument was what it was signed for. O'Donnel *v.* Town of Clinton, 145 Mass. 461, 463, 14 N. E. 747; *citing* Hall *v.* Town of Holden, 116 Mass. 172.

Where the Last of Several Letters, which passed between the parties was from defendant to plaintiff giving a statement of the defendant's understanding of the plaintiff's proposition as to quality and price, and an acceptance thereof; held, that letter, in the absence of any reply thereto, bound the latter, if he furnished, to do so on terms of that letter. Excelsior Coal Min. Co. *v.* Virginia Iron and Coal Co., 23 Ky. L. Rep. 1834; 66 S. W. 373.

5. Rule as to Acceptance applies equally in "assent." "He willed, but did not say" (*voluit sed non dixit*), is insufficient. See White *v.* Corlies, 46 N. Y. 467; Howard *v.* Daly, 61 N. Y. 362.

6. Assent to Sale of Land Made by Agent is shown by a ratification of his act; but it must be on the identical terms. Crane *v.* Partland, 9 Mich. 493.

Assent to Modification of a contract must be shown by him who claims it. See Jackson *v.* Galloway, 5 Bing. N. C. 71, 35 Eng. C. L.

ordinarily he must prove some overt act bringing home to the other party knowledge of his assent.[7]

3. Direct Proof. — A. By Words Spoken. — Proof of assent of a party may be made by showing his affirmative declarations regarding the subject matter, the same as any other question of fact may be proved by direct parol testimony.

B. By Writings. — Proof of assent may be made by pertinent writings, such as letters, which clearly show assent, or from which assent may fairly be inferred.[8]

C. By Overt Acts. — Assent may be established by proving overt acts showing that the party has claimed or received benefit under or acted upon the matter in question without dissent.[9]

4. Indirect Proof. — A. When Silence Raises Presumption of Assent. — Proof of assent may be made by showing that the party was silent when from the circumstances the law imposes upon him the duty to speak and either deny or admit liability;[10] as where the owner stands by and sees improvements made upon his lands, of which he must reap the benefits, under the evident expectation of payment therefor;[11] or a vendor remains silent while seeing the purchaser take possession of land agreed by parol to be sold, and make improvements on it for the purposes for which it was purchased;[12] or an owner standing by and seeing others buying his land

34 (in this case the act was a "consent," though all four of the judges in terms denominate it an "assent.)"

See Darnley *v.* Proprietors, etc., London, C. & D. Ry., 2 L. R. H. L. 43.

7. See *post* note 21.

8. *See* the article "Documentary Evidence."

9. Such as accepting or claiming benefits under an assignment for the benefit of creditors, filing or proving claim, and the like, shows assent to the assignment. *See* the article "Assignment for Benefit of Creditors."

10. Day *v.* Caton, 119 Mass. 513; *citing* Peterson *v.* American Linen Co., 119 Mass. 400; Lamb *v.* Bruce, 4 M. & S. 275.

11. **Party Wall** erected by the plaintiff partly on his estate and partly on the defendant's, the jury may, in the absence of an express agreement on the defendant's part, infer a promise on the part of the defendent to pay his proportion of the cost thereof, where he had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection. Day *v.* Caton, 119 Mass. 513.

Mere Expectation on the part of the plaintiff, however reasonable, that the defendant would pay, is not sufficient of itself to raise a presumption of the assent of the defendant; in the absence of proof of circumstances making it the duty of the defendant to speak. See Day *v.* Caton, 119 Mass. 513; Taft *v.* Dickinson, 6 Allen (Mass.) 553; Bailey *v.* Rutjes, 86 N. C. 517.

Standing by and Seeing Work Done, or materials furnished for work, upon premises belonging to the party, of which he must get the benefit, under circumstances clearly denoting an expectation of payment therefor, implies assent, and the jury may infer a promise to pay the reasonable value of such work or material. See Campbell *v.* Day, 90 Ill. 363; Tascott *v.* Grace, 12 Ill. App 639; Day *v.* Caton, 119 Mass. 513; Wells *v.* Bainster, 4 Mass. 513; Bailey *v.* Rutjes, 86 N. C. 517.

12. Nibert *v.* Baghurst, 47 N. J. Eq. 201, 20 Atl. 252. See Young *v.* Young, 45 N. J. Eq. 27, 16 Atl. 921; Green *v.* Richards, 23 N. J. Eq. 32; Eyre *v.* Eyre, 19 N. J. Eq. 102; Brewer *v.* Wilson, 17 N. J. Eq. 180.

Estoppel in such a case of the ven-

and making improvements,[13] attesting a deed to his own land, knowing its contents,[14] or permits *quasi publice*,[15] or public improvements ;[16]—on adequate proof of any of these a party will be estopped to thereafter claim title or deny the validity of the act.[17]

B. When Silence Does Not Raise Presumption of Assent. Proof that the party was silent will not raise a presumption of assent in those cases where he is not charged with a duty to speak,[18] as where the means of knowledge is equally open to both parties.[19] Silence of guarantor where the terms of the guaranty not strictly pursued;[20] of a landlord where premises rented for a lawful pur-

dor to allege the purchaser is not in possession under the terms of the contract. See Neal *v.* Neal, 69 Ind. 419; Moore *v.* Higbee, 45 Ind 487; Freeman *v.* Freeman, 43 N. Y. 34; Lord *v.* Underdunck, 1 Sandf. Ch. N. Y.) 46; Harris *v.* Knickerbacker, 5 Wend. (N. Y.) 638; Howe *v.* Rogers, 32 Tex. 219; Millard *v.* Harvey, 34 Beav. 237.

13. See Guffey *v.* O'Reiley, 88 Mo. 418, 57 Am. Rep. 424; Miller *v.* Miller, 60 Pa. St. 16, 100 Am. Dec. 538, Workman *v.* Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654; Marines *v.* Goblet, 31 S. C. 153, 9 S. E. 803, 17 Am. St. Rep. 22

14. Georgia Pac. R. Co. *v.* Strickland, 80 Ga. 776, 6 S. E. 27, 12 Am. St. Rep. 282.

Otherwise where the party has no knowledge of his rights. Tongue *v.* Nutwell, 17 Md. 212, 79 Am. Dec. 649.

15. Goodin *v.* Cincinnati & Whitewater Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95. See Anderson *v.* Hubbel, 93 Ind. 570, 47 Am. Rep. 394; Platt *v.* Pennsylvania R. Co., 43 Ohio St. 241; Teegarden *v.* Davis, 36 Ohio St. 601; Carpenter *v.* Cincinnati & Whitewater Canal Co., 35 Ohio St. 307; Cincinnati & Indiana R. Co. *v.* Zinn, 18 Ohio St. 418.

16. *Georgia.*—Griffin *v.* Augusta & K. R Co., 70 Ga., 164; Wood *v.* Macon & B. R. Co, 68 Ga. 539.

Indiana.—City of Logansport *v.* Uhl, 99 Ind. 531, 50 Am. Rep. 109.

Kansas.—Thomas *v.* Woodman, 23 Kan. 151, 33 Am. Rep. 156.

Nebraska.—Nosser *v.* Seeley, 10 Neb. 460, 6 N. W. 755.

New Jersey.—New York & L. B. R. Co. *v.* Dennis, 40 N. J. Law 340; State *ex rel* Youngster *v.* Patterson, 40 N. J. Law 244; State *v.* Patterson, 36 N. J. Law, 159; State *ex rel* Vannata *v.* Morristown, 34 N. J. Law, 445; Traphagan *v.* Jersey City, 29 N. J. Eq. 206; Attorney General *v.* Delaware & B. B. R. Co., 27 N. J. Eq. 1; Attorney General *ex rel* Easton *v.* New York, L. B. R. Co., 24 N. J. Eq. 48.

Wisconsin.—Hanlin *v.* Chicago & N. W. R. Co., 61 Wis. 515, 21 N. W. 623.

17. *See* the article "Estoppel in Pais.

18. Thus proof that a party stood by and permitted riparian owners on the opposite side of a stream to make improvements for the purpose of taking out water not to be returned to the stream until after it passed his lands, does not raise such an implied consent as to estop such party from afterwards assenting his riparian rights. New York Rubber Co. *v.* Rothery, 107 N. Y. 310, 14 N. E. 269, 1 Am. St. Rep. 822.

Proof that a party stood by and acquiesced in a city's devising and carrying out a system of sewers will not be such an assent thereto as will estop him to enjoin a nuisance produced by the operation of such sewer system. Chapman *v.* City of Rochester, 110 N. Y. 273, 18 N. E. 88, 6 Am. St. Rep. 366.

Specific Opportunity and Apparent Duty to Speak are necessary to create an estoppel by assent. Viele *v.* Judson, 82 N. Y. 32.

19. Blodgett *v.* Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307.

20. Taylor *v.* McClung, 2 Houst. (Del.) 24; Barnes *v.* Barrow, 61 N. Y. 39; Hunt *v.* Smith, 17 Wend. (N. Y.) 179; Taylor *v.* Wetmore, 10

pose and used by the tenant for disorderly purposes;[21] of a remainderman seeing improvements made upon the life estate by the tenant;[22] or of a partner with knowledge of the diversion and misappropriation of partnership funds by a co-partner, in violation of the partnership rights;[23]—does not raise a presumption of assent.

5. By Presumption of Law. — A. THE PROOF. — In the absence of dissent the law presumes assent where a party is beneficially interested. Thus, the assent of all parties who take by conveyance[24]

Ohio 490; Bleeker *v.* Hyde, 3 McLean 279; Russell *v.* Perkins, 1 Mason 368; Cremer *v.* Higginson, 1 Mason 323.

See the article "GUARANTY."

21. Assent to Use of House for Purposes of Prostitution is not to be presumed from mere silence, the original letting being lawful, under a statute making it an offense to permit a house to be used for that purpose; there must be proof; some affirmative act or declaration must be shown from which assent may be inferred, a mere silent assent in his own mind, uncommunicated and not acted on, will not sustain a conviction. State *v.* Abrahams, 6 Iowa 117, 71 Am. Dec. 399.

Assent to Unlawful Sale of Intoxicating Liquors is not to be presumed under a statute of similar provisions, the original letting being lawful; there must be proof of some overt act or declaration. State *v.* Ballingall, 42 Iowa 87.

Lien on Building under Liquor Law.—In the case of Loan *v.* Etzel, 62 Iowa 429, 17 N. W. 611, it is held that in order to establish a lien, under the statute, upon a building in which intoxicating liquors are unlawfully sold, the consent of the owner need not be shown by any positive or affirmative act, but may be inferred from circumstances and knowledge of the illegal sales under such conditions as properly call for a protest, and a failure to make any objection, *distinguishing* the cases cited in two preceding paragraphs. See Putney *v.* O'Brien, 53 Iowa 117, 4 N. W. 891.

22. Remainderman's Failure to Give Notice of his claim under such conditions does not raise such presumption of assent thereto as will estop him to claim such improvements upon the termination of the life estate. Stewart *v.* Matheny, 66 Miss. 21, 5 So. 387, 14 Am. St. Rep. 538.

23. *See* the article "PARTNERSHIP."

"**Remaining Silent** or failing to dissent from the contract, made by his partner outside of their business, would be a circumstance to prove assent, but would not be conclusive as fixing his liability as a matter of law." It is a circumstance proper to go to the jury. Ferguson *v.* Shepherd, 1 Sneed (Tenn.) 254.

24. *England.*—Townson *v.* Tickell, 3 Barn. & A. 31, 5 Eng. C. L. 219; Garnons *v.* Knight, 5 Barn. & C. 671; Stirling *v.* Vaughn, 11 East 619; Thompson *v.* Leach, 2 Vent. 198.

United States.—Tompkins *v.* Wheeler, 16 Pet. 106; Halsey *v.* Fairbanks & Whitney, 4 Mason 206; Hurst *v.* McNeil, 1 Wash. 70.

Connecticut.—Merrills *v.* Swift, 18 Conn. 257, Watson *v.* Watson, 13 Conn. 83; Camp *v.* Camp, 5 Conn. 291; Treadwell *v.* Buckley, 4 Day 395.

Massachusetts.—Harrison *v.* Trustees Phillips Academy, 12 Mass. 456; Maynard *v.* Maynard, 10 Mass. 456; Hatch *v.* Hatch, 9 Mass. 307.

New York.—Jackson *ex dem.* Pintard *v.* Bodle, 20 Johns 184; Church *v.* Gilam, 15 Wend. 656.

Pennsylvania.—McDonald *v.* Cooper, 14 Serg. & R. 296.

Rhode Island.—Stone *v.* King, 7 R. I. 368, 84 Am. Dec. 577.

Vermont.—Brackett *v.* Wait, 6 Vt. 411.

Virginia.—Skipwith *v.* Cunningham, 8 Leigh 271.

See articles "CONVEYANCE," "DEEDS."

No Grant Without Assent.—"No one can thrust a grant upon another without an assent." Wayne Co. *v.* Miller, 31 Mich. 477, *citing* Jackson

or devise,[25] where there is no charge or obligation imposed, is presumed, by intendment of law, until the contrary appears.[26]

In Legacies, as in the devise of real property, assent by the legatee is presumed until the contrary is shown; and while consent of the personal representative of the decedent to the taking is necessary before the title of the legatee can be complete and perfect,[27] his

ex dem. Pintard *v.* Bodle, 20 Johns. (N. Y.) 184; Hurst *v.* McNeil, 1 Wash. C. C. 70; Thompson *v.* Leach, 2 Vent. 198.

See Peavey *v.* Tilton, 18 N. H. 151: "a man can not have an estate put into him in spite of his teeth."

"Assent of the Grantee to deed, clearly for his benefit, may be presumed; yet if a consideration is to be paid, the assent must be proved, or nothing passes by the deed." Hurst *v.* McNeil, 1 Wash. C. C. 70. See Stockard *v.* Stockard, 7 Hump. (Tenn.) 303, 46 Am. Dec. 79; Tompkins *v.* Wheeler, 16 Pet. 106; Townson *v.* Tickell, 3 Barn. & A. 31, 5 Eng. C. L. 219.

Presumption of Assent does not arise until knowledge of conveyance is brought home to the grantee. Thus, proof that a debtor executed a chattle mortgage to a portion of his creditors, made without their knowledge, and delivered it to a third person, who was not the agent of the mortgagees, to be filed for record as required by law, does not raise a presumption of assent thereto, and if before the mortgagees had notice of or assented to or accepted the mortgage, another creditor attached, this would defeat the assignment by mortgage. Welch *v.* Sackett, 12 Wis. 243. See McCutchin *v.* Platt, 22 Wis. 561; Miller *v.* Blinebury, 21 Wis. 676.

"An Assent Is Not Only a Circumstance, but it is essential to all conveyances, for they are contracts *actus contra actum,* which necessarily suppose the assent of the parties." Thompson *v.* Leach, 2 Vent. 198; Jackson *ex dem.* Ten Eyck *v.* Richards, 6 Cow (N. Y.) 617.

Assent of Beneficiary Will Be Presumed Only Where Provisions of Indenture Are Beneficial to his interest; in other cases affirmative acts must be shown to establish assent. Hempstead *v.* Johnson, 18 Ark. 123, 44 Am. Dec. 458, *citing* Mauldin *v.* Armistead, 14 Ala. 702; Lockhart *v.* Wyatt, 10 Ala. 231; 44 Am. Dec. 481; Smith *v.* Leavitts, 10 Ala. 92; Graham *v.* Lockhart, 8 Ala. 9; Elmes *v.* Sutherland, 7 Ala. 262.

Assent of Beneficiaries Presumed although they know nothing about it when made. Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806.

25. Disclaimer of Freehold Estate by Devisee, to be of any effect in concluding him, must be shown to have been in writing. Byron *v.* Hyre, 1 Rob. (Va.) 102, 39 Am. Dec. 246.

Renunciation of a Life Estate in Expectancy, before entitled to possession, may be shown to have been by parol. Defreese *v.* Lake, 109 Mich. 415, 67 N. W. 505, 63 Am. St. Rep. 584.

26. This is on the principle of law crystalized in the old Latin maxim *stabit praesumptio donec probetur in contrarium,*—"a presumption will stand good until the contrary is proved." See Davenport *v.* Mason, 15 Mass. 85; Wilt *v.* Franklin, 1 Binn. (Pa.) 502; Skipwith *v.* Cunningham, 8 Leigh (Va.) 271.

27. *England.*—Richardson *v.* Gifford, 1 Ad. & E. 52, 28 Eng. C. L. 35; Flanders *v.* Clark, 3 Atk. 509; Abney *v.* Miller, 2 Atk. 223; Northey *v.* Northey, 2 Atk. 77.

United States.—McClanahan *v.* Davis, 8 How. 170; Schley *v.* Collis, 47 Fed. 250.

Georgia.—Jordan *v.* Thornton, 7 Ga. 517.

Indiana.—Crist *v.* Crist, 1 Ind. 570, 50 Am. Dec. 481.

Kentucky—Pirtle *v.* Cowan, 4 Dana 302.

North Carolina.—Lewis *v.* Smith, 4 Dev. & B. 326; Rea *v.* Rhodes, 5 Ired. Eq. 148; Hearne *v.* Kevan, 2 Ired. Eq. 34.

Tennessee.—Finch *v.* Rogers, 11 Humph. 559.

assent to the taking will be presumed where the legatee is in the possession of a special legacy under a will.[28]

B. The Rebuttal. — All presumption by intendment of law may be rebutted by all sorts of evidence.[29] Thus, parol proof of any relevant fact,[30] as misunderstanding of terms,[31] or error,[32] ignorance of fact,[33] but not of law,[34] will rebut presumption of assent.

III. APPLICATION OF THE RULES.

1. In Contracts. — A. Generally. — Proof of silence where the law imposes a duty to speak may raise a contractural relation, but such circumstances are exceptional in character and of rare occurrence; the duty to speak must be shown to have been neglected to the injury of the other party. Assent by silence is always in the nature of an estoppel *in pias.*[35]

B. In Contract of Bailment. — Proof of notice that a bailee accepts goods only on the condition of a general lien for work and for unpaid balances, raises a presumption that the bailor assented

Virginia.—Fraser *v.* Bevill, 11 Gratt. 9; Lynch *v.* Thomas, 3 Leigh 682.

28. Assent to the First Taker is an assent to all subsequent takers of the legacy, limited over by way of remainder or executory devise. Adie *v.* Carnwell, 3 T. B. Mon. (Ky.) 276; Ingraham *v.* Terry, 2 Hawks (N. C.) 122; Saunden *v.* Gatlin, 1 Dev. & B. Eq. (N. C.) 86.

Exception to the Rule exists in those cases where the executor has a trust to perform after the death of the first taker, in which case the presumption of assent does not arise. Anonymous, 2 Hawk. (N. C.) 161; James *v.* Masters, 3 Murph. (N. C.) 110; Allen *v.* Watson, 1 Murph. (N. C.) 189.

29. "It Seems Reasonable that presumption, which is not founded on the basis of certainty, should yield in evidence, which is the test of truth." Davenport *v.* Mason, 15 Mass. 85.

30. Parol testimony is admissible to repel all kinds of presumptions. Davenport *v.* Mason, 15 Mass. 85; Goodtitle *v.* Otway, 2 H. Bl. 516.

31. See Rowland *v.* New York N. H. & H. R. Co., 61 Conn. 103, 23 Atl. 755; Hartford & N. H. R. Co. *v.* Jackson, 24 Conn. 514, 63 Am. Dec. 177.

Misapprehension between Parties to a contract with reference to the subject matter of the contract, as (1) where one intends to sell a particular thing and the other to buy a different thing, or (2) where the parties suppose the subject-matter of the negotiation to be in existence, when it has been destroyed,— proof of such misapprehension disestablishes a contract. Rice *v.* Dwight Mfg. Co., 2 Cush. (Mass.) 80.

Arising from Mistake in telegram as to price of goods offered. Postal Tel. Co. *v.* Schaefer, 23 Ky. L. Rep. 334, 62 S. W. 1119; Pepper *v.* Western Union Tel. Co., 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660.

32. See Greer *v.* Caldwell, 14 Ga. 207; Goodwyn *v.* Perry, 25 La. Ann. 292; Williams *v.* Hunter, 13 La. Ann. 476; Knight *v.* Lanfear, 7 Rob. (La.) 172; Earle *v.* De Witt, 6 Allen (Mass.) 520; Loffland *v.* Russell, Wright (Ohio) 438; Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Dec. 621. See Dig. 50, 17, 116; Broom Max. 262, 2 Kent. Com. 477.

33. See Rice *v.* Dwight Mfg. Co., 2 Cush. (Mass.) 80.

34. Lawrence *v.* Beaubein, 2 Bailey (S. C.) 623, 23 Am. Dec. 155, enforcing the maxim *ignorantia juris non excusat* — ignorance of the law excuses no one.

35. See New York Rubber Co. *v.* Rothery, 107 N. Y. 310; 14 N. E. 269; 1 Am. St. Rep. 822; Putnam *v.* Taylor, 117 Pa. St. 570, 12 Atl. 43; Nicholas *v.* Austin, 82 Va. 817, 1 S. E. 132.

thereto, in absence of evidence of dissent, and such condition thereby becomes a part of the contract.[36]

C. WRITTEN CONTRACTS. — The legal presumption is that in all written contracts the party read the instrument, is familiar with the provisions thereof, and that he assented thereto at the time of the signing.[37]

D. INSTRUMENT DELIVERED TO BE RETAINED. — a. *Assent Without Signing.* — Where, in the ordinary course of business, a person receives and retains, without objection, an instrument to be kept by him as evidence of his rights in regard to the transaction in hand, the legal presumption is that he read and is familiar with the contents thereof and assented thereto.[38]

b. *Bill of Invoice with Restrictive Conditions of Sale.* — An invoice of patented goods sold, containing restrictive conditions of sale, delivered with the goods to the agent or servant, at the time he presented check in payment therefor, acceptance by him and retention by the purchaser, without objection, raise a legal presumption of assent to the restrictions.[39]

c. *Bill of Lading Limiting Liability of Carrier.* — **(1.) Generally.**

36. See Kirman *v.* Shawcross, 6 Durn. & E. 14; Cumpston *v.* Haigh, 2 Scott 684, 29 Eng. C. L. 391; Overton on Liens, p. 5, § 7. See *post* note 41.

Thus, proof that the plaintiff dyed and finished clothes, on notice that he received goods only on the condition that they were subject to a general lien for all work done on them, and for all unpaid balance of any former amount due, which notice was printed on most of the slips on which the dyeing orders were written by the defendant; also on the delivery slips signed by the defendant or its employees, and on all monthly statements rendered; such notice was held to be part of the contract of dyeing, in absence of a denial that the notice was received and read. Frith *v.* Hammel, 167 Pa. St. 382, 31 Atl. 676.

See also article "BAILMENTS."

37. Glover *v.* Silverman, 6 Misc. 347, 26 N. Y. Supp. 779. See Squire *v.* New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Lewis *v.* Great Western R. Co., 5 Hurl. & N. 867.

Neglect to Read before Signing, furnishes no legal excuse and does not rebut the presumption; even though the signing is induced by fraudulent representation as to its character. Douglas *v.* Matting, 29 Iowa 498, 4 Am. Rep. 238; Chapman *v.* Rose, 56 N. Y. 137, 15 Am. Rep. 401; Foster *v.* Mackinnon, L. R. 4 C. P. 704.

Party Unable to Read must clearly show that the instrument was falsely read or represented to him. Whitney *v.* Snyder, 2 Lans. (N. Y.) 447, published as note 4 Am. Rep. 242; See Foster *v.* Mackinnon, L. R. 4 C. P. 704.

38. Reading and Assenting to Be Presumed in the absence of fraud or imposition. Grace *v.* Adams, 100 Mass. 505, 1 Am. Rep. 131, 97 Am. Dec. 117. See *post,* note 53.

Proof of Possession of Instrument by plaintiff, raises presumption of due delivery and assent to the terms thereof, and the burden of proof is on him to obviate these presumptions by proof that there was no such delivery, or no such assent. King *v.* Woodbridge, 34 Vt. 571; Boorman *v.* American Express Co., 21 Wis. 152.

39. "The Invoice Is Not a Mere Notice or Receipt, and was a paper which, from the nature of the business, must be expected to contain the terms of the contract of sale." Dickerson *v.* Matheson, 57 Fed. 524, *affirming.* 50 Fed. 73.

Proof of acceptance by a consignor, or by one acting for him, duly authorized in the premises, of a bill of lading, purporting to set forth the terms of contract, containing a stipulation limiting the common law liability of the carrier, raises a presumption of law that the consignor assented to the terms thereof.[40]

(2.) Delivery to Agent. — Authority of Agent. — Proof that the carrier had notice that the parties to whom the bill of lading was given were contracting as agents, and that they had no authority to contract for exceptions, rebuts the presumption of assent.[41]

(3.) Delivery After Shipment. — Proof that the bill of lading was delivered after shipment of goods, and when they could not be reclaimed, rebuts the presumption of assent,[42] except on proof that such was the uniform course of dealing between the parties.[43]

(4.) On Verbal Contract. — In a verbal contract for transportation

40. Fillebrown *v.* Grand Trunk R. Co., 55 Me. 462, 92 Am. Dec. 606; Cox *v.* Vermont Cent. R. Co., 170 Mass. 129, 49 N. E. 97; Hoadley *v.* Northern Transp. Co., 115 Mass. 304; Schaller *v.* Chicago & N. W. R. Co., 97 Wis. 31, 71 N. W. 1042; Parker *v.* Railway Co., 1 C. P. Div. 618. See also, Grace *v.* Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131, *distinguishing* Perry *v.* Thompson, 98 Mass. 249; Buckland *v.* Adams Ex. Co., 97 Mass. 124, 93 Am. Dec. 68; Malone *v.* Boston & W. R. Co., 12 Gray (Mass.) 388; Brown *v.* Eastern R. Co., 11 Cush. (Mass.) 97.

Contra.— Chicago & N. W. R. Co., *v.* Simon, 160 Ill. 648, 43 N. E. 596, holding that the acceptance of such a bill of lading without reading does not raise a presumed assent thereto, and the burden is on the carrier to establish such assent. To the same effect; McMillan *v.* Michigan S. & N. I. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Simons *v.* Great Western R. Co., 2 Q. B. N. S. 620, 89 Eng. C. L. 619.

Assent Presumed in the Absence of Fraud or Other Sufficient Excuse, the same as in all other cases of contract, in so far as the provisions in the limitation are lawful and not opposed to public policy. Cox *v.* Vermont Cent. R. Co., 170 Mass. 129, 49 N. E. 97; Bigler *v.* Dinsmore, 51 N. Y. 166.

Failure to Read such stipulation, on the part of the consignor, does not change the rule of presumption. Grace *v.* Adams, 100 Mass. 505, 97 Am. Dec. 117; 1 Am. Rep. 131; Redpath *v.* Western Union Tel. Co., 112 Mass. 71; Monitor M. F. I. Co. *v.* Buffum, 115 Mass. 343; Donlon *v.* Provident Ins. Co., 127 Mass. 183.

Express Words of Limitation of liability must be shown in order to raise presumption of assent to limitation of liability and relieve the carrier from damages for losses resulting from its own negligence or that of its servants. Wells *v.* Steam Nav. Co., 8 N. Y. 375; Alexander *v.* Greene, 7 Hill (N. Y.) 533. See Magnin *v.* Dinsmore, 56 N. Y. 168; Gould *v.* Hill, 2 Hill (N. Y.) 623; Schieffelin *v.* Harvey, 6 Johns. (N. Y.) 171; Cole *v.* Goodwin, 19 Wend. (N. Y.) 251; York Mfg. Co. *v.* Ill. Cent. R. Co., 3 Wall. 107; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344; Grill *v.* General Iron Screw Co., L. R. 3 C. P. 476; Czech *v.* General Steam Nav. Co., L. R. 3 C. P. 14; Martin *v.* Great India R., L. R. 3 Ex. 9; Phillips *v.* Clark, 26 L. J. C. P. 168; Lloyd *v.* General Iron Screw Co., 33 L. J. Ex. 269, 3 H. & C. 284; Peck *v.* North Staffordshire R. Co., 32 L. J. Q. B. 241.

41. See York Mfg. Co. *v.* Illinois Cent. R. Co., 3 Wall. 107.

42. Guilmaume *v.* General Transp. Co., 100 N. Y. 491, 3 N. E. 489. Bostwick *v.* Baltimore & O. R. Co., 45 N. Y. 712; Strahn *v.* Detroit & M. S. R. Co., 21 Wis. 554.

43. See Shelton *v.* Merchants' Dispatch Co., 59 N. Y. 258.

made without restrictions, legal presumption of assent to a limitation of the liability of a carrier does not arise by the acceptance and retention, after shipment, without objection, of the receipt or bill of lading for the goods shipped, which, by its terms, limits the common-law liability of the carrier, and expresses on its face that by accepting it, the shipper agrees to the conditions.[44] Particularly is this true where the goods were delivered by, and the receipt given to, a servant or agent, without express proof of authority on the latter's part to contract with the carrier.[45] But the rule is otherwise in those cases where, upon delivery of the goods for transportation, and before shipment, a bill of lading with such limitation is delivered to the shipper; in that case the prior parol negotiations are merged in the bill of lading, and his assent is presumed.[46]

d. *Expressage Receipt.* — The law raises a presumption that a shipper assents thereto, and is bound by the conditions, who, upon the delivery of property to an express company for transportation, accepts, without dissent, a receipt expressing the terms and conditions upon which the property is received and is to be carried, limiting its common-law liability as a carrier; and, in the absence of fraud or imposition, or other justifiable excuse shown, he will be precluded from denying it thereafter, to the carrier's injury.[47]

44. Evidence of Parol Contract to carry the goods is competent, notwithstanding the bill of lading, and it is a question for the jury to decide whether the contract of the parties is as detailed by the witnesses, or as the bill of lading expresses. Mobile & M. R. Co., *v.* Jurey, 111 U. S. 584, 4 Sup. Ct. 566.

Bill of Lading Delivered After Shipment, conditions contained in, do not control the rights of the parties, was decided by the New York Court of Appeals in Corey *v.* New York Cent. R. Co., not reported.

45. Bostwick *v.* Baltimore & O. R. Co., 45 N. Y. 712. See Swift *v.* Pacific Mail S. S. Co., 106 N. Y. 206, 219, 12 N. E. 583; Guillaume *v.* General Transp. Co., 100 N. Y. 491, 498, 3 N. E. 489; Wheeler *v.* New Brunswick & C. R. Co., 115 U. S. 29, 5 Sup. Ct. 1061; Mobile & M. R. Co. *v.* Jurey, 111 U. S. 584, 4 Sup. Ct. 566.

Authority to Contract for Limited Liability of Carrier, by the person delivering the goods, is in each case a question of fact depending upon the special and peculiar circumstances, to be determined by the jury. American Transp. Co. *v.* Moore, 5 Mich. 368; Fillebrown *v.* Grand Trunk R. Co., 55 Me. 462, 92 Am. Dec. 606.

46. Ignorance of Contents of bill of lading on part of shipper does not do away with presumption of assent. Germania Fire Ins. Co. *v.* Memphis & C. R. Co., 72 N. Y. 90. See Steers *v.* Liverpool, N. Y. & P. S. S. Co., 57 N. Y. 1; Beigler *v.* Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575.

Failure to Read does not annul the legal presumption of assent. Hill *v.* Syracuse, B. & N. Y. R. Co., 73 N. Y. 351. See Steers *v.* Liverpool, N. Y. & P. S. S. Co., 57 N. Y. 1; Bigler *v.* Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Long *v.* N. Y. Cent. R. Co., 50 N. Y. 76.

47. Kirkland *v.* Dinsmore, 62 N. Y. 171; Magnin *v.* Dinsmore, 56 N. Y. 168; Hinckley *v.* New York Cent. R. Co., 56 N. Y. 429; Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174.

"**Assent Is Not Necessarily To Be Inferred** from the mere fact that knowledge of such notice on the part of the owner or consignee is shown. The evidence must go further and be sufficient to show that the terms on which the carrier proposed to carry

e. *Insurance Policy.* — In unilateral contracts, like policies of insurance, assent is conclusively presumed from delivery by one party and acceptance by the other.[48]

Presumption of Assent to the Rules and Regulations of a life insurance company does not arise unless there is proof that the party had knowledge or notice of the same.[49]

Assent to an Application for a Renewal of a policy of insurance is not to be presumed from the mere silence of the agent to whom the application was made.[50]

Where a Renewal of a Policy of Fire Insurance Is on Different Terms and conditions than those of the original policy, assent to the changed terms and conditions is not to be presumed as a matter of law unless it is first proved that the assured had knowledge and notice of the change.[51]

E INSTRUMENTS TO BE RETURNED.—a. *Baggage Check or Token.* — In the case of a baggage check or token, issued by an express company, limiting its common-law liability, as a carrier, in the absence of proof of knowledge by the owner of the baggage of such condition, there is no presumption of assent thereto by him.[52]

b. *Passenger Tickets.* — **(1.) Limitation on Face.** — A passenger, whether on shipboard or an a railway train, is presumed to read the terms and conditions of his ticket, which is his contract for carriage, and where it contains a limitation or condition, either as to travel or as to baggage, by accepting and using the ticket he assents to the terms and limitations thereof.[53]

the goods was adopted as the contract between the parties." This is the Massachusetts rule. See Buckland *v.* Adams Express Co., 97 Mass. 124; Judson *v.* Western R. Cor., 6 Allen 486.

"**Shown To Have Been in the Custody of the Plaintiff,** a due delivery of such receipt to him and his assent to its terms are to be presumed, and it is for him to show that there was no such delivery, or no such assent." Boorman *v.* American Express Co., 21 Wis. 152.

To same effect, Belger *v.* Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575, and King *v.* Woodbridge, 34 Vt. 571.

48. See Rackett *v.* Stickney, 27 Fed. 878.

49. Fisher *v.* Metropolitan Life Ins. Co., 162 Mass. 236, 38 N. E. 503.

50. Royal Ins. Co. *v.* Beatty, 119 Pa. St. 6, 12 Atl. 607, 4 Am. St. Rep. 622.

51. Co-insurance Clause, inserted in renewal policy, not in first, where agreement was to renew on terms and conditions of first policy. Palmer *v.* Hartford Fire Ins. Co., 54 Conn. 488, 9 Atl. 248.

See the article "INSURANCE."

52. Limburger *v.* Westcott, 49 Barb. (N. Y.) 283; Prentice *v.* Decker, 49 Barb. (N. Y.) 21.

Compare Hopkins *v.* Westcott, 6 Blatchf. 64.

"**Baggage Is Usually Identified by Means of Checks** or tokens, and such a card does not necessarily import anything else." Blossom *v.* Dodd, 43 N. Y. 264.

53. In the Absence of Fraud, Concealment or Improper Conduct on the part of the carrier or its agents and representatives. See Mulligan *v.* Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514; Fonseca *v.* Cunard S. S. Co., 153 Mass. 553, 27 N. E. 665; Steers *v.* Liverpool, N. Y. & P. S. S. Co., 57 N. Y. 1, 15 Am. Rep. 453; Zuns *v.* Southeastern R. Co., L. R. 4 Q. B. 539.

(2.) Limitation on Back. — There is no presumption of law that a passenger on a railroad has read the notice on the back of his passenger ticket, containing a limitation of liability for baggage, and detached from what ordinarily contains all that is material.[54]

2. In Corporate Transactions. — Suits Against Directors to Recover Debts. — Under a statute providing that where a corporation, by reason of acts *ultra vires,* becomes insolvent, the directors ordering or assenting to such violation shall be jointly and severally liable for all the debts contracted after such violation; in an action to recover a debt thus contracted the plaintiff, in order to show assent, must prove something more than mere negligence on the part of the defendant director in not knowing what, in the exercise of due and proper care, he ought to have known; he must prove some wilful, that is, intentional violation of duty in assenting to the act, knowing that the act is being done, or about to be done; and, further, that with such knowledge, he neither objected to nor opposed, when his duty so required, and he had the opportunity to do so.[55]

3. In Payment of Money. — No assent is presumed in law where one officiously pays money for another;[56] but in all other cases, where one pays money for the use of another, express or implied assent thereto may be shown, and a recovery had.[57]

A Contrary Doctrine is announced in Henderson *v.* Stevenson, L. R. 2 H. L. (Sc.) 470, 32 L. T. 709, and published as a note to Steers *v.* Liverpool, N. Y. & P. S. S. Co., 57 N. Y. 1, in 15 Am. Rep. 453, in which case it is held that in the absence of proof that the passenger had assented to the limitation contained in the ticket he could recover the full loss he had sustained. See also Burke *v.* Southeastern R. Co., 49 L. J. C. P. 107.

Burden on Carrier to Establish Assent. — The supreme court of the United States, in the case of Baltimore & O. R. Co. *v.* Harris, 12 Wall 65, held that the burden of proof of knowledge by a passenger, of a memorandum on his ticket limiting the liability of the railroad company, and of his assent to it, rests upon the company. *Citing* Bean *v.* Green, 12 Me. 422; Brown *v.* Eastern R. Co., 11 Cush. (Mass.) 97; Dorr *v.* New Jersey Steam Nav. Co., 11 N. Y. 485; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 47 U. S. 344.

Contract-Ticket for Passage on a Steamship, issued in England, containing two quarto pages of printed matter describing the rights and liabilities of the parties during the voyage, and containing special limitations as to liability for baggage, although not read by the passenger, assent thereto is presumed, and the contract being valid where issued, will be enforced in this country. Fonseca *v.* Cunard S. S. Co., 153 Mass. 553, 27 N. E. 665.

54. Brown *v.* Eastern R. Co., 11 Cush. (Mass.) 97.

"**Look on the Back,**" printed in the face of the ticket, does not change the rule. Malone *v.* Boston & W. R. Co., 12 Gray (Mass.) 388. See the same principle in Rackett *v.* Stickney, 27 Fed. 878.

55. Patterson *v.* Stewart, 41 Minn. 84, 42 N. W. 926; *sub nom* Patterson *v.* Minnesota Mfg. Co., 4 L. R. A. 745, 42 N. W. 926.

See the article "CORPORATIONS."

56. See Harris *v.* Champion, 4 N. J. Law 172.

57. Assent May Be Shown in the following ways: 1. By showing a previous arrangement; 2. By showing a subsequent promise to reimburse; 3. By showing a legal compulsion to pay what the defendant ought to have paid; 4. By

4. In Payment of Money by Mail. — Assent to payment of money by mail may be shown by usage or course of dealing;[58] but where assent to remittance by mail is shown, proof of mailing of a letter containing the money is not presumptive proof of payment.[59]

5. In Platting and Donating Streets. — Mortgaged Property. Where mortgaged lands have been platted and a portion thereof dedicated to the use of the public as streets, assent thereto by the mortgagee is shown by proof that the mortgagee has executed releases upon receipt of a certain sum per lot.[60]

showing circumstances which justified him in making the payment without express assent—in which case the law is said to imply a request or promise. See Cook *v.* Linn, 19 N. J. Law 11; Force *v.* Haines, 17 N. J. Law 385; Leonard *v.* Ware, 4 N. J. Law 170; Rittenhouse *v.* Schamp, 3 N. J. Law 532; Woolley *v.* Disbrev, 2 N. J. Law 361; Wright *v.* Butler, 6 Wend. (N. Y.) 284; Moseley *v.* Boush, 4 Rand. (Va.) 392.

58. Wakefield *v.* Lithgow, 3 Mass. 249; Kramer *v.* McDowell, 8 Watts. & S. (Pa.) 138; Warwicke *v.* Noakes, 1 Peake N. P. 98, 3 Rev. Rep. 653.

Evidence of Course of Dealing. A course of dealing justifying an inference of an assent that money be sent by mail, is not established by showing that in a previous instance money was sent by mail without objection. Burr *v.* Sickles, 17 Ark. 428.

59. **No Presumption of Law** that a letter deposited in the postoffice, addressed to one at the usual place of receiving his letters, was received by him. Crane *v.* Pratt, 78 Gray (Mass.) 348; First Nat. Bank of Bellefonte *v.* McMangle, 69 Pa. St. 156, 8 Am. Rep. 236; Walter *v.* Haynes, 1 Ry. & M. 149, 21 Eng. C. L. 402.

A Strong Probability of its receipt. See Oregon S. S. Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485; Tanner *v.* Hughes, 53 Pa. St. 289.

Proof That Money Was Enclosed by the Postmaster at A, in an envelope directed to a party at B, and then enclosed in a registered envelope directed to the postmaster at B, and deposited in the mail bag for the postoffice at P, is not sufficient to justify a jury in finding that the bank received the money. First Nat. Bank of Bellefonte *v.* McMangle, 69 Pa. St. 156, 8 Am. Rep. 236.

Postmaster's Entries of registered letters received at the postoffice are evidence admissible, without the testimony of the clerk who kept it, to show receipt of a registered letter. Garney *v.* Howe, 9 Gray (Mass.) 404.

"An entry on a post-bill is by no means conclusive evidence of the transmission of a letter, for, it may still never have been put into the mail, or may have been stolen in its passage." Dunlap *v.* Monroe, 11 U. S. (7 Cranch) 242.

Such register is not conclusive even as to the date, but may be corrected by parol. Garney *v.* Howe, 9 Gray (Mass.) 404.

60. Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276.

ASSESSMENTS.—See Taxation; Corporations.

ASSETS.—See Bankruptcy; Executors and Administrators; Marshaling Assets and Securities.

ASSIGNMENTS.

By R. K. Wood.

CROSS-REFERENCES.

Assignments for Benefit of Creditors; Bankruptcy; Bills and Notes; Insolvency.

I. GENERALLY.

1. Intent. — In establishing the question of intent to appropriate to the benefit of another a chose in action, or the fund it represents, evidence of the surrounding facts and circumstances of the case is admissible.[1]

2. Account Book Entries. — Evidence of account book entries, debiting and crediting a fund in accordance with the alleged intent to assign, may be competent evidence in respect of the appropriation requisite to establish such assignment.[2]

3. Executory Agreement. — Evidence of such executory agreement to pay a debt out of a particular fund, without any actual or constructive appropriation of the subject matter to the control of the promisee, is incompetent to establish an assignment of such fund.[3]

1. Surrounding Facts and Circumstances to Show Intent. — *England.* — Rodick *v.* Gandell, 1 De G. M. & G 763, 12 Bear 325; Hopkinson *v.* Forster, L. R. 19 Eq. 74; Citizens' Bank *v.* First National Bank, L. R. 6 H. L. 352.

California. — Brown *v.* Curtis, 128 Cal. 193, 60 Pac. 773; McIntyre *v.* Hanser, 131 Cal. 11, 63 Pac. 69; Gustafson *v.* Stockton R. Co., 132 Cal. 619, 64 Pac. 995.

Georgia. — Georgia First Nat. Bank *v.* Hartman Steel Co., 87 Ga. 435, 13 S. E. 586; Jones *v.* Glover, 93 Ga. 484, 21 S. E. 50.

Illinois. — Morris *v.* Cheney, 51 Ill. 451.

Iowa. — McWilliams *v.* Webb, 32 Iowa 577; Schollmier *v.* Schorendelen, 78 Iowa 426, 43 N. W. 282, 16 Am. St. Rep. 455; Dorr *v.* Alford, 111 Iowa 278, 82 N. W. 789.

Missouri. — Sangwinett *v.* Webster, 153 Mo. 343, 54 S. W. 563; Lewellen *v.* Patton, 73 Mo. App. 472.

New Hampshire. — Boyd *v.* Webster, 58 N. H. 336.

New Jersey. — Vickers *v.* Electrozone Co. (N. J. Eq.), 48 Atl. 606; Lanigan *v.* Bradley Co., 50 N. J. Eq. 201, 24 Atl. 505; Gray *v.* Pfeiffer, 59 N. J. Eq. 510, 45 Atl. 967.

North Carolina. — Kahnweiler *v.* Anderson, 78 N. C. 133.

Ohio. — Gardner *v.* National City Bank, 39 Ohio St. 600.

Texas. — Miller *v.* Goodman, 15 Tex. Civ. App. 244, 40 S. W. 743.

West Virginia.—McConaughey *v.* Bennett's Exrs, 50 W. Va. 172, 40 S. E. 540.

2. Pratt *v.* Foote, 9 N. Y. 463; Cootes *v.* First Nat. Bank, 91 N. Y. 20; Chapman *v.* Plummer, 36 Wis. 262; Hackett *v.* Campbell, 10 App. Div. 523, 42 N. Y. Supp. 47; Heath *v.* Hall, 4 Taunt. 326, 13 Rev. Rep. 610; Prince *v.* Oriental Bank, L. R. 3 App. Cas. 325.

3. Executory Promise to Pay Out of a Particular Fund. — *United States.* — Christmas *v.* Russell, 14 Wall. 69; Dillon *v.* Barnard, 21 Wall. 430; Trist *v.* Child, 21 Wall. 441; Williams *v.* Monroe, 101 Fed. 322.

Alabama. — Hanchey *v.* Hurley (Ala.), 30 So. 742.

Colorado. — Silent Friend Co. *v.* Abbott, 7 Colo. App. 73, 42 Pac. 318.

Illinois. — Wyman *v.* Snyder, 112 Ill. 99; Hull *v.* Culver, 143 Ill. 506, 32 N. E. 265.

Iowa. — Foss *v.* Cobler, 105 Iowa 728, 75 N. W. 516; Seymour *v.* Aultman, Co., 109 Iowa 297, 80 N. W. 401.

Indiana. — Ford *v.* Garner, 15 Ind. 298.

Maryland. — Andrew *v.* Meyerdirck, 87 Md. 511, 40 Atl. 173.

Nebraska.—Fairbanks, Morse Co. *v.* Welshans, 55 Neb. 362, 75 N. W. 865; Phillips *v.* Hogue (Neb.), 88 N. W. 180.

New York. — Rogers *v.* Hosack's Ex'rs, 18 Wend. 319; Hoyt *v.* Story, 3 Barb. 262; Rupp *v.* Blanchard, 34 Barb. 627.

4. Partial Assignment. — An equitable assignment of a fund designated in a chose in action, whether evidenced by a writing or otherwise, may be shown by parol evidence.[4]

II. WRITTEN ASSIGNMENTS.

1. Order on Particular Fund.—An order drawn by an owner on a particular fund, is competent in evidence of an equitable assignment of such fund, *inter partis*,[5] even without proof of its

Ohio. — Christmas *v.* Griswald, 8 Ohio St. 558.

Oregon. — Commercial Bank *v.* City, 37 Or. 33, 60 Pac. 563.

Vermont. — Whittle *v.* Skinner, 23 Vt. 531.

Virginia. — Hicks *v.* Roanoke Co., 94 Va. 741, 27 S. E. 596.

West Virginia. — Feanster *v.* Withrow, 9 W. Va. 296.

A Contrary Doctrine Has Been Held. — Holmes *v.* Evans, 129 N. Y. 140, 29 N. E. 233; Buck *v.* Swazey, 35 Me. 41, 56 Am. Dec. 681.

Attorney's Fee To Be Paid From Proceeds of Suit. — In Hull *v.* Culver, 143 Ill. 506, 32 N. E. 265, an agreement with an attorney that he should have a certain proportion of whatever might be recovered by suit or otherwise, as the price of his services, was held incompetent as evidence of an equitable assignment of an interest in such proceeds. See contra, Holmes *v.* Evans, 129 N. Y. 140, 29 N. E. 233; Hargett *v.* McCadden, 107 Ga. 773, 33 S. E. 666; Christie *v.* Sawyer, 44 N. H. 298.

4. Of Mortgage. — Slaughter *v.* Foust, 4 Blackf. (Ind.) 379; Barthal *v.* Blakin, 34 Iowa 452; Runyan *v.* Mersereau, 11 Johns. (N. Y.) 534, 6 Am. Dec. 393.

Of Promissory Note. — Dages *v.* Lee, 20 W. Va. 584; Hackett *v.* Moxley, 65 Vt. 71, 25 Atl. 898; Draper *v.* Fletcher, 26 Mich. 154; Clark *v.* Rogers, 2 Greenl. (Me.) 143; Jones *v.* Witter, 13 Mass. 304; Taylor *v.* Smith, 116 N. C. 531, 21 S. E. 202; Willard *v.* Moies, 30 Mo. 142; Thompson *v.* Emery, 27 N. H. 269.

Of Judgments. — Dunn *v.* Snell, 15 Mass. 481; Conyngham *v.* Smith, 16 Iowa 471; Pass *v.* McRae, 36 Miss. 143; Howe *v.* Jones, 57 Iowa 130; Steele *v.* Thompson, 62 Ala. 323; Clark *v.* Moss, 6 Eng. (11 Ark.) 736; Wood *v.* Wallace, 24 Ind. 226; Winberry *v.* Kounce, 83 N. C. 351.

Of Indemnity Bond. — Hoffman *v.* Smith, 94 Iowa 495, 63 N. W. 182; Everett *v.* Bartlett, 20 N. J. Law 117; Epstein *v.* N. S. Co., 29 Miss. 295.

Contract for Work and Labor. McCubbin *v.* City of Atchison, 12 Kan. 134; Switzer *v.* Smith, 35 Iowa 269; Hooker *v.* Eagle Bank, 30 N. Y. 83, 86 Am. Dec. 351.

Statutory Provision. — A writing may be essential to an assignment, under statutory provision.

In General. — Turk *v.* Cook, 63 Ga. 681; Mutual Ins. Co. *v.* Watson, 30 Fed. 653.

Of Judgment. — Blackman *v.* Joiner, 81 Ala. 344.

Imperfect Assignment. — The intention of the parties may be shown by parol to explain and give effect to an imperfect assignment. Park *v.* Glover, 23 Tex. 469.

5. Accepted Order on a Particular Fund.—*England.*—Crawfoot *et al v.* Gurney, 9 Bing. 621, 35 Rev. Rep. 557, 23 Eng. C. L. 621; *Ex parte* South, 3 Swanston 392, 19 Rev. Rep. 227; Burn *v.* Carvalho, 4 My. & Cr. 690, 48 Rev. Rep. 213; Dickinson *v.* Marrow, 14 M. & W. 713; Rodick *v.* Gandell, 1 De G. M. & G. 763, 12 Beav. 325; *Ex parte* Hall, L. R. 10 Ch. Div. 615; Brice *v.* Bannister, L. R. 32 B. Dev. 569.

United States. — Mandeville *v.* Welch, 5 Wheat. 277.

California.—Pope *v.* Huth, 14 Cal. 403; Joyce *v.* Wing Lung, 87 Cal. 424, 25 Pac. 545.

Illinois. — Koch *v.* Quick, 29 Ill. App. 635; Creighton *v.* Village of Hyde Park, 6 Ill. App. 272.

Iowa. — County *v.* Hinckley, 62 Iowa 637, 17 N. W. 915.

Maine. — Legroo *v.* Staples, 16

acceptance.[6]

2. Order for Part of Debt. — In absence of the debtor's acceptance, express or implied evidence of an order directing the payment of a part only of a debt or fund in the hands of a debtor or holder, has been held inadmissible to show assignment of such part at law[7],

Me. 252; Johnson *v.* Thayer, 17 Me. 401; Wheeler *v.* Evans, 26 Me. 133.

Minnesota.—Baylor *v.* Butterfoss, 82 Minn. 21, 84 N. W. 640.

Maryland. — Wilson *v.* Carson, 12 Md. 54.

Massachusetts. — Osborne *v.* Jordan, 3 Gray 277; Taylor *v.* Lynch, 5 Gray 49; Lannan *v.* Smith, 7 Gray 150; Kimball *v.* Leland, 110 Mass. 325; Foss *v.* Lowell Bank, 111 Mass. 285.

Missouri. — Walker *v.* Mauro, 18 Mo. 564; Boyer *v.* Hamilton, 21 Mo. App. 520; Adler *v.* Kansas City R. Co., 92 Mo. 242, 4 S. W. 917.

New Hampshire. — Conway *v.* Cutting, 51 N. H. 407; Garland *v.* Harrington, 51 N. H. 409.

New York. — Morton *v.* Naylor, 1 Hill 583; Wells *v.* Williams, 9 Barb. 567; People *v.* Westchester Co., 57 App. Div. 135. 67 N. Y. Supp. 981.

Ohio. — Covert *v.* Rhodes, 48 Ohio St. 66, 27 N. E. 94.

Vermont. — Thayer *v.* Kelley, 28 Vt. 19, 65 Am. Dec. 220.

Washington. — Griffith *v.* Burlingame, 18 Wash. 429, 51 Pac. 1059.

Wisconsin. — State *v.* Hastings, 15 Wis. 83; Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 427.

Due Bills Payable in Goods of a third person are held incompetent as evidence of an assignment of the labor claim which they represent. Beecher *v.* Dacey, 45 Mich. 92, 7 N. W. 689; Martin *v.* Mich. R. Co., 62 Mich. 458, 29 N. W. 40; Dudley *v.* Toledo R. Co., 65 Mich. 655, 32 N. W. 884.

6. Unaccepted Order Evidence of an Assignment. — *England.* Yeates *v.* Groves, 1 Ves. Jr. 280.

Alabama. — Curry *v.* Shelby, 90 Ala. 277, 7 So. 922.

California. — Wheatley *v.* Strobe, 12 Cal. 92, 73 Am. Dec. 522.

Colorado. — Colorado Company *v.* Ponick (Colo.), 66 Pac. 458.

Georgia. — Walton *v.* Horkan, 112 Ga. 814, 38 S. E. 105, 81 Am. St. Rep. 77; Stanford *v.* Connery, 84 Ga. 731, 11 S. E. 507.

Iowa. — First Nat. Bank *v.* Dubuque R. Co., 52 Iowa 378, 3 N. W. 395, 35 Am. Rep. 280.

Louisiana. — Edwards *v.* Daley, 14 La. Ann. 384; Gray *v.* Trafton, 12 Mart. 349.

Maine. — Robbins *v.* Bacon, 3 Greenl. 346.

Massachusetts. — Kingman *v.* Perkins, 105 Mass. 111.

Michigan. — Moore *v.* First Nat. Bank, 57 Mich. 256, 23 N. W. 802.

Minnesota.—Brady *v.* Chadbourne, 68 Minn. 117, 70 N. W. 981; Lewis *v.* Bank, 30 Minn. 134, 14 N. W. 587.

Montana. — Oppenheimer *v.* First Nat. Bank, 20 Mont. 192, 50 Pac. 419; Merchants Bank *v.* Barnes, 18 Mont. 335, 45 Pac. 218, 56 Am. St. Rep. 581, 47 L. R. A. 737.

New Hampshire. — Brown *v.* Mansus, 64 N. H. 39, 5 Atl. 768.

South Carolina. — McGahan *v.* Lockett, 54 S. C. 364, 32 S. E. 429, 71 Am. St. Rep. 796.

Texas. — Beaumont Co. *v.* Moore (Tex. Civ. App.), 41 S. W. 180.

Virginia. — Anderson *v.* De Soer, 6 Gratt. 363.

A contrary rule has been maintained, and an unaccepted order held inadmissible as evidence of an assignment. Snyder *v.* Board of Education, 16 Kan. 542; Stanbury *v.* Smythe, 13 Ohio St. 495; Seyfried *v.* Stall, 56 N. J. Eq. 187, 38 Atl. 955.

7. Indebtedness in General. Welsh *v.* Mayer, 4 Colo. App. 440, 36 Pac. 613; Snedden *v.* Doerffler, 5 Colo. App. 477, 39 Pac. 68; Field *v.* The Mayor, 6 N. Y. 179, 57 Am. Dec. 435; Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Connoly *v.* Cheesborough, 21 Ala. 166; Sands *v.* Mathews, 27 Ala. 399; Bullard *v.* Randall, 7 Gray 605, 61 Am. Dec. 433; Eichelberger *v.* Murdock, 10 Md. 373, 69 Am. Dec. 140; Williams *v.* Everett, 14 East. 582, 13 Rev. Rep. 315; Tierman *v.* Jackson, 5 Pet. (U.

but a contrary rule prevails in equity.[8]

S.) 580; Hopkins *v.* Beebe, 26 Pa. St. 85; Gibson *v.* Cooke, 20 Pick. (Mass.) 15, 32 Am. Dec. 194; Moore *v.* Gravelot, 3 Ill. App. 442; Creighton *v.* Village of Hyde Park, 6 Ill. App 272.

Claim for Wages. — *Alabama.* Kansas City R. Co. *v.* Robertson, 109 Ala. 296, 19 So. 432.

Maine. — Getchell *v.* Maney, 69 Me. 42.

Massachusetts. — Knowlton *v.* Cooley, 102 Mass. 233; Papineau *v.* Naumeag Co., 126 Mass. 372.

Missouri. — Adler *v.* Kansas City R. Co., 92 Mo. 212, 4 S. W. 917; Luthy *v.* Woods, 6 Mo. App. 67.

Vermont. — Carter *v.* Nichols, 58 Vt. 553, 5 Atl. 197.

Promissory Notes. — *Illinois.* Miller *v.* Bledsoe, 2 Ill. 530, 32 Am. Dec. 37.

Kentucky. — Weinstock *v.* Bellwood, 12 Bush. 139.

Mississippi.—Hutchison *v.* Simon, 57 Miss. 628.

Missouri. — Beardslee *v.* Morgner, 73 Mo. 22; Fourth Nat. Bank *v* Noonan, 88 Mo. 372.

Ohio. — Stanberry *v.* Smythe, 13 Ohio St. 495.

South Carolina. — Hughes *v.* Kiddell, 2 Bay 324.

Texas. — Frank *v.* Kaigler, 36 Tex. 305; Lindsay *v.* Price, 33 Tex. 280.

Judgment. — Love *v.* Fairfield, 13 Mo. 300, 53 Am. Dec. 148; Loomis *v.* Robinson, 76 Mo. 488; Burnett *v.* Crandall, 63 Mo. 410; Brown *v.* Dunn, 50 N. J. Law 111, 11 Atl. 149; Hopkins *v.* Stockdale, 117 Pa. St. 365, 11 Atl. 368.

Insurance Policy. — Palmer *v.* Merrill, 6 Cush. (Mass.) 282, 52 Am. Dec. 782; German Ins. Co. *v.* Bullene, 51 Kan. 764, 33 Pac. 467.

Indebtedness in General. — Wilson *v.* Carson, 12 Md. 54; Kiddoo *v.* Dalton, 73 Mo. App. 667; Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426.

Claim for Wages. — Leonard *v.* Mo. R. Co., 68 Mo. App. 48.

Consent of Debtor has been held competent evidence in connection with an order for the payment of part of a fund in his hands to establish an equitable assignment of such part. Johnson Co. *v.* Bryson, 27 Mo. App. 341; St. Louis Bank *v.* Nooman, 88 Mo. 372; Kingsbury *v.* Burnett, 151 Mass. 199, 24 N. E. 36; James *v.* City of Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692; Pollard *v.* Pollard, 68 N. H. 356, 39 Atl. 329.

Between Assignor and Assignee, an order transferring part of a debt may be competent evidence of an equitable assignment. County *v.* Latterner, 31 Minn. 239, 17 N. W. 385; James *v.* City of Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692.

8. *England.* — Row *v.* Dawson, 1 Ves. 331; Lett *v.* Morris, 4 Sim. 607, 33 Rev. Rep. 156; Yeates *v.* Groves, 1 Ves. Jr. 280; Watson *v.* The Duke of Wellington, 1 R. & M. 602, 32 Rev. Rep. 293; Tibbits *v.* George, 5 Ad. & E. 107, 31 Eng. C. L. 293; Morrell *v.* Wooten, 16 Beav. 197.

United States. — Trist *v.* Child, 21, Wall. 441; The Elmbank, 72 Fed. 610; *In re* Hanna, 105 Fed. 587; Peugh *v.* Porter, 112 U. S. 737; Dowell *v.* Cardwell, 4 Saw. 217, 7 Fed. Cas. No. 4039; Fourth St. Bank *v.* Yardley, 165 U. S. 634.

Alabama. — Lowery *v.* Peterson, 75 Ala. 109.

California. — Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

Georgia. — Daniels *v.* Meinhard Co., 53 Ga. 359.

Illinois. — Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801; Warren *v.* First Nat. Bank, 149 Ill. 9, 38 N. E. 122. See Hull *v.* Culver, 143 Ill. 506, 32 N. E. 265; Dolese *v.* McDougall, 182 Ill. 486, 55 N. E. 547.

Iowa. — Cutter *v.* McCormick, 48 Iowa 406.

Kansas. — Continental Ins. Co. *v.* Pratt (Kan.), 55 Pac. 671.

Kentucky. — Brown Banking Co. *v.* Stockton, 21 Ky. 1212, 54 S. W. 854.

Maine. — Buck *v.* Swazey, 35 Me. 41, 56 Am. Dec. 681; Simpson *v.* Bibber, 59 Me. 196; Exchange Bank *v.* McLoon, 73 Me. 498, 40 Am. Rep. 388; Horne *v.* Stevens, 79 Me. 262;

3. Checks. — A. Between Holder and Drawer. — As between the holder and the drawer, or his assignee, an unaccepted check or bill of exchange is competent evidence of an assignment of the fund named therein.[9]

B. As Against Drawee. — It has been held that an unaccepted check is competent evidence of an assignment to the payee of the

Jenness *v.* Wharff, 87 Me. 307, 32 Atl. 908.

Maryland. — Sheppard *v.* State, 3 Gill, 289.

Massachusetts. — James *v.* City of Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692.

Mississippi. — Moody *v.* Kyle, 34 Miss. 506.

Nebraska. — Slobodisky *v.* Curtis, 58 Neb. 211, 78 N. W. 522.

New Hampshire. — Pollard *v.* Pollard, 68 N. H. 356, 39 Atl. 329.

New Jersey. — Shannon *v.* Mayor, 37 N. J. Eq. 123; Burnett *v.* Mayor, 31 N. J. Eq. 341; Kirtland *v.* Moore, 40 N. J. Eq. 106, 2 Atl. 269; Brokaw *v.* Brokaw (N. J. Eq.), 4 Atl. 66; Lanigan *v.* Bradley Co., 50 N. J. Eq. 201, 24 Atl. 505; Terney *v.* Wilson, 45 N. J. Law 282.

New York. — Ehrichs *v.* De Mill, 75 N. Y. 370; Munger *v.* Shannon, 61 N. Y. 251; Vreeland *v.* Blunt, 6 Barb. 182; Richardson *v.* Rust, 9 Paige Ch. 243; Brill *v.* Tuttle, 81 N. Y. 454; Lauer *v.* Dunn, 115 N. Y. 405, 22 N. E. 270; Field *v.* The Mayor, 6 N. Y. 179, 59 Am. Dec. 435; Lowery *v.* Steward, 25 N. Y. 239, 82 Am. Dec. 346; Crouch *v.* Muller, 141 N. Y. 495, 36 N. E. 394; Fairbanks *v.* Sargent, 104 N. Y. 108, 9 N. E. 870, 56 Am. Rep. 490; Chambers *v.* Lancaster, 160 N. Y. 342, 54 N. E. 707.

North Carolina. — Howell *v.* Boyd Co., 116 N. C. 806, 22 S. E. 5; Ethelridge *v.* Vernoy, 74 N. C. 800.

Oklahoma. — Gillette *v.* Murphy, 7 Okla. 91, 54 Pac. 413.

Oregon. — Little *v.* Portland, 26 Or. 235, 37 Pac. 911; Willard *v.* Bullen (Or.), 67 Pac. 924; McDaniel *v.* Maxwell, 21 Or. 202, 27 Pac. 952; Erickson *v.* Inman, 34 Or. 44, 54 Pac. 949.

Pennsylvania. — Caldwell *v.* Hartupee, 70 Pa. St. 74.

Texas. — Clark *v.* Gillespie, 70 Tex. 513, 8 S. W. 121; Goldman *v.* Blum, 58 Tex. 630; Wood *v.* Amarillo Co. (Tex.), 31 S. W. 503; Tex. R. Co. *v.* Vaughn, 16 Tex. Civ. App. 403, 40 S. W. 1065; Harris Co. *v.* Campbell, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; Milmo Bank *v.* Connery, 8 Tex. Civ. App. 181, 27 S. W. 828.

Tennessee. — Allison *v.* Pearce (Tenn. Ch. App.), 59 S. W. 192; Bank *v.* Rhea Co. (Tenn. Ch. App.), 59 S. W. 442.

Virginia. — Chespeake Assn. *v.* Coleman, 94 Va. 433, 26 S. E. 843; Hicks *v.* Roanoke Co., 94 Va. 741, 27 S. E. 596; Brooks *v.* Hatch, 6 Leigh 534; Shenandoah R. Co. *v.* Miller, 80 Va. 821.

Washington. — Dowling *v.* City, 22 Wash. 592, 61 Pac. 709; Dickerson *v.* City, 66 Pac. 381.

West Virginia. — First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

Wisconsin. — Baillie *v.* Currie, 95 Wis. 500, 70 N. W. 660.

Promissory Note. — Groves *v.* Ruby, 24 Ind. 418; Hutchison *v.* Simon, 57 Miss. 628; Fordyce *v.* Nelson, 91 Ind. 447; Gardner *v.* Smith, 5 Heisk. (Tenn.) 256.

Judgment. — Brown *v.* Dunn, 50 N. J. Law 111, 11 Atl. 149; Moore *v.* Robinson, 35 Ark. 293; Pattison *v.* Hull, 9 Cow. 747. See Thomas *v.* Parker, 3 Bush. (Ky.) 177.

9. Bell *v.* Alexander, 21 Gratt. (Va.) 1; Kahuweiler *v.* Anderson, 78 N. C. 133; Roesser *v.* Nat. Bank (Wis.), 88 N. W. 618; Dillman *v.* Carlin, 105 Wis. 14, 80 N. W. 932, 76 Am. St. Rep. 902; Lewis *v.* International Bank, 13 Mo. App. 202; Roberts *v.* Corbin & Co., 26 Iowa 315, 96 Am. Dec. 146; Pease *v.* Landaner, 63 Wis. 20, 53 Am. Rep. 247, 22 N. W. 847; *In re* Brown, 2 Story 502, 4 Fed. Cas. No. 1985; Hawes *v.* Blackwell, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870.

Contra. — Harrison *v.* Wright, 100 Ind. 515, 50 Am. Rep. 805. See Miller *v.* Goodman, 15 Tex. Civ. App. 244, 40 S. W. 743.

sum named, even as against the drawee;[10] but the weight of authority is to the contrary.[11]

10. *United States.* — German Savings Trust *v.* Adae, 8 Fed. 106.

Illinois. — Munn *v.* Burch, 25 Ill. 21; Chicago Ins. Co. *v.* Stanford, 28 Ill. 168, 81 Am. Dec. 270; Fourth Nat. Bank *v.* City Nat. Bank, 68 Ill. 398; Brown *v.* Leckie, 43 Ill. 497; Union Bank *v.* Oceana Co. Bank, 80 Ill. 212, 22 Am. Rep. 185; Nat. Bank *v.* Indiana Banking Co., 114 Ill. 483, 2 N. E. 401; Ridgley Bank *v.* Patton, 109 Ill. 479.

Iowa. — Roberts *v.* Corbin, & Co., 26 Iowa 315, 96 Am. Dec. 146; Thomas *v.* Exchange Bank, 99 Iowa 202, 68 N. W. 780.

Kentucky. — Lester *v.* Given, 8 Bush. (Ky.) 357.

Louisiana. — Gordon *v.* Muchler, 34 La. Ann. 604; Vanbibber *v.* State Bank, 14 La. Ann. 481, 74 Am. Dec. 442.

New York. — Harris *v.* Clark, 3 N. Y. 93, 51 Am. Dec. 352.

Nebraska. — Fonner *v.* Smith, 31 Neb. 107, 47 N. W. 632; Colombia Bank *v.* German Bank, 56 Neb. 803, 77 N. W. 346; Neb. Plow Co. *v.* Fuchring, 60 Neb. 316, 83 N. W. 69.

South Carolina. — Fogarties *v.* State Bank, 12 Rich. Law 518, 78 Am. Dec. 468.

Texas. — Neely *v.* Grayson Co. Bank (Tex. Civ. App.), 61 S. W. 559.

Non-Negotiable Check. — A check payable "when settlement is made with the county" was held competent evidence of an equitable assignment. County *v.* Hinckley, 62 Iowa 637, 17 N. W. 915.

11. *England.* — Hopkinson *v.* Forster, L. R. 19 Eq. 74; Citizens' Bank *v.* First Nat. Bank, L. R. 6 H. L. 352.

United States. — Essex Co. Bank *v.* Bank of Montreal, 7 Biss. 193, 8 Fed. Cas. No. 4532; Laclede Bank *v.* Schuler, 120 U. S. 511; Bank of Republic *v.* Willard, 10 Wall. 152; First Nat. Bank *v.* Whitman, 94 U. S. 343; Fourth St. Bank *v.* Yardley, 55 Fed. 850, 165 U. S. 634; Florence Co. *v.* Brown, 124 U. S. 385.

Alabama. — Nat. Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50.

Arizona. — Satterwhite *v.* Melczer (Ariz.), 24 Pac. 184.

California. — Cushman *v.* Harrison, 90 Cal. 297, 27 Pac. 283.

Colorado. — Meldrum *v.* Henderson, 7 Colo. App. 256, 43 Pac. 148; Colo. Bank *v.* Boettcher, 5 Colo. 185, 40 Am. Rep. 142; Snedden *v.* Doerffler, 5 Colo. App. 477, 39 Pac. 68; Boettcher *v.* Bank, 15 Colo. 16, 24 Pac. 582.

Indiana. — Nat. Bank *v.* Second Nat. Bank, 69 Ind. 479, 35 Am. Rep. 236.

Maryland. — Moses *v.* Bank, 34 Md. 594.

Massachusetts. — Bullard *v.* Randall, 1 Gray 605, 61 Am. Dec. 433; Dana *v.* Third Nat. Bank, 13 Allen 445, 90 Am. Dec. 216; Carr *v.* Nat. Bank, 107 Mass. 45, 9 Am. Rep. 6.

Michigan. — Second Nat. Bank *v.* Williams, 13 Mich. 284; Grammel *v.* Carmer, 55 Mich. 201, 21 N. W. 418, 54 Am. Rep. 363; Brennan *v.* Merchants Bank, 62 Mich. 343, 28 N. W. 881; McIntyre *v.* Farmers Bank, 115 Mich. 255, 73 N. W. 233; Sunderlin *v.* Mecosta Bank, 116 Mich. 281, 74 N. W. 478.

Mississippi. — Bush *v.* Foote, 58 Miss. 5, 38 Am. Rep. 310.

Missouri. — Merchants Bank *v.* Coates, 79 Mo. 168; Dickinson *v.* Coates, 79 Mo. 250, 49 Am. Rep. 228; Coates *v.* Doran, 83 Mo. 337. See *contra,* McGrode *v.* German Inst., 4 Mo. App. 330; State Ass'n *v.* Boatman's Bank, 11 Mo. App. 292; Senter *v.* Continental Bank, 7 Mo. App. 532.

New Jersey.—Crewling *v.* Bloomsbury Bank, 46 N. J. Law 255, 50 Am. Rep. 417.

New York. — Chapman *v.* White, 6 N. Y. 412, 57 Am. Rep. 464; Lunt *v.* Bank, 49 Barb. 221; First Nat. Bank *v.* Clark, 134 N. Y. 368, 32 N. E. 38; Atty. Gen. *v.* Continental L. Ins. Co., 71 N. Y. 325, 27 Am. Rep. 55; Dykers *v.* Leather Mf'rs Bank, 11 Paige Ch. 612; Tyler *v.* Gould, 48 N. Y. 682; Duncan *v.* Berlin, 60 N. Y. 151; Viets *v.* Union Bank, 31 Hun 484.

North Carolina.—Hawes *v.* Black-

4. Bills of Exchange. — A. ACCEPTED. — It has been held that a bill of exchange, even after acceptance, is inadmissible as evidence of an equitable assignment to the payee of the funds in the drawee's hands;[12] but the weight of authority is to the contrary.[13]

B. UNACCEPTED. — The general rule is that an unaccepted order or bill of exchange which does not designate any particular fund in the hands of the drawee, is not of itself competent evidence of an equitable assignment,[14] even though a particular fund be provided

well, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870.

Ohio. — Covert *v.* Rhodes, 48 Ohio St. 66, 27 N. E. 94; Cincinnati Co. *v.* Metropolitan Bank (Ohio St.), 42 N. E. 700; Bank of Marysville *v.* Windisch Co., 50 Ohio St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660.

Oklahoma. — Guthrie Bank *v.* Gill, 6 Okla. 560, 54 Pac. 434.

Pennsylvania. — Loyd *v.* McCoffrey, 46 Pa. St. 410; First Nat. Bank *v.* Gish, 72 Pa. St. 13; First Nat. Bank *v.* McMichael, 106 Pa. St. 460, 51 Am. Rep. 529; Taylor *v.* Bushong, 100 Pa. St. 23, 45 Am. Rep. 353; First Nat. Bank *v.* Shoemaker, 117 Pa. St. 94, 11 Atl. 304, 2 Am. St. Rep. 649; Kuhn *v.* Warren Bank (Pa. St.), 11 Atl. 440.

Tennessee. — Imboden *v.* Perrie, 13 Lea. 504; Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 42 Am. St. Rep. 921; Pickle *v.* People's Bank, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L. R. A. 93.

Texas. — House *v.* Kountze, 17 Tex. Civ. App. 402, 43 S. W. 561.

Wisconsin. — Pease *v.* Landauer, 63 Wis. 20, 22 N. W. 847, 53 Am. Rep. 247.

12. Luff *v.* Pope, 5 Hill (N. Y.) 413; Harris *v.* Clark, 3 N. Y. 93, 51 Am. Dec. 352; Cowperthwaite *v.* Sheffield, 3 N. Y. 243; Sheppard *v.* State, 3 Gill (Md.) 289; Wheeler *v.* Stone, 4 Gill (Md.) 47; Bush *v.* Foote, 58 Miss. 5, 38 Am. Rep. 310.

Verbal Acceptance. — Verbal acceptance of a bill drawn generally will not render the bill evidence of an equitable assignment. Erickson *v.* Inman, 34 Or. 44, 54 Pac. 949.

13. Wells *v.* Bingham, 6 Cush. (Mass.) 6, 52 Am. Dec. 750; Buckner *v.* Sayre, 18 B. Mon. (Ky.) 745; Mandeville *v.* Welch, 5 Wheat. (U. S.) 277; First Nat. Bank *v.* Dubuque R. Co., 52 Iowa 378, 3 N. W. 395, 35 Am. Rep. 280; Lewis *v.* Traders' Bank, 30 Minn. 134, 14 N. W. 587; Throop Co. *v.* Smith, 110 N. Y. 83, 17 N. E. 671; Schmitler *v.* Simon, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; Pilcher *v.* Brayton, 17 Hun 429; Tassey *v.* Church, 4 Watts & S. (Pa.) 346; Corbett *v.* Clark, 45 Wis. 403, 30 Am. Rep. 763; Griffin *v.* Wetherby, L. R. 3 Q. B. C. 753.

Accepted Check. — Merchants' Bank *v.* State Bank, 10 Wall. 604; Espy *v.* Bank of Cincinnati, 18 Wall. 604; First Nat. Bank *v.* Whitman, 94 U. S. 343.

14. *England.* — Percival *v.* Dunn, L. R. 29 Ch. Div. 128; Shand *v.* Du Buisson, L. R. 18 Eq. Cas. 283.

United States. — Rosenthal *v.* Mastin Bank, 17 Blatchf. 318, 20 Fed. Cas. No. 12,063; Bosworth *v.* Jacksonville Bank, 64 Fed. 615.

Alabama. — Sands *v.* Mathews, 27 Ala. 399; *Ex parte* Jones, 77 Ala. 330.

California. — Cushman *v.* Harrison, 90 Cal. 297, 27 Pac. 283.

Georgia. — Baer *v.* English, 84 Ga. 403, 11 S. E. 453, 20 Am. St. Rep. 372; Jones *v.* Glover, 93 Ga. 484, 21 S. E. 50.

Illinois. — Abt *v.* American Bank, 159 Ill. 467, 42 N. E. 856, 50 Am. St. Rep. 175.

Iowa. — First Nat. Bank *v.* Dubuque R. Co., 52 Iowa 378, 3 N. W. 395, 35 Am. Rep. 280.

Louisiana. — Dolsen *v.* Brown, 13 La. Ann. 551.

Maine. — Hall *v.* Flanders, 83 Me. 242, 22 Atl. 158.

Massachusetts. — Whitney *v.* Eliot Bank, 137 Mass. 351, 50 Am. Rep. 316; Holbrook *v.* Payne, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456.

Michigan. — Grammel *v.* Carmer,

or named out of which the drawee is to be reimbursed.[15]

5. Unsealed of Sealed Instruments. — A writing not under seal may be competent evidence of an assignment of an instrument under seal.[16]

III. DELIVERY.

1. Generally. — Evidence of the mere act of delivering the written evidences of a chose in action with the intent thereby to assign the same, may be competent to establish such assignment.[17]

55 Mich. 201, 21 N. W. 418, 54 Am. Rep. 363.

Minnesota. — Lewis *v.* Traders' Bank, 30 Minn. 134, 14 N. W. 587.

Mississippi. — Bush *v.* Foote, 58 Miss. 5, 38 Am. Rep. 310.

Missouri. — Kimball *v.* Donald, 20 Mo. 577, 64 Am. Dec. 209; Bank of Com. *v.* Bogy, 44 Mo. 13; Chase *v.* Alexander, 6 Mo. App. 505.

Nevada. — Jones *v.* Pacific Co., 13 Nev. 359, 29 Am. Dec. 308.

New York. — Harris *v.* Clark, 3 N. Y. 93, 51 Am. Dec. 352; Brill *v.* Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; Shaver *v.* Western Union Tel. Co., 57 N. Y. 459; Weinhaer *v.* Morrison, 49 Hun 498, 2 N. Y. Supp. 544.

Pennsylvania. — Greenfield's Estate, 24 Pa. St. 232; Hopkins *v.* Beebe, 26 Pa. St. 85.

Texas. — Campbell *v.* Hildebrandt, 68 Tex. 28, 3 S. W. 243, 2 Am. St. Rep. 467; Jones *v.* Cunningham (Tex. App.), 15 S. W. 38.

Contra. — There are dicisions holding an unaccepted bill is evidence of an assignment. Wheatley *v.* Strobe, 12 Cal. 92, 73 Am. Dec. 522; Corser *v.* Craig, 1 Wash. C. C. 424, 6 Fed. Cas. No. 3255; Nimocks *v.* Woody, 97 N. C. 1, 2 S. E. 240, 2 Am. St. Rep. 268; Walcott *v.* Richman, 94 Me. 364, 47 Atl. 901.

15. Tooke *v.* Hollingsworth, 5 T. R. 215, 2 Rev. Rep. 573; Whitney *v.* Eliot Bank, 137 Mass. 351, 50 Am. Rep. 316; Hopkins *v.* Beebe, 26 Pa. St. 85; Munger *v.* Shannon, 61 N. Y. 251; Shaver *v.* Western Union Tel. Co., 57 N. Y. 459; Brill *v.* Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; Philips *v.* Stagg, 2 Edward Ch. (N. Y.) 108; Kimball *v.* Donald, 20 Mo. 577, 64 Am. Dec. 209.

16. Specialties Generally. — Prioleau *v.* Southwestern Bank, 16 Ga. 582; Dawson *v.* Cowles, 16 Johns. (N. Y.) 51; Durst *v.* Swift, 11 Tex. 273; Moore *v.* Waddle, 34 Cal. 145; Allen *v.* Pancost, 20 N. J. Law 68; Barrett *v.* Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331; Brahan *v.* Ragland, 3 Stew. (Ala.) 247; Becton *v.* Ferguson, 22 Ala. 599; Stoddard *v.* Benton, 6 Colo. 508; Ford *v.* Stuart, 19 Johns. (N. Y.) 342; Mitchell *v.* Hackett, 25 Cal. 538, 85 Am. Dec. 151; Blackman *v.* Joiner, 81 Ala. 344; Steel *v.* Thompson, 62 Ala. 323.

Contra. — There are, however, decisions holding that an assignment of an instrument under seal can be proved only by deed. Perkins *v.* Parker, 1 Mass. 117; Vose *v.* Handy, 2 Greenl. (Me.) 322, 11 Am. Dec. 101; Wood *v.* Partride, 11 Mass. 488.

17. Promissory Note. — Prescott *v.* Hull, 17 Johns. (N. Y.) 284; Hockett *v.* Moxley, 65 Vt. 71, 25 Atl. 898; Clark *v.* Rogers, 2 Greenl. (Me.) 143; Jones *v.* Witter, 13 Mass. 304; Bocka *v.* Nuella, 28 Mo. 180; Williams *v.* Norton, 3 Kan. 895; Cameron *v.* Little, 13 N. H. 23; Blesse *v.* Blackburn, 31 Mo. App. 264.

Contra. — Nichols *v.* Gross, 260 St. 425. See *In re* Whitbeck, 22 Misc. 494, 50 N. Y. Supp. 932.

Of Check or Draft. — Hutchings *v.* Low, 13 N. J. Law 246.

Of Bill of Exchange. — Titcomb *v.* Thomas, 5 Greenl. (Me.) 282.

Of Execution Evidencing Judgment. — Garnsey *v.* Gardner, 49 Me. 167.

Of Bond. — Owen *v.* Potter, 115 Mich. 556, 73 N. W. 977; Licey *v.* Licey, 7 Pa. St. 251, 47 Am. Dec. 513; Vose *v.* Handy, 2 Greenl. (Me.) 322, 11 Am. Dec. 101.

Of Accepted Order for Money. Swett *v.* Green, 4 Greenl. (Me.) 384.

2. Of Written Choses in Action. — Where a chose in action is embodied in a written instrument evidencing the same, it has been held that there must be proof of the delivery of such instrument, in order to establish a valid assignment of the debt or fund;[18] but a separate written instrument may be competent evidence of such assignment, without proof of such delivery.[19]

Of Coupon Bonds, Payable to Bearer. — Morris Canal Co. *v.* Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423.

Of Non-Negotiable Note. — Mowry *v.* Todd, 12 Mass. 281; Norton *v.* Piscataqua Ins. Co., 111 Mass. 532. See Chicago Trust & T. Bank *v.* Chicago Title Co., 190 Ill. 404, 60 N. E. 586.

Of Due Bill. — Littlefield *v.* Smith, 17 Me. 327; Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 427.

Of Officer's Receipt for Attached Goods. — Jewett *v.* Dockray, 34 Me. 45; Clark *v.* Clough, 3 Greenl. (Me.) 357.

Of Certificate of Deposit. — Shanklin *v.* Board of Com'rs, 21 Ohio St. 575; Fultz *v.* Walters, 2 Mont. 165.

Of Mortgage of Realty. — Runyan *v.* Mersereau, 11 Johns. (N. Y.) 534, 6 Am. Dec. 393.

Of Bond and Mortgage. — Vreeland *v.* Van Horn, 17 N. J. Eq. 137; Galway *v.* Fullerton, 17 N. J. Eq. 389.

Of Mortgages of Personal Property. — Crain *v.* Paine, 4 Cush. 483, 50 Am. Dec. 807.

Of Savings Bank Book. — Schollmier *v.* Schorndelen, 78 Iowa 426, 43 N. W. 282, 16 Am. St. Rep. 455; Taft *v.* Bowker, 132 Mass. 277; Hill *v.* Stevenson, 63 Me. 364, 18 Am. Rep. 231; Camp's Appeal, 36 Conn. 88, 4 Am. Rep. 39.

Of Insurance Policy. — Bibend *v.* St. Louis Ins. Co., 30 Cal. 78; Marcus *v.* St. Louis L. Ins. Co., 68 N. Y. 625; Pierce *v.* Nashua Ins. Co., 50 N. H. 297, 9 Am. Rep. 235; New York Ins. Co. *v.* Flack, 3 Md. 341, 56 Am. Dec. 742; Hanchey *v.* Hurley (Ala.), 30 So. 742.

Of Interest Coupons. — Ketchum *v.* Duncan, 96 U. S. 659.

Delivery of Unaccepted Order. In Snyder *v.* Board of Education, 16 Kan. 542, evidence of delivery of an unaccepted order on a board of education to a school treasurer was held inadmissible to prove an assignment to such treasurer.

Delivery of Execution. — In Garnsey *v.* Gardner, 49 Me. 167, the delivery of an unsatisfied execution by an officer to a receipt, or who had paid the judgment, was held competent evidence of an assignment of the judgment.

Delivery of Deposit Slip. — In First Nat. Bank *v.* Clark, 134 N. Y. 368, 32 N. E. 38, it was held that evidence of the delivery of a deposit slip, was not admissible to prove an assignment of the fund on deposit.

18. Of Insurance Policy. — Palmer *v.* Merrill, 6 Cush. (Mass.) 282, 52 Am. Dec. 782.

Of Contract of Conveyance. Bristow *v.* Hall, 16 Tex. 566.

Of Note. — Marshall *v.* Strange (Ky.), 9 S. W. 250.

Contra. — Williamson *v.* Yager, 91 Ky. 282, 15 S. W. 660, 34 Am. St. Rep. 184.

19. Of Judgment. — Conynghan *v.* Smith, 16 Iowa 471.

Of Accepted Draft. — Adams *v.* Robinson, 69 Ga. 627.

Of Insurance Policy. — Spring *v.* S. C. Ins. Co., 8 Wheat. (U. S.) 268.

Of Contract of Conveyance. Durst *v.* Swift, 11 Tex. 273.

Of Promissory Notes. — McGee *v.* Riddlesbarger, 39 Mo. 365; Franklin *v.* Twogood, 18 Iowa 515; Wadsworth *v.* Griswold, Harp. Law (S. C.) 17; Tatum *v.* Bullard, 94 Va. 370, 26 S. E. 871; Ducasse *v.* Keyser, 28 La. Ann. 419.

Delivery of the Assignment. The separate instrument of assignment must itself be shown to have been delivered. Erickson *v.* Kelley, 9 N. D. 12, 81 N. W. 77.

Equitable Interest Only Is Assigned. — The separate instrument of assignment has been held evi-

3. Constructive Delivery. — In respect of choses in action not evidenced by any writing, it has been held that evidence of a constructive or symbolical delivery is admissible as establishing an assignment,[20] although evidence of such delivery is not generally held essential.[21]

IV. CONSIDERATION.

1. Inter Partes. — In general, *inter partes* and between their subsequent assignees or creditors, evidence of a consideration is requisite to establish an assignment of a chose in action.[22]

2. As Against the Debtor. — In general, as between the assignee of a chose in action and the debtor thereunder, evidence of a want of consideration is admissible.[23]

dence of the conveyance of an equitable interest only.

Promissory Notes. — French *v.* Turner, 15 Ind. 59; Barrett *v.* Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331; Planters' Ins. Co. *v.* Tunstall, 72 Ala. 142.

Variance. — Written evidence of an assignment is inadmissible, which exhibits on its face a variance, through alteration, or otherwise, from that set forth in the pleadings. Park *v.* Glover, 23 Tex. 469.

20. Robbins *v.* Bacon, 3 Greenl. (Me.) 346; White *v.* Kilgore, 77 Me. 571; Whittle *v.* Skinner, 23 Vt. 531; Preston *v.* Peterson, 107 Iowa 244, 77 N. W. 864; Boyer *v.* Hamilton, 21 Mo. App. 520.

21. Rollins *v.* Hope, 18 Tex. 446; Waldron *v.* Baker, 4 E. D. Smith (N. Y.) 440; Noyes *v.* Brown, 33 Vt. 431; Risley *v.* Phoenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Chapman *v.* Plummer, 36 Wis. 262. See Cornwell *v.* Baldwin's Bank, 12 App. Div. 227, 43 N. Y. Supp. 771.

Delivery Presumed. — Evidence of long acquiescence in an assignee's claim, will establish a presumption that such claim had a legal commencement, and delivery of the assignment need not be proved. Wolcott *v.* Merchants Co., 45 App. Div. 379, 60 N. Y. Supp. 862.

22. Consideration Must Be Shown. *In General.* — Shaw *v.* Tonns, 20 App. Div. 39, 46 N. Y. Supp. 545; Brokaw *v.* Brokaw (N. J. Eq.), 4 Atl. 66; Parker *v.* City of Syracuse, 31 N. Y. 376; Moffatt *v.* Bailey, 22 App. Div. 632, 47 N. Y. Supp. 983; Cannaday *v.* Shepard, 2 Jones Eq. (N. C.) 224; White *v.* Kilgore, 77 Me. 571; Kennedy *v.* Ware, 1 Pa. St. 445, 44 Am. Dec. 145; State *v.* Hastings, 15 Wis. 83.

Of Bills and Drafts. — Jones *v.* Glover, 93 Ga. 484, 21 S. E. 50; Wells *v.* Brigham, 6 Cush. (Mass.) 6, 52 Am. Dec. 750; Brill *v.* Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; Tallman *v.* Hoey, 89 N. Y. 537; Kahnweiler *v.* Anderson, 78 N. C. 133.

Of Promissory Note. — Perkins *v.* Parker, 1 Mass. 117; Taylor *v.* Smith, 116 N. C. 531, 21 S. E. 202; Prescott *v.* Hull, 17 Johns. 284; Williamson *v.* Yager, 91 Ky. 282, 15 S. W. 660, 34 Am. St. Rep. 184.

Natural Love and Affection. — A consideration of natural love and affection has been held incompetent to sustain an executory assignment of a judgment without delivery. Kennedy *v.* Ware, 1 Pa. St. 445, 44 Am. Dec. 145. See Brokaw *v.* Brokaw (N. J. Eq.), 4 Atl. 66.

Right of Ownership by Joint Owner of a Note. — In Taylor *v.* Smith, 116 N. C. 531, 21 S. E. 202, a mutual assignment by two owners of a note payable to them jointly, providing that the note should belong to the survivor, was held supported by a valuable consideration.

Adequacy of Consideration Not Essential. — Kenner *v.* Hard, 2 Hen. & M. (Va.) 14. See Baker *v.* Wood, 157 U. S. 212.

23. Evidence of Consideration Not Material. — *California.* — Caulfield *v.* Saunders, 17 Cal. 569.

Colorado. — Welch *v.* Mayer, 4 Colo. App. 440, 36 Pac. 613.

3. Assignments for Collection. — An assignment for collection is, in general, held to be competent evidence to sustain an action in the name of the assignee, without proof of consideration,[24] but a contrary rule has been maintained.[25]

V. PRESUMPTIONS AND BURDEN OF PROOF.

Where an actual executed assignment is shown to exist, it is presumed to have been made upon an adequate consideration.[26]

The Burden of Proof of the consideration requisite to support an assignment is upon the party claiming thereunder.[27]

VI. NOTICE.

Between the assignor and the assignee of a chose in action, evidence of notice given to the one from whom the debt is due is not

Florida. — Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526.

Indiana. — Spurgin *v.* McPheeters, 42 Ind. 527; Pugh *v.* Miller, 126 Ind. 189, 25 N. E. 1040; Morrisson *v.* Ross, 113 Ind. 186, 14 N. E. 479.

Iowa. — Wardner Co. *v.* Jack, 82 Iowa 435, 48 N. W. 729; Whittaker *v.* The County, 10 Iowa 161.

Maine. — Norris *v.* Hall, 18 Me. 332.

Massachusetts. — Walker *v.* Sherman, 11 Met. 170; Ensign *v.* Kellogg, 4 Pick. 1.

Michigan. — Coe *v.* Hinkley, 109 Mich. 608, 67 N. W. 915; Seligman *v.* Ten Eyck's Est., 49 Mich. 104, 13 N. W. 377; Hicks *v.* Steele, 126 Mich. 408, 85 N. W. 1121.

Minnesota. — Vanstrum *v.* Liljengren, 37 Minn. 191, 33 N. W. 555; Elmquist *v.* Markoe, 45 Minn. 305, 47 N. W. 970; Anderson *v.* Reardon, 46 Minn. 185, 48 N. W. 777.

New York. — Cummings *v.* Morris, 25 N. Y. 625; Richardson *v.* Mead, 27 Barb. 178; Allen *v.* Brown, 44 N. Y. 228; Deach *v.* Perry, 52 Hun 613, 6 N. Y. Supp. 940; Sheridan *v.* Mayor, 68 N. Y. 30; Rosenthal *v.* Rudwick, 65 App. Div. 519, 72 N. Y. Supp. 804; Brown *v.* Powers, 53 App. Div. 251, 65 N. Y. Supp. 733.

Vermont. — Fisher *v.* Beckwith, 19 Vt. 31, 46 Am. Dec. 174.

Wisconsin. — State *v.* Hastings, 15 Wis. 83; Chase *v.* Dodge, (Wis.), 86 N. W. 548.

24. *California.* — Greig *v.* Riordan, 99 Cal. 316, 33 Pac. 913; Toby *v.* Oregon R. Co., 98 Cal. 490, 33 Pac. 550; McPherson *v.* Wiston, 64 Cal. 275, 30 Pac. 842; Poorman *v.* Mills & Co., 35 Cal. 118, 95 Am. Dec. 90.

Iowa. — Knadler *v.* Sharp, 36 Iowa 232; Cottle *v.* Cole, 20 Iowa 481.

Michigan. — Hicks *v.* Steel, 126 Mich. 408, 85 N. W. 1121; Briscoe *v.* Eckley, 35 Mich. 112.

Missouri. — Young *v.* Hudson, 99 Mo. 102, 12 S. W. 632.

New York. — Allen *v.* Brown, 44 N. Y. 228.

25. Waterman *v.* Merrow, 94 Me. 237, 49 Atl. 157; Gaffney *v.* Tammany, (Conn.), 46 Atl. 156; Stewart *v.* Price, (Kan.), 67 Pac. 553; Bostwick *v.* Bryant, 113 Ind. 448, 16 N. E. 378; Hoagland *v.* Van Etten, 22 Neb. 681, 35 N. W. 869. See Metropolitan Ins. Co. *v.* Fuller, 61 Conn. 262, 23 Atl. 193.

26. Richardson *v.* Mead, 27 Barb. 178; Dickerson *v.* City, (Wash.), 66 Pac. 381; Eno *v.* Crook, 10 N. Y. 60; Belden *v.* Meeker, 47 N. Y. 307; Tallman *v.* Hoey, 89 N. Y. 537; Carver *v.* Lynde, 7 Mont. 108, 14 Pac. 697; Adams *v.* Robinson, 1 Pick. 461; State *v.* Hastings, 15 Wis. 83; O'Donnell *v.* Smith, 142 Mass. 505, 8 N. E. 350. See Wood *v.* Duval, 9 Leigh, (Va.) 6.

27. Perkins *v.* Parker, 1 Mass. 117.

material to the validity of such assignment.[28]

28. Notice As Between Assignor and Assignee. — Wood *v.* Partridge, 11 Mass. 487; Muir *v.* Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633; Countryman *v.* Boyer, 3 How. Pr. (N. Y.) 386; Robinson *v.* Weeks, 6 How. Pr. 161; MacDonald *v.* Kneeland, 5 Minn. 283; Bishop *v.* Holcomb, 10 Conn. 444; Jackson *v.* Hamm, 14 Colo. 58, 23 Pac. 88; Pickering *v.* Ilfracombe Co., L. R. 3, C. P. Cas. 235; Hogan *v.* Black, 66 Cal. 41, 4 Pac. 943; Callanan *v.* Edwards, 32 N. Y. 483.

Insurance Policy. — Wakefield *v.* Martin, 3 Mass. 558.

Omission to Give Notice Evidence of Intention. — "Although it is not necessary to the validity of the assignment of a debt as between the assignor and assignee that notice should be given to the party from whom the debt is due, . . . the omission to give such notice may operate as strong, moral evidence of the intention and understanding of the parties." Rodick *v.* Gandell, 1 De G. M. & G. 763.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

By C. A. Robbins.

CROSS-REFERENCES.

Bankruptcy;
Insolvency.

I. EVIDENCE TO ESTABLISH ASSIGNMENT.

1. Necessity of Writing. — In the absence of a contrary statutory provision, an assignment of personal property for the benefit of creditors need not be in writing.[1]

Such an assignment of real property is within the statute of frauds; and it has been held that an assignment of both real and personal property must likewise be proved by written evidence.[2]

The manner of executing assignments for the benefit of creditors is now governed largely by statutes, which are held, in some states, to exclude proof of assignments made in any other manner.[3]

Parol evidence has been admitted in behalf of creditors[4] to show that instruments not purporting to be such were, in fact, general assignments for the benefit of creditors.[5] And under statutes

1. *Alabama.* — Loftin *v.* Lyon, 22 Ala. 540.

Florida. — Brown *v.* Chamberlain, 9 Fla. 464.

Georgia. — Gordon *v.* Greene, 10 Ga. 534.

Illinois. — Lill *v.* Brant, 6 Ill. App. 366.

Kentucky. — Muir *v.* Samuels (Ky.), 62 S. W. 481.

Massachusetts. — Curtis *v.* Norris, 8 Pick. 280; Boyden *v.* Moore, 11 Pick. 362. *Compare* Foster *v.* Lowell, 4 Mass. 308.

Minnesota. — Conrad *v.* Marcotte, 23 Minn. 55.

New York. — Fairchild *v.* Gwynne, 16 Abb. Pr. 23.

2. Lill *v.* Brant, 6 Ill. App. 366.

3. Writing. — As to the requirement that such assignments be in writing, see Whitaker *v.* Gavit, 18 Conn. 522; Price *v.* Laing, 152 Ill. 380, 38 N. E. 921.

But the declaration of trust may be contained in a separate instrument from that conveying the property, unless the statute expressly provides otherwise. Stiles *v.* Champion, 49 N. J. Eq. 446, 24 Atl. 403; Norton *v.* Kearney, 10 Wis. 443.

Attestation. — As to the requirement that the writing be attested, see Sager *v.* Summers, 49 Neb. 459, 68 N. W. 614; Summers *v.* White, 17 C. C. A. 631, 71 Fed. 106; Barker *v.* Bean, 28 N. H. 412. But see Deere *v.* Losey, 48 Neb. 622, 67 N. W. 462.

Acknowledgment. — As to the requirement that it be acknowledged, see Wilhoit *v.* Lyons, 98 Cal. 409, 33 Pac. 325; Hardman *v.* Bowen, 39 N. Y. 196; Britton *v.* Lorenz, 45 N. Y. 54; Kercheis *v.* Schloss, 49 How. Pr. 284; Rogers *v.* Pell, 154 N. Y. 518, 49 N. E. 75.

Recording. — As to the requirement that it be filed or recorded, see Wilhoit *v.* Lyons, 98 Cal. 409, 33 Pac. 325; Schuylkill Bank *v.* Reigart, 4 Pa. 477; Snyder *v.* Murdock, 20 Utah 419, 59 Pac. 191.

4. But it seems that parties to an instrument should not be permitted, as against creditors of the grantor, to testify to their intent in giving and receiving it for the purpose of determining whether it is a mortgage or a general assignment for the benefit of creditors; though it might be proper to show the circumstances under which the instrument was executed, the situation of the parties, and the acts of the parties in carrying out the contract. Appolos *v.* Brady, 1 C. C. A. 299, 49 Fed. 401.

5. And this either to establish a constructive assignment or to have the assignment declared void as not complying with the statute.

Trust Deed. — Collins *v.* Sanger, 8 Tex. Civ. App. 69, 27 S. W. 500; Hamilton-Brown Shoe Co. *v.* Mayo, 8 Tex. Civ. App. 164, 27 S. W. 781.

Bill of Sale. — Britton *v.* Lorenz, 45 N. Y. 51; Bugbee *v.* Lombard, 94 Wis. 326, 68 N. W. 958; York Co. Bank *v.* Carter, 38 Pa. St. 446.

At least it seems proper to show by a separate contemporaneous written agreement that a bill of sale was intended as an assignment for creditors. Norton *v.* Kearney, 10 Wis. 443.

requiring such assignments to be in writing, parol evidence of the circumstances surrounding the execution of several instruments has been admitted frequently to show that they were executed in pursuance of a general purpose to transfer the debtor's property for the benefit of his creditors and constituted general assignments.[6] But in some states, and especially under statutes not contemplating constructive assignments, the competency of such evidence is denied.[7]

See also Hine *v.* Bowe, 114 N. Y. 350, 21 N. E. 733, *affirming* 46 Hun 196.

Mortgage. — In an action under an insolvency law to have a mortgage, given in contemplation of insolvency, declared an assignment for creditors, the assignor may testify to his intent to prefer the mortgagee. First Nat. Bank *v.* Roberts (Ky.), 7 S. W. 890.

Burden of Proof. — The burden of proving that an instrument purporting to be something else is in fact an assignment for the benefit of creditors is, of course, upon the person so claiming. Collins *v.* Sanger, 8 Tex. Civ. App. 69, 27 S. W. 500; Turner Hardware Co. *v.* Reynolds (Ind. Ter.), 47 S. W. 307.

But under a statute providing that the giving in contemplation of insolvency, of any preference to one creditor over another, except the giving of a mortgage for a contemporaneous loan, should operate as a general assignment of the debtor's property for the benefit of creditors, it was held that the burden of proof was on a mortgagee who had received a mortgage from an insolvent debtor to show that it was given for a contemporaneous loan. Terrell *v.* Jennings, 1 Met. (58 Ky.) 450.

6. *United States.* — White *v.* Cotzhausen, 129 U. S. 329, 9 Sup. Ct. 309; South Branch Lumber Co. *v.* Ott, 142 U. S. 622, 12 Sup. Ct. 318.

Iowa. — Burrows *v.* Lehndorff, 8 Iowa 96; Van Patten *v.* Burr, 52 Iowa 518, 3 N. W. 524.

New Jersey. — Stiles *v.* Champion, 49 N. J. Eq. 446, 24 Atl. 403.

Pennsylvania. — Downing *v.* Kintzing, 2 Serg. & R. 326; Schuylkill Bank *v.* Reigart, 4 Pa. St. 477.

Texas. — City Nat. Bank *v.* Merchants' Nat. Bank, 7 Tex. Civ. App. 584, 27 S. W. 848; *affirmed* in 87 Tex. 295, 28 S. W. 277.

See also Davidson *v.* Kahn, 116 Ala. 427, 22 So. 539; Berry *v.* Cutts, 42 Me. 445; Maass *v.* Falk, 146 N. Y. 34, 40 N. E. 504.

As other contemporaneous mortgages and pledges, orders by the mortgagor on the mortgagee for the payment of other debts, arrangements as to the possession and sale of property, etc., to show an instrument purporting to be a mortgage to be in fact an assignment, Richmond *v.* Miss. Mills, 52 Ark. 30, 11 S. W. 960, 4 L. R. A. 413.

As the known insolvency of a debtor executing several chattel mortgages and assignments of accounts to certain creditors at the same time, the taking possession of the property by one creditor for all those thus preferred, the purchase of the property by one creditor for all under foreclosure proceedings, the division of the proceeds by such creditor *pro rata*, etc., Winner *v.* Hoyt, 66 Wis. 227, 28 N. W. 380, 57 Am. Rep. 257.

As a deed of conveyance of real estate, a bill of sale of personal property, and articles of agreement, Van Vleet *v.* Slauson, 45 Barb. (N. Y.) 317.

The question of fact is for the jury. Mower *v.* Hanford, 6 Minn. 372.

7. **Bill of Sale.** — Price *v.* Laing, 152 Ill. 380, 38 N. E. 921, *affirming* 50 Ill. App. 324; Robins *v.* Embry, 1 Smed. & M. Ch. (Miss.) 207.

Mortgage. — Adams *v.* Bateman (Tex. Civ. App.), 29 S. W. 1124; Dunham *v.* McNatt, 15 Tex. Civ. App. 552, 39 S. W. 1016.

Deed of Trust for Preferred Creditors. — Steadman *v.* Dobbins, 93 Tenn. 397, 24 S. W. 1133.

2. Execution and Delivery of Deed. — The execution[8] of the deed of assignment by the debtor, or by his authorized agent,[9] and its proper delivery,[10] must be established by the person relying upon it.[11] The filing of the deed for record,[12] or the possession of it by

Partial Assignment for Creditors cannot be shown by parol to have been intended as a general assignment. Hays *v.* Covington, 16 Lea (Tenn.) 262.

8. Where there is no subscribing witness, the testimony of a beneficiary under a deed of assignment is competent to prove its execution. Tittle *v.* Vanleer (Tex. Civ. App.), 27 S. W. 736; Davis *v.* Bingham (Tex. Civ. App.), 33 S. W. 1035.

9. Verbal Authority. — Proof of verbal authority on the part of an agent or partner to execute a general assignment is ordinarily competent. McGuffin *v.* Sowell, 1 Tex. Civ. App. 187, 20 S. W. 871; Kittrell *v.* Blum, 77 Tex. 336, 14 S. W. 69.

But under some statutes, such authority must be in writing where the assignment includes real estate. McGuffin *v.* Sowell, 1 Tex. Civ. App. 187, 20 S. W. 871.

Where the original authority is not in writing, the agent's act may be ratified by the principal by an instrument in writing at any time before the heirs of creditors attach. McKee *v.* Coffin, 66 Tex. 304, 1 S. W. 276; Kittrell *v.* Blum, 77 Tex. 336, 14 S. W. 69.

By Partner. — The authority of a sole resident managing partner to execute a general assignment may be assumed. H. B. Claflin Co. *v.* Evans, 55 Ohio St. 183, 45 N. E. 3.

The absconding of a partner leaving the business insolvent is evidence of his assent to the making of a general assignment for creditors by the other partner. Sullivan *v.* Smith, 15 Neb. 476, 19 N. W. 620, 48 Am. Rep. 355.

By Corporation. — The power of a board of directors of a foreign corporation to make a general assignment of the corporate property for creditors is presumed. Rogers *v.* Pell, 154 N. Y. 518, 49 N. E. 75.

Where a deed of assignment of a corporation is regular upon its face and is executed by a properly constituted officer of the corporation under the corporate seal, there is *prima facie* presumption of the authority of the officer to execute the deed. Boynton *v.* Roe, 114 Mich. 401, 72 N. W. 257; Flint *v.* Clinton Co., 12 N. H. 430.

The subsequent ratification of the act by the board of directors affords no presumption of want of original authority on the part of the officers. Anderson Woolen Co. *v.* Lesher, 78 Ill. App. 678.

As to proof of execution by attorney, see Clark *v.* Mix, 15 Conn. 151.

10. That the assignee has acted under the deed is conclusive evidence of delivery against him. Ward *v.* Lewis, 4 Pick. (Mass.) 518.

Time of Delivery. — The date of execution of the instrument is *prima facie* the date of delivery. McLlharay *v.* Chambers, 117 N. Y. 532, 23 N. E. 561.

The presumption that the time indorsed on a deed of assignment by a probate judge under a statute requiring such indorsement was the time of delivery of the deed is rebuttable. Clafflin Co. *v.* Evans, 55 Ohio St. 183, 45 N. E. 3.

As to sufficient evidence of delivery, see Singer *v.* Armstrong, 77 Iowa 397, 42 N. W. 332; Ward *v.* Lewis, 4 Pick. (Mass.) 518; Parker *v.* Jervis, 3 Abb. Dec. (N. Y.) 449; McLlharay *v.* Chambers, 117 N. Y. 532, 23 N. E. 561; Mathews *v.* Poultney, 33 Barb. (N. Y.) 127; Tompkins *v.* Wheeler, 16 Pet. 106; Van Hook *v.* Walton, 28 Tex. 59.

11. Where an assignee for creditors intervenes in an action claiming the property in controversy under the assignment, the burden of proof is on him to show the fact and time of delivery of the deed. Waples-Platter Co. *v.* Low, 54 Fed. 93; Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556, 25 S. W. 868.

12. Scott *v.* Mills, 115 N. Y. 376, 22 N. E. 156.

the assignee,[13] is *prima facie* proof of its delivery. After the actual delivery of the deed by the assignor to the assignee, the former will not be permitted to show, in his own behalf, that the delivery was conditional.[14]

3. Acceptance by Assignee. — Where the acceptance of the trust by the assignee for creditors is required, such acceptance may be proved by evidence of oral assent or acts,[15] or may even be presumed *prima facie*,[16] unless acceptance in writing is expressly required by statute.[17]

4. Assent of Creditors. — When the assent of creditors to an assignment is necessary,[18] such assent will be presumed to sustain the assignment as to creditors who are preferred thereby to the full extent of their claims,[19] and also as to other creditors where the

13. As to the time of execution and record. Rowland *v.* Hewitt, 19 Ill. App. 450.

14. Ward *v.* Lewis, 4 Pick. (Mass.) 518.

Provisional Execution. —But parol evidence is admissible to show that the execution of the deed of assignment was provisional and that delivery to the assignee by the assignor's agent was unauthorized. Kingston *v.* Koch, 57 Hun 12, 10 N. Y. Supp. 363.

Or that complete delivery was left to the discretion of the depositary. Reichenbach *v.* Winkhaus, 67 How. Pr. (N. Y.) 512.

15. *Alabama.* — Dewoody *v.* Hubbard, 1 Stew. & P. 9.

Arkansas. — *Ex parte* Conway, 4 Pike 302.

District of Columbia. — Morrison *v.* Shuster, 1 Mackey 190.

Iowa. — Price *v.* Parker, 11 Iowa 144; Singer *v.* Armstrong, 77 Iowa 397, 42 N. W. 332.

Missouri. — State *v.* Benoist, 37 Mo. 500.

New Hampshire. — Flint *v.* Clinton Co., 12 N. H. 430.

New Jersey. — Scull *v.* Reeves, 3 N. J. Eq. 84.

New York. — Cunningham *v.* Freeborn, 1 Edw. Ch. 256, 11 Wend. 240.

The bringing and prosecuting of a suit under the trust is conclusive evidence of the assignee's acceptance and *prima facie* evidence of his having qualified. Taylor *v.* Atwood, 47 Conn. 498. See also Ward *v.* Lewis, 4 Pick. (Mass.) 518.

Receiving possession of the deed by the assignee is not conclusive evidence of his acceptance of the trust as against execution creditors. Crosby *v.* Hillyer, 24 Wend. (N. Y.) 280.

As to sufficient evidence of failure to accept, see Jackson *v.* Bodle, 20 Johns. (N. Y.) 184.

16. Wilt *v.* Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474; Brevard *v.* Neely, 31 Tenn. (2 Sneed) 164; Brown *v.* Chamberlain, 9 Fla. 464.

17. Acceptance in Writing. — In New York the acceptance must be in writing and acknowledged. Scott *v.* Mills, 115 N. Y. 376, 22 N. E. 156, *affirming* 45 Hun 263; Rennie *v.* Bean, 24 Hun (N. Y.) 123; Smedley *v.* Smith, 15 Daly 421, 8 N. Y. Supp. 100.

But not necessarily upon the deed of assignment itself. Franey *v.* Smith, 125 N. Y. 44, 25 N. E. 1079, overruling Schwartz *v.* Soulter, 41 Hun 323. See also Noyes *v.* Wernberg, 15 Abb. N. C. (N. Y.) 164.

18. Where the deed of assignment has been assented to by all the creditors in writing, it is not competent for one of them to show that he signed on a parol condition. Martin *v.* Taylor, 52 Ark. 389, 12 S. W. 1011. See also Arnold *v.* Bailey, 24 S. C. 493.

19. *United States.* — Wheeler *v.* Sumner, 4 Mason 183, 29 Fed. Cas. No. 17,501.

Alabama. — Abercrombie *v.* Bradford, 16 Ala. 560; Brown *v.* Lyon, 17 Ala. 659.

Connecticut. — De Forest *v.* Bacon, 2 Conn. 633.

Kentucky. — Reinhard *v.* Bank, 6 B. Mon. 252.

deed does not require releases of the debtor by them or contain any provision against their interests.[20]

5. Delivery of Property. — The delivery of the assigned property

Maine. — Copeland *v.* Weld, 8 Greenl. 411.

Massachusetts. — Ward *v.* Lewis, 4 Pick. 518; New England Bank *v.* Lewis, 8 Pick. 113.

Missouri. — Fearey *v.* O'Neill, 149 Mo. 467, 50 S. W. 918.

Rhode Island. — Sadlier *v.* Fallon, 4 R. I. 490.

20. *United States.* — Tompkins *v.* Wheeler, 16 Pet. 106; Halsey *v.* Fairbanks, 4 Mason 206, 11 Fed. Cas. No. 5964; Brown *v.* Minturn, 2 Gall. 557, 4 Fed. Cas. No. 2021; Comer *v.* Tabler, 44 Fed. 467.

Alabama. — Inman *v.* Schloss, 122 Ala. 461, 25 So. 739; Halsey *v.* Connell, 111 Ala. 221, 18 So. 445; Truss *v.* Davidson, 90 Ala. 359, 7 So. 812; Governor *v.* Campbell, 17 Ala. 566; Mauldin *v.* Armistead, 14 Ala. 702; Lockwood *v.* Nelson, 16 Ala. 294; Abercrombie *v.* Bradford, 16 Ala. 560; Rankin *v.* Lodor, 21 Ala. 380.

Arizona. — Cullum *v.* Paul (Ariz.), 8 Pac. 187.

Arkansas. — Ewing *v.* Walker, 60 Ark. 503, 31 S. W. 45; Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458; *Ex parte* Conway, 4 Pike 302.

California. — Forbes *v.* Scannell, 13 Cal. 242.

District of Columbia. — Webster *v.* Harkness, 3 Mackey 220.

Florida. — Brown *v.* Chamberlain, 9 Fla. 464.

Georgia. — Jones *v.* Dougherty, 10 Ga. 272.

Illinois. — Juillard *v.* Walker, 54 Ill. App. 517; Beach *v.* Bestor, 45 Ill. 341.

Iowa. — Price *v.* Parker, 11 Iowa 144.

Kentucky. — U. S. Bank *v.* Huth, 4 B. Mon. 423; Scott *v.* Baldwin, 6 Ky. Law 214.

Louisiana. — Oliver *v.* Lake, 3 La. Ann. 78; Fellows *v.* Commercial Bank, 6 Rob. 246.

Missouri. — Kingman & Co. *v.* Cornell-Tebbetts Co., 150 Mo. 282, 51 S. W. 727; Duvall *v.* Raisin, 7 Mo. 449.

New Hampshire. — Frink *v.* Buss, 45 N. H. 325; Fellows *v.* Greenleaf, 43 N. H. 421.

New York. — Nicoll *v.* Mumford, 4 Johns. Ch. 522; Ludington's Petition, 5 Abb. N. C. 322.

North Carolina. — Ingram *v.* Kirkpatrick, 6 Ired. Eq. 463; Stimpson *v.* Fries, 2 Jones Eq. 156; Moore *v.* McDuffy, 3 Haw. 578.

South Carolina. — Beall *v.* Lowndes, 4 S. C. 258.

Tennessee. — Washington *v.* Ryan, 64 Tenn. 622; Farquharson *v.* McDonald, 2 Heisk. 404; Brevard *v.* Neely, 2 Sneed 164; Shyer *v.* Lockhard, 2 Tenn. Ch. 365; Furman *v.* Fisher, 4 Cold. 626; Weir *v.* Tannehill, 2 Yerg. 57; Robertson *v.* Sublett, 6 Humph. 313.

Texas.—Gonzales *v.* Batts, 20 Tex. Civ. App. 421, 50 S. W. 403; Kendall Boot & Shoe Co. *v.* Johnston (Tex. Civ. App.), 24 S. W. 583.

Vermont.—Hall *v.* Denison, 17 Vt. 310.

See also

United States. — Brooks *v.* Marbury, 11 Wheat. 78; Gordon *v.* Coolidge, 1 Sum. 537, 10 Fed. Cas. No. 5606.

The presumption is not conclusive. Gibson *v.* Rees, 50 Ill. 383. See also Thatcher *v.* Valentine, 22 Colo. 201, 43 Pac. 1031; Spangler *v.* Sanborn, 7 Colo. App. 102, 43 Pac. 905.

Where the creditor is required to execute a release or there are provisions in the deed against his interests, his assent must be proved. Kemp *v.* Porter, 7 Ala. 138; Shearer *v.* Loftin, 26 Ala. 703; McCain *v.* Pickens, 32 Ark. 399; Todd *v.* Buckman, 11 Me. 41; Spinney *v.* Portsmouth Hosiery Co., 28 N. H. 9; Seale *v.* Vaiden, 10 Fed. 831.

Assignment Fraudulent. — The creditor's assent is not presumed where the assignment is fraudulent. Townsend *v.* Harwell, 18 Ala. 301; Benning *v.* Nelson, 23 Ala. 801; Ashley *v.* Robinson, 29 Ala. 112. See also Derry Bank *v.* Davis, 44 N. H. 548; Brown *v.* Warren, 43 N. H. 430.

to the assignee for creditors may be proved by either direct or circumstantial evidence.[21]

II. PAROL EVIDENCE TO SUPPLEMENT AND EXPLAIN DEED OF ASSIGNMENT.

1. Circumstances of Execution of Deed. — Parol or extrinsic evidence of the circumstances under which a deed of assignment for the benefit of creditors was executed is generally admissible to sustain it when not contradicting or varying its terms. It may be shown that the deed does, in fact, convey all the debtor's property, though not in terms purporting to do so,[22] or that the assignor is insolvent where such fact does not appear on the face of the deed.[23] But distinct terms cannot be added to the deed by parol evidence.[24]

2. Explaining and Applying Terms. — In the absence of statute,[25] parol evidence is admissible to identify the property included in a general description in the deed,[26] or the person included in a specified

21. As the taking possession of the assigned property by the assignee. Metcalf *v.* Van Brunt, 37 Barb. (N. Y.) 621.

As to sufficient evidence of delivery, see Ward *v.* Lewis, 4 Pick. (Mass.) 518; Parker *v.* Jervis, 3 Abb. Dec. (N. Y.) 449; Bullis *v.* Montgomery, 50 N. Y. 352.

The question is for the jury where the evidence is contradictory. Stedman *v.* Batchelor, 54 Hun 638, 8 N. Y. Supp. 37.

The recital "have sold, conveyed and delivered" in the deed is not proof of actual delivery of the property assigned. Martin-Brown Co. *v.* Morris, 1 Ind. Ter. 495, 42 S. W. 423.

22. Keighler *v.* Nicholson, 4 Md. Ch. 86; Nightingale *v.* Harris, 6 R. I. 321; McCart *v.* Maddox, 68 Tex. 456, 5 S. W. 150; Landaner *v.* Conklin, 3 S. D. 462, 54 N. W. 322; Gordon *v.* Cannon, 18 Gratt. (Va.) 387; Long *v.* Meriden Britannia Co., 94 Va. 594, 27 S. E. 499.

Contra — Barnitz *v.* Rice, 14 Md. 24.

Compare also McMillan *v.* Knapp, 76 Ga. 171, 2 Am. St. Rep. 29; Lookout Bank *v.* Noe, 86 Tenn. 21, 5 S. W. 433; Keating *v.* Vaughn, 61 Tex. 518; Beard *v.* Kimball, 11 N. H. 471.

23. Foreman *v.* Burnette, 83 Tex. 396, 18 S. W. 756; Dawley *v.* Sherwin, 5 S. D. 594, 59 N. W. 1027.

Contra. — Dawley *v.* Sherwin, 5 S. D. 594, 59 N. W. 1027.

But it will be presumed. Johnson *v.* Robinson, 68 Tex. 399, 4 S. W. 625.

24. Preference cannot be added by parol. Wilson *v.* Hanson, 12 Me. 58. See also Heilner *v.* Imbrie, 6 Serg. & R. (Pa.) 401, and cases in note 43.

25. Under some statutes, the description of property or debts in the deed or schedule cannot be aided by parol evidence.

Colorado. — Burchinell *v.* Mosconi, 4 Colo. App. 401, 36 Pac. 307.

North Carolina. — Hall *v.* Cottingham, 124 N. C. 402, 32 S. W. 745; Brown & Co. *v.* Mimocks, 124 N. C. 417, 32 S. W. 743.

Tennessee. — Stedman *v.* Dobbins, 93 Tenn. 397, 24 S. W. 1133; Schiebler *v.* Mundinger, 86 Tenn. 674, 9 S. W. 33.

See also Powers *v.* Goins (Tenn. Ch. App.), 35 S. W. 902; Rosenbaum *v.* Moller, 85 Tenn. 653, 4 S. W. 10; Sugg *v.* Tillman, 2 Swan 208; Hill *v.* Alexander, 16 Lea 496.

26. *United States.* — Braghear *v.* West, 7 Pet. 608.

Alabama. — Frank *v.* Myers, 97 Ala. 437, 11 So. 832; Clark *v.* Few, 62 Ala. 243; Halsey *v.* Connell, 111 Ala. 221, 20 So. 445; England *v.* Reynolds, 38 Ala. 370; Graham *v.* Lockhart, 8 Ala. 9.

class,[27] or the debts included in a class or description,[28] and, ordinarily, to fix the true amounts of debts specified.[29]

Colorado. — Smith *v.* Strokes, 8 Colo. 286, 7 Pac. 10; Graham Paper Co. *v.* Sanderson, 8 Colo. App. 427, 47 Pac. 904; Falk *v.* Liebes, 6 Colo. App. 475, 42 Pac. 46.

Connecticut. — Clark *v.* Mix, 15 Conn. 151.

Florida. — Dorr *v.* Schmidt, 38 Fla. 354, 21 So. 279; Parker *v.* Cleveland, 37 Fla. 39, 19 So. 344; Bellamy *v.* Bellamy, 6 Fla. 62.

Kansas. — Walker *v.* Newlin, 22 Kan. 106.

Kentucky. — Knefler *v.* Shreve, 78 Ky. 297; Ely *v.* Hair, 16 B. Mon. 230.

Massachusetts. — Pingree *v.* Cornstock, 18 Pick. 46; Emerson *v.* Knower, 8 Pick. 63; Hatch *v.* Smith, 5 Mass. 42; Pierce *v.* Parker, 4 Metc. 180.

Maryland.—Farquharson *v.* Eichelberger, 15 Md. 63.

Michigan. — Nye *v.* Van Husan, 6 Mich. 329.

Mississippi. — Wickham *v.* Green, 61 Miss. 463.

Missouri. — State *v.* Keeler, 49 Mo. 548; First Nat. Bank *v.* Hughes, 10 Mo. App. 7.

Montana. — McColloh *v.* Price, 14 Mont. 320, 36 Pac. 194.

Nebraska. — Maul *v.* Drexel, 55 Neb. 446, 76 N. W. 163.

New York. — Turner *v.* Jaycox, 40 N. Y. 470; Emigrant Industrial Savings Bank *v.* Roche, 93 N. Y. 374; Kellogg *v.* Slawson, 15 Barb. 56.

Texas. — Pierson *v.* Sanger, 93 Tex. 160, 53 S. W. 1012; Gonzales *v.* Batts, 20 Tex. Civ. App. 421, 50 S. W. 403; Nave *v.* Britton, 61 Tex. 572.

Utah. — Snyder *v.* Murdock, 20 Utah 419, 59 Pac. 91.

Virginia. — Kevan *v.* Branch, 1 Gratt. 274.

See also Coffin *v.* Douglass, 61 Tex. 406.

Compare Barkman *v.* Simmons, 23 Ark. 1; Moir *v.* Brown, 14 Barb. (N. Y.) 39; Myers *v.* Conway, 90 Ala. 109, 7 So. 639; Forshee *v.* Willis, 101 Tenn. 450, 47 S. W. 703.

But in the absence of some statutory provision, parol evidence is not admissible to show that the assignment was intended to include certain property not embraced by fair construction in the description in the assignment. Driscoll *v.* Fiske, 21 Pick. (Mass.) 503. And "when the deed in general terms purports to convey all the property and afterwards enumerates and designates the property assigned, such special designation controls the general words" and parol evidence is inadmissible to show that the assignment was intended to include other property. Palmer *v.* McCarthy, 2 Colo. App. 422, 31 Pac. 241; Bock *v.* Perkins, 139 U. S. 628; Mims *v.* Armstrong, 31 Md. 87. See also Ryerson *v.* Eldred, 18 Mich. 12.

Compare Ely *v.* Hair, 16 B. Mon. (Ky.) 230.

27. Silver Creek Bank *v.* Talcott, 22 Barb. (N. Y.) 550; Miller *v.* Cherry, 3 Jones Eq. (N. C.) 24; Gardner *v.* Pike, 3 Jones Eq. (N. C.) 306.

But it seems that a preference cannot be established by parol evidence. Wolf *v.* O'Connor, 88 Mich. 124, 50 N. W. 118.

28. *Alabama.* — Graham *v.* Lockhart, 8 Ala. 9; Halsey *v.* Connell, 111 Ala. 221, 20 So. 445.

Maine. — Wilson *v.* Hanson, 12 Me. 58.

Maryland.—Davis *v.* Shaw, 42 Md. 410.

North Carolina. — Allmand *v.* Russell, 5 Ired, 183; Miller *v.* Cherry, 3 Jones Eq. 24; Gardner *v.* Pike, 3 Jones Eq. 306.

Tennessee. — Galt *v.* Dibrell, 10 Yerg. 146.

Compare Overton *v.* Holinshade, 5 Heisk. (Tenn.) 686.

29. Especially when the deed or schedule purports to approximate only the amount of the claim.

United States. — Halsey *v.* Fairbanks, 4 Mason 206, 11 Fed. Cas. No. 5964.

Alabama. — England *v.* Reynolds, 38 Ala. 370.

Iowa. — Platt *v.* Hedge, 8 Iowa 386.

III. DEED OF ASSIGNMENT AS EVIDENCE.

1. In General. — A. Against Parties. — The deed of assignment, including the schedule, is conclusive evidence of the terms and condition of the assignment as between the parties thereto.[30] They are also bound, as between themselves, by specific recitals in the deed.[31]

The deed is also admissible in evidence in behalf of creditors as *prima facie* proof of facts therein recited.[32] The inventory of the assignee is admissible on the same basis.[33]

Kentucky. — U. S. Bank *v.* Huth, 4 B. Mon. 423.

Louisiana. — Layon *v.* Rowan, 7 Rob. 1.

Missouri. — Brown *v.* Knox, 6 Mo. 302.

New York. — McButt *v.* Peck, 1 Daly 83.

Oregon. — Silsby *v.* Strong, 38 Or. 36, 62 Pac. 633.

Pennsylvania. — Browne *v.* Weir, 5 Serg. & R. 401.

Texas. — Van Hook *v.* Walton, 28 Tex. 59.

Virginia. — Griffin *v.* Macauley, 7 Gratt. 476.

Compare Miles *v.* Bacon, 4 J. J. Marsh. (Ky.) 465.

The rule applies to preferred claims. Strauss *v.* Rose, 59 Md. 525; Mattison *v.* Judd, 59 Miss. 99; Goodbar Shoe Co. *v.* Montgomery, 73 Miss. 73, 19 So. 196; Smith *v.* Smith, 34 N. Y. St. 116, 11 N. Y. Supp. 630; Kavanagh *v.* Beckwith, 44 Barb. 192; Willey *v.* Reynolds (Ind. Ter.), 51 S. W. 972.

30. Hays *v.* Covington, 16 Lea (Tenn.) 262; Morris *v.* Wells, 26 N. Y. St. 9, 7 N. Y. Supp. 61; Sibley *v.* Killow, 19 Weekly Dig. (N. Y.) 190.

Parol evidence is inadmissible to show that the written acceptance of the benefits of an assignment by a creditor and the receipt by him of a *pro rata* share thereunder was not to be in full payment of his claim where the deed so provides. Arnold *v.* Bailey, 24 S. C. 493. See also Martin *v.* Taylor, 52 Ark. 389, 12 S. W. 1011.

At least as against the interests of releasing creditors, parol evidence is not admissible to show that an intended preference was different from that actually written in the deed by the draughtsman. Heilner *v.* Imbrie, 6 Serg. & R. (Pa.) 401. See also note 43.

31. Huntington *v.* Havens, 5 Johns. Ch. (N. Y.) 23.

The recital in the deed of assignment that "the creditors have assented to the terms herein stated" is in no way binding on creditors not present nor actually assenting. Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567.

See also Kellogg *v.* Slawson, 15 Barb. (N. Y.) 56.

32. But the recital in the deed that the grantors "have sold, conveyed and delivered" the assigned property is not proof of delivery to the assignee before the qualification of the latter. Martin-Brown Co. *v.* Morris, 1 Ind. Ter. 495, 42 S. W. 423.

The debtor is not bound by the amount of the debts named in the deed. Griffin *v.* Macaulay, 7 Gratt. (Va.) 476.

Nor by the values placed on the assigned property in the schedules where they indicated the solvency of the assignor. Guerin *v.* Hunt, 6 Minn. 260.

Compare Burt *v.* McKinstry, 4 Minn. 146.

Nor by the recital of a partnership including a person not a partner. Fox *v.* Heath, 16 Abb. Pr. (N. Y.) 163.

The deed of assignment, schedule, inventory, etc., are evidence of insolvency against the assignor; a banker, charged with having received deposits, knowing himself to be insolvent. State *v.* Beach, 147 Ind. 74, 46 N. E. 145.

33. Wilcox *v.* Payne, 28 N. Y. 712, 55 Hun 607, 8 N. Y. Supp. 407. See also Asay *v.* Allen, 124 Ill. 391, 16 N. E. 865.

B. Against Strangers. — The deed is competent evidence against strangers to prove the fact of the assignment and the assignee's title to the assigned property.[34] It has been admitted against creditors of the assignor to prove, *prima facie*, the insolvency[35] of the assignor shown upon its face, and the validity and amount of the debts recited.[36]

2. Fraud in Assignment. — A. Construction of Term. — The effect to be given to a provision in a deed of assignment for the benefit of creditors is ordinarily a question of law for the court.[37] If its necessary effect is to hinder, delay, or defraud creditors, the assignor is held to have intended such result, parol evidence to rebut the presumption of fraud is excluded,[38] and the provision, or the assignment itself, is held void.

But various provisions in such deeds, that are held to be fraudulent *per se* by some courts, are held by other courts to be merely

34. Langdon *v.* Thompson, 25 Minn. 509; Hartley *v.* Cataract Steam Engine Co., 46 N. Y. St. 374, 19 N. Y. Supp. 121.

In an action by the assignee for injury to property by a stranger to the deed, the deed is not evidence that the assignor was the owner of the property at the time of the assignment. Little Rock & M. R. Co. *v.* Sparkman, 60 Ark. 25, 28 S. W. 509.

An order of court substituting an assignee in place of the assignor as plaintiff in a foreclosure proceeding is *prima facie* evidence of the assignee's ownership of the bond and mortgage sued on. Smith *v.* Zalinski, 94 N. Y. 519, *affirming* 26 Hun 225.

35. Southern Suspender Co. *v.* Von Borries, 91 Ala. 507, 8 So. 367; Ball *v.* Bowe, 49 Wis. 495, 5 N. W. 909; Cunningham *v.* Norton, 125 U. S. 77, 8 Sup. Ct. 804; Kellogg *v.* Slawson, 15 Barb. (N. Y.) 56.

But not against the defendant in an action by the assignee to set aside a conveyance made by the debtor to a creditor before the making of the assignment in alleged contemplation of insolvency and for the alleged purpose of giving the creditor an unlawful preference. Simpson *v.* Carleton, 1 Allen (Mass.) 109.

36. Martin-Brown Co. *v.* Henderson, 9 Tex. Civ. App. 130, 28 S. W. 695; *In re* Wolff, 13 Daly (N.Y.) 481; Estate of Truitt, 10 Phila. (Pa.) 16.

Compare notes 44 and 50.

37. Harris *v.* Sumner, 2 Pick. (Mass.) 129; Pierson *v.* Manning, 2 Mich. 444; Sheldon *v.* Dodge, 4 Denio (N. Y.) 217.

Compare Hardy *v.* Skinner, 9 Ired. (N. C.) 191.

38. *United States.* — Rice *v.* Frayser, 24 Fed. 460.

Alabama. — Abercrombie *v.* Bradford, 16 Ala. 560.

Maryland. — Whedbee *v.* Stewart, 40 Md. 414; Inloes *v.* American Exchange Bank, 11 Md. 173; Malcolm *v.* Hodges, 8 Md. 418; Green *v.* Frieber, 3 Md. 11.

New York. — Forbes *v.* Walter, 25 N. Y. 430; Dunham *v.* Waterman, 17 N. Y. 9, 6 Abb. Pr. 357; Kavanagh *v.* Beckwith, 44 Barb. 192; Jessup *v.* Hulse, 29 Barb. 539.

Compare Bobbitt *v.* Rodwell, 105 N. C. 236, 11 S. E. 245. See also Frazier *v.* Traux, 27 Hun (N. Y.) 587.

Where in a law action a deed of assignment provided for the preferred payment of the claims of releasing creditors and the payment of any surplus to the assignor, parol evidence to show that the assignor and assignee intended to provide for the payment of all creditors, and that a clause to that effect had been omitted by mistake of the scrivener was held incompetent. Farrow *v.* Hayes, 51 Md. 498.

But whether the deed might be reformed in a proper action *quae re.*

And *compare* Guittard *v.* Robinson, 29 Neb. 400, 45 N. W. 476.

evidence of a fraudulent intent and subject to explanation by extrinsic or parol evidence.[39] In some cases such provisions have been held by some of these latter courts to raise a *prima facie* presumption of fraud which must be overcome by the person relying on the deed, while in other cases the effect is left a question of fact.[40]

B. Specific Matters As Evidence. — The following provisions or matters in deeds of assignment for the benefit of creditors have been held to be merely evidence of an intent to hinder, delay, or defraud creditors and not conclusive proof thereof:

The failure of the assignor definitely to set out or describe his assets (and in some cases his liabilities) in the deed of assignment, or to make and file a schedule thereof,[41] the omission of property (or debts) from the deed and schedule,[42] the listing in the deed or

39. *Alabama.* — Cummings *v.* McCullough, 5 Ala. 324.

Colorado. — Burr *v.* Clement, 9 Colo. 1, 9 Pac. 633; Hunter *v.* Ferguson, 3 Colo. App. 287, 33 Pac. 82.

New York. — Roberts *v.* Buckley, 145 N. Y. 215, 39 N. E. 966.

North Carolina. — Hardy *v.* Skinner, 9 Ired. (Law) 191; Bobbitt *v.* Rodwell, 105 N. C. 236, 11 S. E. 245.

Texas. — Carlton *v.* Baldwin, 22 Tex. 724; Howerton *v.* Holt, 23 Tex. 52.

40. But it must not be forgotten that other courts hold the same matter fraudulent *per se*.

41. *United States.* — Gilkerson *v.* Hamilton, 10 Fed. Cas. No. 5424a; Pearpoint *v.* Graham, 4 Wash. 232, Fed. Cas. No. 10,877.

Alabama. — Brown *v.* Lyon, 17 Ala. 659; Cummings *v.* McCullough, 5 Ala. 324.

California. — Forbes *v.* Scannell, 13 Cal. 242.

Iowa. — Meeker *v.* Sanders, 6 Iowa 60.

Massachusetts. — Stevens *v.* Bell, 6 Mass. 339.

Michigan. — Hollister *v.* Loud, 2 Mich. 309.

New Hampshire. — Havens *v.* Cutts, 5 N. H. 113.

New York. — Putnam *v.* Hubbell, 42 N. Y. 106; Cunningham *v.* Freeborn, 11 Wend. 240; Van Nest *v.* Yoe, 1 Sandf. Ch. 4; Kellogg *v.* Slawson, 15 Barb. 56.

Pennsylvania. — Hower *v.* Geesaman, 17 Serg. & R. 251; Wilt *v.* Franklin, 1 Binn. 502, 2 Am. Dec. 474.

Texas. — Nave *v.* Britton, 61 Tex. 572.

Tennessee. — Overton *v.* Holinshade, 5 Heisk. 686.

See also Smith *v.* Strokes, 8 Colo. 286, 7 Pac. 10; Coots *v.* Chamberlain, 39 Mich. 565; Burd *v.* Smith, 4 Dall. (Pa.) 76.

42. De Camp *v.* Marshall, 2 Abb. Pr. (N. S.) 373; Mattison *v.* Demarest, 4 Rob. (N. Y.) 161; Loo *v.* Wilkinson, 10 N. Y. St. 297; Blain *v.* Pool, 13 N. Y. St. 571; Ellis *v.* Myers, 28 N. Y. St. 120, 8 N. Y. Supp. 139; White *v.* Benjamin, 3 Misc. (N. Y.) 490, 23 N. Y. Supp. 981; McNaney *v.* Hall, 86 Hun 415, 33 N. Y. Supp. 518

Good Faith of Omission. — It may be shown that the omission was accidental and that the property was actually delivered to the assignee. Troescher *v.* Cosgrove, 40 App. Div. 498, 61 N. Y. Supp. 1036; Shultz *v.* Hoagland, 85 N. Y. 464.

Or that the property omitted was of no value. Long *v.* Meriden Britannia Co., 94 Va. 594, 27 S. E. 499; Shultz *v.* Hoagland, 85 N. Y. 464.

Or was encumbered for its full value. Parsell *v.* Patterson, 47 Mich. 505, 11 N. W. 291; Paul *v.* Baugh, 85 Va. 955, 9 S. E. 329.

Or that it was thought to be worthless. Acker *v.* Leland, 109 N. Y. 5, 15 N. E. 743; Sabin *v.* Lebenbaum, 26 Or. 420, 38 Pac. 434.

It seems that similar omissions from the assignee's inventory are some evidence of fraud. Dibble *v.* Morris, 26 Conn. 416.

Probably in the absence of stat-

schedule of fictitious claims against the assignor,[43] or the listing of claims for greater amounts than are actually due,[44] the insertion in the deed of a provision for the employment of the assignor in the administration of the assigned estate,[45] or a provision for the sale

ute, no presumption of fraud arises from the failure to include individual property in a firm assignment. Long *v.* Meriden Britannia Co., 94 Va. 594, 27 S. E. 499.

The burden of proof is on the party attacking the assignment to show that property has been omitted from the schedule and inventory, but such omission being shown, the burden is on the assignee to explain it. Batten *v.* Richards, 70 Wis. 272, 35 N. W. 542.

43. *United States.* — Farwell *v.* Maxwell, 34 Fed. 727.

Alabama. — Abercrombie *v.* Bradford, 16 Ala. 560.

Missouri. — Goodwin *v.* Kerr, 80 Mo. 276.

New York. — Browning *v.* Hart, 6 Barb. 91; Webb *v.* Daggett, 2 Barb. 9; Smith *v.* Clarendon, 25 N. Y. St. 219, 221, 6 N. Y. Supp. 809.

North Carolina. — Royster *v.* Stallings, 124 N. C. 55, 32 S. E. 384; Blair *v.* Brown, 116 N. C. 631, 21 S. E. 434.

Wisconsin. — Backhaus *v.* Sleeper, 66 Wis. 68, 27 N. W. 409.

See also Bickham *v.* Lake, 51 Fed. 892.

The rule applies to a debt once existing but paid at the time of making the assignment. Guerin *v.* Hunt, 6 Minn. 260; First Nat. Bank *v.* Halstead, 20 Abb. N. C. (N. Y.) 155; Talcott *v.* Hess, 31 Hun 282, 4 N. Y. St. Rep. 62; Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W. 719.

Partnership Assets. — The application of partnership assets to the payment of individual debts is evidence of fraud. Hulbert *v.* Dean, 2 Abb. Dec. (N. Y.) 428; First Nat. Bank *v.* Halstead, 20 Abb. N. C. (N. Y.) 155.

As to the sufficiency of evidence to show the application of partnership assets to individual debts of partners, where such application is deemed fraudulent, see Millhiser *v.* McKinley, 98 Va. 207, 35 S. E. 446; Benheimer *v.* Rindskopf, 116 N. Y. 428, 22 N. E. 1074.

Proof of Claims. — Judgments obtained by preferred creditors against the assignor are *prima facie* evidence of the validity of the debts against creditor's attacking the assignment on the ground that debts preferred therein are fictitious. Acker *v.* Leland, 109 N. Y. 5, 15 N. E. 743.

As to sufficient evidence of genuineness of debts listed, see Paul *v.* Baugh, 85 Va. 955, 9 S. E. 329; Scott *v.* Francis Vandegrift Shoe Co. (Miss.), 10 So. 455; Talcott *v.* Hess, 31 Hun 282, 4 N. Y. St. 62.

Parol Evidence of Trust. — Parol evidence is inadmissible to show that a preference given to a person not a creditor was so given in trust for a real creditor. Frazier *v.* Traux, 27 Hun (N. Y.) 587.

Or that the excess in the amount of the preference over the creditor's claim was to be paid to another creditor. Naples-Platter Co. *v.* Low, 4 C. C. A. 205, 54 Fed. 93.

44. Roberts *v.* Buckley, 145 N. Y. 215, 39 N. E. 966; Smith *v.* Clarendon, 6 N. Y. Supp. 809.

But preferring a creditor for a larger amount than is due him may be explained by facts shown in good faith. Goodbar Shoe Co. *v.* Montgomery, 73 Miss. 73, 19 So. 196; Yerger *v.* Carter Dry Goods Co. (Miss.), 27 So. 989; Beck *v.* Burdett, 1 Paige (N. Y.) 305; Kavanagh *v.* Beckwith, 44 Barb. (N. Y.) 192; Davis *v.* Smith, 113 N. C. 94, 18 S. E. 53; Farwell *v.* Maxwell, 34 Fed. 727. But see Phillips *v.* Tucker, 14 N. Y. St. 120.

Especially where the assignment gives the amount as approximate only and directly the payment of the true amount when determined. Trueheart *v.* Craddock, 1 Miss. 242, 23 So. 549. See also note 36.

45. Frank *v.* Robinson, 96 N. C. 28, 1 S. E. 781; Browning *v.* Hart, 6 Barb. (N. Y.) 91; Wilbur *v.* Fradenburgh, 52 Barb. (N. Y.) 474; Currie *v.* Hart, 2 Sandf. Ch. (N. Y.) 353; Blow *v.* Gage, 44 Ill. 208; Van

of the property on credit,[46] or otherwise in the discretion of the assignee,[47] or a provision exempting the assignee from liability for the acts of others in the management and disposition of the property.[48]

IV. PAROL AND EXTRINSIC EVIDENCE OF FRAUD IN ASSIGNMENT.

1. Admissibility. — Where an actual intent to hinder, delay, or defraud creditors, upon the part of the assignor alone or upon the part of the assignee,[49] is material,[50] extrinsic or parol evidence is admissible to prove such intent.[51]

2. Burden of Proof. — Where the deed of assignment is regular

Hook *v.* Walton, 28 Tex. 59. See also note 61.

And especially where there is a provision in the deed exempting the assignee from all liability for his acts. Eigenbrum *v.* Smith, 98 N. C. 207, 4 S. E. 122.

Control by Assignor. — But stipulations for the control of the assigned property by the assignor, usually deemed fraudulent *per se*, have been held only evidence of fraud in some cases. Wright *v.* Thomas, 1 Fed. 716; Cannon *v.* Peebles, 2 Ired. (N. C.) 449; Means *v.* Montgomery, 23 Fed. 421.

46. Billings *v.* Billings, 2 Cal. 107; Carlton *v.* Baldwin, 22 Tex. 724; Kellogg *v.* Muller, 68 Tex. 182, 4 S. W. 361; Baldwin *v.* Peet, 22 Tex. 708; Dance *v.* Seaman, 11 Gratt. (Va.) 778.

Compare Bobbitt *v.* Rodwell, 105 N. C. 236, 11 S. E. 245.

47. A provision that the assigned property may be sold at either public or private sale furnishes, it is said, no evidence of fraudulent intent. Barber *v.* Buffaloe, 111 N. C. 206, 16 S. E. 386.

Compare Baldwin *v.* Peet, 22 Tex. 708.

A provision authorizing the assignee to sell the assigned property for what he may deem sufficient is not conclusive evidence of fraud. Bagley *v.* Bowe, 18 Jones & S. (N. Y.) 100.

Nor is a provision permitting the assignee to fix the time of sale to prevent a sacrifice of the property. Wooster *v.* Stanfield, 11 Iowa 128.

Or to continue the sale from day to day. Willis *v.* Thompson, 85 Tex. 301, 20 S. W. 155.

48. Van Nest *v.* Yoe, 1 Sandf. Ch. (N. Y.) 4; Eigenbrum *v.* Smith, 98 N. C. 207, 4 S. E. 122.

49. In some states, the assignee is considered a purchaser for value and his participation in the fraud must be shown. See for example, State *v.* Keeler, 49 Mo. 548; Truss *v.* Davidson, 90 Ala. 359, 7 So. 812.

While in other states, the fraud of the assignor alone will vitiate the assignment. Loos *v.* Wilkinson, 10 N. Y. St. 297; Bobbitt *v.* Rodwell, 105 N. C. 236, 11 S. E. 245; Farrington *v.* Sexton, 43 Mich. 454, 5 N. W. 654.

But *compare* Parsell *v.* Patterson, 47 Mich. 505, 11 N. W. 291.

50. Under the statutes of some states, the debtor's intent is generally immaterial where the assignment conveys all the debtor's property to the payment of his debts. Killman *v.* Gregory, 91 Wis. 478, 65 N. W. 53; Thomas *v.* Tallmadge, 16 Ohio St. 433.

51. Pleadings. — Where there is no general allegation of fraud, evidence of specific fraudulent acts, not alleged in the complaint, are not admissible. East River Nat. Bank *v.* Adams, 21 N. Y. St. 880, 4 N. Y. Supp. 366.

Judgments in Other Actions. The record in another action between different parties and involving a different subject-matter in which the assignment was declared fraudulent, is not admissible. Mower *v.* Hanford, 6 Minn. 372. See also Wise *v.* Wimer, 23 Mo. 237.

and lawful upon its face, the burden of proving fraud is upon the person attacking the assignment,[52] and the evidence thereof should be clear and convincing.[53]

3. Specific Facts As Evidence. — Among facts admissible in evidence upon the issue of intent to hinder, delay, or defraud creditors, of varying probative force and subject to rebuttal, are the following:

That the debtor made the assignment for the purpose of gaining

52. *United States.* — Farwell *v.* Maxwell, 34 Fed. 727; Means *v.* Montgomery, 23 Fed. 421.

Arkansas. — Dews *v.* Cornish, 20 Ark. 332.

Maryland. — Strauss *v.* Rose, 59 Md. 525; Farrall *v.* Farman (Md.), 5 Atl. 622; Pfaff *v.* Prag, 79 Md. 369, 29 Atl. 824.

Michigan. — Pierson *v.* Manning, 2 Mich. 444.

Minnesota. — Guerin *v.* Hunt, 6 Minn. 260.

New York. — Grover *v.* Wakeman, 11 Wend. 187; Townsend *v.* Stearns, 32 N. Y. 209; Bank of Silver Creek *v.* Talcott, 22 Barb. 550; Shultz *v.* Hoagland, 85 N. Y. 464; Bernheimer *v.* Rindskopf, 116 N. Y. 428, 22 N. E. 1074; Roberts *v.* Buckley, 145 N. Y. 215, 39 N. E. 966.

North Carolina. — Hodges *v.* Lassiter, 96 N. C. 351, 2 S. E. 923.

South Dakota.—Landaner *v.* Conklin, 3 S. D. 462, 54 N. W. 322.

Tennessee. — Washington *v.* Ryan, 64 Tenn. 622.

Wisconsin. — Norton *v.* Kearney, 10 Wis. 443.

But when the assignment is impeached by circumstances, the burden of proof may shift to the grantor or beneficiaries thereunder. Estes *v.* Spain, 19 Fed. 714.

And it has been held that there must be proof that the persons named as creditors are such. Hughes *v.* Ellison, 5 Mo. 463; Crow *v.* Ruby, 5 Mo. 484. And see Hodges *v.* Lassiter, 96 N. C. 351, 2 S. E. 923.

Compare cases cited in note 36.

53. *United States.* — Olney *v.* Tanner, 10 Fed. 101.

Michigan. — Hollister *v.* Loud, 2 Mich. 309.

New York. — Bagley *v.* Bowe, 105 N. Y. 171, 11 N. E. 386; Perry *v.* Volkening, 12 Jones & S. 332; North River Bank *v.* Schumann, 63 How. Pr. 476.

Oregon. — Neuberger *v.* Boyce, 29 Or. 458, 45 Pac. 908.

Virginia. — Simon *v.* Ellison (Va. App.) 22 S. E. 860.

Wisconsin. — Lindsay *v.* Guy, 57 Wis. 200, 15 N. W. 181; Batten *v.* Smith, 62 Wis. 92, 22 N. W. 342.

If the facts proved are consistent with innocence, proof of fraud is lacking. Shultz *v.* Hoagland, 85 N. Y. 464; Bernheimer *v.* Rindskopf, 116 N. Y. 428, 22 N. E. 1074; North River Bank *v.* Schumann, 63 How. Pr. 476.

But *compare* cases in note 40.

Good Faith. — Evidence of fraud may be rebutted by proof of facts and circumstances showing good faith in the making of the assignment. McFarland *v.* Birdsall, 14 Ind. 126; Covert *v.* Rogers, 38 Mich. 363; Richardson *v.* Stringfellow, 100 Ala. 416, 14 So. 283.

It may be shown that the assignor applied his available means to the payment of his debts up to the time of making the assignment. Mower *v.* Hanford, 6 Minn. 535.

Question for Jury. — The question is for the jury.

United States. — Bickham *v.* Lake, 51 Fed. 892.

Illinois. — Nimmo *v.* Kuykendall, 85 Ill. 476.

Kansas. — Higby *v.* Ayres, 14 Kan. 256.

Missouri. — State *v.* Keeler, 49 Mo. 548.

New York. — Mathews *v.* Poultney, 33 Barb. 127; McNaney *v.* Hall, 86 Hun 415, 33 N. Y. Supp. 518.

North Carolina. — Hodges *v.* Lassiter, 96 N. C. 351, 2 S. E. 923; Barber *v.* Buffaloe, 111 N. C. 206, 16 S. E. 386.

Texas. — Baldwin *v.* Peet, 22 Tex. 708; Van Hook *v.* Walton, 28 Tex. 59; Bailey *v.* Mills, 27 Tex. 434.

See also Nordlinger *v.* Anderson, 5 N. Y. Supp. 609.

time thereby for the payment of his debts,[54] or for the purpose of preventing, in his own interest, a sacrifice of his property by forced sale,[55] or for the purpose of compelling his creditors to compromise their claims;[56]

That the debtor believed himself solvent at the time of making the assignment;[57]

That he withheld from the assignment[58] property of a sub-

54. Gardner *v.* Commercial Nat. Bank, 95 Ill. 298; Cuyler *v.* McCartney, 33 Barb. 165; Griffin *v.* Marguardt, 21 N. Y. 121; Baldwin *v.* Buckland, 11 Mich. 389; Field *v.* Romero, 7 N. M. 630, 41 Pac. 517. And see note 46. See also Greene *v.* Sprague Mfg. Co., 52 Conn. 330.

The fact that the assignor stated to the assignee that he expected or had reason to believe that the assignment would prove temporary only is not of itself proof of fraud. North River Bank *v.* Schumann, 63 How. Pr. (N. Y.) 476.

55. Forbes *v.* Walter 25 N. Y. 430; Farwell *v.* Maxwell, 34 Fed. 727. See also Burt *v.* McKinstry, 4 Minn. 146; Wooster *v.* Stanfield, 11 Iowa 128; Willis *v.* Thompson, 85 Tex. 301, 20 S. W. 155; Bagley *v.* Bowe, 18 Jones & S. (N. Y.) 100.

If the sacrifice is sought to be avoided for the sole purpose of giving creditors the benefit of the property, which in case of a sacrifice they would not be likely to obtain to the same extent, the assignment is not, therefore, fraudulent. Angell *v.* Rosenbury, 12 Mich. 241; Hefner *v.* Metcalf, 1 Head (Tenn.) 577; Sacks *v.* Hesse, 6 K. Law 652; Brigham *v.* Tillinghast, 15 Barb. (N. Y.) 618.

56. Cuyler *v.* McCartney, 33 Barb. (N. Y.) 165; Bacchaus *v.* Sleeper, 66 Wis. 68, 27 N. W. 409; Haven *v.* Cutts, 5 N. H. 113.

Compare Moore *v.* Stege, 93 Ky. 27, 18 S. W. 1019.

That the assignor, shortly before making the assignment, exhibited to his creditors an incorrect list of his assets and falsely represented the value thereof to them and told them that if they did not take the property at such valuation they would get nothing is evidence (but not conclusive) of his fraudulent intent in making the assignment. McNaney *v.* Hall, 159 N. Y. 544, 54 N. E. 1093. See also Gasherie *v.* Apple, 14 Abb. Pr. (N. Y.) 64; Wilson *v.* Britton; 6 Alb. Pr. (N. Y.) 97, 20 Barb. 562.

57. *United States.*—Farwell *v.* Maxwell, 34 Fed. 727.

Illinois. — Gardner *v.* Commercial Nat. Bank, 95 Ill. 298.

Kansas. — Holmberg *v.* Dean, 21 Kan. 67.

Kentucky. — Grimstead *v.* Richardson, 12 K. Law 798.

Michigan. — Baldwin *v.* Buckland 11 Mich. 389; Angell *v.* Rosenbury, 12 Mich. 241.

Minnesota. — Burt *v.* McKinstry, 4 Minn. 146; Guerin *v.* Hunt, 6 Minn. 260.

New York. — Kennedy *v.* Wood, 52 Hun 46, 22 N. Y. St. 132, 4 N. Y. Supp. 758; Kellogg *v.* Slawson, 15 Barb. 56; Van Nest *v.* Yoe, 1 Sandf. Ch. 4.

New Jersey. — Knight *v.* Packer, 12 N. J. Eq. 214.

Wisconsin. — Bates *v.* Ableman, 13 Wis. 644.

Compare Ogden *v.* Peters, 21 N. Y. 23; Hodges *v.* Lassiter, 96 N. C. 351, 2 S. E. 923; Hunter *v.* Ferguson, 3 Colo. App. 287, 33 Pac. 82.

58. *Alabama.* — Richards *v.* Hazzard, 1 Stew. & P. 139.

Michigan. — Smith *v.* Mitchell, 12 Mich. 180; Flanigan *v.* Lampman, 12 Mich. 58; Parsell *v.* Patterson, 47 Mich. 505, 11 N. W. 291.

Minnesota. — Blackman *v.* Wheaton, 13 Minn. 299.

New York. — Coursey *v.* Morton, 132 N. Y. 556, 30 N. E. 231; Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, *affirming* 10 N. Y. St. 297; Wilson *v.* Forsyth, 24 Barb. 105; Rothschild *v.* Salomon, 52 Hun 486, 5 N. Y. Supp. 865; Fay *v.* Grant, 53 Hun 44, 5 N. Y. Supp. 910; Iselin

stantial[59] amount, not exempt by law from seizure for the payment of his debts;[60]

That he retained, or retains, possession of assigned property;[61]

v. Henlein, 16 Abb. N. C. 73; Harting *v.* Rosenfeld, 26 Misc. 175, 56 N. Y. Supp. 753; Feldstein *v.* Richardson, 27 App. Div. 3, 50 N. Y. 105; Victor *v.* Nichols, 13, N. Y. St. 461, *affirmed* 114 N. Y. 617.

North Carolina. — Royster *v.* Stallings, 124 N. C. 55, 32 S. E. 384.

Texas. — Baldwin *v.* Peet, 22 Tex. 708; Carlton *v.* Baldwin, 22 Tex. 724.

West Virginia. — Clarke & Co. *v.* Figgins, 27 W. Va. 663.

See also Tait *v.* Carey (Ind. Ter.), 49 S. W. 50; Verner *v.* Davis, 26 S. C. 609, 2 S. E. 114.

Proof of Reservation. — As to the sufficiency of evidence to prove unlawful reservations of property by assignors, see

United States. — Woolridge *v.* Irving, 23 Fed. 676.

Illinois. — Blow *v.* Gage, 44 Ill. 208.

Michigan. —Farrington *v.* Sexton, 43 Mich. 454, 5 N. W. 654.

Mississippi. — Goodbar *v.* Tatum (Miss.), 10 So. 578.

Missouri. — Baker *v.* Harvey, 133 Mo. 653, 34 S. W. 853; Thompson *v.* Foerstel, 10 Mo. App. 290.

New York. — Coursey *v.* Morton, 132 N. Y. 556, 30 N. E. 231; Waverly Nat. Bank *v.* Halsey, 57 Barb. 249; Rothchild *v.* Solomon, 52 Hun. 486; 5 N. Y. Supp. 865; Lewis *v.* Bache, 7 N. Y. Supp. 757, *affirmed* 130 N. Y. 640, 29 N. E. 151; Wilcox *v.* Pane, 28 N. Y. St. 712, 55 Hun 607, 8 N. Y. Supp. 407; Feldstein *v.* Richardson, 27 N. Y. App. Div. 3, 50 N. Y. 105; Constable *v.* Hardenberg, 4 N. Y. App. Div. 143, 38 N. Y. Supp. 694.

North Carolina.— Bobbitt *v.* Rodwell, 105 N. C. 236, 11 S. E. 245.

Virginia.— Armstrong *v.* Lachman, 84 Va. 726, 6 S. E. 129.

See also Asay *v.* Allen, 124 Ill. 391, 16 N. E. 865.

That the deed of assignment was written at midnight by an attorney called from another county and shortly after the creditor, attacking the assignment, had obtained judgment against the assignor, that it preferred a debt exceeding in amount the entire assigned estate and which was secured by a mortgage on the assignor's home, and for which a relative was surety, and that at a sale under the mortgage the relative purchased the home property and permitted the assignor to remain in possession thereof without paying rent, was held such evidence of fraud as must be submitted to a jury. Barber *v.* Buffaloe, 111 N. C. 206, 16 S. E. 386.

Evidence as to how much the assignor's wife is worth is inadmissible in the absence of evidence that she has received any property from him. Richardson *v.* Stringfellow, 100 Ala. 416, 14 So. 283.

59. See note 42.

60. The retention by the assignor of property exempt from execution is not ordinarily evidence of a fraudulent intent. Clark Shoe Co. *v.* Edwards, 57 Ark. 331, 21 S. W. 477; Bobbitt *v.* Rodwell, 105 N. C. 236, 11 S. E. 245; Morehead Banking Co. *v.* Whitaker, 110 N. C. 345, 14 S. E. 920; Davis *v.* Smith, 113 N. C. 94, 18 S. E. 53; Blair *v.* Brown, 116 N. C. 631, 21 S. E. 434; Paul *v.* Baugh, 85 Va. 955, 9 S. E. 329.

Nor is the fact that the assignor's homestead allotment was made by neighbors on the request of the assignee and without notice to creditors. Jordan *v.* Newsome, 126 N. C. 553, 36 S. E. 154.

61. *Michigan.*— Falnigan *v.* Lampman, 12 Mich. 58.

Missouri.— Goodwin *v.* Kerr, 80 Mo. 276; Burkett *v.* Thornbury, (Mo.), 2 S. W. 838.

New York. — Vrendenbergh *v.* Stout, 1 Johns. Cas. 156; Mathews *v.* Poultney, 33 Barb. 127; Cuyler *v.* McCartney, 33 Barb. 165; Cram. *v.* Mitchell, 1 Sandf. Ch. 251; Pease *v.*

that he has been retained or employed by the assignee as manager, agent, or clerk in the control, management, or sale of the assigned property;[62]

Batten, 31 N. Y. St. 57, 9 N. Y. Supp. 621.

Pennsylvania.— Wilt *v.* Franklin, 1 Binn. 502, 2 Am. Dec. 474.

Utah.— Snyder *v.* Murdock, 20 Utah 419, 59 Pac. 91.

Virginia.— Paul *v.* Baugh, 85 Va. 955, 9 S. E. 329.

See also Royster *v.* Stallings, 124 N. C. 55, 32 S. E. 384; Currie *v.* Hart, 2 Sandf. Ch. (N. Y.) 353; Dolson *v.* Kerr, 5 Hun (N. Y.) 643.

Compare Thomas *v.* Talmadge, 16 Ohio St. 433; Fitler *v.* Maitland, 5 Watts & S. (Pa.) 307; Mitchell *v.* Willock, 2 Watts & S. (Pa.) 253, 30 Am. Dec. 251.

Presumption of Fraud. — It has frequently been held that the retention of the assigned property by the assignor raises a *prima facie* presumption of fraud.

Alabama. — Cummings *v.* McCullough, 5 Ala. 324.

Connecticut. — Osborne *v.* Tuller, 14 Conn. 529.

Nebraska. — Morgan *v.* Bogue, 7 Neb. 429.

New York. — Van Nest *v.* Yoe, 1 Sandf. Ch. 4; Mead *v.* Phillips, 1 Sandf. Ch. 83; Fuller *v.* Williamson, 14 How. Pr. 289; Terry *v.* Butler, 43 Barb. 395; Connah *v.* Sedgwick, 1 Barb. 210; Ball *v.* Loomis, 29 N. Y. 412; Einstein *v.* Chapman, 10 Jones & S. 144.

See also Howerton *v.* Holt, 23 Tex. 52.

Assignor as Tenant. — The use of the assigned property by the debtor as tenant may be explaind. Hollister *v.* Loud, 2 Mich. 309; Scott *v.* Ray, 18 Pick. (Mass.) 360; Stewart *v.* Kerrison, 3 S. C. 266.

But parol evidence is not admissible, it seems, in support of the assignment to show that there was no agreement that assignor should retain possession of assigned property; the assignment giving the assignee the immediate right of possession. Forbes *v.* Walter, 25 N. Y. 430.

62. *United States.* — Means *v.* Montgomery, 23 Fed. 421; Olney *v.* Tanner, 10 Fed. 101.

California — Forbes *v.* Scannell, 13 Cal. 242.

Illinois. — Blow *v.* Gage, 44 Ill. 208.

Iowa. — Savery *v.* Spaulding, 8 Iowa 239, 74 Am. Dec. 300.

Kentucky. — Vernon *v.* Morton, 8 Dana 247; Pearson *v.* Rockhill, 4 B. Mon. 296.

Minnesota. — Noyes *v.* Beaupre, 36 Minn. 49, 30 N. W. 126.

Nebraska. — Sullivan *v.* Smith, 15 Neb. 476, 19 N. W. 620, 48 Am. Rep. 355.

New York. — Browning *v.* Hart, 6 Barb. 91; Parker *v.* Jervis, 3 Abb. Dec. 449; Beamish *v.* Conant, 24 How. Pr. 94; Shultz *v.* Hoagland, 85 N. Y. 464; Victor *v.* Nichols, 13 N. Y. St. 401; Turney *v.* Van Gelder, 68 Hun 481, 23 N. Y. Supp. 27; Putnam *v.* Hubbell, 42 N. Y. 106; Mathews *v.* Poultney, 33 Barb. 127.

Texas. — Van Hook *v.* Walton, 28 Tex. 59; Wright *v.* Linn, 16 Tex. 34.

Vermont. — Hall *v.* Parsons, 17 Vt. 271.

Virginia. — Marks *v.* Hill, 15 Gratt. 400.

Wisconsin. — Bates *v.* Simmons, 62 Wis. 69, 22 N. W. 335.

See also note 45.

See also Blalock *v.* Kernersville Mfg. Co., 110 N. C. 99, 14 S. E. 501.

Proof of Assignor's Control.— For cases in which the employment of the assignor in connection with other circumstances has been held sufficient evidence of fraud, see Smith *v.* Leavitts, 10 Ala. 92; Beers *v.* Lyon, 21 Conn. 604; Bernard *v.* Barney Myroleum Co., 147 Mass. 356, 17 N. E. 887; Pine *v.* Rikert, 21 Barb. (N. Y.) 469; Field *v.* Romero, 7 N. M. 630, 41 Pac. 517.

The misapplication of a portion of the assigned estate by the assignor having charge thereof as agent of the assignee is evidence of fraud. Linn *v.* Wright, 18 Tex. 317.

That the debtor was guilty of fraud in obtaining property or made fraudulent conveyances of property in contemplation of the assignment;[63]

The fact that the assignor, as managing agent of the assigned property, sold it for half the value placed on it in the inventory does not establish fraud. Turney *v.* Van Gelder, 68 Hun 481, 23 N. Y. Supp. 27, *affirmed* in 143, N. Y. 632, 37 N. E. 826.

That the assignee is a relative of the assignor and resides in another town, and that the assignor is in charge of the property as managing agent is not conclusive evidence of fraud. Baldwin *v.* Buckland, 11 Mich. 389.

The promise of the debtor before the assignment to render any needed service to the assignee without compensation is not evidence of fraud. North River Bank *v.* Schumann, 63 How. Pr. (N. Y.) 476.

63. But the transactions must be "so connected and similar in their relations that the same motive may be reasonably attributed to all." White *v.* Benjamin, 3 Misc. 490, 23 N. Y. Supp. 981.

For various illustrations of the principle, see

United States. — Adler *v.* Ecker, 1 McCrary 256, 2 Fed. 126; Baer *v.* Rooks, 50 Fed. 898.

Alabama. — Truss *v.* Davidson, 90 Ala. 359, 7 So. 812.

Michigan. — Koch *v.* Lyon, 82 Mich. 513, 46 N. W. 779; Farrington *v.* Sexton, 43 Mich. 454, 5 N. W. 654.

New York. — Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, *affirming* 10 N. Y. St. 297; Waverly Nat. Bank *v.* Halsey, 57 Barb., 249; McNaney *v.* Hall, 86 Hun 415, 33 N. Y. Supp. 518; Pease *v.* Batten, 31 N. Y. St. 57, 9 N. Y. Supp. 621; First Nat. Bank *v.* Wood, 86 Hun 491, 33 N. Y. Supp. 777; Zimmer *v.* Hays, 8 App. Div. 34, 40 N. Y. Supp. 397; Feldstein *v.* Richardson, 27 App. Div. 3, 50 N. Y. Supp. 105.

Texas. — Bailey *v.* Mills, 27 Tex. 434.

See also Coots *v.* Chamberlain, 39 Mich. 565.

Compare Batten *v.* Richards, 70 Wis. 272, 35 N. W. 542.

False Representations. — False representations to secure credit in the purchase of goods and preferential assignments of the same goods to others, furnish some evidence of fraud in the assignment. Excelsior Mfg. Co., *v.* Owens, 58 Ark. 556, 25 S. W. 868.

See also Creglow *v.* Creglow, 100 Iowa 276, 69 N. W. 446; Field *v.* Romero, 7 N. M. 630, 41 Pac. 517; Roberts *v.* Vietor, 54 Hun 461, 7 N. Y. Supp. 777.

But not false representations in no way relating to the assignment made by the assignor to his creditors. Trueheart *v.* Craddock, 1 Miss. 242, 23 So. 549. See also Friedenwald Co. *v.* Sparger, 128 N. C. 446, 39 S. E. 64.

Sales on Credit. — The sale of goods on credit by an insolvent shortly before making the assignment is sometimes a circumstance to be considered on the issue of fraud. Roberts *v.* Shepard, 2 Daly (N. Y.) 110.

Fraudulent Conveyances.—Fraudulent conveyances by the debtor prior to the assignment, if in contemplation thereof, are evidence of fraud in the assignment. Illinois Watch Co. *v.* Payne, 132 N. Y. 597, 30 N. E. 1151; Putnam *v.* Hubbell, 42 N. Y. 106; Chambers *v.* Smith, 60 Hun 248, 14 N. Y. Supp. 706; Pool *v.* Ellison, 56, Hun 108, 9 N. Y. Supp. 171. See also Pease *v.* Batten, 31 N. Y. St. 57, 9 N. Y. Supp. 21.

Preferential transfers or payments to a creditor who is named as assignee are evidence of fraud. Friedburgher *v.* Jaberg, 20 Abb. N. C. (N. Y.) 279; Gilkerson *v.* Hamilton, 10 Fed. Cas. No. 5424a.

Bad Business Management by Debtor. — Bad management of the business and the failure to keep

That the assignee for creditors or trustee selected by the assignor was known to be insolvent[64] or otherwise unfit[65] for the trust;

That the assignee has been guilty of unreasonable delay in the administration of the assigned estate,[66] or has been otherwise remiss in its management,[67] in evident collusion with the assignor.

proper books of account are not evidence of fraudulent intent on the part of the debtor. Sullivan *v.* Sullivan Mfg. Co., 17 S. C. 588; Roberts *v.* Victor, 54 Hun 461, 7 N. Y. Supp. 777. See also notes 42 and 56.

Reed *v.* Emery, 8 Paige (N. Y.) 417; Bobbitt *v.* Rodwell, 105 N. C. 236, 11 S. E. 245. *Contra.* — Chambers *v.* Meaut, 66 Miss. 625, 6 So. 465.

And more especially where insolvency is coupled with bad reputation as to business capacity or integrity. Clark *v.* Groom, 24 Ill. 316; Holmberg *v.* Dean, 21 Kan. 67; Angell *v.* Rosenburg, 12 Mich. 241. *Compare* Taylor *v.* Watkins (Miss.), 13 So. 811.

64. The naming of an insolvent stockholder as assignee in a deed of assignment by a corporation may be considered on the question of the good faith of the transaction. Covert *v.* Rogers, 38 Mich. 363, 31 Am. Dec. 319; Hays *v.* Doane, 11 N. J. Eq. 84.

65. Assignee Illiterate. — The selection of an illiterate person as assignee is some evidence of fraud. Guerin *v.* Hunt, 6 Minn. 260; Cram *v.* Mitchell, 1 Sandf. Ch. (N. Y.) 251.

Assignee Physically Incapacitated. So is the selection of a person incapacitated by sickness or distant residence. Currie *v.* Hart, 2 Sandf. Ch. (N. Y.) 353; Cram *v.* Mitchell, 1 Sandf. Ch. (N. Y.) 251.

Assignee Relative or Clerk. That the assignee is a relative or clerk of the assignor is not conclusive evidence of fraud. Schultz *v.* Hoagland, 85 N. Y. 464; Baldwin *v.* Buckland, 11 Mich. 389; Olney *v.* Tanner, 10 Fed. 101; Pearce *v.* Beach, 12 How. Pr. (N. Y.) 404. See also Pease *v.* Batten, 31 N. Y. St. 57, 9 N. Y. Supp. 621.

Compare Currie *v.* Hart, 2 Sandf. Ch. (N. Y.) 353; Cram *v.* Mitchell, 1 Sandf. Ch. (N. Y.) 251; Angell *v.* Rosenburg, 12 Mich. 241.

Nor is the fact that the assignee is a clerk of the assignor's legal adviser whose claim for fees is preferred in the assignment. Burr *v.* Clement, 9 Colo. 1, 9 Pac. 633.

66. Snyder *v.* Murdock, 20 Utah 419, 59 Pac. 91; Wolf *v.* O'Conner, 88 Mich. 124, 50 N. W. 118; Hardy *v.* Skinner, 9 Ired, Law (N. C.) 191; Gillott *v.* Redlich, 50 Hun 390, 3 N. Supp. 325.

Continuation of Business by Assignee. — It may be shown that there was no market for the assigned propety, and that the assignee's delay was in the interest of the creditors. Hull *v.* Evans, (Ky.), 59 S. W. 851.

Or that the interests of creditors required the completion of outstanding contracts. Olney *v.* Tanner, 10 Fed. 101; Talley *v.* Curtain, 54 Fed. 43.

Or the working up of materials on hand. DeForest *v.* Bacon, 2 Conn. 633; Kendall *v.* New England Carpet Co., 13 Conn. 383; Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240.

Compare Holmberg *v.* Dean, 21 Kan. 67.

The replenishment of stock even and sales on credit are not conclusive evidence of fraud. Gerst *v.* Turley, 7 Ky. Law 217; Marks *v.* Hill, 15 Gratt. (Va.) 400; Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W. 719.

Compare Field *v.* Romero, 7 N. M. 630, 41 Pac. 517. See also note 46.

67. That is when the assignee's administration of the assigned estate reflects light upon the original intent; otherwise the remissness of the assignee is not evidence of fraud upon the part of the assignor.

United States. — Olney *v.* Tanner, 10 Fed. 101.

Michigan. — Baldwin *v.* Buckland, 11 Mich. 389; Smith *v.* Mitchell, 12 Mich. 180.

The making of an assignment for the benefit of creditors and the necessary delay incident to the execution of the trust, furnish no evidence of a fraudulent intent to hinder, delay, or defraud the assignor's creditors;[68] nor does the fact that the assignment was made in contemplation of the obtaining of judgments against him or the levy of attachments or execution upon the property assigned.[69]

4. Acts Generally Lawful. — But an act generally lawful may be a circumstance to be considered in connection with other facts indicating a fraudulent intent. Thus the giving of preference in

Minnesota. — Guerin *v.* Hunt, 6 Minn. 260.

Missouri. — Goodwin *v.* Kerr, 80 Mo. 276.

New York. — Shultz *v.* Hoagland, 85 N. Y. 464; Hardman *v.* Bowen, 39 N. Y. 196; Cuyler *v.* McCartney, 40 N. Y. 221; Griffin *v.* Marquardt, 21 N. Y. 121; Browning *v.* Hart, 6 Barb. 91; Mathews *v.* Poultney, 33 Barb. 127; Dambmann *v.* Butterfield, 2 Hun 284, 4 T. & C. 542; Pool *v.* Ellison, 56 Hun 108, 9 N. Y. Supp. 171; McNaney *v.* Hall, 86 Hun 415, 33 N. Y. Supp. 518.

South Dakota. — Wright *v.* Lee, 10 S. D. 263, 72 N. W. 895.

Texas. — Piggott *v.* Schram, 64 Tex. 447; Wright *v.* Linn, 16 Tex. 34; Linn *v.* Wright, 18 Tex. 317. See also notes 73 and 74.

Where the debtor shortly before making an assignment for creditors conveyed his lands to his wife through the medium of his son, who was also named as assignee in the deed of assignment, evidence of the acts of the assignor and his wife and the assignee after the making of the assignment in relation to the debtor's property, was admitted as tending to show the original intent with which the assignment was made. Pease *v.* Batten, 31 N. Y. St. 57, 9 N. Y. Supp. 621. See also notes 45, 46, 47, 48.

68. *United States.* — Mayer *v.* Hellman, 91 U. S. 496; Halsey *v.* Fairbanks, 4 Mason 206, 11 Fed. Cas. No. 5964.

Colorado. — Burr *v.* Clement, 9 Colo. 1, 9 Pac. 633.

Illinois. — Myers *v.* Kinzie, 26 Ill. 36.

Michigan. — Hollister *v.* Loud, 2 Mich. 309.

Minnesota. — Guerin *v.* Hunt, 8 Minn. 477.

New York. — North River Bank *v.* Schumann, 63 How. Pr. 476.

Texas. — Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806; Bailey *v.* Mills, 27 Tex. 434.

Wisconsin. — Bates *v.* Simmons, 62 Wis. 69, 22 N. W. 335.

Nor is a mere threat by the debtor to make an assignment for creditors not accompanied by offers of compromise evidence of fraud. Dickerson *v.* Benham, 20 How. Pr. (N. Y.) 343. See note 54.

69. *New York* — Jackson *v.* Cornell, 1 Sandf. Ch. 348; Hauselt *v.* Vilmar, 2 Abb. N. C. 222; North River Bank *v.* Schumann, 63 How. Pr. 476; Gillott *v.* Redlich, 50 Hun 390, 3 N. Y. Supp. 325; White *v.* Benjamin, 3 Misc. 490, 23 N. Y. Supp. 981.

North Carolina. — Royster *v.* Stallings, 124 N. C. 55, 32 S. E. 384; Guggenheimer *v.* Brookfield, 90 N. C. 232.

Virginia. — Paul *v.* Baugh, 85 Va. 955, 9 S. E. 329.

See also Barber *v.* Buffaloe, 111 N. C. 206, 16 S. E. 386.

Delaying Legal Proceedings. The use of dilatory tactics in a case to delay judgment of execution that time may be gained to execute a general assignment for creditors is at most a mere circumstance to be considered by the jury. Billings *v.* Parsons, 17 Utah 22, 53 Pac. 730; Olney *v.* Tanner, 10 Fed. 101; Pike *v.* Bacon, 21 Me. 280.

Promise of Payment. — So, it is held, are promises of payment made by the debtor for the same purpose. Royster *v.* Stalings, 124 N. C. 55, 32 S. E. 384. But *compare* Bernard *v.*

the deed of assignment,[70] or unusual secrecy in the execution of the deed,[71] may add weight to other evidence of fraud.

5. Declarations and Admissions of Assignor. — The debtor may testify directly as to his purpose in making an assignment for creditors.[72]

Barney Myroleum Co., 147 Mass. 356, 17 N. E. 887; Clark *v.* Taylor, 37 Hun (N. Y.) 312.

Withholding Deed. — So is the preparation of a deed of assignment for registration in case of proceedings by creditors. Friedenwald Co. *v.* Sparger, 128 N. C. 446, 39 S. E. 64. See also Ford *v.* Clarke, 83 Wis. 45, 53 N. W. 31.

70. *United States.* — Farwell *v.* Maxwell, 34 Fed. 727; Webb *v.* Armistead, 26 Fed. 70; Talley *v.* Curtain, 54 Fed. 43; Gilkerson *v.* Hamilton, 10 Fed. Cas. No. 5424a.

Louisiana. — Layson *v.* Rowan, 7 Rob. 1.

New York. — Lewis *v.* Bache. 28 N. Y. St. 405, 7 N. Y. Supp. 757, *affirmed* 130 N. Y. 640, 29 N. E. 151; Smith *v.* White, 19 N. Y. St. 164, 2 N. Y. Supp. 855.

North Carolina. — Royster *v.* Stallings, 124 N. C. 55, 32 S. E. 384; Barber *v.* Buffaloe, 111 N. C. 206, 16 S. E. 386.

Pennsylvania. — Hower *v.* Geesaman, 17 Serg. & R. 251.

See also Burr *v.* Clement, 9 Colo. 1, 9 Pac. 633; Mathews *v.* Poultney, 33 Barb. (N. Y.) 127; Friedburgher *v.* Jaberg, 20 Abb. N. C. (N. Y.) 279; Wilson *v.* Berg, 88 Pa. St. 167; Adler *v.* Ecker, 2 Fed. 126.

Indebtedness Against Homestead. The mere fact that a debt secured by a lien on the debtor's homestead is preferred in the assignment is some evidence of fraud. Ball *v.* Bowe, 49 Wis. 495, 5 N. W. 909. See also Barber *v.* Buffaloe, 111 N. C. 206, 16 S. E. 386.

Preferring Relatives. — That a preferred creditor is a relative of the assignor is a mere circumstance to be considered by the jury in connection with other evidence. Halsey *v.* Connel, 111 Ala. 221, 20 So. 445; Bernard *v.* Barney Myroleum Co., 147 Mass. 356, 17 N. E. 887; Eastern Nat. Bank *v.* Hulshizer, 2 N. Y. St. 93; Friedenwald Co. *v.* Sparger, 128 N. C. 446, 39 S. E. 64. *Compare* Creglow *v.* Creglow, 100 Iowa 276, 69 N. W. 446.

That one named as a preferred creditor was the assignor's mother-in-law and lived in his family, and that the amount named would have absorbed almost the whole of the assigned estate, was held, in the absence of any explanation, proof of the fraudulent character of the preference. Jordan *v.* Newsome, 126 N. C. 553, 36 S. E. 154.

That the president of an assigning corporation is preferred as a creditor is not conclusive evidence of fraud. Sullivan *v.* Sullivan Mfg. Co., 17 S. C. 588; Blalock *v.* Kernersville Mfg. Co., 110 N. C. 99, 14 S. E. 501.

Other Security. — The failure to recite in the deed or schedule that a creditor is otherwise secured is some evidence of fraud. Cutter *v.* Hume, 138 N. Y. 630, 33 N. E. 1084; Stern *v.* Fisher, 32 Barb. (N. Y.) 198.

That the assignee stated prior to the assignment that the debtor was not largely indebted, for the purpose of aiding him in securing a loan, and then was preferred by the assignment in a large sum, was held evidence of fraud in the assignment. Angell *v.* Rosenbury, 12 Mich. 241. See also note 43.

71. Place *v.* Miller, 6 Abb. Pr. (N. S.) (N. Y.) 178; Cummings *v.* McCullough, 5 Ala. 324; Barber *v.* Buffaloe, 111 N. C. 206, 16 S. E. 386.

But *compare* note 68.

The antedating of a deed of assignment has been deemed a suspicious circumstance. Cuyler *v.* McCartney, 33 Barb. (N. Y.) 165.

72. Forbes *v.* Walter, 25 N. Y. 430, 25 How. Pr. 166; Seymour *v.* Wilson, 14 N. Y. 567, 15 How. Pr. 355; Mathews *v.* Poultney, 33 Barb.

His declarations and acts at the time of its execution, or so connected therewith as to be of the *res gestae,* are admissible on the issue of a fraudulent intent in making it.[73]

His admissions and declarations before[74] and after[75] the making of the assignment, and not of the *res gestae,* are not so admissible as a general rule. But in some states, the declarations and admissions of the assignor after the execution and delivery of the deed of assignment, but while he remains in possession of the assigned property, are admissible as in the nature of *res gestae.*[76] And, in

(N. Y.) 127. See also First Nat. Bank *v.* Roberts (Ky.), 7 S. W. 890.

Contra. — Ecker *v.* McAllister, 45 Md. 290.

But the husband and managing agent cannot testify directly as to his wife's purpose in making an assignment. Talcott *v.* Hess, 31 Hun (N. Y.) 282.

Nor can the assignee so testify where he is not considered a purchaser for value. Kennedy *v.* Wood 52 Hun 46, 4 N. Y. Supp. 758.

73. Baldwin *v.* Buckland, 11 Mich. 389; Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99; Cuyler *v.* McCartney, 40 N. Y. 221; Jellenik *v.* May, 41 Hun (N. Y.) 386; York Co. Bank *v.* Carter, 38 Pa. St. 446, 80 Am. Dec. 494; Bates *v.* Ableman, 13 Wis. 644.

74. Truax *v.* Slater, 86 N. Y. 630; Bullis *v.* Montgomery, 50 N. Y. 352; Ball *v.* Loomis, 29 N. Y. 112; Flagler *v.* Schoeffel, 40 Hun (N. Y.) 125; Vidvard *v.* Powers, 34 Hun (N. Y.) 221. See also Hess *v.* Blakeslee, 2 N. Y. St. 309.

In an action by an assignee for creditors to set aside as fraudulent a conveyance made by the assignor before the assignment, declarations made by the assignor prior to the making of the alleged fraudulent conveyance and not of the *res gestae* are not admissible against the defendant Baldwin *v.* Short, 125 N. Y. 553, 26 N. E. 928, *affirming* 54 Hun 473.

75. *Illinois.* — Myers *v.* Kinzie, 26 Ill. 36.

Iowa. — Savery *v.* Spaulding, 8 Iowa 239, 74 Am. Dec. 300.

Michigan. — Baldwin *v.* Buckland, 11 Mich, 389.

Minnesota. — Burt *v.* McKinstry, 4 Minn. 146.

New York. — Beste *v.* Burger, 110 N. Y. 644, 17 N. E. 734; Coyne *v.* Weaver, 84 N. Y. 386; Bullis *v.* Montgomery, 50 N. Y. 352; Newlin *v.* Lyon, 49 N. Y. 661; Cuyler *v.* McCartney, 40 N. Y. 221; Jacobs *v.* Remsen, 36 N. Y. 668; Noyes *v.* Morris, 5 Hun 501, 10 N. Y. Supp. 561; Flagler *v.* Scoeffel, 40 Hun 178; Schofield *v.* Scott, 20 N. Y. St. 815, 3 N. Y. Supp. 496; Peck *v.* Crouse, 46 Barb. 151; Ogden *v.* Peters, 15 Barb. 560, 21 N. Y. 23; Hanna *v.* Curtis, 1 Barb. Ch. 263; Minzesheimer *v.* Mayer, 66 How. Pr. 484.

Wisconsin. — Bates *v.* Ableman 13 Wis. 644; Norton *v.* Kearney, 10 Wis. 443.

Affidavits and Testimony in Other Proceedings. — The rule applies to declarations contained in affidavits made by the assignor in judicial proceedings. Minzesheimer *v.* Mayer, 66 How. Pr. (N. Y.) 484.

The examination of the debtor after the making of the assignment in proceedings supplementary to execution are not admissible against the assignee to set aside the assignment for fraud. Barhans *v.* Kelly, 49 Hun 610, 2 N. Y. Supp. 175; Passavant *v.* Cantor, 43 N. Y. St. 277, 17 N. Y. Supp. 37. See also Beste *v.* Burger, 110 N. Y. 644, 17 N. E. 734.

See also note 66.

76. *Michigan.* — Frankel *v.* Coots, 41 Mich. 75, 1 N. W. 940; Wycoff *v.* Carr, 8 Mich. 44.

New York. — Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99; Newlin *v.* Lyon, 40 N. Y. 661; Adams *v.* Davidson, 10 N. Y. 309; Jellenick *v.* May 41 Hun 386; Flagler *v.* Schoeffel, 40 Hun 178.

some states (where the assignee is not regarded as a purchaser for value) in a direct action to impeach an assignment for fraud to which the assignor is a party, his declarations and admissions made before and after the execution of the deed of assignment and delivery of the assigned property are admissible to prove the fraud.[77]

Where a conspiracy between the assignor and assignee to defraud creditors of the assignor has been established by other evidence,[78] the acts, declarations and admissions of either, made either before or after the assignment and having relation thereto, are admissible to prove the execution and effect of the conspiracy.[79]

6. Judgment Against Assignor. — In the absence of fraud or collusion, judgments obtained against the assignor are competent evidence to prove his insolvency[80] at the time of making an assignment for the benefit of creditors and the validity of the preferred debts.[81]

V. EVIDENCE IN ACTION UNDER ASSIGNMENT.

In actions between assignee and third persons involving the title to property included in the assignment or the validity of claims against the assigned estate (but not the validity of the assignment itself), the declarations and admissions of the assignor as to such

Rhode Island. — Dodge *v.* Goodell, 16 R. I. 48, 12 Atl. 236.

77. Kennedy *v.* Wood, 52 Hun 46, 4 N. Y. Supp. 758; Passavant *v.* Cantor, 43 N. Y. St. 247, 17 N. Y. Supp. 37; Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99. See also Bates *v.* Ableman, 13 Wis. 644; Flagler *v.* Wheeler, 40 Hun (N. Y.) 125.

But it has been said that they are not to be considered as evidence against the assignee. Hairgrove *v.* Millington, 8 Kan. 480.

Debtor's Books. — Where the acts and declarations of the assignor are competent evidence, his books of account are competent for the same purpose. Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99 Becker *v.* Koch, 104 N. Y. 394, 10 N. E. 701.

78. "The existence of such conspiracy must be established, as against the assignee, by evidence independent of such subsequent declarations and acts of the assignor, and the latter cannot properly be used in addition to the other evidence when not sufficiently clear without it to establish that fact." Cuyler *v.* McCartney, 40 N. Y. 221; Newlin *v.* Lyon, 49 N. Y. 661; Pease *v.* Batten, 31 N. Y. St. 57, 9 N. Y. Supp. 621.

Compare Dodge *v.* Goodell, 16 R. I. 48, 12 Atl. 236.

The common intent must be to defraud creditors and not merely to concur in an assignment. Cuyler *v.* McCartney, 40 N. Y. 221.

79. Caldwell *v.* Williams, 1 Ind. 405; Newlin *v.* Lyon, 49 N. Y. 661; Pease *v.* Batten, 31 N. Y. St. 57, 9 N. Y. Supp. 621; Blair *v.* Brown, 116 N. C. 631, 21 S. E. 434; Dodge *v.* Goodell, 16 R. I. 48, 12 Atl. 236.

Declarations and directions of the assignor made after the assignment in the presence of the assignee and assented to by the latter and carried out by him in managing the property are competent to show who really controlled the property and are in the nature of *res gestae.* Cuyler *v.* McCartney, 40 N. Y. 221.

Compare Peck *v.* Crouse, 46 Barb. (N. Y.) 151.

80. Third Nat. Bank *v.* Guenther, 1 N. Y. Supp. 753.

81. Acker *v.* Leland, 109 N. Y. 5, 15 N. E. 743.

property or claims made before the assignment have been admitted in evidence against the assignee by some courts.[82]

In an action by an assignee to avoid a preferential transfer or conveyance made by the debtor prior to the assignment, evidence of notoriety of the debtor's insolvency is admissible to prove the defendant vendee's knowledge thereof, but not the insolvency itself.[83]

82. Koch *v.* Lyons, 82 Mich. 513, 46 N. W. 779; Von Sachs *v.* Kretz, 72 N. Y. 548.

Contra. — Vidvard *v.* Powers, 34 Hun (N. Y.) 221, Jones *v.* East Society M. E. Church, 21 Barb. (N. Y.) 161; Bullis *v.* Montgomery, 50 N. Y. 352.

Compare also Morris *v.* Wells, 7 N. Y. Supp. 61.

Similar admissions made by the debtor after the assignment were admitted in Koch *v.* Lyons, 82 Mich. 513, 46 N. W. 779.

The admissions of members of a firm making an assignment for creditors have been held conclusive evidence as to the validity of claims against the estate as against other creditors objecting to their allowance, in the absence of any showing of fraud or collusion. McCracken *v.* Milhous, 7 Ill. App. 169.

The assignor's receipts for payments upon a mortgage made by the mortgagor to the assignor after the assignment but before notice thereof, are evidence of payment against the assignee. Van Keuren *v.* Corkins, 66 N. Y. 77.

83. Loos *v.* Wilkinson, 10 N. Y. St. 207, 110 N. Y. 195, 18 N. E. 99; Griffin *v.* Macaulay, 7 Gratt. (Va.) 476; Simpson *v.* Carleton, 1 Allen (Mass.) 109, 79 Am. Dec. 707; Lee *v* Kilburn, 3 Gray (Mass.) 594; Martin *v.* Mayer, 112 Ala. 620, 20 So. 963.

As to sufficiency of proof of creditor's good faith, see Matthews *v.* Chaboya, 111 Cal. 435, 44 Pac. 169.

The Burden of Proof Is on the Assignee. — Butler *v.* Breck, 7 Metc. (Mass.) 164, 39 Am. Dec. 768; Glenn *v.* Grover, 3 Md. 212; Fuller *v.* Mehl, 134 Ind. 60, 33 N. E. 773; Stix *v.* Sadler, 109 Ind. 254, 9 N. E. 905.

ASSIGNOR.—See Admissions; Declarations.

ASSUMPTION.—See Mortgages.

ASSUMPSIT.

CROSS-REFERENCES.

Bills and Notes.

I. SCOPE OF ARTICLE.

The rules of evidence considered under this title will be restricted to those only which are peculiarly pertinent to this form of action. And those rules of evidence pertaining to actions of special assumpsit, such as "Bills and Notes," "Money Lent," "Money Paid," "Contribution," and the like, and those applicable to the modes of proof of particular issues, such as "Fraud," "Infancy," and the like, will be considered under their appropriate titles.

II. THE PROMISE.

1. Burden of Proof. — A. In General. — In an action of assumpsit in which the defendant has pleaded non-assumpsit, the plaintiff has the burden of proving the defendant's promise as declared upon, either by direct proof, or by showing by the evidence a state of facts from which the law will imply such promise.[1]

1. Wrought Iron Bridge Co. *v.* Utica Highway Comrs., 101 Ill. 518. See also Lefler *v.* Hunt, 8 Blackf. (Ind.) 195; Landrum *v.* Brookshire, 1 Stew. (Ala.) 252 (holding that in order to support a common count the plaintiff must prove everything which it would be necessary to aver if the count were special).

If in Assumpsit the General Issue and a Plea in Confession and Avoidance Be Filed, the plaintiff cannot have a verdict without proving to the satisfaction of the jury the matter alleged in the declaration. Connersville *v.* Wadleigh, 6 Blackf. (Ind.) 297.

Money Collected by Defendant's Attorney. — In assumpsit against a collector for money alleged to have been collected by defendant's attorney, the collection of the money as alleged must be shown by the plaintiff. Baker *v.* Rend, 8 Ill. App. 409.

In Indebitatus Assumpsit the plaintiff must prove the express promise agreed upon; but on a *quantum meruit,* delivery only is enough. Glover *v.* Le Testau, Quincy (Mass.) 225n.

Burden of Proving New Promise. In Gregory *v.* Mack, 3 Hill (N. Y.) 380, assumpsit to recover commissions on a sale of real estate under an agreement requiring the agent to find a purchaser on designated terms, wherein the evidence showed that the sale was not made on such terms, but was on other and different terms, it was held that the plaintiff should show a new promise or agreement by the defendant before recovering, notwithstanding the fact that the vendor explicitly adopted and executed the sale as made by the plaintiff.

Implied Assumpsit After Waiver of Tort. — *Ownership of Property.* Duren *v.* Stratt, 16 S. C. 465, was originally an action of trespass for the alleged unlawful cutting of trees on the plaintiff's land by the defendant. Defendant died, whereupon plaintiff was permitted to amend his action, waiving the tort and suing for the value of the property taken, as on an implied assumpsit. It was held not to be enough for the plaintiff to prove mere possession of the land from which the trees were cut, but that he must prove ownership of the trees, by proof of title to the land, or ownership of the trees, or such possession of them as would invest him with the character of temporary owner.

Recovery Without Proof of Fixed Price. — Plaintiff in assumpsit or debt may recover without proving a fixed price. Michael's Bay Lumber Co. *v.* Jenks, 20 Ill. App. 369.

Assumpsit for Money to Be Repaid. — In an action upon a promise by the defendants to return to the plaintiff a sum paid by him to them, if, upon accounting, it appear that he

B. Possession and Production of Written Promise. — In assumpsit on a written promise to pay and discharge certain notes, described by their dates, amounts, etc., and as having been given to the plaintiff by a third person, the possession and production of the promise by the plaintiff are presumptive evidence of its having been made to him, although no promisee was named in it.[2]

C. Execution of Writing Sued On. — So, under a plea of non-assumpsit, the plaintiff has the burden of proving the execution of the writing sued on.[3]

D. Joint Promise. — In assumpsit against two defendants as partners, in the common counts, the plaintiff has the burden of proving a joint promise, or the fact of the co-partnership.[4]

E. Surplusage. — Where matter is stated in a declaration which might have been struck out on motion as surplusage, such matter need not be proved at the trial.[5]

2. Variance Between Pleading and Proof. — A. In General. Where the declaration is upon a special contract, the contract must be proved as alleged; otherwise the variance will be fatal to the plaintiff's recovery.[6]

does not owe such sum, the plaintiff must show that he was not indebted to the defendants in that sum. Smith *v.* Grant, 30 Ill. App. 150.

2. Forman *v.* Stebbins, 4 Hill (N. Y.) 181.

3. Gray *v.* Tunstall, Hempst. 558, 10 Fed. Cas. No. 5730; Kripner *v.* Lincoln, 66 Ill. App. 532; Daly *v.* Bernstein, 6 N. M. 380, 28 Pac. 764.

And Where a Writing Is Offered in Evidence Under the Common Counts, its execution must be proved. Hunley *v.* Lang, 5 Port. (Ala.) 154.

A Draft on a Particular Fund, Not Purporting to Be for Any Consideration, and not a bill, note, order, draft or check within the law merchant, can not be introduced under the money counts without proof of its execution by the defendant. Raigauel *v.* Ayliff, 16 Ark. 594.

Execution of Note by Wife as Agent or Trustee. — In Coyle *v.* Hill, 19 D. C. 72, assumpsit against a husband on a note executed by the wife, the plaintiff, in addition to the common counts averred in a special count that the wife executed the note as agent or trustee for her husband. It was held in the absence of proof of that fact, the plaintiff could not recover on any of the counts.

4. Findley *v.* Stevenson, 3 Stew. (Ala.) 48.

But in Touhy *v.* Daly, 27 Ill. App. 459, assumpsit against a husband and wife jointly for commissions on the sale of real estate inherited by the wife, it was held that the defendants had the burden of disproving joint liability.

In New Mexico, by Statute, all contracts which by the statute law are joint only, are to be construed to be joint and several, and suit may be brought and prosecuted against any one or more of the parties liable thereon; and it is not necessary in assumpsit on a contract alleged in the declaration as being joint to prove a joint contract by all the defendants; proof of a several contract with one is sufficient. Kirchner *v.* Laughlin, 4 N. M. 386, 17 Pac. 132.

5. Bailey *v.* Freeman, 4 Johns. (N. Y.) 280.

6. *Alabama.* — Hopper *v.* Eiland, 21 Ala. 714.

Connecticut. — Hendricks *v.* Seeley, 6 Conn. 176; Russell *v.* South Britain Society, 9 Conn. 508; Bunnel *v.* Taintor, 5 Conn. 273; Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140.

Delaware. — Simpson *v.* Warren, 5 Harr. 371.

Illinois. — Keiser *v.* Topping, 72 Ill. 226; Wheeler *v.* Reed, 36 Ill. 81;

There are cases, however, in which it is held that although the promise proved does in fact vary from that alleged, the variance is immaterial, and hence not fatal to the plaintiff's recovery.[7]

Mastin *v.* Toncray, 3 Ill. 216; Menifree *v.* Higgins, 57 Ill. 50.

Maine. — Kidder *v.* Flagg, 28 Me. 477.

Maryland. — Walsh *v.* Gilmor, 3 Har. & J. 383, 6 Am. Dec. 502; Coursey *v.* Covington, 5 Har. & J. 45.

Mississippi. — Fowler *v.* Austin, 1 How. 156, 26 Am. Dec. 701.

New York. — Stone *v.* Knowlton, 3 Wend. 374; Hess *v.* Fox, 10 Wend. 436.

Oregon. — Little Klamath Water Ditch Co. *v.* Ream, 27 Or. 129, 39 Pac. 998.

Pennsylvania.—Anderson *v.* Hayes, 3 Yeates 95.

Tennessee. — Vance *v.* Jones, Peck 263.

Texas. — Gammage *v.* Alexander, 14 Tex. 414.

West Virginia. — Baltimore & O. R. Co. *v.* Rathbone, 1 W. Va. 87, 88 Am. Dec. 664; Davisson *v.* Ford, 23 W. Va. 617.

Promise to Pay Interest. — In *indebitatus assumpsit* when a promise to pay interest is laid in the declaration, an express promise to pay interest must be proved. Tappan *v.* Austin, 1 Mass. 31.

In an Action by a Summary Process, if the plaintiff intends to rely upon a special promise distinct from a general assumpsit, he must set it forth in his process, otherwise evidence of it cannot be received. McDaniel *v.* Scoggins, 2 Const. (S. C.) 227.

Rejection of Evidence Disproving Contract Alleged. — In Emerton *v.* Andrews, 4 Mass. 653 assumpsit for money due for the board of the defendant's employees and for goods sold and delivered, it was held that evidence tending to prove a special contract made by the defendant with the plaintiff to pay for the board in goods, thereby disproving the contract on which the action was brought, was properly rejected.

Agreement to Pay Rent. — In Warden *v.* Dundas, 1 Ind. 396, the declaration averred that the plaintiffs were the owners of certain land, and that the defendants made their certain writing whereby they acknowledged themselves tenants of said land and agreed to pay rent therefor. An agreement was produced corresponding with that set out in the declaration except that it was signed by another person as agent for the plaintiffs. It was held that this was not sufficient to prove the contract declared upon without proof of its execution, or explanation.

Agreement by Bank to Convey Land. — *Individual Deed of President.* — In Bank of Metropolis *v.* Guttschlick, 14 Pet. 19, it was held that under a declaration charging as a breach of an agreement by a bank to convey land, the failure to make a deed, a deed by the president under his own, and not the corporate seal, is admissible to support the allegation, as such a deed is not that of the corporation.

In an Action of Assumpsit on a Warranty, no proof of fraudulent misrepresentations by the vendor is admissible. Wiggins *v.* Long, 9 Humph. (Tenn.) 140.

7. **Immaterial Variance.** — In Angell *v.* Loomis, 97 Mich. 5, 55 N. W. 1008, an action to recover money paid on a contract binding the plaintiff and defendant's general agent for a designated territory, the declaration counted specially on the contract, naming the territory covered, and generally on the common counts. The evidence showed that by subsequent agreement indorsed upon the back of the original, certain other territory was substituted for that named therein. It was held that the objection to the admission of the contract in evidence on the grounds of variance was without merit, for two reasons; (1) the change was immaterial and in no manner affected the issue involved; (2) the plaintiff was entitled to re-

Implied Promise. — Where the plaintiff has declared on a special cover on the common counts under which the contract was admissible.

Proof of a Contract to Carry and Deliver a Letter Containing an Account, is not a material variance from a declaration setting out a contract to carry and deliver an account. Favor *v.* Philbrick, 7 N. H. 326.

Promise to Pay Judgment Due Plaintiff. — *Proof of Suit by Plaintiff and Another.* — In Cross *v.* Richardson, 30 Vt. 639, wherein the declaration alleged that the plaintiff had instituted a suit in his name against another, causing certain property to be attached and certain persons to be summoned as trustees therein, and that the defendant in consideration of the release of the property attached and the discharge of the trustees, promised to pay the plaintiff the sum sued for, it was held that evidence that the suit mentioned had been brought in the name of plaintiff and another person, but that plaintiff was sole owner of the claim, was not a fatal variance.

Promise to Deliver Articles Without Stating Value. — *Proof of Promise Stating Value.* — In Andrews *v.* Williams, 11 Conn. 326, wherein the declaration alleged a promise by the defendant to deliver certain articles specifically named, without stating their value, it was held that proof of a writing by which the defendant promised to deliver such articles "being of the value of 75 dollars" was not a fatal variance.

Agreement to Rent a House and Board Defendant. — In Wroe *v.* Washington, 1 Wash. (Va.) 357, the declaration set up an agreement of the plaintiff to "rent and furnish a house at a certain place, and board the defendant for a certain time, for which the defendant was to pay a certain sum." The breach assigned was failure to pay the money. The evidence showed the agreement to be that the plaintiff "would board the defendant" for the time and sum set out. It was held that the variance was immaterial.

Agreement to Sell Several Articles. — *Breach of Agreement as to Part.* — In Smith *v.* Webster, 48 N. H. 142, it was held that where defendant, in consideration of plaintiff's promise to pay a certain amount, offered to sell plaintiff a sleigh of a certain description and other property, in an action by plaintiff for breach of the contract as to the sleigh, the declaration alleging the consideration and merely defendant's promise as to the sleigh is sufficient, and proof of the actual contract is not a variance.

New Promise After Discharge in Bankruptcy. — In Craig *v.* Seitz, 63 Mich. 727, 30 N. W. 347 assumpsit on a judgment to which the defendant pleaded a discharge in bankruptcy, it was held that the plaintiff could introduce evidence of a new promise made after the discharge, although such new promise was not counted on.

Other Similar Transactions. — In Washington A. & G. Steam P. Co. *v.* Sickles, 10 How. (U. S.) 419, one count alleged an agreement to place a fuel saving machine on a boat, the value of the saving to be determined in a manner agreed on. Another alleged a *quantum meruit* for placing the machine on the boat. Evidence having been given that the mode agreed on was pursued and the value of the saving determined, it was held that expert evidence of engineers on other boats as to the value of savings made thereon by similar machines was competent under either count.

Amount of Recovery. — In assumpsit founded on a special agreement, plaintiff may recover less damages than are laid in his declaration, although he cannot recover more. Covington *v.* Lide, 1 Bay (S. C.) 158.

In California, Under the Code, under the common counts in assumpsit a special promise need not be alleged, and if alleged need not be proved. De La Guerra *v.* Newhall, 55 Cal. 21.

In Foltz *v.* Cogswell, 86 Cal. 542, 25 Pac. 60, the complaint alleged that the defendant had retained the plaintiff as his attorney, agreeing to pay the sum of five thousand dollars for such services, and further that

contract, he cannot recover upon proof of an implied promise.[8] But under an allegation of an express agreement which is not special, there may be recovery upon proof of an implied promise.[9]

If the Legal Effect of the Contract Proved Be the Same As the Promise Alleged, the variance is not fatal.[10]

B. Where Special Counts Are Not Harmonious. — It is not necessary that the special counts in assumpsit should be harmonious, even when the same instrument is set out in each as the foundation of the action; and evidence under the declaration is not to be excluded on the ground that what would support one count would defeat another.[11]

C. Several Plaintiffs. — In assumpsit by several persons joined as plaintiffs, to which the plea was non-assumpsit, any testimony which tends to prove the joint interest of the persons in the cause of action, and consequently their right to sue jointly, is proper evidence to go to the jury.[12]

she rendered services which "were and are reasonably worth $5000." It was held that evidence was admissible in support of a demand on *quantum meruit*; that the complaint counted on an implied, and not on an express promise.

8. Armacost *v.* Lindley, 116 Ind. 295, 19 N. E. 138; Sanders *v.* Hartge, 17 Ind. App. 243, 46 N. E. 604. See also Price *v.* Price, 101 Ky. 28, 39 S. W. 429; Mayer *v.* Ver Bryck, 46 Neb. 221, 64 N. W. 691; Orynski *v.* Menger, 15 Tex. Civ. App. 488, 39 S. W. 388.

Implied Promise. — Under a general count on an account annexed for board furnished to defendant's minor children, the plaintiff may show that the defendant expelled his children from his home under such circumstances as to render himself liable for board furnished to them. Raymond *v.* Eldridge, 111 Mass. 390.

9. Forester *v.* Forester, 10 Ind. App. 680, 38 N. E. 426.

10. Hough *v.* Rawson, 17 Ill. 588; Wheller *v.* Reed, 36 Ill. 81.

Under Counts for Work Done, Materials Furnished and Goods Sold and Delivered, plaintiff may prove, and recover for, manufacturing cloth, for work and labor, and for board. Davis *v.* Dyer, 60 N. H. 400.

Difference Between Declaration and Proof Due to Failure to Plead All Facts. — In Shea *v.* Kerr, 1 Penn. (Del.) 530, 43 Atl. 843, it is held that there is not a fatal variance between the contract declared upon and the contract as proved where there appears no inconsistency between them, the only difference consisting of the fact that the declaration does not set out all the facts and details of the contract proved.

11. Barton *v.* Gray, 48 Mich. 164, 12 N. W. 30.

Action on Lost Instrument. — In Chamberlain *v.* Chamberlain, 116 Ill. 480, 6 N. E. 444, wherein the plaintiff declared upon an instrument alleged to have been lost, the various counts differing in the description of the note both as to date and amount, which the evidence showed was due to the fact that he was declaring upon a lost instrument and was describing it from memory—the evidence also showing that but one debt was being sued upon—it was held that the plaintiff was entitled to refer the evidence in the case, both that given in his own behalf and that given by the defendant, to such count as it tended to support.

Under a Declaration Containing Three Counts, the plaintiff may give evidence to either one. Matthien *v.* Nixon, 1 McCord, (S. C.) 571.

Under a Common Indebitatus Assumpsit, evidence admissible under a *quantum meruit* or *quantum valebant* may be given. Carroll *v.* Quyun, 13 Md. 379.

12. Kirkley *v.* Segar, 20 Ala. 226.

D. Several Defendants. — In assumpsit against several defendants, a promise by all must be proved.[13] But where the declaration alleges an individual contract, proof of a joint contract is not a variance.[14]

E. Mode of Payment. — Evidence of a promise to pay an indebtedness in other than money is a material variance from an allegation of a promise to pay money.[15]

F. Date of Promise. — In assumpsit on a parol contract, where the day upon which it was made is alleged only for form, the plaintiff may prove that the contract, whether express or implied, was made at any other time.[16] But it has been held that a variance between the declaration, where a written instrument is set out, and the proof, is fatal.[17]

G. Time of Performance. — A variance between the contract as stated in the declaration, and that established by the plaintiff's proof, fixing the time of the performance of the contract, is material

13. *Illinois.* — Flake *v.* Carson, 33 Ill. 518; Gribben *v.* Thompson, 28 Ill. 61.

Kentucky. — Brown *v.* Warner, 2 J. J. Marsh. 37; Erwin *v.* Devise, 2 T. B. Mon. 124.

Maine. — Cutts *v.* Gordon, 13 Me. 474, 29 Am. Dec. 520 (holding unless one of the defendants is an infant).

Massachusetts. — Columbian Ins. Co. *v.* Ditch, 13 Pick. 25.

New York. — Robertson *v.* Lynch, 18 Johns. 451.

Pennsylvania. — Williams *v.* McFall, 2 Serg. & R. 280.

Vermont. — Metropolitan Washing Mach. Co. *v.* Morris, 39 Vt. 393.

West Virginia. — Enos *v.* Stansbury, 18 W. Va. 477.

The Description of the Defendants As Parties Under a Particular Name or Firm, in the writ, is not an averment that they promised by that name, and hence proof of a promise by another name is not a fatal variance. Brown *v.* Jewett, 18 N. H. 230.

Under a Declaration Alleging a Joint Indebtedness in Three Defendants, evidence that they were in partnership in the transaction out of which the plaintiff's claim arose is admissible. Ward *v.* Dow, 44 N. H. 45.

14. It Is Still the Undertaking of the Defendant in Solido, though being with another, he has the right to have that other brought in by appropriate proceedings at the proper time. Collins *v.* Smith, 78 Pa. St. 423.

15. Vance *v.* Jones, Peck (Tenn.) 263 (where the promise proved was to pay money and iron, or iron only); Baylies *v.* Fettyplace, 7 Mass. 324 (where the promise proved was to deliver debentures).

So also, where the declaration alleges a promise to pay money on demand, it is a fatal variance to prove a promise to pay in commodities. Titus *v.* Ash, 24 N. H. 319.

16. Hagan *v.* Alstan, 9 Ala. 627; Dawkins *v.* Southwick, 4 Fla. 158.

17. Brown *v.* Smith, 3 N. H. 299. *Compare* Stout *v.* Rassel, 2 Yeates (Pa.) 334.

For a further and more exhaustive discussion of this question, *see* the title "Bills and Notes."

In Assumpsit for Moneys Due and Omitted by Mistake in a Settlement Between the Plaintiff and Defendant, it was held that the statement in the declaration of the time when the alleged mistake occurred and not embraced in the settlement, are allegations of matters of substance in contradistinction to matters of description, and held only to be proved substantially. If the term was prior to the beginning of the suit and there was any such indebtedness, it is sufficient. Sage *v.* Hawley, 16 Conn. 106, 41 Am. Dec. 128.

and fatal to the plaintiff's recovery unless removed by amendment.[18]

H. Where Declaration Contains Special and Common Counts. — Where the declaration contains both special and common counts, so long as it appears that the special contract counted upon remains in force, the plaintiff can not resort in making his proof to the common counts.[19] But if he fails to prove the special contract counted upon, he may then resort to the common counts and introduce his evidence in support thereof;[20] but in such case, it

18. Bannister *v.* Weatherford, 7 B. Mon. (Ky.) 271. *Compare* Barton *v.* Gray, 48 Mich. 164, 12 N. W. 30, wherein the declaration alleged performance by plaintiff of a continuous contract for a long space of time to wit, five years, it was held that evidence showing performance for three years only was not a fatal variance.

Under an Allegation of Performance at the Day Fixed by the Contract, it is not enough to prove performance under a parol enlargement of the contract. Higgins *v.* Lee, 16 Ill. 495.

Evidence That Rent Sued for Was Payable at the End of the Year is a fatal variance from a declaration for rent due on demand. Taylor *v.* Hickman, Litt. Sel. Cas. (Ky.) 434.

Time Not of Essence of Contract. In Frazer *v.* Smith, 60 Ill. 145, the declaration set up the contract as made February 20, and to be performed within six weeks, while the evidence showed it to have been made March 1, and to be performed in thirty days. It was held that the variance was immaterial, the time of making not being of the essence of the contract.

19. *United States.* — Young *v.* Preston, 4 Cranch 239.

Massachusetts.—Sargent *v.* Adams, 3 Gray 72, 63 Am. Dec. 718.

Michigan. — Wyatt *v.* Herring, 90 Mich. 581, 51 N. W. 684.

Mississippi. — Morrison *v.* Ives, 4 Smed. & M. 652.

New Hampshire. — Streeter *v.* Sumner, 19 N. H. 516.

New York. — Clark *v.* Smith, 14 Johns. 326; Norris *v.* Durham, 9 Cow. 151; Jennings *v.* Camp, 13 Johns. 94, 7 Am. Dec. 367; Wood *v.* Edwards, 19 Johns. 205.

Where There Is a Contract in Writing plaintiff cannot recover on the general counts without producing or accounting for it. Sherman *v.* N. Y. Cent. R. Co., 22 Barb. (N. Y.) 239.

In Burke *v.* Claughton, 12 App. D. C. 182, it is held proper to prove both a special contract and a *quantum meruit* under the common counts and plea of the general issue.

20. *England.* — Harris *v.* Oke, Bull N. P. 139; Payne *v.* Bacomb, 2 Doug. 651.

United States. — Amos *v.* Le Rue, 2 McLean 216, 1 Fed. Cas. No. 327; Hopkins *v.* Orr, 124 U. S. 510, 8 Sup. Ct. 590; Gormley *v.* Bunyan, 138 U. S. 623, 11 Sup. Ct. 453.

Alabama. — Darden *v.* James, 48 Ala. 33.

Delaware. — Porter *v.* Beltzhoover, 2 Harr. 484; Morris *v.* Burton, 4 Harr. 53.

Illinois. — Johnson *v.* Glover, 19 Ill. App. 585.

Maryland. — Speake *v.* Sheppard, 6 Har. & J. 81.

Michigan. — Hall *v.* Woodin, 35 Mich. 67.

New Jersey. — Perrine *v.* Hankinson, 11 N. J. Law 181.

New York. — Tuttle *v.* Mayo, 7 Johns. 132; Linningdale *v.* Livington, 10 Johns. 36; Robertson *v.* Lynch, 18 Johns. 451; Dubois *v.* Delaware & H. C. Co., 4 Wend. 285; Taylor *v.* Pinckney, 12 Civ. Proc. 107.

North Carolina. — Kiddie *v.* Debrutz, 5 Hayw. 429.

South Carolina. — Barnes *v.* Gorman, 9 Rich. Law 297.

Right to Sue Upon a Contract As Assignee Must Be Positively Averred, and an allegation of the

must be such a transaction as entitles him to recover on the money counts, supposing there had been no special contract.[21] Nor will a variance between the proof and the allegations of the special counts, preclude him from recovery on the common counts.[22] So also, when the special contract has been fully performed and nothing remains to be done but the payment of the money due thereon, this constitutes a debt which the plaintiff may declare upon and prove under the common counts.[23]

I. Special Contract As Evidence Under Common Counts. A special contract may be received as evidence of value or damages, under the common counts.[24] But an instrument which is not

assignment in the consolidated common counts will not support a recovery upon a special count in which it is averred. Nor will a mere additional allusion to the assignment in the special count be sufficient. Rose *v.* Jackson, 40 Mich. 29.

Non-Suit for Variance. — In Hatch *v.* Adams, 8 Cow. (N. Y.) 35, where the declaration contained special and general counts in assumpsit, and plaintiff's proof was offered under the former from which it varied, but would support the common counts, it was held that plaintiff was properly non-suited because he failed to insist on the common counts at the trial.

Declaring on Vow Contract. — In Sherman *v.* N. Y. Cent. R. Co., 22 Barb. (N. Y.) 239, plaintiff declared on a written agreement which was void, and also upon the common counts for goods sold and delivered; and it was held that the writing should be received not as a basis of recovery, but to show that it was void, and hence to permit the plaintiff to resort to the common counts.

21. Morrison *v.* Ives, 4 Smed. & M. (Miss.) 652.

22. Staat *v.* Evans, 35 Ill. 455; Boxberger *v.* Scott, 88 Ill. 477; Keyes *v.* Stone, 5 Mass. 391. *Contra.* Morris *v.* Burton, 4 Harr. (Del.) 53; Draper *v.* Randolph, 4 Harr. (Del.) 454; Watkins *v.* Hodges, 6 Har. & J. (Md.) 38; Speake *v.* Sheppard, 6 Har. & J. (Md.) 81; Fowler *v.* Austin, 1 How. (Miss.) 156, 26 Am. Dec. 701.

23. Chesapeake & O. R. Co. *v.* Knapp, 9 Pet. (U. S.) 541; Holbrook *v.* Dow, 1 Allen (Mass.) 397; Tebbetts *v.* Pickering, 5 Cush. (Mass.) 83, 51 Am. Dec. 48, (citing Felton *v.* Dickinson, 10 Mass. 287; State Bank *v.* Hurd, 12 Mass. 171; Baker *v.* Corey, 19 Pick. 496; Bates *v.* Curtis, 21 Pick. 247); Tuttle *v.* Mayo, 7 Johns. (N. Y.) 132; Robertson *v.* Lynch, 18 Johns. (N. Y.) 451; Hale *v.* Handy, 26 N. H. 206; Wright *v.* Morris, 15 Ark. 444.

Express Promise for Payment of Money. — In Ezell *v* King, 93 Ala. 470, 9 So. 534, an action on the common counts for goods sold, work and labor done and money received for the use of the plaintiff's deceased husband, in which the bill of particulars showed that the claim was for timber sold to the plaintiff's deceased husband, it was held that recovery was not defeated on the common counts because there was an express contract with the plaintiff for the payment of the money.

24. Steward *v.* Hinkel, 72 Cal. 187, 13 Pac. 494; Brewing Co. *v.* Hermann, 187 Ill. 40, 58 N. E. 397; Sands *v.* Potter, 59 Ill. App. 206; Wilson *v.* St. John's Hospital, 92 Ill. App. 413; Brown *v.* Foster, 51 Pa. St. 165; Harris *v.* Ligget, 1 Watts & S. 301. *Contra.* — Haynes *v.* Woods, 1 Stew. (Ala.) 12.

Where a Declaration Besides the Common Money Counts Contains a Special Count on a Promissory Note, such note may be given in evidence under the money counts without being specified in a bill of particulars. Tebbetts *v.* Pickering, 5 Cush. (Mass.) 83, 51 Am. Dec. 48.

An Award may be given in evidence under the money counts.

for the unconditional payment of a specific sum of money is not admissible under the common counts.[25]

III. CONSIDERATION FOR THE PROMISE.

1. Burden of Proof. — It has been held that, in order to maintain assumpsit, it must be shown by the plaintiff that the consideration for the promise moved from himself.[26]

2. Variance Between Pleading and Proof. — In assumpsit, the plaintiff must prove the consideration for the promise as he has alleged it in his declaration.[27] And it is a fatal variance for the

Brady *v.* Brooklyn, 1 Barb. (N. Y.) 584.

Note Subjoined Constituting the Bill of Particulars. — In Gardner *v.* Able, 1 Morris (Iowa) 489, an action of assumpsit in which judgment was taken by default, wherein the declaration contained a special count on a note and a common count, and the note subjoined constituted the only bill of particulars, it was held that it was not necessary to enter a *nolle prosequi* as to the common counts, as nothing but the note should be allowed to be given in evidence under the special or common counts.

In Walter *v.* Walter, 1 Whar. (Pa.) 292, where there was a special count in an action of assumpsit, which alleged that the plaintiff, defendant and others, being tenants in common of land, appointed certain persons to make partition and appraisement, and that the persons so appointed did make partition and appraisement; in consequence of which the defendant became liable to pay the plaintiff a certain sum for owelty, etc.; and there was also an account in *indebitatus assumpsit;* and a third count was on an *insimul computassent;* and the evidence offered was of a partition made by the tenants in common among themselves, and of a valuation only, by the appraisers; it was held, that although this evidence was variant from the special count, yet as the plaintiff was entitled to recover on the second count, the variance was not cause of demurrer.

25. Instrument Must Be for Unconditional Payment of Money. Under a count for money paid for defendant's use, for money due on account stated and for money loaned, a note for the payment of money if the maker should at any time become intoxicated, etc., is not admissible, as it is not a note for the unconditional payment of a specific sum of money; and no other instrument is admissible under the common counts. Meyers *v.* Phillips, 72 Ill. 460.

A Draft Drawn on a Particular Fund, Not Purporting Upon Its Face to Have Been Executed Upon a Consideration, and not being a bill of exchange, note, order, draft or check within the law merchant importing a consideration, is not evidence of indebtedness under the common counts. The plaintiffs are not entitled to recover without other proof. Raigauel *v.* Ayliff, 16 Ark. 594.

A Promissory Note Payable in Property, may be given in suit under the common counts in an action of assumpsit. Taplin *v.* Packard, 8 Barb. (N. Y.) 220, citing Smith *v.* Smith, 2 Johns. (N. Y.) 235, 3 Am. Dec. 410; Crandal *v.* Bradley, 7 Wend. (N. Y.) 311, and criticising Douglass *v.* Wilkeson, 6 Wend. (N. Y.) 637.

26. Farlow *v.* Kemp, 7 Blackf. (Ind.) 544.

27. *Connecticut.*—Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140; Chittenden *v.* Stevenson, 26 Conn. 442.

Illinois. — Indianapolis B. & W. R. Co. *v.* Rhodes, 76 Ill. 285.

Michigan. — Bromley *v.* Goff, 75 Mich. 213, 42 N. W. 810.

New Hampshire.—Benden *v.* Manning, 2 N. H. 289; Knox *v.* Martin, 8 N. H. 154; Smith *v.* Wheeler, 29 N. H. 334; Colburn *v.* Pomeroy, 44 N. H. 19.

evidence to show a consideration, a part of which the declaration has omitted to set out,[28] unless the portion omitted be frivolous.[29] So, also, if two considerations, both of which are good, be alleged as the basis of a special agreement reduced to writing, both must be proved as laid.[30]

IV. REQUEST BY THE DEFENDANT.

In actions upon the common counts for goods sold, work and material furnished, money lent and money paid, it is necessary to prove a request by the defendant.[31] But the law does not require direct evidence of a request. It may be proved by circumstantial evidence. The relations of the parties, the kind and amount of labor performed, and whether with or without the defendant's knowledge, will ordinarily furnish satisfactory proof on this point.[32]

V. PERFORMANCE BY PLAINTIFF.

And where the plaintiff in an action of assumpsit is suing upon a special contract, he must show that there has been a performance of the contract upon his part.[33]

New York. — Lansing *v.* McKillip, 3 Caines 286.

28. Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140; Hendrick *v.* Seeley, 6 Conn. 176; Russell *v.* So. Britain Society, 9 Conn. 508; Carrell *v.* Collins, 2 Bibb (Ky.) 429; Brooks *v.* Lowrie, 1 Nott & McC. (S. C.) 342; (citing Hyde *v.* Wilson, 1 Bos. & Pul. 119; Clarke *v.* Gray, 6 East 564; Miles *v.* Sheward, 8 East 8; Churchill *v.* Higgins, 1 Term R. 449; Smith *v.* Barker, 3 Day (Conn.) 312.)

A declaration averring that the defendant promised to pay in consideration that the plaintiff would cure a certain one of the defendant's slaves, is not sustained by evidence of a promise to pay in consideration that plaintiff would take said slave and "effect a cure free of any charge for board." Jordan *v.* Roney, 23 Ala. 758.

A declaration stating a promise that in consideration the plaintiff *would indorse* a note signed by another person, the defendant would hold himself liable thereon in the same manner as though he had signed it with his individual name, is not sustained by evidence of a promise in consideration of the plaintiff's *having indorsed.* Bulkley *v.* Landon, 2 Conn. 404.

Evidence of Consideration. Where a promise to pay money is averred in the declaration to have been made for value received, it is sufficient proof of a *consideration* to show a written promise to pay for value received. Meyers *v.* Phillips, 72 Ill. 460.

29. Brooks *v.* Lowrie, 1 Nott & McC. (S. C.) 342.

30. Lansing *v.* McKillip, 3 Caines (N. Y.) 286.

So held, although the instrument recite that it is "for value received." Carrell *v.* Collins, 2 Bibb (Ky.) 429.

31. 2 Greenl. Ev., § 107.

32. Hill *v.* Packard, 69 Me. 158. See also 2 Greenl. Ev., § 107, where this question is discussed.

33. Gregory *v.* Mack, 3 Hill (N. Y.) 380. See also Parmly *v.* Farrar, 169 Ill. 606, 48 N. E. 693.

Materiality of Allegation that Defendant prevented Completion of Contract. — In Wise *v.* Chaney, 6 Ill. 562, assumpsit to recover damages sustained in consequence of being prevented by the defendants from performing a special verbal contract to furnish materials and

perform labor, plaintiff alleged partial performance on his part, and that he was prevented by the defendants from completing the contract. It was held that his allegation that he was so prevented was material, and that without proof thereof he could not recover.

In Kerstetter *v.* Raymond, 10 Ind. 199, it was held that if the evidence showed a special contract relating to the controversy, the plaintiff must show its stipulations, and that he has complied with them on his part, or that he has been prevented from so doing, and he must make it appear that he is in condition to recover without regard to it.

ATHEIST.

I. COMPETENCY.

1. Common Law Rule. — It was the rule of common law that a person who is proved to have openly and repeatedly avowed his disbelief in the existence of a God, cannot be admitted to testify in a court of justice,[1] not even as an attesting witness to the execu-

1. *England.* — Omychund *v.* Barker, 1 Atk. 21, Wiles 538; Atty. Genl. *v.* Bradlaugh, 14 Q. B., Div. 667.

United States.—Wakefield *v.* Ross, 5 Mason 16, 28 Fed. Cas. No. 17,050; U. S. *v.* Kennedy, 3 McLean 175, 26 Fed. Cas. No. 15,524.

Alabama. — Porter *v.* Cotney, 3 Ala. 314; Blocker *v.* Burness, 2 Ala. 354.

Connecticut. — Curtis *v.* Strong, 4 Day 51, 4 Am. Dec. 179; Atwood *v.* Welton, 7 Conn. 66; Bow *v.* Parsons, 1 Root 480; Beardsley *v.* Foot, 2 Root 399. But see Gen. Stat. 1888, §1098.

Delaware. — State *v.* Townsend, 2 Har. 543; Perry *v.* Stewart, 2 Har. 37.

Illinois. — Noble *v.* People, 1 Ill. 54; Central Military R. R. Co. *v.* Rockafellow, 17 Ill. 541. But see Hroneck *v.* People, 134 Ill. 139, 24 N. E. 861, 23 Am. St. Rep. 652.

Louisiana. — State *v.* Washington, 49 La. Ann. 1602, 22 So. 841, 42 L. R. A. 553.

Maine. — Smith *v.* Coffin, 18 Me. 157.

Maryland. — Arnd *v.* Amling, 53 Md. 192.

Massachusetts.—Thurston *v.* Whitney, 2 Cush. 104; Com. *v.* Hill, 10 Cush. 532; Com. *v.* Smith, 2 Gray 516, 61 Am. Dec. 478. But see Hunscom, *v.* Hunscom, 15 Mass. 184; Com. *v.* Burke, 16 Gray 33.

New Hampshire. — Free *v.* Buckingham, 59 N. H. 225; Norton *v.* Ladd, 4 N. H. 444.

New Jersey. — Donnelly *v.* State, 26 N. J. Law 463, 601; Den *v.* Vancleve, 5 N. J. Law 589.

New York.—Butts *v.* Swartswood, 2 Cow. 431; Jackson *v.* Gridley, 18 Johns. 98; People *v.* McGarven, 17 Wend. 460. But see Stambro *v.* Hopkins, 28 Barb. 265.

North Carolina. — Shaw *v.* Moon, 4 Jones 25.

Ohio. —Brock *v.* Milligan, 10 Ohio 121; Clinton *v.* State, 33 Ohio 27; Easterday *v.* Kilborn, 1 Wright 345.

Pennsylvania. — Blair & Hutton *v.*

tion of written instruments.[2]

2. Test of Competency. — A. Belief in God. — The proper test of a witness' competency, on the grounds of his religious principles, is whether he believes in the existence of a God who will punish him if he swears falsely.[3]

B. Belief in Future Punishment. — It has been held that no person can be a witness who does not believe in the existence of a God and a future state of rewards and punishments.[4]

Belief in Future Punishment Not Necessary. — But according to the great weight of authority, a witness is competent who believes in the existence of a God, and that he will punish falsehood and perjury in this world; although he does not believe in future rewards and punishment.[5]

Seaver, 26 Pa. St. 274; Com. *v.* Winnemore, 2 Brewst. 404.

South Carolina. — Jones *v.* Harris, 1 Strob. 160; State *v.* Belton, 24 S. C. 184, 58 Am. Rep. 245.

Tennessee. — Harrel *v.* State, 1 Head 125; State *v.* Cooper, 2 Overt. 96; Odell *v.* Koppee, 5 Heisk. 88; Burnett *v.* State, 1 Swan. 411; McClure *v.* State, 1 Yerg. 207; Anderson *v.* Mayberry, 2 Heisk. 653.

Vermont. — Arnold *v.* Estate of Arnold, 13 Vt. 363; Scott *v.* Hooper, 14 Vt. 535. But see R. L. Vt., §1007.

2. Curtis *v.* Strong, 4 Day (Conn.) 51; Winstead Savings Bank *v.* Spencer, 26 Conn. 196; Jones *v.* Harris, 1 Strob. (S. C.) 160.

3. Omychund *v.* Barker, Willes 549; Jackson *v.* Gridly, 18 Johns. (N. Y.) 98; Curtis *v.* Strong, 4 Day (Conn.) 55; Arnold *v.* Estate of Arnold, 13 Vt. 363; Wakefield *v.* Ross, 5 Mason 16, 28 Fed. Cas. No. 17,050; Blair & Hutton *v.* Seaver, 26 Pa. St. 274; United States *v.* Kennedy, 3 McLean 175, 26 Fed. Cas. No. 15,524; Butts *v.* Swartswood, 2 Cow. (N. Y.) 432; People *v.* Matteson, 2 Cow. (N. Y.) 433; Brock *v.* Milligan, 10 Ohio 121; Cubbison *v.* McCreary, 2 Watts & S. (Pa.) 262.

4. Curtis *v.* Strong, 4 Day 51, 4 Am. Dec. 179; State *v.* Cooper, 2 Overt. (Tenn.) 96; Donnelly *v.* State, 26 N. J. Law 463, Den *v.* Vancleve, 5 N. J. Law 589, 652; State *v.* Townsend, 2 Harr. (Del.) 543; Perry *v.* Stewart, 2 Harr. (Del.) 37; Johnson *v* Gridley, 18 Johns. (N. Y.) 98.

In Atwood *v.* Welton, 7 Conn., the court said: "As an oath is an indispensable means of ascertaining truth in a court of justice, so the oath necessarily implies the existence of a God, and a belief in a future state, and a punishment of some duration in that future state; and that a witness who has no belief in these truths is not a competent witness."

5. *England.* — Omychund *v.* Barker, Wiles 538; Atty. Gen. *v.* Bradlaugh, 14 Q. B., Div., 667.

United States. — U. S. *v.* Kennedy, 3 McLean 175, 26 Fed. Cas. No. 15,524.

Alabama. — Porter *v.* Cotney, 3 Ala. 314.

Illinois. — Central Military R. R. Co. *v.* Rockafellow, 17 Ill. 541.

Iowa. — Dedric *v.* Hopson, 62 Iowa 562, 17 N. W. Rep. 772; Searcy *v.* Miller, 57 Iowa 613, 10 N. W. Rep. 912.

Massachusetts. — Hunscom *v.* Hunscom, 15 Mass. 184.

Mississippi. — Phebe *v.* Price, Walk., 131.

New Hampshire. — Free *v.* Buckingham, 59 N. H. 225.

Ohio. — Clinton *v.* State, 33 Ohio 27; Brock *v.* Milligan, 10 Ohio 121.

Pennsylvania. — Cubbison *v.* McCreary, 2 Watts & S. 262; Blair & Hutton *v.* Seaver, 26 Pa. St. 274.

South Carolina. — State *v.* Belton, 24 S. C. 184, 58 Am. Rep. 245; Jones *v.* Harris, 1 Strob. 160.

Vermont. — Arnold *v.* Estate of Arnold, 13 Vt. 362.

All persons who believe in the existence of a God and a future state, though they disbelieve in a punishment hereafter for crimes committed

3. Change in the Rule. — But the tendency of modern times by the courts and in legislation is towards liberalizing the rule, and in many states incompetency for want of religious belief has been abolished.[6]

here, are competent witnesses. Noble *v.* People, 1 Ill. 54.

Where the witness on being asked as to his religious belief, stated, that, "he did not believe in a state of future rewards and punishments after death; and that the only punishment inflicted for wrongs in this life was the pangs of conscience; but he believed in the existence of a God; he also believed the Bible." *Held* to be a competent witness, notwithstanding his inconsistent statement. Bennett *v.* State, 1 Swan (Tenn.) 411.

In Shaw *v.* Moore, 4 Jones (N. C.) 25, it is said, "the great case of Omychund *v.* Barker (it may be called 'great' for it relieved the common law from an error that was a reproach to it) established the rule to be that an infidel is a competent witness, provided he believes in the existence of a Supreme Being who punishes the wicked, without reference to the *time* of punishment. The substance of the thing is *every oath must have a religious sanction.*"

6. Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wisconsin.

Arizona. — Rev. Stat. 1901, § 2538.

California. — People *v.* Sanford, 43 Cal. 29; People *v.* Chin Mook Sow, 51 Cal. 599; People *v.* Copsey, 71 Cal. 548, 12 Pac. 721.

The Practice Act, § 392, provides "That no person offered as a witness shall be excluded on account of his opinion on matters of religious belief." We can assign to this language no other import than that a witness is competent without any respect to his religious sentiments or convictions; the law leaving this matter of *competency* to legal sanctions, or, at least, to considerations independent of religious sentiments or convictions." Fuller *v.* Fuller, 17 Cal. 605.

Colorado. —Mills Anno. Stat. 1891, § 4821.

Connecticut. — Gen. Stat. 1888, § 1098. It would seem that this changes the rule laid down in the early decisions in this state in Curtis *v.* Strong, 4 Day 51; Beardsley *v.* Foot, 2 Root 399; Atwood *v.* Welton, 7 Conn. 66.

Florida. — Rev. Stat. 1892, § 1097.

Georgia. — "The section of the Code 3797, simply intends the religious belief which made a witness incompetent at common law, shall, in Georgia, go only to the credit of the witness." Doukle *v.* Kohn, 44 Ga. 266.

Illinois. — Constitution of 1870, §3, Art. 2, "guarantees non-interference of the state with the religious faith of its citizens."

In Hroneck *v.* People, 134 Ill. 139, 24 N. E. 861, 23 Am. St. Rep. 652, 8 L. R. A. 837, it is held, "that the effect of this constitutional provision is to abrogate the rule which obtained in this state prior to the constitution of 1870, and that there is no longer any test or qualification in respect to religious opinion or belief, or want of the same, which affects the competency of citizens to testify as witnesses in courts of justice." Macamore *v.* Wiley, 49 Ill. App. 615.

Indiana. — Snyder *v.* Nations, 5 Blackf. 295; Nickson *v.* Beard, 111 Ind. 137.

Iowa. — State *v.* Elliott, 45 Iowa 486; Searcy *v.* Miller, 57 Iowa 613; Dedric *v.* Hopkins, 62 Iowa 562, 17 N. W. 772; all hold that evidence in regard to religious belief of witness can be given only to affect his credibility.

Kansas. — Section 7 of the bill of rights embodied in the state constitution provides that "no person shall be incompetent to testify on account of religious belief." Dickinson *v.* Beal, 10 Kan. App. 233, 62 Pac. 724.

Kentucky. — In Bush *v.* Com., 80 Ky. 244, the court holds the 5th and

II. CREDIBILITY.

But it is still the rule that the witness' religious belief or unbelief may be considered as affecting his credibility.[7]

6th sections of the constitution changes the common law rule, and makes competent as witnesses all persons so far as any religious test is concerned.

In support of this constitutional provision the court say: "If a case should occur in which a Christian man should suffer death, though innocent, because an atheist was denied the capacity to testify in his behalf, every citizen would denounce such a rule thus applied as absolutely unjust, oppressive and in violation of our institutions."

Maine. — Rev. Stat. 1883, chap. 82, § 92.

Massachusetts. — Gen. Stat., chap. 131, § 12. In the case of Com. *v.* Burke, 16 Gray 33, it was said: "The purpose and effect of this provision were to render persons who were disbelievers in any religion, competent witnesses, and to cause their disbelief to be proved only to affect their credibility."

Michigan. — Section 4336, compiled laws, provides that "No person shall be deemed incompetent as a witness in any court, matter or proceeding, on account of his opinions on the subject of religion, nor shall any witness be questioned in relation to his opinions thereon, either before or after he shall have been sworn." People *v.* Jenness, 5 Mich. 305.

Minnesota. — Const., Art. 1, § 17.

Mississippi. — Const. 1868, Art. 1, § 23; Code of 1892, § 1742.

Missouri. — Const., Art. 2, § 5, provides that no person shall be disqualified from testifying on account of his religious opinion. In the case of Londener *v.* Lichtenheim, 11 Mo. App. 385, this provision was held to mean that a witness is competent without regard to his believing or not believing in a God, who will reward the just and punish the wicked. Cadmus *v.* St. Louis Bridge Co., 15 Mo. App. 86.

Montana. — Const. 1889, Art. 3, § 4.

Nebraska. — Const. 1875, Art. 1, § 4.

Nevada. — Const. 1864, Art. 1, § 4.

New Mexico. — Comp. Laws, 1897, § 3016.

New York. — Stambro *v.* Hopkins, 28 Barb. 265; Wilder *v.* Peabody, 21 Hun 376, hold that religious belief may be shown only to affect credibility.

North Dakota. — Const. 1889, Art. 1, § 4.

Oregon. — Const. 1859, Art. 1, § 6.

Rhode Island. — Const. 1842, Art. 1, § 3.

Tennessee. — Laws of 1895, chap. 10, § 4500.

Texas. — "An atheist or a deist is a competent witness if he understands the nature and obligation of an oath; and he is sworn or affirmed, as the case may be, in the manner most binding upon his conscience." Colter *v.* State, 37 Tex. Crim. 284, 39 S. W. 576.

Utah. — Const. 1895, Art. 1, § 4.

Vermont. — In Vermont no person is incompetent as a witness on account of his opinions on matters of religious belief, R. L. Vt. § 8, 1007, Vt. Stat. 1894, § 1244, which changes the rule laid down in Arnold *v.* Arnold Estate, 13 Vt. 363, and Scott *v.* Hooper, 14 Vt. 535.

Virginia. — No person is incapacitated from being a witness on account of religious belief. Perry's Case, 3 Gratt. 602.

Washington. — Const. 1889, Art. 1, § 11.

West Virginia. — Const. 1872, Art. 3, § 15.

Wisconsin. — Const. 1848, Art. 1, § 19.

7. Wilder *v.* Peabody, 21 Hun 376; Hunscom *v.* Hunscom, 15 Mass. 184; Com. *v.* Burke, 16 Gray 33; Com. *v.* Winnemore, 2 Brewst. 404; People *v.* Chin Mook Sow, 51 Cal. 597.

Art. 1, § 4, of the constitution provides that a person shall not be rendered incompetent to give evidence in consequence of his opinion on the subject of religion. It is not provided that the credibility of his evidence may not be lessened.

III. ESTABLISHING INCOMPETENCY.

1. Burden of Proof. — The incompetency of a person as a witness, from defect of religious belief, is not to be presumed.[8] It is incumbent on the party objecting to such witness to show his incompetency by clear and satisfactory proof.[9]

2. Mode of Proof. — The incompetency of the witness can be proved from his declarations made out of court, concerning his opinion and principles.[10] He cannot be admitted to deny or explain in court the declarations imputed to him, as it would be incongruous to admit a man to his oath for the purpose of ascertaining whether he had the necessary qualifications to be sworn.[11]

Searcy *v.* Miller, 57 Iowa 613, 10 N. W. 912; Dedric *v.* Hopson, 62 Iowa 562, 17 N. W. 772.

Dying Declaration. — In State *v.* Elliott, 45 Iowa 486, it was held competent to prove as affecting the credibility of one whose dying declarations were introduced, that he was a materialist and believed in no God or future conscious existence.

In the case of Snyder *v.* Nations, 5 Blackf. (Ind.) 295, it is said: "By a statute of this state (R. S. 1838, p. 275), it is enacted that want of religious faith shall not affect the competency of the witness, but shall go only to his credibility."

8. Atty. Gen. *v.* Bradlaugh, 14 Q. B. Div. 667; Com. *v.* Hill, 10 Cush. (Mass.) 530; Donnelly *v.* State, 26 N. J. Law 463, 601; Territory *v.* Yee Shun, 3 N. M. 82, 2 Pac. 84.

9. The Queen's Case, 2 B. & B. 284; Wakefield *v.* Ross, 5 Mason 16, 28 Fed. Cas. No. 17,050, 1 Greenl. 370; Com. *v.* Smith, 2 Gray 516, 61 Am. Dec. 478; Com. *v.* Burke, 16 Gray 33; Donnelly *v.* State, 26 N. J. Law 463, 601; Arnd *v.* Amling, 53 Md. 192; Territory *v.* Yee Shun, 3 N. M. 82, 2 Pac. 84.

When Alleged As a Ground of Exclusion, it must be proved. The evidence is to be heard and the question to be decided by the presiding judge; and whether upon the whole evidence, the fact is established that the proposed witness is an atheist, or "one who disbelieves in the existence of a God, who is the rewarder of truth and avenger of falsehood," is a question solely for the presiding judge, and as a question of fact not subject to any exception or appeal. Com. *v.* Hill, 10 Cush. (Mass.) 530.

10. *United States.* — U. S. *v.* Kennedy, 3 McLean 175, 26 Fed. Cas. No. 15,524.

Connecticut. — Bow *v.* Parsons, 1 Root 480; Clark *v.* Higgins, 2 Root 399; Curtis *v.* Strong, 4 Day 55, 4 Am. Dec. 179; Atwood *v.* Welton, 7 Conn. 66.

Illinois. — Central Military R. Co. *v.* Rockafellow, 17 Ill. 541.

Iowa. — Searcy *v.* Miller, 57 Iowa 613, 10 N. W. 912.

Massachusetts. — Thurston *v.* Whitney, 2 Cush. 104; Com. *v.* Smith, 2 Gray 516.

New Hampshire. — Norton *v.* Ladd, 4 N. H. 444.

New York. — Butts *v.* Swartswood, 2 Cow. 431; Jackson *v.* Gridley, 18 Johns. 98.

Ohio. — Brock *v.* Milligan, 10 Ohio 121.

Tennessee. — Harrel *v.* State, 1 Head 125; Odel *v.* Koppee, 5 Heisk. 88; Anderson *v.* Mayberry, 2 Heisk. 653.

11. Curtis *v.* Strong, 4 Day 55, 4 Am. Dec. 179; Wakefield *v.* Ross, 5 Mason 16, 28 Fed. Cas. No. 17,050; State *v.* Townsend, 2 Harr. (Del.) 543; Den *v.* Vancleve, 5 N. J. Law 589; Jackson *v.* Gridley, 18 Johns. 98; Smith *v.* Coffin, 18 Me. 157; Harrel *v.* State, 1 Head (Tenn.) 125; Com. *v.* Burke, 16 Gray 33; Com. *v.* Smith, 2 Gray 516. But see Central Military Co. *v.* Rockafellow, 17 Ill. 541. In Thurston *v.* Whitney, 2 Cush. (Mass.) 104, the court say: "But it has been frequently held that this mode of proof is admissible, and is an exception to the general rule; that a witness shall not be permitted to disqualify himself by declaration not under oath made out

May Explain Belief. — There are authorities to the effect that while the witness is not to be examined under oath, concerning his religious opinions, he may, however, be permitted to explain them, and if he then declares his belief in a Supreme Being, he may be examined as a witness, leaving his credibility to the jury.[12]

of court, from the necessity of the case, it being deemed unreasonable that the party objecting should be restricted to the testimony of the witness on the *voir dire*, as the objection supposes he has no regard to the sanction of an oath."

"In many of our elementary treatises it is laid down as the invariable rule, that, before a witness takes the oath, he may be asked whether he believes in the existence of a God, the obligation of an oath, and in a future state of rewards and punishments; and if he does not, he cannot be sworn." Brock *v.* Milligan, 10 Ohio 121.

Must Be Established by Other Means. — "While a belief in the existence of a God is held by us necessary to the competency of a witness, yet the want of such religious belief must be established by other means than an examination of the witness upon the stand. He is not to be questioned as to his religious belief." Com. *v.* Smith, 2 Gray 516.

12. U. S. *v.* White, 5 Cranch 38, 28 Fed. Cas. No. 16,675; Central Military R. Co. *v.* Rockafellow, 17 Ill. 541; McFadden *v.* Com., 23 Pa. St. 12, 62 Am. Dec. 308; Arnd *v.* Amling, 53 Md. 192; Jones *v.* Harris, 1 Strob. (S. C.) 160.

ATTACHMENT.

By Clark Ross Mahan.

CROSS-REFERENCES.

Attendance of Witnesses;
Creditors' Suits;
Domicile;
Garnishment;
Malicious Prosecution.

I. EVIDENCE TO PROCURE AN ATTACHMENT.

Although under the present practice the issuance of a writ of attachment is generally a matter of right upon compliance by the applicant with the statutory provisions governing attachments, it was formerly a requirement, and is yet in some jurisdictions, that the facts and circumstances necessary to entitle the applicant to the writ should be proven to the satisfaction of the court granting the same,[1] and in such case, proof, in the sense in which it was used, meant legal evidence, or such evidence as would be received in the ordinary course of judicial proceedings.[2]

1. Proof Necessary to Prove Writ of Attachment. — Thus, under a former Minnesota statute, it was necessary for the applicant for an attachment to prove to the satisfaction of the judge, the facts and circumstances to entitle him to the writ. Keighler *v.* McCormick, 11 Minn. 420. So also in New York, *Ex parte* Haynes, 18 Wend. 611.

In Georgia a Statute provides that in certain contingencies, a creditor may petition the proper court for an attachment, supporting his petition "by affidavit or testimony, if he can control the same." And in Leob *v.* Smith, 78 Ga. 504, 3 S. E. 458, it was held that in granting an attachment under this statute the judge may rest his decision on affidavit or other testimony, but that the testimony must be in writing and not oral. Mere oral testimony cannot be heard or considered. To same effect see Gazan *v.* Royce, 78 Ga. 512. 3 S. E. 753.

2. Granting Attachment a Judicial Act. — The application for an attachment in such case is not addressed to the whim or caprice of a judge. In granting or refusing it, he acts judicially, and is bound to exercise a sound discretion. He must have evidence before him upon which to exercise it. He has no right to be satisfied, unless circumstances are sworn to sufficient to prove the requisite facts, so as to satisfy a reasonable man in the exercise of a sound judgment, of their truth. Pierse *v.* Smith, 1 Minn. 82.

Information and Belief Not Enough. — It was not enough for the witnesses to say they were informed and believed there were grounds for the attachment. They must give the facts and circumstances which induced the belief. *Ex parte* Haynes, 18 Wend. 611; *Ex parte* Robinson, 21 Wend. (N. Y.) 672; *Ex parte* Faulkner, 4 Hill (N. Y.) 598; *Ex parte* Bliss, 7 Hill (N. Y.) 187; Pierse *v.* Smith, 1 Minn. 82.

Presumption That Witness Is Disinterested. — In Van Alystine *v.* Erwine, 11 N. Y. 331, it was held that where it was necessary by statute that the facts and circumstances to establish the grounds on which an application for an attachment was made should be proved by disinterested witnesses, it would be presumed that the witnesses were disinterested in the absence of an affirmative showing to the contrary.

II. MATTERS PERTAINING TO THE DISCHARGE OF AN ATTACHMENT.

1. Truth or Falsity of Grounds Alleged. — A. BURDEN OF PROOF. On the hearing of a proceeding instituted by the defendant in attachment for the purpose of procuring the discharge of an attachment, either by a motion, traverse, plea or other appropriate pleading, which denies the facts alleged in the plaintiff's affidavit as constituting the ground upon which the attachment was issued, the burden is upon the plaintiff of satisfying the court or jury by a preponderance of the evidence that the charge he has made is well founded,[3]

3. *United States.* — Strauss *v.* Abrahams, 32 Fed. 310.

Colorado. — Drake *v.* Avanzini, 20 Colo. 104, 36 Pac. 846.

Georgia. — Oliver *v.* Wilson, 29 Ga. 642; Kenney *v.* Wallace, 87 Ga. 724, 13 S. E. 744.

Illinois. — Jaycox *v.* Wing, 66 Ill. 182; Hawkins *v.* Albright, 70 Ill. 87; Wells *v.* Parrott, 43 Ill. App. 656; Towle *v.* Lamphere, 8 Ill. App. 399; Ridgway *v.* Smith, 17 Ill. 33.

Indiana. — Bradley *v.* Bank of Indiana, 20 Ind. 528.

Iowa. — Byfow *v.* Girton, 90 Iowa 661, 57 N. W. 588.

Kansas. — Champion Mach. Co. *v.* Updyke, 48 Kan. 404, 29 Pac. 573; Wichita Wholesale Gro. Co. *v.* Records, 40 Kan. 119, 19 Pac. 346; Becker *v.* Langford, 39 Kan. 35, 17 Pac. 648; McPike *v.* Atwell, 34 Kan. 142, 8 Pac. 118.

Maryland. — Pitts Agri. Wks. *v.* Smelser, 87 Md. 493, 40 Atl. 56.

Michigan. — Cottrell *v.* Hatheway, 108 Mich. 619, 66 N. W. 596; Iosco Co. Sav. Bank *v.* Barnes, 100 Mich. 1, 58 N. W. 606 (citing Bank of Whittle, 41 Mich. 365, 1 N. W. 957; Schall *v.* Bly, 43 Mich. 401, 5 N. W. 651); Rickel *v.* Strehinger, 102 Mich. 41, 60 N. W. 307; Carver *v.* Chapell, 70 Mich. 49, 37 N. W. 879; Brown *v.* Blanchard, 39 Mich. 790; McMowan *v.* Moore, 113 Mich. 101, 71 N. W. 505.

Minnesota. — Jones *v.* Swank, 51 Minn. 285, 53 N. W. 634.

Missouri. — Ross *v.* Clark, 32 Mo. 296.

Nebraska. — Ellison *v.* Tallon, 2 Neb. 14; Tallon *v.* Ellison, 3 Neb. 53; Olds Wagon Co. *v.* Benedict, 25 Neb. 372, 41 N. W. 254; Steele *v.* Dodd, 14 Neb. 496, 16 N. W. 909; Hilton *v.* Ross, 9 Neb. 406, 2 N. W. 862; Geneva Nat. Bank *v.* Bailor, 48 Neb. 866, 67 N. W. 865; Dolan *v.* Armstrong, 35 Neb. 339, 53 N. W. 132; Grimes *v.* Farrington, 19 Neb. 44, 26 N. W. 618; Jordan *v.* Dewey, 40 Neb. 639, 59 N. W. 88.

Ohio. — Coston *v.* Paige, 9 Ohio St. 397; Seville *v.* Wagner, 46 Ohio St. 52, 18 N. E. 430.

South Carolina.—Lipscomb *v.* Rice, 47 S. C. 14, 24 S. E. 925.

South Dakota. — Park *v.* Armstrong, 9 S. D. 269, 68 N. W. 739; Noyes *v.* Lane, 1 S. D. 125, 45 N. W. 327; Wyman *v.* Wilmarth, 1 S. D. 172, 46 N. W. 190; Wilcox *v.* Smith, 4 S. D. 125, 55 N. W. 1107; Jones *v.* Meyer, 7 S. D. 152, 63 N. W. 773.

Utah. — Deseret Nat. Bank *v.* Little, 13 Utah 265, 44 Pac. 930; Godbe-Pitts Drug Co. *v.* Allen, 8 Utah 117, 29 Pac. 881.

Virginia. — Burruss *v.* Trant, 88 Va. 980, 14 S. E. 845; Sublett *v.* Wood, 76 Va. 318.

Washington. — Bender *v.* Rinker, 21 Wash. 633, 59 Pac. 503; Cox *v.* Dawson, 2 Wash. 381, 26 Pac. 973; Henson *v.* Tompkins, 2 Wash. 508, 27 Pac. 73.

Statement of Rule. — "The affidavit of the plaintiff, his agent or attorney, is *prima facie* sufficient cause for issuing the writ (of attachment); but upon the facts being denied in the petition for a dissolution, the burden is cast upon the plaintiff to make good the cause he alleges by other competent proof, in addition to that contained in his affidavit for the writ. He must main-

unless the conduct of the defendant in attachment has been such as to preclude him from showing the falsity of the charge.[4] Nor does a statute, requiring the court to hear the proofs and allegations of the parties, and to discharge the attachment if he shall be satisfied that the plaintiff has not good legal cause for suing out the writ, shift the burden upon the defendant to show in fact that no grounds existed for issuing the writ.[5]

Qualification of Rule. — It has been held, however, that where an affidavit is made for an attachment, some *prima facie* proof must

tain the affirmative of the issue thus made up, in order to sustain his lien, created by a levy under his writ. The writ is issued upon his information and belief that the causes alleged existed. He is called upon by the petition for dissolution to sustain by proof his charges. So far as the original suit is concerned, the application to dissolve is entirely an interlocutory proceeding, and does not affect or touch the merits thereof. It is in the nature of a motion, and may be disposed of at chambers. A hearing, however, is required, and a trial of a question of fact must be had, and there is no reason why the rules governing the trial of such issues should not be applied by the court upon the hearing." Genesee Co. Sav. Bank *v.* Mich. Barge Co., 52 Mich. 164, 17 N. W. 790.

In Michigan a Statute (2 How. Ann. Stat., § 8015) provides that when two or more persons are jointly indebted, and an affidavit shall be made as provided in another section, so as to bring one or more of such joint debtors within its provisions and amenable to the process of attachment, a writ shall issue against the property of such as are so brought within the statute; and where a plaintiff in attachment under this statute against two debtors alleges not only joint indebtedness, but also joint action or intended action on the part of both defendants in respect of their joint property, with intent on their part to defraud creditors, he must not only show the joint indebtedness, but also the joint action or intended action on the part of the defendants; otherwise, his action must fail. Cottrell *v.* Hatheway, 108 Mich. 619, 66 N. W. 596.

Denial on Information and Belief. Upon a motion by an assignee for the benefit of the defendant's creditors to dissolve an attachment, the objection that the court ruled that the plaintiff had the burden of proof, upon the assignee's affidavit on information and belief, is without merit, when it appears that the affidavit of the attachment defendant specifically denying each of the grounds set up by the plaintiff, was also introduced in evidence. Wichita Wholesale Gro. Co. *v.* Records, 40 Kan. 119, 19 Pac. 346.

4. Conduct of Defendant to Estop, to Deny Falsity. — "The plaintiff must establish the truth of the facts averred in the affidavit, unless the conduct of the defendant has been such as to preclude him from showing their falsity. It should be borne in mind that this estoppel will not arise because of erroneous and unfounded inferences, which the plaintiffs may have drawn from the defendant's conduct, nor unless they have really acted upon the faith of that conduct, and upon the belief engendered and honestly entertained therefrom. The language or conduct must have been such as warranted the charges contained in the affidavit, the affiant must have believed them to be true, and that belief must have been caused by the acts or declarations of the debtor. Under such circumstances only will the defendant be precluded from showing the truth of the matter, and the plaintiff be relieved from establishing the existence of the facts charged by him." Roach *v.* Brannon, 57 Miss. 490.

5. Macumber *v.* Beam, 22 Mich. 395.

be adduced by the defendant that the facts sworn to are not true, in order to throw upon the plaintiff the burden of proving their truth.[6]

Burden Shifting to Defendant. — But after the plaintiff has given evidence sufficient to establish the ground laid in his affidavit, it then devolves upon the defendant to give evidence to repel the inference to be drawn from the plaintiff's evidence.[7]

B. Direct and Circumstantial Evidence. — a. *In General.* For the purpose of establishing the truth or falsity of the ground or grounds laid in the affidavit for the attachment, it is not necessary to produce direct testimony, but either party may resort to any competent evidence, though it may be circumstantial in its nature, which tends to prove his contention.[8]

b. *Matters Subsequent to Attachment.* — It is competent for the plaintiff to introduce evidence of matters that have transpired since the attachment if they tend to prove the truth of the ground alleged;[9]

6. Offutt *v.* Edwards, 9 Rob. (La.) 90.

And in New Jersey, upon a trial of the issue raised by defendant's motion to quash the attachment, the party moving to quash must sustain the burden and establish, by legal evidence, that the writ was illegal and void, and ought to be quashed. Morris *v.* Quick, 45 N. J. Law 308.

7. As where the ground is removal of property from the state, and the plaintiff has given evidence showing such fact as to some of the property, the defendant must show that he has ample property to meet the demands of all his creditors. Pickard *v.* Samuels, 64 Miss. 822, 2 So. 250.

8. Chatham Nat. Bank *v.* Goldsoll, 14 Mo. App. 586; Ross *v.* Clark, 32 Mo. 296; Ruthven *v.* Beckwith, 84 Iowa 715, 51 N. W. 153; Barney *v.* Scherling, 40 Miss. 320.

Pretended Sale of Property. Thus, on a proceeding to dissolve an attachment, the plaintiff may show an arrangement made by the defendant with the witness, whereby the witness was to, and did, take possession of the property under a pretended sale in order to cover up the defendant's property from his creditors. Parker *v.* Luce, 14 Mich. 8.

Misdemeanor As Ground for Attachment. — In Chouteau *v.* Boughton, 100 Mo. 406, 13 S. W. 877, wherein the affidavit for the attachment alleged that the cause of action sued on resulted from the commission by defendant of an act constituting a misdemeanor; it was held proper to allow the plaintiff to introduce evidence which showed that the defendant had been guilty of a trespass upon plaintiff's property, which by express statute, was made a misdemeanor.

9. **Fraudulent Removal of Property.** — Thus, upon the issue raised by defendant's plea to the ground of attachment that the defendant is about to remove his property from the state, it is competent for the plaintiff to give evidence showing that the defendant removed his property out of the state soon after the attachment was sued out. Such evidence tends to prove the truth of the ground of attachment alleged. Friedlander *v.* Pollock, 5 Cold. (Tenn.) 490.

Conduct Subsequent to Conveyance. — It is competent to show what the conduct of the parties was with respect to the mortgage alleged to be fraudulent, after it was made, for the purpose of disclosing what was the true intent at the time it was made, the attachment being grounded upon fraudulent conveyance by way of mortgage. Burnham *v.* Johnson, 5 Kan. App. 321, 48 Pac. 460.

Conveyance Subsequent to Attachment. — It is not competent on the trial of an issue upon a traverse of

although it has been held that an affidavit of the plaintiff containing matters which have transpired since the issuance of the attachment is immaterial and irrelevant.[10]

c. *No Knowledge of Indebtedness.* — Where the ground alleged is that the debtor is about to remove his property with intent to defraud his creditors, it is proper to permit him to testify that at the time of the attachment he did not know he owed any one, where he expressly disclaims any intent to raise the question of such indebtedness.[11]

d. *Debtor Owning Property Sufficient to Satisfy Creditor's Claim.* Where the ground alleged is that the debtors were about to remove their property from the state to the plaintiff's injury, it is error to exclude evidence offered by the defendants that one of them had unincumbered property in the state sufficient to discharge the plaintiff's claim.[12]

e. *Assignment for Creditors.* — Where the debtor is charged with having fraudulently disposed of his property, a deed of assignment by him for the benefit of creditors showing on its face that he had disposed of his property is admissible to show that fact, leaving the question of the fraudulent character of the transfer for subsequent consideration.[13]

f. *Offer to Compromise.* — An offer to compromise the debt, in order to prevent suit against him, cannot be used against the defendant for the purpose of sustaining the attachment.[14]

an affidavit alleging fraudulent disposition of his property by the debtor as ground for the attachment, for the plaintiff to introduce in evidence conveyances made by the defendant months after the date of the attachment. Hobbs *v.* Greenfield, 103 Ga. 1, 30 S. E. 257.

Subsequent Absconding of Debtor. Where the ground upon which an attachment has been issued, is the intended absconding of the defendant, the fact that he has since the issuance of the attachment actually left the state cannot be judicially noticed; but must be proved as any other fact to be relied upon. Pierse *v.* Smith, 1 Minn. 82.

10. Geneva Nat. Bank *v.* Bailor, 48 Neb. 866, 67 N. W. 865, so holding upon the ground that the question on the hearing of a proceeding to discharge the attachment is whether any grounds existed for the attachment at the time the writ was issued, and not since. See also Denegre *v.* Milne, 10 La. Ann. 324.

11. "**If He Honestly Believed He Had No Creditors** he could not very well have entertained any design to defraud them, and his belief on the subject was very important. The intent is the very thing in controversy and may be proved by direct testimony as well as by circumstantial evidence." Hyde *v.* Nelson, 11 Mich. 353.

12. White *v.* Wilson, 10 Ill. 21; White *v.* Williams, 10 Ill. 25.

13. Meyer & Sons Co. *v.* Black, 4 N. M. 190, 16 Pac. 620.

14. Chaffe *v.* Mackenzie, 43 La. Ann. 1062, 10 So. 369, wherein the court said: "The proposition or offer was made to the plaintiffs for their benefit. It would probably have authorized an attachment by another creditor, but it is not apparent in what manner the offer to plaintiffs has injured them, or in what manner the intent to defraud his other creditors could justify an attachment on a preferred sale which would enure exclusively to their benefit. There is no evidence that any such proposition was made to

C. Admissions and Declarations. — a. *Generally.* — Evidence of admissions by the defendant in attachment tending to show that he was about to do the identical act at the time the attachment was sued out, which was laid as the ground for the attachment, is competent for the plaintiff.[15] And it has been held competent for the attachment defendant to give evidence of declarations made by him at the time of the act laid in the affidavit as the ground for the attachment, which characterize the intent or motive with which the act was done.[16]

b. *Effect of Motion to Discharge.* — The truth of the facts well stated in the plaintiff's affidavit, with every legitimate inference to be drawn therefrom, is admitted by a motion by the defendant to vacate the attachment, in support of which he files no affidavit, but

any other creditor." *Compare* Gries *v.* Blackman, 30 Mo. App. 2, wherein it was held that a circular letter from the debtor to his creditors containing a statement of his assets and liabilities, and their classification and concluding with an offer to settle his debts at twenty-five per cent. was not open to the objection that it was an offer to compromise but tended to show his financial condition, which was a material fact, the attachment having been sued out on the ground that he was fraudulently disposing of his property and that he had fraudulently contracted the debt sued on.

15. Perryman *v.* Pope, 102 Ga. 502, 31 S. E. 37 (removal from country).

16. Temporary Absence. — Thus, evidence of declarations of the debtor whose property has been attached as a non-resident, made by him at the time of his departure, and showing his leaving the state to be only temporary, is admissible. Wallace *v.* Lodge, 5 Ill. App. 507. *Compare* Charles *v.* Amos, 10 Colo. 272, 15 Pac. 417, wherein the error charged was refusal of the court to permit a witness to testify what were the debtor's intentions in leaving.

Declarations Subsequent to Attachment. — But evidence of declarations that he had no intention of removing, made after he knew the attachment had been issued, and evidently with a view to the litigation thereby begun, is inadmissible for the defendant. Perryman *v.* Pope, 102 Ga. 502, 31 S. E. 37.

Contemplated Residence in State. When the ground of the attachment traversed is the non-residence of the defendant, the fact that a few months before the attachment was levied, being then engaged as a contractor in the construction of a railroad, he offered to buy an interest in a business conducted in the state, saying at the time that he liked the firm by which the business was conducted, is not admissible to show that he "had come to Georgia with the mind of remaining." Hickson *v.* Brown, 92 Ga. 225, 17 S. E. 1035.

In Tucker *v.* Frederick, 28 Mo. 574, 75 Am. Dec. 139, the grounds for the attachment were that the defendant was about to remove out of the state with intent to defraud creditors, and also that she was about to move out of the state with intent to move her domicile, the truth of both of which was put in issue by plea. Plaintiff's evidence pertained only to the charge that the defendant was about to move out of the state with intent to change her domicile; and it was held improper for the court to allow the defendant to prove by one witness that prior to the attachment she proposed to sell out to him, and stated that she desired to apply a portion of the proceeds to the payment of the plaintiff's claim, and by another witness that after the attachment had been levied she told him she would not have removed but for the attachment.

bases his application upon the papers upon which the attachment was granted.[17]

D. Evidence Impeaching Defendant's Character. — It is error to permit the plaintiff in attachment to introduce evidence which only tends remotely to impeach the character of the defendant.[18]

E. Property Owned by Defendant's Wife. —When the ground alleged is that the defendant had disposed of his property with intent to defraud his creditors, the defendant may show that the property attached was his wife's property, having been conveyed to her by a third person.[19]

F. Property Exempt From Seizure. — It is competent for the debtor to show that the property claimed to have been fraudulently concealed is in fact exempt from seizure.[20] But where the defendant moves to discharge the attachment upon the grounds that the property attached is exempt from attachment, the burden is upon him to make out his case clearly and entirely satisfactory in order to entitle him to have the attachment discharged.[21]

G. Examination of Witnesses. — Although ordinarily affidavits are the only testimony received upon a motion to set aside an attachment, it is competent for the court to call the plaintiff's witnesses before it and have them examined and cross-examined orally in its presence.[22] But whether or not it shall be done is a matter resting

17. Loeser *v.* Rosman, 10 N. Y. Supp. 415; Wickham *v.* Stem, 9 N. Y. Supp. 803; Lowry *v.* Stowe, 7 Port. (Ala.) 483; Calhoun *v.* Cozzens, 3 Ala. 21.

18. Lewis *v.* Kennedy, 3 G. Greene (Iowa) 57.

19. Barny *v.* Scherling, 40 Miss. 320. See also Carver *v.* Chappell, 70 Mich. 49, 31 N. W. 879.

20. Carver *v.* Chappell, 70 Mich. 49, 31, N. W. 879.

21. McLaren *v.* Hall, 26 Iowa 297; Baer etc. Co. *v.* Otto, 34 Ohio St. 11.

But where the averment, in an affidavit for attachment before a justice of the peace, that the property about to be attached is not exempt from execution, is traversed by the affidavit of defendant, and it is shown circumstantially by such affidavit that the property is exempt, the burden is on the plaintiff to maintain the truth of the statement by other evidence, and, where no such additional evidence is offered, the attachment should be discharged. Kirk *v.* Stevenson, 59 Ohio St. 556, 53 N. E. 49.

22. Tyler *v.* Stafford, 24 Kan. 580, wherein the court say: "We all know how often an affidavit speaks the language of counsel, rather than that of witness, or fails to state all the facts. Great injustice may be done, if the court has no power to bring the witnesses before it, and have them examined in its presence."

In Arkansas, by Express Statute, where the attachment is granted upon an affidavit, and a motion is made to discharge or vacate it, the party against whom the attachment is granted may require the production, for cross-examination, of the person who made the affidavit; and failure to produce the affiant under the provisions of the statute is ground for suppression of his affidavit. But where the defendant by his affidavit merely traverses the statement of the affidavit upon which the attachment was issued, this statute is not available to a defendant; the affidavits of both plaintiff and defendant in such

in the discretion of the court.[23]

H. Testimony of Defendant. — The defendant may show by his own testimony that the ground laid in the affidavit for the attachment was in fact untrue.[24]

I. Affidavits. — a. *On Application to Discharge Attachments.* **(1.) Necessity.** — An application to discharge an attachment, by motion or other appropriate remedy, on the ground of the falsity of the grounds laid in the affidavit for the attachment, must be supported by the affidavit of the applicant specifying wherein such falsity exists.[25]

(2.) Counter and Supplemental Affidavits. —On a motion to discharge an attachment, it is competent for the court to hear affidavits or any other proper evidence tending to disprove the allegations of the affidavit supporting the warrant, and the plaintiff may in such case present counter affidavits.[26] But where the motion to discharge is

case becoming and having no other effect than pleadings. Churchill *v.* Hill, 59 Ark. 54, 26 S. W. 378.

23. Tyler *v.* Stafford, 24 Kan. 580; Kountze *v.* Scott, 52 Neb. 460, 72 N. W. 585.

In Washington, the defendant is precluded from resorting to oral testimony to support his motion to discharge the attachment, when he has supported such motion by an affidavit. Hanson *v.* Doherty, 1 Wash. 461, 25 Pac. 297.

24. Draddy *v.* Heile, 17 Ky. Law 1182, 33 S. W. 1107. See also Brown *v.* Blanchard, 39 Mich. 790; Hyde *v.* Nelson, 11 Mich. 353.

25. Jenks *v.* Richardson, 71 Fed. 365; Evans *v.* Andrews, 7 Jones (N. C.) 117; Netter *v.* Hosch, 1 Pa. Co. Ct. 452; Barnhart *v.* Foley, 11 Utah 191, 39 Pac. 823.

The Verified Answer of the defendant in attachment may be read by him in support of his motion to dissolve, so far as it is pertinent. Nelson *v.* Munch, 23 Minn. 229.

The Affidavit of One of Several Defendants is sufficient to support an application by them to discharge the attachment. Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189.

Depositions Taken Upon Insufficient Notice. — Depositions may be used in evidence upon the hearing of a motion to discharge an attachment, although they were taken upon insufficient notice. They are the written declarations of the witnesses, and fulfill the statutory definition of affidavits, irrespective of any question of notice. Hanna *v.* Barrett, 39 Kan. 446, 18 Pac. 497.

In New Jersey, a statute provides that upon the filing by the defendant of affidavits showing on their face such facts as, if uncontradicted, would evince that the attachment was illegal, the defendant may move to quash, and a trial of the facts shall then take place. And in Morris *v.* Quick, 45 N. J. Law 308, it was held that on such trial such affidavits are not admissible as evidence, but that legal evidence must be produced to prove the facts set forth in the affidavits.

26. Hale *v.* Richardson, 89 N. C. 62; Talbot *v.* Pierce, 14 B. Mon. (Ky.) 195; Hill *v.* Bond, 22 How. Pr. (N. Y.) 272; New York & Erie Bank *v.* Codd, 11 How. Pr. (N. Y.) 221.

Contra. — Eldridge *v.* Robinson, 4 Serg. & R. (Pa.) 548.

In California, a statute provides for the issuance of an attachment on the ground that the security has become valueless. Another statute gives the plaintiff the right to contradict the defendant's statement of facts or to state other facts. And in Barbieri *v.* Ramelli, 84 Cal. 174, 24 Pac. 113, it was held that where plaintiff in an attachment under the above statute fails to avail himself of the right conferred on him to so contradict the defendant's affidavit,

founded upon the original papers on which the attachment was granted, the plaintiff cannot present counter or supplemental affidavits to sustain or fortify the grounds upon which the attachment was issued.[27]

(3.) Rebuttal. — The court may, in its discretion, permit the defendant to read affidavits rebutting those read by the plaintiff.[28]

b. *Contradiction of Affidavits.* — **(1.) In Proceedings to Discharge.** The absolute right of a party to have an attachment sustained depends, not upon the fact of his making the affidavit of the existence of the facts set forth therein, nor of his belief in their existence, but upon the existence of such facts themselves; and accordingly it is proper for the court, on the hearing of a proceeding instituted for the purpose of securing the discharge of the attachment, to receive legal evidence to disprove the truth of the affidavit upon which it was granted.[29] There are cases, however, which hold that the truth

or to state other facts, the defendant's affidavit will be deemed conclusive against plaintiff's right to the attachment.

27. Steuben Co. Bank *v.* Alberger, 75 N. Y. 179, 56 How. Pr. 345, reversing 55 How. Pr. 179, 14 Hun 479; Trows Prtg. & Bookbinding Co. *v.* Hart, 85 N. Y. 500; *affirming* 60 How. Pr. 190; Sutherland *v.* Bradner, 34 Hun 509, 1 How. Pr. 188; Appleton *v.* Speer, 57 N. Y. Sup. Ct. 119, 6 N. Y. Supp. 511; Ladenburg *v.* Commercial Bank, 87 Hun 269, 33 N. Y. Supp. 821, reversing 32 N. Y. Supp. 873, *affirmed* 146 N. Y. 406, 42 N. E. 543.

Amending Original Affidavit. Nor is it permissible in such case to amend the original affidavit by adding new allegations showing the source of knowledge of the agent making it. Buhl *v.* Ball, 41 Hun 61.

Affidavits Identifying the Affidavit for the Attachment may be read in evidence. Hallock *v.* Van Camp, 55 Hun 1, 8 N. Y. Supp. 588.

28. Nelson *v.* Munch, 23 Minn. 229; Carson *v.* Getchell, 23 Minn. 571.

In Nebraska the rule is that when the grounds for issuing the attachment are statutory, and the defendant moves to dissolve, denying the truth of the plaintiff's affidavit, the plaintiff should be required to file such evidence as he desires, and the defendant to file such evidence to traverse the same as he sees fit, the plaintiff being allowed to file rebutting evidence. Jordan *v.* Dewey, 40 Neb. 639, 59 N. W. 88.

29. *Arkansas.* — Ward *v.* Carlton, 26 Ark. 662. *Compare* under former statute, Mandel *v.* Peet, 18 Ark. 236.

Colorado. — Miller *v.* Godfrey, 1 Colo. App. 177, 27 Pac. 1016.

Illinois. — Bates *v.* Jenkins, 1 Ill. 411; Ridgway *v.* Smith, 17 Ill. 33.

Indiana. — Cooper *v.* Reeves, 13 Ind. 53; Fleming *v.* Dorst, 18 Ind. 493; McFarland *v.* Birdsall, 14 Ind. 126.

Iowa. — Lewis *v.* Sutliff, 2 G. Greene 186. *Compare* Veiths *v.* Hagge, 8 Iowa 163. And see cases cited in next note.

Kansas. — Doggett *v.* Bell, 32 Kan. 298, 4 Pac. 292.

Louisiana. — Thomas *v.* Dundas, 31 La. Ann. 184.

Maryland. — Clarke *v.* Meixsell, 29 Md. 221.

Michigan. — Folsom *v.* Teichner, 27 Mich. 107.

Minnesota. — Nelson *v.* Gibbs, 18 Minn. 485; Drought *v.* Collins, 20 Minn. 325.

Mississippi. — Roach *v.* Braunon, 57 Miss. 490.

Compare Smith *v.* Herring, 10 Smed. & M. 518.

Missouri. — Rheinhart *v.* Grant, 24 Mo. App. 154.

Nebraska. — Citizens State Bank *v.* Baird, 42 Neb. 219, 60 N. W. 551.

New Jersey. — City Bank *v.* Merritt, 13 N. J. Law 131; Brauson *v.*

or falsity of the affidavit in attachment cannot be put in issue in the attachment suit, but that the defendant's remedy, in case the attachment was wrongfully sued out, is by an action on the bond to recover damages for such wrongful attachment.[30]

(2.) In Actions on Bonds to Discharge. — In an action by an attaching creditor against the sureties on a bond given for the purpose of securing the discharge from the attachment of the property attached, the defendants may prove in defense of the suit the falsity of the attachment affidavit.[31]

(3.) Insufficiency of Bond. — When the issue presented by the affidavit of the defendant, filed for the purpose of having the bond strengthened, is heard before the magistrate, the burden is on the defendant to show the insufficiency of the bond.[32]

(4.) Irregularity of Officer. — Where the defendant in attachment sets up as a ground for his motion to discharge the attachment, an irregularity of the court or some of its officers, such as that the summons had not been issued when the attachment was granted, he has the burden of proving that fact; an irregularity by an officer of the court cannot be presumed.[33]

J. Parol Evidence to Contradict Recital of Bond. — On a hearing of a motion to quash a writ of attachment on the ground that it appeared from a recital in the condition of the bond that the writ was issued before the bond was filed, contrary to law, the plaintiff cannot introduce evidence to show that the bond was in fact filed before the writ was issued.[34]

Shinn, 13 N. J. Law 250; Brundred *v.* Del Hayo, 20 N. J. Law 328; Clark *v.* Likens, 26 N. J. Law 207; Morrel *v.* Fearing, 20 N. J. Law 670.

Compare Mercantile Nat. Bank *v.* Pequannock Nat. Bank, 58 N. J. Law 300, 33 Atl. 474.

New York. — *In re* Chipman, 1 Wend. 66; N. Y. & Erie Bank *v.* Codd, 11 How. Pr. 221.

Compare Lansingburgh Bank *v.* McKie, 7 How. Pr. 360.

North Carolina. — Hale *v.* Richardson, 89 N. C. 62.

Oklahoma. — Carnahan *v.* Gustine, 2 Okla. 399, 37 Pac. 594.

Rhode Island. — Kelley *v.* Force, 16 R. I. 628, 18 Atl. 1037.

South Carolina. — Degnans *v.* Wheeler, 2 Nott & McC. 323; Blake *v.* Hawkes, 2 Hill 631.

Tennessee. — Harris *v.* Taylor, 3 Sneed 536, 67 Am. Dec. 576; McCown *v.* Drake, 7 Heisk. 447.

Virginia. — Claflin *v.* Steenbock, 18 Gratt. 842.

Wisconsin. — Davidson *v.* Hackett, 49 Wis. 186, 5 N. W. 459.

30. *Alabama.* — Jones *v.* Donnell, 8 Ala. 695. See also Garner *v.* Johnson, 22 Ala. 494.

Arkansas. — Taylor *v.* Ricards, 9 Ark. 378. The rule is otherwise now. See cases cited in preceding note.

Iowa. — Sachett *v.* Partridge, 4 Iowa 416; McLaren *v.* Hall, 26 Iowa 297. See also Sturman *v.* Stone, 31 Iowa 115.

Texas. — Dwyer *v.* Testard, 65 Tex. 432.

31. Murphy *v.* Montandon, 2 Idaho 1048, 29 Pac. 851, 35 Am. St. Rep. 279. And for this purpose they may introduce the affidavit itself.

Contra. — Hoggart *v.* Morgan, 6 N. Y. Sup. Ct. 198; Wyman *v.* Hallock, 4 S. D. 469, 57 N. W. 197.

32. Reid *v.* Armour Packing Co., 93 Ga. 696, 21 S. E. 131.

33. Cureton *v.* Dargan, 12 S. C. 122.

34. The Recital Forms Part of

III. MATTERS BETWEEN ATTACHING CREDITORS.

1. Burden of Proof. — On an intervention by subsequent attaching creditors, who seek to have set aside the plaintiff's attachment as being invalid in law, the intervenors are for the purpose of the intervention defendants, and after they have given evidence to show their right to intervene,[35] the plaintiff has the burden to prove his cause of action.[36]

2. Admissions of Debtor. — Where a creditor who has attached the property of his debtor is allowed, pursuant to express statute, to defend against the suit of a prior attaching creditor, the plaintiff may give in evidence the admissions of the debtor that his demand is *bona fide* and for a valuable consideration,[37] even if made since the subsequent attaching creditor took upon himself the defense.[38]

IV. MATTERS BETWEEN ATTACHING CREDITOR AND CLAIMANT.

1. Title to Property. — A. Burden of Proof and Presumptions. a. *General Rule.* — It has been held that where a person other than the defendant in attachment institutes a proceeding for the purpose

the Bond, and the plaintiff is estopped to contradict or explain that recital by parol. Summers *v.* Glancey, 3 Blatchf. 361. It was held, however, that the record of the case, which, of course, would include the bond and the writ, might be used to show that the recital in question did not correspond with the fact, as shown by the writ itself, that it did not issue until after the bond was filed.

35. "Proof of a Subsequent Valid Levy Upon the Same Property covered by the prior attachment is a necessary condition to the right of a subsequent creditor to initiate a proceeding to vacate the prior attachment. (Code of Civil Procedure, § 682.) Until this fact is established by legal evidence he is a mere stranger having no right to intervene." Tim *v.* Smith, 93 N. Y. 87.

To same effect, see Ladenburgh *v.* Commercial Bank of New Foundland, 74 N. Y. St. 267, 39 N. Y. Supp. 1085. See also Bradley *v.* Interstate Land & Canal Co., 12 S. D. 28, 80 N. W. 141. And see Dayton *v.* McElwee Mfg. Co., 46 N. Y. St. 139, 19 N. Y. Supp. 46, holding that he must also show that the papers upon which his own attachment was granted were sufficient to confer jurisdiction.

Judgment Against Common Debtor Admissible. — Upon the issue of the right of a subsequent attaching creditor to intervene in the first attachment suit, the judgment of such intervenor against the common debtor is admissible, and is decisive of the question where the plaintiff's answer to the intervention contains no allegation charging that the judgment had been gotten up merely for the purpose of masking an intervention in the suit of the plaintiff against the common debtor. Coghill *v.* Marks, 29 Cal. 673.

36. Speyer *v.* Ihmels, 21 Cal. 281.

Supplyman Claiming Priority. Where the furnisher of money or supplies is claiming a privilege, contradictorily with other attaching creditors, the burden of proof is on him to show that the products on which the privilege is claimed, are those which the money and supplies furnished by him were used to produce. Minge *v.* Barbre, 51 La. Ann. 1285, 26 So. 180.

37. Strong *v.* Wheeler, 5 Pick. (Mass.) 410.

38. Lambert *v.* Craig, 12 Pick. (Mass.) 198.

of discharging property from the levy of an attachment, upon the ground that he is the owner thereof or has a special interest therein, entitling him to the possession thereof, and the proceedings in the attachment suit are not attacked, as being in any way irregular or invalid,[39] the burden is upon such third person or claimant to prove his ownership or special interest in the property, and the court may properly require him to first produce his evidence,[40] although there

39. **Validity of Writ of Attachment.** — Under a Texas statute, providing for the trial of the right to property attached, and claimed by a third person, the validity of the writ of attachment cannot be contested except by special plea pointing out the grounds of its invalidity; and it is therefore not necessary that the plaintiff establish its validity by other evidence than that which the writ itself affords. Yarborough *v.* Weaver (Tex. Civ. App.), 22 S. W. 771. And where the claimant files a general denial only, reversal of a judgment for the plaintiff is not required because he did not introduce his writ in evidence. Ft. Worth Pub. Co. *v.* Hettson (Tex.), 16 S. W. 551.

40. *Georgia.*—Thompson *v.* Waterman, 100 Ga. 586, 28 S. E. 286.

Illinois. — Hollenback *v.* Todd, 119 Ill. 543, 8 N. E. 829; Com. Nat. Bank *v.* Canniff, 51 Ill. App. 579 (citing Dexter *v.* Parkins, 22 Ill. 143; Mericks *v.* Davis, 65 Ill. 319; Hansen *v.* Dennison, 7 Ill. App. 73; Ripley *v.* People's Sav. Bank, 18 Ill. App. 430).

Indian Territory. — Swofford Bros. D. G. Co. *v.* Smith-McCord D. G. Co., 1 Ind. Ter. 314, 37 S. W. 103.

Iowa. — Lagomarcino *v.* Quattrochi, 89 Iowa 197, 56 N. W. 435.

Kansas. — Parlin & Orendoff Co. *v.* Spencer (Kan.), 33 Pac. 363.

Louisiana. — Harper *v.* Bank of Vicksburg, 15 La. Ann. 136.

Transfer to Pay Precedent Debt. Where the claimant bases his right to the property on a transfer to him in payment of rent due to him from the defendant, he has the burden of establishing his rent claim. Baum *v.* Sanger (Tex. Civ. App.), 49 S. W. 650.

Bona Fides of Transfer to Creditor. — Where the plaintiff in an action for wrongful attachment claims to own the property attached as purchaser from the attachment defendant, the property to be applied on a debt owing to him from the latter, he has the burden, as against the defendants whose claims were prior to his purchase, of showing that the attachment defendant was indebted to him as claimed and that the goods were sold in payment of such indebtedness at their reasonably fair value, before there is a presumption of the *bona fides* of the transfer to be overcome by the defendants. Pollack *v.* Searcy, 84 Ala. 259, 4 So. 137.

Prima Facie Case for Plaintiff. In Curtis *v.* Wortsman, 25 Fed. 893, the court charged the jury thus: "The plaintiffs in attachment make out a case under the law when they introduce their judgment, and when they show that the property levied upon was in possession of the defendant at the time the levy was made. Evidence has been presented before you to show that at the time the attachment was levied on the stock of goods that it was in the possession of defendant; that defendant was in the store, and at his usual place of business; other goods were there. This makes out the case *prima facie* at the first glance for the plaintiff in attachment; and the property will be held subject to the payment of the debt, if there is no evidence before the jury to remove the legal presumption that the goods were the property of defendant. You will then consider the evidence submitted by the claimant."

Property Exempt From Attachment. — Upon the trial of an issue between an attaching creditor and a claimant, by purchase from the debtor, who bases his right to the

are decisions imposing upon the attaching creditor the burden of showing that the property attached belonged to the defendant in attachment,[41] at least to the extent of making a *prima facie* case by proof of prior possession, or other evidence of ownership in the defendant.[42]

property on the claim that the property was exempt in the hands of the debtor, the claimant has the burden of proof of such exemption. Stone *v.* Spencer, 77 Mo. 356.

In Texas the statute provides that if, when levied, on, the property was in the possession of the defendant in the attachment, the burden of proof shall be on the claimant. Pierson *v.* Tom, 10 Tex. 145.

Actual Possession Not Necessary. And it is not necessary that the defendant in attachment should be in the actual, corporeal possession of the property. It is sufficient, if the property is found in the possession of his agents, and those holding it on his behalf and in his right. Pierson *v.* Tom, 10 Tex. 145.

In Trover for Property Seized Under Attachment, wherein the plaintiff claims the same by purchase from the attachment defendant, the defendant has not the burden of showing by a fair preponderance of the evidence that the title to the property had not passed by a completed sale from the attaching defendant to the plaintiff at the time of the seizure, in order to defeat the plaintiff's action; but rather the plaintiff has the burden of showing that at the time of the seizure the sale had been completed and the title passed. Buckingham *v.* Tyler, 74 Mich. 101, 41 N. W. 868.

41. Morrow *v.* Smith, 4 B. Mon. (Ky.) 99.

Validity of Transfer to Claimant. In Sawyer *v.* Plow, 48 Fed. 152, it was assigned for error that the interpleader was permitted to open and close the argument; but it was held that, as the plaintiffs desired the execution and validity of the assignment, the burden was on the interpleader to prove the execution of the deed and his title to the assigned property, and that he was hence entitled to open and close on that issue. He was not concerned with the issues on the attachment. *Compare* Freiberg *v.* Elliott (Tex.), 8 S. W. 322, an action for the unlawful seizure and conversion under a writ of attachment of goods claimed by the plaintiffs under purchase from the attachment defendant, which transfer the defendants claim was fraudulent, wherein it was held that the burden of proving that fact rests upon the defendants; and they may do this by either direct or positive testimony or by circumstancial evidence.

A Mississippi Statute provides that all provisions of law in relation to third persons claiming property levied on under a writ of *fieri facias* shall apply to claimants of property levied on under attachment. Another section provides that the burden of proof on the trial of the issue between a claimant of property seized under execution and the execution plaintiff shall be on the latter, and the issue tried as in ordinary actions at law. Mandel *v.* McClure, 14 Smed. & M. (Miss.) 11; Irion *v.* Hume, 50 Miss. 419. And a creditor who has attached property which is claimed by another under a purchase from the debtor prior to the attachment, must show that the claimant is not a *bona fide* purchaser, although there was a fraudulent intent on the part of the vendor in making the transfer. Bernheim *v.* Dibrell (Miss.), 11 So. 795, distinguishing Richards *v.* Vaccaro, 67 Miss. 516, 7 So. 506, 19 Am. St. Rep. 322.

42. In Alabama, the decisions have settled the following rules as applicable to every trial of the right of property, in an issue framed under the statute, between the plaintiff in attachment and the claimant of the property: (1) The *onus* of proof is, in the first instance, on the plaintiff to make out a *prima facie* case that the property levied on is the

b. *Presumption From Possession.* — On the other hand, there are decisions to the effect that if, at the time of the levy of the writ of attachment, the property was found in the possession of the interpleading claimant, then from such possession, the law raises a presumption that the claimants were the owners of the property, and imposes upon the plaintiff the burden of proof.[43] And the fact

property of the defendant, he being required by the statute to assume the affirmative of this issue. (2) This *onus* is discharged sufficiently when it is shown by the plaintiff that the defendant was in possession of the property at the time of the levy; such possession being presumptive evidence of title. (3) When the case assumes this *status,* the claimant is not permitted to show an outstanding title in a stranger, between whom and himself there is no privity, for the purpose of defeating the plaintiff's execution. He must show a legal title in himself, such as would support an action of detinue for the property, or else fail in his claim suit; the possession of the defendant, to whose right the plaintiff succeeds, being superior to a want of both title and possession in himself. Unless the satisfaction of the execution is inconsistent with the claimant's rights, it is immaterial to him that a stranger's rights, with whom he has no privity, may be invaded. Jones *v.* Franklin, 81 Ala. 161, 1 So. 199; Wollner *v.* Lehman etc. Co., 85 Ala. 274, 4 So. 643; Rhodes *v.* Smith, 66 Ala. 174; Jackson *v.* Bain, 74 Ala. 328; Shahan *v.* Herzberg, 73 Ala. 59.

Case Appealed From Magistrate's Court. — And when a case is brought up by appeal on the statutory writ of *certiorari* from a magistrate's court to the circuit court, the trial is *de novo.* The plaintiff is the actor, and the burden is on him to show that the property is subject to plaintiff's debt. Until this has been done, the claimant is not required to introduce any evidence. Schamagel *v.* Whitehurst, 103 Ala. 260, 15 So. 611.

Transfer Subsequent to Attaching Creditor's Debt. — A claimant under a transfer subsequent to the attaching creditor's debt has the *onus* to prove the consideration paid by him. Ellis *v.* Allen, 80 Ala. 515, 2 So. 676, holding, however, that as the record showed that this was proved, and there was no conflicting evidence, a charge misplacing the burden of proof was error without injury.

43. Presumption From Possession. Doane *v.* Glenn, 1 Colo. 495; Traders Nat. Bank *v.* Day, 7 Tex. Civ. App. 569, 27 S. W. 264 (Tex. Rev. Stat., Art. 4838); Ft. Worth Pub. Co. *v.* Hettson (Tex.), 16 S. W. 551. *Compare* Burr *v.* Clement, 9 Colo. 1, 9 Pac. 633, where the court said: "The correct view, as it seems to us, is that the interpleader in such case by interpleading is deemed to admit, *prima facie,* the legal possession of the attaching creditor, and sets up a right in himself to overcome the presumptive or supposed right founded upon the legal process of the attachment proceeding. The burden of proof is upon the interpleading claimant to show a superior right in himself. If he fails in this, it leaves the possession and presumptive right thereof in the attaching creditor, as at the beginning of the contest upon the interplea. The first presumption of right founded upon the possession of the assignee prior to the attachment is shifted to the attaching creditor as soon as the property in controversy is, by the attachment process, taken into the custody of the law, and the burden of proof is therefore cast upon the interpleading claimant."

Fraudulent Transfer. — Where the claimant of property attached as belonging to another, is in possession thereof at the time of the levy, claiming under a bill of sale regular on its face, the burden of proof is on the attaching creditor to show that the transfer to the claimant is fraud-

that the property is in the hands of a carrier for shipment does not deprive the claimant of the benefit of such presumption.[44]

B. Title in Third Person. — A person intervening in an attachment suit claiming to own the property attached is confined in his proof to evidence showing the title to the property to be in himself; he cannot be permitted to prove an outstanding title in another, although it may be absolute, defeating the levy of the attachment.[45]

ulent, even although the claimant has averred in his interplea the good faith of the transfer. Albert *v.* Besil, 88 Mo. 150. And claimants in possession of the property at the time of the seizure, and claiming under a sale prior to the attachment, have not the burden of showing that the sale was without benefit to the debtor. Roswald *v.* Hobbie, 85 Ala. 73, 4 So. 177, 7 Am. St. Rep. 23.

In Martin *v.* Davis, 76 Iowa 762, 40 N. W. 712, the evidence tended to show that the intervenor had possession of the property at the time it was levied upon, but he did not rely exclusively on such possession. In making out his case he introduced evidence tending to show that he had purchased of, and paid the, defendant for the property prior to the levy of the attachment. The only material question on the trial was whether the intervenor purchased the property in good faith, or whether such purchase was fraudulent, and an instruction that the intervenor must show by a preponderance of the evidence that he was the owner, and that if he purchased and paid for the property in good faith and had no intent to defraud creditors the sale was valid, otherwise it was invalid, was upheld.

Burden Shifting to Claimant. Where property is in the possession of a third person the attaching creditor has the burden of showing that the property was subject to levy; and the introduction by the plaintiff of his affidavit in attachment and the judgment therein foreclosing the attachment lien, on the trial of the right to the property between the plaintiff and the claimant is sufficient evidence of a fraudulent intent in transferring the property by the debtor to the claimant to shift the burden upon the claimant to prove his case. Levy *v.* Fischl, 65 Tex. 311.

Burden of Proving Possession. In Wallace *v.* Robeson, 100 N. C. 206, 6 S. E. 650, the claimants laid much stress upon the fact that they were in possession of the property when the sheriff levied upon it, insisting that such possession was evidence of title; but the court held that even, if this be granted, the burden was on the claimants to prove such possession, saying: "It was not admitted as alleged; but, if it had been, evidence of the admission should have been produced by the claimants. But evidence of mere possession would not have been sufficient. The claimants were bound to prove their title and right of possession to the property substantially as alleged by them, and as required by the statute."

Compare Boaz *v.* Schneider, 69 Tex. 128, 6 S. W. 402, wherein it was held that when the plaintiffs allege that the property, when signed, was in the possession of the defendant, and the return of the officer shows nothing in regard to that fact, they have the burden of proving it.

44. Wear *v.* Sanger, 91 Mo. 348, 2 S. W. 307.

45. Thompson *v.* Waterman, 100 Ga. 586, 28 S. E. 286; Fleming *v.* Shields, 21 La. Ann. 118, 99 Am. Dec. 719; Treadway *v.* Treadway, 56 Ala. 390. And see note 33, *supra*.

Contra. — Irion *v.* Hume, 50 Miss. 419.

The Reason is that the claimant must recover, if at all, upon the strength of his own title; if he has not title, his claim fails. He must have the legal title, with a right to possession, or the actual possession,

C. Title in Claimant. — The plaintiff will be permitted to show lien on the property attached antedating claimant's title.[46]

D. Record of Attachment Proceedings As Evidence. — On the trial of the issue between the plaintiff in attachment and a claimant of the property attached, the record of the attachment proceedings, including the affidavit and writ of attachment, although the latter may be irregular or defective, is admissible in evidence against the claimant.[47]

E. Claim Bond As Evidence. — So also the claim bond given by the claimant for the property levied upon, is competent evidence for the plaintiff.[48]

2. Amount and Value of Property. — If the claim affidavit and bond fix, as they should, the amount of property claimed and delivered to the claimant, that is conclusive and cannot be disproved.[49] The value, however, is one of the facts to be found by the court or jury, and evidence of that should always be received.[50]

or the right to it; such title or right as would support trespass, trover, or detinue, against a wrongdoer. *Ibid.*

46. But where he is seeking to enforce by the attachment a statutory lien, and the claimant has introduced evidence showing title in himself prior to the levy of the attachment, the plaintiff may, in rebuttal introduce in evidence the instrument creating the lien which he seeks to enforce, which antedates the title shown by the claimant. Boswell *v.* Carlisle, 55 Ala. 554.

47. Mayer *v.* Clark, 40 Ala. 259; Guy *v.* Lee, 81 Ala. 163, 2 So. 273; Sheldon *v.* Reihle, 2 Ill. 519; Meacharn *v.* Moore, 59 Miss. 561.

Contra. — In Abbot *v.* Besel, 88 Mo. 150, as to the affidavit; and in Huiskamp *v.* Moline Wagon Co., 121 U. S. 310, as to that part of the record in the attachment suit which showed the proceedings on the trial of the defendant's plea in abatement, including the verdict and the judgment, the verdict being the finding of the issues for the plaintiff, and the judgment being that the plea in abatement be overruled and the attachment sustained.

Compare Dollins *v.* Pollock, 89 Ala. 351, 7 So. 904, wherein it was held that on an issue between an attaching creditor claiming the property by purchase antedating the levy of the attachment, the affidavit for the attachment is not admissible for the attaching creditor.

48. Guy *v.* Lee, 81 Ala. 163, 2 So. 273; Mayer *v.* Clark, 40 Ala. 259.

49. Wollner *v.* Lehman etc. Co., 85 Ala. 274, 4 So. 643.

50. Wollner *v.* Lehman etc. Co., 85 Ala. 274, 4 So. 643; Roswald *v.* Hobbie, 85 Ala. 73, 4 So. 177, 4 Am. St. Rep. 23.

The Judgment in the Attachment Suit Is of Itself No Evidence of the Value of the property attached, in the subsequent action by the attaching creditors against claimants of the property to recover on a bond given by the claimants. Bruck *v.* Feiner, 26 Misc. 724, 56 N. Y. Supp. 1025.

Amount of Sales Deposited in Bank. — When the value of the property at a time prior to the attachment is shown, and there is evidence of the quantity of property bought in the interim, the proceeds of the sales being always deposited in bank, the value of the goods at the time of the attachment may be proved by evidence of the amount of such bank deposit. Tobias *v.* Treist, 103 Ala. 664, 15 So. 914.

In Colorado a Statute (Gen. St. § 2011) provides that in all cases where upon trial of the issues between plaintiff in attachment and the claimant of the property, the property is found to be in the claimant, the damages suffered by

3. Matters Personal to Attachment Defendant. — Nor can the claimant be permitted to introduce evidence controverting the fact of indebtedness from the defendant to the plaintiff,[51] nor to introduce evidence of the irregularity of the affidavit in attachment, the insufficiency of the bond and other informalities in the proceedings.[52]

V. ACTIONS FOR WRONGFUL AND MALICIOUS ATTACHMENTS.

1. Scope of Article. — A. As to Facts Constituting Grounds for Attachment. — The rules of evidence pertaining to the mode of proving or disproving the facts which were set up as grounds for the attachment are fully treated elsewhere in this work under their appropriate titles, as for example: non-residence,[53] concealment of personal property,[54] removal of property from the state,[55] absconding by the debtor,[56] fraudulent contraction of the debt sued on,[57] fraudulently disposing of, or transferring his property by the debtor,[58] and the like.

B. Malicious Attachments. — The mode of proving, or rebutting evidence of, malice as an issuable fact arising in an action for wrongful and malicious attachment, is fully treated in another portion of this work. And, accordingly, the scope of this article, so far as concerns this class of actions, will be restricted to the wrongfulness of the attachment, and the actual damages resultant therefrom, and facts in mitigation of such actual damages.[59]

2. Wrongfulness of the Attachment. — A. Burden of Proof. Whenever it is sought by the attachment defendant to compel the attachment plaintiff to respond in damages on the ground that the

the claimant by reason of the levy shall be assessed by the court or jury and the claimant shall also recover his costs. And in Schluter *v.* Jacobs, 10 Colo. 449, 15 Pac. 813, it was held that after finding the property in the claimant the court may receive evidence as to the value of the property taken although the pleadings do not formally raise such an issue.

51. Pulliam *v.* Newberry, 41 Ala. 168; West *v.* His Creditors, 8 Rob. (La.) 123.

Payment of Debt. — Nor can the claimant be permitted to prove payment of the debt subsequently to the suing out of the writ. Foster *v.* Goodwin, 82 Ala. 384, 2 So. 895.

But Where the Attachment Is Resorted to for the Purpose of Enforcing a Lien in pursuance of the terms of a statute, the person in possession of the property attached deriving title from the attachment defendant, may, on his interposing a claim under the statute, introduce evidence to show that the debt due from the attachment defendant to the plaintiff has been paid; such evidence tends to negative the ground upon which the plaintiff's attachment and right to the property rests. Dryer *v.* Abercrombie, 57 Ala. 497.

52. Fleming *v.* Shields, 21 La. Ann. 118, 99 Am. Dec. 719; Harper *v.* Bank of Vicksburg, 15 La. Ann. 136.

53. *See* "Domicile."

54. *See* "Circumstantial Evidence."

55. *See* "Fraudulent Conveyances."

56. *See* "Domicile."

57. *See* "Fraud."

58. *See* "Fraudulent Conveyance."

59. *See* title "Malice;" "Malicious Prosecutions."

attachment was sued out wrongfully, either by way of reconvention or counter-claim in the original attachment suit, or in an original action appropriate for that purpose, he has the burden of proof,[60] although his pleadings may allege, and involve proof of, a negative.[61]

Demand of Payment or Security. — And if the plaintiff in an action for wrongful attachment, relies on the fact to sustain the issue on his part that no demand was ever made upon him for payment or

60. *Alabama.* — Calhoun *v.* Hannan, 87 Ala. 277, 6 So. 291; O'Grady *v.* Julian, 34 Ala. 88; Flournoy *v.* Lyon, 70 Ala. 308; City Nat. Bank *v.* Jeffries, 73 Ala. 183.

Iowa. — Veiths *v.* Hagge, 8 Iowa 163; Burrows *v.* Lehndorff, 8 Iowa 96; Burton *v.* Knapp, 14 Iowa 196; McCormick Harv. Mach. Co. *v.* Colliver, 75 Iowa 559, 39 N. W. 892; Nordhaus *v.* Peterson, 54 Iowa 68, 6 N. W. 77.

Nebraska. — Jandt *v.* Deranleau, 57 Neb. 497, 78 N. W. 22; Storz *v.* Finkelstein, 50 Neb. 177, 69 N. W. 856.

Tennessee. — Ranning *v.* Reeves, 2 Tenn. Ch. 263.

Texas. — Melvin *v.* Chaney, 8 Tex. Civ. App. 252, 28 S. W. 241; Armstrong *v.* Ann. Frost Co., 17 Tex. Civ. App. 46, 43 S. W. 302.

The Reason is that the right to recover damages in such case rests on the wrongful uses of the extraordinary and harsh remedy by attachment, and this forms the gravamen of the action. Durr *v.* Jackson, 59 Ala. 203.

Ownership of Property. — So in an action for conversion by attachment against a third person, the burden of proof is on the plaintiff to show that the property was his at the time of the levy of the attachment. Sawyer *v.* Thomasson (Tex. Civ. App.), 44 S. W. 408.

Presumptions of Jurisdiction. In an action on an attachment bond given in another state in an action of which the court had jurisdiction, it will be presumed that the court had jurisdiction to issue the attachment. Cunningham *v.* Jacobs, 120 Ind. 306, 22 N. E. 335.

Presumption of Abandonment of Attachment. — In an action to recover for wrongful attachment, the presumption of wrongfulness does not arise from the facts that the attachment was abandoned, so as to cast upon the defendant the burden of showing that the attachment was rightfully sued out. Frank *v.* Tatum (Tex. Civ. App.), 26 S. W. 900.

Admission of Trespass to Shift Burden. — In an action for wrongful attachment, wherein the defendant in his answer admits the issuance of the attachment, the levy thereof by the officer to whom it was delivered and the subsequent sale on execution of the property attached under the judgment attained in the proceedings, the effect of such admission will be to relieve the plaintiff of the burden of proving that defendant was responsible for the trespass in the seizure and sale of the property. Peterson *v.* Foli, 67 Iowa 402, 25 N. W. 677.

Imposing Burden on Defendant Harmless Error. — When the uncontroverted evidence, introduced by both parties to an action for wrongful attachment, shows that the grounds stated in the affidavit for the attachment did not in fact exist, the defendant cannot complain that the burden was cast upon him by proving the truth of the affidavit. Williams *v.* Kane (Tex. Civ. App.), 55 S. W. 974.

Property Exempt From Seizure. Where a defendant sued in trespass for taking goods proved to be those of the plaintiff, shows that he took them as an officer by virtue of a writ of attachment against the plaintiff and his goods, the burden is then on the plaintiff to show that the goods were exempt from seizure, where he relies on that contention. Gordon *v.* Clapp, 113 Mass. 335.

61. Durr *v.* Jackson, 59 Ala. 203.

security of the debt, and that there was consequently no refusal, he must prove it.[62]

B. Record of the Attachment Suit. — a. *Admissibility.* — In an action to recover damages for an alleged wrongful attachment, the record of the attachment suit showing the termination thereof adverse to the attachment plaintiff, is competent evidence for the plaintiff on the question of the wrongfulness of the attachment.[63]

b. *Conclusiveness.* — If the affidavit in attachment was controverted and the issue determined in favor of the defendant in attachment, it has been held that the judgment is, in a subsequent action by the defendant in attachment on the bond to recover damages on the ground that the attachment was wrongfully sued out, conclusive evidence of the wrongfulness of the attachment,[65] although there are cases holding that the fact that an attachment was dissolved is only *prima facie* evidence that it was rightfully dissolved, and does not preclude an investigation of that question in a subsequent action.[66] But if the discharge was for informality of the

62. Veiths *v.* Hagge, 8 Iowa 163.

63. Dothard *v.* Sheid, 69 Ala. 135; Hundley *v.* Chadick, 109 Ala. 575, 19 So. 845; Raver *v.* Webster, 3 Iowa 502; Draper *v.* Vanhorn, 12 Ind. 352; Blanchard *v.* Brown, 42 Mich. 46, 3 N. W. 246.

So also is the writ of attachment and the officer's return thereof. Drummond *v.* Stewart, 8 Iowa 341.

Judgment Incompetent During Time Allowed for Appeal. — A judgment adverse to the attachment plaintiff is not competent evidence for the attachment defendant in an action of trover by him against the sheriff where the time for an appeal from the judgment in the former suit had not expired at the time the judgment was offered in evidence. Treat *v.* Dunham, 74 Mich. 114, 41 N. W. 876.

Joint Trespass Under Two Attachments. — In Ellis *v.* Howard, 17 Vt. 330, trespass against two attaching creditors and the levying officer, for seizing property claimed by the plaintiff by purchase from the attachment defendant, the plaintiff introduced the writ of attachment in favor of one of the defendants and then offered in evidence the writ and return thereon in favor of the other defendant, both of which had been levied upon the same property. To the admission of the latter writ the first defendant objected on the ground that the plaintiff, having undertaken to show a trespass in the taking by virtue of his attachment could not afterward be allowed to prove a trespass by virtue of the other defendant's attachment. But the court ruled that the attachments, appearing to have been proved at the same time, bearing the same date, and having been served by the same officer, it was *prima facie*, sufficient evidence of a joint taking by the defendants; but that it was competent for either of the defendants to show that he was not concerned in procuring the attachment, or that the attachments were in fact made at different times.

65. Hayden *v.* Sample, 10 Mo. 215; Hoge *v.* Norton, 22 Kan. 374; Vurpillat *v.* Zehner, 2 Ind. App. 397, 28 N. E. 556; Schofield *v.* Territory, 9 N. M. 526, 56 Pac. 306.

66. Sloan *v.* Langert, 6 Wash. 26, 32 Pac. 1015; Sacket *v.* McCord, 23 Ala. 851.

In an action upon an attachment bond, the defendants who undertook to make proofs of facts justifying a resort to attachment should be permitted to introduce testimony relevant to that issue. Jandt *v.* Deranleau, 57 Neb. 497, 78 N. W. 22.

May Prove Any of Several

affidavit, and not for its falsity, other proof than that afforded by the judgment will be necessary to show that the writ was wrongfully sued out.[67]

C. Admissions and Declarations. — On an issue as to the wrongfulness of an attachment, evidence of admissions and declarations of the debtor which tend to show the truth of the grounds stated in the affidavit for the attachment, is admissible.[68] But evidence of declarations by the plaintiff in an attachment, made after the commencement of the suit, without other evidence connecting them directly with the act of suing out the writ, is not evidence for the plaintiff in an action on the attachment bond.[69]

D. Direct and Circumstantial Evidence. — a. *In General.* When it is said that in an action for wrongful attachment the plaintiff has the burden of establishing the wrongfulness of the attachment, it is not meant that he must do so by positive testimony, but he may resort to evidence of circumstances from which may be fairly inferred the untruth of the fact or facts stated in the affidavit.[70] And the rule is generally applicable to evidence neces-

Grounds. — In an action on an attachment bond the defense is not limited to proof of the particular grounds laid in the affidavit for the attachment, but evidence of any of the several grounds upon which an attachment may be obtained is competent. Lockhart *v.* Woods, 38 Ala. 631.

67. Boatwright *v.* Stewart, 37 Ark. 614.

68. Raver *v.* Webster, 3 Iowa 502.

Representations to Third Persons. But where the affidavit for the attachment was based on representations made by the attachment defendant to the attachment plaintiff and to third persons, evidence of representations made to such third persons cannot be received by the jury as bearing on the good faith of the attachment plaintiff actuating them in making the affidavit for the attachment, unless it is shown that such representations were communicated to them. Tiblier *v.* Alford, 12 Fed. 262.

Business Transactions Before and After Attachment. — So, where the defendant, under a counterclaim for wrongful attachment, introduced evidence that he was not about to dispose of his property, it is competent for the plaintiff in rebuttal to show any declarations and business transactions of defendant both before and after the attachment was sued out, although not known to plaintiffs at the time, which tend to show that defendant was preparing to dispose of his property. Deere *v.* Bagley, 80 Iowa 197, 45 N. W. 557.

69. Burton *v.* Knapp, 14 Iowa 196.

70. Durr *v.* Jackson, 59 Ala. 203; O'Grady *v.* Julian, 34 Ala. 88; Burrows *v.* Lehndorf, 8 Iowa 96.

General Course of Business. Thus, under a counterclaim for damages for wrongful attachment, the defendant, being in the business of bailing and selling hay, may testify to delays in getting cars to ship the hay, as tending to show the general course of his business, as bearing upon the question of intent to defraud creditors. Ruthven *v.* Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153.

Creditors Angry at Debtor. But on an issue as to the wrongfulness of an attachment, evidence which only tends to show that the creditor was mad at the debtor subsequent to the attachment, is inadmissible. The condition of his mind at such a time is wholly immaterial to the issue involved. Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468.

sary to be adduced by the defendant to prove the truth of those facts, when that inquiry is open to him.[71]

b. *Testimony of Attachment Defendant.* — On an issue as to the wrongfulness of an attachment, the attachment defendant may be asked whether or not the grounds stated in the affidavit for the attachment were true or false.[72]

c. *Acts and Conduct.* — A purpose to dispose of property with intent to defraud creditors can only be shown by inference from the acts and conduct of the debtors; and all acts and conduct of theirs tending to show such intent are proper to be proven, whether before or after the attachment.[73]

71. Thus, evidence of the execution of mortgages by the debtor on the same day, but after the attachment was levied, is competent evidence for the defendant in an action for wrongful attachment, sued out on the ground that the debtor was about to dispose of his property. Citizens Nat. Bank *v.* Converse, 105 Iowa 669, 75 N. W. 506.

Information on Which Action Taken. — Portions of a city directory showing the defendant's business, is admissible under a counterclaim by him for wrongful attachment, in connection with others to show the facts on which the plaintiff acted on suing out the attachment. Bowman *v.* Western Fur. Mfg. Co. (Iowa), 64 N. W. 775. But testimony that the witness heard certain persons, workmen and creditors of the debtor, tell the attachment plaintiff that the debtor was running away, is properly excluded—especially where there is no offer to show the truth of such testimony, or that the plaintiff in attachment had any reason to believe it to be true. Schrimpf *v.* McArdle, 13 Tex. 368.

72. Williams *v.* Kane (Tex. Civ. App.), 55 S. W. 924. "Whether the affidavit was true or false," said the court, "was the issue in the case, and we cannot see how evidence upon it could have been better elicited than by asking the party who knew the fact, the question complained of."

Motive in Confessing Judgment. In Empire Mill Co. *v.* Lovell, 77 Iowa 100, 41 N. W. 583, on a counterclaim for damages for the wrongful issuance of the attachment, testimony of the defendant as to his motive in confessing judgment in favor of another creditor, was held irrelevant to the issue, viz.: the truth of the allegations of the petition for attachment; but the court held that its admissions did no prejudice the plaintiff in attachment.

73. Troy *v.* Rogers, 113 Ala. 131, 20 So. 999; Mayne *v.* Council Bluffs Sav. Bank, 80 Iowa 710, 45 N. W. 1057. See also Gaddis *v.* Lord, 10 Iowa 141, wherein it was held that on the issue as to whether the debtor had disposed of his property fraudulently, it was proper to show the indebtedness of the debtor; that he had been disposing of his property for some time prior to, and had acted fraudulently for some time after the attachment.

On an issue of the wrongfulness of an attachment for which actual and exemplary damages are sought on the ground that the debtor was about to remove his property with intent to defraud his creditors, the creditor may introduce, by way of defense, any evidence tending to show that the debtor was removing his property from the county, and that at the time he was clouding the title to a part of the propery so to be removed. O'Neil *v.* Will's Point Bank, 67 Tex. 36, 2 S. W. 754.

Compare Blum *v.* Strong, 71 Tex. 321, 6 S. W. 167, a suit for actual damages caused by a false attachment, wherein the affidavit asserted that the debtor had disposed of his property for the purpose of defrauding his creditors, evidence that, shortly before the levy, the debtor had attempted fraudulently to dispose of his entire stock of goods was

d. *Financial Condition of Debtor.* — Testimony as to the financial condition of the debtor, though not known to the creditor, is admissible for the debtor as tending to show the truth or falsity of the charge of intent to defraud creditors.[74] But it has been held that the creditor cannot introduce evidence that the debtor was embarrassed financially and hard pressed for money.[75]

held to have been rightly excluded. . . . "That a debtor has done a certain act that would authorize an attachment is not sufficient reason for a creditor to make affidavit of other acts not in fact true, and thereby cause a loss to the debtor; and, if he does so, he ought not to be heard to say: 'It is true I made a false affidavit to procure the attachment, but you were guilty of other acts, which, if known in time, would have justified me in procuring an attachment on those grounds, and therefore you are not wronged.' This would be giving the creditor an unjust advantage, making the debtor suffer for his violations of law, while holding the creditor blameless for false swearing, even though the debtor sustained an actual loss on account of it, and releasing the creditor from the consequences of his tort, for no other reason than that the debtor had done an unlawful act."

74. Ruthven *v.* Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153; Lockhart *v.* Woods, 38 Ala. 631.

Application of Rule. — Burton *v.* Smith, 49 Ala. 293, was an action on a bond for an attachment sued out on the ground that the debtor had moneys, property or effects liable to satisfy his debts which he fraudulently withheld. The plaintiff was permitted to prove that he was a man of large means and had at the time of the attachment a large amount of property, claiming it openly and notoriously as his own. The court said: "As the issue was the fraudulent withholding of property, how better can the plaintiff disprove the fact than by showing a large amount of property in his possession, subject to and sufficient for the payment of his debts? The amount, description, value, etc., of his property were matters of proper if not indispensable inquiry. There was no error in the admission of the testimony."

Reputation for Solvency. — On reconvention for wrongful attachment, where the evidence shows that the defendant was in the act of making a transfer and disposition of a considerable amount of property in a manner apparently out of the ordinary course of business, the ground laid for the attachment being that the defendant was about to transfer his property in fraud of his creditors whereby the plaintiff would probably lose his debt, evidence of the defendant's reputation for solvency and ability to pay his debts is competent evidence for the defendant, to be considered by the jury in determining upon the motive by which plaintiff was actuated in suing out the attachment. Mayfield *v.* Cotton, 21 Tex. 1.

75. Floyd *v.* Hamilton, 33 Ala. 235. See also Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048. *Compare* Yarbrough *v.* Hudson, 19 Ala. 653, where it was held that a deed of trust executed by the plaintiff in an action for maliciously suing out an attachment is competent for the defendant, together with any evidence tending to show that it was fraudulent, or that it was part of a plan to enable the plaintiff to dispose of his property fraudulently; that he was in embarrassed circumstances at the time of its execution, as a motive for his fraudulently disposing of the property, and that the property conveyed by the deed was subsequently removed by the beneficiary to another state, and was in his possession, as a circumstance tending to show that the execution of the deed was not intended as the only act to be done towards the fraudulent disposition of the property.

e. *Payment of Debts.* — Plaintiff in an action for wrongful attachment sued out on the ground that he had property liable to satisfy the defendant's claim which he fraudulently withheld, may show what he had paid on his debts during the year preceding the attachment.[76] And where the attachment issued on the ground that the debtor was about to dispose of his property with intent to defraud his creditors, he may show that all the money received in his business other than such as was necessary for the support of his family, was used by him in paying debts.[77]

f. *Other Attachments.* — On an issue as to the wrongfulness of an attachment, the attaching creditor cannot show that other attachments were issued at the instance of other creditors at the same time and upon the same grounds as laid by him.[78] Nor that he had heard that such other attachments were about to be issued.[79]

g. *Offer to Compromise.* — Testimony of the debtor to the effect that prior to the issuance of the writ of attachment, he made an offer to settle the creditor's claim by the transfer to the latter of property, which was declined, is irrelevant upon the issue of the wrongfulness of the attachment.[80] Nor can the creditor resort to such evidence.[81]

E. General Credit and Reputation. — In an action for wrongful attachment, evidence of the plaintiff's general credit and reputation is not admissible until it is assailed. But where his credit and reputation are put in issue, he may offer evidence to sustain them.[82]

3. Damages. — A. Measure Of. — a. *Actual.* — **(1.) In General.** It is proper to receive any legal evidence which will show what the actual damages were, suffered by the defendant in attachment, as a result of the wrongful suing out of the attachment.[83]

76. Birmingham D. G. Co. *v.* Finley, 122 Ala. 534, 26 So. 138.

Property Sufficient to Pay Debts. But he cannot prove that at the time of the attachment levy, he had sufficient goods in his store to pay off all his indebtedness, and prove this by stating the amount of profits he had made on the goods sold, and in this way approximating the amount of goods he had on hand. Jefferson Co. Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. 386. The court said: "Copy Ap. 390."

77. Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048. *Compare* Lister *v.* Campbell (Tex. Civ. App.), 46 S. W. 876, holding that in such case the debtor should not be permitted to testify that all his debts except one had been paid since the attachment issued.

78. Pollock *v.* Gantt, 69 Ala. 373.

79. Carothers *v.* McIlhenny Co., 63 Tex. 138.

80. Such evidence does not tend to shed any light upon the question of his intent to defraud creditors by his subsequent act in preferring another creditor. Jefferson Co. Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. 386.

81. Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468.

82. Goldsmith *v.* Picard, 27 Ala. 142.

83. Ruthven *v.* Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153; Emmons *v.* Westfield Bank, 97 Mass. 230.

Where the plaintiff in an action for wrongful attachment waives his claim for vindictive damages, evidence that he had stated, the day after the levy of the attachment, that he did not want the property back

The Amount of Business Done Since the Attachment by the attachment defendant is incompetent; it furnishes no reliable basis for the assessment of damages.[84]

(2.) Value of Property. — It is competent to prove the value of the property[85] before the levy of the writ, and also the extent of the depreciation in value at the time of its restoration to the debtor.[86]

(3.) Attorney's Fees. — Evidence of attorney's fees, as damages, is properly limited to fees paid for defending against the writ.[87]

(4.) Loss of Credit and Prospective Profits. — In actions for wrongfully, but not maliciously, suing out and levying a writ of attachment, evidence of loss of credit and prospective profits is not received.[88]

B. MITIGATION. — a. *Appropriation Under Subsequent Valid Attachment.* — It may be shown in mitigation of damages for a wrongful attachment that the property was subsequently seized and sold under a second valid attachment issued by another creditor.[89]

because he had a better thing in a suit for damages, is inadmissible for the defendant on the issue of actual damages. Williams *v.* Kane (Tex. Civ. App.), 55 S. W. 974.

84. "Trade is dependent on too many contingencies," said the court, "to be relied on as a factor in such calculation. Financial activity or depression, competition, amount of capital invested, and many other concomitants or accidents enter into the problem of success in a mercantile adventure. Probable data for the assessment of damages should be sufficiently uniform in their nature and working, to have acquired the qualities of at least a general rule." Adams *v.* Thornton, 82 Ala. 260, 3 So. 20.

85. Jamison *v.* Weaver, 81 Iowa 212, 46 N. W. 996; Caldwell *v.* Porcher (Tex.), 17 S. W. 87; Michigan Stove Co. *v.* Waco Hdw. Co., 24 Tex. Civ. App. 301, 58 S. W. 734; Jefferson Co. Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. 386.

Officer's Return. — Under a counterclaim for wrongful attachment wherein the value of the property as alleged is not controverted, the return of the sheriff is sufficient proof thereof. Hayden Saddlery Hdw. Co. *v.* Ramsay, 14 Tex. Civ. App. 185, 36 S. W. 595.

Value Since Attachment. — In an action for wrongful attachment, it is not error to refuse to permit the defendant to testify what he had been willing to sell the property for since the attachment and while he owned it—the inquiry is the value of the goods at the time and place of the levy. Williams *v.* Kane (Tex. Civ. App.), 55 S. W. 974.

86. Estes *v.* Chesney, 54 Ark. 463, 16 S. W. 267.

Cause of Depreciation in Value of Property. — So, evidence that some of the property seized was valuable only at certain seasons of the year, and that in consequence of the attachment and the season having passed for its sale, the property would have to be carried over in stock until the next season, is competent as showing some of the causes and extent of the depreciation in the value of the property. Knapp & Spaulding Co. *v.* Barnard, 78 Iowa 347, 43 N. W. 197.

87. Byford *v.* Girton, 90 Iowa 661, 57 N. W. 588. See also Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468, holding evidence of fees paid to prosecute the claim for damages to be incompetent.

88. Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048.

89. Grisham *v.* Bodman, 111 Ala. 194, 20 So. 514.

In Earl *v.* Spooner, 3 Denio (N. Y.) 246, the plaintiff in attachment seized under attachment property of the defendant in attachment and after being non-suited, immediately sued

b. *Property Unsalable.* — And to mitigate damages for a wrongful attachment, it may be shown that the property was not salable and was of less value than claimed.[90]

c. *Possible Sale at Reduced Price.* — But the creditor cannot mitigate the damages by proving that the debtor would probably have sold them in bulk within a short time after the levy at the reduced price.[91]

d. *Cause of Action Sued On.* — Nor can the defendant in an action on an attachment bond, whose attachment has been discharged on the ground that he had no cause of action, set up the alleged cause of action sued on, to mitigate the damages.[92]

out another attachment, levying on the same property in his own possession. In an action by the defendant an attachment against the attachment plaintiff on the bond given in the first attachment, it was held that the defendant might show in mitigation of damages, the appropriation of the property under the second attachment in satisfaction of the debt.

90. Armstrong *v.* Ames & Frost Co., 17 Tex. Civ. App. 46, 43 S. W. 302.

91. Estes *v.* Chesney, 54 Ark. 463, 16 S. W. 267: "The sale," said the court, "was entirely conjectural and might never have been made, and proof that it was contemplated was therefore incompetent. The proof that such sale, if made, would have been at a reduced price was further incompetent for the reason that it had no tendency to fix the real damage. One whose property is injured by the wrongful act of another is entitled to recover to the extent of the injury, although he may have intended to give it away or sacrifice it in the near future."

92. Adam Roth Gro. Co. *v.* Hopkins, 16 Ky. Law 678, 29 S. W. 293.

ATTENDANCE OF WITNESSES.

By Frank S. Adams.

I. ORDINARY MEANS OF OBTAINING PRESENCE OF WITNESSES.

1. Without Process. — A. Persons Present in Court. — A person present in court at the time of the trial or hearing may, without process, be called on as a witness in the matter pending before the court.[1] The rule extends to parties as well as to third persons,[2] and may be enforced by legislative committees.[3]

B. Recognizance of Witnesses. — Examining magistrates are generally given authority to compel material witnesses to enter into a recognizance with or without sureties to appear and testify at the court to which the accused may be held to appear.[4] In some juris-

1. Blackburn *v.* Hargreave, 2 Lewin C. C. 259; Hurd *v.* Swain, 4 Ben. 75; Rex *v.* Saddler, 4 Car. & P. 218; Burnham *v.* Morrisy, 14 Gray (Mass.) 226; Goodpaster *v.* Voris, 8 Iowa 334.

2. Parties. — The object of a summons is only to give notice and call the witness in, and if he is already in court, he requires no further notice. A witness who is not a party cannot make this objection, and neither can the party. In legal theory he is already in court, and always prepared to testify the truth. Goodpaster *v.* Voris, 8 Iowa 334.

3. Legislative Committee. — Committee may call witness who is present without subpoena, and compel him to produce books and papers. Burnham *v.* Morrissey, 14 Gray (Mass.) 226.

4. *England.* — Evans *v.* Rees, 12 Ad. & E. 55; *Ex parte* Williams, 13 Price 670.

United States. — 1 Cranch, C. C. 422.

Alabama.—Code Ala. § 5245; State *v.* Calhoun, 99 Ala. 279, 13 So. 325.

California. — *Ex parte* Shaw, 61 Cal. 58; People *v.* Lee, 49 Cal. 37.

Colorado. — Mills Anno. Stat. §§ 2109, 4832.

Indiana. — Clayburn *v.* Tompkins, 141 Ind. 19, 40 N. E. 121.

Iowa. — Code Iowa, §§ 4248, 4249; Comfort *v.* Kittle, 81 Iowa 79, 46 N. W. 988; Markwell *v.* Warren Co., 53 Iowa 422, 5 N. W. 570.

Kansas. — *In re* Petrie, 1 Kan. App. 184, 40 Pac. 118.

Kentucky. — Brickley *v.* Com., 2 J. J. Marsh. 572.

Maine. — Rev. Stat. p. 934, Ch. 132, § 8.

Massachusetts. — P. S. p. 1189, §§ 36, 37, 38, 39 and 40; p. 1199, § 35. Where the witness is unable to give surety the justice may discharge him except in case of felony. Section 40 *supra.*

Michigan.—Compiled Laws (1036) § 18; *In re* Lewellen, 104 Mich. 318, 62 N. W. 554; Guenther *v.* Whiteacre, 24 Mich. 504.

Minnesota. — Stat. Minn. 1894, § 7150; State *v.* Grace, 18 Minn. 398.

Missouri. — Hutchins *v.* State, 8 Mo. 288.

New Hampshire. — Mitchells Case, 17 N. H. 501.

New Jersey. — State *v.* Zellers, 7 N. J. Law 220.

New York. — Code Cr. Proc., §§ 215, 216, 218; People *ex rel* Troy *v.* Pettit, 19 Misc. Rep. 280, 44 N. Y. Supp. 256.

Texas. — Means *v.* State, 10 Tex. App. 16.

Vermont. — Stat. 1894, § 1981.

West Virginia. — Warth's Code, p. 1028, § 3.

Wisconsin. — It is provided by statute 1898, § 4473, that whenever it shall appear to any court of record that any witness or party who has been sworn in court or who has made an affidavit in any proceeding, has testified or sworn in such a manner as to induce a reasonable presumption that he has committed perjury therein, the court may take a recognizance with sureties for his appearance to answer to a complaint for perjury, and thereupon the witnesses to establish such perjury may be bound over to the proper court.

dictions it is made mandatory upon the magistrate to require the recognizance.[5]

2. By Ordinary Process. — A. SUBPŒNA AD TESTIFICANDUM. The process by which a person is notified that his presence is required as a witness to give evidence, is called a subpœna *ad testificandum*.[6]

a. *General Form of Process.* — The subpœna is usually directed to the witness, commanding him to appear before a court or magistrate therein named, at a time therein mentioned, to testify for the party named, under a penalty therein mentioned.[7]

b. *Federal Courts May Prescribe Form.* — Federal courts have power to prescribe a form of subpœna different from that prescribed by the state, and a uniform practice of following a particular form of subpœna in a federal court, acquiesced in by the bar for a long period of time, has been held to as firmly establish a particular form of subpœna as if it had been prescribed by the written rules of the court.[8]

Wyoming. — Rev. Stat. 1899, §§ 5263, 5264, 5265, 5266.

In Indiana. — A justice of the peace may require witnesses to enter into a recognizance: (1) where a continuance of the criminal case is granted; (2) where changes of venue are granted on the application of the prisoner; (3) where the offense charged is a felony and the justice recognizes the accused to appear at the next term of the criminal or circuit court of the county. Burns' Rev. Stat. 1894, §§ 1699, 1701, 1703; (Rev. Stat. 1881, §§ 1630, 1632, 1634) Clayburn *v.* Tompkins, 141 Ind. 19, 40 N. E. 121.

Undertaking Should Be Definite and Certain as to Time and Place of Appearance. — A bond taken on the 22d day of November, 1893, requiring the witness to appear on the fourth Monday in April, 1893, is void. Mackey *v.* State, 38 Tex. Crim. App. 24, 40 S. W. 982.

After Change of Venue. — "When the venue in a criminal action has been changed, it shall not be necessary to have the witnesses therein again subpoenaed, attached or recognized, but all the witnesses who have been subpoenaed, attached or recognized to appear and testify in the cause, shall be held bound to appear before the court to which the cause has been transferred, in the same manner as if there had been no transfer." Code Crim. Proc., Art. 591. Means *v.* The State, 10 Tex. Ct. App. 16.

5. In Colorado. — Mills' Anno. Stat., § 2109. See also Mills' Anno. Stat., § 4832.

6. Bouv. Law Dict.

7. Should Name the Proper Tribunal. — In State *v.* Butler, 8 Yerg. (Tenn.) 83, where the subpoena commanded the sheriff to summon the witness to appear before the grand jury to give evidence, it was held that it should have required him to appear before the court to give evidence to the grand jury. As it did not require him to appear in court, his non-appearance, when called, is no failure on his part.

Terms of Court and Places of Meeting. — In People *v.* Van Wyck, 2 Caines (N. Y.) 333, it was held that the terms of the court and the places of its meeting being regulated by public act, the ticket was good notwithstanding that the place of holding the court was omitted.

8. Practice May Establish Form. The court held that as it had been the practice in that court for a period of ten years, to direct subpoenas to the marshal, instead of to the witness, as required by the state law, which practice had been acquiesced in by the bar, it was sufficiently established as a rule of the court. Russell *v.* Ashley, Hempst. 546, 21 Fed. Cas. No. 12,150.

c. *Process Must Be Authorized.* — A subpœna issued without authority of law is void, and the party upon whom it is served is justified in disregarding it.[9]

d. *How Issued.* — **(1.) For Attendance in State Courts.** — The summons for the attendance of witnesses to give evidence in courts of justice is usually issued by the clerk of the court if it be a court of record, or by the justice or judge if the attendance of the witness is required in an inferior court.[10] In some jurisdictions, however, the summons to appear may be issued in a criminal case by the prosecuting attorney of the jurisdiction.[11]

(2.) For Attendance Out of Court. — When the attendance of the witness is required to give evidence out of court before some magistrate, commissioner, or other officer, no general rule can be laid down for the issuance of the summons to appear. In some jurisdictions the subpœna may be issued by the officer before whom the attendance of the witness is required,[12] and in others the subpœna

9. Chambers *v.* Oehler, 107 Iowa 155, 77 N. W. 853; Dudley *v.* McCord, 65 Iowa 671, 22 N. W. 920; Henderson *v.* Henderson, 55 Mo. 534.

Federal Practice Attendance Before Commissioner. — Where it appeared that the subpœna for the attendance of a witness before the commissioner issued without any preliminary evidence having been given, showing it to be a case in which a *de bene esse* examination could be lawfully had, it was held that the want of such proof is a vital objection to the issuing of an attachment. *Ex parte* Peck, 3 Blatchf. 113, 19 Fed. Cas. No. 10,885.

After Change of Venue. — After a change of venue has been ordered from one county to another, the court of the latter county has jurisdiction to issue a subpœna, and a subpœna issued out of the court of the former county is void. State *v.* Hopper, 71 Mo. 424.

Must Be Signed by the Clerk. — A subpœna to which the attorney for the defendant has signed the name of the clerk under a general direction from that officer to "prepare" the subpœnas in the case, is not valid, and although served cannot be a legal basis for a motion to continue the case, on the ground of the absence of the witness so served. Horton *v.* State, 112 Ga. 27, 37 S. E. 100.

10. **Attendance in Court.** — *Alabama.* — Code Alabama, § 1824.

Arkansas. — Sandels *v.* Hill, Dig. 1894, § 2933.

Arizona. — Rev. St., § 1113.

California. — Issued under seal of court, Code Civ. Proc., § 1986.

Colorado. — Mills' Ann. St. 1891, § 1457.

Florida. — Rev. St. 1892, § 1098.

Georgia. — Horton *v.* State, (Ga.), 37 S. E. 100.

Indiana. — By the clerk and attested by him without seal. Burns' Rev. St. 1901, § 492; Louisville, etc. R. Co. *v.* Dryden, 39 Ind. 393.

Maine. — Rev. St., p. 706, § 91.

Minnesota. — Statutes Minn., § 5595.

New York. — Code Civ. Proc., § 854.

Vermont. — Statutes 1894, § 1251.

West Virginia. — Warth's Code, 1899.

Wisconsin. — Statutes 1898, § 4053.

Wyoming. — Rev. St. 1899, § 3688.

11. *Arizona.* — Rev. St., § 1113.

Michigan. — Compiled Laws, 1899, § 15.

Minnesota. — Statutes of Minn., § 5595.

West Virginia. — Warth's Code, 1899, p. 1027.

Wisconsin. — Attorney General or any District Attorney acting in his stead may issue summons for witnesses in behalf of the state, in any court and from any part of the state. Statutes 1898, § 4053.

12. *Alabama.* — Arbitrators may

issues from the court in which the cause in which the evidence is to be used, is pending,[13] while in still others the authority to issue the summons to appear is limited to certain officers in addition to courts.[14]

(3.) Legislative Bodies. — Legislative bodies,[15] and committees[16] have the right and power to summon and compel the attendance of witnesses.[17]

(4.) Registers and Receivers. — Registers and receivers of the United States land office have no power to issue subpœnas nor any

issue. Code Ala., § 5016, and commissioners, § 1837.

Arkansas. — Summons may be issued by arbitrators, masters in chancery and commissioners. Sandel's and Hill's Dig., § 2934, or by officer authorized to take deposition.

California. — By the officer before whom the attendance is required. Code Civ. Proc., § 1986; but where the attendance is required before a commissioner appointed by another state, the summons is issued by any judge or justice of the peace within their respective jurisdictions. Code Civ. Proc., § 1986, sub. 3.

Illinois. — Commissions, masters in chancery, notaries public or other officer before whom the attendance is required may summon. Starr *v.* Curtis's Ann. St., ch. 51, § 36.

Iowa. — By officers authorized to take depositions. Code Iowa, § 4672, or any board or officer authorized to hear testimony may subpoena witnesses and compel them to testify in the same manner as officers authorized to take depositions.

Louisiana. — Justices of peace may issue subpoenas for witnesses whose deposition is required in a foreign state. Rev. St., § 3941.

New York. — Subpoenas may be issued by and under the hand of the judge arbitrator, referee, or other person, or the chairman, or a majority of the board or committee. Code Civ. Proc., § 854; but where the attendance of the witnesses is required before a commissioner or other officer appointed by the court of another state to take testimony within the state, the summons is issued by any justice of the supreme court or a county judge. Code Civ. Proc., § 915.

Vermont. — Notaries public and masters in chancery may issue subpoenas. Statutes 1894, § 1251.

West Virginia. — May be issued by persons authorized to take the deposition. Warth's Code, 1899, p. 1027.

Wisconsin. — Subpoenas issued by judge, or clerk of court of record, or court commissioner, or justice of peace, or municipal judge, or police judge. Statutes 1898, § 4053.

Wyoming. — Officers taking depositions may issue. Rev. St. 1899, § 3690.

13. Statutes Minn., § 5662.

14. Starr and Curtis's Ann. Ill. St., ch. 51, § 36.

15. Burdett *v.* Abbott, 14 East 1; Burdett *v.* Coleman, 14 East 163; Coffin *v.* Coffin, 4 Mass. 1; State *v.* Mathews, 37 N. H. 453; *In re* Falvye *v.* Kilbourn, 7 Wis. 630; Anderson *v.* Dunn, 6 Wheat. 204; *Ex parte* McCarthy, 29 Cal. 395; Kilbourn *v.* Thompson, 103 U. S. 168.

Legislative Body of the State. The House of Representatives of the state of Massachusetts has the constitutional right to take evidence, to summon witnesses, and to compel them to attend and testify, by subpoena, or in case of refusal to obey the subpoena, may order them to be arrested and brought before the house. Burnham *v.* Morrissey, 14 Gray (Mass.) 226.

16. Legislative Committees. The power of the legislature to summon and examine witnesses may be exercised by means of committees. Burnham *v.* Morrissey, 14 Gray (Mass.) 226.

17. Kilbourn *v.* Thompson, 103 U. S. 168; *Ex parte* McCarthy, 29 Cal. 395; Burnham *v.* Morrissey, 14 Gray (Mass.) 226.

power to bring witnesses before them or keep them there.[18] Nor will a state court issue a subpœna for the attendance of witnesses before those officers.[19]

(5.) Under Letters Rogatory. — In taking depositions under letters rogatory or under a commission appointed by the court of a foreign state in which the deposition is to be used, courts of competent jurisdiction of the state in which the deposition is to be taken, will, by the usual process of the court, give its aid to compel the attendance of the witness before the commissioner or other officer appointed to take the testimony.[20] This practice is said to be now common and unquestioned, and in the absence of statutory authority, to rest upon national comity.[21]

(6.) Federal Court Practice. — Subpœnas issuing from any federal court must be under the seal of that court and signed by the clerk thereof. Those issuing from the Supreme Court or a Circuit Court shall bear *teste* of the Chief Justice of the United States, or if that office is vacant, of the associate justice next in precedence, and those issuing from a district court shall bear *teste* of the judge, or when that office is vacant, of the clerk thereof.[22]

(7.) For Attendance Out of Court. — In Equity Cases. — By the 78th rule in equity, subpœnas may be issued by the clerks of the federal courts, in blank, and filled up by the commissioner, master, or examiner, requiring the attendance of the witness at the time and place specified, and this rule applies as well to *subpœnas duces tecum*.[23]

(8.) Special Examiners. — Where a circuit court of one district appoints a special examiner to take testimony in another district,

18. Boom *v.* DeHaven, 72 Cal. 280.

19. State Courts Will Not Assist Registers and Receivers. — In Boom *v.* DeHaven, 72 Cal. 280, in an application for a writ of mandate to compel the respondent to issue a subpœna to certain persons, commanding them to appear and testify before the register and receiver of the United States land office, the writ said that if the federal government . . . desired to compel the attendance of witnesses before the register and receiver here, it had ample power to do so, but it did not desire to do so. The compulsory attendance in such cases is against its settled policy. "It does not ask the state for any assistance in the matter, and the use of our processes would be a mere gratuitous intrusion,— attempting to thrust our system on a government that does not want it."

20. *In re* Strauss, 32 App. Div. 610, 52 N. Y. Supp. 392; Nelson *v.* U. S., 1 Pet. C. C. 235, 17 Fed. Cas. No. 10,116; State *v.* Bourne, 21 Or. 218, 27 Pac. 1048.

21. Subpœna Duces Tecum, Before Commissioner. — § 915 of the Code of Civil Procedure, which contains the provisions for compelling the attendance of a witness before a commissioner appointed by a court of a foreign state, to take testimony in the state of New York, does not authorize a court in New York to issue a subpœna *duces tecum*, but the court may compel the attendance of a witness before such commissioner in obedience to a subpœna *ad testificandum*. *In re* Strauss, 32 App. Div. 610, 52 N. Y. Supp. 392. See also, *In re* Searles, 155 N. Y. 333, 49 N. E. 938.

22. U. S. Rev. Stat., § 911.

23. 78th rule in Equity. Johnson Steel Street Rail Co. *v.* North Branch Steel Co., 48 Fed. 191.

the circuit court of the latter district must issue the summons for the attendance of the witnesses before the examiner.[24]

(9.) Before Examiner of Pension Claims. — Subpœnas for witnesses before officers authorized to take testimony in the investigation of pension claims, are issued by the courts of the United States upon proper application of the commissioner of pensions.[25]

(10.) By Interstate Commerce Commission. — The summons for the attendance of witnesses before the Interstate Commerce Commission is issued by the commission.[26]

(11.) Before Commissioner of Patents. — The attendance of witnesses before the commissioner of patents is obtained by the process of the United States courts.[27]

e. *Jurisdiction.* — **(1.) Of State Process.** — Process to procure the attendance cannot extend beyond the limits of the state in which it issues;[28] and when served at a place beyond the jurisdiction of the court has no coercive force.[29]

(2.) Of Federal Process. — The jurisdictional limits of a subpœna issued from the federal courts in civil cases is, by the act of March 2nd, 1873, limited to the distance of one hundred miles from the place where the court is situated,[30] and a witness residing at a greater distance may disregard the summons.[31]

3. Service of Process. — A. By Whom Served. — a. *State Process.* The party by whom the subpœna may be served is usually desig-

24. West N. C. R. Co. *v.* Drew, 3 Woods 691, 17 Fed. Cas. No. 17,434; *In re* Steward, 29 Fed. 813; Johnson Street Steel Rail Co. *v.* North Branch Steel Co., 48 Fed. 191.

25. Form of Application. — The application for the subpoena should be drawn with reasonable certainty and precision, so that it may clearly appear upon its face to be in accordance with the act, and the pension claims in which the testimony is required should be reasonably identified. *In re* Gross, 78 Fed. 107.

Form of Subpoena. — The application for the subpoena being the foundation for the proceeding, the subpoena should follow the requirement of the application. Thus, where the application required the testimony of the witness "on the matter of certain charges made against him in connection with his prosecution of claims before the pension bureau," and the subpoena required him to testify "in the matter of the pension claim of Celestine Washington, No. 641, 346, and others," the proceedings were held void. *In re* Gross, 78 Fed. 107.

26. Commerce Commission *v.* Brimson, 154 U. S. 447, 14 Sup. Ct. 1125; United States *v.* Bell, 81 Fed. 830.

27. Does Not Apply to Subpoena Duces Tecum. — That § 4906, Rev. Stat., does not authorize the issuance of a subpoena *duces tecum*, see *Ex parte* Moses, 53 Fed. 346.

28. State *v.* Huff, 164 Mo. 459, 61 S. W. 900; State *v.* Butler, 67 Mo. 59; State *v.* Murphy, 48 S. C. 1, 25 S. E. 43; State *v.* Yetzer, 97 Iowa 423, 66 N. W. 737.

29. Westfall *v.* Madison County, 62 Iowa 427.

30. Patapsco Ins. Co. *v.* Southgate, *et al.*, 5 Pet. 604; Russell *v.* Ashley, Hempst. 546, 21 Fed. Cas. No. 12,150; Voss *v.* Luke, 1 Cranch C. C. 331, 28 Fed. Cas. No. 17,014; Johnson Steel Street Rail Co. *v.* North Branch Steel Co., 48 Fed. 191.

31. Russell *v.* Ashley, Hempst. 546, 21 Fed. Cas. No. 12,150; Park *v.* Willis, 1 Cranch C. C. 357, 18 Fed. Cas. No. 10,716; Voss *v.* Luke, 1 Cranch C. C. 331, 28 Fed. Cas. No. 17,014.

nated by statute. In some states the subpœna must be served by some duly authorized officer;[32] while in others it may be served by any person,[33] or by any person of full age,[34] or by any person not interested in the proceedings concerning which the witness is summoned to testify.[35]

b. *Federal Process.* — Subpœnas issued from the courts of the United States, in a civil suit, may be served by a person competent to make a legal service thereof under the laws of the state in which the court is situated,[36] criminal process being served by the marshal of the district in which the witness lives.[37]

B. When Should Be Served. — The subpœna should be served at such time before the trial or hearing as to give the witness a reasonable opportunity to attend,[38] but it has been held that a party is entitled as a matter of right to the issuance of a subpœna while the trial is in progress, where it does not appear, but that the attendance of the witness may be procured before the close of the trial.[39]

C. How Served. — In most jurisdictions the service is made by reading or showing the original subpœna to the witness and delivering to him a copy thereof; or by showing the original and stating its substance.[40] In some states by reading the original or delivery

32. By Officer. — Code Alabama, § 1826; Rev. St. Louisiana, § 1037.

Vermont. — "Legal service" intends service made by some one duly authorized for that purpose. Such are those who are duly appointed as sheriffs, constables, etc., or constituted such by the authority issuing the process for that occasion, and in all cases where provision is made by law for service by an indifferent person, that person is named or deputed by the authority issuing the writ. The service of a subpoena by a person not named is not conformable to the statutes, and it cannot be regarded as a legal service, so as to subject the person summoned to the penalty of the statute. The appearance of the person subpoenaed in such a case is purely voluntary. Mattock *v.* Wheaton, 10 Vt. 493.

33. May Be Served by Any Person. — *Arizona.* — Rev. Stat., § 1113.

Indiana. — Rev. Stat. 1881, § 484.

Wyoming. — Rev. Stat. 1899, § 3688.

Illinois. — "It may be served upon him by the sheriff, or the party, or any private person, or may be even sent by mail, and as the command is to the witness, he is bound to obey it, whenever he receives that command." The Chicago & Aurora R. Co. *v.* Dunning, 18 Ill. 494.

34. By Any Person of Full Age. *Colorado.* — The subpoena may be served by any person of full age not interested in the cause. Mills' Anno. Stat., 1891.

Massachusetts. — By any disinterested person. Public Stat., p. 985, § 2.

35. By Any Disinterested Person. Public Stat. Mass., p. 985, § 2.

Service by Party. — *Construction of Statute.* — Under Rev. Stat., § 8937, providing that subpoenas may be served by the sheriff, coroner, marshal, constable, or by any disinterested person who would be a competent witness in the cause, it is held that the service may be made by a party to the action. Laramore *v.* Bobb, 114 Mo. 446, 21 S. W. 922.

36. Cummings *v.* Akron Cement & Plaster Co., 6 Blatchf. 509, 6 Fed. Cas. No. 3473.

37. Voss *v.* Luke, 1 Cranch C. C., 28 Fed. Cas. No. 17,014.

38. McLeod *v.* Tarrance, 3 Q. B. 146; Respublica *v.* Duane, 4 Yeates (Pa.) 347.

39. Edmonston *v.* State, 43 Tex. 230.

40. Showing Original and Stating Substance. — *Arkansas.* — Sandel's and Hill's Dig., § 2936.

Arizona. — Rev. Stat., § 1114.

of a copy,[41] while in still other jurisdictions leaving a copy at the place of abode of the witness is sufficient.[42]

4. Return of Subpoena. — The return of the officer or affidavit of the person by whom the subpoena is served should show that all those things required by statute to constitute a valid service have been complied with.[43]

5. Fees of Witnesses. — A. Payment or Tender of Fees, as a Pre-Requisite. — In some jurisdictions the payment or tender to the witness of certain fees is made a necessary incident to valid service of the summons.[44] But such tender or payment may be waived by the witness.[45]

41. By Reading or Delivering Copy. — *Vermont.*—Stat. 1894, § 1252.
Wisconsin. — Statutes 1898, § 4055.
Wyoming.—Rev. Stat. 1899, § 3691.

42. By Leaving Copy at Residence of Witness. —*Wisconsin.*—Stat. 1898, § 4055.
Wyoming.—Rev. Stat. 1899, § 3699.

43. Showing Diligence. — In Missouri it is held that the sheriff should go at least once to the place of residence of the witness to seek him; and if he cannot find the witness, appropriate return should be made, setting forth that fact. State *v.* Huff, 164 Mo. 459, 61 S. W. 900.

Return by Special Deputy. — A return of service of subpoena by a special deputy in his own name is void. State *v.* Huff, 164 Mo. 459, 61 S. W. 900.

What Return Should Show. — "As a general rule an officer's return on process of every kind should state that he has performed what the mandatory part of the process required of him, and when the law requires and prescribes any particular form of proceeding in the service, the return should show that they were specifically complied with, and should set them forth as fully and circumstantially as if they had been especially required in the mandatory part of the process. A return of 'not found,' 'not served,' 'not executed,' is not legal, and it may in fact be as untrue as it is illegal. It may be more: it may deprive a defendant of his right to other more compulsory process." Neyland *v.* State, 13 Tex. App. 536.

44. Meffert *v.* Dubuque, B. & M. R. R. Co., 34 Iowa 430; Ogden *v.* Gibbons, 5 N. J. Law 518; Muscott *v.* Runge, 27 How. Pr. 86.

Where Witness Is Not a Resident of the County. — In Indiana it is provided in Rev. Stat. 1881, §§ 489, 490, that if the witness is a resident in the county in which his evidence is required, his fees need not be paid or tendered in advance; but if he resides out of the county, his mileage and one day's pay for attendance must be paid or tendered before or at the time of the service of the subpoena. See also Thurman *v.* Virgin, 18 B. Mon. (Ky.) 785.

45. Thurman *v.* Virgin, 18 B. Mon. (Ky.) 785; Goff *v.* Mills, 2 Dowl. & L. 23, 8 Jur. 758; Hurd *v.* Swan, 4 Den. 75; Bettley *v.* McLeod, 3 Bing. (N. C.) 405; Andrews *v.* Andrews, Coleman, 119, 2 Johns. Cas. 109.

Waiver of Mileage. — A witness after appearing, cannot, before testifying, demand the mileage fees allowed by law, having failed to demand the same at the time of the service upon him of the subpoena. Stockberger *v.* Lindsey, 65 Iowa 471.

Waiver Must Be Express. — The waiver of the fees must be express in order to subject the witness to the penalty for non-attendance: an implied waiver is not sufficient. The witness is not bound to assert his rights upon peril of losing them. Muscott *v.* Runge, 27 How. Pr. (N. Y.) 85; Stockberger *v.* Lindsey, 65 Iowa 471; Mattocks *v.* Wheaton, 10 Vt. 493; Courtney *v.* Baker, 3 Denio 27.

Need Not Be Demanded. — Fees must be paid in advance each day,

B. Fees for Continued Attendence. — It is provided in some states that a witness may, at the commencement of each day, where his attendance for a longer time than one day is required, demand his legal fees for that day in advance and if they are not paid he is not obliged to attend further.[46]

C. In Suits in Forma Pauperis. — Witnesses in suits commenced by plaintiffs in *forma pauperis* must attend in obedience to summons without payment of fees.[47]

D. In Criminal Cases. — Witnesses are required to attend in criminal cases without the prepayment of fees,[48] unless otherwise provided by statute.[49]

E. Waiver of Legal Forms of Service. — A witness may also, by his own act, dispense with the legal forms of service.[50]

6. Process for Imprisoned Witnesses. — A. Habeas Corpus or Order. — The attendance of imprisoned witnesses may be obtained, in cases where their personal attendance in court is required, by means of *habeas corpus* or by order of the court for that purpose, according to the practice prescribed in the particular jurisdiction;[51] but in some jurisdictions the authority of the court to

and witness need not demand them, Atwood *v.* Scott, 99 Mass. 177, 96 Am. Dec. 728.

46. Where Cause Is Continued Over Sunday. — Where the cause is continued over Sunday the witness must be paid in advance for Sunday as well as Monday. Muscott *v.* Runge, 27 How. Pr. 85.

47. Norris *v.* Rippy, 4 Jones Law (N. C.) 533.

48. Huckins *v.* State, 61 Neb. 891, 86 N. W. 485; West *v.* State, 1 Wis. 186.

49. Public Sta. Mass. 1882, p. 861, § 3.

In Iowa witnesses in criminal cases are not compelled to attend unless their fees are paid in advance when demanded, except where the subpoena is issued under order of the judge. Code Iowa, § 1298; State *v.* Keenan, 111 Iowa 286, 82 N. W. 792.

Compulsory Attendance Without Compensation Constitutional. — In no sense can the requisition upon the citizen of his attendance upon the courts in a criminal case without compensation, be considered as the taking of private property for public use, within the meaning of the constitution. The object of that provision in the fundamental law, was to protect the citizen from the grasping demands of government; not to absolve him from any of those various personal duties which every good citizen owes to his country. West *v.* State, 1 Wis. 186.

50. Waiver of Legal Forms of Service. — Where it appeared on the examination of the person who was said to have served the subpoena that he had shown the witness a subpoena and required his attendance, but the witness, on looking at it, said his name was not in the writ, to which the other replied that it certainly was on the other subpoena, which he had in his pocket, and he was about pulling it out, when the witness evaded it, and said he would endeavor to attend—it was held to amount to a service, as the witness by his own act had dispensed with the legal forms. Feree *v.* Strome, 1 Yeates (Pa.) 303.

51. *England.* — Rex. *v.* Burbage, 3 Burr. 1440; Rex. *v.* Roddam, 2 Cowp. 672; Brown *v.* Gisbourne, 2 Dow. (N. S.) 963; Graham *v.* Glover, 5 El. & Bl. 591.

United States. — *Ex parte* Barnes, 1 Spr. 133, 2 Fed. Cas. No. 1010.

Arizona. — Rev. Sta. § 1119.

Arkansas. — Sandels & Hill Dig. 1894, § 2948.

California. — People *v.* Putnam,

obtain the attendance of such witness is confined to certain territorial limits.[52]

When Order May Issue. — But the order for the production of such witnesses does not issue as a matter of course, but only when it appears to the satisfaction of the trial court that the witness is necessary.[53]

7. Compelling Witness to Go to Sister State to Testify. — In some states statutory provision is made for compelling witnesses to go to a sister state to give evidence in a cause there pending. In these cases the witness is compelled to obey the summons upon the payment or tender to him of certain traveling fees, and certain penalties are incurred for disobedience.[54]

II. ATTENDANCE WITH WRITTEN EVIDENCE.

1. Subpoena Duces Tecum. — A. In General. — The witness may be required to bring with him any book, paper, or document which he may have in his possession, material to the issues involved in the action concerning the matters of which the witness is called to testify;[55] or which may contain evidence material to the cause,

129 Cal. 258, 61 Pac. 961; Willard *v.* Superior Court, 82 Cal. 456, 22 Pac. 1120; People *v.* Willard, 92 Cal. 482, 28 Pac. 585; Code Civ. Proc. § 1995; Penal Code, § 1567.

Georgia. — Code Ga., § 5264.

Iowa. — Code Iowa, § 4670.

Kentucky. — Hancock *v.* Parker, 100 Ky. 143, 37 S. W. 594.

Massachusetts. — Pub. Sta., § 29.

Minnesota. — Sta. Minn. 1894, § 6027.

Missouri. — *Ex parte* Marmaduke, 91 Mo. 228, 4 S. W. 91.

New York.—Shank's Case, 15 Abb. Pr. (N. S.) 38.

Wyoming. — Rev. Sta. 1899, § 3699.

Similarity of Order to Habeas Corpus. — In People *v.* Willard, 92 Cal. 482, 28 Pac. 585, it was said that the order of the court to procure the attendance of the witness is equivalent to the writ of *habeas corpus ad testificandum.*

52. In Arizona it is discretionary with the court to order the attendance of one imprisoned in a county other than that in which the trial court is situated. Rev. Stat. 1119.

In Wyoming the court may order the witness brought in if imprisoned in the county in which the court is situated, but in all other cases the testimony must be taken by deposition. Rev. Stat. 1899, § 3699.

53. People *v.* Putnam, 129 Cal. 258, 61 Pac. 961; Willard *v.* Superior Court, 82 Cal. 456, 22 Pac. 1120; People *v.* Willard, 92 Cal. 482, 28 Pac. 585.

Defendant Cannot Object to Process or Method of Service. — The defendant cannot object to the form of the process or the manner of its service to procure witnesses for the state. People *v.* Sebring, 69 N. Y. St. 612, 35 N. Y. Supp. 237.

54. Public Statutes (Mass.) 1882, p. 986, §§ 10, 11.

In Maine, under the provisions of § 10, ch. 132 R. S. p. 934, a witness may be compelled to attend before any court in New England upon affidavit filed by the clerk of the court of any other New England state stating that a criminal case is pending in such court and that the person named is a material witness, and upon payment or tender of twelve cents per mile to and from the place of trial the witness is compelled to obey the summons or forfeit the sum of $200 to any prosecutor. Similar statutes exist in New Hampshire and Vermont; in 1902 New York passed a like law.

55. *England.* — Amey *v.* Long, 9 East. 473; Evans *v.* Moseley, 2 Dow. 364.

United States. — Wertheim *v.* Rail-

whether the witness is examined or not,[56] if this be the necessary and proper method of obtaining a view of the required document.[57] The demand upon the witness is made by the insertion of a clause in the ordinary subpœna commanding the witness to bring with him the book, paper, or document specified,[58] and the subpœna is then called a subpœna *duces tecum*.[59]

B. General Use Of. — Such a subpœna is in ordinary and general use and is of compulsory obligation in courts of justice.[60]

C. To Whom May Issue. — The subpœna *duces tecum* may be issued to any person to whom an ordinary subpœna may issue.[61]

way etc. Co., 15 Fed. 716; Johnson Steel Rail Co. *v.* North Branch Steel Co., 48 Fed. 191; Edison Electric Light Co. *v.* U. S. Electric Lighting Co., 45 Fed. 56.

Alabama. — Martin *v.* Williams, 18 Ala. 190.

Indiana. — Carlton *v.* Litton, 4 Blatchf. 1.

Maryland. — Townshend *v.* Townshend, 7 Gill. 10.

Massachusetts. — Bull *v.* Loveland, 10 Pick. 9.

New York. — Lane *v.* Cole, 12 Barb. 680; Aiken *v.* Martin, 11 Paige 499; Davenbaugh *v.* McKinnie, 5 Cow. 37.

56. Smith *v.* McDonald, 52 How. Pr. 117; U. S. *v.* Tilden, 28 Fed. Cas. No. 16,522.

Object of Subpoena. — The object sought in the examination of a witness is to obtain from him not only the evidence which he may give orally, but the written evidence which may be in his possession or under his control. One is as much a part of what he is called upon to furnish, and in respect to which he may be examined, as the other. Mitchell's Case, 12 Abb. Pr. (N. Y.) 249.

57. Combs' Trial of Aaron Burr, p. 47; U. S. *v.* Burr, 25 Fed. Cas. No. 14,692; Edison Electric Light Co. *v.* U. S. Electric Lighting Co., 45 Fed. 59; Kirkpatrick *v.* Pope Mfg. Co., 61 Fed. 46; Morrison *v.* Sturges, 26 How. Pr. 177.

58. Insufficient or No Description of Documents. — Where the subpoena applied for contained a statement of the evidence desired but did not describe any papers or documents required to show the facts, it was held that the subpoenas were properly refused. Murray *v.* State of Louisiana, 163 U. S. 101.

59. Bouv. Law Dict.

60. Russel *v.* McLellan, 3 Woodb. & M. 157, 21 Fed. Cas. No. 12,158; U. S. *v.* Babcock, 3 Dill. 566, 24 Fed. Cas. No. 14,484; Bull *v.* Loveland, 10 Pick. (Mass.) 9; Edison Electric Light Co. *v.* U. S. Electric Lighting Co., 45 Fed. 56; Bischoffsheim *v.* Brown, 29 Fed. 341.

Compulsory Obligation. — In the case of Amy *v.* Long (9 East. 473), it was denied by counsel that the *duces tecum* clause in a subpoena to testify was obligatory upon a witness; but the court held otherwise — observing that the right to resort to means competent to compel the production of written as well as oral testimony seemed essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them.

Power Inherent in Court of Equity. — A court of equity has the power to compel the discovery and production of papers in virtue of its inherent and general jurisdiction. U. S. *v.* Babcock, 3 Dill. 566, 24 Fed. Cas. No. 14,484.

61. May Be Issued to Any Person. That this form of subpoena may be issued to any person, even to the president of the United States. See Combs' Trial Case of Aaron Burr, p. 47; U. S. *v.* Burr, 25 Fed. Cas. No. 14,692d.

Party Must Obey Subpoena. That a party may be compelled to obey a subpoena *duces tecum* see People *v.* Dickman, 24 How. Pr. 222; Smith *v.* McDonald, 52 How. Pr. 117;

D. Opposite Party Cannot Object to Issuance. — While in some jurisdictions subpœnas *duces tecum* are not issued without leave of court,[62] yet it seems that a party is entitled to the process as a matter of right in a proper case and the opposite party cannot object regularly to its issuance.[63]

E. Confined to Written Evidence. — The subpœna *duces tecum* can only require the production of books, papers or other written documents.[64]

F. Showing of Materiality on Application For. — Where it is necessary to apply to the court for a subpœna *duces tecum*, the materiality of the documents or writings required to be brought in should be shown by the applicant for the subpœna.[65]

G. Private Writings. — A witness cannot refuse to produce books and papers material to any inquiry merely because they are private; and the rule applies with equal force to parties.[66]

Duke *v.* Brown, 18 Ind. 111; Bonesteel *v.* Lynde, 8 How. Pr. 226; Mitchell's Case, 12 Abb. Pr. 249; Murray *v.* Elston, 23 N. J. Eq. 212; Woods *v.* DeFigamere, 16 Abb. Pr. 159; De Barry *v.* Stanley, 48 How. Pr. 349; Hauseman *v.* Stealing, 61 Barb. 347.

Fees of Party. — A party to an action duly served with a subpoena *duces tecum*, being present in court cannot excuse his refusal to produce the book and papers sought upon the ground that he has not been paid his witness fees. Culliers *v.* Birge (Tex. Civ. App.), 39 S. W. 986.

62. U. S. *v.* Burr, 25 Fed. Cas. No. 14,692d; Combs' Trial of Aaron Burr, p. 47.

63. Opposite Party Cannot Object to Issuance.—The opposite party can, regularly, take no more interest in the awarding a subpoena *duces tecum* than in the awarding an ordinary subpoena. In either case he may object to any delay, the grant of which may be implied in granting the subpoena; but he can no more object, regularly, to the legal means of obtaining testimony, which exists in the papers, than in the mind of the person who may be summoned. Combs' Trial of Aaron Burr, p. 47; U. S. *v.* Burr, 25 Fed. Cas. No. 14,692.

64. Patterns for Stone. — Where the subpoena required the production of patterns for a stone the court held the writ to be a novelty and not agreeable to any usage of the law, and therefore not within the power conferred by the statute. *In re* Shephard, 3 Fed. 12.

Drawings and Templates. — Where a subpoena *duces tecum* required the production of certain drawings and templates, and it appeared that the templates consisted of pieces of sheet iron, it was held, that the production of the templates could not be compelled, but that the drawings, so far as they were found to be material evidence, must be produced. Johnson Steel Street Rail Co. *v.* North Branch Steel Co., 48 Fed. 191.

Paper Straps Containing Memoranda. — Where a package of notes was bound with paper straps containing memoranda of the amount of notes contained in the package, it was held that the witness could be compelled by subpoena *duces tecum* to produce the straps. Morrison *v.* Sturges, 26 How. Pr. 177.

65. Thorp *v.* Page, 66 Ark. 229, 50 S. W. 454.

66. Bull *v.* Loveland, 10 Pick. (Mass.) 9; Burnham *v.* Morrissey, 14 Gray (Mass.) 226.

Private Writings. — "While the law jealously protects private books and papers from unreasonable searches and seizures, and from unnecessary exposure, even when necessarily produced in court, yet the principle is equally strongly held that parties litigant have the right to have private writings which are com-

H. Production of Books, Etc., by Corporation. — As to the power of a court to compel the production of books, etc., by corporation, by a subpœna *duces tecum,* the authorities are not in unison. The authorities in support of the power to thus compel their production seem, however, to preponderate.[67] And where provision is made by statute for the exercise of such power, there can, of course, be no question.[68] But the subpœna should in all cases be served upon the officer having the books in custody.[69]

petent for proof in their causes produced in evidence; and to this imperative demand of justice, all scruples as to the confidential character of the writings as private property, except in certain well-ascertained exceptions growing out of professional employment, must yield from consideration of public policy." U. S. *v.* Tilden, 28 Fed. Cas. No. 16,522.

Disclosing Secrets of Invention. In Johnson Steel Street Rail Co. *v.* North Branch Steel Co., 48 Fed. 191, it was held that a witness may be compelled to obey a subpoena *duces tecum,* requiring him to produce before a special examiner books, drawings, papers, etc., relating to a valuable secret invention, although the witness is not a party to the suit.

Party Must Obey the Subpoena. Under a statute providing that a party may be examined as a witness, at the instance of the adverse party, and declaring that for that purpose, he may be compelled in the same manner and subject to the same rules of examination as any other witness, to *testify,* etc., imports an obligation upon the party not merely to answer orally, but to bring with him and produce his books and papers. Bonesteel *v.* Lynde *et al.,* 8 How. Pr. 226, N. Y. Code § 390. See also Mitchell's Case, 12 Abb. Pr. (N. Y.) 249; Smith *v.* McDonald, 52 How. Pr. 117; Valiente *v.* Dyckman, 24 How. Pr. 222. See also Mitchell's Case, 12 Abb. Pr. (N. Y.) 249; Smith *v.* McDonald, 52 How. Pr. 117; Valiente *v.* Dyckman, 24 How. Pr. 222.

67. U. S. *v.* Babcock, 3 Dill. 566, 24 Fed. Cas. No. 14,484; Russell *v.* McClellan, 3 W. & M. 157, 21 Fed. Cas. No. 12,158; Johnson Steel Street Rail Co. *v.* North Branch Steel Co., 48 Fed. 191; Kirkpatrick *v.* Mfg. Co., 61 Fed. 46; Wertheim *v.* Trust Co., 15 Fed. 716; Edison Electric Light Co. *v.* U. S. Electric Co., 45 Fed. 56.

Questions of Inconvenience Not Considered. — "In Wertheim *v.* Railway etc. Co., 15 Fed. 716, Judge Wallace held that a corporation, not a party to the suit, might be compelled to produce its books and papers in evidence, which might be necessary and vital to the rights of litigants, and that considerations of inconvenience must give way to the paramount rights of parties to the litigation."

In the following cases the power to compel the production of books etc., by corporations is denied. Bank of Utica *v.* Hillard, 5 Cow. (N. Y.) 153, LaFarge *v.* LaFarge Fire Ins. Co., 14 How. Pr. (N. Y.) 26; Henry *v.* Ins. Co., 35 Fed. 15; Southern R. Co. *v.* North Carolina Corp. Com., 104 Fed. 700.

68. **Statutory Provisions.** — New York Code Civ. Proc., § 868; Wertheim *v.* Continental R. & T. Co., 15 Fed. 716, overruling Bank of Utica *v.* Hillard, 5 Cow. (N. Y.) 153.

69. *In re* Sykes, 10 Ben. 162, 23 Fed. Cas. No. 13,707; National Fertilizer Co. *v.* Holland, 107 Ala. 412, 18 So. 170; Bank of Utica *v.* Hillard, 5 Cow. (N. Y.) 153.

Who May Comply With Requirements of Subpoena. — By New York Code Civ. Proc. § 869, the books or documents may be brought in by a subordinate officer or employee instead of the person subpoenaed if he has sufficient knowledge to identify it and testify concerning the purposes for which it is used. But if the personal attendance of a particular officer of the corporation is required, a subpoena without the

I. Ambassadors and Consuls. — An ambassador or consul to the United States will not be required to appear and produce documentary evidence in the courts of the United States, by subpœna *duces tecum* except it be shown by the applicant for such process that the papers or documents sought to be produced are not official documents of that officer.[70]

J. Telegraphic Messages. — Courts may compel the production of telegrams in obedience to a subpœna *duces tecum,* notwithstanding rules and regulations of telegraph companies, or statutory provisions prohibiting the wilful or voluntary disclosure of such by employees or agents.[71]

a. *In Federal Courts.* — In the federal courts where telegrams are required before the grand jury, the practice requires the district attorney to apply to the court for the subpœna and the facts showing the necessity for their production and their materiality should be stated.[72]

duces tecum clause must also be served on him.

70. Nature of Document Should Be Disclosed. — Upon application for a subpoena *duces tecum* directed to a consul, the court should require the applicant to disclose by affidavit the nature of the document sought to be produced that the court may be informed whether the document is such as to be received in evidence if produced, or whether it is of such a character as that the court ought to compel its production, since if it is one of the official documents of the consulate, its production cannot be compelled. *In re* Dillon, 7 Saw. 561.

71. Telegrams Must Be Produced. *England.* — Waddell's Case, 8 Jur. (N. S.) 181.

United States. — U. S. *v.* Babcock, 3 Dill. 566, 24 Fed. Cas. No. 14,484; U. S. *v.* Hunter, 15 Fed. 712; *In re* Starroe, 63 Fed. 566.

Iowa. — Woods *v.* Miller, 55 Iowa 168, 7 N. W. 484.

Maine. — State *v.* Litchfield, 58 Me. 267.

Missouri. — *Ex parte* Brown, 72 Mo. 83.

West Virginia. — National Bank *v.* National Bank, 7 W. Va. 544.

Telegrams Not Privileged. — No legislative enactment, state or national, shields the communications by the telegraph; the adoption of the principle would limit the field of inquiry after truth, in the investigation of human affairs, and would be introducing a new class of privileged communications unknown to the common law. National Bank *v.* National Bank, 7 W. Va. 544.

How Described in Subpoena. "The subpoena should describe the telegrams required to be produced as described in the application, either naming the parties sending or receiving, if stated, and the subject-matter to which they are supposed to relate; or, if the names are not known, then the subject-matter and the time or periods between which they were sent or received. When such a subpoena is served upon the person having the possession of the telegram, it is his duty to appear before the grand jury or court and produce the telegram." U. S. *v.* Hunter, 15 Fed. 712.

Commanding Search. — It is not necessary to insert a clause in the writ commanding the witness to search for the documents he is required to produce. U. S. *v.* Babcock, 3 Dill. 566, 24 Fed. Cas. No. 14,485.

72. Federal Practice on Application for Subpoena. — "When the district attorney, either upon his own motion or at the instance of the grand jury, applies for the subpoena, he should state that there is a question either pending before the grand jury or the court, or which is intended to be brought before the grand jury or court, as the case may be,

K. Official Records of United States. — It is in the power of state courts to compel the production in court of official records, registers, books or detached documents, of a public nature by officers of the federal government, except in cases where the production or disclosure thereof is prohibited by express statute of the United States, or by rules and regulations of the heads of departments of the government having the force of law.[73]

L. Incriminating Documents. — A witness cannot be compelled in obedience to a subpœna *duces tecum,* to produce books, papers or other documents, the disclosure of the contents of which might subject him to a penalty or forfeiture,[74] or to a prosecution for a criminal offense,[75] except in those proceedings where a witness is protected by statute from prosecution for or on account of any matter or thing concerning which he may testify.[76] A wit-

in which certain telegrams sent from or received at the telegraph office in charge of the witness named, are believed to be pertinent to the question to be considered, and should state the names of the parties sending or receiving the telegrams, and should further state the periods between which, or the day upon which, they were sent or received, which should be a reasonable time; or, if the names of the parties should not be known, then the time should be stated, and the subject-matter which the dispatches are supposed to contain, or to which they are supposed to relate, in either case, in order that the court or judge ordering the subpoena may have some means of judging the relevancy of the testimony sought." U. S. *v.* Hunter, 15 Fed. 712.

73. **Government Documents.** — It was held in the matter of Hirsch, 74 Fed. 928, that a collector of internal revenue could be compelled to produce, in obedience to a subpoena *duces tecum* issued by the state court, papers and records of his office, showing the application and payment of a revenue tax by a defendant in a criminal prosecution for the illicit sale of intoxicating liquors, as there was no express statute of the United States, or any general rule or regulation of the commissioner of internal revenue forbidding him to disclose them.

Infringement of Copyright. Upon the trial of an action for the infringement of a copyright the plaintiff attempted, by a subpoena *duces tecum,* to compel the defendant to produce his books of account, photographic plates, and the copies of the printed chromos claimed to be in his possession, to be used as evidence for the plaintiff, but the court held that, as the action was for penalties and a forfeiture, the defendant could not be compelled to furnish evidence against himself. Johnson *v.* Donaldson, 3 Fed. 22.

Unconstitutionality of Act of Congress. — In the case of Boyd *v.* U. S., 116 U. S. 616, the court held that a provision of a law of Congress, which authorized a court of the United States in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices and papers, or that the allegations of the attorney respecting them should be taken as confessed, was unconstitutional and void as applied to suit for penalties or to establish a forfeiture of the party's goods. *In re* Pacific R. Com'n, 32 Fed. 241.

74. Rev. Stat. U. S. § 860; Bull *v.* Loveland, 10 Pick. (Mass.) 9.

75. U. S. *v.* Reyburn, 6 Pet. 367; Cosen *v.* Doubois, 1 Holt 241; Mitchell's Case, 12 Abb. Pr. (N. Y.) 249.

76. People *ex rel* American Ice Co. and People *ex rel* Norse *v.* Mussbaum, Referee, 32 Misc. 1, 66 N. Y. Supp. 129.

ness cannot refuse to produce documents on the ground that their disclosure would subject third persons to penalties and forfeitures.[77]

M. Privileged Documents. — Nor will the court compel a witness to produce by subpœna *duces tecum* documents which have come into the hands of the witness by reason of any relationship, the existence of which renders communications confidential.[78]

N. Attorney Having Lien on Documents. — An attorney summoned by a subpœna *duces tecum* cannot refuse to produce in court documents upon which he claims a lien, if the party demanding their production is not the person against whom the lien is claimed,[79] but he may decline to produce them on behalf of his debtor.[80]

O. Materiality and Privilege a Question for Court. — The court and not the party is the judge of the materiality of the documents, or of their privileged character.[81]

P. Right of Accused Persons To. — The constitutional and legal right of the accused to obtain process to compel the attendance of his witnesses extends to their bringing with them such papers as may be material for the defense.[82]

Q. In Federal Courts. — a. *Form of.* — A subpœna *duces*

77. *In re* Peasley, 44 Fed. 271.

78. *See* article "Privilege."

79. Hope *v.* Liddell, 7 De Dex, M. & G. 331.

80. *In re* Cameron's Coalbrook, etc. R. Co., 25 Beav. 1; Brassington *v.* Brassington, 1 Sim. & S. 455; Kemp *v.* King, 2 Moody & R. 437.

Value of Lien Should Not Be Destroyed. — The value of the lien often lies almost altogether in the power to withhold the papers from use as evidence; and that the debtor client should be allowed by subpoena *duces tecum* to make practically worthless his creditor's lien seems unjust. Davis *v.* Davis, 90 Fed. 791.

81. Mitchell's Case, 12 Abb. Pr. (N. Y.) 249; Edison Electric Co. *v.* U. S. Electric Co., 44 Fed. 294.

Court Must Decide Questions of Privilege. — "A subpœna *duces tecum* is a writ of compulsory obligation, which the court has power to issue, and which the witness is bound to obey, and which will be enforced by proper process to compel the production of the paper, when the witness has no lawful or reasonable excuse for withholding it, but of such lawful or reasonable excuse the court at *nisi prius*, and not the witness, is the judge." Johnson Steel Street Rail Co. *v.* North Branch Steel Co., 48 Fed. 191.

82. U. S. *v.* Burr, 25 Fed. Cas. No. 14,692d; Combs' Trial of Aaron Burr, p. 47; *In re* Dillon, 7 Sawy. 561.

Right of Accused. — The right of the accused under the constitution to obtain a subpœna *duces tecum* rests on the same ground as his right to process to compel the attendance of witnesses to testify orally in his favor. *In re* Dillon, 7 Sawy. 561.

Party. — *Private or Irrelevant Papers.* — The evil of subjecting private and confidential papers to invasion by strangers is not to be apprehended any more in the case of a party, than of any other witness. It is always in the discretion of the court to say whether the witness shall produce the papers or documents after he has brought them into court. It by no means follows that because he has brought them with him he shall be compelled to produce them in evidence. Bonesteel *v.* Lynde *et al.*, 8 How. Pr. (N. Y.) 226; Amy *v.* Long, 9 East 473; The King *v.* Dixon, 3rd Burr. 1687; Miles *v.* Dawson, 1 Esp. N. P. Cas. 405.

tecum issued out of the federal courts should bear *teste* as other subpœnas for witnesses and should require the production of the papers in court and not before the judge.[83]

b. *Practice in Federal Courts.* — Where depositions are taken *de bene esse,* or in *perpetuam rei memoriam* and under *dedimus potestatem* under section 866 of the Revised Statutes, subpœnas *duces tecum* cannot issue without an order of court.[84]

c. *Before Special Examiners.* — Where a special examiner is appointed by the federal court of one district to take testimony in another district, the subpœna *duces tecum* issues from the clerk's office in the usual manner without application to the latter court for an order directing the subpœna to issue.[85]

III. EXTRAORDINARY PROCESS.

1. Attachment. — A. In General. — A witness who has disregarded the summons to attend may be compelled to attend before the court or other tribunal or officer before whom his personal attendance is required, by means of a writ of attachment issued for that purpose.[86]

83. Corbett *v.* Gibson, 16 Blatchf. 334, 6 Fed. Cas. No. 3221.

84. Rev. Stat. §§ 863, 866; *Ex parte* Fisk, 113 U. S. 713; Johnson Steel Rail Co. *v.* North Branch Steel Co., 48 Fed. 191.

85. Johnson Steel Street Rail Co. *v.* North Branch Steel Co., 48 Fed. 191.

86. *England.* — Reg. *v.* Russell, 7 Dowl. 693; Dixon *v.* Lee, 3 Dow. 259; Middleton *v.* Speright, Cary 80.

United States. — Voss *v.* Luke, 1 Cranch C. C. 331, 28 Fed. Cas. No. 17,014; Woods *v.* Young, 1 Cranch C. C. 346, 30 Fed. Cas. No. 17,994; Carmen *v.* Emerson, 71 Fed. 264; U. S. *v.* Smith, 3 Wheeler Cr. Cas. 100, 27 Fed. Cas. No. 16,342.

Alabama. — Woodward *v.* Purdy, 20 Ala. 379.

Arkansas. — Welsh *v.* Lloyd, 5 Ark. 367.

California. — *Ex parte* McCarthy, 29 Cal. 395.

Connecticut. — Noys *v.* Byxbee, 45 Conn. 382.

Florida. — Green *v.* State, 17 Fla. 669.

Illinois. — Chicago R. Co. *v.* Dunning, 18 Ill. 494; Brockman *v.* Aulger, 12 Ill. 277.

Indiana. — Wilson *v.* State, 57 Ind. 71; Baldwin *v.* State, 126 Ind. 24, 25 N. E. 820.

Massachusetts. — Piper *v.* Pearson, 2 Gray 120; Whitcomb's Case, 120 Mass. 118; Burnham *v.* Morrissey, 14 Gray 226; Heard *v.* Pierce, 8 Cush. 338; Com. *v.* Carter, 11 Pick. 277.

Nebraska. — Huckins *v.* State, 61 Neb. 891, 86 N. W. 485.

New Hampshire. — Burnham *v.* Stevens, 22 N. H. 247; State *v.* Copp, 15 N. H. 212.

New Jersey. — State *v.* Trumbull, 4 N. J. Law 157.

New York. — People *ex rel* Baldwin *v.* Miller, 9 Misc. 1, 29 N. Y. Supp. 305; Andrews *v.* Andrews, 2 Johns. Cas. 109; Woods *v.* DeFiganiere, 1 Robt. 607; Stephens *v.* The People, 19 N. Y. 549; Bleecker *v.* Carroll, 2 Abb. Pr. 82; *In re* Dickenson, 58 How. Pr. 260.

North Carolina. — Icehour *v.* Martin, Busb. L. 478.

Pennsylvania. — Respublica *v.* Duane, 4 Yeates 347; Com. *v.* Newton, 1 Grant Cas. 453.

Virginia. — Morris *v.* Creel, 1 Va. Cas. 333.

Wisconsin. — Haight *v.* Lucia, 36 Wis. 355; Stuart *v.* Allen, 45 Wis. 158.

Attachment a Common Law Weapon. — "The authority to com-

B. When Attachment May Issue. — To obtain the writ it is necessary to show that the witness has been duly served with a subpœna;[87] and where the payment or tender of fees is necessary to obligate the witness to attend, it must be shown that the required fees were paid or tendered.[88] And an attachment will be denied where the tender or payment is insufficient in amount,[89] unless the witness has by some act or admission waived the payment of fees,[90]

mand the attendance of a witness necessarily implies a power to enforce that command. The means of enforcing it is an attachment, which is a common law weapon given to every court of record, and without which it would soon sink into disgrace and contempt." Voss *v.* Luke, 28 Fed. Cas. No. 17,014, 1302.

87. Proof of Service of Subpoena. *United States.* — U. S. *v.* Caldwell, 2 Dall. 333; *Ex parte* Humphrey, 2 Blatchf. 228, 12 Fed. Cas. No. 6867; *Ex parte* Peck, 3 Blatchf. 113, 12 Fed. Cas. No. 6867; Carman *v.* Emerson, 71 Fed. 264.

Arkansas. — St. Louis & S. F. R. Co. *v.* Kilpatrick, 67 Ark. 47, 54 S. W. 971.

Indiana. — White *v.* Morgan & Co., 119 Ind. 338, 21 N. E. 968; Bish *v.* Beatty, 111 Ind. 403, 12 N. E. 523.

Missouri. — State *v.* Huff, 164 Mo. 459, 61 S. W. 900.

Nebraska. — Huckins *v.* State, 61 Neb. 891, 86 N. W. 485.

New Jersey. — State *v.* Trumbull, 4 N. J. Law 157.

New York. — Tebo *v.* Baker, 16 Hun 182; Loop *v.* Gould, 17 Hun 585; Courtney *v.* Baker, 3 Den. 27; People *v.* Davis, 15 Wend. 602; Bleeker *v.* Carroll, 2 Abb. Pr. 82; McCaulay *v.* Palmer, 40 Hun 38; Haynes *v.* Hatch, 62 Hun 620, 16 N. Y. Supp. 685; *In re* Smith, 15 N. Y. 733; Muscott *v.* Runge, 27 How. Pr. 85.

Witness Must Be Shown to Have Had Knowledge. — In Indiana it is provided by statute that service may be made by leaving a certified copy of the subpoena at the last known residence of the witness and by the same section it is provided that where an attachment is sought to compel obedience, the application for the attachment must be supported by the affidavit of the party or his attorney that he believes or has reason to believe that the witness had knowledge of the service in time to have obeyed the summons. Rev. Stat. 1881 § 486; Horner's Rev. Stat. 1901 § 486; Burnes' Rev. Stat 1901 § 494.

88. Payment of Fees. — *England.* Brocas *v.* Lloyd, 23 Beav. 129; Bowles *v.* Johnson, 1 W. Bl. 36.

Illinois. — Bonner *v.* People, 40 Ill. App. 628.

Kentucky. — Thurman *v.* Virgin, 18 B. Mon. 785.

Massachusetts. — Atwood *v.* Scott, 99 Mass. 177, 96 Am. Dec. 728.

New Hampshire. — Bliss *v.* Brainard, 42 N. H. 255.

New Jersey. — Odgen *v.* Gibbons, 5 N. J. Law 518.

New York. — Hewlett *v.* Brown, 1 Bosw. 655; Anderson *v.* Johnson, 1 Sandf. 713.

Texas. — Culliers *v.* Birge (Tex. Civ. App.), 34 S. W. 986.

Vermont. — Mattox *v.* Wheaton, 10 Vt. 493.

Where Prepayment of Fees Not Required by Statute. — Witness compelled to attend without payment or tender of fees, when served in the manner required by the statute (Code § 3814). Smith *v.* Barger, 17 Tenn. (9 Yerg.) 320.

In Federal Courts. — In criminal prosecutions, if the witness subpoenaed by the government has the means to travel it is not necessary that the fees should be tendered to him before he is required to obey the process. U. S. *v.* Durling, 4 Biss. 509, 25 Fed. Cas. No. 15,010.

89. Chapman *v.* Pointon, 1 Str. 1150; Dixon *v.* Lee, 1 Cromp. M. & R. 645, 3 Dow. P. C. 259; Fuller *v.* Prentice, 1 H. Bl. 49; Ashton *v.* Hay, 2 Chitty 201; Brocas *v.* Lloyd, 23 Beav. 129.

90. Thurman *v.* Virgin, 18 B. Mon. 785; Goff *v.* Mills, 2 Dow. & L.

or the amount thereof.[91]

C. May Not Issue as of Course. — It is said to be discretionary with the court to grant or refuse the writ.[92] The court will not usually resort to this process where it appears that the testimony expected from the witness would be merely cumulative;[93] or immaterial;[94] or where it appears that the witness is detained at home by reason of illness.[95] The application for the attachment may also be refused if too long delayed,[96] or where the witness is incompetent

23, 8 Jur. 758; Andrews *v.* Andrews, 2 Johns. Cas. 109.

91. Andrews *v.* Andrews, 2 Johns. Cas. (N. Y.) 109; Betteley *v.* McLeod, 3 Bing. (N. C.) 405.

92. Discretion of Court. — Crawford *v.* State, 44 Ala. 382; Peterson *v.* State, 63 Ala. 113; Davis *v.* State, 92 Ala. 20, 9 So. 616; Terry *v.* State, 120 Ala. 286, 25 So. 177; Martin *v.* State, 125 Ala. 64, 28 So. 92; Stephens *v.* People, 19 N. Y. 540; Respublica *v.* Duane, 4 Yeates (Pa.) 347.

Similar to Motion for Continuance or New Trial. — It does not follow that the refusal of the court to grant an attachment against the witness is error. An award of the attachment rests in the sound discretion of the court to whom application is made and whose process is disobeyed. It is somewhat like a motion for a continuance for a new trial, and other like matters addressed to the discretion of the court, the refusal of which is not necessarily error, and only becomes so when the discretion is clearly abused to the manifest injury of the party or to the perversion of justice. West *v.* State, 1 Wis. 186.

93. Where Evidence Expected Would Be Cumulative. — St. Louis & S. F. R. Co. *v.* Kilpatrick, 67 Ark. 47, 54 S. W. 971.

94. Where the Evidence Would Be Immaterial. — Schloss *v.* Hilton, 10 M. & W. 15; Dicas *v.* Lawson, 1 Cr. M. & R. 934.

95. Sickness of Witness. — It is not error for the court to refuse to order an attachment for an absent witness who has been duly subpoenaed, where it is shown by the affidavit of the defendant or any other person who knows the facts, that the witness is sick, and unable to obey the summons. Cutler *v.* State, 42 Ind. 244. See also Terry *v.* State (Ala.), 25 So. 176.

Witness Not Bound to Endanger Life. — No witness is bound to endanger his life by his attendance at court; the law does not exact it. Jackson *v.* Perkins, 2 Wend. (N. Y.) 308.

Serious Illness of a Member of Family. — Serious illness of a member of a witness' family will excuse the non-attendance of a witness, but a slight indisposition cannot be urged as an excuse. Foster *v.* McDonald, 1 Head. (Tenn.) 619.

96. Where Application for Process Is Too Long Delayed. — It is not error for the court to refuse to issue an attachment for a witness where it appears that if issued they could not be served at the term of the court and would be ineffectual in accomplishing the purpose they were designed for, viz: to bring the absent witness to court during the term. State *v.* Hatfield, 72 Mo. 518.

Party Must Suffer Consequences of His Own Neglect. — If the defendant chose to rely upon the statements of plaintiff's counsel that he had no objection to the witness remaining and giving testimony, he must suffer the consequences of his own neglect to compel his attendance. The court would not be justified in delaying the trial to procure the attendance of a witness under such circumstances, much less to attempt to procure his attendance by writ of attachment. Beaulean *v.* Parsons, 2 Gil. (Minn.) 26.

After Testimony Is Closed. After counsel on both sides had, in effect, announced that the testimony was all in, the motion for an attachment came too late. Stephens *v.* People, 19 N. Y. 549.

to testify,[97] or where the subpœna was unauthorized, and the witness may occupy such an official position as to be exempt from the service of such process.[1]

D. Practice on Application For. — It has also been held proper to refuse an attachment unless it appears that the disregard of the original summons to attend is of such a nature as to indicate a design to contemn the process of the court.[3] Hence it is the practice in some courts to grant the witness, by order or rule *nisi*, an opportunity to purge himself of the contempt, before issuing an attachment.[4] But in other jurisdictions the attachment issues on the first instance upon proof of service and default,[5] the presumption being that, the witness when duly served with summons, is under a legal obligation to attend,[6] and it is the duty of the witness to

97. Where Witness Could Not Testify. — If the testimony of the witness could not be received if he were present—as, if from infamy or other reasons he is incompetent to testify, compulsory process cannot issue. *In re* Dillon, 7 Saw. 561.

In Federal Court. — *Incompetent Witness.* — The court will not order process of any kind to compel the production of a witness confined in the state prison for the commission of a felony, as he would be incompetent to testify as a witness should objection be made. But the district attorney and the proper authorities having the custody may voluntarily produce the witness, if they see fit to do so, as no objection to his competency can be made until his testimony is offered. U. S. *v.* Barefield, 23 Fed. 136.

1. Respublica *v.* Duane, 4 Yeates (Pa.) 347; U. S. *v.* Cooper, 4 Dall. 341; Geyers Lessee *v.* Irwin, 4 Dall. 107; U. S. *v.* Thomas, 1 Hayw. & H. 243, 28 Fed. Cas. No. 16,476; *In re* Dillon, 7 Saw. 561, 7 Fed. Cas. No. 3914; Anderson *v.* Rountree, 1 Pinn. (Wis.) 115; *Ex parte* Schulenburg, 35 Fed. 211.

3. State *v.* Hopper, 71 Mo. 425. Henderson *v.* Henderson, 55 Mo. 535.

Contempt Must Be Apparent. In State *v.* Trumbull, 4 N. J. Law, 157, where the witness, Trumbull, in obedience to the subpoena, was in attendance at the court just prior to trial, but being led to believe that the case would not be called for some days, went to the city of New York where he had a cause of great importance pending and to be tried, and where the court was in session, an attachment was asked for to compel his attendance. The court held that the facts ought to be clear and strong to justify a party in pursuing this remedy, or the court in granting it. Two facts are necessary. 1. That the process be strictly and legally served. 2. It must also appear that the disobedience was of such a nature as to indicate a design to contemn the process and authority of the court, and as the circumstances under which the witness had left the jurisdiction did not show any such contempt, the attachment was refused.

4. Jackson *v.* Marin, 2 Cai. (N. Y.) 192; Morris *v.* Creel, 2 Va. Cas. 49; Doe *v.* Thomson, 9 Dow. 948.

5. *Ex parte* Judson, 3 Blatchf. (U. S.) 89, 14 Fed. Cas. No. 7561; Carman *v.* Emerson, 71 Fed. 264.

6. Presumption of Obligation to Attend. — In an action against the sheriff for false imprisonment in arresting a witness under a writ of attachment, the witness claiming to have been exempt by reason of non-residence and other causes, none of which were apparent at the time the attachment was issued, the court, per Caldwell, Judge, said: "The circuit court of Columbia county is a court of general, original jurisdiction. It has jurisdiction to issue writs of subpoena for witnesses in cases pending before it, and to enforce obedience to the exigencies of such writs by attachment. The subpoena was regularly issued and the

bring to the attention of the court in some proper manner any fact or facts excusing his disobedience.[7]

E. Insufficiency of Summons. — Where the summons to attend is insufficient to give proper notice to the witness, the application for the attachment will be refused[8] unless it appears that the witness was not misled by the subpœna.[9]

F. Residence of Witness. — The court cannot take judicial notice of the place of residence of a witness, and although the court cannot issue an attachment for a witness who resides in another county, or at a place beyond the coercive power of a subpœna,[10] yet this fact must be made to appear by the witness; but it has been held that it must be shown by the applicant that the witness resides

return of the sheriff thereon showed a due and legal service thereof on the witness, and neither the subpoena nor the return disclosed any fact which showed that the witness was not under legal obligation to obey the subpoena. Upon this state of the record the presumption was that the witness was under a legal obligation to attend, and was in contempt of court for failing to do so. It was, therefore, the duty of the court to issue the writ of attachment for the witness." Carman *v.* Emerson, 71 Fed. 264.

Prima Facie Evidence of Contempt. — In Voss *v.* Luke, 1 Cranch C. C. 331, 28 Fed. Cas. No. 17,014, it is held that the record of the default of the witness and the affidavit as to residence are *prima facie* evidence of the contempt upon which to issue the attachment.

7. Duty of Witness Who Has Been Served With Process. — The service of the writ of subpoena imposes upon a witness the duty of treating the process of the court with decent respect, and of either attending the court in person or causing to be brought to the attention of the court the facts which in law will excuse him from attending. If he does not do this he justly subjects himself to attachment. Carman *v.* Emerson, 71 Fed. 264.

8. Wrong Court. — Where the subpoena commanded the sheriff to summon the defendant to appear before the grand jury to give evidence it was held that it should have required him to appear before the court to give evidence to the grand jury. As it did not require him to appear in court, his non-appearance, when called, was no failure on his part. State *v.* Butler, 16 Tenn. (18 Yerg.) 83.

9. Omission to Name Place of Court. — Where it appeared on application for an attachment, by the affidavit of the witness that the ticket left with the witness, omitted to name the city in which the court would be held, it was held that the terms of the court and the places of its meeting being regulated by a public act, the ticket was good, notwithstanding the omission, especially as the witness did not pretend ignorance on this head and was a counselor of the court. People *v.* Van Wyck, 2 Cai. (N. Y.) 334.

See also Bodwell *v.* Wilcox, 2 Cai. (N. Y.) 104, as to general knowledge of place where different terms are held.

Office of Notary Public. — Where the subpoena failed to give the location of the office of the notary, and it appeared that the witness, by his own showing, went to the notary's office and after waiting a few moments, departed before seeing the notary, it was held that he could not be excused for non-attendance as he was not misled by the subpoena. Keiser *v.* Ayers, 46 Cal. 62.

10. Patapsco Ins. Co. *v.* Southgate, 5 Pet. (U. S.) 604; Carmen *v.* Emerson, 71 Fed. 264; Voss *v.* Luke, 1 Cranch C. C. 331, 28 Fed. Cas. No. 17,014; Alexander *v.* Harrison, 2 Ind. App. 47; State *ex rel* Tim *v.* Trounce (Wash.), 32 Pac. 750.

within reach of the court's process.[11]

G. Witness Need Not Attend to Show Cause. — The personal attendance of a witness to show cause against the issuance of an attachment is unnecessary. He may present the merits of his defense by affidavit.[12]

H. Where Witnesses Have Been Recognized. — It is error for the court to refuse to issue an attachment for a witness who has been recognized to appear, but the fact that the witness has been recognized should be shown when the application for the attachment is made.[13]

I. Expert Witnesses. — It has been held by a federal court that expert witnesses should not be compelled to attend by attachment except in case of necessity;[14] but it is provided by statute in at least one state that such witness may be compelled to attend in the same manner as any other witness.[15]

J. Before Officers Taking Testimony Out of Court. Officers taking testimony out of court cannot compel the attendance of witness by attachment unless such authority is conferred by statute.[16] Such statutory authority is found in some states for the issuance of this process by notaries public,[17] examiners,[18] court commissioners,[19] insurance commissioners,[20] bank commissioners,[21] referees,[22] coroners,[23] and officers having power to take

11. State *ex rel* Tim *v.* Trounce (Wash.) 32 Pac. 750.

12. Affidavit of Witness. — In People *v.* Van Dyke, 2 Cai. (N. Y.) 333, the witness on a rule to show cause why an attachment should not issue against him for non-attendance was allowed to show by affidavit that a ticket which was annexed to his affidavit, was served on him, but that no subpoena was shown to him at the time. The court by way of argument saying: "Why bring a man from Ontario to New York to swear that he was sick, and, therefore, unable to attend on a subpoena, when that fact can as easily be communicated by his affidavit properly taken? An attachment might as well go in the first instance."

13. State *v.* Hopper, 71 Mo. 426.

14. *Ex parte* Roelker, 1 Spr. 276, 20 Fed. Cas. No. 11,995.

In Arkansas it is held not to be error to refuse to issue an attachment for a physician, whose deposition may be used under §§ 2978, 2979, Sand & H. Dig., where it is not shown that the physician had failed, when duly summoned, to appear and give his deposition. St. Louis S. F. R. Co. *v.* Kilpatrick, 67 Ark. 47, 54 S. W. 971.

15. In Indiana expert witnesses may be compelled to appear and testify without further compensation than that provided by law for ordinary witness. Rev. Stat. 1881, § 504; Horner's Rev. Stat. 1901, § 504; Burns' Rev. Stat. 1901, § 512.

16. *Ex parte* Millinkrodt, 20 Mo. 493; *Ex parte* Munford, 57 Mo. 603; *Ex parte* Lizinski, 72 Cal. 510, 14 Pac. 104; *In re* Huron, 58 Kan. 152, 48 Pac. 574; State *v.* Keenan, 111 Iowa 286, 82 N. W. 792.

17. Dogge *v.* State, 21 Neb. 272, 31 N. W. 929; *Ex parte* Munford, 57 Mo. 603; *Ex parte* Lizinski, 72 Cal. 510, 14 Pac. 104.

18. Com. *v.* Newton, 1 Grant (Pa.) 453.

19. Haight *v.* Lucia, 36 Wis. 355; Stewart *v.* Allen, 35 Wis. 158; Com. *v.* Roberts, 2 Clark (Pa.) 340.

20. Noyes *v.* Byxbee, 45 Conn. 382.

21. Noyes *v.* Byxbee, 45 Conn. 382.

22. People *ex rel* Baldwin *v.* Miller, 9 Misc. 1, 29 N. Y. Supp. 305.

23. Kuhlman *v.* Superior Court, 122 Cal. 636, 55 Pac. 589.

depositions generally.[24]

K. Before Masters in Chancery. — According to the practice in chancery an attachment to compel the attendance of a witness before the master in chancery requires an application to the court.[25]

L. Before Grand Jury. — The attendance of witnesses before the grand jury may be compelled by the court from which the original summons issues.[26]

M. Justices of the Peace. — The authority of justices of the peace, to compel witnesses to attend before them by extraordinary process has been generally admitted. But such authority is usually conferred upon them by statute.[27]

N. Legislative Bodies. — The right of either house of a legislature to compel witnesses to appear and testify before its committees, has been frequently upheld.[28]

2. Practice in Federal Courts. — A. Construction of Section 914, R. S. — In the matter of compelling attendance of witnesses the federal courts are not required to follow the practice of the state courts.[29]

B. Materiality of Documents. — The compulsory production of books, papers, or other documents by subpœna *duces tecum* in the federal courts of the United States on an examination of witnesses out of court, including examinations *de bene esse*, is limited to such as would be, if produced, competent and material evidence for the party seeking their production.[30]

24. *In re* Jenckes, 6 R. I. 18.

Subpoena Duces Tecum. — The power of officers taking depositions being purely statutory, a notary public has no power to attach a witness for disobedience of a subpoena *duces tecum*, when no such power is given in the statute. *Ex parte* Mallinkrodt, 20 Mo. 493.

25. Middleton *v.* Speright, Cary 80; Brockman *v.* Aulger, 12 Ill. 277.

26. Heard *v.* Pierce, 8 Cush. (Mass.) 338; Baldwin *v.* State, 126 Ind. 24, 25 N. E. 820.

27. State *v.* Copp, 15 N. H. 212; Piper *v.* Pearson, 2 Gray (Mass.) 120; Whitcomb's Case, 120 Mass. 118; Winder *v.* Diffenderffer, 2 Bland (Md.) 155.

28. Briggs *v.* Mackellar, 2 Abb. Pr. (N. Y.) 30; Burnham *v.* Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676; *In re* Pilsbury, 56 How. Pr. 290; Briggs *v.* Matsell, 2 Abb. Pr. (N. Y.) 156; *In re* Dickenson, 58 How. Pr. (N. Y.) 260.

The house of representatives of Kansas has power to compel, by arrest, the attendance of witnesses to testify before the house, or one of its committees. *In re* Gunn, 50 Kan. 155, 32 Pac. 470.

29. Brardsley *v.* Littell, 14 Blatchf. 102, 2 Fed. Cas. No. 1185. A party cannot be subpoenaed to appear and submit to examination before trial in order to assist the opposite party to prepare for trial. Colgate *v.* Campagnie du Telegraphe, 23 Blatchf. 88, 23 Fed. 82. See also Easton *v.* Hodger, 7 Biss. 324, 8 Fed. Cas. No. 4258.

Compelling Production of Writings. In the courts of the United States the production of books and writings must be enforced according to modes of procedure not deriving their origin from state statutes or practice. Easton *v.* Hodges, 7 Biss. 324, 18 Fed. Cas. No. 4258.

30. *Ex parte* Peck, 19 Fed. Cas. No. 10,885; U. S. *v.* Tilden, 28 Fed. Cas. No. 16,522.

To Refresh Witnesses' Memory.

C. Showing Required on Application for Attachment. And their competency and materiality must be shown by the applicant for the writ.[31]

D. In Aid of Pension Bureau. — The attendance of witnesses before officers taking testimony in the investigation of pension claims, is also compelled by the process of the federal courts.[32]

E. Before Interstate Commerce Commission. — Any federal court of the United States may, upon application of the commission or of a party to any proceeding before it, compel obedience to a subpœna *duces tecum* issued by the Interstate Commerce Commission.[33]

F. How Compelled Before Court Commissioners. — The power to compel the attendance of witnesses before United States court commissioners, by attachment, rests with the court.[34] Commissioners have no power to issue the attachment for that purpose;[35]

In U. S. *v.* Tilden, 28 Fed. Cas. No. 16,522, it was held that a witness could not be compelled by subpoena *duces tecum,* to produce before the commissioner in an examination *de bene esse,* his books of accounts and other private papers, merely for the purpose of refreshing his memory.

31. *Ex parte* Peck, 19 Fed. Cas. No. 10,885; U. S. *v.* Tilden, 28 Fed. Cas. No. 16,522.

32. *In re* Gross, 78 Fed. 107.

33. Commerce Commission *v.* Brimson, 154 U. S. 447, reversing *In re* Interstate Commerce Commission, 53 Fed. 476. Chief Justice Fuller, Mr. Justice Brewer and Mr. Justice Jackson, dissenting. For dissenting opinion see 155 U. S. 3.

Documents Must Be Material to the Issue, and Jurisdictional Facts Must Appear. — But where it appears upon the hearing of the application for this compulsory process that the books, papers or documents, called for, do not relate to the particular matter under investigation, nor to any matter which the commission is entitled under the constitution or laws to investigate, the order may be refused. Commerce Commission *v.* Brimson, 154 U. S. 447.

34. **Before Special Examiners.** The power to compel obedience to a summons to appear and testify before a special examiner who has been appointed by the circuit court of another district, rests in the circuit court of the district in which the examiner is discharging the duties of his appointment. See *In re* Steward, 29 Fed. 813; Johnson Steel Street Rail Co. *v.* North Branch Steel Co., 48 Fed. 191; *Ex parte* Humphrey, 2 Blatchf. 228, 12 Fed. Cas. No. 6867; *In re* Dunn, 8 Fed. Cas. No. 4173; U. S. *v.* Tilden, 10 Ben. 566, 28 Fed. Cas. No. 16,582; *Ex parte* Judson, 14 Fed. Cas. No. 7561.

Federal Court Must Compel Attendance Before Commissioners. "This court interposes its authority to compel witnesses to attend before commissioners and give evidence there, under the provision of the 30th section of the judiciary act of 1789 which declares that any person may be compelled to appear and depose before a commissioner, in the same manner as to appear and testify in court. Accordingly, a refractory, or reluctant witness, who has been duly subpoenaed to attend for examination before a commissioner, will be made to obey the order, to the same extent as if the writ of subpoena had been returnable to this court. There is nothing in the law, or in the reason of the case which supplies a different authority, in respect to *ex parte* evidence taken out of court, from that which legally appertains to the court in proceedings before it. The act places both on the same footing." *In re* Judson, 3 Blatchf. 148, 14 Fed. Cas. No. 7563.

35. *In re* Mason, 43 Fed. 510.

or for the purpose of taking the witness before the court to answer as for a contempt for disobedience of the summons to attend.[36]

G. When Authority of Commissioner May Be Inquired Into. — Upon application for the attachment of the witness in *de bene esse* proceedings, where the commissioner is appointed by the court of another district, the question of the authority of the commissioner and of the regularity of the proceedings may be inquired into.[37]

H. Service and Default Must Be Proved. — The attachment issues only upon due proof of the service of a subpœna upon a witness requiring his attendance before the commissioner, and the certificate of the commissioner that the witness did not attend before him.[38]

I. Process May Run Into Another District. — A writ of attachment may run into another district to compel the attendance of a witness who has disobeyed the original subpœna, where the

36. *In re* Mason, 43 Fed. 510.

37. **In Bankruptcy Cases.** — Evidence in bankruptcy must be taken under a commission, and not by notice to take testimony *de bene esse*. And an attachment cannot be issued against a witness for the disobedience of a subpoena to take testimony *de bene esse* in a bankruptcy proceeding. *In re* Dunn, 9 N. B. R. 487, 8 Fed. Cas. No. 4173.

Jurisdictional Facts Must Appear. In must first be made clearly to appear that the commissioner has jurisdiction in the matter and that the witness resides more than one hundred miles from the place of trial of the action. *Ex parte* Peck, 3 Blatchf. 113, 19 Fed. Cas. No. 10,885.

Materiality of Testimony Must Be Shown. — It must also be shown that the witness was called to testify to facts material and relevant to the issue in the case. *Ex parte* Peck, 3 Blatchf. 113, 19 Fed. Cas. No. 10,885.

Burden of Proof on Applicant. These facts must be established by the applicant for the attachment. *Ex parte* Peck, 3 Blatchf. 113, 19 Fed. Cas. No. 10,885.

Application May Be Resisted by Affidavit. — The question of the authority of the commission and the regularity of the proceedings before him, is properly brought before the court on affidavit, and the witness may be discharged from the attachment, when it appears that he could not rightfully be subjected to an examination *de bene esse* under the statute. *Ex parte* Humphrey, 2 Blatchf. U. S. 228, Fed. Cas. No. 6867.

Want of Original Proof. — Where it appears that the subpoena for the attendance of a witness before the commissioner was issued without any preliminary evidence having been given, showing it to be a case in which a *de bene esse* examination could be lawfully had, it was held, that the want of such proof is a vital objection to the issuing of an attachment. The attendance of the witness can not be exacted by the high compulsory writ of attachment, unless the magistrate has clear cognizance of the matter. *Ex parte* Peck, 3 Blatchf. 113, 19 Fed. Cas. No. 10,885.

Bad Faith Cannot Be Shown. But the *bona fides* of the proceedings cannot be impeached on a motion for an attachment. The proper place to do so is before the court in which they are pending, and until a determination before that court condemning them is procured, it must be assumed that they are prosecuted in the usual way. *Ex parte* Judson, 3 Blatchf. (U. S.) 89, 14 Fed. Cas. No. 7561.

38. *Ex parte* Peck, 3 Blatchf. 113, 19 Fed. Cas. No. 10,885; *Ex parte* Humphrey, 2 Blatchf. 228, 12 Fed. Cas. No. 6867.

witness resides within one hundred miles of the place of trial,[39] but this power was formerly doubted.[40]

J. By Whom Served. — A writ of attachment issued to compel the attendance of a witness residing in another district should be directed to and served and returned by the marshall of the district in which the witness lives.[41]

K. Arrest of Fugitive Witnesses. — Fugitive witnesses who have disobeyed a summons to attend in a federal court may be arrested by the warrant of any federal court in the United States, and returned to the court of the district where their attendance is required.[42]

IV. RIGHT OF ACCUSED PERSONS TO COMPULSORY PROCESS.

1. Constitutional Provisions. — A. In General. — Persons accused of crime have the right to compulsory process for obtaining the attendance of witnesses in their favor.[43] But in the absence of statute to the contrary all expense connected with legal service

39. Gustine *v.* Ringgold, 4 Cranch C. C. 191, 11 Fed. Cas. No. 5877; Woods *v.* Young, 1 Cranch C. C. 346, 30 Fed. Cas. No. 17,994.

40. Lewis *v.* Mandeville, 1 Cranch C. C. 360, 15 Fed. Cas. No. 8326; Woods *v.* Young, 1 Cranch C. C. 346, 30 Fed. Cas. No. 17,994.

41. Voss *v.* Luke, 1 Cranch C. C. 331, 28 Fed. Cas. No. 17,014.

42. *In re* Ellerbe, 13 Fed. 530.

43. Right of Accused to Compulsory Process. — *United States.* Voss *v.* Luke, 1 Cranch C. C. 331, 28 Fed. Cas. No. 17,014; U. S. *v.* Burr, 25 Fed. Cas. No. 14,692d; *In re* Dillon, 7 Saw. 561, 7 Fed. Cas. No. 3914; U. S. *v.* Kennealley, 5 Biss. 122, 26 Fed. Cas. No. 15,522.

Alabama. — Martin *v.* State, 125 Ala. 64, 28 So. 92.

Colorado. — People *v.* Grand Co., 7 Colo. 190, 2 Pac. 912.

Delaware. — State *v.* Dill, 9 Houst. 495, 18 Atl. 763.

Florida. — Jenkins *v.* State, 31 Fla. 190.

Indiana. — Buchman *v.* State, 54 Ind. 1.

Iowa. — State *v.* Yetzer, 97 Iowa 423, 66 N. W. 737.

Kentucky. — Adkins *v.* Com., 98 Ky. 539, 33 S. W. 948.

Nebraska. — Huckins *v.* State, 61 Neb. 891, 86 N. W. 485.

Louisiana. — State *v.* Nathaniel, 52 La. Ann. 558; State *v.* Adam, 40 La. Ann. 745.

Maine. — State *v.* Waters, 39 Me. 54.

Massachusetts. — Com. *v.* Buzzell, 16 Pick. 153.

South Carolina.—Eustace *v.* Greenville Co., 42 S. C. 190, 20 S. E. 88.

Texas. — Roddy *v.* State, 16 Tex. App. 502; Neyland *v.* State, 13 Tex. App. 536; Edmondson *v.* State, 43 Tex. 230.

In Federal Courts. — In criminal prosecutions in the courts of the United States the accused is entitled to compulsory process for a witness in his behalf, before and after indictment, all expense connected therewith being paid by the defendant. But where it is shown that the defendant is unable, by reason of poverty, to pay the expense of summoning his witnesses, the court will, upon a proper application therefor showing the materiality of the evidence expected to be proved by them, order the material witnesses for the accused who reside within one hundred miles of the place of trial, to be summoned at the expense of the government. But this order cannot be made before indictment and the granting of it is in the discretion of the court. U. S. *v.* Burr, 25 Fed. Cas. No. 14,692d; Compton *v.* U. S. 138 U. S. 361.

of the process must be paid by the accused.[44] In some states the attendance of witnesses for the defendant is obtained at the expense of the state, in the absence of any statutory provision, in capital cases in *favorem vitae*.[45]

B. Statutory Limitations. — In some states the right to have compulsory process at the expense of the state is limited to felony cases;[46] in others it extends to all cases;[47] and in some states the number of witnesses summoned for the accused at the expense of the state is limited.[48]

C. Upon Application to Admit to Bail. — Upon the application of an accused person to be admitted to bail in a capital case after indictment the defendant, as well as the state, is entitled to compulsory process for obtaining the attendance of witnesses.[49]

44. State of Maine *v.* Waters, 39 Me. 54.

45. Com. *v.* Williams, 13 Mass. 501; State *v.* Waters, 39 Me. 54.

46. Whittle *v.* Saluda Co., 59 S. C. 554, 38 S. E. 168.

47. *Ex parte* Chamberlain, 4 Cow. (N. Y.) 49.

48. **Montana.** — Political Code § 4656 provides that "in criminal actions in a court of record, the clerk of the court shall not issue a subpoena on behalf of the state or defendant for more than six witnesses except upon the order of the court or judge and such order may be made upon proper showing by affidavit or otherwise." See also State *v.* O'Brien, 18 Mont. 1, 43 Pac. 1091, where the judge required defendant's counsel to show that the testimony of the additional witnesses was material, and offered to allow the defendant's counsel to show orally such materiality by stating the substance of their proposed testimony and even offered not to disclose such statement to the counsel for the state. Counsel declined the offer, claiming that he had a constitutional right to these subpoenas without the showing. The action of the court refusing the subpoenas was held proper.

Limited Number of Witnesses. The provision of act No. 67 of 1894, which requires that an application for subpoenas for additional witnesses should set forth under oath what the applicant expects to prove by such witnesses, does not contravene the provision of article 9 of the constitution, which secures to the accused in a criminal prosecution the right "to compulsory process for obtaining witnesses in his behalf." The statutory provision in question is intended to apply only to witnesses summoned at the expense of the parish, and is not restrictive of the right of the accused to compulsory process for obtaining witness at his own expense. State *v.* Nathaniel, 52 La. Ann. 558, 26 So. 1008.

49. State *v.* Crocker, 5 Wyo. 385, 40 Pac. 681.

Right to Attachment. — The right is not confined to the ordinary process of subpoena but embraces also the right to the extraordinary process of attachment. The writ of attachment being the only form of compulsory process known to the law by which the attendance of a witness may be guaranteed. Voss *v.* Luke, 1 Cranch C. C. 331, 28 Fed. Cas. No. 17,014. See also Roddy *v.* State, 16 Tex. App. 502; Com. *v.* Buzzell, 16 Pick. (Mass.) 153; Combs' Trial of Aaron Burr, p. 46; U. S. *v.* Burr, 25 Fed. Cas. No. 14,692d; Crompton *v.* U. S., 13 U. S. 361; U. S. *v.* Kenneally, 5 Biss. 122, 26 Fed. Cas. No. 15,522; U. S. *v.* Stewart, 44 Fed. 483.

Order for Service of Process Discretionary With the Court. — In Goldsby *v.* U. S., 160 U. S. 70, it was held that the right to summon witnesses at the expense of the government is by Rev. Stat., § 858, left to the discretion of the trial court. To the same effect see Crompton *v.*

V. THE PROTECTION OF WITNESSES.

1. Protection From Service of Process. — A. Protection From Arrest. — Witnesses are privileged from arrest on civil process while in attendance upon courts, while going thereto and for a reasonable time in returning therefrom.[50]

B. Protection of Foreign Witnesses. — A non-resident who comes into a state for the purpose of attending as a witness in a cause pending in one of its courts, is exempt from the service of civil process while going, remaining and returning to his home, provided he acts in good faith and without unreasonable delay.[51]

U. S., 138 U. S. 361. But see U. S. *v.* Kenneally, 5 Biss. 122, 26 Fed. Cas. No. 15,522.

50. *England.* — *In re* Pioneer Paper Co., 7 B. R. 250; Newton *v.* Askew, 6 Hare 319; *Ex parte* List, 2 V. & B. 373; Arding *v.* Flower, 8 T. R. 534; *Ex parte* King, 7 Ves. Jr. 312; Willingham *v.* Mathews, 6 Taunt. 356; Chauvin *v.* Alexandre, 31 L. J. (N. S.) 79; Moore *v.* Booth, 3 Ves. 350; *In re* Paddock, 6 B. R. 396; Holiday *v.* Pitt, 2 Str. 985; Cole *v.* Hawkins, Andrews 275, 2 Str. 1094; Gilpin *v.* Cohen, L. R. 4.

United States. — Larned *v.* Griffin, 12 Fed. 590; *Ex parte* Hurst, 1 Wash. C. C. 186, 12 Fed. Cas. No. 6924; Juneau Bank *v.* McSpedan, 5 Biss. 64, 13 Fed. Cas. No. 7587; Bridges *v.* Sheldon, 7 Fed. 17; Wilson Sewing Machine Co. *v.* Wilson, 22 Fed. 803; Davis *v.* Sherron, 1 Cranch C. C. 287, 7 Fed. Cas. No. 3652.

California. — Page *v.* Randall, 6 Cal. 32.

Connecticut. — Bishop *v.* Vose, 27 Conn. 1.

Georgia. — Henegar *v.* Spangler, 29 Ga. 217.

Massachusetts. — McNeil's Case, 6 Mass. 245; Wood *v.* Neale, 5 Gray 538; May *v.* Shumway, 16 Gray 86, 76 Am. Dec. 582; Thompkin's Case, 122 Mass. 428.

Michigan. — Watson *v.* Judge Superior Court, 40 Mich. 729.

New Hampshire. — State *v.* Buck, 62 N. H. 670.

New Jersey. — Jones *v.* Knauss, 31 N. J. Eq. 211; Harris *v.* Grantham, 1 N. J. Law 142.

New York. — Norris *v.* Beach, 2 Johns. 294; Sanford *v.* Chase, 3 Cow. 381; Person *v.* Grier, 66 N. Y. 124; Hopkins *v.* Coburn, 1 Wend. 294; Bours *v.* Tuckerman, 7 Johns. 538; Farmer *v.* Robbins, 47 How. Pr. 415.

North Carolina. — Ballinger *v.* Elliott, 72 N. C. 596.

Ohio. — Compton *v.* Wilder, 40 Ohio St. 130.

Pennsylvania. — Hudson *v.* Prizer, 9 Phila. 65.

South Carolina.—Hunter *v.* Cleveland, 1 Brev. 167; Sadler *v.* Ray. 5 Rich. 523.

Vermont. — *In re* Healey, 53 Vt. 694; Booraem *v.* Wheeler, 12 Vt. 311; *Ex. parte* Hall, 1 Tyler, 274; Washburn *v.* Phelps, 24 Vt. 506.

51. *England.* — *In re* Pioneer Paper Co., 7 B. R. 250; *Ex parte* List, 2 V. & B. 373; Arding *v.* Flower, 8 T. R. 534; Newton *v.* Askew, 6 Hare 319; Moore *v.* Booth, 3 Ves. 350; Willingham *v.* Matthews, 6 Taunt. 356; *Ex parte* King, 7 Ves. Jr. 312; *In re* Paddock, 6 B. R. 396; Holiday *v.* Pitt, 2 Str. 985; Gilpin *v.* Cohen, L. R. 4 Ex. 134; Cole *v.* Hawkins, Andrews 275, 2 Str. 1094.

United States. — Atchison *v.* Morris, 11 Biss. 191, 11 Fed. 582; Kauffman *v.* Kennedy, 25 Fed. 785; Small *v.* Montgomery, 23 Fed. 707; Brooks *v.* Farwell, 4 Fed. 166; Parker *v.* Hotchkiss, 1 Wall. Jr. 269, 18 Fed. Cas. No. 10,739; Bridges *v.* Sheldon, 7 Fed. 17; Hurst's Case, 4 Dall. 387.

Delaware. — *In re* Dickenson, 3 Har. 517.

Georgia. — Thornton *v.* American Writing Machine Co., 83 Ga. 288, 9 S. E. 679; Fidelity & Casualty Co. *v.* Everett, 97 Ga. 787, 25 S. E. 734.

Illinois. — Gregg *v.* Sumner, 21 Ill. App. 110.

Indiana. — Wilson *v.* Donaldson,

C. Does Not Depend on Permanency of Residence. — The

117 Ind. 356, 20 N. E. 250, 10 Am. St. Rep. 48, 3 L. R. A. 266.

Maryland. — Bolgiono *v.* Lock Co., 73 Md. 132, 20 Atl. 788, 25 Am. St. Rep. 582.

Massachusetts. — May *v.* Shumway, 16 Gray 86, 76 Am. Dec. 582.

Michigan. — Mitchell *v.* Circuit Judge, 53 Mich. 541, 19 N. W. 176; Jacobson *v.* Hosmer, 76 Mich. 234; Letherby *v.* Shaver, 73 Mich. 500.

Minnesota. — Sherman *v.* Gundlach, 37 Minn. 118, 33 N. W. 549; First National Bank of St. Paul *v.* Ames, 39 Minn. 179, 39 N. W. 308.

Missouri. — Small *v.* Montgomery, 23 Fed. 707.

Nebraska. — Palmer *v.* Rowan, 21 Neb. 452, 32 N. W. 210, 59 Am. Rep. 844.

New Jersey. — Jones *v.* Knauss, 31 N. J. Eq. 211; Massey *v.* Colville, 45 N. J. Law 119; Dungan *v.* Miller, 37 N. J. Law 182; Halsey *v.* Stewart, 4 N. J. Law 420, 1 So. 366.

New York. — Seaver *v.* Robinson, 3 Duer 622; Hopkins *v.* Coburn, 1 Wend. 294; Thorp *v.* Adams, 58 Hun 603, 11 N. Y. Supp. 41; Merrill *v.* George, 23 How. Pr. 331; Person *v.* Grier, 66 N. Y. 124, 23 Am. Rep. 35; Matthews *v.* Tufts, 87 N. Y. 568; Jenkins *v.* Smith, 57 How. Pr. 171; Sanford *v.* Chase, 3 Cow. 381; Lamkin *v.* Starkey, 7 Hun 479; Sander *v.* Harris, 59 Hun 628, 14 N. Y. Supp. 37; Hollender *v.* Hall, 58 Hun 604, 33 N. Y. St. Rep. 848; 13 N. Y. Supp. 758.

North Carolina. — Ballinger *v.* Elliott, 72 N. C. 596.

Ohio. — Compton *v.* Wilder, 40 Ohio St. 130.

Pennsylvania. — Hayes *v.* Shields, 2 Yeates 222; Miles *v.* McCullough, 1 Binn. 77; Heddeson *v.* Prizer, 9 Phila. 65.

Rhode Island.—Waterman *v.* Merritt, 7 R. I. 345, where the party was attending under a writ of protection.

Tennessee. — Martin *v.* Ramsey, 7 Humph 260.

Vermont. — *In re* Healey, 53 Vt. 694, 38 Am. Rep. 713; Washburn *v.* Phelps, 24 Vt. 506; Hall's Case, 1 Tyler, 274.

Wisconsin. — Moletor *v.* Sinned, 76 Wis. 308, 7 L. R. A. 817, 44 N. W. 1099.

Privilege Should Be Absolute. The privilege of a witness should be absolute. An arrest should not be valid even for the purpose of giving jurisdiction to the court out of which the process issues; more especially where the witness is attending from a foreign state. Sanford *v.* Chase, 3 Cow. (N. Y.) 381.

Attendance as a Party. — "It would be an idle ceremony for a party to sue out process of subpoena for himself to give evidence in his own behalf. His attendance for that purpose is an attendance as a party in a proceeding connected with the trial of the cause, and as such he is exempt from the service of summons." Dungan *v.* Miller, 37 N. J. Law 182.

Agent of Foreign Corporation. An agent of a foreign corporation who attends court in another state for the sole purpose of testifying as a witness for the state in a criminal case is exempt from service upon him, as such agent, of a process against the corporation. Fidelity & Casualty Co. *v.* Everett, 97 Ga. 787, 25 S. E. 734. See also Mulhearn *v.* Press Pub. Co., 53 N. J. Law 153, 11 L. R. A. 101.

Service of Subpoena Not Necessary to Exemption. — The object of affording such immunity being to encourage the voluntary attendance of witnesses from other states, who are beyond the reach of process to compel their attendance, the exemption does not depend upon the service of the subpoena. Malloy *v.* Brewer, 7 S. D. 587, 64 N. W. 1120.

As a Means of Procuring Attendance. — It is often matter of great importance to the citizen, to prevent the institution and prosecution of a suit in any court, at a distance from his home and his means of defense; and the fear that a suit may be commenced there by summons, will as effectually prevent his approach as if a *capias* might be served upon him. This is especially the case with citizens of neighboring states, to whom the power which the court possesses of compelling attendance

exemption does not depend upon the permanency of the foreign residence,[52] and the witness is none the less exempt even though his residence abroad is for the very purpose of avoiding the service of process.[53]

D. SERVICE OF SUBPOENA. — There are a number of cases in the reports where proceedings for attachment against witnesses have been taken for their refusal to obey the process of subpœna served in the very presence of the court, the question of the legality of the service was not raised.[54] The service of the subpœna upon an attorney, while in attendance on business for his clients, was held void;[55] but it has been held also, that a subpœna *duces tecum* may be legally served upon a party while in attendance before the master in the same cause in which he is summoned as a witness by the subpœna.[56]

E. REASON AND SOURCE OF THE RULE. — The power of the court thus to protect suitors and witnesses is said to be a necessary incident to the administration of justice and exists independently of statutory authority.[57]

F. GROWTH AND EXTENT OF THE RULE. — Formerly this priv-

cannot reach. Halsey *v.* Stewart, 4 N. J. Law 420.

52. Cake *v.* Haight, 63 N. Y. Supp. 1043, 30 Misc. 386; Thorp *v.* Adams, 58 Hun 603, 11 N. Y. Supp. 41.

53. Cake *v.* Haight, 30 Misc. 386, 63 N. Y. Supp. 1043.

54. Under Statute. — In Martin *v.* Ramsey, 7 Humph. (Tenn.) 360, it is held under § 3828 of the code, that a witness, while in attendance upon a court, is exempt from the service of any civil process except a summons for witnesses. See also Baker *v.* Compton, 2 Head. (Tenn.) 472; Bowles *v.* Johnson, 1 W. Bl. 36; Jupp *v.* Andrews, Cowp. 845; Pitcher *v.* King, 2 Dowl. & L. 755.

55. Central Trust Co. of New York *v.* Milwaukee St. R. Co., 74 Fed. 442.

56. Norris, *et al. v.* Hassler, 23 Fed. 581.

57. Jones *v.* Knauss, 31 N. J. Eq. 211; Lamkin *v.* Starkey, 7 Hun (N. Y.) 479; Malloy *v.* Brewer, 7 S. D. 587, 64 N. W. 1120; U. S. *v.* Edme, 9 Serg. & R. (Pa.) 147; Halsey *v.* Stewart, 4 N. J. Law 420; Matthews *v.* Tufts, 87 N. Y. 568; Marks *v.* La Societe De l'Union Des Papeteries, 46 N. Y. St. 660, 19 N. Y. Supp. 470.

Universality of the Rule. — That suitors should feel safe at all times to attend, within any jurisdiction outside of their own, upon judicial proceedings in which they are concerned, and which require their presence, without incurring the liability of being picked up and held to answer to some other adverse judicial proceedings against him, is so far a rule of public policy that it has received almost universal recognition wherever the common law is known and administered. Andrew *v.* Lembeck (Ohio), 18 N. E. 483.

General Words of Statute. — Anderson *v.* Rountrie, 1 Pinn. (Wis.) 115. Rev. Stat. of Indiana, 1881, § 312, providing that in cases of non-residents an action may be commenced and summons served in any county in which they may be found, cannot operate to change the rule of privilege. Wilson *v.* Donaldson, 117 Ind. 360, 20 N. E. 250, 10 Am. St. Rep. 48, 3 L. R. A. 266.

In Georgia. — Non-resident suiters and witnesses are privileged from the service of civil process, notwithstanding code § 21, which declares that the jurisdiction of the state and its laws extends to all persons while within its limits, whether as citizens, denizens, or temporary sojourners. Thornton *v.* American Writing Machine Co., 83 Ga. 288, 9 S. E. 679.

ilege embraced only attendance of courts,[58] but has been extended in process of time to all legal tribunals of a judicial character whether strictly courts of record or not, and to every case where the attendance is a duty in conducting any proceedings of a judicial nature.[59] Thus witnesses have been relieved from the service of process while in attendance before commissioners in bankruptcy,[60] arbitrators,[61] masters in chancery;[62] a witness giving a deposition under order of court;[63] before a commissioner in a foreign state appointed by a master;[64] before referees;[65] a party attending a writ of inquiry;[66] and even to bail attending for the purpose of justification.[67]

G. Extent of Protection. — The privilege exempts the witness not only while in attendance but in going to and returning from the place of the hearing.[68] But the privilege will not protect him while he is engaged in transacting private business,[69] or in the pursuit of pleasure after he is discharged from further attendance,[70] or where his return to his home is unreasonably delayed.[71]

58. U. S. *v.* Edme, 9 Serg. & R. (Pa.) 147.

59. U. S. *v.* Edme, 9 Serg. & R. (Pa.) 147.

60. Matthews *v.* Tufts, 87 N. Y. 568; Arding *v.* Flower, 8 T. R. 534; *Ex parte* Byne, 1 Ves. & B. 316; *Ex parte* King, 7 Ves. Jr. 312.

61. Sanford *v.* Chase, 3 Cow. (N. Y.) 381; Spence *v.* Stewart, 3 East 89; Randall *v.* Guney, 1 Chitty 679.

62. Nichols *v.* Harton, 4 McCrary 567, 14 Fed. 327; First Nat. Bank of St. Paul *v.* Ames, 39 Minn. 179, 39 N. W. 308; Larned *v.* Griffin, 12 Fed. 590; Scott *v.* Curtis, 27 Vt. 762; Vincent *v.* Watson, 1 Rich. L. 194; Plimpton *v.* Winslow, 9 Fed. 365; Bridgdes *v.* Sheldon, 7 Fed. 17; Dungan *v.* Miller, 8 Vroom (N. J. Law) 182.

63. U. S. *v.* Edme, 9 Serg. & R. (Pa.) 147; Wood *v.* Neale, 5 Gray (Mass.) 538.

64. Bridges *v.* Sheldon, 7 Fed. 17.

65. Walters *v.* Rees, 4 Moore 34; Clark *v.* Grant, 2 Wend. (N. Y.) 257.

66. Rimmer *v.* Green, 1 M. & S. 638.

67. Sanford *v.* Chase, 3 Cow. 381; Person *v.* Grier, 66 N. Y. 124, 23 Am. Rep. 35; Seaver *v.* Robinson, 3 Duer (N. Y.) 622; Richards *v.* Goodson, 2 Va. Cas. 381; Merril *v.* George, 23 How. Pr. 331; Frisbie *v.* Young, 11 Hun 474; Palmer *v.* Rowan, 21 Neb. 452, 59 Am. Rep. 844, 32 N. W. 210; Scott *v.* Curtis, 27 Vt. 762; Bolgiano *v.* Lock Co., 73 Md. 132, 20 Atl. 788, 25 Am. St. Rep. 582.

68. Reasonable Time Should Be Allowed for Returning. — Palmer *v.* Rowan, 21 Neb. 452, 59 Am. Rep. 844, 32 N. W. 210; *Ex parte* Hall, 1 Tyler (Vt.) 274; Brett *v.* Brown, 13 Abb. Pr. N. S. (N. Y.) 295; Sherman *v.* Gundlach, 37 Minn. 118, 33 N. W. 549; Bolgiano *v.* Lock Co., 73 Md. 132, 20 Atl. 788, 25 Am. Rep. 582; Sadlinger *v.* Adler, 2 Robt. (N. Y.) 704; Hays *v.* Shields, 2 Yeates (Pa.) 222; Smithe *v.* Banks, 4 Dall. (U. S.) 328.

69. Smithe *v.* Banks, 4 Dall. (U. S.) 328; Finch *v.* Galligher, 25 Abb. N. C. 404, 12 N. Y. Supp. 487.

70. Finch *v.* Galligher, 25 Abb. N. C. 404, 12 N. Y. Supp. 487.

71. Unreasonable Delay. — But where it appeared that the witness' delay in returning home was unnecessarily prolonged, and that, at or about the time of the service of the process, he was attending to business of a private nature, it was held that he had forfeited his privilege of exemption and his motion to set aside the process was denied. Woodruff *v.* Austin, 15 Misc. 450, 37 N. Y. Supp. 22.

H. Witnesses Coming Into County. — In some states it has been held that a witness who is a resident of the state is protected only from arrest on civil process while attending as a witness in a county other than that of his residence.[72] But in other states such witnesses may be relieved also from the service of process for the commencement of an action.[73]

I. While Passing Through a State. — It has been held that a foreign witness is not exempt from the service of summons, while traveling through an intermediate state on his way to a foreign state as a witness.[74]

J. Necessity of Subpoena. — The general rule seems to be that a resident witness in order to be entitled to protection must be in attendance in obedience to a subpœna.[75] But it has been held that compulsory attendance is not necessary to the exemption.[76]

K. Privilege Not a Shield for Wrong. — But the privilege thus extended to non-residents cannot avail to protect a party from the service of process for the commencement of an action for damages for maliciously bringing the action in which the party is attending as a party plaintiff.[77]

72. *California.* — Page *v.* Randall, 6 Cal. 32.

Connecticut. — Bishop *v.* Vose, 27 Conn. 1.

Kentucky. — Legrand *v.* Bedinger, 4 T. B. Mon. 539; Catlett *v.* Morton, 4 Litt. 122.

Missouri. — Christian *v.* Williams, 111 Mo. 429, 20 S. W. 96.

Rhode Island. — Baldwin *v.* Emerson, 16 R. I. 304; Waterman *v.* Merritt, 7 R. I. 345; Ellis *v.* DeGarmo, 17 R. I. 715, 19 L. R. A. 560, 24 Atl. 579.

Vermont. — Booraem *v.* Wheeler, 12 Vt. 311.

73. *Michigan.* — People *v.* Judge Sup. Ct., 40 Mich. 729; Mitchell *v.* Circuit Judge, 53 Mich. 541, 19 N. W. 176.

Nebraska. — Palmer *v.* Rowan, 21 Neb. 452, 32 N. W. 210, 59 Am. Rep. 844.

New Jersey. — Massey *v.* Colville, 45 N. J. Law 119.

Pennsylvania. — Miles *v.* McCullough, 1 Binn. 77; Hayes *v.* Shields, 2 Yeates 222; U. S. *v.* Edme, 9 Serg. & R. 147.

74. Holyoke & South Hadley Falls Ice Co. *v.* Ambden, 55 Fed. 593, 21 L. R. A. 319.

75. Hardenbrook's Case, 8 Abb. Pr. 416; *Ex parte* McNeil, 6 Mass. 265; Rogers *v.* Bullock, 2 Pen. (N. J. Law) 109; Cole *v.* McLellan, 4 Hill (N. Y.) 59; Pollard *v.* Union Pacific R. Co., 7 Abb. Pr. N. S. 70.

Subpoena Must Be Previously and Duly Served. — A witness to be entitled to protection from arrest must be necessarily attending court, or going to or from it under a subpoena "previously and duly executed." It is not sufficient to show that he was so connected with the suit and had such a relation to it, as rendered his attendance necessary, where the facts shown are repugnant to the idea held out of his being in attendance as a witness. Rogers *v.* Bullock, 3 N. J. Law 109.

76. Dixon *v.* Ely, 4 Edw. Ch. 557, 6 L. Ed. 973; U. S. *v.* Edme, 9 Serg. & R. (Pa.) 147.

77. If a non-resident party brings an attachment suit in the state of Maryland and comes into the state to testify as a witness therein, he is not privileged, while in attendance, from the service of summons for the commencement of an action for damages for maliciously causing the attachment. Having failed in the attachment suit and the defendant therein having sued him to ascertain the damages so that he could avail himself of a suit on the bond to make himself whole, the plaintiff in the attachment suit must be held

L. Character of Privilege. — The privilege, is at most, a conditional right of the witness. He may avail himself of it or not as he pleases. In all cases the protection is limited to the fact of the person so arrested being entitled to be discharged by *habeas corpus* or on motion.[78] Hence the arrest is not void, but voidable,[79] and the privilege may be waived by some affirmative action of the party,[80] or by laches.[81]

M. What Court May Grant Relief. — The court from which the process issues may relieve party or witness from the service, or the application may be made to the court whose prerogative has been violated,[82] either of which courts may relieve the party or witness, as it is for the protection of the party that the courts interfere in such cases, that he may not be unwarrantably forced to trial in a local court to whose process he was not properly subject, and not simply for the dignity of the court; and the state courts may protect their suitors and witnesses from federal interference,[83]

to have waived his right, if he had any, to exemption from summons, and should at least be put in the same and no worse position than resident suitors would be under like circumstances. Mullen *v.* Sanborn, 79 Md. 364, 29 Atl. 522, 25 L. R. A. 721.

78. Smith *v.* Jones, 76 Me. 138; Land Title and Trust Co. *v.* Crump, 16 Pa. Co. Ct. R. 593.

79. *England.* — Kinder *v.* Williams, 4 Term R. 377; Cameron *v.* Lightfoot, 2 W. Black 1190.

United States. — Gyer *v.* Irwin, 4 Dall. 107; Green *v.* Bonaffon, 2 Miles 219.

Arkansas. — Fletcher *v.* Baxter, 2 Ark. 224.

Massachusetts. — Wilmarth *v.* Burt, 7 Metc. 257.

Michigan. — People *v.* Judge Superior Ct., 40 Mich. 729.

New York. — Sperry *v.* Willard, 1 Wend. 32; Stewart *v.* Howard, 15 Barb. 26; Randall *v.* Crandall, 6 Hill 342.

Pennsylvania. — Fox *v.* Wood, 1 Rawle 143.

Rhode Island. — Watterman *v.* Merritt, 7 R. I. 345.

Vermont. — Washburn *v.* Phelps, 24 Vt. 506.

80. In Farmer *v.* Robbins, 47 How. Pr. (N. Y.) 415, it was held that the giving of bail and then waiting twenty-two days before applying for his discharge, amounted to a waiver of the privilege. See also Petrie *v.* Fitzgerald, 1 Daly 401; Brown *v.* Getchell, 11 Mass. 11; Fletcher *v.* Baxter, 2 Ark. (Vt.) 24. But in Washburn *v.* Phelps, 24 Vt. 506, it was held that the giving of bail was not a waiver of the privilege, the court saying: "It was not esteemed any good ground for presuming a waiver of privilege from arrest, because a party makes the most expeditious mode of freeing himself." See also Matthews *v.* Puffer, 10 Fed. 606.

81. Waiver by Delay. — Where a non-resident suitor who was garnisheed while in attendance upon the trial of his cause in the state of Georgia, remained silent as to his privilege, filed no answer, and suffered default to be entered against him, and, eighteen months thereafter moved to set aside the judgment, it was held that the motion came too late. Thornton *v.* American Writing Machine Co., 83 Ga. 288, 9 S. E. 679.

82. Bours *v.* Tuckerman, 7 Johns. (N. Y.) 538; People *v.* Judge Superior Court, 40 Mich. 729; U. S. *v.* Edme, 9 Serg. & R. (Pa.) 147.

The Practice More Fit and Decorous. — In Vincent *v.* Watson, 1 Rich. Law (S. C.) 194, it is said to be more fit and decorous in such case of improper arrest of a party or witness, to apply to the court by whose process the arrest was made for the discharge of the prisoner.

and *vice versa*.[84]

83. Federal Interference With State Witnesses. — There is no prerogative in the federal courts by which the power of the state courts to protect their witnesses can be controlled or diminished. U. S. *v.* Edme, 9 Serg. & R. (Pa.) 147.

Even Though the Process Be Criminal. — Even though the form of the process be criminal, as attachment for contempt, and in the name of the United States or the state, if it be only to compel the payment of money, the party is protected from arrest. U. S. *v.* Edme, 9 Serg. & R. (Pa.) 147.

84. Hurst's Case, 4 Dall. 387; Bridges *v.* Sheldon, 7 Fed. 17.

ATTESTATION.— See Acknowledgment; Copies; Deeds; Wills; Records; Private Writings.

ATTORNEY AND CLIENT.

By Clark Ross Mahan.

CROSS-REFERENCES.

Fraud;
Good Faith;
Intent;
Motive;
Principal and Agent;
Privileged Communications.

I. THE RIGHT TO PRACTICE LAW.

1. Judicial Notice. — Where an attorney may, under the statutes of the state, be a member of the bar of an inferior court, and yet not be a member of the bar of the supreme court, the latter court cannot take judicial notice of the members of the bar of the former court.[1]

2. Burden of Proof and Presumptions. — It has been held that the plaintiff in an action to recover for legal services alleged to have been performed by him for the defendant must show his right to practice law as an attorney under the statute regulating such matters; and that the necessity of such proof is not dispensed with by the fact that he has been allowed, without objection, to show he has been a practicing attorney.[2]

When a Record Recites the Appearance of a Party by His Attorneys it will be presumed on appeal that the attorneys so appearing were duly qualified and authorized attorneys of the lower court.[3]

II. DISBARMENT AND SUSPENSION PROCEEDINGS.

1. Proof of Charges. — A. Burden of Proof and Presumptions. — Although a proceeding instituted for the purpose of depriving an attorney-at-law of the right to practice, is not, strictly speaking, a criminal proceeding; yet it is held that the respondent is presumed to be innocent of the charges preferred against him until the contrary appears;[4] accordingly the prosecution has the burden of proof to establish the charges preferred.[5]

Presumption from Refusal to Testify. — The refusal of the respondent in disbarment proceedings to testify on his own behalf raises the legal presumption of the truth of the facts on which the charges preferred are based.[6]

B. Mode of Proof. — a. *In General.* — In proceedings instituted for the purpose of disbarring or suspending an attorney from

1. Clark *v.* Morrison, (Ariz.), 52 Pac. 985.

2. Perkins *v.* McDuffee, 63 Me. 181. *Compare* Miller *v.* Ballerino, 135 Cal. 56, 67 Pac. 1046, 69 Pac. 600.

In Goldsmith *v.* St. Louis Candy Co., 85 Mo. App. 595, it was contended that in order to recover for legal services the plaintiff should have produced a license authorizing him to practice law; but it was held sufficient for the attorney to testify on the trial that he had been a practicing attorney for nearly 30 years.

Fact not in Issue. — An attorney suing for legal services does not have the burden of showing that he was a duly admitted attorney-at-law where no issue as to that fact is raised by the pleadings. Bachman *v.* O'Reilly, 14 Colo. 433, 24 Pac. 546.

3. Clark *v.* Morrison, (Ariz.), 52 Pac. 985.

4. *In re* Wellcome, 23 Mont. 450, 59 Pac. 445. And see *In re* Catron, 8 N. M. 253, 43 Pac. 724.

5. For cases supporting this rule see *post,* note 11.

6. *In re* Randel, 158 N. Y. 216, 51 N. E. 1106. "Such a proceeding," said the court, "is in no sense a criminal proceeding, and the statutory rule of no presumption in such cases does not apply."

the right to practice law, the respondent can be convicted only upon evidence good at common law.[7]

b. *Production of Witnesses.* — And it has been held that this evidence must be delivered if the respondent chooses,[8] in his presence by witnesses, subject to cross-examination by him.[9]

7. Matter of an Attorney, 83 N. Y., 164. And see *In re* Catron, 8 N. M. 253, 43 Pac. 724.

Affidavits. — Where the respondent denies the charge made against him as grounds for the disbarment proceedings the affidavits and papers upon which the proceedings were instituted are not competent evidence upon the issues, but simply perform the office of pleadings or statement of the charges relied upon. They are sufficient to originate the proceedings, but upon the trial of the issues the common law rules of evidence must be observed. Matter of Eldridge, 82 N. Y. 161, 37 Am. Rep. 558. See also *In re* Simpson, 9 N. D. 379, 83 N. W. 541.

Statements by Third Person to Prosecuting Witness. — In *In re* Barnes, (Cal.), 16 Pac. 896, it was held that the charge of having corruptly advised and procured the theft of an important paper could not be proved by the testimony of the party to whom the paper belonged as to what had been told him by the person alleged to have been the medium of the theft.

Testimony of Client Participating with Attorney in Fraudulent Scheme. — A client who has participated in successful fraudulent practices with his attorney is not for that reason incompetent to testify to such practices, as against the attorney in subsequent disbarment proceedings based upon charges growing out of such practices. State *v.* Cadwell, 16 Mont. 119, 40 Pac. 176.

Recitals in Record. — In Dillon *v.* State, 6 Tex. 55, it was held that a recital of a statement in the record of the suit out of which arose the charges against the respondent, of an acknowledgment by him that he had instituted such suit without authority from the plaintiff was not competent evidence on the disbarment proceedings to prove the admissions of the respondent so recited.

Letters Written by Attorney. — In *Ex parte* Cole, 1 McCrary 405, 6 Fed. Cas. No. 2,973, it was held that a proposition by an attorney in a letter to his client that he would control the newspapers and induce them to attack the judge presiding over the court in which their trial was pending was evidence of a purpose on the part of the attorney to improperly influence the judicial action of the judge.

Good Character. — Evidence of the respondent's good character and standing as a lawyer and as a man of integrity in the community is properly received and may be considered; but will not exonerate him from liability for the consequences of the charge preferred where the truth of the latter is fully established by the evidence. People *v.* Betts, 26 Colo. 521, 58 Pac. 1091. See also People *v.* Benson, 24 Colo. 358, 51 Pac. 481.

8. **Waiver of Right.** — In the matter of ———, attorney, 86 N. Y. 563, it was held that although the rule stated in the text was the rule to be observed; yet the right to be confronted with the evidence prescribed was a personal right which the respondent might waive expressly or by tacit acquiescence in the course taken by the court on the hearing: *Citing.*— *Ex parte* Burr, 9 Wheat. 929; Anon., 22 Wend. (N. Y.) 656.

9. Matter of an Attorney, 83 N. Y. 164, *distinguishing*, Matter of Percy, 36 N. Y. 651; Matter of Eldrige, 82 N. Y. 161, 37 Am. Rep. 558; *In re* Simpson, 9 N. D. 379; 83 N. W. 541. *Contra.*—*In re* Wellcome, 23 Mont. 259, 58 Pac. 711.

Commission to Take Testimony. Under the rule stated in the text, it was held in the Matter of an Attorney, 83 N. Y. 164, that it was er-

c. *Variance Between Specifications and Proof.* — It is held that, since a disbarment proceeding is not a criminal prosecution, the fact that the charges specified are not proved precisely as alleged is not fatal.[10]

C. Cogency of Proof. — The burden of proof in disbarment proceedings is required to be sustained by a clear preponderance of evidence establishing the truth of the charge;[11] but it is not necessary that the court be satisfied beyond a reasonable doubt.[12]

ror for the court to grant an order for a commission to take the testimony of the witness out of the state; and that the order was not validated by the insertion in it of a provision reserving until the final hearing of the matter the question as to the right to issue the commission and the legality of the evidence taken thereunder.

10. Bar Assn. of Boston *v.* Greenhood, 168 Mass. 169, 46 N. E. 568.

Compare — State *v.* Chapman, 11 Ohio 430, wherein it was held that although the disbarment of an attorney is largely a matter of discretion of the court, that discretion is by no means an arbitrary one, but is to be applied according to legal rules, as the allegations and proofs are to be considered in the usual way, and that they must correspond substantially at least or the respondent will go acquitted.

11. Truth of Charges Must Be Established by Clear Preponderance of Evidence. — *California.* — *In re* Cobb, 84 Cal. 550, 24 Pac. 293; *In re* Houghton, 67 Cal. 511, 8 Pac. 52.

Colorado.—People *v.* Goddard, 11 Colo. 259, 18 Pac. 338; People *v.* Benson, 24 Colo. 358, 51 Pac. 481; People *v.* Pendleton, 17 Colo. 544, 30 Pac. 1041.

Illinois.—People *v.* Moutray, 166 Ill. 630, 47 N. E. 79; Shufeldt *v.* Barker, 56 Ill. 299.

Iowa.—State *v.* Howard, 112 Iowa 256, 83 N. W. 975.

Louisiana.—State *v.* Fourchy, 106 La. 743, 31 So. 325.

Massachusetts.—*In re* O'Connell, 174 Mass. 253, 262, 53 N. E. 1001, 54 N. E. 558; Bar Ass'n of Boston *v.* Greenhood, 168 Mass, 169, 46 N. E. 568.

Michigan.—*In re* Clink, 117 Mich. 619, 76 N. W. 1; *In re* Balus, 28 Mich. 507.

Missouri.—*In re* Bowman, 7 Mo. App. 569.

Montana.—*In re* Wellcome, 23 Mont. 259, 58 Pac. 711; *In re* Wellcome, 23 Mont. 450, 59 Pac. 445; State *v.* Wines, 21 Mont. 464, 54 Pac. 562.

New Hampshire.—Barker's Case, 49 N. H. 195; Bryant's Case, 24 N. H. 149.

New Mexico.—*In re* Catron, 8 N. M. 253, 43 Pac. 724.

Ohio.—State *v.* Chapman, 11 Ohio 430.

Pennsylvania.—Smith's appeal, 179 Pa. St. 14, 36 Atl. 134.

Utah.—*In re* Evans, 22 Utah 366, 62 Pac. 913.

West Virginia.—State *v.* Schumate, 48 W. Va. 359, 37 S. E. 618; Walker *v.* State, 4 W. Va. 749.

Wisconsin.—Flanders *v.* Keife, 108 Wis. 441, 84 N. W. 878.

Rule Stated. — *In re* O—, 73 Wis. 602, 42 N. W. 221, the court say: "This court has held in effect that where the charges of professional misconduct are such as would if proved subject him to criminal prosecution, the same 'should be established by clear and satisfactory evidence and cannot rest in doubtful uncertain inferences.' *In re* Orton, 54 Wis. 379, 11 N. W. 584. But even where such charges are not of a criminal nature, yet, we apprehend, that in order to justify disbarment they should be established by preponderance of satisfactory evidence."

12. *In re* Wellcome, 23 Mont. 450, 59 Pac. 445. *Compare.*—Matter of attorney, 1 Hun (N. Y.) 321, (where the court after an examination of the evidence decided, in view of respondents positive denial, explained that it was not sufficient to

III. RELATIONSHIP OF ATTORNEY AND CLIENT.

1. Burden of Proof and Presumption. — A. General Rule. — It is now the settled rule that, although the attorney cannot, without special authority admit service of jurisdictional process upon his client, it will still be presumed in all proceedings in which that question may be involved, whether directly or collaterally, and perhaps on appeal or in error,[13] that a regularly licensed attorney at law,[14] who appears for a party litigant, either the plaintiff or the defendant, and whether the latter has been served with process or not, has authority so to act.[15] Accordingly it is held that where

justify the respondent's degradation and punishment; that the proceeding was penal and should be sustained by evidence free from serious doubt); Matter of Mashbir, 44 App. Div. 632, 60 N. Y. Supp. 451, (where the court held that although such a proceeding is not technically a criminal trial, so serious a consequence as the deprivation for life of a man's vocation should only result from grave malpractice, established beyond a reasonable doubt.) And see Matter of Randel, 158 N. Y. 216, 52 N. E. 1106.

The Case Must Be Clear and Free from Doubt, not only as to the act charged, but as to the motive. People *v.* Harvey, 41 Ill. 277.

13. Ricketson *v.* Torres, 23 Cal. 636, (where this presumption was applied by the supreme court on appeal to a notice of appeal signed by an attorney); Lagow *v.* Patterson, 1 Blackf. (Ind.) 327.

In Beal *v.* Harrington, 116 Ill. 113, 4 N. E. 664, it was contended that the lower court had no jurisdiction of one of the defendants upon whom service of process was not had. The record recited that the defendants demurred to the plaintiff's bill, and that, upon the hearing upon the demurrer, the defendants came by their attorneys, but the demurrer was not set out in the record. And it was held that because of the record reciting what it did, and because of the failure of the defendant appealing to incorporate in the record the papers purporting by its recitals to have been filed by him, the presumption should be indulged that the papers would, if produced, sustain the recitals in the record. And see Wyatt *v.* Burr, 25 Ark. 476, where it was held that when the record of a case presented to the appellate court shows that a party appeared in the lower court by attorney, the former court will presume such to have been the fact.

14. Attorney Admitted in Another State. — The presumption of authority as to an entry of appearance by one who has been admitted to practice in the courts of another state, but who has not been formally admitted to practice in the court where the action is pending, but has been accustomed to appear as attorney without ever having been previously questioned, is of the same effect as though he had been formally admitted. Garrison *v.* McGowan, 48 Cal. 592.

15. *Canada.*—Brossard *v.* Chartrand, 8 Quebec Sup. Ct. 518; Wilson *v.* Street, 8 N. Brun. 251.

United States.—Osborn *v.* Bank of U. S., 9 Wheat. 738; Bonnifield *v.* Thorp, 71 Fed. 924; Standefer *v.* Dowlin, Hempst. 209, 22 Fed. Cas. No. 13,284a; Hill *v.* Mendenhall, 21 Wall. 453.

Alabama.—Hilliard *v.* Carr, 6 Ala. 557.

California.—San Luis Obispo *v.* Hendricks, 71 Cal. 242; Holmes *v.* Rogers, 13 Cal. 191; Hunter *v.* Bryant, 98 Cal. 247, 33 Pac. 51; Hayes *v.* Shattuck, 21 Cal. 51; San Francisco Sav. Union *v.* Long, 123 Cal. 107, 55 Pac. 708; Turner *v.* Carruthers, 17 Cal. 431; People *v.* Mariposa Co., 39 Cal. 683.

Colorado.—Williams *v.* Uncompahgre Canal Co., 13 Colo. 469; 22 Pac. 806.

the want of authority is raised, the burden of proof is on the

District of Columbia.—U. S. Elec. Co. *v.* Leiter, 8 Mackey 575, 9 Cent. 655.

Florida.—Seedhouse *v.* Broward, 34 Fla. 509, 16 So. 425.

Georgia.—Bigham *v.* Kistler, 114 Ga. 453, 40 S. E. 303; Dobbins *v.* Dupree, 36 Ga. 108; Saffold *v.* Foster, 74 Ga. 751.

Illinois.—Lawrence *v.* Jarvis, 32 Ill. 304; Famous Mfg. Co. *v.* Wilcox, 180 Ill. 246, 54 N. E. 211; Williams *v.* Butler, 35 Ill. 544; Leslie *v.* Fischer, 62 Ill. 118; Reed *v.* Curry, 35 Ill. 536; Ferris *v.* Commercial Nat. Bank, 158 Ill. 237, 41 N. E. 1118; Harris *v.* Galbraith, 43 Ill. 309; Cohn *v.* Smith, 33 Ill. App. 344; Ruckman *v.* Allwood, 40 Ill. 128; People *v.* Barnett Township, 100 Ill. 332.

Indiana.—Pressley *v.* Lamb, 105 Ind. 171, 4 N. E. 682.

Iowa.—State *v.* Carothers, 1 Greene 464; Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520; Piggott *v.* Addicks, 3 Greene 427, 56 Am. Dec. 547.

Kansas.—Esley *v.* People of Illinois, 23 Kan. 510.

Kentucky.—Louisville, etc., R. Co. *v.* Newsome, 13 Ky. L. Rep. 174; Handley *v.* Statelor, Litt. Sel. Cas. 186.

Louisiana.—Taylor *v.* New Orleans, 41 La. Ann. 891, 6 So. 723; Etie *v.* Cade, 4 La. 383; New Orleans *v.* Steinhardt, 52 La. Ann. 1043, 27 So. 586; Postal Tel. Cable Co. *v.* Louisville, etc., R. Co., 43 La. Ann. 522, 9 So. 119; Succession of Massieu, 24 La. Ann. 237; Succession of Patrick, 20 La. Ann. 204.

Maine.—Penobscot Boom Co. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656; Upham *v.* Bradley, 17 Me. 423.

Maryland.—Henck *v.* Todhunter, 7 Har. & J. 275, 16 Am. Dec. 300; Kelso *v.* Stigar, 75 Md. 376, 24 Atl. 18; Kent *v.* Ricards, 3 Md. Ch. 392; Hager *v.* Cochran, 66 Md. 253, 7 Atl. 462; Dorsey *v.* Kyle, 30 Md. 512, 96 Am. Dec. 617.

Massachusetts.—Steffe *v.* Old Colony R. Co., 156 Mass. 262, 30 N. E. 1137.

Michigan.—Norberg *v.* Heineman, 59 Mich. 210, 26 N. W. 481; Wilcox *v.* Kassick, 2 Mich. 165; Arnold *v.* Nye, 23 Mich. 286; Corbitt *v.* Tinnerman, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586.

Minnesota.—Nelson *v.* Jenks, 51 Minn. 108, 52 N. W. 1081; St. Paul Title and Trust Co. *v.* Thomas, 60 Minn. 140, 61 N. W. 1134.

Mississippi.—Lester *v.* Watkins, 41 Miss. 647; Fisher *v.* Battaile, 31 Miss. 471; Hardin *v.* Hoyo-po-nubby, 5 Cushm, 567.

Missouri.—State *v.* Crumb, 157 Mo. 545, 57 S. W. 1030.

Nebraska.—Vorce. *v.* Page, 28 Neb. 294, 44 N. W. 452; Missouri P. R. Co. *v.* Fox, 56 Neb. 746, 77 N. W. 130; White *v.* Merriam, 16 Neb. 96, 19 N. W. 703.

Nevada.—Deegan *v.* Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

New Hampshire.—Beckley *v.* Newcomb, 24 N. H. 359.

New Jersey.—Easton R. Co. *v.* Greenwich, 25 N. J. Eq. 565; Gifford *v.* Thorn, 9 N. J. Eq. 702; Mutual Life Ins. Co. *v.* Pinner, 43 N. J. Eq. 52, 10 Atl. 184; Norris *v.* Douglas, 5. N. J. Law 817.

New York.—Pozt *v.* Haight, 1 How. Pr. 171; Vincent *v.* Vanderbilt, 10 How. Pr. 324; Republic of Mexico *v.* De Arrangois, 1 Abb. Pr. 437, Ninety-nine Plaintiffs *v.* Vanderbilt, 4 Duer. 632; Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589.

Ohio.—Pillsbury *v.* Dugan, 9 Ohio 117, 34 Am. Dec. 427.

Pennsylvania.—Miller *v.* Preston, 154 Pa. St. 63, 25 Atl. 1041; Betz *v.* Valer, 15 Phila. 324.

South Carolina.—Sanders *v.* Price, 56 S. C. 1, 33 S. E. 731.

South Dakota.—Noyes *v.* Belding, 5 S. D. 603, 59 N. W. 800; Dalbkermeyer *v.* Scholtes, 3 S. D. 183, 52 N. W. 871.

Texas.—Dunman *v.* Hatwell, 9 Tex. 495, 60 Am. Dec. 176.

Vermont.—Proprietors *v.* Bishop, 2 Vt. 231.

Virginia.—Fisher *v.* March, 26 Gratt. 765.

Washington.—Ashcraft *v.* Powers, 22 Wash 440, 61 Pac. 661.

party attacking.[16] But where the appearance is by one who is not

West Virginia.—Low *v.* Settle, 22 W. Va. 387.

Wisconsin. Andrews *v.* Thayer, 30 Wis. 228; Shroudenbeck *v.* Phœnix F. Ins. Co., 15 Wis. 632; Schlitz *v.* Meyer, 61 Wis. 418, 21 N. W. 243.

Statement of Rule. — "The general rule, that an appearance by attorney, whether for the plaintiff or the defendant, if there be no collusion, may be recognized by the adverse party as authentic and valid, I deem important to the safe administration of justice, and well founded in the scheme and plan of such administration in England and this country ever since such officers were commissioned to represent litigants in the courts. Receiving their authority from the court, they are deemed its officers. Their commissions declare them entitled to confidence, and, in a just sense, their license is an assurance, not only of their competency, but of their character and title to confidence. The direct control of the courts over them as officers by way of summary discipline and punishment to compel the performance of their duty, or to suspend or degrade them, is retained and exercised as a guaranty of their fidelity. It is no denial of the rule that, where there are special circumstances calling for its relaxation, the courts may and do relieve from its rigid application. The exception arising from such special circumstances strengthens, as well as recognizes, the rule itself." Hamilton *v.* Wright, 37 N. Y. 502. And in Penobscot Boom Co. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656, the court say: "When one person professes to represent another, or a body corporate, he should exhibit his authority; and attorneys, according to the practice of many courts, appear by warrant of attorney; but in our practice, where the law recognizes certain persons as officers of the court, and entitled as such to represent others, as an official duty, no such warrants have been required; and the statements of the attorney, that he does represent a person, or body corporate, has been deemed sufficient. Should he abuse such power he may be deprived of his privilege, and be subjected to an action for damages by the party injured."

Presumption from Examining Witnesses. — In Kelly *v.* Benedict, 5 Rob. (La.) 138, 39 Am. Dec. 530, this presumption of authority was applied to the case of an attorney appearing before a commissioner taking depositions, and examing the witnesses, on an objection to the admission of the depositions on the ground that they were taken without notice and without interrogatories served, and that the certificate of the commissioner that counsel appeared was extrajudicial.

Appearing for Party in Representative Capacity. — But it cannot be presumed that the attorney for a defendant sued in his individual capacity has authority to stipulate for the substitution of such defendant in the capacity as receiver of a corporation, the real party defendant in interest, and appear for him in such new capacity. The burden in such case is on the plaintiff to show the authority of the attorney appearing. Erskine *v.* McIlrath, 60 Minn. 485, 62 N. W. 1130. The court said that, if for a considerable length of time after such substitution, the action had proceeded without objection on the part of the defendant, it might have been evidence of the attorney's authority to consent to the substitution, or of a ratification of his act in so consenting; but that that was not the case, the fact being that the act of the attorney was repudiated within three days.

Prosecuting Writ of Certiorari. In Burghart *v.* Gardner, 3 Barb. (N. Y.) 64, it was held that retainer of attorneys for the purpose of prosecuting a writ of *certiorari* upon a justice's judgment would not be presumed from the fact that a bond for *certiorari*, purporting to be signed by the client, had been duly approved by the proper officer and filed, and that the justice had made a return to the writ, upon which the cause had been disposed of in the common pleas.

16. *United States.*—Bonnifield *v.*

an attorney at law, but merely by him as agent, there is no such presumption.[17] This presumption, however, is not a conclusive one, but is rebuttable by any competent evidence for that purpose.[18]

B. Rule Applied to Particular Cases. — a. *Course of Business.* — And this presumption of authority to appear is to be especially invoked where it appears that it had been the uniform course of business of a local agent for the non-resident party to employ counsel and pay him out of funds in the agent's hands belonging to the party, for a number of years, with the knowledge and at least the tacit approval of the party, and the attorney in question had been so repeatedly employed.[19]

Thorp, 71 Fed. 924; Rutledge *v.* Waldo, 94 Fed. 265.

Alabama.—Stubbs *v.* Leavitt, 30 Ala. 352.

Georgia.—Bingham *v.* Kistler, 114 Ga. 453, 40 S. E. 303.

Iowa. — State *v.* Carothers, 1 Greene 464.

Kansas.—Reynolds *v.* Fleming, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 85.

New Jersey.—Dey *v.* Hathaway Printing etc. Co., 41 N. J. Eq. 419, 4 Atl. 675; Gifford *v.* Thorn, 9 N. J. Eq. 702.

New York.—Silkman *v.* Boiger, 4 E. D. Smith 236.

Texas.—Holder *v.* State, 35 Tex. Crim. App. 19, 29 S. W. 793.

Wisconsin.—Thomas *v.* Steele, 22 Wis. 207, 99 Am. Dec. 165; Shroudenbeck *v.* Phœnix F. Ins. Co., 15 Wis. 632.

Compare.—Stewart *v.* Stewart, 56 How. Pr. (N. Y.) 256, where it was held that when an attorney has instituted a suit in the name of another who challenges his right to do so, he (the attorney) must affirmatively establish such right. "In holding that the burden of proof rests upon the attorney," said the court in the case, "the ordinary rules of logic and law are followed. He who claims that he has authority or right derived from another must, when it is questioned, prove it; but whether such authority or right relates to the use of another's property or name, the rule is the same." And see Belt *v.* Wilson, 6 J. J. Marsh (Ky.) 495, 22 Am. Dec. 88, (placing upon the attorney such burden when there is reasonable ground to think that he is assuming to act without permission of the party); Tally *v.* Reynolds, 1 Ark. 99, 31 Am. Dec. 737, (to the effect that on a sufficient showing, an attorney whose authority to appear is questioned may be required to show by what authority he does so appear); McAlexander *v.* Wright, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93, holding thus as to an attorney prosecuting an action for the use of another in whose derivation of right to the demand there is a material defect.

See also Colorado Coal & I. Co. *v.* Carpita, 6 Col. App. 248, 40 Pac. 248.

In Dangerfield *v* Thruston, 8 Mart. (N. S.) (La.) 233, it was held that where a party who had been represented without his consent, denies the attorney's authority under oath, the burden of proving the authority is upon his adversary.

17. Fowler *v.* Morill, 8 Tex. 153.

18. Great Western Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Leslie *v.* Fischer, 62 Ill. 118; Bigham *v.* Kistler, 114 Ga. 453, 40 S. E. 303 See also Dillon *v.* Rand, 15 Colo. 372, 25 Pac. 185, from which it would seem that an issue as to the authority of an attorney to enter an appearance when properly raised is to be tried and determined by and under the direction of the court the same as any other issue of fact. In this case affidavits were used pro and con without question as to their competency, the objection going to their authentication.

19. Garrison *v.* McGowan, 48 Cal. 592. And see Bogardus *v.* Livingston, 2 Hilt, (N. Y.) 236, so holding of an attorney who was general coun-

b. *Appearance for Corporation.*—And the mere fact that the party litigant for whom the appearance has been entered is a corporation is no reason for refusing sanction to this presumption.[20]

c. *Appearance for Several Parties.* — And this presumption of authority to appear obtains in actions by[21] or against[22] several parties joined as plaintiffs or defendants, unless some of them object to the proceedings[23] or the adverse party shows affirmatively that the action is unauthorized as to one of them.[24]

d. *Appearance in Justices' Courts.* — It has been held that in justices' courts, where an appearance has been entered for a party by another person, the authority of the latter is not presumed, but must be made to appear in order to bind the party and to give the justice jurisdiction.[25]

sel for the defendant for whom he appeared without objection from the latter, although he knew of the appearance. But in Roselius *v.* Delachaise, 5 La. Ann. 481, 52 Am. Dec. 597, it was held that the presumption of authority does not apply where the party has his own attorneys to manage the case, and it appears that the attorney whose services are in question was secured by other parties in interest.

20. Osborn *v.* United States Bank, 9 Wheat. 738.

21. Bank Commissioners *v.* Bank of Buffalo, 6 Paige (N. Y.) 497.

22. Stubbs *v.* Leavitt, 30 Ala. 352; Schirling *v.* Scites, 41 Miss. 644; Adams *v.* Mowry, 6 Mo. App. 582. And see Lagow *v.* Patterson, 1 Blackf. (Ind.) 327. *Compare.*—Beal *v.* Harrington, 116 Ill. 113, 4 N. E. 664.

Phelps *v.* Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56, where a general appearance for the defendants in an action against a partnership was construed as for the partners, and not as individuals.

In Miller *v.* Alexander, 8 Tex. 36, a cause of action was alleged in the petition and process was prayed against two, but only one was cited, and no answer was filed, but the judgment recited that the parties appeared by attorney and confessed judgment, and judgment was accordingly rendered against "the aforesaid defendants." It was held that the presumption was that, the attorney had authority from both defendants.

23. See Clark *v.* Willett, 35 Cal. 534, where the Court, although recognizing the presumption, held that on the showing there made the cause had been properly dismissed as to one of the plaintiffs as having been instituted without his authority.

24. McKiernan *v.* Patrick, 4 How. (Miss.) 332, 34 Am. Dec. 96.

25. Sperry *v.* Reynolds, 65 N. Y. 179. And see Wilcox *v.* Clement, 4 Denio (N. Y.) 160.

Contra.—Ransom *v.* Jones, 2 Ill. 291, a cause in the Justices' Court raising no question that the rule as to the presumption of authority did not apply in such courts. To same effect Morris *v.* Douglas, 5 N. J. Law 817, where the court says that where the attorney is regularly licensed the presumption is in favor of his authority.

The Reason Seems to Be that there are no attorneys-at-law in those courts. The principle obtaining in courts of record that the authority of attorneys to appear is to be presumed cannot be applied to courts which have no attorneys, and in which any person may appear for a party, and which have not the power to administer relief in the action which is possessed by courts of record.

The New York Code of Civil Procedure, Sec. 2890 provides that in actions before justices of the peace, "the attorneys' authority may be conferred orally or in writing; but the justice shall not suffer a person to appear as attorney, unless his authority is ad-

e. *Action Instituted for State.* — Again, where attorneys other than the regular state's attorneys have instituted an action by and in the name of the state as plaintiff, the presumption of authority is to be invoked.[26]

f. *Actions of Ejectment.*— By statute sometimes, in actions of ejectment any written recognition of the attorney's authority to begin suit proved as therein provided, is presumptive evidence of his authority.[27]

g. *Actions for Professional Services.* — An attorney suing to recover for legal services performed by him has the burden of establishing the fact of the retainer or employment.[28]

mitted by the adverse party, or proved by the affidavit or oral testimony of himself, or another;" and in Syracuse Moulding Co. *v.* Squires, 39 N. Y. St. 824, 15 N. Y. Supp. 321, it was held that the return of the justice showing that the attorney "offered to appear for the plaintiff, and was by him sworn as to his authority to appear" was a sufficient compliance with the Code.

See also Pixley *v.* Butts, 2 Cow. (N. Y.) 421, holding that in such actions the person offering to appear is a competent witness to prove his authority; Andrews *v.* Harrington, 19 Barb. (N. Y.) 343, holding that the oath of the attorney declaring his authority was sufficient to establish that fact.

But in People *v.* Murray, 2 Misc. 152, 23 N. Y. Supp. 160, it was held that the presumption of authority to appear does obtain in an inferior court (in this instance the district court of the city of New York), where by express statute it is only made a misdemeanor to practice in such courts without being admitted to the bar, but all the rules and regulations of courts of record are made applicable thereto as far as can be.

26. Alexander *v.* State 56 Ga. 478; McCauley *v.* State, 21 Md. 536. And see State *v.* Baxter, 38 Ark. 462. See also State *v.* California Min. Co. 13 Nev. 203, where it was held that counsel appearing for the State in tax cases in the supreme court will be presumed to have been authorized by the attorney general to act, in the absence of evidence to the contrary. And see San Luis Obispo *v.* Hendricks, 71 Cal. 242, an action to recover the amount of a license for carrying on a certain business, instituted by the district attorney, where it was held that it was not necessary that it be stated in the complaint that he was directed to bring the action.

27. Strean *v.* Lloyd, 128 Ill. 493, 21 N. E. 533; (Rev. Stat. 1874, vol. 1, p. 445, § 16.)

Under the Wisconsin Statute (Rev. Stat., ch. 141 § 6,) the authority of an attorney to commence an action for the recovery of real property is sufficiently evidenced by writing from the plaintiff's agent requesting the attorneys to commence the action, and it is not necessary to show that the plaintiff had given written authority to the agent. Grignon *v.* Schmitz, 18 Wis. 620.

28. *United States.*—Windett *v.* Union Mut. Life Ins. Co., 144 U. S. 581.

Illinois.—Chicago, St. Charles & Miss R. Co. *v.* Larned, 26 Ill. 218.

Louisiana.—Roselius *v.* Delachaise, 5 La. Ann. 481, 52 Am. Dec. 597; Cooley *v.* Cecile, 8, La. Ann. 51; Michon *v.* Gravier, 11 La. Ann. 596.

Maine.—Prentiss *v.* Kelley, 41 Me. 436 (*dictum*); Wright *v.* Fairbrother, 81 Me. 38, 16 Atl. 330.

Massachusetts.—Caverley *v.* McOwen, 123 Mass. 574.

Nebraska.—Breman-Love Co. *v.* McIntosh, 62 Neb. 522, 87 N. W. 327.

New York.—Hotchkiss *v.* LeRoy, 9 Johns 142; Burghardt *v.* Gardner, 3 Barb. 64; Kellogg *v.* Rowland, 40 App. Div. 416, 57 N. Y. Supp. 1064.

Vermont.—Smith *v.* Dougherty, 37 Vt. 530.

It Is Not Enough Merely to Prove

But whenever it becomes necessary to prove that an attorney has been given special power not embraced in his employment as such an attorney, the burden is on the party asserting that fact to show it the same way that the authority of other agents must be shown.[29]

Presumption from Appearance in Original Suit. — Where it clearly appears, by admission of the party to be charged or otherwise by proper evidence, that the plaintiff in an action for legal services did in fact appear for the defendant and act as his attorney in the original action, the presumption is that he was employed by the party he represented.[30]

h. *Actions for Negligence.*— So, in an action against an attorney to recover damages resulting from his alleged negligence in the management of the plaintiff's litigation, the plaintiff has the burden of establishing the retainer or employment,[31] and the terms thereof.[32]

i. *Presumption from Possession of Claim.* — It has been held

That the Work Was Performed, because it may have been done without authority, or may have been upon the employment of some person other than the party sought to be charged. Wright *v.* Fairbrother, 81 Me. 38, 16 Atl. 330.

Authority of Third Person Retaining Attorney.—Where it is sought to hold liable a party for attorney's fees earned in the foreclosure of a mortgage held by such party, and the employment of the attorney is dependent on whether or not one who had authorized the commencement of such foreclosure proceedings did so with authority from the mortgagee, the burden of proof is on the attorney to establish such authority, and evidence which tends to negative the existence of such authority in the alleged agent is admissible under proper pleadings. Saxton *v.* Harrington, 52 Neb. 300, 72 N. W. 272.

Special Contract. — An attorney seeking to hold his client responsible for his professional services under a special contract therefor has the burden to establish the same. Parker *v.* Esh, 5 Wash. 296, 31 Pac. 754.

Good Faith of Agreement. — An agreement between an attorney and his client by which the attorney is to receive as compensation for his services a certain proportion of any amount that may be recovered is looked upon in the law with suspicion; and an attorney seeking to recover for services rendered in such an agreement must not only make clear proof of the making of the contract but also of its integrity and entire fairness. Allison *v.* Scheeper, 9 Daly (N. Y.) 365; *In re* Mayer's Estate, 84 Hun. 539, 32 N. Y. Supp. 850 and numerous authorities there cited; Haight *v.* Moore, 5 Jones & S. (37 N. Y. Super. Ct.) 161. See also McMahan *v.* Smith, 6 Heisk. (Tenn.) 167.

29. Bigler *v.* Toy, 68 Iowa, 687, 28 N. W. 17. This ruling was made in reference to the right of an attorney who had the claim sued on for collection to receive less than the face of the claim in settlement thereof, the defendant asserting such settlement as a defense to the claim.

30. Shain *v.* Forbes, 82 Cal. 547, 23 Pac. 198.

31. National Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed 621.

32. **Agreement to Pay Costs in Event of Failure.** — In an action against an attorney to recover costs paid by plaintiff in a former suit, on the ground that the defendant had agreed to be responsible therefor in the event of failure, the plaintiff has the burden of establishing the contract as alleged. Wildey *v.* Crane, 69 Mich. 17, 36 N. W. 734.

that the fact of possession of evidence of indebtedness by an attorney is presumptive evidence of his authority to receive payment from the debtor.[33]

2. Mode of Proof. — A. General Rule. — The retainer or employment of an attorney may be shown by evidence that the client consulted him at his office relative to the matter in question,[34] or carried out certain directions,[35] was present and assisted at the trial of the cause while the attorney conducted the same;[36] that the

33. Whelan *v.* Rielley, 61 Mo. 565; Cone *v.* Brown, 15 Rich. (S. C.) 262; Patten *v.* Fullerton, 27 Me. 58.

Possession of Evidence of Indebtedness is Indispensable in order to raise presumption of authority in an attorney to collect the principal, and mere authority to collect interest thereon without any evidence as to such possession does not raise presumption of authority to collect the principal. Smith *v.* Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Williams *v.* Walker, 2 Sandf. Ch. 325.

County Attorney.—In Carroll Co. *v.* Cheatham, 48 Mo. 385 an action by a county to recover money due it in which the defense was payment to the county attorney; it was held that authority of such an attorney to receive the money alleged to have been paid to him would be presumed without such proof in relation thereto.

In succession of Barr, 8 La. Ann. 458, a receipt acknowledging payment of money signed by one as attorney for the plaintiff was excluded on the ground of the absence of proof showing the authority of such person as attorney for the plaintiff; and it was held that the ruling was proper, because the attorney not being one of record for plaintiff, the burden was on the defendant to show relationship between attorney and client as in other cases of agency.

34. Taft *v.* Shaw, 159 Mass. 592, 35 N. E. 88; Pinley *v.* Bagnall, 3 Doug. 155, 26 Eng. C. L. 62.

The Authority of an Attorney Who Has Been Employed by a Managing Officer of a Corporation to appear for it without any previous vote therefor and who has been paid for his services by the corporation is sufficiently proved. Field *v.* Prop. of Com. and Undiv. Land in Nantucket, 1 Cush. (Mass.) 11.

Evidence that one had a claim which he intended to prosecute at law sent for the attorney and employed him to assist as counsel through the whole case, and that the attorney agreed so to do and gave him advice several times, will warrant a finding for the attorney in an action by him for retainer. Perry *v.* Lord, 111 Mass. 504.

Written Instructions to an Attorney to bring a suit and oral instructions to discontinue it under certain circumstances are competent as against the client to prove a retainer and are not to be excluded as privileged communications. Snow *v.* Gould, 74 Me. 540, 43 Am. Rep. 604.

Previous Employment. — In Mabry *v.* Cheadle, (Iowa) 80 N. W. 312, the attorney was permitted to show a previous employment and services rendered thereunder, and also conversations with some of the clients, although there was no direct connection between that employment and the one in issue, and the conversations did not alone tend to show the last employment, the evidence being allowed as tending to explain the relation of the parties and a leading up to the second employment.

A Request in Writing and Addressed to the Attorney, signed by the party sought to be charged as a client, asking for his legal opinion upon a question fully stated therein, is sufficient to justify the attorney in preparing his opinion thereon. Jameson *v.* Butler, 1 Neb. 115.

35. In Robinson *v.* Ware, 34 Ga. 328, it was held that a retainer was established by evidence that the client adopted, signed, and swore to the pleadings prepared by the attorney.

36. Fore *v.* Chandler, 24 Tex. 146; Goodall *v.* Bedel, 20 N. H. 205.

defendant by spoken words, or by his conduct recognized the plaintiff as his attorney,[37] or that the attorney was present and actively participated in the hearing.[38]

In a suit by an attorney to recover for legal services as upon an alleged implied contract, evidence of a special conditional contract is incompetent.[39]

B. PAROL TESTIMONY. — a. *In General.* —The authority of an attorney may be shown by any parol evidence competent for this purpose,[40] unless of course, there is a writing specially authorizing the attorney, in which case the writing itself should be produced.[41]

b. *Testimony of the Client.* — On an issue as to whether or not an attorney had authority to appear as attorney for a party litigant, it is permissible for such party to go on the stand himself and testify on the subject.[42]

c. *Testimony of the Attorney.* — It is very generally held that the authority of an attorney of record, or the want of it, may be proved by the testimony of the attorney himself.[43] And his testi-

In Briggs *v.* Georgia, 15 Vt. 61, an attorney having argued a cause at the suggestion of counsel of record, it was held that his subsequent assent to a proposal of such counsel to make application to his client to engage him in the cause was properly received in evidence to show whether the services were rendered under an expectation of compensation.

37. Jackson *v.* Clopton, 66 Ala. 29; Hotchkiss *v.* LeRoy, 9 Johns (N. Y.) 142.

38. Callender *v.* Turpin, (Tenn.), 61, S. W. 1057.

In Wheeler *v.* Harrison, 94 Md. 147, 50 Atl. 523, an action for legal services, plaintiff being employed by defendant and others to relieve them from subscription to the stock of a corporation, performed services in suits brought against other subscribers, though none was brought against defendant; took depositions over a large extent of country, and did other legal work and prepared to resist all demands against the defendant and after several years procuring release. It was held that the evidence of performance of the services was sufficient.

39. Roche *v.* Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903.

In Miller *v.* Ballerino, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600, an action to recover for legal services, in which it was clearly shown that the defendant did in fact employ the plaintiff to assist the defendant's attorney of record but did not disclose to the plaintiff the fact that it was understood between the defendant and the original attorney of record that the latter was to pay for the plaintiff's services, and his knowledge of such contract being acquired from an affidavit by the defendant in the original action upon an application for allowance for attorney fees, it was held that the contract between the defendant and original attorney of record was properly excluded as immaterial.

40. Rogers *v.* Park, 4 Hump. (Tenn.) 480.

41. See *infra* note 45.

42. Raub *v.* Otterback, 89 Va. 645, 16 S. E. 933; Bender *v.* McDowell, 46 La. Ann. 393, 15 So. 21.

43. Hirschfield *v.* Landman, 3 E. D. Smith (N. Y.) 208; Penobscot Boom Co. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656; Bridgton *v.* Bennett, 23 Me. 420; Berg *v.* McLafferty, (Pa.), 12 Atl. 460; Parkhurst *v.* Lowten, 2 Swanst. 213, 19 Rev. Rep. 63; Levy *v.* Pope, 1 M. & M. 410, 31 Rev. Rep. 743; Folly *v.* Smith, 12 N. J. Law, 139; Woods *v.* Dickinson, 7 Mackey (D. C.) 301; Caniff *v.* Myers, 15 Johns. 246; Gaul *v.* Groat, 1 Cow. 113; Tullock *v.* Cunningham, 1 Cow. 256; Bush *v.* Miller, 13 Barb. 481; Pixley *v.* Butts, 2 Cow. 421. See also Andrews *v.* Harrington, 19

mony in this respect is not open to objection as being within the rule against privileged communications.[44]

C. DOCUMENTARY EVIDENCE. — a. *In General.* — Where the authority of the attorney is in writing, ordinarily the writing itself should be produced.[45]

Barb. 343; Manchester Bank *v.* Fellow, 25 N. H. 302. And see the following cases where such testimony was admitted without objection: Anderson *v.* Hawhe, 115 Ill. 33, 3 N. E. 566; Windmiller *v.* Chapman, 38 Ill. App. 276; Dobbins *v.* Dupree, 39 Ga. 394; Phelps *v.* Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Norberg *v.* Heineman, 59 Mich. 210, 26 N. W. 481; McOlin & St. Louis B. Co. *v.* Slevin, 56 Mo. App. 107; Budd *v.* Gamble, 13 Fla. 165.

The Mere Statement of an Attorney in the verification by him of a petition for a nonresident applicant for the appointment of a committee for the estate of a life convict, to the effect that he is authorized to sign the petition is no evidence of that fact, so as to give the court jurisdiction. *In re* Stephani 75 Hun. 188, 26 N. Y. Supp. 1039.

Failure to Answer Motion.—An attorney may show his authority to enter an appearance, by his own testimony, upon hearing of a motion, notwithstanding he has filed no written answer to the motion. Bridge *v.* Samuelson, 73 Tex. 522, 11 S. W. 539.

Refusal to Answer Question During Argument.—It is proper for an attorney whose authority is being questioned to refuse to answer during argument a question put to him concerning his authority to so appear. Andrews *v.* Thayer, 30 Wis. 228.

Sufficiency of Testimony.—Where the only proof offered by an attorney to establish the retainer claimed by him is his own testimony against which is the testimony of the alleged client directly contradicting that of the attorney and in addition thereto the testimony of witnesses to statements made by the attorney at or near the time in question tending very strongly to contradict the direct testimony of the attorney and equally strong to confirm that of the client, it cannot be held that the attorney has established the contract as claimed. Parker *v.* Esch, 5 Wash. 296, 31 Pac. 754.

In Alabama, a statute (Code 1886, § 868), provides that when required by the court to produce his authority "the oath of the attorney is presumptive evidence of his authority." In Daughdrill *v.* Daughdrill, 108 Ala. 321, 19 So. 185, the authority of the attorney was questioned; and it was held that the oath of the attorney as prescribed by this statute is not conclusive and when the presumption is overcome, it must be proved by legal evidence.

44. Eickman *v.* Troll, 2 Minn. 124, 12 N. W. 347; Brown *v.* Payson, 6 N. H. 443.

45. Bush *v.* Miller, 13 Barb. (N. Y.) 481; Lindheim *v.* Manhattan R. Co., 68 Hun. 122, 22 N. Y. Supp. 685.

In Lockwood *v.* Mills, 39 Ill. 602, an action for ejectment, in answer to a rule upon the attorney to produce the authority under which he acted in bringing the suit, he exhibited a power of attorney, purporting to have been signed by all but one of the parties to the action. There seemed to be five owners of the land, all of whom joined in the execution of the power, but the wife of one of them. It was held that as four out of five of the owners formally acted, and the other consented, although irregularly, the authority was sufficiently shown.

Affidavits.—In Ferris *v.* Com. Nat. Bank, 158 Ill. 237, 41 N. E. 1118, affidavits were offered but held inadmissable because not properly authenticated. The court seems not to have questioned their competency if otherwise in proper form.

Counter-Affidavits. — Upon a motion to set aside a default upon the ground of want of authority in plaintiff's attorney to prosecute the action counter-affidavits are properly received upon the question of authority. Reed *v.* Curry, 35 Ill. 536.

Letters. — An attorney cannot show his authority by a letter from a third person asking him to appear; and the fact that such third person is himself an attorney is not enough unless it also appears that he is attorney for the party.[46]

Letter Stating Contract. — Letters written by an attorney to his client requesting payment for his professional services and stating the contract under which they were performed to which the client does not reply, or deny the truth of what they contain, are admissible, to show the contract.[47]

The Pocket Docket of an attorney, on which is entered the name of the original litigation in which he acted, of itself furnishes no evidence of his right to charge for his services.[48]

Attorney's Receipt for Claim. — Proof of a retainer or employment may be made by the attorney's receipt for a claim placed in his hands for collection.[49]

b. *Records of Original Litigation.* — The record of the litigation in which the attorney is alleged to have appeared is admissible as tending to show a retainer or employment.[50]

46. Blood *v.* Westbrook, 50 Mich. 443, 15 N. W. 544.

An Attorney Offering in Evidence a Letter of Introduction from a Third Person handed to him by the defendant which states in effect that the defendant wished to employ the attorney in a suit then pending, must also show that the writer was authorized by the defendants to write the letter and that the defendants knew its contents when they delivered it to the plaintiffs. Wright *v.* Gillespie & Co., 43 Mo. App. 244.

A Letter from a Party for Whom Appearance by an attorney was made to the attorney so appearing was used in evidence, the question being not its competency, but rather the sufficiency of the letter as giving authority to so appear, in Eickman *v.* Troll, 29 Minn. 124, 12 N. W. 347.

47. Murphey *v.* Gates, 81 Wis. 370, 51 N. W. 573.

48. Briggs *v.* Georgia, 15 Vt. 61.

49. Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134; Smedes *v.* Elmendorf, 3 Johns. 185. See also Hair *v.* Glover, 14 Ala. 500.

But where the legal inference deducible from the pleadings is that the pleader was the owner of the claim, a receipt by an attorney showing ownership to be in another person is not admissible. Sevier *v.* Holliday, 2 Ark. 512.

50. Stringer *v.* Breen, 7 Ind. App. 557, 34 N. E. 1015; Beneville *v.* Whalen, 14 Daly 508, 2 N. Y. Supp. 20.

Harper *v.* Williamson, 1 McCord (S. C.) 156, wherein the pleadings in the original action were in the attorney's handwriting, and signed and sworn to by him; and it was held that this furnished the highest evidence that could be required that the services were performed at the party's request.

In Indianapolis Chair Mfg. Co. *v.* Swift, 132 Ind. 197, 31 N. E. 800, an action by an attorney for professional services rendered in another action, it was contended that the record in the original cause conclusively showed the attorney to have appeared for and acted solely as the attorney for the president of the corporation, and not as the attorney for the corporation. The name of the attorney appeared to the answer of the corporation as one of the attorneys in that cause, and the attorney brings this action for the value of his services rendered as attorney for the corporation, and he testified as a witness, in his own behalf, that he was employed as the attorney of the corporation and rendered the services for it. It was held that there was no such case presented as would authorize rever-

D. Admissions. — The authority of an attorney is proved by the admission that he was retained by the person for whom the action is brought; although not the nominal party to the action.[51]

3. Cogency of Proof.— A. Proof of Authority. — The authority of an attorney is sufficiently shown by evidence which raises a reasonable presumption of the existence of such authority, although it may not in fact amount to legal proof.[52]

B. Proof of Want of Authority. — But the burden resting upon the party who raises the objection, that the appearance of a party by attorney is without authority, of showing that fact must be sustained by clear and convincing proof.[53]

sal on account of a failure of the evidence to support the verdict.

On an issue between an attorney and an alleged client for whom the attorney appeared in the original litigation as to whether or not the attorney was employed by other parties thereto, it is proper to admit in evidence a pleading filed in the original suit, signed and verified by such an attorney for and on behalf of such third parties as tending to show that the attorney's appearance for them was not merely nominal but that they had claimed to have had substantial interests to protect by the appearance of the attorney for them. White *v.* Esch, 78 Minn. 264, 80 N. W. 976.

In Hale *v.* Ard, 48 Pa. St. 22, it was held that the record of litigation against the alleged client, in which the name of the attorney did not appear, was not admissible for the attorney on an issue as to his retainer.

51. Cartwell *v.* Menifee, 2 Ark. 356.

In Wright *v.* Gillespie & Co., 43 Mo. App. 244, the admission of an employment was implied in a letter offering a sum in compromise of the fee sued for; and it was held that merely because the letter did contain such an offer that did not affect the competency of the letter to prove the employment by such admission.

52. Low *v.* Settle, 22 W. Va. 387; Rogers *v.* Park, 4 Humph. (Tenn.) 480; Bacon *v.* Smith, 1 Brev. (S. C.) 426; Holden *v.* Greve, 41 Minn. 173, 42 N. W. 861; Savery *v.* Savery, 8 Iowa, 217; Sullivan *v.* Susong, 40 S. C. 154, 18 S. E. 268.

A motion by the attorney for the defendant to strike out the name of a plaintiff, based upon a power of attorney given by one of the plaintiffs, will be denied, where the attorney for the plaintiff produces a letter from plaintiff, of a date later than that of the power, authorizing the suit to go on. Petteway *v.* Dawson, 64 N. C. 450.

An Attorney's Affidavit That He Has Authority to appear is not overcome by affidavits on information and belief denying his authority. Bonnifield *v.* Thorp, 71 Fed. 924.

An Affidavit by the Party's Agent that he was directed by his principal to cause the suit to be brought and that in pursuance of that direction he employed said attorney is sufficient. Hughes *v.* Osborn, 42 Ind. 450.

53. Clear and Convincing Proof Necessary.—Dobbins *v.* Dupree, 39 Ga. 394; Garrison *v.* McGowan, 48 Cal. 592; Wheeler *v.* Cox, 56 Iowa 36, 8 N. W. 688; Hunter *v.* Bryant, 98 Cal. 247, 33 Pac. 51; Winters *v.* Means, 25 Neb. 241, 41 N. W. 157, 13 Am. St. Rep. 489; Mutual Life Ins. Co. *v.* Pinner, 43 N. J. Eq. 52, 10 Atl. 184; Kemmerer *v.* Markle, 14 Pa. Co. Ct. 493. And for other cases in which this rule is recognized, but the evidence is held to be insufficient, see People *v.* Mariposa County, 39 Cal. 683 (where the evidence consisted of the affidavit of plaintiff's counsel stating that he was informed and believed that counsel representing defendants had no authority from them); Mendel *v.* Kinnemouth Township, 3 Ky. L. Rep. 139; People *v.* Barnett Township, 100 Ill. 332; Louisville etc. R. Co. *v.* Newsome, 13 Ky. L. Rep. 174; Swift *v.* Lee, 65 Ill. 336; Valle *v.* Picton, 91 Mo. 207,

4. Questions of Law and Fact. — Whether or not an alleged contract, creating relationship of attorney and client, was entered into in a given case, is a question of fact to be determined from all the evidence.[54] So also is the question of the nature and terms of the contract.[55]

IV. LIABILITIES OF ATTORNEY TO CLIENT.

1. Negligence. — A. Burden of Proof. — A client suing his attorney for alleged negligence and want of skill in the management of his affairs as his attorney has the burden of showing, not only the negligence alleged, but also the damages resultant therefrom.[56] Thus, where it is sought to hold an attorney liable

3 S. W. 860; Bender *v.* McDowell, 46 La. Ann. 393, 15 So. 21; Dey *v.* Hathaway Printing Tel. & Tel. Co., 41 N. J. Eq. 419, 4 Atl. 675. *Compare* Clark *v.* Willett, 35 Cal. 534, where the affidavit of one of several plaintiffs to the effect that the action had been commenced without his consent and without his authority was received by the court and held to be sufficient to authorize the court to discontinue the action as to the affiant.

Statement of the Rule.—"There is a strong legal presumption that all acts of an attorney in the progress of a suit are done by the direction of the party whom he assumes to represent. A lawyer is an officer of the court, and the presumption of right acting can always be invoked in support of his action in the courts. When this presumption is supported by the affidavit of the attorney himself, a strong case is made, and it can only be overcome by the production of very satisfactory evidence of want of authority. And the affidavit of the opposite party, the purport of which is that one of the attorney's clients told him that the attorneys were without authority is insufficient for that purpose. Ring *v.* Vogel Paint & G. Co., 46 Mo. App. 374.

54. Playford *v.* Hutchinson, 135 Pa. St. 426, 19 Atl. 1019; Franklin Co. *v.* Layman, 43 Ill. App. 163; Graves *v.* Lockwood, 30 Conn. 276; Briggs *v.* Georgia, 15 Vt. 61; Northern Pac. R. Co. *v.* Clarke, 106 Fed. 794.

55. Broward *v.* Doggett, 2 Fla. 49. See also Strong *v.* McConnel, 5 Vt. 328; Dodge *v.* Janvrin, 59 N. H. 16.

Whether or not the employment was by the client in his individual or representative capacity is a question of fact. Butterfield *v.* Wells, 4 Ont. (Can.) 168.

Where the Contract of an Employment Between Attorney and Client is in Writing it is a question of fact for the jury to determine what the attorney was employed to do; anything upon that subject should be stated to the jury unconditionally and not hypothetically. Hutchinson *v.* Dunham, 41 Ill. App. 107.

56. *United States.*—National Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621.

Arkansas.—Sevier *v.* Holliday, 2 Ark. 512; Pennington *v.* Yell, 11 Ark. 212, 52 Am. Dec. 262.

California—Hinckley *v.* Krug (Cal.) 34 Pac. 118.

Georgia.—Cox *v.* Sullivan, 7 Ga. 144, 50 Am. Dec. 386.

Indiana.—Batty *v.* Fout, 54 Ind. 482.

Mississippi—Hoover *v.* Schakelford, 23 Miss. 520.

New York.—Turner *v.* Van Pelt, 56 N. Y. 417.

South Carolina.—Wright *v.* Ligon, Harp. Eq. 166.

Tennessee.—Bruce *v.* Baxter, 7 Lea 477; Read *v.* Patterson, 11 Lea 430.

Virginia.—Staples *v.* Staples, 85 Va. 76, 7 S. E. 199.

To Charge an Attorney with Negligence in Failing to Set Up a Particular Defense the client must show

for negligence in failing to collect claims entrusted to him, it is incumbent on the client to prove the failure to collect and that such failure was the result of the attorney's negligence.[57]

But after the plaintiff has established a *prima facie* case of negligence, it is then incumbent on the attorney to show matters excusing his conduct.[58]

B. Mode of Proof. — a. *Record of Original Litigation.* — On an issue as to the alleged negligence of an attorney therein, and for the purpose of showing the final determination of the original litigation, the record thereof is competent against the attorney, notwithstanding he had conducted it in another attorney's name.[59]

b. *Opinion Evidence.* — It is held that on an issue as to the alleged negligence of an attorney in the conduct of his client's affairs, the testimony of other attorneys as experts that the attorney was negligent as alleged is admissible.[60]

C. Defense. — In an action against an attorney for the loss of a claim from the alleged negligence of the attorney, any evidence which tends to show that the claim was not so lost is pertinent and it is error to exclude it.[61]

by proper evidence the existence of facts constituting such defense, and that they were susceptible of proof at the trial by the exercise of proper diligence on the part of the attorney. Hastings *v.* Halleck, 13 Cal. 203.

Where an Attorney Withdraws from a Cause on learning that his client denies liability for fees unless in case of success, it will not be presumed that the adverse result was owing to his conduct. Cullison *v.* Lindsay, 108 Iowa 124, 78 N. W. 847.

57. Palmer *v.* Ashley, 3 Ark. 75; Nisbet *v.* Lawson, 1 Ga. 275; Jenkins *v.* Stephens, 60 Ga. 216; Spiller *v.* Davidson, 4 La. Ann. 171; Staples *v.* Staples, 85 Va. 76, 7 S. E. 199. See also Joy *v.* Morgan, 35 Minn. 184, 28 N. W. 237.

58. Bourne *v.* Diggles, 18 Eng. C. L. 348; Moorman *v.* Wood, 117 Ind. 144, 19 N. E. 739; Gould *v.* Blanchard, 29 Nov. Scot. 361.

Receipt for Claim Not Stating Purpose.—In Sneedes *v.* Elmendorf, 3 Johns. (N. Y.) 185, it was held that where an attorney, sued for negligence in failing to collect a claim in his hands for collection, gave a receipt for the claim without expressly stating the purpose for which he received it, the presumption was that he received it for collection; that the burden was on him to show that he received it specially and for some other purpose, if he would avoid the consequences resulting from such general intendment.

Merely Showing the Debtor to Be Solvent does not raise the presumption that the attorney had collected the claim so as to make it incumbent on the attorney to show that he has not received the money. Peay *v.* Kingo, 22 Ark. 68; Caverley *v.* McOwen, 123 Mass. 574.

59. Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134.

On an issue in an action for legal services as to the plaintiff's alleged negligence and want of skill the record of the original action and the statute touching matters in controversy therein are competent to show the character and nature of his services. Caverley *v.* McOwen, 123 Mass. 574.

60. Pennington *v.* Yell, 11 Ark. 212, 52 Am. Dec. 262; Cochrane *v.* Little, 71 Md. 323, 18 Atl. 698. *Contra.*—Gambert *v.* Hart, 44 Cal. 542; Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134.

61. Huntington *v.* Rumnill, 3 Day (Conn.) 390, so holding of evidence that the client had another remedy for the recovery of the claim which he had successfully pursued, and that the record of such recovery was

But it has been held that negligence by an attorney cannot be excused by evidence in his defense that he consulted prominent attorneys as to how his client's interests could be best conserved, or that the steps taken were the best for that purpose.[62]

2. Failure to Pay Over Proceeds of Collections. — A. BURDEN OF PROOF. — In an action against an attorney to recover money collected in a suit in favor of the plaintiff, the plaintiff has the burden of showing upon all the evidence his right to recover.[63]

proper evidence of that fact, although the attorney was no party to it.

In Godefroy *v.* J., 7 Bing. 413, 20 Eng. C. L. 183, the defendant, an attorney, was sued for negligence for allowing the judgment to go by default in an action which the plaintiff had retained him to defend; it was held that the attorney, after proof of the negligence alleged, might show that the plaintiff had no defense to the original action and that it was not necessary for the plaintiff to begin by showing that he had good defense and so had been damaged by default judgment.

Reduction of Damages. — An attorney sued for negligence in failing to move for a return of property replevied in an action in which the plaintiff in replevin was non-suited and that the writ should be placed on file, cannot reduce damages by evidence that the plaintiff in replevin was the real owner of the property. Smallwood *v.* Norton, 20 Me. 83, 37 Am Dec. 39.

Client's Refusal to Settle Original Case. — In Wildey *v.* Crane, 69 Mich. 17, 36 N. W. 734, an action against an attorney to recover for costs paid by plaintiff in a former suit which the plaintiff claimed the attorney had agreed to assume in case of failure; it was held that the attorney might show that after the judgment against his client in the former action it was possible for his client to have settled the suit by a discontinuance without liability for any costs whatsoever, but that the client had refused to settle.

Reason for Act Alleged as Negligence. — Under a claim of damages by a client resulting from his attorney's alleged negligence in not taking certain steps it is proper for the attorney to show his reason for not so doing, that he had explained to his client the effect of taking or the failure to take such steps and the probable expense connected therewith and that the client stated he did not want any such steps taken. Hinckley *v.* Krug, (Cal.), 34 Pac. 118.

Circumstances Contemporaneous with Negligence Alleged. — In Salisbury *v.* Gourgas, 10 Metc. (Mass.) 442, it was held that an attorney sought to be charged with negligence in failing to make any defense in the original litigation, might give evidence of statements made by him to the court when the case was called for trial, to the effect that he had no defense to make, because his client, although requested, had failed to instruct him relative thereto, subject to a charge to the jury that such statements were not evidence of the truth of the facts stated, but were proper to be considered as showing the circumstances under which the failure to defend occurred.

62. Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134.

63. Ross *v.* Gerrish, 8 Allen (Mass.) 147, so holding, and also that, although the answer admitted a *prima facie* case for the plaintiff, it did not change the burden of proof. See also Kuhn *v.* Hunt, 2 Brev. (S. C.) 164; Hall *v.* Wright, 9 Rich. (S. C.) 392; Baker *v.* Rend, 8 Ill. App. 409.

In Matter of Silvernail, 45 Hun. (N. Y.) 575, a proceeding to compel an attorney to pay over into the county treasury the surplus money in his hands over and above the amount of the debt, it was held that the attorney had the burden of showing such payment, if that was his defense; and that failure by the

And the plaintiff in such an action has the burden of also establishing a demand upon the attorney, and his refusal to pay over or remit as instructed, or such circumstances as will dispense with the necessity of such demand and refusal.[64]

There is authority, however, to the effect that in the absence of proof to the contrary, the law will presume both notice by the attorney that he has collected the money and demand by the client for its payment, made in a proper and reasonable time.[65]

B. DEFENSES. — On a proceeding to compel an attorney to turn over to his client money collected as his attorney, the attorney may show the circumstances under which he had retained the money, in mitigation, if not in justification, of his conduct.[66]

V. COMPENSATION FOR PROFESSIONAL SERVICES.

1. Performance of the Services. — A. BURDEN OF PROOF. — An attorney seeking to recover fees for professional services rendered by him has the burden of establishing that he did in fact render the services alleged.[67] And there is authority to the effect that he

petitioners to prove non-payment was not equivalent to proof of payment by the attorney.

64. *Alabama.*—Mardis *v.* Shackleford, 4 Ala. 493.

Arkansas.—Cummins *v.* McLain, 2 Ark. 402.

Indiana.—Black *v.* Hersch, 18 Ind. 342, 81 Am. Dec. 362.

Missouri.—Beardsley *v.* Boyd, 37 Mo. 180.

New York—Satterlee *v.* Frazer, 2 Sandf. 141; Walradt *v.* Maynard, 3 Barb. 584; People *v.* Brotherson, 36 Barb. 662.

North Carolina.—Wiley *v.* Logan, 95 N. C. 358.

Pennsylvania. — Krause *v.* Dorrance, 10 Pa. St. 462, 51 Am. Dec. 496.

Declarations Made by an Attorney That He Intended to Retain Money Collected by Him for his client to indemnify him on a claim against the client, do not dispense with the necessity of a demand, although such declarations were made to the client's agent or came to his knowledge before suit was brought. Rathbun *v.* Ingall, 7 Wend. (N. Y.) 320.

65. Voss *v.* Bachop, 5 Kan. 59.

66. Dawson *v.* Compton, 7 Blackf. (Ind.) 421, Heffen *v.* Jayne, 39 Ind. 463, 13 Am. Rep. 281.

67. *United States.* — Windett *v.* Union Mut. Life Ins. Co., 144 U. S. 581, 36 L. ed. 551.

California—Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356.

Iowa.—Stanton *v.* Clinton, 52 Iowa 109, 2 N. W. 1027.

Maine.—Wright *v.* Fairbrother, 81 Me. 38, 16 Atl. 330.

Massachusetts.—Caverley *v.* McOwen, 123 Mass. 574.

New York.—Stow *v.* Hamlin, 11 How. Prac. 452. See also Stillman *v.* Northrup, 109 N. Y. 473, 17 N. E. 379.

Pennsylvania — Allen *v.* Gregg, (Pa. St.), 16 Atl. 46.

Tennessee.—Moyers *v.* Graham, 15 Lea 57. See also Bayard *v.* McLane, 3 Harr. (Del.) 139.

An Attorney Seeking to Hold a Husband Liable for Fees for professional services rendered to his wife on the theory that such services were reasonably necessary for the wife, has the burden of proof. Artz *v.* Robertson, 50 Ill. App. 27.

Where the Defendant by His Answer Admits the Services, and some evidence has been given as to their value, the plaintiff has made a *prima facie* case for the recovery of a reasonable compensation which it is the duty of the defendant then to

must show that he has done all that he ought to have done.[68]

When the client by his own conduct puts it out of the power of the attorney to fully perform the services agreed to be performed, it is enough for the attorney to show by a preponderance of the evidence that he was ready, able and willing to comply with his contract.[69]

Abandonment of Employment. — Where the client, during the pendency of the employment, employs another attorney to perform the same service, without notice to the attorney first employed, he must assume the burden of showing that such attorney had himself abandoned the prosecution of the employment, either expressly or by such lack of effort as would reasonably show an abandonment.[70]

New Matter Set Up by Defendant. — Where the defense to a claim for fees for legal services is that it was "agreed" between the parties that the attorney should perform the services in consideration of fees to be received from third persons for the particular services, the defendant has the burden of proof.[71]

meet and overcome. Shain *v.* Forbes, 82 Cal. 577, 22 Pac. 198.

Proof That the Defendant Was Present at the Original Trial and was a witness does not demand a ruling that the burden of proof shifts and is cast upon the defendant to show that the services were not rendered on his account. Wright *v.* Fairbrother, 81 Me. 38, 16 Atl. 330.

Evidence that an attorney was employed to render services does not prove that the services stipulated for have been rendered. The attorney must go further and show the extent of its performance and its value. The law will not presume from mere proof of the undertaking that the party has performed any valuable services under it. Stow *v.* Hamlin, 11 How. Pr. 452.

Services Rendered in Another State. — In Williams *v.* Dodge, 8 Misc. 317, 28 N. Y. Supp. 729, it was held that an attorney suing a client for services alleged to have been rendered in another state must show his right to maintain an action therefor in the state where the services were rendered.

68. In Allison *v.* Rayner, 7 Barn. & C. 441, 14 Eng. C. L. 76, a statute enacted that no suit in law be proceeded in futher than an arrest on *mesne* process by any assignee of an insolvent's estate, without the consent of creditors and the approbation of one of the commissioners of the insolvent court. It was held in an action brought by an attorney to recover his bill of costs incurred in an action at the suit of such an assignee, that it was incumbent on the attorney to prove that the consent of creditors and the approbation of one of the commissioners of the insolvent court had been obtained, or at all events that he had informed his client that such consent was necessary.

In Artz *v.* Robertson, 50 Ill. 27, an action by an attorney against a husband for services rendered to the wife sought to be recovered on the theory that they were necessaries; it was held that the objection that the attorney failed to prove that he was an experienced and competent attorney was without merit in the absence of any proof that he failed to properly attend the case or that he mismanaged it; proof that he was in actual practice is sufficient.

69. Millard *v.* Richland County, 13 Ill. App. 527. See also Majors *v.* Hickman, 2 Bibb (Ky.) 217; Hargis *v.* Louisville Gas Co., 15 Ky. L. Rep. 369, 22 S. W. 85.

70. Craddock *v.* O'Brien, 104 Cal. 217, 37 Pac. 896.

71. Hughes *v.* Dundee Mtge. & Ins. Co., 21 Fed. 169.

B. Mode of Proof. — a. *In General.* — The nature and extent of the services may be proved by any parol evidence competent for that purpose.[72]

Relation of Proof to Pleadings. — Where an action for legal services is based upon a written contract, full performance being alleged and full compensation being asked at the contract price, evidence of a right to recover upon the *quantum meruit* is incompetent.[73]

b. *Books of Account of the Plaintiff.* — It has been held that fees for the professional services of an attorney are proper subject matter for charge by him in his books of account[74] and hence that in an action by him to recover therefor such books are competent evidence for him.[75]

72. Brewer *v.* Cook, 11 La. Ann. 637.

Length of Time Consumed. — Testimony of an attorney suing for services specified in his bill of particulars, that half of his time during 11 years was devoted to the business of the defendant is admissible to show the length of time occupied in the services specified, but not to prove other services than those so specified. Yates *v.* Shepardson, 27 Wis. 238.

Performance by Another Attorney. In an action by an attorney for services to be performed under an express contract in which the defendant shows that the attorney did not perform the services in person, the attorney may show performance of the services by another attorney. Smith *v.* Lipscomb, 13 Tex. 532.

In Manning *v.* Borland, 83 Me. 125, 21 Atl. 837, an action to recover for legal services claimed to have been rendered by the plaintiff in the prosecution of an Alabama claim; it was held that evidence by the defendant that subsequent to the time when the services sued for were claimed to have been performed the plaintiff was expelled from the court and prohibited from prosecuting claims therein was neither admissible nor relevant to the issue.

In Stewart *v.* Robinson, 76 Cal. 164, 18 Pac. 157, the fee sued for was for obtaining a rehearing in a matter pending before an executive department of the general government; and it was held that on an issue as to whether or not the services had been performed it was proper for the plaintiff to show that the practice before such department was by written communications and to further introduce the communications themselves.

An attorney seeking to recover for services alleged to have been rendered in securing a new trial in the original action cannot introduce evidence of services performed by him at and during the new trial itself. Callender *v.* Turpin, (Tenn.), 61 S. W. 1057.

73. Elwood *v.* Wilson, 21 Iowa 523.

74. Block *v.* Reybold, 3 Harr. (Del.) 528.

75. Codmon *v.* Coldwell, 31 Me. 560; Snell *v.* Parsons, 59 N. H. 521. See also Charlton *v.* Lawry, Mart. (N. C.) pt. 1, p. 26.

An entry in an attorney's books of account is competent evidence for the attorney in an action by him against a surety to recover fees for services rendered to the principal as tending to show to whom the credit had been extended. Murphy *v.* Gates, 81 Wis. 370, 51 N. W. 573.

In Pennsylvania the question is not settled. Hale *v.* Ard, 48 Pa. St. 22, where the books were admitted without objection; but the court said that they should hesitate to admit the books on a proper objection, "because," said the court, "unlike physical labor, such a service is incapable of being gauged by the time it occupies or by comparing it with other similar services with which the jury is supposed to be acquainted.

c. *Record of Original Litigation.* — Upon an issue as to whether or not an attorney has performed the services for which he seeks compensation, the record of the original litigation is competent evidence.[76]

C. Questions of Law and Fact. — What services were in fact rendered by the attorney is a question of fact from all the evidence.[77]

2. The Value of the Services. — A. Burden of Proof. — So also an attorney seeking to recover compensation for alleged professional services rendered to and for another has the burden of showing their value.[78] But when the instrument on which the original litigation was based fixed the amount of the attorney's

Nor is it capable of such certainty of description as is essential to an ordinary charge for work done." See also Matter of Fulton, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133; Atwood *v.* Caverley, 1 W. N. C. (Pa.) 82; Rogers *v.* Scullins, 2 W. N. C. (Pa.) 535; Meany *v.* Kleine, 3 W. N. C. (Pa.) 474; Forman's Estate, 7 Pa. Dist. R. 214.

76. See Stringer *v.* Breen, 7 Ind. App. 557, 34 N. E. 1015.

In Lockwood *v.* Brush, 6 Dana (Ky.) 433 the record of the original action was introduced by the attorney on an issue as to whether or not he had performed the services alleged; and it was held that such evidence was proper in so far as it did show such performance, but that because the record also showed the appearance of other attorneys for the same party it furnished apparently conflicting and nearly equiponderant presumptions which the jury alone had the right to weigh and determine.

In Stewart *v.* Robinson, 76 Cal. 164, 18 Pac. 157, the fee sued for was for obtaining a rehearing in a matter pending before an executive department of the general government; and it was held competent for the plaintiff to introduce telegrams and letters from such department showing that a rehearing had been in fact granted.

77. Playford *v.* Hutchison, 135 Pa. St. 426, 19 Atl. 1019.

78. Caverley *v.* McOwen, 123 Mass. 574; Bell *v.* Welch, 38 Ark. 139; Garr *v.* Mairet, 1 Hilt. (N. Y.) 498. And see Nixon *v.* Phelps, 29 Vt. 198; Stanton *v.* Clinton, 52 Iowa 109, 2 N. W. 1027.

It is Not Enough to Prove That the Services Were Rendered; the attorney must prove what the services were worth. Fry *v.* Lofton, 45 Ga. 171.

It is enough for an attorney suing for legal services to show in general terms the proceedings of the court, of the time occupied in the performance of any part of the services by which their value was enhanced and the value of the whole or in detail as he may elect. But he is not required to show the value of each item charged. Garfield *v.* Kirk, 65 Barb. (N. Y.) 464.

In New York prior to the code the rule was that the amount of costs taxed was the measure of compensation to the attorney as between him and his client. McFarland *v.* Crary, 8 Cow. 253; Brady *v.* New York, 1 Sandf. 569, 583. But by the code this rule was changed and proof of the value of the services is required. Garr *v.* Mairet, 1 Hilt. (N. Y.) 498; Easton *v.* Smith, 1 E. D. Smith 318; Stowe *v.* Hamlin, 11 How. Pr. 452; Moore *v.* Westervelt, 3 Sandf. 762; Garfield *v.* Kirk, 65 Barb. 464.

In New Jersey an attorney cannot maintain an action against his client for fees unless he can show the express agreement upon the part of that client to pay the specified fee fixed upon as such. Hopper *v.* Ludlum, 41 N. J. Law 182. See also Schomp *v.* Schenck, 40 N. J. Law 195, 29 Am. Rep. 219.

compensation, it is not necessary for the attorney to show that such compensation so fixed was reasonable.[79] And where a client admits that the attorney rendered the services sued for, and that they were worth the sum claimed, but that the services were rendered gratuitously he has the burden of showing that fact.[80]

B. Mode of Proof. — a. *In General.* — Of course, in proving the value of the professional services, if the retainer or employment expressly fixes the amount to be paid by the client, the measure of recovery is the amount so fixed, and evidence that it is a reasonable fee is inadmissible.[81]

But controversies between attorney and client in respect of the claim of the attorney for compensation for his professional services, most usually arise where there has been no previous agreement between them fixing the amount; and the inquiry then is, what would be a reasonable fee for the services rendered and what evidence may be resorted to by either party for the purpose of reaching a just and proper solution of that question, as illustrated by the cases set out in the note below.[82]

79. Dorn *v.* Ross, 177 Ill. 225, 52 N. E. 321. The court said that where the parties have expressly contracted for a fixed amount for attorney's fees and that contract appears in evidence it cannot be said that there is no proof of the reasonableness of such an amount; and accordingly held that it was not necessary that a witness should compute the amount due and testify to it in order to authorize a finding for the attorney.

80. Kelly *v.* Houghton, 59 Wis. 400, 18 N. W. 326.

81. White *v.* Lueps, 55 Wis. 222, 12 N. W. 376.

Note Given for Fees. — In an action by an attorney on a note given for legal services performed by him for the defendant the attorney cannot give evidence as to the value of the services; he is entitled to recover the amount of the note or not recover at all. Pennington *v.* Nave, 15 La. 323.

In Powers *v.* Rich, 184 Pa. St. 325, 39 Atl. 62, it was held that an attorney suing for services on an alleged contract to conduct a certain litigation only a part of which the client permitted the attorney to perform, the attorney could not give evidence as to what would have been the value of his services had he been allowed to conduct to the end the litigation which he had commenced.

Failure of Consideration. — In an action by an attorney for services rendered under an express contract the defendant may show failure of consideration for the contract by evidence that the attorney did not perform the services agreed upon. Smith *v.* Lipscomb, 13 Tex. 532.

Ex Parte Taxation of Fees. — In an action to recover the amount of an attorney's fee bill taxed *ex parte*, and without any copy thereof or notice of taxation, the bill is not conclusive evidence of the services charged. Cook *v.* Stilson, 3 Barb. (N. Y.) 337.

82. **In an Action Upon a Quantum Meruit** for services rendered by an attorney, evidence as to what would be a reasonable contingent fee for the services rendered is inadmissible. Ellis *v.* Woodburn, 89 Cal. 129, 26 Pac. 963. In this case it was held also that where an express contract for a contingent fee was admitted, and the only dispute was as to the amount thereof, such evidence might be relevant upon the probabilities of the case, but as the controversy in that case was whether there was any agreement at all to pay such a fee, such evidence was not admissible.

Amount Contingent on Success. On an issue as to the value of legal services of attorneys who in the

Repeated Declarations by the Client declaring his readiness to allow

event of success were to receive what their services were worth it is proper to ask the witnesses to state what would be a reasonable fee for the services rendered contingent on their success. Walbridge *v.* Barrett, 118 Mich. 433, 76 N. W. 973.

Retainer Included. — In Knight *v.* Russ, 77 Cal. 410, 19 Pac. 698, assumpsit by an attorney for the value of legal services, it was held that the value of the retainer was included in the cause of action, though not specified in the complaint, and might be proved under an issue tendered as to the value of the services.

Attorney Approached by Opposite Party. — On a trial for an action to recover for legal services the attorney cannot show for the purpose of estimating the value of his services that after he was employed by the defendant an attempt was made to retain him on the other side of the litigation; or to show what a reasonable fee would have been had he been so retained and had he conducted the other side. Steenerson *v.* Waterbury, 52 Minn. 211, 53 N. W. 1146. "If entitled to anything," said the court, "the attorney was entitled to the value of the services performed in defendant's behalf. This value cannot be increased on the one hand by the fact that he could have been retained on the other side of the litigation or decreased on the other hand by the fact that his client's adversary made no effort to employ him, nor can it be measured by any estimate as to what would have been a reasonable fee had he been so employed."

Conversation at Time of Retainer. Evidence by an attorney that in negotiations with his client at the time of his employment in a case prior to the one in which the services in question were rendered, he had a conversation in which he stated to his client what the lawyers about the town had said about the client's having trouble in settling with all the lawyers he ever had is immaterial. Crowell *v.* Truax, 94 Mich. 585, 54 N. W. 384. And in Lamprey *v.* Langevane, 25 Minn. 122, an action to recover for legal services it was held that the defendant could not testify that when he went to see the plaintiff about employing him as an attorney in the original litigation a certain conversation took place between them in reference to the probable cost of defending those actions.

Items With No Charge Carried Out. Where the attorney's bill of particulars contains an item "small and miscellaneous business done" with no amount charged he cannot give evidence as to what the "small and miscellaneous business" was, and as to its value. Yates *v.* Shepardson, 27 Wis. 238.

Counsel Fee. — In Easton *v.* Smith, 1 E. D. Smith (N. Y.) 318, an action for legal services it was held that an admission by an attorney that he had received a certain "counsel fee by agreement," neither proved nor tended to prove that he had agreed to perform the duties of attorney without other compensation.

In Churchill *v.* Bee, 66 Ga. 621, it was held that the amount of fees to be allowed counsel for bringing money into court should be fixed by the jury on proof of the value of their services.

The court in fixing the amount of attorney's fees to be allowed by it should inquire what is customary for such legal services where contracts have been made with persons competent to contract and not what is reasonable, just and proper for the attorney in the particular case. The inquiry should not be what an attorney thinks is reasonable but what is a reasonable charge. Dorsey *v.* Corn, 2 Ill App. 533.

Champertous Agreement. — The fact that an agreement between the attorney and the client stipulating for the fees to be paid is void for champerty should not be allowed to be shown on an issue as to the value of the services rendered. Holloway *v.* Lowe, 1 Ala. 246.

In Louisiana it is held that the court should not receive evidence of

the attorney a certain sum for his services in the event of a successful termination of the litigation are properly taken into consideration in determining the value of those services, as tending to show the client's own estimate thereof.[83]

Inquiry into Merits of Original Litigation. — When an attorney seeking to recover for services rendered has testified that an appeal was taken in the original cause under his client's direction, he cannot be asked upon cross examination whether or not there was anything to argue.[84]

Account Rendered by Attorney. — The fact that an attorney has rendered to his client an account for the services rendered does not

the value of legal services rendered under his eye but should pass upon them as an expert. Baldwin *v.* Carleton, 15 La. 394; Dorsey *v.* His Creditors, 5 Mart. (N. S.) (La.) 399.

Collection of Fees from Third Persons. — On a proceeding by an attorney to recover for legal services rendered to third persons on the alleged credit of the defendant the client may show, after giving evidence of the nature and purpose of the transactions, that the attorney had collected fees from the other parties notwithstanding that the attorney has testified that his charges against the defendant did not include any of the services for which he had received pay from such third persons. Olson *v.* Gjersten, 42 Minn. 400, 44 N. W. 306.

In Garfield *v.* Kirk, 65 Barb. (N. Y.) 464, an action to recover legal services a witness was asked, on cross-examination, by the defendant, "Suppose there was a perfect and clear defense to a suit specified, and the plaintiff, for the sake of peace, should bring about a settlement, what would his services be worth?" It was held that the question was proper on the theory that the defendant claimed that the services were neither difficult nor extraordinary.

Negligence and Want of Skill. The defendant in an action for legal services may under an answer containing a general denial introduce evidence of the attorney's negligence and want of skill. Caverley *v.* McOwen, 123 Mass. 574. "Such evidence," said the court, "is not matter in avoidance of the plaintiff's action, but met the plaintiff's evidence upon an issue on which the burden was on him, and was admissible under the general denial, which included a denial of all the facts which the plaintiff was bound to prove." See also Garfield *v.* Kirk, 65 Barb. (N. Y.) 464 to the effect that when a client is sued by his attorney for services he may show that the attorney did not conduct the original case energetically or skillfully, such evidence not being a bar but limited the right of the attorney to recover.

On an issue as to the value of legal services the client cannot show damages sustained by him because of an action brought against him after the settlement of the litigation in which the services were rendered where it does not appear that such second suit was through the attorney's fault. Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

83. Randall *v.* Packard, 1 Misc. 344, 20 N. Y. Supp. 716, *affirmed* 147 N. Y. 47, 36 N. E. 823.

84. Case *v.* Hotchkiss, 37 How. Pr. (N. Y.) 283. "Whether the case presented to the court any question for its consideration," said the court, "or whether the question presented any merit or not was quite immaterial inasmuch as the attorneys had been employed by the defendant to carry the case to the general term and were thereupon bound to see that it received the attention necessary to obtain the decision of the general term sought after by the appeal. Neither was it material with reference to the question whether an argument was in fact had."

estop him from showing by competent evidence the value of those services.[85]

Order of Proof. — The mere fact that testimony as to the time spent by an attorney in the original litigation is given before there is evidence of his retainer is immaterial.[86]

b. *Professional Standing and Character of Attorney.* — One of the most important elements proper to be considered in determining the value of the professional services of an attorney is his professional standing and character, and hence evidence of that fact is properly received.[87]

85. Romeyn *v.* Campau, 17 Mich. 327.

The Only Pertinence of Such an Act is an admission by the attorney as to the value of the services, capable, however, of explanation. Wilkinson *v.* Crookston, 75 Minn. 184, 77 N. W. 797.

86. This Is Merely a Question of the Order of the Proof which is a matter in the discretion of the trial judge. Sheil *v.* Muir, 22 N. Y. St. 829, 4 N. Y. Supp. 272.

87. *California.*—Knight *v.* Russ, 77 Cal. 410, 19 Pac. 698.

Connecticut.—Robbins *v.* Harvey, 5 Conn. 335.

Indiana.—Blizzard *v.* Applegate, 77 Ind 516.

Iowa.—Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023.

Michigan.—Eggleston *v.* Boardman, 37 Mich. 11, 26 Am. Rep. 491; Chamberlain *v.* Rodgers, 79 Mich. 219 44 N. W. 598; Lungerhausen *v.* Crittenden, 103 Mich 173, 61 N. W. 270.

New York.—Schlesinger *v.* Dunne, 36 Misc. 529, 73 N. Y. Supp. 1014.

Tennessee.—Bowling *v.* Scales, 1 Tenn. Ch. 618.

Texas.—International & G. N R. Co *v.* Clark, 81 Tex. 481, 16 S. W. 631.

Vermont.—Vilas *v.* Downer, 21 Vt. 419.

Statement of Rule. — ' The value of professional services may depend very considerably upon the character and standing of him who performs them. In the first place, there are diversities of gifts, then the period of time passed in the profession, the experience acquired, the degree of skill, the faculty of using professional knowledge, make great differences in individuals. The services of some are worth more than the services of others because they will command more. Should a question arise as to the value of services, in an action brought by an attorney to recover fees, where the nature of the services performed makes the possession of certain qualifications to constitute an important element in the value of those services, evidence of professional standing is clearly admissible, and is entitled to much consideration." Phelps *v.* Hunt, 40 Conn. 97.

The point in Randall *v.* Packard, 1 Misc. 344, 20 N. Y. Supp. 716, *affirmed* 147 N. Y. 47, 36 N. E. 823 was that as affecting the attorney's professional standing, it was proper to show that the attorney had at some time in the past been disbarred in another State

Practice in Particular Litigation. In Harland *v.* Lilienthal, 53 N. Y. 438, it was held that on an issue as to the value of legal services, it is competent to show how often in fact the attorney appeared as such or as associate counsel in cases pending in the court in which the services were rendered; such testimony being relevant and material as showing their skill and experience; that they were recognized in the same court and in the same case for the services claimed for. *Compare* Gaither *v.* Dougherty, 18 Ky. L. Rep. 709, 38 S. W. 2, wherein it was held that evidence as to the amount of legal business the attorney had on hand at the time is irrevelent; Willard *v.* Williams, 10 Colo. App. 140, 50 Pac. 207, wherein it was held that an attorney suing for services, some of which were rendered in the contest of a particular

c. *The Services Rendered.* — Again, the amount and character of the services rendered is a legitimate subject of inquiry to aid in determining their value.[88]

So also the labor and skill involved and the time required is a proper element to be shown for this purpose.[89]

d. *Importance of the Litigation.* — Another important element

character, cannot be asked respecting the number of cases of that character which he has had. "It may easily be true," said the court in this case, "that a lawyer may have had a very extended and large experience in litigations of the gravest character and yet never had a suit of that particular description in that particular court." The court said, however, that if the inquiry had been pursued and other questions put tending in the same direction to elicit facts which would have exhibited the limits of the attorney's experience a different question would have been presented.

The Admission of Evidence of the Reputation for Skill and Ability of the Attorney for the Opposite Party in the litigation was held to be error without harm, if it was error at all, in Blizzard *v.* Applegate, 77 Ind. 516.

88. Clarke *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023; Breaux *v.* Francke, 30 La. Ann. 336; Selover *v.* Bryant, 54 Minn. 434, 56 N. W. 58, 31 L. R. A. 418; Holly Springs *v.* Manning, 55 Miss. 380; Randall *v.* Packard, 147 N. Y. 471, 36 N. E. 823; People *v.* Bond Street Sav. Bank, 10 Abb. N. C. 15.

Facts Which Show the Character of the Services Rendered, that is, the difficulties to be met and overcome, which, with the success of the litigation tended to show the merit or the value of such services may be considered by a witness in estimating the value of those services. Steven *v.* Ellsworth, 95 Iowa 231, 63 N. W. 683.

Services of Other Attorneys. — On an issue between an attorney and client as to fees for legal services the client cannot show that other attorneys rendered services in his behalf in the same matter without further showing that such services lightened the labors of the attorney whose services are in question. Hutchinson *v.* Dunham, 41 Ill. App. 107. See also Matten *v.* Simpson's Estate 24 N. Y. St. 685, 5 N. Y. Supp. 863.

In Garfield *v.* Kirk, 65 Barb. (N. Y.) 464, an action by an attorney for legal services in making a search as to title to real estate in which the defense was that the search would have been made for a much smaller sum by the County Clerk; it was held that the attorney might show that at the time of the search there was no one in the clerk's office competent to make it.

Where an Attorney Has Shown the Time Consumed in rendering the services claimed which he claims was necessary to perform such services, it is proper to receive evidence on behalf of the client showing that the work performed could have been done in less time than that claimed by the attorney. Clarke *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023. See also Stark *v.* Hill, 31 Mo. App. 101.

89. Campbell *v.* Goddard, 17 Ill. App. 385; Humes *v.* Decatur Land Imp. & F. Co., 98 Ala. 461, 13 So. 368.

The testimony of an attorney suing for legal services that he had had consultation with various persons and a great number of witnesses is properly received as descriptive of the character of the services sued for. Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585. And such testimony is not to be stricken out because those services were not specifically stated in his bill of items or declaration. Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

Associate Counsel. — In an action to recover for services rendered by an attorney individually evidence as to the labor of his associate counsel is irrevelant. Wright *v.* Gillespie, 43 Mo. App. 244.

properly to be shown upon an inquiry as to the value of legal services is the importance of the controversy in which the services were rendered, the amount involved, what results hung upon it in other matters, and how other matters affected it and increased its gravity.[90]

90. *Alabama.*—Humes *v.* Decatur Land Imp. & F. Co., 98 Ala. 461, 13 So. 368.

Colorado.—Wells *v.* Adams, 7 Colo. 26, 1 Pac. 698.

Illinois.—Campbell *v.* Goddard, 17 Ill. App. 385. See also Bruce *v.* Dickey, 116 Ill. 527, 6 N. E. 435.

Iowa.—Smith *v.* C. & N. W. R. Co., 60 Iowa 515, 15 N. W. 291; Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023.

Kansas.—Ottawa University *v.* Parkinson, 14 Kan. 159; Ottawa University *v.* Welsh, 14 Kan. 164.

Louisiana.—Rutland *v.* Cobb, 32 La. Ann. 857.

Michigan.—Eggleston *v.* Boardman, 37 Mich. 14; Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

Minnesota. — Selover *v.* Bryant, 54 Minn. 434, 56 N. W. 58, 21 L. R. A. 418.

Mississippi. — Holly Springs *v.* Manning, 55 Miss. 380.

Nevada.—Quint *v.* Ophir Silver Min. Co., 4 Nev. 304.

New York.—Randall *v.* Packard, 147 N. Y. 47, 36 N. E. 823; Harland *v.* Lilienthal, 53 N. Y. 438; Schlesinger *v.* Dunne, 36 Misc. 529, 73 N. Y. Supp. 1014.

Texas.—International & G. N. R. Co. *v.* Clark, 81 Tex. 48, 16 S. W. 631.

Statement of Rule. — "Every lawyer," said the court in Garfield *v.* Kirk, 65 Barb. (N. Y.) 464 "knows that the labor bestowed upon a case is, as a general rule, in proportion to the magnitude of the interest involved. While the labor in drawing a pleading may be no more, when the amount involved is large, than when it is small, yet the labor in the examination of authorities and documents preliminary to drawing it, and the care bestowed upon the pleading itself, would be much greater in one case than in the other. This extra care and labor must be compensated; and it may be measured with some degree of accuracy by the amount involved in the suit. The attorney who does the labor can estimate, himself, the value of his extra labor, but there is no way another lawyer can acquire the means of estimating the value of the services, better than by being informed of the magnitude of the interests involved."

Illustration. — Where an attorney is employed to solicit a pardon for a fugitive from justice, to enable him to return to the State, so that he may be used as a witness in a claim for which suit has been brought, the amount of the claim is properly shown for the consideration of the jury in estimating the value of the attorney's services Kentucky Bank *v.* Combs, 7 Pa. St. 543.

Character and Value of Realty in Litigation. — In Forsyth *v.* Doolittle, 120 U. S. 73, an action to recover for services rendered in effecting the sale of certain lands and in various legal proceedings concerning the title and claims against them; it was held that evidence was properly admitted as to the character of the lands sold, of their possible value as a favorable suburb of a large city near which they were situated.

Character of Claims. — In Christy *v.* Douglas, Wright (Ohio) 485, an attorney offered evidence to show that the claims put in his hands were of a desperate character in order as he said, to deduce his right to one-half for his compensation to be followed by evidence that others had allowed that portion in such cases; but the evidence was held inadmissible because the attorney, if he rendered the services claimed, should show what he had done, and if there was no agreement as to price, he should then call witnesses to show what those services were worth, by showing what others in like business usually charge.

e. *The Result of the Services.* — Again, it is held that the result of an attorney's services is an element in determining their value, and unquestionably an important one to be shown.[91]

And this inquiry is available to the client as well as to the attorney.[92]

Expert Testimony. — The attorney for the opposite party in the original litigation may give his opinion that the plaintiff therein had no cause of action. Aldrich *v.* Brown, 103 Mass. 527. This evidence was admitted on the theory that as the nature and value of the services in the original action were important, it was necessary to ascertain whether the claim therein was plain and of an indisputable or of a doubtful character, and that the testimony of the attorney in question as an expert was proper.

91. Holloway *v.* Lowe, 1 Ala. 246; Haish *v.* Payson, 107 Ill. 365; Randall *v.* Packard, 147 N. Y. 47, 36 N. E. 823; International & G. N. R. Co. *v.* Clark, 81 Tex. 48, 16 S. W. 631; Fillmore *v.* Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

The Reason Why the Result of the Litigation Is One of the Important Factors in considering the value of the attorneys services must be obvious. It not only is some evidence of the usefulness of the services, but for its effect upon the situation of the client, relatively to what it had been, it must be conceded a degree of influence in fixing the amount of the attorney's compensation, which is measured by the nature and incident of the result, in connection with other matters properly to be considered. Randall *v.* Packard, 147 N. Y. 47, 36 N. E. 823. And in Berry *v.* Davis, 34 Iowa 594, the court, in holding such an inquiry proper, said: "Upon the success of the services of this kind their value greatly depends. Besides, it is a criterion of diligence and ability exercised by the attorney which deserves and should receive consideration in estimating the value of his services."

Amount Realized. — In an action by an attorney for services rendered it is not error to allow the attorney to testify to admissions made by his clients as to the amount realized by them by the defeat of the actions which he defended under the employment in question, on the theory that the benefits conferred by his services were proper to be considered in determining the amount of his compensation. MacNiel *v.* Davidson, 37 Ind. 336.

Judgment in Original Litigation. On an issue as to the value of professional services it is proper to receive in evidence the entry of judgment in the original case as proving the amount of the recovery and the result of the litigation. McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107. "While the success of an attorney," said the court, "in a litigated cause and the amount of the recovery therein may not always be an absolute criterion for the amount of his fee, it cannot be said that these facts have no influence whatever upon the sum he should recover. Such facts are material and it would be error to exclude them."

In Haish *v.* Payson, 107 Ill. 365, the original prosecution was one of several prosecutions for infringement of patents and it was held that evidence tending to show that the terms of the client's compromise were more favorable to him than those of which other persons who had been similarly prosecuted had been able to effect, was not admissible.

92. The Fact That an Attorney Failed in His Efforts in the original litigation is properly to be considered in determining the amount of his fees therein. Germania Safety V. & T. Co. *v.* Hargis, 23 Ky. L. Rep. 874, 64 S. W. 516.

Defective Title Passed by Attorney. — On a claim by the attorney for services for examining and passing on title to realty, evidence that the title was subsequently found so defective as to necessitate the purchase of outstanding claims is admissible. Hinckley *v.* Krug, (Cal.), 34 Pac. 118.

But the inquiry is not to be extended to remote contingent consequences.[93]

f. *Fees for Similar Services.* — For the purpose of aiding in determining the value of legal services, it is proper to receive evidence as to the prices usually charged and received for similar services by other persons of the same profession in the same vicinity and practicing in the same vicinity.[94]

In Wildey *v.* Crane, 69 Mich. 17, 36 N. W. 734, under a claim for attorney's fees the attorney showed that the client had placed in his hands for collection a note which he was proceeding to collect when the client recalled the note and arranged the matter with the debtor by taking a new note; it was held incompetent for the client to show in rebuttal of the attorney's testimony as to the value of his services therein and against the attorney's objection that the new note thus taken for the old one had not yet been paid.

93. Robbins *v.* Harvey, 5 Conn. 335; Phelps *v.* Hunt, 40 Conn. 97; Haish *v.* Payson, 107 Ill. 365.

By the Expression "Results Attained," when it is considered that the results attained in the original litigation may be shown as an element to be considered in estimating the value of the legal services, is meant the success or non-success of the litigation and not the ultimate benefit to the client. Stevens *v.* Ellsworth, 95 Iowa 231, 63 N. W. 683.

94. *United States*—Stanton *v.* Embry, 93 U. S. 548, 557.

Alabama.—Holloway *v.* Lowe, 1 Ala. 246.

California.—Knight *v.* Russ, 77 Cal. 410, 19 Pac. 698.

Illinois.—Nathan *v.* Brand, 167 Ill. 607, 47 N. E. 771; Louisville N. A. & C. R. Co. *v.* Wallace, 136 Ill. 87, 26 N. E. 493.

Indiana.—McNiel *v.* Davidson, 37 Ind. 336.

Ohio.—Christy *v.* Douglas, Wright 485.

Pennsylvania.—Thompson *v.* Boyle, 85 Pa. St. 477.

Settlements With Others in Same Litigation. — On a claim by an attorney for fees in defending his client against a criminal prosecution evidence as to what the attorney had settled for with other persons charged in the same indictment and for whom the same services were rendered is proper. Cunning *v.* Kimp, 22 Wis. 509.

In Reynolds *v.* McMillan, 63 Ill. 46, where the proceeding was an amicable partition suit requiring no great legal skill but merely the ordinary attainments of a good clerk; it was held that in fixing the amount of an attorney's fee the inquiry should be directed to what is customary for such legal services where contracts have been made with persons competent to contract.

In Bodfish *v.* Cox, 23 Me. 90, 39 Am. Dec. 611, it was held that although it is competent to show the usual compensation claimed and paid for similar services it must also be shown that the contract of employment had reference to the usage and there must be proof arising out of the situation of parties, their knowledge of the business, their knowledge of the usage or other circumstances from which it must be presumed that they had reference to it.

Evidence as to the Usual Fee for Similar Services in Another State, although accompanied by proof that the usual charges for such services in the two cities are the same is immaterial where there is uncontradicted evidence that there are established usual charges for such services in the city where the services were rendered. Ward *v.* Kohn, 58 Fed. 462, 7 C. C. A. 314. This case also held that evidence of the usual value of similar services in a smaller city in another state was at best but secondary evidence, although accompanied by evidence that the usual charges for the stated services in the two cities were the same; that such evidence could be

But this rule does not permit an inquiry as to the fees received by a particular attorney in a given case.[95] And what an attorney received in a case is no criterion of the value of the services of another attorney in the same case in the absence of any showing that the services were similar, the skill equal and the time spent the same.[96]

g. Client's Financial Standing. — As to whether or not evidence of the client's financial standing is proper on an issue as to the value of legal services rendered for him is not clear. On the one hand there is authority that such evidence cannot be received.[97]

competent only upon proof that there were no usual charges for such services in the city where rendered or that all the witnesses who knew the fees usually obtained for such services in that city were in some way incapacitated to testify.

Evidence of a Schedule of Fees Adopted by a Local Bar for service rendered at that place cannot be given in evidence on an issue as to what is a reasonable fee for services rendered in making a trip to another State. Gaither *v.* Dougherty, 18 Ky. L. Rep. 709, 38 S. W. 2.

95. Eggleston *v.* Boardman, 37 Mich. 11, 26 Am. Rep. 491; Playford *v.* Hutchinson, 135 Pa. St. 426, 19 Atl. 1019; Hart *v.* Vidal, 6 Cal. 56. See also Allison *v.* Scheeper, 9 Daly, (N. Y.) 365.

On a Claim by an Associate Counsel to Recover from His Chief counsel for services rendered evidence as to what the chief counsel received as a fee in the case is inadmissible. Wells *v.* Adams, 7 Colo. 26, 1 Pac. 698.

In Robbins *v.* Harvey, 5 Conn. 335, assumpsit on a *quantum meruit* for legal services, it was held that evidence of another attorney to prove what compensation he had received pursuant to his previous contract for services rendered to a relative of the defendant with the view to the recovery of a similar claim, was inadmissible because the services rendered were not the same and the amount of compensation being determined not by what they were reasonably worth but by his previous special agreement.

Testimony by a Client That Less Was Charged by the Attorneys for the Other Side in the original litigation than was charged by his attorney and that their services were quite as important and of as much or even greater value than those of his attorneys is not admissible. Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

96. Ottawa University *v.* Parkinson, 14 Kan. 159; Ottawa University *v.* Welsh, 14 Kan. 164; Calvert *v.* Coxe, 1 Gill (Md.) 95.

In Compton *v.* Barnes, 4 Gill (Md.) 55, 45 Am. Dec. 115, it was held that the fee paid by a caveator of a will admitted to probate was evidence of the reasonableness of a similar fee allowed to the executor for the caveatee's counsel to maintain it.

Where the attorney for the opposite party in the original litigation has testified to fees received by himself therein he may be asked on cross examination whether he regards the fee so received a usual, customary and ordinary fee for the services so rendered. Levinson *v.* Sands, 74 Ill. App. 273.

97. Robbins *v.* Harvey, 5 Conn. 335; Stevens *v.* Ellsworth, 95 Iowa 231, 63 N. W. 683.

Wealth of Client as Affecting Burden of Services. — In Hamman *v.* Willis, 62 Tex. 507, it was held that the wealth of the client in the original litigation is not to be considered as an element of fixing the value of the attorney's services unless the same increased or diminished the burden of those services. But it is not necessary to charge the jury on this question where there is no evidence in relation thereto and no issue made

On the other hand there are cases in which such evidence has been held proper.[98] There is authority, however, to the effect that evidence of the pecuniary condition of the client may be considered, not to enhance the fees above a reasonable compensation, but to determine whether or not he is able to pay a fair and just compensation for the services rendered.[99]

h. *Pleadings in Original Action.* — As tending to show the character of legal services and as forming a basis from which to determine the value of such services, it is proper to receive in evidence the records and pleadings in the action in which the services were rendered.[1]

upon it. International & G. N. R. Co. *v.* Clark, 81 Tex. 48, 16 S. W. 631.

Wealth as Affecting Importance of Case. — Although the wealth of the client or his ability to pay for services rendered is not to be considered for the purpose of enhancing the value of the services it may be considered as an incident in ascertaining the importance and gravity of the interest involved in the litigation in which the services were rendered. Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023.

98. Randall *v.* Packard, 147 N. Y. 47, 36 N. E. 823.

Rule Stated. — "The intrinsic value of professional services — of those services which tend to protect life, liberty, reputation or property, are not to be measured by the client's standing or his ability to pay, but by their character and importance, the nature and the difficulties of the litigation, the advantages to be gained or lost by its result, the researches to be made, the time and care to be given, the obstacles to be overcome, the intellectual exertion required to unmask pretension and expose errors honestly asserted and earnestly sustained by experience and talent. The humble and the poor — whose life and liberty, whose reputation or property is imperiled, attach as much importance to their protection as does the proud or the wealthy, and the sum of material and intellectual labor required to defend the first, is never less and often more than that required to defend the latter. When the service has been rendered its value is commensurate with the service itself: the compensation alone, although unequal to the labor, must be measured to the client's financial condition." Breaux *v.* Francke, 30 La. Ann. 336.

Condition Subsequent to Retainer. In Daly *v.* Hines, 55 Ga. 470, it was held that while the financial condition at the time of retaining counsel or at the time the services were rendered may be pertinent in graduating the fees, such condition several years later at the time of trial is irrelevant.

99. Ward *v.* Kohn, 58 Fed. 462, 7 C. C. A. 314.

1. Stringer *v.* Breen, 7 Ind. App. 557, 34 N. E. 1015; Cooke *v.* Plaisted, 176 Mass. 374, 57 N. E. 687.

"It is proper," said the court in McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107, "that the jury should know the nature of the suit in which the (services were rendered) the issues in said cause, the amount involved in the litigation and the result of the same. This could best be done by the introduction of the whole record and it was therefore proper to admit it."

The Note Which Formed the Basis of the Original Litigation in which it is claimed that the services were rendered is material and relevant upon an issue as to the value of such services, as a part of the history of the case. McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107.

In Clarke *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023, it was held proper to receive depositions taken by the opposite party in the original litigation for the purpose of showing the character of the contest in which the services were rendered and the na-

And the fact that the attorney whose services are in question was not called into the case until it had progressed beyond the making up of the issues does not affect the competency of such evidence.[2]

i. *Opinion Evidence.* — (1.) **Generally.** — It is a generally recognized rule that the value of the professional services of an attorney may be proved by the testimony of expert witnesses.[3]

Whether Legal Services Have Been Properly Performed according to good practice in a special profession or occupation of a lawyer, are expert questions, and a lawyer may be called upon to testify to such matters as an expert.[4]

(2.) Testimony of the Attorney. — And the attorney whose services are in question is a competent witness on his own behalf to testify to the value of such services.[5]

ture of those services; and the mere fact that it is offered with the testimony given as to the nature of the depositions or as to the time spent or the labor required to meet them which the court rejected will not make the reception of such evidence error.

2. McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107. "It was proper," said the court, "to prove what steps were taken in the case, who took them, and what part (the attorney) had in such work. We cannot say, therefore, that the evidence was irrelevant. To hold that the record was competent only from the time (the attorney) came into the case would be an anomaly indeed."

3. *United States.*—Forsyth *v.* Doolittle, 120 U. S. 73; Sanders *v.* Graves, 105 Fed. 849.

Arkansas.—Bell *v.* Welch, 38 Ark. 139.

Colorado. — Bourke *v.* Whiting, 19 Colo. 1, 34 Pac. 172.

Florida.—Young *v.* Whitney, 18 Fla. 54 (*dictum*).

Illinois.—Haish *v.* Payson, 107 Ill. 368; Louisville N. A. & C. R. Co. *v.* Wallace, 136 Ill. 87, 21 N. E. 493, 11 L. R. A. 787.

Indiana.—Covey *v.* Campbell, 52 Ind. 157.

Iowa.—Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023.

Kentucky.—Gaither *v.* Dougherty, 18 Ky. L. Rep. 709, 38 S. W. 2.

Louisiana.—Succession of Jackson, 30 La. Ann. 463.

Maine. — Bodfish *v.* Fox, 23 Misc. 90, 39 Am. Dec. 611.

Michigan.—Kelley *v.* Richardson, (Mich.), 37 N. W. 514.

New York.—Harnett *v.* Garvey, 66 N. Y. 641; Garfield *v.* Kirk, 65 Barb. 464.

Ohio.—Williams *v.* Brown, 28 Ohio St. 547.

Pennsylvania.—Thompson *v.* Boyle, 85 Pa. St. 477.

The Reason why expert testimony in this class of cases is proper is that the experience and knowledge of the ordinary juror do not qualify him to form an opinion as to the value of services of this character. Allis *v.* Day, 14 Minn. 388.

"What is a fair and reasonable compensation for the professional services of a lawyer cannot in many, if not in most cases be otherwise ascertained than by the opinions of members of the bar who have become familiar by experience and practice with the character of such services." Louisville N. A. & C. R. Co. *v.* Wallace, 136 Ill. 87, 21 N. E. 493, 11 L. R. A. 787.

4. Artz *v.* Robertson, 50 Ill. 27.

5. Ellis *v.* Warfield, 82 Iowa 659, 48 N. W. 1058; Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; Garfield *v.* Kirk, 65 Barb. (N. Y.) 464. See also Germania Safety V. & T. Co. *v.* Hargis, 23 Ky. L. Rep. 874, 64 S. W. 516.

It is competent for an attorney seeking to recover for his services to state the number of days he worked upon the original litigation. Shiel *v.*

Cross-examination. — An attorney testifying as to the value of his services may be asked on cross-examination as to the value of each or any proper ingredient which he may have considered in reaching the value of the whole testified to by him.[6] He may also be asked on cross-examination what was his customary charge per day for appearing before a Justice of the Peace at that time, notwithstanding that no such item as the question refers to is contained in his bill of particulars.[7] And when he has testified in direct examination that his services are reasonably worth a certain amount, it is competent to ask him on cross-examination, questions tending to elicit statements to the effect that by reason of his carelessness or unskillfulness the services are worth less than the amount claimed, or are in fact entirely valueless.[8]

And when an attorney testifies that while the original litigation was pending, an agreement between himself and his client was made, for the payment of "more than an ordinary fee" stating as his reasons therefor that there were complications in the case which compromised him in his profession, he may be compelled to state upon cross-examination what these complications were that led up to the making of the contract.[9]

But it is discretionary with the court to refuse to allow the attorney to be asked on cross-examination as to the amount of his income.[10]

(3.) Qualification of Witness. — The weight of authority is to the effect that a witness who is not a lawyer is not competent to testify as an expert to the value of the professional services of an attorney.[11]

Muir, 22 N. Y. St. 829, 4 N. Y. Supp. 272.

In re Simpson's Estate, 24 N. Y. St. 685, 5 N. Y. Supp. 863, a proceeding by the executors to charge their predecessors in office with fees paid to an attorney on the ground that the fees so paid were excessive it was held that the attorney is not a competent witness to testify to the value of such services and the time devoted therein, under N. Y. code Civ. Proc. Sec. 829, for the reason that he is interested in the claim of the executors to retain the amount which they had paid to them and which was sought to be recovered.

In Anthony *v.* Stinson, 4 Kan. 180, an action by attorneys to recover for their legal services, one of the plaintiffs was offered as a witness to which objection was made on the ground that he, the coplaintiff, was the personal representative of the deceased person and that consequently he was not competent to testify to the employment of himself and his associate by the defendant for services rendered by them and the value thereof because there were transactions occurring during the life time of his associate to which the defendant was not permitted to testify; but it was held that he was a good witness because his adversary was living and in court to contradict him if necessary.

6. Humes *v.* Decatur Land Imp. & F. Co., 98 Ala. 461, 13 So. 368.

7. Phelps *v.* Hunt, 43 Conn. 194.

8. Cranmer *v.* Bldg. & Loan Ass'n., 6 S. D. 341, 61 N. W. 35; Bowman *v.* Tallman, 40 How. Pr. (N. Y.) 1.

9. Bolton *v.* Daily, 48 Iowa 349.

10. Harland *v.* Lilienthal, 53 N. Y. 438.

11. Hart *v.* Vidal, 6 Cal. 56; Fry *v.* Estes, 52 Mo. App. 1. *Compare* McNeil *v.* Davidson, 37 Ind. 336, where-

But even though the witness offered be a lawyer he must be qualified to speak as an expert.[12]

(4.) Examination of Witnesses. — The value of legal services may be shown by opinions of other attorneys based partly upon their personal knowledge of the service performed and partly upon the testimony of the plaintiff and others personally acquainted with them.[13]

But where the witness is not shown to have any personal knowledge of the case in which the services were rendered or of the amount and character of such services, he cannot be asked to give

in it was held that the question as to the value of services by an attorney is not to be regarded as one of science or skill for the testimony of experts, but that any one who knows what the usual and customary charges are for lawyers can testify.

The Mere Fact That the Person Who Is Not a Lawyer Has Had Some Experience in Employing Counsel and has had occasion to settle with them for their fees and knows what services had been rendered and what other attorneys charge for like services does not render the witness competent as an expert. Howell *v.* Smith, 108 Mich. 350, 66 N. W. 218.

Practicing Lawyers Occupy the Position of Experts as to the question of the value of legal services; from the character of their business they are not only in the habit of estimating the value of official services but they enjoy peculiar advantages for so doing; their opinions of such values should therefore be received, not only because they are qualified to perform them, but because it appears to be impracticable to furnish any more satisfactory evidence. Allis *v.* Day, 14 Minn. 388.

12. Judicial Notice will not be taken that a witness offered is a lawyer; that fact must be made to appear. Fry *v.* Estes, 52 Mo. App. 1.

An Attorney of Long Practice Having Knowledge of the Employment by another attorney and of the services renderd by him who was also engaged as one of the attorneys in the case in which the services were rendered is a competent witness to testify to the value thereof. Ottawa University *v.* Parkinson, 14 Kan. 159; Ottawa University *v.* Welsh, 14 Kan. 164.

An Attorney Who Assisted Upon a Trial in the Original Litigation and in preparing the case for appeal is competent to testify to the time spent in preparing and trying the case, his knowledge of what the attorneys did and give his opinion of the value of the services. Walbridge *v.* Barrett, 118 Mich. 433, 76 N. W. 973.

Attorneys Who Live in Different Parts of the State than those where the services were rendered must show their knowledge of such services charged in the vicinity where rendered in order to be competent to testify as to the value of the services rendered there. Stevens *v.* Ellsworth, 95 Iowa 231, 63 N. W. 683. See also Clarke *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023.

Practice in Particular Branch of Law. — It is not necessary to show that an attorney testifying to the value of legal services performed in a criminal prosecution had any particular experience in criminal practice; the fact that he is an attorney in good standing and engaged in the active performance of his profession is sufficient to entitle his opinion to be given in evidence. The weight to be given to such testimony is for the jury and as an aid to such determination it is proper for them to be informed as to the experience or lack of experience in the criminal practice of those giving such opinion, but the competence of their testimony is in no manner dependent thereon. Bachman *v.* O'Reilly, 14 Colo. 433, 24 Pac. 546.

13. Garfield *v.* Kirk, 65 Barb. (N. Y.) 464. See also Beekman *v.* Plattner, 15 Barb. 550.

his opinion as to the value of such services except in reply to a question stating the nature and the amount thereof.[14]

A Hypothetical Question Which Materially Exaggerates the Services

14. Williams *v.* Brown, 28 Ohio St. 547. See also Allison *v.* Scheeper, 9 Daly (N. Y.) 365; Southgate *v.* Atl. & P. R. Co., 61 Mo. 89.

Basis for Question. — A hypothetical question put to an expert witness should not ask for the witness's opinion based upon his knowledge of the services rendered; but should be throughout what its name imports and not a question calling for the personal judgment of the witness upon facts known to him outside of the question and outside of the testimony. Bramble *v.* Hunt, 52 N. Y. St., 92, 22 N. Y. Supp. 842.

Question Based on Complaint in Original Case. — A hypothetical question is not objectionable for asking the opinion based on the character of the cases set out in the complaint filed in the original litigation; nor upon hypothetical cases put to the witness which on comparison corresponds with the real case as set out in the original litigation. Covey *v.* Campbell, 52 Ind. 157.

In Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499, the question stated the services to be the employment of the attorney as associate counsel in the administration, management and securing to his client a certain estate, and was objected that the question asked for the opinion of the witness as to services other than professional but it was held that rightly construed and understood by the witness it did not call for any opinion upon the value of services other than those pertaining to the practice of the law and the giving of legal advice.

Question Based on Unsworn Statement of Attorney. — In Robbins *v.* Harvey, 5 Conn. 335, assumpsit on a *quantum meruit* for legal services the plaintiff offered in evidence the deposition of another lawyer containing a copy of his bill of particulars and the statement in the plaintiff's handwriting subscribed by him showing the circumstances under which the services were rendered, of the final success of the defendant concluding with the declaration that such success was due to the plaintiff alone, accompanied by the testimony of such a lawyer that the amount charged was reasonable under the circumstances stated, and not more than was usually charged for like services where the services were rendered. It was held that although the testimony of such lawyer by itself was not open to objection yet the plaintiff's statement and declaration were inadmissible and that the deposition should have been rejected.

Question Not Stating Place. — A hypothetical question put to an attorney as to the value of professional services is not objectionable for not expressly fixing the place where the services were rendered where it does in fact show that they were rendered at that place. Clarke *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023.

Decision in Original Case. — On the examination of an expert testifying to the value of legal services the client sought to be charged cannot, as a basis for hypothetical question to be put to such expert, read in evidence a portion of the decision of the court in the original action giving their reasons therefor and incorporate an extract therefrom in such hypothetical question: the order of judgment entered on the court's opinion is the best evidence of the adjudication and should itself be produced. Crawford *v.* Tyng, 51 N. Y. St. 153, 21 N. Y. Supp. 1041.

Experience of Attorney. — Attorneys testifying to the value of legal services may be asked on cross-examination whether they regard the sums named by them as the usual customary compensation of an attorney having that limited experience shown to have been possessed by the attorney whose services are in question. Levinson *v.* Sanders, 74 Ill. App. 273.

Rendered, or is unwarranted by any testimony in the case, is objectionable and should not be allowed to be answered.[15]

Basis for Hypothetical Question.— Hypothetical questions asked for the purpose of obtaining the opinion of lawyers as to the value of legal services are not objectionable because counsel have assumed facts as they claim them to exist and an error in such assumption does not render the question objectionable if it is within the probable or possible range of the evidence.[16]

(5.) Conclusiveness of Testimony. — The testimony of experts, however, as to the value of the professional services of an attorney, while entitled to due consideration, is not as matter of law conclusive, even although it be uncontradicted; the issue being one of fact to be determined upon a consideration of all the evidence in the case.[17]

15. Williams *v.* Brown, 28 Ohio St. 547; Wells *v.* Adams, 7 Colo. 26, 1 Pac. 698.

16. Harnett *v.* Garvey, 66 N. Y. 641. See also Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499.

17. *United States.*—Greeff. *v.* Miller, 87 Fed. 33; Sanders *v.* Graves, 105 Fed. 849; Head *v.* Hargraves, 105 U. S. 45.

California. — Hansen *v.* Martin, 63 Cal. 285.

Colorado. — Willard *v.* Williams, 10 Colo. App. 140, 50 Pac. 207; Bourke *v.* Whiting, 19 Colo. 1, 34 Pac. 172.

Florida. — Young *v.* Whitney, 18 Fla. 54.

Illinois. — Dorsey *v.* Corn, 2 Ill. App. 533.

Indiana. — Blizzard *v.* Applegate, 61 Ind. 368.

Iowa. — Schlicht *v.* Stivers, 61 Iowa 746, 16 N. W. 74; Clarke *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023; Arndt *v.* Hosford, 82 Iowa 499, 48 N. W. 981.

Kansas. — Bentley *v.* Brown, 37 Kan. 17, 14 Pac. 435; Anthony *v.* Stinson, 4 Kan. 180.

Kentucky. — Germania Safety V. & T. Co. *v.* Hargis, 23 Ky. L. Rep. 874, 64 S. W. 516.

Louisiana. — Breaux *v.* Francke, 30 La Ann. 336; Succession of Lee, 4 La. Ann. 578; Succession of Macarty, 3 La. Ann. 517.

Michigan. — Walbridge *v.* Barrett, 118 Mich. 433, 76 N. W. 973; Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499.

Minnesota. — Olson *v.* Gjertsen, 42 Minn. 400, 44 N. W. 306.

Missouri. — Rose *v.* Spiers, 44 Mo. 20; Cosgrove *v.* Leonard, 134 Mo. 419, 33 S. W. 777, *affirmed*, 35 S. W. 1137.

New York. — Bramble *v.* Hunt, 52 N. Y. St. 92, 22 N. Y. Supp. 842; Randall *v.* Packard, 1 Misc. 344, 20 N. Y. Supp. 716, *affirmed*, 147 N. Y. 47, 36 N. E. 823; Schlesinger *v.* Dunne, 36 Misc. 529, 73 N. Y. Supp. 1014; Holm *v.* Parmelee-Eccleston Co., 68 N. Y. St. 362, 34 N. Y. Supp. 458; Betteus *v.* Fowler, 19 Jones S. (51 N. Y. Super Ch.) 166; Reeves *v.* Hyde, 14 Daly 431.

Pennsylvania. — Playford *v.* Hutchinson, 135 Pa. St. 426, 19 Atl. 1019.

Texas.— Hammam *v.* Willis, 62 Tex. 507.

Wisconsin. — Moore *v.* Ellis, 89 Wis. 108, 61 N. W. 291.

Statement of Rule. — "It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character and services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of pro-

VI. ATTORNEYS AS WITNESSES.

Although the practice of an attorney testifying on behalf of his client has been characterized as of questionable propriety,[18] yet it is a very generally recognized rule that his competency as a witness in this respect is not affected by the fact of his connection with the cause as attorney of record[19] such fact going only to his credit as a witness.[20]

fessional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry." Head *v.* Hargrave, 105 U. S. 45.

In fixing the value of services rendered by an attorney in a litigation in which he has been engaged the court will not be governed exclusively by the testimony of witness, but will look into the whole record and form an estimate of the usual charges made for similar services. Cullom *v.* Mock, 21 La. Ann. 687; Randolph *v.* Carroll, 27 La. Ann. 467.

In Brewer *v.* Cook, 11 La. Ann. 637, it was held that although opinions of witnesses as to the value of services were not conclusive upon the court, yet where there are facts disclosed in the testimony relative to the matters in controversy in the original suit which corroborated such opinions, an allowance of fees based upon those opinions would not be disturbed.

18. Stratton *v.* Henderson, 26 Ill. 68; Spencer *v.* Kinnard, 12 Tex. 180.

19. *Kentucky.* — Hall & Co. *v.* Renfro, 3 Met. (Ky.) 51.

Maine. — Davis *v.* Gowen, 17 Me. 51.

Massachusetts.— Phillips *v.* Bridge, 11 Mass. 242.

New York. — Robinson *v.* Danchy, 3 Barb. 20; Little *v.* McKeon, 1 Sandf. 607.

North Carolina. — Slocum *v.* Newby, 1 Murph. 423.

Pennsylvania. — Frear *v.* Drinker, 8 Pa. St. 520; Miles *v.* O'Hara, 1 Serg. & R. 32; Boulden *v.* Hebel, 17 Serg. & R. 312; Newman *v.* Bradley, 1 Dall. (U S.) 240.

South Carolina. — Reid *v.* Colcock, 1 Nott. & McC. 592, 9 Am. Dec. 729.

Although an attorney is bound to withhold and will never be compelled to disclose any information which he knows only through professional relation to his client he is not incompetent for that reason as a witness to testify against a client as to other matters. Milan *v.* State, 24 Ark. 346.

An attorney with whom a champertous contract is alleged to have been made for his services in behalf of a plaintiff is competent witness for the complainant to disprove the champerty. The fact of the alleged participation in the champertous contract would go to their credit but does not render them incompetent as witnesses. Benton *v.* Henry, 2 Coldw. (Tenn.) 83.

20. Little *v.* McKeon, 1 Sandf. (N. Y.) 607.

For an Exhaustive Discussion of this question, see article "PRIVILEGED COMMUNICATIONS."

BACKWATER.—See Water and Watercourses.

BAD CHARACTER.—See Character.

BAD FAITH.—See Good and Bad Faith.

BADGE OF FRAUD.—See Fraud.

BAGGAGE.—See Carriers (of Passengers).

BAIL.—See Bonds; Recognizance.

BAILIFFS.—See Accounts and Accounting; Sheriffs and Constables.

BAILMENTS.

By Clarence Thompson.

CROSS-REFERENCES.

Carriers of Goods; Carriers of Passengers;
Damages;
Negligence;
Value.

SCOPE NOTE. — This article treats generally of the contract of bailment, its origin, terms, and breach, and of the distinction between bailments, sale and exchange. It covers all species of bailments except the contracts of carriers, chattel mortgages, and factors, for each which see special articles. Conversion and embezzlement by bailee are omitted herefrom, also treatment of confusion of goods. Under the head of negligence, are given only the rules peculiar to bailments. The general subject is treated elsewhere.

The rules herein laid down apply to all species of bailments except those above mentioned, unless some particular class is specified, which is always done when there is a law peculiar to the particular class, such as innkeepers or warehousemen.

I. DISTINCTION BETWEEN BAILMENTS, SALE AND GIFT.

The question whether a particular transaction constitutes a sale or a bailment seems to be one of mixed law and fact; that is, it is to be determined by the jury under instructions from the court.[1] What the terms of agreement entered into between the parties were, is a question of fact. What the legal effect of the provisions of the contract is, is a question of law.[2]

1. Knights *v.* Piella, 111 Mich. 9, 69 N. W. 92, 66 Am. St. Rep. 375.

The Distinction usually drawn between a bailment and a sale is that in the former the subject of the contract, although possibly in an altered form, is to be restored to the owner, while in the latter there is no obligation to return the specific article, the party receiving it being at liberty to return some other thing of equal value for it. Backus *v.* Lawbaugh, (Iowa), 86 N. W. 298, *citing* Bretz *v.* Diehl, 117 Pa. St. 589, 2 Am. St. Rep. 706; Nelson *v.* Brown, 44 Iowa 455; Barnes *v.* McCrea, 75 Iowa 267, 39 N. W. 392, 9 Am. St. Rep. 473; Johnstone *v.* Browne, 37 Iowa 200.

For a learned discussion on the difference between bailment and sale, see Haskins *v.* Dern, 19 Utah 89, 56 Pac. 953.

Contra. — The question whether a particular contract is one of sale or bailment, appears generally to be one of construction for the court. Woodward *v.* Edmunds, 20 Utah 118, 57 Pac. 848.

2. Jordan *v.* Patterson, 67 Conn.

1. Burden of Proof. — In an action against a bailee for the return of a chattel shown to have been loaned to him the *onus* is on him to prove the loan to have been changed to an absolute gift.[3] Where grain is left in a warehouse, and there is a question whether the transaction is one of sale or of bailment, the burden of proof is on the party alleging it to be a sale.[4]

2. Presumptions. — A. Adverse Possession. — Where the alleged bailee claims the transaction to be a sale, he may assert adverse possession, but in such case, open and notorious claim of ownership raises no presumption of notice to bailor.[5]

B. Estoppel. — On a question whether goods are in the hands of a party as bailee or donee, it is competent to prove by way of estoppel that the alleged bailor allowed the alleged bailee to spend money in the care and preservation of the goods as though they were the property of the latter.[6]

3. Proof of Facts. — A. Variation of Written Contract by Parol. — A written contract of bailment cannot be varied or modified by parol proof to give it the effect of an absolute gift.[7]

B. Custom. — To determine whether a contract is one of sale or bailment, the custom of a warehouseman unrebutted or unmodified by other evidence is not sufficient proof one way or the other;[8] but it is competent to prove the custom of the warehouseman to receive storage for grain left with him, and the fact that he had notices posted in his warehouse to the effect that storage would be charged;[9] or that it is his custom to keep on hand and in store grain of like character and quality to be redelivered to the depositors on demand.[10]

II. CONTRACT OF BAILMENT.

1. Character of Bailment. — By one line of authorities, it is said that the question of the nature of a bailment, whether gratuitous or

473, 35 Atl. 521; Harris *v.* Coe, 71 Conn. 157, 41 Atl. 552.

The question whether a bailor ever relinquished or intended to relinquish a right to demand the return of the deposit, and thus make it an absolute gift, is an issue of fact for the jury. Selleck *v.* Selleck, 107 Ill. 389.

3. Seleck *v.* Selleck, 107 Ill. 389.

4. McGrew *v.* Thayer, 24 Ind. App. 578, 57 N. E. 262.

5. When the character of the possession by defendant is in issue, evidence that he claimed the property as his own is admissible; but the ownership could not be proved by general reputation, nor by evidence of any stranger's opinion. Benje *v.* Creagh's, 21 Ala. 151.

Declaration by the alleged bailor that the property belonged to another would be strong evidence against him, but would not be of itself conclusive. Hunt *v.* Moultrie, 1 Bosw. (N. Y.) 531.

6. Hunt *v.* Moultrie, 1 Bosw. (N. Y.) 531.

7. Selleck *v.* Selleck, 107 Ill. 389.

8. Weiland *v.* Krejnick, 63 Minn. 314, 65 N. W. 631.

9. Yockey *v.* Smith, 81 Ill. App. 556.

10. McGrew *v.* Thayer, 24 Ind. App. 578, 57 N. E. 262.

for hire;[11] factor,[12] or innkeeper,[13] depends upon the intention of the parties, and such intention is a question of fact.[14] Other authorities hold that whether the bailment is gratuitous or not,[15] or is that of an innkeeper,[16] is one of pure law for the court. The better rule, however, appears to be that the question is one of fact for the jury to decide under proper instructions from the court,[17] except that where there is no dispute in the evidence, it is then a question of law.[18]

A. Burden of Proof. — a. *Compensation.* — In an action against a bailee for ordinary negligence, the burden is on the bailor to prove that the bailment is one for compensation.[19] Where a contract

11. Carvins *v.* Robins, 8 Mees. & W. 258; Kincheloe *v.* Priest, 89 Mo. 240, 1 S. W. 235, 58 Am. Rep. 117; Fidelity Inv. Co. *v.* Carico, 1 Colo. App. 292, 28 Pac. 1131; James *v.* Orrell, 68 Ark. 284, 57 S. W. 931, 82 Am. St. Rep. 293.

12. Citroen *v.* Adam, 2 Silv. 187, 24 N. Y. St. 263, 5 N. Y. Supp. 669.

13. Bunn *v.* Johnson, 77 Mo. App. 596; Jalie *v.* Cardinal, 35 Wis. 118; Magee *v.* Pacific Imp. Co., 98 Cal. 678, 33 Pac. 772, 35 Am. St. Rep. 199.

14. Bradley Livery Co. *v.* Snook, (N. J.), 50 Atl. 358, 55 L. R. A. 208.

15. Lyons First Nat. Bank *v.* Ocean Nat. Bank, 48 How. Pr. (N. Y.) 148; Whiting *v.* Chicago M. & St. P. R. Co., 5 Dak. 90, 37 N. W. 222; First Nat. Bank *v.* Graham, 79 Pa. St. 106, 21 Am. Rep. 49.

16. Innkeepers. — The question whether a party is a guest or a boarder is ordinarily one of law. The only cases in which it is a question of fact are those in which the relations of innkeeper and guest had been originally assumed by the parties, and the defendant had introduced evidence to show that these relations had ceased, and the plaintiff had lost his status as a guest and had become a boarder. Haff *v.* Adams, (Ariz.), 59 Pac. 111.

17. The question whether bailment is gratuitous or not is one of fact for the jury to decide under instructions from the court. Shelden *v.* Robinson, 7 N. H. 157, 26 Am. Dec. 726.

Carrier or Warehouseman. — National Line S. S. Co *v.* Smart, 107 Pa. St. 492; St. Louis & S. F. R. Co. *v.* Terrell, (Tex. Civ. App.), 72 S. W. 430; Murray *v.* International S. S. Co., 170 Mass. 166, 48 N. E. 1093, 64 Am. St. Rep. 290; Missouri Pac. R. Co. *v.* Riggs, 10 Kan. App. 578, 62 Pac. 712.

Common Carrier. — Samms *v.* Stewart, 20 Ohio 69, 55 Am. Dec. 445.

Innkeepers. — Curtis *v.* Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242.

Innkeepers. — "Thus, if he engaged a room at an hotel and occupied it in the usual way, there could be no question that he intended to become a guest, and it would be the duty of the court to instruct the jury that if they found those to be the facts, they should find that plaintiff was a guest. On the other hand, if a plaintiff should engage and pay for a room merely to secure a safe place for the deposit of his valuables, then clearly he would not be a guest, and it would be the duty of the court to instruct the jury to so find, provided they found the facts as stated. But if, from the evidence, it be doubtful whether the plaintiff engaged and paid for a room with the intention of availing himself of the hospitalities of the house, then it would be the duty of the court to instruct the jury that before they could return a verdict for plaintiff they must find that such was his intention." Bunn *v.* Johnson, 77 Mo. App. 596.

18. Denver & R. G. R. Co. *v.* Peterson, (Colo.), 69 Pac. 578.

19. Union Compress Co. *v.* Nunnally, 67 Ark. 284, 54 S. W. 872.

proved is such as raises a presumption that the bailment was one for hire, it is on the defendant to prove it to be gratuitous.[20]

Contra. — It has been held, however, that to determine the nature of a bailment, where a contract is proved, the burden is on the plaintiff, even in a case where the defendant sets up some other and additional agreement adding to or varying the terms of the plaintiff's contract.[21]

b. *Carriers.* — Where the carrier seeks to relieve himself from his direct liability as such, and make his liability that of warehouseman, the burden is on him to prove that his status is that of warehouseman.[22]

c. *Pledgee.* — Where the bailee claims a lien on chattels deposited with him on the ground that he holds them as pledgee, the burden is on him to establish the fact of the pledge.[23]

B. INNKEEPER. — Proof of the simple fact that a guest at a hotel made an agreement as to the price to be paid by him by the week, raises no presumption that he has changed his character from guest to boarder.[24]

C. PROOF OF FACTS. — a. *Question of Carrier or Warehouseman.* A stipulation converting a contract of a carrier into one of ordinary bailment is admissible in evidence.[25] It is also competent to prove, as affecting the question, the custom of the carrier of notifying consignee of the arrival of goods, and its thereupon depositing them in its warehouse to hold for the consignee.[26] The directions of

20. Kincheloe *v.* Priest, 89 Mo. 240, 1 S. W. 235, 58 Am. Rep. 117.

21. Gay *v.* Bates, 99 Mass. 263.

22. Wardlaw *v.* S. C. R. Co., 11 Rich. Law (S. C.) 337.

23. Citroen *v.* Adam, 2 Silv. 187, 24 N. Y. St. 263, 5 N. Y. Supp. 669.

24. **Innkeepers.**— Berkshire Woollen Co. *v.* Proctor, 7 Cush. (Mass.) 417.

Neither the Length of Time that a man remains at an inn, nor any agreement he may make as to the price of board per day or week, deprives the person of his character of a traveler and guest if he retains his status as a traveler in other respects. Cunningham *v.* Bucky, 42 W. Va. 671, 26 S. E. 442, 57 Am. St. Rep. 876, 35 L. R. A. 850.

25. Farnham *v.* Camden & A. R. Co., 55 Pa. St. 53.

26. **Warehousemen Custom.** — "As a general rule of law, then, it follows that after the company has placed goods at their destination within the usual time required for transportation, and are there by it deposited in a place of safety, and held ready to be delivered on demand, its liability as a common carrier ceases, and that of a warehouseman commences. The only exception to this rule is where the custom of trade is shown to be otherwise as to delivery. In order to show the existence of such a custom varying this general rule at a particular place, by reason of the company having observed a usage of notifying consignees of the arrival of goods, it should be affirmatively shown that this usage was of an established and general nature. The notice given in pursuance thereof should be of such a nature as to reasonably warrant the inference that the company intended to remain liable as a common carrier until the consignee, in each instance, had reasonable time and opportunity to remove his goods from its custody." Georgia & A. R. *v.* Pound, 111 Ga. 6, 36 S. E. 312.

Warehouse Notice to Agent. Where it is to be determined whether the liability of the bailee is that of carrier or warehouseman, and that fact depends upon whether or not

the consignor are also admissible as declarations.[27]

b. *Common Carrier.* — To determine whether a person is a common carrier or an ordinary bailee, the amount to be paid for transportation may be considered.[28]

c. *Warehouseman.* — To determine whether goods are in the hands of a bailee as warehouseman or as a mere gratuitous depositor, it is competent to prove that the bailee placed the goods in his own warehouse under the custody and control of his servants, and that in his bill of lading he calls this place of deposit a warehouse, and reserves the right to charge storage.[29]

d. *Innkeeper.* — To determine the status of a bailee as innkeeper, it is competent to introduce in evidence an affidavit made by him to procure license to sell spirituous liquors on the premises, as an innkeeper.[30] Evidence of the custom of a city is admissible to determine whether one who engages a room in a hotel, and leaves goods therein, but occasionally absents himself from meals, and for a night or two from lodging, is a guest or a boarder.[31] Evidence of the moral character of the guest is inadmissible to affect the question;[32] but his place of residence and reasons for frequenting the inn may be shown.[33] Evidence of a special contract tending to prove the alleged guest to be merely a boarder is admissible.[34]

e. *Gratuitous or Otherwise.* — A bailment may be for hire when no hire is actually paid, when it is a necessary incident of the business in which the bailee himself profits, and the question whether it is such an incident, is one of fact for the jury.[35] The nature of a bailment is to be determined by a contract between the parties to it,

notice of the receipt of goods at their destination has been given to the consignee, it is admissible to prove notice to the wife of the consignee, or of a clerk or other person in charge of the consignee's place of business. King *v.* New Brunswick & A. & N. Y. S. S. Co., 36 Misc. 555, 73 N. Y. Supp. 999.

27. Byrne *v.* Fargo, 36 Misc. 543, 73 N. Y. Supp. 943.

28. Shelden *v.* Robinson, 7 N. H. 157, 26 Am. Dec. 726.

29. Collins *v.* Burns, 63 N. Y. 1.

30. Kopper *v.* Willis, 9 Daly (N. Y.) 460, *citing* Cayles' Case, 8 Co. 32.

31. McDaniels *v.* Robinson, 26 Vt. 316, 62 Am. Dec. 574.

"The Guest comes without any bargain for time, and remains without one, and may go whenever he pleases, paying only for the actual entertainment he receives; and it is not enough to make one a boarder, and not a guest, that he stayed for a long time in the inn in this way." Meacham *v.* Galloway, 102 Tenn. 415, 52 S. W. 859, 73 Am. St. Rep. 886, 46 L. R. A. 319. (This case is an exhaustive study of the distinction between guest and boarder.)

32. Lucia *v.* Omel, 46 App. Div. 200, 61 N. Y. Supp. 659.

33. Curtis *v.* Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242.

34. Metzger *v.* Schnabel, 23 Misc. 698, 52 N. Y. Supp. 105.

35. Woodruff *v.* Painter, 150 Pa. St. 91, 24 Atl. 621, 30 Am. St. Rep. 786, 16 L. R. A. 451.

Where Grain is Left With a Warehouseman with the expectation of paying storage thereon after a specified time, and with the understanding that the warehouseman may purchase the grain from the bailor, in order to prove the bailment to be one for the mutual benefit of the parties, it is not necessary to show that any payments for storage had yet occurred. The probability that the warehouseman would have an oppor-

and not by transactions, however numerous, between one of these parties and third persons having no relation to the case.[36]

2. Origin of Contract. — A. In General. — a. *Burden of Proof.* The burden to prove the fact of a contract of bailment is on the bailor.[37] When a contract of bailment, which is in fact a lease of

tunity to purchase and handle the grain is sufficient compensation. Yockey *v.* Smith, 81 Ill. App. 556.

To show a bailee to be one for hire, it is competent to prove that he expected to get his compensation in the way of charges for work on goods deposited. Union Compress Co. *v.* Nunnally, 67 Ark. 284, 54 S. W. 872.

Bank. — The prospect of profit to be derived by a bank from the collection of notes left in its hands is sufficient consideration to change the nature of its bailment from gratuitous to one for hire. First Nat. Bank of Birmingham *v.* Bank of Newport, 116 Ala. 520, 22 So. 976.

Shopkeeper. — The fact that a person is invited into a store to become a purchaser of goods therein, is sufficient consideration to change the character of a bailment of goods with the proprietor of the store, from gratuitous to one for compensation. Bunnell *v.* Stern, 122 N. Y. 539, 25 N. E. 910, 19 Am. St. Rep. 519; McDonald *v.* Palmer, (Tenn.), 48 S. W. 338.

Consideration of Forbearance. The plaintiff was in the employ of Buffalo Bill's Wild West Show. When the season closed at Philadelphia, the men were discharged, and the following day the employees were paid off. When the expressman came for the trunks, the plaintiff was not present to attend to the delivery of his. The other employees had tags placed upon theirs, and they were taken to the train by the expressman employed by the defendant. Mr. O. B. represented the defendant at the train in checking the baggage for the men. When the plaintiff came there for his check, his trunk could not be found, and he was told that he should have been at the grounds like the other men and attended to the tagging and delivery of his trunk. When the plaintiff discovered that his trunk had not reached the depot at Philadelphia, he proposed to go to the baggage car to look it up, when Mr. P., the contracting agent of the defendant, and the person delegated by it to attend to the transportation of the men, told him not to do so, but to go to Washington with the other men, and if he did, the defendant would be responsible for the safe delivery of his trunk, upon which assurance, the plaintiff forebore all effort to find the trunk and went to Washington as requested, after first giving Mr. P. the address to which he wanted the trunk forwarded. The defendant company was under a contractual obligation to transport plaintiff and his trunk back to Washington at the close of its season. The company transported its men at reduced rates on what is called a "combination" ticket. If the plaintiff had remained in Philadelphia to ascertain the whereabouts of his trunk, the defendant company would have had to pay a higher rate to get plaintiff back to Washington. The court held that the saving in railroad fares was sufficient consideration to change the nature of the bailment from gratuitous to one for a valuable consideration, and that the evidence showed that defendant undertook to exercise ordinary care and prudence in handling plaintiff's property. McKay *v.* Buffalo Bill's Wild West Co., 17 Misc. 396, 39 N. Y. Supp. 1041.

36. Merchant's Nat. Bank *v.* Guilmartin, 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322.

37. Runyan *v.* Caldwell, 7 Humph. (Tenn.) 134; Union Compress Co. *v.* Nunnally, 67 Ark. 284, 54 S. W. 872; Higman *v.* Camody, 112 Ala. 267, 20 So. 480, 57 Am. St. Rep. 33; Lancaster Mills *v.* Merchants' Cotton Press Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586; Texas Cent. R. *v.* Flanary, (Tex. Civ. App.), 50 S. W. 726.

personal property is assailed by the bailor on the ground of fraud, the burden of proving fraud is on him.[38]

b. *Proof of Facts.* — In order to prove actual bailment, the delivery of the chattel and its voluntary acceptance must be proved.[39]

B. DELIVERY. — a. *Burden of Proof.* — The *onus* to prove delivery of chattels to bailee is on the bailor.[40]

b. *Presumption.* — Proof of the mere fact that goods are left within an inn by a guest is sufficient evidence of delivery to the innkeeper.[41]

C. ACCEPTANCE. — a. *Burden of Proof.* — The burden of proving acceptance of a bailment by the bailee is on the bailor.[42] The mode of proof will vary with the case; no general rule can be stated, but a few illustrations of the methods of business of the alleged bailee may be shown.[43]

3. Terms of Contract. — A. IN GENERAL. — The terms of a contract of bailment are a question of fact for the jury.[44]

a. *Presumption.* — It is presumed that a notice varying the ordinary liability of a warehouseman, printed on the face of a storage receipt, is read by the depositor.[45]

B. COMPENSATION. — a. *In General.* — (1.) **Presumption.** — There is a conflict in the authorities as to whether delivery and receipt of goods by a bailee raise any presumption as to compensation. The

38. Chamberlain *v.* Pratt, 33 N. Y. 47.

39. Montgomery *v.* Ladjing, 30 Misc. 92, 61 N. Y. Supp. 840; Stearns *v.* Farrand, 29 Misc. 292, 60 N. Y. Supp. 501.

Sufficiency. — Proof of reception of baggage is sufficient to establish relation of innkeeper and guest when the owner delivers it for the purpose of becoming a guest and soon afterwards does become an inmate of the hotel. Eden *v.* Drey, 75 Ill. App. 102; Hulbert *v.* Hartman, 79 Ill. App. 289.

Sufficiency. — Proof that defendants were engaged in the warehouse business, and that in the conduct of that business they came into possession of chattels as bonded warehousemen to hold for the owner and the Government establishes the relation between them and the plaintiff of bailee and bailor. Litchtenstein *v.* Jarvis, 31 App. Div. 33, 52 N. Y. Supp. 605.

40. Gay *v.* Bates, 99 Mass. 263; Scott *v.* Jester, 13 Ark. 437; Lockwood *v.* Manhattan, S. & W. Co., 28 App. Div. 68, 50 N. Y. Supp. 974; Runyan *v.* Caldwell, 7 Humph. (Tenn.) 134; Nicholls *v.* Roland, 11 Mart. (O. S.) La. 190; Lancaster Mills *v.* Merchants' Cotton Press Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586; Lobenstein *v.* Pritchett, 8 Kan. 213; Higman *v.* Camody, 112 Ala. 267, 20 So. 480, 57 Am. St. Rep. 33.

41. Kopper *v.* Willis, 9 Daly (N. Y.) 460, *citing* Cayles' Case, 8 Co. 32; Watson *v.* Loughran, 112 Ga. 837, 38 S. E. 82.

42. Scott *v.* Jester, 13 Ark. 437; Montgomery *v.* Ladjing, 30 Misc. 92, 61 N. Y. Supp. 840; Stearns *v.* Ferrand, 29 Misc. 292, 60 N. Y. Supp. 501; Higman *v.* Camody, 112 Ala. 267, 20 So. 480, 57 Am. St. Rep. 33; Gay *v.* Bates, 99 Mass. 263.

43. Pattison *v.* Syracuse Nat. Bank, 1 Hun (N. Y.) 606.

44. Labowitz *v.* Frankfort, 4 Misc. 275, 53 N. Y. St. 525, 23 N. Y. Supp. 1038; Cartlidge *v.* Slone, 124 Ala. 596, 26 So. 918; Cobb *v.* Wallace, 5 Cold. (N. Y.) 539, 98 Am. Dec. 435; Sheffer *v.* Harnon, 20 N. Y. St. 792, 3 N. Y. Supp. 591.

45. Taussig *v.* Bode, 134 Cal. 260, 66 Pac. 259, 54 L. R. A. 774.

better rule seems to be that as the question depends upon the intention of the parties, it is one of fact for the jury.[46] The law will not presume a contract for compensation from the mere fact of delivery of chattels to the bailee.[47] Quite a number of authorities hold, however, that where goods are delivered to a bailee and nothing is said about compensation, it is presumed that a just,[48] usual,[49] or reasonable [50] compensation will be given,[51] or the attendant circumstances may raise the presumption that the undertaking was gratuitous.[52] But where a bailor deposits goods with a bailee and offers him compensation for their storage, proof that the bailee accepted the deposit without communicating to the bailor the fact that he declines compensation, raises the presumption that he accepts the position of bailee for hire.[53]

(2.) **Proof of Facts.** — (A.) PAROL EVIDENCE.— Parol evidence is not admissible to vary the terms of a written contract between the bailor and warehouseman as to terms of compensation.[54]

(B.) CUSTOM. — In the absence of an agreement as to compensation, proof of usage is admissible.[55]

46. Mariner *v.* Smith, 5 Heisk. (Tenn.) 203; Lobenstein *v.* Pritchett, 8 Kan. 213.

Where bailee does not keep a storage warehouse, and no agreement to charge storage is proved, none can be implied. Lyungstrandh *v.* Haaker Co., 16 Misc. 387, 38 N. Y. Supp. 129.

47. Mariner *v.* Smith, 5 Heisk. (Tenn.) 203.

48. Brock *v.* King, 3 Jones Law (N. C.) 45.

49. Sheldon *v.* Robinson, 7 N. H. 157, 26 Am. Dec. 726.

50. Andrews *v.* Keith, 168 Mass. 558, 47 N. E. 423.

Where a Dealer who sells goods on commission has stock in a building owned by him at the time he retires from business, and notifies the consignors of the stock at the time of his retirement, the fact that the consignors leave the goods in his building, in the absence of any contract, raises a presumption that a reasonable compensation is expected to be paid. Moline M. & S. Co. *v.* Neville, 52 Neb. 574, 72 N. W. 854.

Warehouseman. — Upon proof of character of bailee as warehouseman and delivery to and receipt by him of goods for storage, the law in the absence of other facts, implies a contract upon the part of the bailor to pay a reasonable compensation. Gay *v.* Bates, 99 Mass. 263.

51. Graves *v.* Moses, 13 Minn. 335.

The Attendant Circumstances, such as where one undertakes for a near relative, or personal friend, or out of mere charity, a favor, and more especially, if accomplishing the trust puts the bailee to little outlay of time, trouble, and skill, and the bailment lies outside his remunerative field of labor, raises the presumption that the undertaking was gratuitous. Kincheloe *v.* Priest, 89 Mo. 240, 1 S. W. 235, 58 Am. Rep. 117.

52. Presumption of Compensation. Where bailee originally gratuitous handles funds and carries on business for his bailor for a period of many years, carries on much necessary correspondence during the bailor's absence in a foreign country, employs council, and superintends litigation which is brought to a successful issue, and thereby greatly enhances the value of the property left with him, the law will presume a contract to reimburse him. Beugnot *v.* Tremoulet, 52 La. Ann. 454, 27 So. 107.

53. Second Nat. Bank of Erie *v.* Ocean Nat. Bank, 11 Blatchf. 362, 21 Fed. Cas. No. 12,602.

54. Union Storage Co. *v.* Economy D. Co., (Pa.), 45 Atl. 48.

55. Shelden *v.* Robinson, 7 N. H. 157, 26 Am. Dec. 726.

The Question Whether a Printer is to Be Paid for any part of his

b. *Lien.* — **(1.) May Be Question of Fact.** — The question whether or not the bailee has a lien on goods deposited with him, is generally a pure question of law,[56] but he may lose such lien by redelivery to the bailor, and the question whether he has made such redelivery as dissipates the lien, is one of fact for the jury.[57] As to whether the bailee has a general lien on goods deposited with him, evidence of previous dealings between the same parties or of common usage is admissible.[58]

(2.) Waiver. — Whether a warehouseman has waived his lien for storage, by refusing upon other grounds, to redeliver goods, is a question of fact for the jury.[59]

C. Degree of Care Contracted For. — a. *Burden of Proof.* Where the bailee sets up some special facts as limiting the nature of the care he is to bestow upon a deposit in his hands, the burden is still upon the bailor to show that a particular degree of care was contracted for.[60]

b. *Presumptions.* — Where the bailor personally inspects the warehouse in which he deposits, he is presumed to contract for such a degree of care, in the absence of a special contract, as his observation shows him the warehouse is capable of.[61] There is no pre-

work before the whole is completed and delivered, may be settled by proof of the custom of the trade. Gillett *v.* Mawman, 1 Taunt, 137.

56. Grieve *v.* New York C. & H. R. R. Co., 25 App. Div. 518, 49 N. Y. Supp. 949.

A Person Not Engaged in the Business of Warehousing or storage who permits another to deposit a chattel in an unoccupied room of his premises does not thereby acquire any lien on such chattel for the value of the storage of it. Quoted from Syllabus Alt. *v.* Weidenberg, 6 Bosw. (N. Y.) 176.

A Mere Volunteer, under no obligation to receive goods, but accepting their temporary custody without any agreement on the subject, has no lien for storage. He may or may not, according to circumstances, be entitled to compensation, as for work and labor, etc., as upon a *quantum meruit,* but he has no lien. Rivara *v.* Ohio, 3 E. D. Smith (N. Y.), 264.

57. Dixon *v.* Yates, 5 Barn & A. 313, 27 Eng. C. L. 86.

Agisters. — "When horses are kept at livery, the owner takes and uses them at pleasure, and the bailee only has a lien so long as he retains the uninterrupted possession. If the owner gets the property into his hands without fraud, the lien is at an end, and it will not be revived by the return of the goods. (Bevan *v.* Waters, 3 Car. & Payne, 520; Jones *v.* Thurloe, 8 Mod. 172; Jones *v.* Pearle, 1 Str. 556; Sweet *v.* Pym, 1 East 4.) So in the case of milch cows, the agister has no lien, for the reason that the owner has occasional possession for the purpose of milking them. (Jackson *v.* Cummins, 5 Mees. & Wels. 342. Cross on Lien, 25, 36, 332.) Now here, from the nature of the case, the plaintiff was not to have the continued and exclusive possession of the horses, but Tyler was at liberty to take and use them when he pleased, and he did in fact take them at pleasure. The witness says he does not know that the plaintiff was at home when Tyler took the horses, but there was no pretense that they were taken by fraud, or against the will of the plaintiff." Grinnell *v.* Cook, 3 Hill (N. Y.) 485.

58. Scott *v.* Jester, 13 Ark. 437.

59. Scott *v.* Jester, 13 Ark. 437.

60. Gay *v.* Bates, 99 Mass. 263.

61. Sutherland *v.* Albany C. S. & W. Co., 55 App. Div. 212, 66 N. Y. Supp. 835.

sumption that the bailor is aware of the general course of conduct of the bailee in regard to the care he generally undertakes to give in his warehouse.[62] Receipt of goods by a warehouseman in the absence of an expressed contract, raises a presumption of a contract to give ordinary care under the circumstances.[63]

Where goods are leased to a bailee to be transported by him from the place of delivery to some distant point, there is no presumption that the bailor agreed to properly prepare the apparatus for transportation.[64]

Where a liveryman lends a carriage to another person, and both parties are silent as to the number of persons to be permitted to ride in the carriage, it is presumed that the bailee will carry such number as the vehicle was made for, not exceeding, of course, the ordinary load for the team drawing said carriage.[65]

c. *Terms of Contract are Question of Fact for the Jury.* — What degree of care was contracted to be exercised by the bailee, is a question of fact for the jury.[66]

(1.) Notice of Variation of Liability. — Where a restaurant proprietor seeks to exonerate himself from liability for loss of chattel given into the hands of a waiter, on the ground that there was a rule of the house forbidding waiters to receive property from a guest evidence of such rule is not admissible unless it is first shown that the guest had notice thereof.[67]

d. *Ordinary Diligence Question for Jury.* — What constitutes ordinary diligence and care is always a question to be determined by the triers of the facts in view of the surrounding circumstances when there is substantial evidence upon which to submit to them such an issue, but in the absence of such evidence, it becomes a question of law to be determined by the court.[68]

(1.) Nature and Condition of Goods Bailed. — It is competent for the bailor to prove the existence of any weakness or defect of property

62. Weiland *v.* Krejnick, 63 Minn. 314, 65 N. W. 631.

63. Gay *v.* Bates, 99 Mass. 263.

Proof that defendants were established in business as bonded warehousemen, and that in the conduct of their business they came into the possession of goods to hold for the owner, establishes an obligation on them to safely store the property. Litchtenstein *v.* Jarvis, 31 App. Div. 33, 52 N. Y. Supp. 605; Rettner *v.* Minn. C. S. Co., (Minn.), 93 N. W. 120.

Temperature. — Receipt of goods by a warehouseman, in the absence of an expressed contract, raises the presumption of a contract to maintain the necessary temperature required for the preservation of the property stored with him. Sutherland *v.* Albany C. S. & W. Co., 171 N. Y. 269, 63 N. E. 1100.

64. Phillips *v.* Hughes, (Tex. Civ. App.), 33 S. W. 157.

65. Harrington *v.* Snyder 3 Barb. (N. Y.) 380.

66. Wilson *v.* F. C. Linde Co. 47 App. Div. 327, 62 N. Y. Supp. 69; Higman *v.* Camody, 112 Ala. 267. 20 So. 480, 57 Am. St. Rep. 33; Saunders *v.* Hartsook, 85 Ill. App. 55; Hatchett *v.* Gibson, 13 Ala. 587.

67. La Salle R. & O. Hon. *v.* McMasters, 85 Ill. App. 677.

68. American Brewing Co. *v.* Talbot, 141 Mo. 674, 42 S. W. 679, 64 Am. St. Rep. 538.

bailed by him, of which the bailee had notice,[69] and to prove the nature and quality of goods bailed,[70] the greater or less value of an article deposited,[71] and the character and custom of the place where they are to be kept.[72]

(2.) Custom as Tending to Prove Degree of Care Contracted to be Exercised. — It is admissible to prove the custom of the neighborhood where the custody of similar property is involved,[73] or the usage of men in the same profession and situation as the bailee [74] or the usage of the place where the contract was entered into.[75] If the bailee take advantage of a custom relieving him of his ordinary liability, it is necessary for him to prove it to be a custom either clearly established and generally known and acquiesced in, or that the bailor had actual notice thereof.[76]

69. Higman *v.* Camodv, 112 Ala. 267, 20 So. 480, 57 Am. St. Rep. 33.

70. Minn. Butter & Cheese Co. *v.* St. Paul S. C. W. Co., 75 Minn. 445, 77 N. W. 977, 74 Am. St. Rep. 575; Griffith *v.* Zipperwick, 28 Ohio St. 388.

71. Mariner *v.* Smith, 5 Heisk. (Tenn.) 203.

"It may be admitted that the degree of care required of a bailee is proportioned to the nature, intrinsic value, etc., of the article intrusted to his keeping. A man will not be expected to take the same care of a bag of oats, as of a bag of dollars; of a bale of cotton, as of a box of diamonds or other jewelry; of a load of wood, as of a box of rare paintings; of a rude block of marble, as of an exquisite sculptured statue. The bailee therefore ought to proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part, and to the watchfulness necessary to the preservation of the article. Hence, as dollars, jewelry and fine paintings, present a greater temptation to the thief, and are more easily secreted, than oats, cotton or wood, or a finished statue is more liable to injury than rough marble, a bailee should bestow more diligence in their safe keeping." Hatchett *v.* Gibson, 13 Ala. 587.

72. Griffith *v.* Zipperwick, 28 Ohio St. 388.

73. Cass *v.* Boston & L. R. Co., 14 Allen (Mass.) 448.

Contra. — On a question as to the degree of care expected to be exercised by a warehouseman it is not competent to prove the degree of care used by similar warehouses in the vicinity. Schwerin *v.* McKie, 51 N. Y. 180, 10 Am. Rep. 581.

74. Brown *v.* Hitchcock, 28 Vt. 452.

75. Moorehead *v.* Brown, 6 Jones Law (N. C.) 367.

76. In Alabama & Tenn. Rivers. R. Co. *v.* Kidd, 35 Ala. 209, the court said: "When this case was here before, it was held that it was competent for the company to prove that it was their custom to deposit freight, transported by the road and consigned to their agent, in the warehouse of Adams & Co.; and that if such custom existed, and was proved according to the rule governing in questions of that description, it might relieve the company from the liability which would otherwise rest upon them, for the loss of the cotton in the hands of their agent. Ala. & Tenn. R. R. *v.* Kidd, 29 Ala. 221. The evidence, all of which is set out in the bill of exceptions, wholly fails to establish any such custom or usage as can be looked to in the interpretation of contracts. Usage, to be binding, must be of such duration, so clearly established, and so generally known and acquiesced in, that the parties must be presumed to have contracted with reference to it. Steele *v.* McTyer, 31 Ala. 676; Crawford *v.* Clark, 15 Ill. 567; Dixon *v.* Dunham, 14 Ill. 324; Angell on Carr. § 301. The fact that the company had been, for about a month, in the habit of storing cotton con-

(3.) Advertisements. — To determine the degree of care contracted to be exercised, newspaper advertisements announcing "uniform temperature," "duplicate machinery,"[77] "fire-proof warehouse,"[78] etc., are admissible.

(4.) Method of Majority. — Where it is contracted to handle fruit in the "most approved manner," evidence of the manner in which the majority of competent dealers handle fruit is competent and sufficient.[79]

(5.) Res Inter Alios Acta. — To show the degree of care contracted to be used in a particular bailment between certain parties, evidence of the bailee's dealings with other parties is not admissible.[80]

D. Redelivery.—a. *Time.*— **(1.) Waiver, Burden of Proof.** —Where a contract to redeliver goods at a certain time is proved, and defendants attempt to set up a waiver of such time, the burden is on them to prove the waiver.[81]

(2.) Presumptions. — When a contract of bailment does not specify the time at which the bailment terminates, it is presumed to terminate on the accomplishment of the purpose of the bailment, or after a reasonable time,[82] but it has been held that a loan of a chattel for hire without specification as to time raises no presumption whatever as to the length of time the loan is to continue.[83]

(3.) Question for Jury. — Whether there has been a waiver of the clause of the contract specifying the time for the redelivery, is a question of fact for the jury.[84] Where a written contract of bailment is to terminate after a reasonable time, what is a reasonable time may be proved by parol, and is a matter for the jury.[85]

(4.) Custom. — Where the contract is silent as to the time of redelivery, evidence of the customs and usages of business at the place of hiring is admissible.[86]

b. *Manner.* — The manner of redelivery is a question of fact for the jury.[87]

(1.) Custom. — Where the contract says nothing as to the manner of redelivery proof of the usages and customs of the business at the

signed to their agent, in the warehouse of Adams & Co., without any proof that this was generally known, or any other evidence that the appellee had notice of it, cannot be sufficient to establish a custom which must be deemed to have entered into the contract made between the parties to this suit."

77. Rettner *v.* Minn. C. S. Co. (Minn.), 93 N. W. 120.

78. In a question whether the bailor waives the term of his contract in regard to the degree of care to be exercised is one of fact for the jury. Hatchett *v.* Gibson, 13 Ala. 587.

79. Arnold *v.* Producers' Fruit Co., 128 Cal. 637, 61 Pac. 283.

80. Backus *v.* Lawbaugh, (Iowa), 86 N. W. 298.

81. Treacy *v.* Barclay, 9 Ky. L. Rep. 707, 6 S. W. 433.

82. Cobb *v.* Wallace, 5 Cold. (Tenn.) 539, 98 Am. Dec. 435.

83. Gleason *v.* Morrison, 20 Misc. 4, 44 N. Y. Supp. 909.

84. Treacy *v.* Barclay, 9 Ky. L. Rep. 707, 6 S. W. 433.

85. Cobb *v.* Wallace, 5 Cold. (Tenn.) 539, 98 Am. Dec. 435.

86. Gleason *v.* Morrison, 20 Misc. 320, 45 N. Y. Supp. 684.

87. Labowitz *v.* Frankfort, 4

place of hiring is admissible,[88] as is also evidence of the custom between the bailee and the bailor.[89]

4. Continuance and Termination of Contract — Question for Jury. Where the hirer retains property beyond the term of hiring, the question whether the bailment has been terminated or has been continued is one of fact for the jury.[90]

A. Burden of Proof. — Where a contract of bailment has been proved, and possession and control of the property transferred to the bailee,[91] or where the bailment is terminable at will,[92] if the bailee wishes to end his responsibility under the bailment, he must prove the revocation of the contract, and the restoration of the property to the person whom by accepting the bailment, he admitted to be entitled to it.

B. Presumption. — Where the letter accepts compensation for the use of a vessel on a second trip, the bailment is presumed to continue the same as if the original letting had been for both trips.[93]

In the absence of an expressed contract for the length of time for which goods are to remain in storage, it is presumed to be a continuing contract until it is terminated by one of the parties, either by the removal of the goods by the bailor,[94] or notice to do so by the bailee,[95] together with the latter's affording the bailor reasonable opportunity to take the property away.[96]

III. BREACH OF CONTRACT.

1. Negligence. — A. Presumptions and Burden of Proof.—a. *Fact of Loss.* — The *onus* of establishing the fact that goods were returned in a damaged condition or not returned at all is on the plaintiff.[97]

Misc. 275, 53 N. Y. St. 525, 23 N. Y. Supp. 1038.

88. Gleason *v.* Morrison, 20 Misc. 320, 45 N. Y. Supp. 684.

89. **Between Pawnor and Pawnee** where there has been a custom for the pawnor to redeem his property through a third person, upon such third person presenting ticket for the same, it is presumed that there was incorporated into any certain contract of pawn, that custom as to the manner of redelivery. Johnson *v.* Praeger, 59 App. Div. 339, 69 N. Y. Supp. 836.

90. Benje *v.* Creagh, 21 Ala. 151.

91. Emmerling *v.* First Nat. Bank, 97 Fed. 739.

92. Andrews *v.* Keith, 168 Mass. 558, 47 N. E. 423.

93. Higman *v.* Camody, 112 Ala. 267, 20 So. 480, 57 Am. St. Rep. 33.

94. When a person leaves a horse at a stable to be boarded, it is presumed that he intends to pay a reasonable compensation, and a simple announcement to the effect that he would not do so coupled with a refusal to take back the horse, is not sufficient to exempt him from liability for such payment. Andrews *v.* Keith, 168 Mass. 558, 47 N. E. 423; Sutherland *v.* Albany C. S. & W. Co., 171 N. Y. 269, 63 N. E. 1100; Holt Ice & C. S. Co. *v.* Jordan Co., 25 Ind. App. 314, 57 N. E. 575.

95. Sutherland *v.* Albany C. S & W. Co., 171 N. Y. 269, 63 N. E. 1100; De Lemos *v.* Cohen, 28 Misc. 579, 59 N. Y. Supp. 498.

96. Emerald & P. B. Co. *v.* Leonard, 22 Misc. 120, 48 N. Y. Supp. 706.

97. Higman *v.* Camody, 112 Ala. 267, 20 So. 480, 57 Am. St. Rep. 33; Dinsmore *v.* Abbott, 89 Me. 373, 36 Atl. 621; Farley *v.* Van Wickle, 19 La. Ann. 9.

b. *Of Negligence.* — On the question where the burden of proof belongs in an action between the bailor and bailee for damage to or loss or non-return of the subject of a bailment, the authorities are in direct and almost irreconcilable conflict.[98]

The rulings of the court seem to be governed by the form of the action [99] and the stage of the proceedings where the question arises;[1] they depend also upon, First, what doctrine the court holds as to

98. Hilderbrand *v.* Carroll, 106 Wis. 324, 82 N. W. 145, 80 Am. St. Rep. 29.

99. Winston *v.* Taylor, 28 Mo. 82, 75 Am. Dec. 112. *Contra.* — Willett *v.* Rich, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684.

In Cass *v.* Boston & L. R. Co., 14 Allen (Mass.) 448, the majority of the court holds the burden of accounting for the loss to be upon the defendant on the ground that it is a mere non-tortious breach of contract. The court speaking through Chapman J., says: "It may be conceded that when a plaintiff founds his action upon negligence, or a culpable omission of duty, the burden is upon him to establish it by proof. Fiske *v.* New England Insurance Co., 15 Pick. 317. . . . But a majority of the court are of opinion that the plaintiff did not put his case on any such ground. He did not choose to frame his action, as he might have done, upon a breach of contract by the warehousemen relating to the care and custody of property intrusted to them, but upon the omission to deliver goods which they had received, and promised to deliver. This form of declaring imposed the duty and burden upon the defendants to put in evidence special matter in avoidance of the action. They must show an excuse for the non-performance of their promise; and the burden of proof was upon them to establish their excuse. . . . This precise distinction is stated as the result of the authorities in a note to the case of Platt *v.* Hibbard, 7 Cow. 500 and is approved by the supreme courts of New York and Pennsylvania, in Schmidt *v.* Blood, 9 Wend. 271, and Beckman *v.* Shouse, 5 Rawle. 189, 190. It has been fully sanctioned and approved by this court in Litchenstein *v.* Boston & Providence Railroad, 11 Cush. 70."

In Arent *v.* Squires, 1 Daly (N. Y.) 347, Judge Daly in his discussion of the cases accounts for the difference of opinion among the courts by attributing it to the difference in the nature of the forms of action employed in cases between bailor and warehouseman. He says: "If the action is trover, a wrongful conversion of the property must be shown to maintain it. If it is an action on the case for negligence, the plaintiff must make out a case of negligence, as that is the gist of the action; but a bailee for hire may be sued in assumpsit (Hutton *v.* Briton, 1 H. B., 298, note; Cairns *v.* Robbins, 1 Mees & Wels. 258,) and all that the plaintiff would have to show in assumpsit would be the non-performance of the contract, to cast upon the bailee the *onus* of showing why it had not been performed. We are relieved by the Code of any difficulty that might arise from the form of the action, as we have now but one course of procedure whether a plaintiff sues for the non-performance of a contract or for injuries to property, and all that is necessary is, that it should appear by his complaint, that he has a cause of action entitling him to either legal or equitable relief."

1. Winston *v.* Taylor, 28 Mo. 82, 75 Am. Dec. 112; Clark *v.* Shrimski, 77 Mo. App. 166. Where the complaint in action against a bailee for hire, alleges delivery of the animal to the bailee, and the latter's failure to redeliver it, the only facts admissible in defense under a general denial are proof either that the animal was never delivered to the bailee, or that he had returned him to the bailor. Cochran *v.* Walker, (Tex. Civ. App.), 49 S. W. 403.

whether the burden of proof ever shifts;[2] or second, whether the court is governed by the strict rule that the burden is upon the affirmative of the issue,[3] or will consider the circumstances of the case and the relative convenience of producing evidence.[4] The nature of the liability of the bailee—*i. e.*, whether it is that of insurer or not—also affects the question.[5]

(1.) **Presumptions.** — It is held almost without exception that proof of delivery to bailee and of the failure of bailee to redeliver raises

2. The burden of proof remains on plaintiff irrespective of form of action. Willett *v.* Rich, 142 Mass. 356, 7 N. E. 776, 56 Am. St. Rep. 684.

"The complaint in this action alleged that the plaintiff's goods were lost through the negligence and improper conduct of the defendant. This allegation was denied by the answer, and, upon the issue thus made, the burden of proof was upon the plaintiff. He made out a *prima facie* case when he proved that the defendant has failed to deliver his goods to him upon demand; but when it appeared that their loss was due to the collapse of the warehouse while the contractor was engaged in repairing the injury caused by the fire, the burden was on the plaintiff to show that that result was due to the negligence of the defendant. There is in such a case as this no shifting of the burden of proof. The warehouseman, in the absence of bad faith, is liable only for negligence. That fact is the basis of the plaintiff's cause of action, and the burden of proving it rests upon him throughout the trial. He may make out a *prima facie* case of liability by showing a failure on the defendant's part to deliver the goods on demand; but, when that refusal is sustained by testimony, upon the whole case the burden rests upon the plaintiff to establish the defendant's negligence by a preponderance of evidence." Kaiser *v.* Latimer, 75 N. Y. St. 555, 41 N. Y. Supp. 94.

3. Kincheloe *v.* Priest, 89 Mo. 240, 1 S. W. 235, 58 Am. Rep. 117; Taussig *v.* Bode, 134 Cal. 260, 66 Pac. 259, 44 L. R. A. 774.

In case of damage to goods while in custody of a warehouseman, the burden is usually upon the bailor to prove negligence, but where the warehouseman in an action against the bailor for storage alleges in his declaration that he took reasonable and proper care of the goods, the burden is on him to prove his allegation. Milliken *v.* Randall, 89 Me. 200, 36 Atl. 75.

4. In Bennett *v.* O'Brien, 37 Ill. 250, the following instruction was requested: "When the loss of the mare is shown, the proof of negligence or want of care is thrown upon the plaintiff; it being a presumption of law that proper care and diligence were exercised on the part of the defendant.

"There is some conflict of authority on this subject, but we think this instruction was properly refused in reference to a gratuitous bailee. When the death of the mare, in the hands of the defendant was proved, together with the character of the bailment, it devolved upon him to show that he had exercised the degree of care required by the nature of the bailment. These were facts peculiarly within his knowledge and power to prove, and any other rule would impose great difficulty upon bailors."

5. Under a contract where the bailee's liability to return the deposit is absolute, unless prevented from so doing by the act of God, the burden is on the bailee to prove that the chattels were destroyed without negligence on his part, and that they were in fact destroyed or damaged by the elements. Pope *v.* Farmers Union & Milling Co., 130 Cal. 139, 62 Pac. 384, 80 Am. St. Rep. 87.

Contra. — The degree of care which should be exercised by the bailee makes no difference in the proposition that the burden of proof

a presumption of negligence on the part of bailee sufficient to make a *prima facie* case.[6]

Presumption of Negligence From Nature of Accident. — The circumstances of the loss may be such in their nature as to support a presumption of negligence on the part of the bailee.[7]

(2.) Burden of Proof. — (A.) At Commencement of Action. — **Massachusetts Rule.** — In Massachusetts the burden of proof is held to be always on the plaintiff, on the theory that the burden never shifts.[8] This rule has also been laid down in

is on him to account for loss. Watson *v.* Loughran, 112 Ga. 837, 38 S. E. 82.

6. Georgia Code, § 2938.

Alabama. — Davis *v.* Hurt, 114 Ala. 146, 21 So. 468.

California. — Taussig *v.* Bode, 134 Cal. 260, 66 Pac. 259, 54 L. R. A. 774.

Delaware. — Pusey *v.* Webb, 2 Pen. 490, 47 Atl. 701.

Georgia. — Watson *v.* Loughran, 112 Ga. 837, 38 S. E. 82.

Illinois. — Funkhouser *v.* Wagner, 62 Ill. 59; Brewster *v.* Weir, 93 Ill. App. 588; Cumins *v.* Wood, 44 Ill. 416, 92 Am. Dec. 189; Baren *v.* Cain, 15 Ill. App. 387; Eden *v.* Drey, 75 Ill. App. 102; Hulbert *v.* Hartman, 79 Ill. App. 289; Parry *v.* Squair, 79 Ill. App. 324; Hudson *v.* Bradford, 91 Ill. App. 218.

Indiana. — Laird *v.* Eichold, 10 Ind. 212, 71 Am. Dec. 323.

Kentucky. — Ray *v.* Bank of Ky., 10 Bush 344.

Michigan. — Knights *v.* Piella, 111 Mich. 9, 69 N. W. 92, 66 Am. St. Rep. 375

Minnesota. — Bagley Elev. Co. *v.* American Exp. Co., 63 Minn. 142, 65 N. W. 264.

Mississippi. — Lampley *v.* Scott, 24 Miss. 528. (This case contains an unusually full discussion of the burden of proof).

Missouri. — Thompson *v.* St. Louis & S. F. R. Co., 59 Mo. App. 37; Wiser *v.* Chesley, 53 Mo. 547; Casey *v.* Donovan, 65 Mo. App. 521; American Brewing Co. *v.* Talbot, 141 Mo. 671, 42 S. W. 679, 64 Am. St. Rep. 538.

New York. — McLoughlin *v.* New York L. & T. Co., 57 N. Y. St. 543, 27 N. Y. Supp. 248; Nichols *v.* Balch, 8 Misc. 452, 28 N. Y. Supp. 667; Lynch *v.* Kluber, 20 Misc. 601, 46 N. Y. Supp. 428; Lyons *v.* Thomas, 34 Misc. 175, 68 N. Y. Supp. 802.

Tennessee. — Lancaster Mills *v.* Merchants Cotton P. Co., 89 Tenn. 1, 14 S. W. 617, 24 Am. St. Rep. 586.

Vermont. — McDaniels *v.* Robinson, 26 Vt. 316, 62 Am. Dec. 574.

Wisconsin.—Hildebrand *v.* Carroll, 106 Wis. 324, 82 N. W. 145, 80 Am. St. Rep. 29; Jalie *v.* Cardinal, 35 Wis. 118.

Conflicting Presumptions.— Where goods are lost while in the hands of an attaching officer, the presumption that he performed his duty outweighs the presumption of negligence arising from the fact of the loss. Mills *v.* Gilbreth, 47 Me. 320, 74 Am. Dec. 487.

7. Western Union Tel. Co. *v.* Crall, 38 Kan. 671, 17 Pac. 309; Stewart *v.* Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Kaiser *v.* Latimer, 75 N. Y. St. 555, 41 N. Y. Supp 94; Wintringham *v.* Hayes, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. Rep. 725; Foster *v.* Pacific Clipper Line (Wash.), 71 Pac. 48.

8. Whitney *v.* Lee, 8 Metc. (Mass.) 91. In Brown *v.* Waterman, 10 Cush. (Mass.) 117, the lower court instructed the jury that when the bailee undertook to excuse his default on the ground of loss or theft he must show exercise of due care on his part. Exception was taken to this charge but was not argued on the appeal, and the upper court expressly declined to rule upon it, but intimated that it was erroneous.

In Cass *v.* Boston & L. R. Co., 14 Allen (Mass.) 448, the court held that when the action was founded upon negligence the burden was upon the plaintiff, but that where it is

New York.[9] The burden of proof may be fixed by the form of the action or the allegations of the complaint. Where no allegation is made by the plaintiff that the goods have been lost or destroyed by reason of the negligence of the defendant, the burden of proof has been held to rest on the defendant to account for the property, but if the plaintiff alleges in his petition what has become of the property and avers that it was lost or destroyed through negligence or carelessness on the part of the bailee the burden of proof has been held to rest upon him.[10]

(B.) Negligence Basis of Action. — Where the fact of negligence is at the basis of the right of recovery the burden has been held to be upon the party depending upon negligence, whether it is alleged

based upon the contract justification is in the nature of affirmative confession and avoidance, and must be proved by the defendant. Bigelow C. J. dissenting. This case was expressly overrruled in Willett *v.* Rich, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684, the court holding that the burden of proof never shifts, and that the plaintiff cannot by merely changing the form of the declaration alter the rights and liabilities of the parties. Murray *v.* International S. S. Co., 170 Mass. 166, 48 N. E. 1093, 64 Am. St. Rep. 290, *affirming* Willett *v.* Rich, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684.

9. Claflin *v.* Meyer, 75 N. Y. 260, 31 Am. Dec. 467.

10. Burden of proof of negligence is on the plaintiff.

England. — Brind *v.* Dale, 8 Car. & P. 327, 34 Eng. C. L. 355; Ross *v.* Johnson, 5 Burr. 2825; Cooper *v.* Barton, 3 Camp. 5, note, 13 Rev. Rep. 736, note; Doorman *v.* Jenkins, 2 Ad. & E. 256, 4 N. & M. 170.

Arkansas. — Gracie *v.* Robinson, 14 Ark. 438; Union Compress Co. *v.* Nunnally, 67 Ark. 284, 54 S. W. 872; James *v.* Orrell, 68 Ark. 284, 57 S. W. 931, 82 Am. St. Rep. 293.

Connecticut. — Allen *v.* Somers, 73 Conn. 355, 47 Atl. 653, 52 L. R. A. 106.

Delaware. — Pusey *v.* Webb, 2 Pen. 490, 47 Atl. 701.

Louisiana. — Marks *v.* New Orleans C. S. Co., 107 La. 172, 31 So. 671, 57 L. R. A. 271.

Maryland. — Hambleton *v.* McGee, 19 Md. 43.

New York. — Newton *v.* Pope, 1 Cow. 109; Harrington *v.* Snyder, 3 Barb. 380; Platt *v.* Hibbard, 7 Cow. 497; Coleman *v.* Livingston, 45 How. Pr. 483; Fairfax *v.* N. Y. C. & H. R. R. Co., 67 N. Y. 11; Golden *v.* Romer, 20 Hun 438; Kaiser *v.* Latimer, 40 App. Div. 149, 57 N. Y. Supp. 833; Stewart *v.* Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Grieve *v.* New York C. & H. R. R. Co., 25 App. Div 518, 49 N. Y. Supp. 949; Mautner *v.* Terminal Warehouse Co., 25 Misc. 729, 55 N. Y. Supp. 603; King *v.* New Brunswick A. & N. Y. S. S. Co., 36 Misc. 555, 73 N. Y. Supp. 999.

Pennsylvania. — Logan *v.* Mathews, 6 Pa. St. 417; Safe Deposit Co. *v.* Pollock, 85 Pa. St. 391, 27 Am. Rep. 660; Nat. Line S. S. Co. *v.* Smart, 107 Pa. St. 492; Leidy *v.* Quaker City C. S. Co., 180 Pa. St. 323, 36 Atl. 851.

Tennessee. — Runyan *v.* Caldwell, 7 Humph. 134.

Texas. — Texas Cent. R. Co. *v.* Flannery, (Tex. Civ. App.), 50 S. W. 726.

Vermont. — Malaney *v.* Taft, 60 Vt. 571, 15 Atl. 326, 6 Am. St. Rep. 135.

Washington. — Foster *v.* Pacific Clipper Line, (Wash.), 71 Pac. 48.

Wisconsin. — Hildebrand *v.* Carroll, 106 Wis. 324, 82 N. W. 145, 80 Am. St. Rep. 29.

Contra. — Scranton *v.* Baxter, 4 Sandf. (N. Y.) 5; Lyons First Nat. Bank *v.* Ocean Nat. Bank, 48 How. Pr. (N. Y.) 148.

The case of Standard Milling Co. *v.* White L. C. T. Co., 122 Mo. 258, 26 S. W. 704, laid down the rule exactly

or not.[11] But this burden may be lifted by the presumption of negligence arising from the fact of non-delivery as above stated.

(a.) *Presumption From Exclusive Possession.*— Where property is damaged or injured while in the exclusive possession of the bailee it is incumbent upon him to satisfy the jury that the injury was not occasioned by his negligence, on account of the peculiar advantage which the bailee has in such a case. The law arbitrarily attaches to him a presumption of negligence in order to cast upon him the burden of proof.[12] It has been held in Vermont[13] that where the bailee has all the means of producing testimony that fact alone will throw upon him the burden of proof.

as above given and establishes the present law in Missouri.

11. Jackson *v.* Sacramento Val. R. Co., 23 Cal. 269; Finucane *v.* Small, 1 Esp. 315; McCullom *v.* Porter, 17 La. Ann. 89; Babcock *v.* Murphy, 20 La. Ann. 399; Rey *v.* Toney, 24 Mo. 600, 69 Am. Dec. 444; Rayl *v.* Kreilich, 74 Mo. App. 246; Schmidt *v* Blood, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143, (valuable note in Am. Dec.); Fleming *v.* National Bank, 62 How. Pr. (N. Y.) 177; Labowitz *v.* Frankfort, 4 Misc. 275, 23 N. Y. Supp. 1038.

12. Pusey *v.* Webb, 2 Pen. (Del.) 490, 47 Atl. 701; Walrod *v.* Ball, 9 Barb. (N. Y.) 271; Collins *v.* Bennett, 46 N. Y. 490, Wintringham *v.* Hayes, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. Rep. 725; Hislop *v.* Ordner, (Tex. Civ. App.), 67 S. W. 337.

The general rule is that proof of damage to goods delivered in good condition to bailee, raises a presumption of negligence, and casts upon the defendant the burden of proof; one of the reasons given being that the bailee naturally has better opportunities of knowing the circumstances of the damage than the bailor. It is therefore held that when the bailor's agent is on the premises of the bailee at the time of the accident, and has as good means of knowing the circumstances as the bailee, the burden does not shift to the defendant, but is still on the plaintiff to establish the fact of negligence. Wall *v.* Gillin, Prtg. Co., 21 Misc. 649, 48 N. Y. Supp. 67.

In an action against a bailee for damage to goods, slight evidence will shift the burden to the bailee, and in considering the amount of evidence on the part of the plaintiff, it will make it necessary for the defendant to show that he exercised proper care. The court will consider the opportunities of knowledge with respect to the fact to be proved which may be possessed by the respective parties, and it is for the bailee to prove that the loss or damage was the result of inevitable accident or wrongful act "which in the exercise of due diligence could not have been avoided or prevented." Lyons *v.* Thomas, 34 Misc. 175, 68 N. Y. Supp. 802.

In speaking of the relative duties and obligations of bailors and bailees, some confusion has arisen in the books as to the burden of proof to establish negligence. Technically speaking, that burden always rests upon the plaintiff. But there are certain classes of bailments, when the property is in the exclusive possession of the bailee, and the property is returned damaged, in which it is said the law casts upon the bailee the burden of showing that the loss did not occur through his negligence. The authorities are by no means harmonious on this question. The ancient rule and older decisions are to the effect that the loss or injury raises no presumption of negligence. The more modern decisions hold that the proof of loss or injury establishes a sufficient *prima facie* case against the bailee to put him upon his defense. Hildebrand *v.* Carroll, 106 Wis. 324, 82 N. W. 145, 80 Am. St. Rep. 29.

13. Gleason *v.* Beers, 59 Vt. 581, 59 Am. Rep. 757.

(b.) *Presumption From Nature of Liability.* — Where the burden is ordinarily held to be on the bailor, it may be shifted to the bailee on account of the unusual liability of the latter.[14]

(c.) *Where Action is Based Upon Contract.* — As before stated, the English rule is,[15] that when the action is not based upon the negligence of the bailee and the plaintiff pleads only the bailee's failure to redeliver, then the burden is upon the bailee to controvert or excuse the fact of non-delivery. This rule is followed in some states.[16]

Illinois Rule. — The courts in Illinois hold consistently that the burden of proof should be upon the bailee on account of the strong presumption of negligence from the fact of loss or damage and from the relatively greater convenience to the bailee of proving the circumstances.[17] The same reasoning has led to the same rule in Missouri and in Ohio.[18]

14. Laird *v.* Eichold, 10 Ind. 212, 71 Am. Dec. 323; Wardlaw *v.* S. C. Railroad Co., 11 Rich Law (S. C.) 337.

15. Thomas *v.* Day, 4 Esp. 262, 6 Rev. Rep. 857; Parry *v.* Roberts, 3 Ad. & E. 118, 30 Eng. C. L. 46.

16. *Kansas.* — Lobenstein *v.* Pritchett, 8 Kan. 213.

Louisiana — Nichols *v.* Roland, 11 Mart. (O. S.) 190, *citing* Pothier Traite Des Chaptels N. 53, and Traite Du Pret A. Usage N. 40, and Traites on Obligations N. 620; Thomas *v.* Darden, 22 La. Ann. 413; Schwartz *v.* Baer, 21 La. Ann. 601.

Minnesota. — Bagley Elev. Co. *v.* American Exp. Co., 63 Minn. 142, 65 N. W. 264.

Missouri. — Casey *v.* Donovan, 75 Mo. App. 521; Dixon *v.* McDonnell, 92 Mo. App. 479.

New York. — Campbell *v.* Muller, 19 Misc. 189, 43 N. Y. Supp. 233; Lockwood *v.* Manhattan S. & W. Co., 28 App. Div. 68, 50 N. Y. Supp. 974; Ouderkirk *v.* Central Nat. Bank, 119 N. Y. 263, 23 N. E. 875; Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582.

South Carolina. — Tindall *v.* McCarthy, 44 S. C. 487, 22 S. E. 734.

Tennessee. — Kelton *v.* Taylor, 11 Lea 264, 47 Am. Rep. 284.

17. *Illinois.* — Funkhouser *v.* Wagner, 62 Ill. 59; Baren *v.* Cain, 15 Ill. App. 387; Brewster *v.* Weir, 93 Ill. App. 588; Cumins *v.* Wood, 44 Ill. 416, 92 Am. Dec. 189; Burlingame *v.* Horne, 30 Ill. App. 330; Bennett *v.* O'Brien, 37 Ill. 250; Hudson *v.* Bradford, 91 Ill. App. 218; Parry *v.* Squair, 79 Ill. App. 324.

18. Darling *v.* Younker, 37 Ohio St. 487, 41 Am. Rep. 532.

"Where a person becomes the bailee of a chattel, and, before the same is restored to the bailor, something happens to the chattel, whether it be loss or damage, such as ordinarily does not happen to a chattel where the skill or diligence which the law requires in the particular kind of bailment is exercised, the bailor, in an action for such loss or damage, is entitled to recover upon merely showing the fact of the bailment, and of such loss or damage during the term of the bailment, unless the bailee shows that such loss or damage took place under such circumstances as exonerate him from liability. . . . The plaintiff had committed the custody of the horse and buggy wholly to the defendant, and he had taken them beyond the plaintiff's view and control. The plaintiff had no personal knowledge of the circumstances attending the injury; the defendant presumptively knew all about it. Surely a rule which would require the party whose situation implies that he has no knowledge of the circumstances immediately attending the loss or injury to come forward and prove such circumstances, and which would allow the party whose situation im-

Rule of Georgia Code. — Under the Georgia Code (Sec. 2064) in all cases of bailment, the burden of proving due care is on the bailee.[19]

Where the Fact and Manner of Loss are Shown by the Bailee. — The burden of proof of the loss of the goods and the manner of the loss is upon the bailee.[20]

(d.) *Burden of Proof of Negligence.* — **General Rules.** —Where the loss is accounted for and the cause of action is based on negligence, or where there is no presumption of negligence the *onus* is on the bailor.[21]

Where there is no allegation of negligence or where the pre-

plies that he has full knowledge of them, to remain silent, would be at once illogical, inconvenient, and unjust. The object of legal proceedings is to elicit the truth, and in civil cases, the law generally demands the disclosure of the party who knows the facts and who in fairness ought to speak." Arnot *v.* Bramonier, 14 Mo. App. 431.

19. Almand *v.* Georgia R. & B. Co., 95 Ga. 775, 22 S. E. 674; Merchants' Nat. Bank *v.* Carhart, 95 Ga. 394, 22 S. E. 628, 51 Am. St. Rep. 95, 32 L. R. A. 775; Western Union Tel. Co. *v.* Fontaine, 58 Ga. 433; Concord Variety Works *v.* Beckham, 112 Ga. 242, 37 S. E. 392; Massillon E. & T. Co. *v.* Akerman, 110 Ga. 570, 35 S. E. 635; Merchants' Nat. Bank *v.* Guilmartin, 93 Ga. 503, 21 S. E. 55; Hawkins *v.* Haynes, 71 Ga. 40.

Apparent Exception. — The case of McNabb *v.* Lockhart, 18 Ga. 495, decided before the adoption of the Code, seems to hold that where a mandatory is accused of gross negligence or fraud the presumption that he has done his duty and that he is innocent of fraud is sufficiently strong to throw upon the plaintiff the burden of establishing at least a *prima facie* case against him.

20. Knights *v.* Piella, 111 Mich. 9, 69 N. W. 92, 66 Am. St. Rep. 375; Hoffman *v.* Coughlin, 26 Misc. 24, 55 N. Y. Supp. 600; Kafka *v.* Levensohn, 18 Misc. 202, 41 N. Y. Supp. 368; Lancaster Mills *v.* Merchants' Cotton P. Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586; Shelden *v.* Robinson, 7 N. H. 157, 26 Am. Dec. 726.

Where goods left with bailee are not returned, the burden is on him to account for them. His testimony that the goods were stolen, and that he had nothing to do with the theft, is not sufficient to shift the burden of proving negligence on the bailor. Rothoser *v.* Cosel, 39 Misc. 337, 79 N. Y. Supp. 855.

21. *Alabama.* — Higman *v.* Camody, 112 Ala. 267, 20 So. 480, 57 Am. St. Rep. 33.

California. — Cussen *v.* Southern Cal. Sav. Bank, 133 Cal. 534, 65 Pac. 1099; Taussig *v.* Bode, 134 Cal. 260, 66 Pac. 259, 54 L. R. A. 774.

Maine. — Dinsmore *v.* Abbott, 89 Me. 373, 36 Atl. 621.

Minnesota. — Bagley Elev. Co. *v.* American Exp. Co., 63 Minn. 142, 65 N. W. 264.

Missouri. — American Brewing Co. *v.* Talbot, 141 Mo. 674, 42 S. W. 679, 64 Am. St. Rep. 538.

New York. — McLaughlin *v.* New York L. & T. Co., 57 N. Y. St. 543, 27 N. Y. Supp. 248; Beardslee *v.* Richardson, 11 Wend. 25, 25 Am. Dec. 596; Liberty Ins. Co. *v.* Central V. R. Co., 19 App. Div. 509, 46 N. Y. Supp. 576; Stearns *v.* Farrand, 29 Misc. 292, 60 N. Y. Supp. 501.

Tennessee. — Lancaster Mills *v.* Merchants' Cotton P. Co., 89 Tenn. 1, 24 S. W. 317, 24 Am. St. Rep. 586.

When goods delivered to a bailee are not returned, and the bailee shows the loss was occasioned by some misfortune or accident not within his control, then the *onus* continues on the bailor to prove that it was chargeable to the want of care of the bailee. Kafka *v.* Levensohn, 18 Misc. 202, 41 N. Y. Supp. 368.

In Claflin *v.* Meyer, 75 N. Y. 260, 31 Am. Rep. 467, a case where goods

sumption of negligence from the loss or damage is strong the bailee must assume the burden to clear himself.[22]

Where damage to a large quantity of fruit is sought to be proved, and it is shown that the plaintiff is part owner of the fruit, having

deposited with a warehouseman were stolen by burglars, the court said: "Upon its appearing that the goods were lost by a burglary committed upon the defendant's warehouse, it was for the plaintiffs to establish affirmatively that such burglary was occasioned or was not prevented by reason of some negligence or omission of due care on the part of the warehouseman. The cases agree that where a bailee of goods, although liable to their owner for their loss only in case of negligence, fails, nevertheless, upon their being demanded, to deliver them or account for such non-delivery, or, to use the language of Sutherland, J., in Schmidt *v.* Blood, where "there is a total default in delivering or accounting for the goods," (9 Wend. 268,) this is to be treated as *prima facie* evidence of negligence. (Fairfax *v.* N. Y. C. & H. R. R. Co., 67 N. Y. 11; Steers *v.* Liverpool Steamship Co., 57 *id.* 1; Burnell *v.* N. Y. C. R. R. Co., 45 *id.* 184.) . . . But where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care, and the court will not assume in the absence of proof on the point that such fire or theft was the result of his negligence. (Lamb *v.* Camden & Amboy R. R. Co. 46 N. Y. 271, and cases there cited; Schmidt *v.* Blood, 9 Wend. 268; Platt *v.* Hibbard, 7 Cow. 500, note.)

22. Versailles *v.* La Compaignie De L'Union Des Abbatoirs De Montreal, 16 Rap. Jud. C. S. De Que. 227; Standard Brewery *v.* Hale & C. M. Co., 70 Ill. App. 363; C. R. I. & P. R. Co. *v.* Kendall, 72 Ill. App. 105; Safe Deposit Co. *v.* Pollock, 85 Pa. St. 391, 27 Am. Rep. 660; Donlan *v.* Clark, 23 Nev. 203, 45 Pac. 1; Litchtenstein *v.* Jarvis, 31 App. Div. 33, 52 N. Y. Supp. 605; Lynch *v.* Kluber, 20 Misc. 601, 46 N. Y. Supp. 428; Burnell *v.* N. Y C. R. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Schwerin *v.* McKie, 51 N. Y. 180, 10 Am. Rep. 581.

"The loss of paper by a bank, to which it had been sent for collection, carries with it the presumption of negligence and want of care, and the burden of proof to rebut the presumption is on the bank. Chicopee Bank *v.* Philadelphia Bank, 8 Wall. 641. And it is a general rule that in an action against a bailee for the failure to redeliver the property bailed, if the proof shows such failure, *prima facie* negligence will be imputed to the bailee; and, if the testimony of the plaintiff shows only that the property was lost, the burden of showing the circumstances of the loss is devolved on the defendant, and, unless the evidence shows due care by him according to the nature of the bailment and the property bailed, he will be held responsible for the breach of his contract to redeliver the property." Seals *v.* Edmondson, 71 Ala. 512; First Nat. Bank *v.* Bank of Newport, 116 Ala. 520, 22 So. 976.

"The general rule in negligence cases is that the complaining party must aver and prove negligence, and, in a line of decisions, this rule has been applied to a suit on a bailment contract; holding that, as the case is founded on negligence, the burden of proving it affirmatively rests throughout on the plaintiff. But the better reason underlies the doctrine, and it is supported by the weight of modern authority, that when a plaintiff has shown that the bailee received the property in good condition, and failed to return it or returned it damaged, he has made out a *prima facie* case of negligence. As is said in Hale, Bailm. & Carr. p. 30: 'The better opinion, supported by the weight of authority, holds that while the burden of proving negligence rests upon the plaintiff and does not shift throughout the trial, the burden of proceeding does shift, and that when

an undivided interest therein, it is not necessary to prove injury to any particular portion alleged to belong to the bailor.[23]

B. Proximate Cause. — To establish negligence of a bailee it is necessary to show that the negligence complained of was the proximate cause of the injury,[24] and the question whether it is or not is one of fact for the jury.[25]

C. Judicial Notice.— The court will take judicial notice that exposure of carriages to rain and snow through a winter is not the course of an ordinarily prudent and reasonable man.[26]

D. Res Inter Alios Acta. — To prove negligence on the part of a warehouseman in the erroneous delivery of goods, it is not competent to prove that other goods have been erroneously delivered from the same warehouse,[27] nor, in general, is it competent to prove what has been the habit of the bailee in dealing with other persons, not parties to the suit.[28] Nor is it material as affecting

the plaintiff has shown that the bailee received the property in good condition, and failed to return it, or returned it badly injured, he has made out a *prima facie* case of negligence. When he has shown a situation which could not have been produced except by the operation of abnormal causes, the *onus* rests upon defendant to prove that the injury was caused without his fault.'" Holt Ice & C. S. Co. *v.* Jordan Co., 25 Ind. App 314, 57 N. E. 575.

In Lichtenhein *v.* Boston & P. R. Co., 11 Cush. (Mass.) 70, the court held that where goods are delivered by a warehouseman to the wrong party the burden is on the warehouseman to at least balance the presumption of negligence — apparently meaning by such presumption the strong inference of fact arising from the peculiar circumstances of the case.

23. Arnold *v.* Producers Fruit Co., 128 Cal. 637, 61 Pac. 283.

24. Lockridge *v.* Feslar, 18 Ky. L. Rep. 469, 37 S. W 65; Cochran *v.* Walker, (Tex. Civ. App.), 40 S. W. 403; Cartlidge *v.* Slone, 124 Ala. 596, 26 So. 918; Scott *v.* Nat. Bank, 72 Pa. St. 471, 13 Am. Rep. 711.

25. Leber *v.* Stores, 31 Misc. 804, 62 N. Y. Supp. 1124; Forsythe *v.* Walker, 9 Pa. St. 148.

26. Briggs *v.* Taylor, 28 Vt, 180; Thompson *v.* St. Louis & S. F. R. Co., 59 Mo. App. 37.

27. Lichtenstein *v.* Jarvis, 31 App. Div. 33, 52 N. Y. Supp 605.

28. "Evidence to show that the fence surrounding the pasture at other points was maintained so that it met the requirements of the law, or otherwise, was immaterial to a determination of the issue made by the plaintiff. That other persons of prominence regarded the defendant a careful and prudent agister of horses, and intrusted valuable horses to her care; that the fence around her pasture compared favorably with the fences surrounding the pastures of other persons in that section; and that no other animals, to the knowledge of the witness, escaped from the pasture until the plaintiff's horse escaped — had no relevancy to the determination of this issue, and were properly rejected All the facts proposed to be established by such testimony did not tend to show that the defendant might not have been negligent in regard to maintaining a legal fence at the point complained of. Nor, on the issue presented by the plaintiff, was it material to show how the defendant kept other horses for people, or that their horses ran with other horses. The plaintiff made no complaint in this respect. Nor was it material for the defendant to show that such other persons took the risk of injury to their horses. That she made such a trade with others did not tend to show that she made it with the plaintiff. As bearing upon the conflict of her testimony with that

the liability of the bailee, what may have happened to the goods after the occurrence of the injury complained of.[29]

E. CUSTOM. — As tending to prove whether proper care was taken to guard a depot, evidence is admissible to the effect that it was not customary or usual to keep nightwatchmen at depots of similar size and importance to that in question.[30] Where an agent having in his possession money belonging to his principal lost part of it, and it is proved that he used some of it while on a train to make change for a friend, evidence is admissible to show that the exchange of money on a train is not an unusual occurrence.[31]

F. CHARACTER AND SKILL. — In an action against a gratuitous bailee for loss of money intrusted to him, it is competent for the bailee to introduce evidence of his good character for honesty and general trustworthiness.[32] Where the bailee is liable for ordinary negligence, proof that he was utterly unskilled in his business, and that the bailor had notice of that fact, is immaterial.[33]

G. CONTRIBUTORY NEGLIGENCE. — a. *Burden of Proof.* — The burden of proving the sound condition of chattels when they were delivered to the bailee is on the plaintiff.[34]

b. *Presumptions.* — There is no presumption of law that a guest at a hotel has knowledge of the peculiar usage of that particular inn, of which there was no notice in any way given him.[35]

of the plaintiff on this point, she was permitted to show that it was her custom to insert in her contracts a provision that the owner of the horse took the risk of its injury. This did not permit her to show particular instances in which she carried the custom into effect. There was no error in the rejection of offered testimony." Lucia *v.* Meach, 68 Vt. 175, 34 Atl. 695.

29. Where goods in the hands of a bailee are damaged through his negligence and while they are still in his custody they are further damaged or are totally destroyed through causes over which he had no control the latter fact does not operate to relieve him from liability for the first damage. Powers *v.* Mitchell, 3 Hill (N. Y.) 545. "The defendant was no more released from liability for the injury resulting from his negligence before the flood, than he would have been under like circumstances if he had carelessly permitted the goods to be stolen or burned. In such an event he might have contended with as much propriety as in the present case, that he ought not to be held responsible for the consequences of his own neglect, because the goods would have been destroyed by the flood if no loss or damage had previously occurred. It cannot be denied that a cause of action to recover the full amount of damages that had already been sustained, existed before and at the time of the destruction by the flood; and unless the defendant can find some principle which will enable him to plead the flood in bar of an action for his own previous wrong, his liability must still continue. The flood may excuse the defendant from liability for injuries happening through its agency, but nothing further. He must answer for such as had previously accrued by means of his own misconduct."

30. Pike *v.* Chicago M. & St. P. R. Co., 40 Wis. 583.

31. Darling *v.* Younker, 37 Ohio St. 487, 41 Am. Rep. 532.

32. McNabb *v.* Lockhart, 18 Ga. 495.

33. Motley *v.* Southern F. & W. Co., 126 N. C. 339, 35 S. E. 601.

34. Higman *v.* Camody, 112 Ala. 267, 20 So. 480, 57 Am. St. Rep. 33.

35. Berkshire Woollen Co. *v.* Proctor, 7 Cush. (Mass.) 417.

c. *Estoppel.* — Where the contract provides that the chattel should be delivered to the bailee in good condition, if there was any defect which was known to, or could be seen by the bailee, and he accepts it without making objections in consequence of the defect, then he is estopped from setting it up as a defense.[36]

d. *Custom.* — Where the bailee attempts to prove that goods were not in good condition when delivered to him, it is competent for the bailor to prove the custom of the trade as to the manner of delivering such goods.[37] Where chattels remain in the hands of a bailee after the time for redelivery has expired, and are then lost or damaged, it is admissible for the bailee to prove the custom of the bailor to send for and reclaim his goods in a particular way, and that in the instance in question, it was not so done.[38]

H. Degree of Negligence Matter for Jury. — Where there is a conflict in the evidence, the degree of negligence is one of fact for the jury.[39]

36. The contract provided that the boat was in good condition, and that two persons named in the contract might or should determine whether the boat was not in good condition. It turned out in point of fact that these persons from some cause, never did determine whether the boat was in the condition named in the contract, but the boat was delivered to and received by the defendant without objection. If there was any defect which was known to or could be seen by the servants of the defendant, and they accepted without making objections in consequence of the defects, then the defendant is estopped from setting it up as a defense to this action. The time to make that objection was when the boat was delivered, and that might have been urged as a reason for non-acceptance. Stewart *v.* Western Union R. Co., 4 Biss. 362, 23 Fed. Cas. No. 13,438.

Estoppel. — The plaintiff delivered goods to a dressmaker to be made up into a dress. When the dress was completed, plaintiff discovered that it was made with the goods wrong side out. Defendant proved that at various times during the progress of the dressmaking plaintiff tried on the dress, and had an opportunity to see how it was being made, and set that fact up to estop plaintiff from proving negligence on defendant's part. The lower court in its instruction allowed the estoppel. The supreme court said: "So much of the instructions requested as referred to the matter of estoppel was also clearly erroneous. It made the plaintiff's knowledge that the dress was being made up wrong side out the sole test, but in order to justify the jury in finding an estoppel, it was necessary that there should be evidence tending to show that the defendant was induced by the plaintiff's conduct to do something different from what she would otherwise have done, and that the plaintiff knew or had reasonable cause to know that the defendant would so act." Lincoln *v.* Gay, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480.

37. Brown *v.* Hitchcock, 28 Vt. 452.

38. Cohen *v.* Moshkowitz, 17 Misc. 389, 39 N. Y. Supp. 1084.

39. *England.* — Doorman *v.* Jenkins, 2 Ad. & E. 256, 4 N. & M. 170; Shiells *v.* Blackburne, 1 H. Bl. 158, 2 Rev. Rep. 750; Reece *v.* Righy, 4 Barn. & A. 202, 23 Rev. Rep. 257; Moore *v.* Mourgue, 2 Cowp. 479.

Dakota. — Whiting *v.* Chicago M. & St. P. R. Co., 5 Dak. 90, 37 N. W. 222.

a. *Presumption.* — There is no presumption that the conduct of a bailee in a given case conforms to the standard of care required by law.[40] It is held, however, that proof that bailee has dealt with the bailor's property in the same way as with his own, raises a presumption of ordinary diligence,[41] or of slight diligence at least,[42] and that though such evidence is not conclusive against an

Georgia. — McNabb *v.* Lockhart, 18 Ga. 495; Merchants' Nat. Bank *v.* Guilmartin, 93 Ga. 503, 21 S. E. 55.

Illinois. — Skelley *v.* Kahn, 17 Ill. 170; Mayer *v.* Brensinger, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196; Saunders *v.* Hartsook, 85 Ill. App. 55.

Maine. — Storer *v.* Gowen, 18 Me. 174.

Massachusetts. — Whitney *v.* Lee, 8 Metc. 91; Smith *v.* First Nat. Bank, 99 Mass. 600, 97 Am. Dec. 59.

Michigan. — Knights *v.* Piella, 111 Mich. 9, 69 N. W. 92, 66 Am. St. Rep. 375.

New York. — Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582; Ouderkirk *v.* Cent. Nat. Bank, 119 N. Y. 263, 23 N. E. 875.

Ohio. — Griffith *v.* Zipperwick, 28 Ohio St. 388.

Pennsylvania. — Safe Deposit Co. *v.* Pollock, 85 Pa. St. 391, 27 Am. Rep. 660; First Nat. Bank *v.* Graham, 85 Pa. St. 91.

South Carolina. — Wardlaw *v.* S. C. Railroad Co., 11 Rich. Law 337.

Texas. — Fulton *v.* Alexander, 21 Tex. 148; Texas Cent. R. Co. *v.* Flanary, (Tex. Civ. App.), 45 S. W. 214.

Virginia. — Carrington *v.* Ficklin, 32 Grat. 670.

The question whether bailee took reasonable care of chattels left with him is one of fact for the jury. Hoffman *v.* Coughlin, 26 Misc. 24, 55 N. Y. Supp. 600.

Whether ordinary care was exercised, is a question of fact for the jury. Rettner *v.* Minn. C. S. Co., (Minn.), 93 N. W. 120.

The question whether proper care has been used is one of fact for the jury. Cussen *v.* Southern Cal. Sav. Bank, 133 Cal. 534, 65 Pac. 1099.

For statement of facts held to constitute slight negligence for which an innkeeper is liable, see Watson *v.* Loughran, 112 Ga. 837, 38 S. E. 82.

For statement of facts constituting extraordinary care, see Cowles *v.* Pointer, 26 Miss. 253.

For a set of facts held to be gross negligence, see Samonset *v.* Mesnager, 108 Cal. 354, 41 Pac. 337.

In the State of Colorado, degrees of negligence such as slight, ordinary and gross are not recognized. Denver & R. G. R. Co. *v.* Peterson, (Colo.), 69 Pac. 578.

The question whether negligence is gross negligence or not may be one of law or of fact. Doorman *v.* Jenkins, 2 Ad. & E. 256, 4 N. & M. 170.

Contra. — Degree of negligence is a question of law for the court. Green *v.* Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680; Lyons First Nat. Bank *v.* Ocean Nat. Bank, 48 How. Pr. (N. Y.) 148.

40. Merchants' Nat. Bank *v.* Guilmartin, 93 Ga. 503, 21 S. E. 55.

41. First Nat. Bank *v.* Graham, 79 Pa. St. 106, 21 Am. Rep. 49.

42. Under a gratuitous bailment, defendant is liable only for gross negligence, the true test of which is whether the defendant took the same care of plaintiff's property as he did of his own. Standard Milling Co. *v.* White L. C. T. Co., 122 Mo. 258, 26 S. W. 704.

As to the degree of care used by a bank to protect deposits in its hands, it is competent for the bank to show that its own funds were entrusted to the same person who had charge of its patrons' deposits. Merchants' Nat. Bank *v.* Guilmartin, 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322.

Proof that bailee gave the same care to property left with him that he did to his own, is sufficient to exonerate him from the charge of gross negligence. Fulton *v.* Alexander, 21 Tex. 148.

allegation of gross negligence,[43] it is strong and persuasive evidence against negligence.[44]

b. *Proof of Circumstances.* — Evidence of the quality and condition of goods,[45] the difficulty of holding such property,[46] the fact of duress preventing the bailee from exercising ordinary care,[47] circumstances tending to show that the injury was occasioned by the acts of others,[48] etc., is admissible.

c. *Custom.* — To determine the degree of care exercised, it is competent to prove by way of comparison the custom in neighboring mills,[49] stock yards,[50] warehouses,[51] and usages of drovers,[52] innkeepers,[53] watchmakers,[54] etc.

43. The fact that the defendant bank intrusted its own money and other property to the safe keeping of its defaulting cashier, and in consequence itself suffered a heavy loss through his peculations, is one which the jury might very properly consider in arriving at a conclusion concerning the good faith and diligence observed by the bank's officials. However, this solitary fact could not properly serve as the test upon which the liability of the bank should be made to depend. What the bank ought to have done in order to come up to the full measure of diligence required by the law could not be arrived at by showing simply what it actually did in other matters relating to its own affairs. Indeed, the officials of the bank might have been grossly negligent concerning the care bestowed upon its own property, and it could not excuse its negligence in regard to the duty owing to its customers by showing it had been equally negligent in failing to properly look after its own affairs. Merchants' Nat. Bank *v.* Carhart, 95 Ga. 394, 22 S. E. 628, 51 Am. St. Rep. 95, 32 L. R. A. 775; Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582; Ray *v.* Bank of Ky., 10 Bush. (Ky.) 344.

44. Ouderkirk *v.* Central Nat. Bank, 119 N. Y. 263, 23 N. E. 875.

45. McDaniels *v.* Robinson, 26 Vt. 316, 62 Am. Dec. 574.

46. Perry *v.* Beardslee, 10 Mo. 569.

47. In a question of the degree of negligence of which a warehouseman has been guilty, it is competent for him to prove that he is not in such a situation as to be capable of exercising ordinary care. "Duress by the *vis major* of the person so that he cannot exercise ordinary care to save goods is just as much a *vis major* as a violent seizure of the goods." Smith *v.* Frost, 51 Ga. 336.

48. Lockridge *v.* Fesler, 18 Ky. L. Rep. 469, 37 S. W. 65.

49. McKibben *v.* Bakers, 1 B. Mon. (Ky.) 120.

50. Union S. Y. & T. Co. *v.* Mallory S. & Z. Co., 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341.

51. Taussig *v.* Bode, 134 Cal. 260, 66 Pac. 259, 54 L. R. A. 774; Lichtenstein *v.* Jarvis, 31 App. Div. 33, 52 N. Y. Supp. 605.

52. The usual practice or mode of proceeding ordinarily adopted by drovers under given circumstances when engaged upon routes of any great length, and from the same point, would have some bearing upon the question of what is ordinary care. Testimony of such practices is not competent to prove custom in the direct sense of that term, but to show course of proceeding ordinarily pursued, has bearing upon the question of what is ordinary care. Maynard *v.* Buck, 100 Mass. 40.

53. It is not admissible for an innkeeper to prove the custom of other innkeepers in the same place to provide safes for the purpose of depositing therein large sums of money and other valuable things which their guests may have, and the custom of guests to deposit accordingly, but it is competent for the innkeeper to prove fully a custom of his own hotel and of his guests in this particular. Berkshire Woollen Co. *v.* Proctor, 7 Cush. (Mass.) 417.

54. Clarke *v.* Earnshaw, Gow. 30, 21 Rev. Rep. 790.

2. Failure to Redeliver — Non-Tortious. — A. In General.— In an action on a contract for non-delivery of goods bailed, it is sufficient to prove the contract, its breach, and the damages following from such breach.[55]

B. Burden of Proof. — A bailee defending on the ground that the title is in a third person, assumes the burden of proof to make out every fact necessary either to permit such defense,[56] or to establish it.[57]

IV. DAMAGES.

1. For Loss of Goods. — Cost of property lost may be shown, and in the absence of other proof is sufficient to establish value at the time of loss.[58] It is competent to prove the market value of the

55. Tindall *v.* McCarthy, 44 S. C. 487, 22 S. E. 734.

A refusal to deliver a part of the goods bailed on account of having a general lien, is a refusal to deliver the whole. Scott *v.* Jester, 13 Ark. 437.

56. Palmtag *v.* Doutrick, 59 Cal. 154, 43 Am. Rep. 245; Wetherly *v.* Straus, 93 Cal. 283, 28 Pac. 1045; Bates *v.* Stanton, 1 Duer (N. Y.) 79; *citing* Biddle *v.* Bond, 6 B. & S. 225; Thorne *v.* Tilbury, 3 H. & N. 534.

It is competent for the bailee to show that the property has been taken from him by process of law, or by a person having a paramount title, or that the title of the bailor had terminated, or that the bailor was a mere agent, and that the return of the property to him had been forbidden by his principal. Sedgwick *v.* Macy, 24 App. Div. 1, 49 N. Y. Supp. 154.

In an action between bailor and bailee for damages for the delivery of goods by the latter to a third person, the bailee may show by way of estoppel against the bailor that in an action between such third person and the bailor involving the title of the goods in controversy, that the title was adjudged to be in such third person. Burton *v.* Wilkinson, 18 Vt. 186.

57. Wetherly *v.* Straus, 93 Cal. 283, 28 Pac. 1045; Cass *v.* Boston & L. R. Co., 14 Allen (Mass.) 448; Enterprise Oil & Gas Co. *v.* Nat. Transit Co., 172 Pa. St. 421, 33 Atl. 687, 51 Am. St. Rep. 746.

58. Biad *v.* Everard, 4 Misc. 104, 23 N. Y. Supp. 1008, 53 N. Y. St. 210; Jones *v.* Morgan, 90 N. Y. 4, 43 Am. Rep. 131; Curren *v.* Ampersee, 96 Mich. 553, 56 N. W. 87.

Contra. — Watson *v.* Loughran, 112 Ga. 837, 38 S. E. 82.

In a question of damages for the loss of bailed goods it is competent, in showing an overestimation, to prove the value of other goods included in the same purchase with those lost. Wells *v.* Kelsey, 37 N. Y. 143.

Inventor's Model. —"The point is made that the recovery was excessive, because based upon the plaintiff's testimony of the price paid by her for the construction of this model, it being contended that the defendant's evidence given to show that the reasonable value of the article was much less, should have been accepted as establishing the damages actually. It is true that the defendant's witness, a model maker, testified that he thought that this model could be replaced for the sum of $30, but this was not controlling as against the plaintiff's testimony of the price actually paid by her for it. The article had no market value, and, from its nature, the actual value could be determined as well from the price paid as from the opinion of a witness of the cost of replacing it. Being the model of a new device, the personal requirements of the inventor had necessarily much to do with the matter of its construction; and while the defendant's witness may have been prepared to reproduce the article at less cost, to his own satisfaction, it does not follow that the result would

chattels at the time the loss occurred,[59] or at the time of the delivery to the bailee,[60] or at the time of the termination of the bailment.[61] To show the amount of damage resulting from the loss of land certificates deposited with the bailee, it is competent to prove the expense of suits to recover the land covered by such certificates.[62] To determine the value of goods lost in a fire, it is competent to prove the amount of insurance recovered by the warehouseman.[63]

2. Injury to Goods. — To determine the amount of damages recoverable for negligent injury to a horse, it is competent to prove the market value of the horse immediately before and after the injury,[64] and the amount necessarily laid out and expended in the endeavor to heal and cure it.[65] On a question of damage to goods left in a warehouse, it is competent to prove the price they brought in their damaged condition and the price they would have brought in perfect condition, and the difference between them.[66] To determine the amount of damages from bailee's refusal to redeliver goods when demanded, when such goods are afterwards delivered to bailor and sold, it is admissible to prove the market price of the goods at the time of demand and refusal, and the price for which the goods were actually sold, and the difference between these prices.[67] Proof of amount paid for necessary repairs is admissible.[68]

3. Mode of Proof. — Expert testimony is admissible to prove the probable cost of repairing injuries;[69] the value of jewelry lost.[70] The person who repaired the damaged article may prove the amount

reasonably have satisfied the plaintiff. The justice was quite well authorized to find the fact favorably to the plaintiff upon this conflict of evidence and to base the judgment upon the proof of value furnished by the testimony of the actual cost price under the circumstances of the case. Hawver *v.* Bell, 141 N. Y. 140, 36 N. E. 6; Parmenter *v.* Fitzpatrick, 135 N. Y. 190, 31 N. E. 1032; Jones *v.* Morgan, 90 N. Y. 4; Hangen *v.* Hachemeister, 114 N. Y. 566, 21 N. E. 1046; Glovinsky *v.* Steamship Co., 6 Misc. Rep. 388, 26 N. Y. Supp. 751. See, also, Heald *v.* MacGowan (Com. Pl.), 5 N. Y. Supp. 450; Scattergood *v.* Wood, 14 Hun 269, *affirmed* 79 N. Y. 263; Frankerstein *v.* Thomas, 4 Daly, 256;" Waterman *v.* American Pin Co., 19 Misc. 638, 44 N. Y. Supp. 410.

59. Watson *v.* Loughran, 112 Ga. 837, 38 S. E. 82; Clark *v.* Ford, 7 Kan. App. 332, 51 Pac. 938.

60. Rey *v.* Toney, 24 Mo. 600, 69 Am. Dec. 444.

61. Holt Ice & C. S. Co. *v.* Jordan Co., 25 Ind. App. 314, 57 N. E. 575.

62. First Nat. Bank *v.* Bank of Newport, 116 Ala. 520, 22 So. 976.

63. Sidaways *v.* Todd, 2 Stark, 400, 20 Rev. Rep. 703.

64. Mason *v.* St Louis Union Stock Yards Co., 60 Mo. App. 93.

65. Pusey *v.* Webb, 2 Pen. (Del.) 490, 47 Atl. 701.

66. Marks *v.* New Orleans C. S. Co., 107 La. 172, 31 So. 671, 57 L. R. A. 271.

67. Scott *v.* Jester, 13 Ark. 437; Graves *v.* Moses, 13 Minn. 335.

68. Schoenholtz *v.* Third Avenue R. Co., 14 Misc. 461, 36 N. Y. Supp. 15; Wintringham *v.* Hayes, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. Rep. 725.

69. Wintringham *v.* Hayes, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. Rep. 725.

70. Taussig *v.* Schields, 26 Mo. App. 318.

of his charges therefor, and that the charges were reasonable.[71] Market values may be proved by the testimony of persons shown to be familiar with such values.[72] A receipt given by a bailee,[73] or other declarations relative to the value of the articles lost is admissible.[74] To prove the amount of damages consequent upon the loss of bonds by a bailee, bailor may introduce in evidence copy of the judgment rendered against him in consequence of the loss of such bonds.[75]

71. Lynch *v.* Kluber, 20 Misc. 601, 46 N. Y. Supp. 428.
72. Parry *v.* Squair, 79 Ill. App. 324.
73. Clark *v.* Schrimski, 77 Mo. App. 166.
74. Taussig *v.* Schields, 26 Mo. App. 318.
75. Second Nat. Bank *v.* Ocean Nat. Bank, 11 Blatchf. 362, 21 Fed. Cas. No. 12,602.

BALLOTS.—See Elections.

BANKRUPTCY.

BY CLARK ROSS MAHAN.

CROSS-REFERENCES.

For matters of evidence of insolvency, *see* the article, "INSOLVENCY."

See also:
Assignment for Benefit of Creditors;
Contempt of Court;
Fraud; Fraudulent Conveyances;
Intent;
Motive.

For matters of evidence as to revival of a debt discharged in bankruptcy, *see* the article, "NEW PROMISE, REVIVAL."

I. THE ADJUDICATION OF BANKRUPTCY.

1. Burden of Proof. — A. INVOLUNTARY PROCEEDINGS. — By express provisions of the present bankruptcy act, whenever a person against whom is filed a petition in bankruptcy takes issue with and denies the allegation of his insolvency, he must appear in court on the hearing, with his books, papers, and accounts, and submit to an examination and give testimony as to all matters tending to establish solvency or insolvency; otherwise the burden of proving his solvency is upon him.[1]

1. Bankruptcy Act, 1898, § 3, sub. D. And see *In re* Rogers Milling Co., 102 Fed. 687; *In re* Bloch, 109 Fed. 790.

When the Debtor Simply Denies the Insolvency. basing his denial solely on an opinion as to the value of his estate, unascertained by schedules or other proper basis, and not accompanied by any evidence whatever, no issue of insolvency is raised; nor is the burden of proof sustained. Bray *v.* Cobb, 91 Fed. 102.

Burden on Bankrupt.— In *In re* Schenklein, 7 Am. Bank. Rep., 162, where the petition showed such concealment of assets as amounted to intent to hinder and delay the petitioning creditor, it was held that the bankrupt had the burden to show solvency.

Intentional Preference of Creditor. — When the act of bankruptcy charged is a conveyance of property to a creditor with intent to prefer him, the petitioner also has the burden of proving the intent. *In re* Bloch, 109 Fed 790; *In re* Gilbert, 112 Fed. 951. But it is not necessary to show the intent with which the creditor received the property, nor that he had reasonable cause to believe that a preference was intended. *In re* Rome Planing Mill, 96 Fed. 812.

Burden of Proving Insolvency. Where the petition in involuntary proceedings is based on an alleged transfer of property with intent to hinder and delay creditors, the creditors have not the burden of proving insolvency, solvency of the bankrupt being solely a matter of defense. *In re* West, 108 Fed. 940, 48 C. C. A. 155, 5 Am. Bank. Rep. 734.

Under Former Bankruptcy Acts, also, the petitioning creditor in involuntary proceedings in bankruptcy had the burden of proof,[2] and until a *prima facie* case was made by him, neither an order to show cause, nor an order of seizure, injunction or arrest would be granted.[3]

B. VOLUNTARY PROCEEDINGS. — A petitioner in voluntary bankruptcy proceedings, whose allegation as to his residence within the district is contested by motion to vacate the adjudication filed as soon thereafter as possible, still has the burden of proof, although the adjudication requires the creditor to adduce evidence to support his motion.[4]

The Fact of Intent to Create a Preference sufficiently appears from the fact of his having made a transfer, while insolvent, of a large part of his property to a single creditor. (*In re* Rome Planing Mill, 96 Fed. 812; *In re* Gilbert, 112 Fed. 951), or from the facts of the insolvency and the preference, if no attempt is made by the bankrupt to show an absence of intent; but it is permitted to the bankrupt to show such absence by reason of his entire ignorance of insolvency and a reasonable expectation of ability to pay his debts (*In re* Gilbert, 112 Fed. 951); and it is error to charge that that intent to prefer is conclusively established so that rebutting evidence is of no avail. *In re* Bloch, 109 Fed. 790.

Invalidity of Debt of Petitioning Creditor.— A debtor in involuntary bankruptcy proceedings who resists an adjudication on the ground that the debt of the petitioning creditor is invalid because the transaction from which the debt arose was a gambling transaction, has the burden of proving, by clear and conclusive evidence, that the dealings in question were of the character alleged. Hill *v.* Levy, 98 Fed. 94.

2. *In re* King, 14 Fed. Cas. No. 7,783; *In re* Oregon Bulletin Prtg. & Pub. Co., 18 Fed. Cas. No. 10,559, *reversed* 18 Fed. Cas. No. 10,561; *In re* Safe Deposit & Sav. Bank, 21 Fed. Cas. No. 12,211; Miller *v.* Keys, 17 Fed. Cas. No. 9,578; *In re* Leonard, 15 Fed. Cas. No. 8,255; *Ex parte* Hull, 12 Fed. Cas. No. 6,856; Brock *v.* Hoppock, 4 Fed. Cas. No. 1,912; *Ex parte* Foster, 9 Fed. Cas. No. 4959. *Compare In re* Price, 19 Fed. Cas. No. 11,411, wherein it was held that upon return of the rule to show cause, the burden of proof was on the debtor to explain, if he could the acts of bankruptcy charged in the petition; that the creditor was not, in the first place, required to submit any evidence except the depositions filed with the petition and on which the rule to show cause was based. This case was decided, however, under the provision of § 14 of the act of 1867, prior to the amendment of 1874.

The Right to Open and Close the case on the issue of bankruptcy was with the respondents, in involuntary bankruptcy proceedings. *In re* Jelsh, 13 Fed. Cas. No. 7,257.

3. *In re* Leonard, 15 Fed. Cas. No. 8,255.

In *In re* Safe Deposit & Savings Bank, 21 Fed. Cas. No. 12,211, it was held that though insolvency might be admitted, the adjudication will not be decreed until an act of bankruptcy alleged was proven, where the acts of bankruptcy were denied.

It Was Not Required That the Petitioner should make full and complete proof of the debtor's insolvency, but upon the production of proof tending to establish it, the debtor must, if he could, explain the conditions shown to exist, because he was presumed to be in possession of the facts. *In re* Oregon Bulletin Prtg. & Pub. Co., 18 Fed. Cas. No. 10,559, *reversed* 18 Fed. Cas. No. 10,561.

4. *In re* Scott, 111 Fed. 144.

Explaining Change of Residence. And where it is shown that, until a few years before he resided and did business in another State, that he is still in the employ of a busi-

2. Depositions. — The right to take depositions in proceedings under the present bankruptcy act is to be determined and enjoyed according to the United States laws now in force, or such as may be enacted relating to the taking of depositions, except as therein provided.[5]

3. Competency of Evidence. — A. IN GENERAL. — The mode of proving the facts constituting the grounds upon which the adjudication of bankruptcy may be decided differs in no essential particulars from the mode of proving such facts when in issue in other proceedings, as for example insolvency,[6] conveyance of property constituting a fraudulent preference,[7] and the like; and hence it is thought that no good purpose can be served by segregating the cases in which the mode of proving these facts has been the question decided, merely because the proceeding happened to be a bankruptcy proceeding. Some cases are, however, set out in the note to illustrate the extent of the inquiry on the issues in a bankruptcy proceeding looking to the adjudication of Bankruptcy.[8]

ness firm in that State, and that he spends his time partly in one State and partly in the other, the petitioner has the burden of proof to show satisfactorily the alleged change of residence. *In re* Waxelbaum, 97 Fed. 562.

5. Act of 1898, § 21, subd. B.

"**Notice of the Taking of Depositions** shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim, notice shall also be served upon the bankrupt." Sec. 21, subd. E.

"**A Deposition Taken upon an Examination before a Referee** shall be in the form of a narrative, unless he determines that the examination shall be by question and answer. The referee shall note upon the deposition any question objected to, with his decision thereon." Gen. Ord. Bank. No. 22, 89 Fed. x.

Under the Act of 1867, testimony in bankruptcy proceedings could not be taken *de bene esse,* on notice, but could only be taken on commission. *In re* Dunn, 9 Nat. Bank Rep. 487, 8 Fed. Cas. No. 4,173.

Depositions Taken in Shorthand and reduced to longhand by the stenographer must be read over to and signed by the witness, otherwise they will be suppressed. *In re* Cary, 9 Fed. 754.

6. *See* the article "INSOLVENCY."

7. *See* the article "FRAUDULENT CONVEYANCES."

8. **Insolvency.**— When a bankrupt's assets consisted in part of a stock of unseasonable goods, which had been taken and partly sold by a receiver, on the issue as to the insolvency of the bankrupt a few days prior to the receiver taking possession, the amount of goods sold by the receiver, and the amount on hand at the cost price may be shown as important on the question of the market value at such prior date. *In re* Bloch, 109 Fed. 790.

Evidence of Suspension of Business and Inability to Pay Debts at a time shortly after the act of bankruptcy alleged in an involuntary petition, and of negotiations looking to creditors permitting future operations by the bankrupt, is competent on the question of insolvency at the time of such act of bankruptcy. *In re* Elmira Steel Co., 109 Fed. 456; (*citing* Davis *v.* Stevens, 104 Fed. 235; *In re* Lange, 97 Fed. 197; Tuthice *v.* Skidmore, 124 N. Y. 148, 26 N. E. 348; Terry *v.* Tubman, 92 U. S. 156, 23 L. ed. 537.) *See* the title "INSOLVENCY" for this principle fully discussed.

The Intent to Prefer is to be proven as a fact by direct evidence, or as the necessary and certain consequence of other facts clearly proved. Morgan *v.* Mastick, 2 Nat.

B. ADMISSIONS OF DEBTOR. — It is proper to prove the insolvency of the debtor by his admissions.[9]

4. Variance. — A petitioning creditor in involuntary bankruptcy proceedings is, in adducing his evidence to sustain his petition, confined to evidence which will establish the acts of bankruptcy charged.[10]

5. The Adjudication as Evidence. — A. IN GENERAL. — The fact of the adjudication may be proved by the record thereof.[11]

B. CONCLUSIVENESS OF THE DECREE. — It has been very gen-

Bank. Rep. 521, 17 Fed. Cas. No. 9,803. *See* also article "INTENT."

Circumstances Surrounding Transfer.— Where it is doubtful whether or not the intention of a transfer of property was such as to make it an act of bankruptcy, evidence will be received to prove the true circumstances of the whole transaction. *Ex parte* Potts, Crabbe 469, 19 Fed. Cas. No. 11,344.

Under the Issue Made by the Denial of Bankruptcy, the debtor can introduce evidence to contradict all the material allegations in the petition, as for example that he has since the filing of the petition made payments on the debt of the petitioner. *In re* Skelley, 3 Biss. 260, 22 Fed. Cas. No. 12,921.

9. *In re* Lange, 97 Fed. 197.

10. *Ex parte* Shouse, Crabbe 482, 22 Fed. Cas. No. 12,815; *Ex parte* Potts, Crabbe 469, 19 Fed. Cas. No. 11,344. See also *In re* Scudder, 21 Fed. Cas. No. 12,563; *In re* Sutherland, Deady 344, 23 Fed. Cas. No. 13,638.

Proving Either of Two Acts of Bankruptcy Charged.— In *In re* Drummond, 7 Fed. Cas. No. 4,093, it was held that when two distinct matters, each of which was sufficient on which to base an adjudication of bankruptcy, were alleged conjunctively, it was sufficient to satisfactorily prove either of them.

Proof that the Claim of the Petitioning Creditor Is Not Due is not a fatal variance from an averment that it is due. Linn *v.* Smith, 15 Fed. Cas. No. 8,375.

Proof of a Refusal by a Debtor to Pay His Note on the Ground that he has a defense, made in good faith, or that the holder is not the owner and has no title, is not proof of an act of bankruptcy. The evidence must be confined to the acts charged, and under this head time of act charged is material and must be proved as alleged. *In re* Sykes, 5 Biss. 113, 22 Fed. Cas. No. 13,708.

11. *In re* Keller, 109 Fed. 118.

"**Certified Copies of Proceedings before a Referee,** or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now, or may hereafter be admitted as evidence." Act of 1898, § 21, subd. D.

An Examination of the Bankrupt Taken before a Master in Chancery, in equity proceedings is admissible in evidence before the commissioner in bankruptcy, so far as it may elucidate the state of the bankrupt's property. *In re* Bragg, 1 N. Y. Leg. Obs. 119, 4 Fed. Cas. No. 1,799. "The creditors had a right," said the court, "to use his declarations, whether oral or written, against the verity and integrity of his inventory, and his sworn statements would be of still stronger effect if they were in collision with his representations on his papers in this court."

The Inventory of a Voluntary Bankrupt rendered on his petition in bankruptcy or a duly certified copy thereof, is competent evidence for the plaintiff in an action against the bankrupt without the production of the entire record. "It is a written statement of his effects surrendered, made out on oath, over his own signature, and is competent evidence against him as his answer in chancery would be." Dupuy *v.* Harris, 6 B. Mon. (Ky.) 534.

erally held, under all of the bankruptcy acts, that a decree or adjudication in bankruptcy, made on a petition and other proceedings regular in form, cannot be collaterally attacked in subsequent proceedings except for fraud or collusion in obtaining it.[12]

II. EXAMINATION OF WITNESSES.

1. The Bankrupt. — A. THE RIGHT. — a. *In General.* — It is expressly provided by the national bankruptcy act of 1898[13] that a

12. *United States.*— *In re* Columbia Real Estate Co., 101 Fed. 965; *In re* Ives, 5 Dill 146, 13 Fed. Cas. No. 7,115; Chapman *v.* Brewer, 114 U. S. 158; *In re* Wallace, Deady 433, 29 Fed. Cas. No. 17,094; Michaels *v.* Post, 21 Wall. 398; Graham *v.* Boston E. & H. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009; Hobson *v.* Markson, 1 Dill. 421, 12 Fed. Cas. No. 6,555; *In re* Funkenstein, 3 Sawy. 605, 9 Fed. Cas. No. 5,158; *In re* Ordway, 18 Fed. Cas. No. 10,552; *In re* Duncan, 8 Ben. 365, 8 Fed. Cas. No. 4,131; *In re* McKinley, 7 Ben. 562, 16 Fed. Cas. No. 8,864; *In re* Fallon, 8 Fed. Cas. No. 4,628; Sutton *v.* Mandeville, 1 Cr. C. C. 187, 23 Fed. Cas. No. 13,651.

Connecticut.— Barstow *v.* Adams, 2 Day 70; Bissell *v.* Post, 4 Day 79.

Indiana.—Roberts *v.* Shroyer, 68 Ind. 64.

Massachusetts.—Livermore *v.* Swasey, 7 Mass. 213.

New Jersey.—Mount *v.* Manhattan Co., 41 N. J. Eq. 211, 3 Atl. 726.

North Carolina.—Lewis *v.* Sloan, 68 N. C. 557.

Adjudication Including Validity of Claim.— In *In re* Henry Ulfelder Clothing Co., 98 Fed. 409, the court in passing on the question whether or not an adjudication of bankruptcy which also established the validity of the petitioner's claim could be collaterally attacked, said: "The right to prosecute a proceeding in involuntary bankruptcy is one of the remedies which the law in the cases prescribed in the bankruptcy act gives to the creditor for the enforcement of his claim against his debtor, and in such a proceeding the question whether the petitioning creditor has a legal demand against the alleged bankrupt in such an amount as entitles him to maintain the action may be put in issue and tried, and the decision of that question in favor of the petitioning creditor is conclusive as to the particular claim thus litigated, in all subsequent proceedings in the cause having relation to such claim, so long as the judgment remains in force." But it does not dispense with subsequent proof of the claim. *In re* Cleveland Ins. Co., 22 Fed. 200.

The Record of the Federal District Court Sitting as a Court of Bankruptcy showing the filing of a petition in bankruptcy at a particular time is conclusive and cannot be contradicted in the circuit court by parol testimony, collaterally. Alabama & C. R. Co. *v.* Jones, 7 Nat. Bank. Rep. 145, 1 Fed. Cas. No. 127.

Preferred Creditor.— In *In re* Dunkle, 8 Fed. Cas. No. 4,160, it was held that as against an execution creditor claimed to have been preferred, an adjudication of bankruptcy *in invitum* was not conclusive evidence as to the allegations in the petition for adjudication, found by such adjudication to be true.

Under the Act of 1867, it was held that so far as the acts of bankruptcy affected him with notice, a creditor not appearing to the petition for an adjudication was not precluded from denying such acts. *In re* Thomas, 11 Nat. Bank. Rep. 330, 23 Fed. Cas. No. 13,891.

13. Act of Cong., July 1, 1898, § 21, subd. A., (30 Stat. at L., p. 552.)

Sec. 7, Sub. 9 of the Bankruptcy Act of 1898 also provides that the bankrupt shall, "when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other

court of bankruptcy may, upon application of any officer,[14] or creditor, by order require the bankrupt whose estate is in process of administration under the provisions of that act, to appear in court, or before a referee, or the judge of any state court, to be examined concerning his acts, conduct, or property.[15]

b. *Claim of Set-Off by Bankrupt.* — It has been held that a claim by the bankrupt that the debt of the creditor at whose instance the order for examination was granted is extinguished by a claim which he holds against the creditor, and that he desires to file a petition for re-examination of the debt, is not sufficient reason for the bankrupt refusing to be sworn.[16]

c. *Validity of Claim.* — Refusal by the bankrupt to be sworn and examined is not justified by a claim by the bankrupt that the claim of the creditor at whose instance the examination has been ordered, which has been duly proved, is not valid, unless the claim of invalidity is proved.[17]

B. TIME OF THE EXAMINATION. — It is held, under the present bankruptcy act, that an examination of the bankrupt may be ordered at any time during the pendency of the proceedings.[18]

persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."

14. A Receiver Appointed to Take Charge of a Bankrupt's Property until the qualification of a trustee is an officer within the meaning of the act, providing that the order for such an examination may be made upon the application of "any officer." *In re* Fixen & Co., 96 Fed. 748.

15. For Illustrative Cases citing and applying this act, see succeeding sections and notes thereto.

The Departure from the State of the Bankrupt, and the failure to submit himself to examination as ordered, is a violation of the order, which though not so willful as to deserve proceedings on account of it, is such that no discharge or other thing moved for by him, should be granted him until it is rectified by submitting himself to such examination. *In re* Kingsley, 16 Nat. Bank. Rep. 301, 14 Fed. Cas. No. 7,820.

16. *In re* Kingsley, 6 Ben. 300, 14 Fed. Cas. No. 7,818.

17. *In re* Winship, 7 Ben. 194, 30 Fed. Cas. No. 17,878.

18. *In re* Price, 91 Fed. 635 (holding that such application should be allowed before specifications are filed if applied for on the return day of the notice of the debtor's application for discharge, and no prior examination has been had; and *citing In re* Mawson, 1 Nat. Bank. Rep. 271, 16 Fed. Cas. No. 9,320; *In re* Seckendorf, 1 Nat. Bank. Rep. 626, 21 Fed. Cas. No. 12,600; *In re* Vogel, 5 Nat. Bank. R. 393, 28 Fed. Cas. No. 16,984.)

Examination before First Meeting of Creditors.— In *In re* Franklin Syndicate, 101 Fed. 402, it was held that it was proper to order a bankrupt before the referee for examination before the first meeting of the creditors and the appointment of a trustee.

Examination after Discharge.— In *In re* Westfall, 8 Nat. Bank. Rep. 431, it is held that the bankrupt must submit to examination even after his discharge, if within one year of its granting.

Under the Act of 1867 the debtor could be examined before adjudication, and though he denied the indebtedness and the act of bankruptcy. *In re* Salkey, 5 Biss. 486, 21 Fed. Cas. No. 12,252.

C. NOTICE OF THE EXAMINATION. — Under the provisions of the present bankruptcy act, creditors are entitled to at least ten days' notice by mail of all examinations of the bankrupt.[19]

D. NUMBER OF EXAMINATIONS. — It is held that only one examination of the bankrupt, had for the purpose of enabling creditors to prepare specifications in opposition to the bankrupt's discharge, should be had.[20]

2. Other Witnesses. — A. THE RIGHT. — a. *In General.* — The present bankruptcy act also expressly authorizes the examination of any other person than the bankrupt, designated in the order, who may be a competent witness under the laws of the state in which the proceedings are pending.[21]

19. It is so expressly provided by § 58, subd. A.

If the notice of the bankrupt's application for his discharge contains also a notice of the examination to be held, that is sufficient. *In re* Price, 91 Fed. 635.

Examination to Prepare Schedules.— The notice required by this section is not necessary, however, where the purpose of the examination is solely to prepare the schedules. *In re* Franklin Syndicate, 101 Fed. 402.

Uder the Act of 1867 it was not the duty of the bankrupt to notify the creditor of the time and place of the examination. It was for the creditor to examine the debtor if he desired to do so, and to see that due appointments were made with the register for that purpose and to give the other party notice of them. *In re* Littlefield, 1 Low. 331, 15 Fed. Cas. No. 8,398.

20. *In re* Price, 91 Fed. 635.

The Correct Practice is to require the bankrupt to attend for examination whenever reasonably required by creditors for the purpose of establishing their objections to his discharge. The bankrupt must plead his privilege, if any privilege legally exists, to the particular questions propounded, and the proper rulings can then be made. The attendance of the bankrupt on the return day of the order to show cause is required for the purpose of enabling creditors to form specifications against his discharge. If an examination be then had, it may be used in the subsequent proceedings in support of the specifications before the referee; but this does not necessarily supersede a further examination of the bankrupt if on application by objecting creditors, the referee shall deem a further examination reasonable and necessary. *In re* Mellen, 97 Fed. 326.

The Reason Assigned is that the act, in requiring notice to all the creditors, presumably intends that all shall be equally allowed to participate once for all, and not further harass the bankrupt. *In re* Price, 91 Fed. 635.

Under the Act of 1867, it was held that the fact that one creditor had examined the bankrupt, as provided by the bankruptcy act, was no reason for withholding that privilege from another creditor. It was held also that the register, however, in the exercise of a sound discretion, should so regulate the time, and manner, and course of the examination, as to protect the bankrupt from annoyance and oppression and mere delay, at the same time allowing full and fair opportunity to the creditors to inquire as to the matters specified in the act. *In re* Adams, 3 Ben. 7, 1 Fed. Cas. No. 40. See also *In re* Gilbert, 1 Low. 340, 10 Fed. Cas. No. 5,410; *In re* Isidor, 2 Ben. 123, 13 Fed. Cas. No. 7,105; *In re* Frisbie, 13 Nat. Bank. R. 349, 9 Fed. Cas. No. 5,131.

21. A Trustee in Insolvency Appointed under the State Insolvent Laws more than four months before the bankruptcy proceedings, may be examined, at the instance of a trustee in bankruptcy, as to the disposition made by him of the bankrupt's estate. *In re* Pursell, 114 Fed. 371.

Validity of Appointment of Receiver. — It is held that the fact that tion is had, was erroneous or improvidently made, will not justify the order appointing the receiver, at whose instance the examina- the witness designated in the order in refusing to attend or be examined.[22]

b. *The Assignee.* — Under the act of 1867, it was held that the assignee might be subpœnaed and required to testify in the same manner as any other witness.[23]

c. *The Bankrupt's Wife.* — Under former bankruptcy acts the wife of the bankrupt was required to attend before the register and submit to an examination the same as any other witness.[24]

Under the Present Bankruptcy Act, as it was first enacted, if a wife was not a competent witness for or against her husband under the laws of the state wherein the bankruptcy proceedings were pending, she could not be required to submit herself to an examination in such proceedings;[25] but a recent amendment provides that she may be examined concerning the acts, conduct or property of her husband, limiting the scope of such examination, however, to business transacted by her or to which she is a party and to determine whether she has transacted or been a party to any business of her husband.[26]

d. *The Bankrupt's Counsel.* — Counsel for the bankrupt cannot, as a witness, be required to disclose any information he received

22. *In re* Fixen & Co., 96 Fed. 748.

23. *In re* Smith, 14 Nat. Bank. Rep. 432, 22 Fed. Cas. No. 12,988, holding, however, that he was not subject, as of course, to an examination by any creditor, whenever the latter might desire it.

24. *In re* Anderson, 2 Hughes 378, Fed. Cas. No. 351; *In re* Woolford, 4 Ben. 9, 30 Fed. Cas. No. 18,029; *In re* Anderson, 23 Fed. 482; *In re* Craig, 4 Nat. Bank. Rep. 50, 6 Fed. Cas. No. 3,323. And see *In re* Van Tuyl, 3 Ben. 237, 28 Fed. Cas. No. 16,879.

Application Not Made in Good Faith.— In *In re* Selig. 21 Fed. Cas. No. 12,641, an order to examine the bankrupt's wife, at the instance of the assignee, was refused because it appeared that the application was not made in good faith, but merely for the purpose of delay.

Scope of Inquiry.—She could be required to testify to all facts and transactions to which she was either a party or a witness, but not to mere confessions or admissions of her husband as to dealings between himself and others. *In re* Gilbert, 1 Low. 340, 10 Fed. Cas. No. 5,410.

25. *In re* Fowler, 93 Fed. 417; *In re* Jefferson, 96 Fed. 826; *In re* Mayer, 97 Fed. 328. *Compare, In re* Foerst, 93 Fed. 190, wherein it was held proper to question a wife, under examination at the instance of the trustee, as to money or property acquired during the year preceding the adjudication, when and how she received it. The fact of the witness being the wife of the bankrupt, however, was not raised or discussed.

Amendment IV of the Federal Constitution, prohibiting unreasonable searches and seizures, is violated by requiring the wife of a bankrupt, while being examined as a witness in bankruptcy proceedings, to disclose confidential communications made to her by her husband concerning his property or income. *In re* Jefferson, 96 Fed. 826.

26. Act of Cong., January 12, 1903, § 7, subd. A., amending § 21, subd. A.

from the bankrupt in regard to the latter's affairs if the witness received such information from the bankrupt as his counsel.[27]

B. Notice to the Bankrupt. — Notice of the examination of a witness called by the assignee in bankruptcy need not be given to the bankrupt.[28]

3. Preliminary Proof Requisite to Order of Examination. A. Evidence To Be Adduced. — It is not necessary, in order to procure an order for the examination of a witness, either the bankrupt or any other person, in a bankruptcy proceeding, that any showing be made as to the questions to be asked or the particular facts to be inquired into.[29]

B. Suit Pending by or Against Bankrupt. — Nor is it necessary to show that a suit is pending by or against the bankrupt or his estate.[30]

C. Filing Objections to Discharge. — Nor, under the act of 1867, was it necessary to show, as a prerequisite to an order for the examination of a witness, either the bankrupt or any other person, that the applying creditor had filed specifications in opposition to the bankrupt's discharge.[31]

D. Relationship of Debtor and Creditor. — Before granting the order for the examination of the bankrupt, the referee should be satisfied that the party applying for the order is in fact a creditor of the bankrupt; but, if this fact be shown, no good reason

27. *In re* Aspinwall, 7 Ben. 433, Fed. Case No. 591. *See* also *infra*, note 54. For a general discussion of this question *see* the articles "Attorney and Client;" "Privileged Communications."

Refusing to Be Sworn.— In *In re* Woodward, 4 Ben. 102, 30 Fed. Cas. No. 17,999, it was held that the fact that an attorney acted as counsel for the bankrupt did not justify his refusal to be sworn as a witness in the bankruptcy proceedings.

Counsel for Bankrupt in Suit by Assignee.— In *In re* Leland, 8 Ben. 204, 15 Fed. Cas. No. 8,232, it was held that an attorney who had acted as counsel in a suit in equity against the bankrupt and others, by the assignee could be required to testify for the creditors in opposition to the discharge.

28. *In re* Levy, 1 Ben. 454, 15 Fed. Cas. No. 8,295; *In re* Duncan, 8 Ben. 541, 8 Fed. Cas. No. 4,132.

29. *In re* Fixen & Co., 96 Fed. 748.

The Act Does Not Contemplate That Any Such Showing Shall Be Made as the basis for an order of this character. The simple application or demand for such an order by any of the persons named in the act is all that is required to support it. *In re* Howard, 95 Fed. 415.

Under Former Bankruptcy Acts, it was held that third persons could be compelled to submit to examination only on affidavit or verified petition showing cause. *In re* Gilbert, 1 Low. 340, 10 Fed. Cas. No. 5,410. Otherwise, however, of the assignee's application for the examination of the bankrupt. *In re* Lanier, 14 Fed. Cas. No. 8,070.

30. **The Purpose of the Examination** is to afford creditors and the officer charged with administering the trust, full information touching the bankrupt's estate, in order that necessary steps may be taken for its possession and preservation. It is not intended as a means of producing testimony pertinent to the issues then on trial. *In re* Fixen & Co., 96 Fed. 748.

31. *In re* Baum, 1 Ben. 274, 2 Fed. Cas. No. 1,116.

exists why the examination should not be had, even though the creditor may not have proved his claim in set form.[32]

4. Conduct of the Examination. — A. In General. — The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall he had in conformity with the mode now adopted in courts of law.[33]

B. Oath of Bankrupt. — It has been said that, although the question is controverted, the examination of the bankrupt is to be had under oath.[34]

32. *In re* Jehu, 94 Fed. 638. See also *In re* Groome, 1 Fed. 464.

That the Applicant Is Listed as a Creditor is *prima facie* sufficient evidence of his having a provable claim. *In re* Walker, 96 Fed. 550.

Under the Act of 1867, before a creditor could apply for an order to examine the bankrupt, he must have proved his claim; although it was held that under § 22 of that act he could tender proof of his debt and then apply for the order. *In re* Ray, 2 Ben. 53, 20 Fed. Cas. No. 11,589; *In re* Belden, 4 Nat. Bank. Rep. 194, 3 Fed. Cas. No. 1,241; *In re* Patterson, 1 Ben. 448, 18 Fed. Cas. No. 10,814.

33. Gen. Ord. Bank. No. 22, cited and applied in *In re* De Gottardi, 114 Fed. 328, is set out in full in 89 Fed. X.

For the Form of the Examination of the bankrupt or other witnesses, see Forms in Bankruptcy, No. 29, 89 Fed. XLI.

Cross Examination by Bankrupt. In *In re* Duncan, 8 Ben. 541, 8 Fed. Cas. No. 4,132, it was held that the bankrupt had not the right to appear by counsel and cross examine a witness called by a creditor opposing the granting of a discharge. See also *In re* Cobb, 7 Am. Bank. Rep. 104, so holding as to the examination of a witness at the instance of the trustee.

Adjournment.— In *In re* Hyman, 3 Ben. 28, 12 Fed. Cas. No. 6,984, it was held that no inflexible rule could be laid down as to postponements or adjournments by the register. And in *In re* Robinson, 2 Nat. Bank. Rep. 516, 20 Fed. Cas. No. 11,942, it was held that the examination of the bankrupt might be adjourned upon failure of the creditor to appear on the day set for the examination.

Limiting Time for Concluding Examination.— In *In re* Tifft, 17 Nat. Bank. Rep. 421, 23 Fed. Cas. No. 14,036, it was held that the register had no power, by an announcement in advance to fix a limit of time within which the examination of the bankrupt must be concluded, without regard to the nature of the questions sought to be asked, or the interest with which they were asked. See also *In re* Waitzelder, 8 Ben. 423, 28 Fed. Cas. No. 17,047.

Examination of Witness Independent of Examination of Bankrupt.— In *In re* Levy, 1 Ben. 454, 15 Fed. Cas. No. 8,295, it was held that the examination of a witness at the instance of the assignee was an independent proceeding, and could be had without reference to an examination of the bankrupt, had at the instance of the creditors.

Examination of Witness Prior to Examination of Bankrupt.— In *In re* Fredenberg, 2 Ben. 133, 9 Fed. Cas. No. 5,075, it was held proper to examine a witness prior to examining the bankrupt, even although there was no question in controversy to be settled by testimony.

Objections by Other Creditors. Where a witness is under examination at the instance of one creditor, other creditors can not interpose objections to questions propounded. *In re* Stuyvesant Bank, 6 Ben. 33, 23 Fed. Cas. No. 13,582.

34. *In re* Dow's Estate, 105 Fed. 889.

C. Counsel. — a. *Right of the Bankrupt.* — The bankrupt, while undergoing his examination before a referee in bankruptcy, is entitled to the benefit of counsel.[35]

b. *Consultation with Counsel.* — Under former bankruptcy acts it was held to be discretionary with the register before whom the examination was proceeding whether to permit the bankrupt to consult with his counsel, and that the register was to decide that question with reference to the facts of each particular case.[36]

c. *Right of the Witnesses.* — Under the bankruptcy act of both 1867 and 1898, it is held that a witness under examination before a register in bankruptcy, is not a "party" to the proceeding, and hence not entitled as a matter of strict legal right to be attended or represented by counsel.[37]

D. Cross-Examination of the Bankrupt. — Under the act of 1867, and general order number 10, promulgated pursuant to the provisions thereof, a bankrupt, while undergoing examination before a register, could be examined, and cross-examined by his counsel.[38] The rule was otherwise, however, under the act of 1841.[39]

E. Reducing Examination to Writing. — The bankruptcy act of 1898 requires a deposition taken upon an examination before a referee to be reduced to writing by him, or under his direction, and when completed to be read over to the witness and signed by him in the presence of the referee.[40]

35. *In re* Mayer, 101 Fed. 695. See also *In re* Collins, 1 Nat. Bank. Rep. 551, 6 Fed. Cas. No. 3,008; *In re* Leachman, 1 Nat. Bank. Rep. 391, 15 Fed. Cas. No. 8,157; *In re* Tanner, 1 Low. 215, 23 Fed. Cas. No. 13,745.

36. *In re* Collins, 1 Nat. Bank. Rep. 551, 6 Fed. Cas. No. 3,008; *In re* Judson, 2 Ben. 210, 14 Fed. Cas. No. 7,562; *In re* Lord, 15 Fed. Cas. No. 8,502; *In re* Patterson, 1 Ben. 508, 18 Fed. Cas. No. 10,815; *In re* Tifft, 23 Fed. Cas. No. 14,030. **The Bankrupt's Attorney Could Attend the Examination,** and object to improper questions put to the bankrupt, but the latter had no right without consent of the magistrate to consult his attorney before answering. *In re* Tanner, 1 Low. 215, 23 Fed. Cas. No. 13,745.

37. *In re* Howard, 95 Fed. 415; *In re* Comstock, 3 Sawy. 517, 6 Fed. Cas. No. 3,080; *In re* Feeny, 1 Hask. 304, 8 Fed. Cas. No. 4,715; *In re* Fredenberg, 2 Ben. 133, 9 Fed. Cas. No. 5,075; *In re* Schonberg, 7 Ben. 211, 21 Fed. Cas. No. 12,477; *In re* Stuyvesant Bank, 6 Ben. 33, 23 Fed. Cas. No. 13,582.

38. *In re* Levy, 1 Ben. 496, 15 Fed. Cas. No. 8,296; *In re* Leachman, 15 Fed. Cas. No. 8,157; *In re* Noyes, 2 Low. 352, 18 Fed. Cas. No. 10,370.

39. *In re* Bragg, 1 N. Y. Leg. Obs. 119, 4 Fed. Cas. No. 1,799.

40. Gen. Ord. Bank. No. 22, 89 Fed. X. See also, *In re* De Gottardi, 114 Fed. 328, holding that under this general order it is the duty of the referee, although he must pass on objections to testimony, to cause all the testimony excluded to be reduced to writing and made part of the record, with his ruling and the exceptions noted. **This Was Also the Practice under the Act of 1867.**— *In re* Jackson, 13 Fed. Cas. No. 7,128. And when depositions taken by a stenographer and afterwards by him reduced to longhand were not read over and signed by the witness as required, it was held they should be suppressed.

F. Rulings by Referee on Objections to Evidence. — Under former bankruptcy acts it was held that a register had no power to rule on the admissibility of testimony offered, but that he must take and report such testimony to the judge for his decision[41] although there were cases which held otherwise, and that upon exception being taken to his ruling, he could, at the close, entertain a motion to strike out specified questions, or to have excluded questions answered, and then certify to the judge the questions thus raised.[42] But under the act of 1898, the referee must pass on objections to testimony, and cause all testimony excluded to be taken down and made part of the record, with his rulings thereon, and the exceptions noted.[43]

G. Punishment for Contempt. — The present bankruptcy act contains an express provision under which any person who, in proceedings before a referee, neglects to produce any pertinent document after having been ordered to do so, or who refuses to appear after having been subpœnaed, or after having been sworn, refuses to be examined according to law, may, upon appropriate proceedings being had as required by that act, be punished as for a contempt committed before the court of bankruptcy itself.[44]

In re Cary, 9 Fed. 754. But when the assignee furnished a stenographer, the bankrupt could not insist on his examination being taken down in longhand. *In re* Frey, 9 Ben. 185, 9 Fed. Cas. No. 5,114.

41. *In re* Bond, 3 Fed. Cas. No. 1,618; *In re* Koch, 14 Fed. Cas. No. 7,916; *In re* Levy, 1 Ben. 496, 15 Fed. Cas. No. 8,296; *In re* Patterson, 18 Fed. Cas. No. 10,818; *In re* Rosenfield, 20 Fed. Cas. No. 12,059.

42. *In re* Levy, 15 Fed. Cas. No. 8,298; *In re* Lyon, 15 Fed. Cas. No. 8,643; *In re* Reakirt, 20 Fed. Cas. No. 11,614.

43. *In re* De Gottardi, 114 Fed. 328.

44. "**A Person Shall Not**, in proceedings before a referee, (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpœnaed, or, after having taken the oath, refuse to be examined according to law: Provided, that no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him." Sec. 41, subd. A.

"**The Referee Shall Certify the Facts to the Judge**, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court." Sec. 41, subd. B. *See* also articles "Attendance of Witnesses;" "Contempt;" "Witnesses."

Commitment for False Testimony. A bankrupt who has not complied with an order to pay over to his trustee moneys alleged to be in his possession may, on his denial of ability to comply with such order, be brought before the court for further examination as to whether or not he has made a full disclosure of the facts, and the court may upon concluding that his story is a fabri-

Question Previously Answered. — It has been held that the fact that the bankrupt has already answered a question at a former examination had at the instance of another creditor or the assignee is not sufficient excuse for refusing to again answer the question.[45]

5. Scope of the Examination. — A. In General. — The examination of a witness in bankruptcy proceedings, whether he be the bankrupt or any other person, must be confined to matters relevant to, and concerning, the acts, conduct, or property of the bankrupt,[46]

cation and that he has the moneys alleged, commit him until he complies with the order. *In re* McCormick, 97 Fed. 566.

A Similar Practice obtained under former bankruptcy acts. See *In re* Rosenfield, 20 Fed. Cas. No. 12,059; *In re* Glaser, 2 Nat. Bank. Rep. 398, 10 Fed. Cas. No. 5,476.

When the usual order and subpœna have been issued for the wife of the bankrupt to attend before the register and be sworn and testify as a witness and she fails to appear, and counsel file an affidavit explanatory of her non-attendance but question the power of the court to compel her to testify, the proper proceeding is to issue an order to show cause why an attachment should not be issued against her. *In re* Bellis, 38 How. Pr. 88, 3 Fed. Cas. No. 1,276.

Illness.— A bankrupt who fails to attend on the adjourned day of his examination before the register because of illness cannot be punished for contempt. *In re* Carpenter, 1 Nat. Bank. Rep. 299, 5 Fed. Cas. No. 2,427.

A Court of Another State, to which is issued by the bankruptcy court a commission to take testimony, may punish a witness for refusing to testify. *In re* Johnston, 13 Fed. Cas. No. 7,423.

Disobeying Order Not Served in Jurisdiction of Court.— In *In re* Hughes, 11 Nat. Bank. Rep. 452, 12 Fed. Cas. No. 6,843, it was held that where the order for the examination of the bankrupt was served on him without the jurisdiction of the bankruptcy court, an attachment for contempt would not issue.

Advice of Counsel.— In *In re* Winship, 7 Ben. 194, 30 Fed. Cas. No. 17,878, it was held that a bankrupt would not be punished for refusing to be sworn and examined, where he did so under advice of his counsel.

Readiness to Abide by Decision of Court.— A citation will not be issued for a person subpœnaed as a witness before a referee in bankruptcy, requiring him to show cause why he should not be punished for contempt in refusing to be sworn, where the court is satisfied that he will yield ready obedience to the subpœna upon receiving notice of the formal decision of the district court. *In re* Howard, 95 Fed. 415.

Order Issued after Discharge Granted.— In *In re* Jones, 6 Nat. Bank. Rep. 386, 13 Fed. Cas. No. 7,449, it was held that under an order for the bankrupt's examination issued after the granting of his discharge, which had not been set aside, the bankrupt would not be punished for disobeying the order.

Sufficiency of Excuse for Non-Attendance.— In *In re* Tifft, 17 Nat. Bank. Rep. 502, 23 Fed. Cas. No. 14,029, the debtor failed to attend an adjourned meeting in composition proceedings, assigning as a reason for his failure that he had already been subjected to an exhaustive examination, that his business was largely a summer business and at that time required his personal attendance in order to meet the terms of the composition, if accepted. The creditors by a vote more than sufficient to pass the resolution of composition, resolved that the cause assigned was satisfactory to them. It was held that this was sufficient to terminate the examination of the debtor so far as that meeting was concerned.

45. *In re* Vogel, 28 Fed. Cas. No. 16,984.

46. *In re* Howard, 95 Fed. 415

and the witness will be justified in refusing to answer irrelevant and impertinent questions.[47] Nor is inquiry into the private affairs of the witness having no relation to the bankrupt's acts, conduct

(*citing In re* Stuyvesant Bank. 6 Ben. 33, 23 Fed. Cas. No. 13,582.)

Statement of the Rule.— In *In re* Foerst, 93 Fed. 190, the court said: "There is no precise rule governing the admissibility of such testimony, other than it should be reasonably pertinent to the subject of inquiry. In general, a large latitude of inquiry should be allowed in the examination of persons closely connected with the bankrupt in business dealings, or otherwise, for the purpose of discovering assets and unearthing frauds, upon any reasonable surmise that they have assets of the debtor. The intent of the bankruptcy law is that only the debtor dealing honestly with his property shall be discharged; and that any proper assets of the estate, however concealed shall be made available to creditors. The examination for this purpose is of necessity to a considerable extent a fishing examination. The extent to which it should be permitted to go must be determined by the sound judgment of the officer before whom it is taken. Reasonable examination should not be allowed to be checked by constant objections that the materiality of the answer may not be immediately apparent, where no harm can arise to the witness from his disclosure, if the transaction is honest. If the result of such an examination may often be a considerable amount of immaterial testimony, this is a much less evil than to stifle examination by technical rules which would defeat the purpose of the act, and discredit the administration of the law in the interest of the creditors. Unreasonable discursiveness in the examination will be in a measure checked by making it at the expense of the examining party; if plainly frivolous or prolix, it should be stopped. Where questionable proceedings have been disclosed greater latitude in the prosecution of inquiries should be allowed; and the precise form or order in which the questions are put can scarcely be deemed material." See also *In re* Frisbie, 13 Nat. Bank. Rep. 349, 9 Fed. Cas. No. 5,131.

Duty of the Court.— It is the duty of the bankruptcy court to see that such examinations are not permitted to transcend the limit of legitimate investigation for these purposes; but of necessity this is a duty which involves the exercise of wide discretion, and which should not be interfered with except when it has been manifestly abused. *In re* Horgan 98, Fed. 414.

In *In re* De Gottardi, 114 Fed. 328, wherein the bankrupts claimed that shortly before their bankruptcy their store had been burglarized and a large sum of money taken, it was held proper to show that the witnesses saw no strangers or suspicious characters in the village where the store was located, on the day preceding the night of the alleged burglary.

The Mode in Which He Conducted His Business is a proper subject of inquiry of the bankrupt on his examination. *In re* Price, 91 Fed. 635.

In *In re* Pioneer Paper Co., 7 Nat. Bank. Rep. 250, 19 Fed. Cas. No. 11,178, it was held that a bankrupt or witness under examination in bankruptcy proceedings might be examined fully, substantially as under a reference upon a creditor's bill or in proceedings supplementary to execution under the code.

47. *In re* Howard, 95 Fed. 415. See also McKinsey *v.* Harding, 4 Nat. Bank. Rep. 38, 16 Fed. Cas. No. 8,866. *Compare* Peoples Bank *v.* Brown, 112 Fed. 652, holding that the witness, who is being examined for the purpose of ascertaining what if any, interest, the bankrupt has therein, cannot, after denying any interest in the bankrupt in the property, refuse to answer questions on the ground that they are irrelevant and immaterial; that it is for the court to pass on that question.

or property authorized.[48] But any testimony, the tendency of which is to show that the bankrupt owned or had an interest in certain property at the time of the commencement of the bankruptcy proceedings, is properly received.[49]

B. Matters Previous to Bankruptcy Proceedings. — The mere fact that the matter or transaction inquired about happened more than four months before the initiation of the bankruptcy

Ownership of Property Denied by Bankrupt.— Testimony concerning the identity of the owner, duration, extent and character of the ownership, of property which the bankrupt has testified he does not own, is irrelevant. *In re* Van Tuyl, 28 Fed. Cas. No. 16,880.

Under the Act of 1867. it was held that a witness could not rightfully object to being sworn or refuse to be examined upon any matter within the subjects mentioned in § 26, in reference to which the bankrupt might be examined. *In re* Blake, 2 Nat. Bank. Rep. 10, 3 Fed. Cas. No. 1,492.

48. *In re* Carley, 106 Fed. 862.

In the examination of a third person under the bankruptcy act, to ascertain what if any interest the bankrupt has in certain property, on objection or refusal to answer on the ground of irrevelancy, if the question asked appears to be relevant, it should not be excluded, or the witness be excused from answering, because of his assertion that his answer, if made, would disclose the personal affairs of himself or others, not material to the subject of the inquiry. Peoples Bank *v.* Brown, 112 Fed. 652.

49. *In re* Bonesteel, 2 Nat. Bank. Rep. 330, 3 Fed. Cas. No. 1,628; *In re* Carson, 2 Nat. Bank. Rep. 107, 5 Fed. Cas. No. 2,461. *See* also *In re* Dole, 7 Fed. Cas. No. 3,965; *In re* Clark, 4 Nat. Bank. Rep. 237, 5 Fed. Cas. No. 2,805.

"While it is the purpose of the court to be entirely fair toward persons who are subject to criminal prosecutions, the purposes of the bankruptcy act may not be defeated by the refusal to give evidence concerning his transactions, whereby property belonging to his estate may escape distribution to his creditors, and no refinement of argument will be permitted to save the bankrupt from giving evidence that shall tend to that result." *In re* Franklin Syndicate, 114 Fed. 205.

Trade and Dealings with Bankrupt.— A witness must answer all proper questions on matters relating to his trade and dealings with the bankrupt prior to the commencement of the bankruptcy proceedings; and if to answer properly and fully and truthfully any such question, it is necessary that he produce a copy of any transaction with the bankrupt, as contained in the witness books, such copy must be produced. *In re* Earle, 3 Nat. Bank. Rep. 304, 8 Fed. Cas. No. 4,244; *In re* Stuyvesant, 6 Ben. 33, 23 Fed. Cas. No. 13,582.

A Purchaser of Claims Against the Bankrupt Estate, who has testified as a witness that he did not obtain the money to pay for such claims from the bankrupt, may be compelled to state where he did obtain it. *In re* Lathrop, 14 Fed. Cas. No. 8,106. And *In re* Trask, 7 Ben. 60, 24 Fed. Cas. No. 14,141, it was held that it was not sufficient reason for the witness in such case to refuse to testify that the consideration did not come from the bankrupt or his estate and that to answer would be to expose the private business of the witness unnecessarily, and possibly to his prejudice in another suit then pending.

The Original Consideration of a Negotiable Bond issued by the bankrupt cannot be inquired into where the creditor is a *bona fide* holder thereof for value. *In re* Leland, 6 Ben. 175, 15 Fed. Cas. No. 8,229.

Property in Wife's Name.— The circumstances of the purchase of property by the bankrupt, the title to which is taken in the wife's name, is a legitimate subject of inquiry. *In re* Schonberg, 7 Ben. 211, 21 Fed.

proceedings is no reason why it may not be inquired into or proved, provided it will aid in throwing light upon any issue or fact pertinent to the proceedings.[50]

C. Matters Subsequent to Filing of Petition. — Where the bankrupt denies that property acquired or business done by him after he has filed his voluntary petition in bankruptcy has any connection with or reference to his estate or business done prior thereto, he cannot be examined in relation thereto.[51]

D. Fraud in Contraction of Debt. — It has been held that it may be shown on the examination of the bankrupt that the debt of the creditor at whose instance the examination is had was fraudulently contracted.[52] But a creditor, who claims that his own debt was contracted for fraud, cannot inquire into the facts constituting the alleged fraud.[53]

E. Privileged Communications. — It has been held that the act of congress of February 25, 1868, did not have the effect to take away the protection extended to communications between client and

Cas. No. 12,477. *See* also *In re* Craig, 4 Nat. Bank. Rep. 50, 6 Fed. Cas. No. 3,323.

50. Possible Interest of Bankrupt in Property.— In order to fully investigate the condition of the bankrupt's property, it is frequently necessary to inquire about facts, transfers, and the like, that may have taken place more than four months prior to the date of the adjudication or of the beginning of the proceedings. The mere fact that the transaction inquired about happened more than four months before the initiation of the bankruptcy proceedings is no reason why it may not be inquired into or proved, provided it will aid in throwing light upon any issue or fact pertinent to the proceedings. *In re* Brundage, 100 Fed. 613, wherein it was held proper, after the bankrupt has stated that he had sold certain property and used part of the proceeds to pay a debt for borrowed money, to inquire into the circumstances of the transaction of the loan, although it was made more than four months before the bankruptcy proceedings.

The Circumstances under Which the Bankrupt Made an Assignment for the benefit of creditors under a State law, over a year before the bankruptcy proceedings, is not a material or proper inquiry in a bankruptcy proceeding, unless some foundation for the belief that certain property of the bankrupt was withheld by him at the time of such assignment, was still his at the time the bankrupt act became a law. *In re* Hayden, 96 Fed. 199.

Money Acquired Previous to Filing Petition.— In *In re* McBrien, 3 Ben. 481, 15 Fed. Cas. No. 8,666, it was held proper to propound to the bankrupt questions tending to show that within a short time after filing his petition he had money in his possession which he had not acquired by the transaction of any business subsequent to the filing.

In *In re* Craig, 3 Ben. 353, 6 Fed. Cas. No. 3,322, wherein counsel for the creditors put questions to the bankrupt touching property of his wife, and his own acts in relation thereto, to which the bankrupt objected on the ground that the questions related to matters existing and transpiring prior to the time when the creditor's debts were contracted, and declined to answer unless compelled, it was held that the questions were proper and should have been answered.

51. Property Acquired or Business Done Prior to Petition.— *In re* Rosenfield, 20 Fed. Cas. No. 12,059.

52. *In re* Koch, 14 Fed. Cas. No. 7,916.

53. *In re* Wright, 2 Ben. 509, 30 Fed. Cas. No. 18,065.

solicitor.[54] And under the act of 1898 it is held that it is a violation of the 4th amendment to the federal constitution against unreasonable searches and seizures to compel the bankrupt's wife to disclose confidential communications made by him to her as to his property or income.[55]

F. CRIMINATING MATTERS. — Neither the bankrupt, nor any other witness, can be required to answer questions over his claim that the answers would tend to criminate him, where the situation is such as seems to put him in hazard.[56] It is not enough, how-

54. *In re* Krueger, 2 Low. 182, 14 Fed. Cas. No. 7,942.

Information Derived from Third Persons.— This privilege extends to information received on behalf of the bankrupt in regard to his affairs, from persons to whom the witness was referred by the bankrupt for the purpose of obtaining such information, as counsel for the bankrupt. *In re* Aspinwall, 7 Ben. 433, 10 Nat. Bank. Rep. 448, 2 Fed. Cas. No. 591.

Whether or Not a Communication Is in Fact Privileged is a question for the court, and not for the witness. People's Bank *v.* Brown, 112 Fed. 652.

Preliminary Investigation.— An attorney who refuses to testify on the ground that the matters to be testified to by him came to his knowledge in professional confidence is subject to examination, by way of preliminary investigation in order that that court may determine whether or not the matters are in fact privileged. People's Bank *v.* Brown, 112 Fed. 652.

Reservation in Oath.— An attorney subpœnaed as a witness on a hearing in bankruptcy, cannot add to his oath as a witness, a clause reserving the right to refuse to answer any question on the ground of privilege as the attorney and counsel of said bankrupt. *In re* Adams, 6 Ben. 56, 1 Fed. Cas. No. 42.

55. *In re* Jefferson, 96 Fed. 826.

56. *In re* Scott, 95 Fed. 815; *In re* Shera, 114 Fed. 207, (*disapproving* Mackel *v.* Rochester, 102 Fed. 314, 42 C. C. A. 427, 4 Am. Bank. Rep. 1, as not being in accord with Counselman *v.* Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. ed. 1110); *In re* Patterson, 1 Ben. 544, 18 Fed. Cas. No. 10,816; *In re* Koch, 14 Fed. Cas. No. 7,916; *In re* Nachman, 114 Fed. 995; *In re* Feldstein, 103 Fed. 269; *In re* Danforth, 6 Fed. Cas. No. 3,560; *In re* Lewis, 4 Ben. 67, 15 Fed. Cas. No. 8,312; *In re* Graham, 8 Ben. 419, 10 Fed. Cas. No. 5,659.

The Bankruptcy Act of 1898 contains an express prohibition against using testimony given by the bankrupt as evidence against him in any criminal proceeding; but it is held that even if applicable in favor of a witness other than the bankrupt, it is not sufficient to secure the full protection intended to be afforded witnesses under the Fifth Amendment to the Federal Constitution, providing that no person shall be a witness against himself in any criminal proceeding. *In re* Feldstein, 103 Fed. 269; *In re* Scott, 95 Fed. 815; *In re* Rosser, 96 Fed. 305.

And in *In re* Nachman, 114 Fed. 995, wherein it was expressly held that the constitutional protection in such a case might be invoked by the witness, the court said: "The constitutional immunity can only be invoked to protect him from answering a question the answer to which might subject him to prosecution. In the further conduct of the examination the referee is directed, whenever a question is propounded, to notify the witness that he is not required to answer it if the answer would tend to criminate himself. It is only questions of that nature that he may refuse to answer. He is not to be permitted to interpose his constitutional immunity as a shield to every inquiry concerning his business, nor is his counsel to be permitted to delay or obstruct inquiry by making objections for him. If he claims that the answer to any question propounded would tend to criminate

ever, that the answers might furnish evidence against him in a civil action which might be brought against him.[57]

6. Production of Documents. — Any witness, whether the bankrupt or any other person, may, under the express provisions of the present bankruptcy act, be required to produce books, papers or other documents in his possession or under his control, which relate

him, he cannot be compelled to answer. This claim, to be effective, should be made by the witness himself, but the referee should notify him that a statement that such answer would tend to criminate him would, if false, subject him to a prosecution for perjury, as would any other false oath."

Reservation in Oath.— A bankrupt, against whom indictments are pending in a state court, cannot reserve in his oath as a witness the right to claim his privilege against giving criminating testimony. The constitutional privilege against giving testimony against himself in a criminal proceeding does not exempt him from being sworn. Such a reservation is unnecessary, and he must take the oath as prescribed by the referee in bankruptcy. *In re* Scott, 95 Fed. 815.

Developing Whereabouts of Criminating Papers.— Although a bankrupt may be required to submit to examination as to what property he has, what disposition he has made of any property which the court is entitled to administer, to what persons he has paid money or delivered property, and where they are, and though the statute provided that no testimony given by him shall be offered against him in any criminal proceeding, he will not be required to develop the whereabouts of papers which might be used against him in a criminal proceeding. *In re* Franklin Syndicate, 114 Fed. 205.

A bankrupt cannot refuse to answer questions as to his having lost money at gaming, on the ground that they will criminate him or degrade him. *In re* Richards, 4 Ben. 303, 20 Fed. Cas. No. 11,769.

Where bankrupt partners, on their examination, by pre-arrangement with their counsel, refuse to answer a large number of competent and material questions with reference to their property and business, such as the capital they had when they established the business, whether they took inventories, etc., in effect refusing to give any information respecting their affairs, on the ground that their answers might tend to criminate them, reading their refusal and the grounds from a slip of paper given them by their counsel, such action shows a disposition not to be fair and candid with their creditors, and a purpose to conceal their transactions which may properly be taken into consideration in determining the weight to be given to their testimony in subsequent proceedings to compel them to turn over money and property which they are alleged to have concealed. *In re* De Gottardi, 114 Fed. 328.

Privilege Personal to Witness. Refusal to answer question on the ground that the answers could tend to criminate the bankrupt is a privilege personal to the witness, who may wish to answer, and counsel cannot be heard to object to the evidence. *In re* Shera, 114 Fed. 207. See also *In re* Nachman, 114 Fed. 995.

57. *In re* Fay, 3 Nat. Bank. Rep. 660, 8 Fed. Cas. No. 4,708. See also *In re* Krueger, 14 Fed. Cas. No. 7,942; *In re* Stuyvesant Bank, 23 Fed. Cas. No. 13,582.

A creditor cannot on his examination in bankruptcy proceedings refuse to answer questions touching the nature, extent and evidences of his claims against the bankrupt, on the ground that his answers might furnish evidence which could be used against him in a civil suit thereafter to be brought against him by the trustee in bankruptcy. *In re* Cliffe, 97 Fed. 540.

to the acts, conduct, or property of the bankrupt;[58] and failure to comply with a proper order to that end subjects the witness to liability for punishment for contempt.[59]

III. PROOF OF CLAIMS AGAINST BANKRUPT'S ESTATE.

1. Burden of Proof. — Where a creditor makes proof of his claim against the estate of the bankrupt in the manner directed by the bankruptcy act, his verified statement of the claim makes out a *prima facie* case for its allowance; and if any party in interest objects to its allowance, he must assume the burden of producing evidence against it whose probative force shall be equal to or

58. *In re* Horgan, 98 Fed. 414. See also *In re* Mendenhall, 17 Fed. Cas. No. 9,423; *In re* Parker, 18 Fed. Cas. No. 10,722; *In re* Earle, 3 Nat. Bank. Rep. 304, 8 Fed. Cas. No. 4,244.

Question for Court.— A witness ordered to produce books and paper called for cannot, however, refuse on the ground that they relate in no way to the bankrupt's property. That is a question for the court to decide, and not the witness. *In re* Fixen & Co., 96 Fed. 748.

A referee in bankruptcy cannot compel the production by the assignee of the bankrupt under an assignment for the benefit of creditors, made by the bankrupt over a year before the bankruptcy proceedings were instituted, of books of accounts and other papers turned over by said bankrupt to said assignee at the time of said assignment and in the possession of the assignee, unless some foundation is first laid for the belief that property of the bankrupt was withheld by him at the time of the assignment and was still held by him at the time the bankrupt act became a law. *In re* Hayden, 96 Fed. 199.

A witness under examination as provided by Sec. 21 cannot be required to produce private papers which have no relation to the acts, conduct or property of the bankrupt. And a mere affidavit of belief on the part of creditors or others is not sufficient to overcome a positive statement of the witness that the transactions inquired about or papers demanded have no relation to the bankrupt, so as to authorize a court to compel him to answer or produce such papers. *In re* Carley, 106 Fed. 862.

Criminating Documents.— In *In re* Sapiro, 92 Fed. 340, it was held that one who has filed his voluntary petition in bankruptcy cannot be excused from producing his books of account kept by him in his business at the time of filing his petition on the ground that matter contained therein, or the evidence thus furnished, might tend to criminate him. The court said: "The privilege is asserted here in favor of the bankrupt to excuse him from producing his books of account kept in the business which he was conducting when his voluntary petition was filed. . . . He thereby elected to place all his property (aside from exemptions), including these books of account, which contain apparently the only evidence of credits outstanding, at the disposition of this court. If he were otherwise privileged to withhold the books, his petition operates both as a waiver and as a transfer of the right of custody, and the books cannot now be withheld or withdrawn upon the assertion that they might contain criminating matter or evidence."

59. Bankruptcy Act of 1898, Sec. 41, subds. A, B.

Advice of Counsel.— Where a witness under examination refuses to produce books called for by the subpœna and to answer questions relating thereto, but does so under the direction of counsel, who in good faith advised him to pursue that course, and professes his readiness to submit to an examination if the court should hold it proper, he will not be punished as for con-

greater than the evidence furnished by the claimant's sworn statement.[60]

2. Examination of Witnesses. — If the referee is not satisfied with the evidence of a claimant, relative to the reasonableness of the claim, he may suspend action thereon in order that he may examine the bankrupt relative thereto.[61] So, also, a party in interest, objecting to the allowance of a claim, is entitled, in support of his objection, to examine the claimant and other witnesses, if their attendance can be secured seasonably and without embarrassing delay.[62]

3. Competency of Witnesses. — It has been held that a bankrupt is a competent witness to support a claim by his wife against his

tempt, but the court will simply order the examination to proceed. *In re* Fixen & Co., 96 Fed. 748.

60. *In re* Sumner, 101 Fed. 224.

On the Hearing of a Motion to Expunge a Proof of Debt, the moving party has the burden of showing that the debt is not a provable one, and has the right to open and close. Canby *v.* McLear, 13 Nat. Bank. Rep. 22, 5 Fed. Cas. No. 2,378.

Re-examination of Claim.— A creditor who presents a petition praying for the re-examination of a debt of another creditor and reduction in amount on the ground that it had been in part released and cancelled by agreement of the parties before the bankruptcy, has the burden of proving the facts alleged. *In re* Howard, 100 Fed. 630.

61. *In re* Dreeben, 101 Fed. 110. This case also holds, however, that if it is impossible to procure the bankrupt's testimony, it is the duty of the referee to pass on the claim on the evidence before him.

"Objections to Claims Shall Be Heard and Determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit." Act 1898, Sec. 57, subd. F.

Notices of a Special Meeting called upon the petition of a creditor under paragraph 6 of general order 21 (32 C. C. A. XXIII, 89 Fed. X), should be sent out by the referee to have a re-examination of certain claims. *In re* Stoever, 105 Fed. 355.

If the Testimony of the Bankrupt Is Desired on a Motion to Expunge a Proof of Debt, he should be subpœnaed. Canby *v.* McLear, 13 Nat. Bank. Rep. 22, 5 Fed. Cas. No. 2,378.

62. **Examination of Creditor.** — In *In re* Cliffe, 97 Fed. 540, it was held proper for the trustee to examine a creditor whose claim he disputes, as to the claim, and what obligations of the bankrupt were held by the creditor. The objection was that under the provisions of the bankruptcy act, the proper form for the determination of a controversy between the creditor and the trustee, would, in case of a suit by the trustee against the debtor, be the state court, and that, in advance of a trial in that court, the trustee was not entitled to question the witness in the bankruptcy court about the disputed matters; but the court ruled that the fact, if such is the fact, that the bankruptcy act forbids the trustee to sue an adverse claimant in a federal court unless the bankrupt can himself sue in that court does not limit the right also given by the act to examine "any designated person . . . concerning the acts, conduct or property" of the bankrupt.

Non-Resident Creditor.— In *In re* Kyler, 2 Ben. 414, 14 Fed. Cas. No. 7,956, it was held that a non-resident creditor becomes subject to the jurisdiction by proving his debt and is bound to obey an order to appear for examination touching the same, and in case of disobedience his claim may be stricken out. It was also there held, however, that he could be examined before a register of the district in which he resided if he could not without hardship appear in the district

estate,[63] and that a wife is a competent witness to support her own claim.[64] But the fact that a claimant against the estate of a deceased bankrupt has been examined by the trustee relative to a transfer of property to him by the bankrupt, claimed to be a preference, does not make him a competent witness to prove the validity of his claim.[65]

4. Testimony Taken on Other Issues. — If issue is taken by the trustee on the right of a creditor to prove up his claim, the testimony of witnesses taken before the referee upon other issues, to which the claimant was not a party, and when he was not present and could not exercise the right of cross-examination, is not admissible.[66]

5. Pleadings as Evidence. — It has been held that the answer to a petition to expunge a proof of debt cannot be used as evidence,[67] and that the papers annexed thereto can only be used by being proved in the usual manner.[68]

IV. COMPOSITION PROCEEDINGS.

1. In General. — It has been held that, at a meeting of creditors for the consideration of resolutions of composition, creditors who have proved their claims may produce testimony other than that of

wherein the proceedings were pending.

A Suspension of the Proceedings for the Purpose of Obtaining the Testimony of witnesses not within the jurisdiction of the court should he had only when the referee is convinced that there is not only formal objection to the claim interposed in good faith, but that there is substantial reason for believing that such testimony is necessary for the just administration of the estate. *In re* Sumner, 101 Fed. 224.

Effect of Failure to Appear. It is proper for the register in bankruptcy to consider objections to a claim as admitted where the creditor fails to appear and submit to examination as required by the notice given under the 34th rule in bankruptcy. *In re* Lount, 11 Nat. Bank. Rep. 315, 15 Fed. Cas. No. 8,543.

63. *In re* Bean, 14 Nat. Bank. Rep. 182, 2 Fed. Cas. No. 1,166, so holding under U. S. Rev. Stat. Sec. 858 and Penna. Act. April 15, 1869 (P. L. 30), and distinguishing *In re* Bechtel, 3 Fed. Cas. No. 1,204, which had held to the contrary, on the ground that at the time of the decision in the Bechtel case the state laws furnished no rule of decision, while in the Bean case the state law had been made expressly applicable in the federal court by the federal statute cited.

64. *In re* Richards, 20 Fed. Cas. No. 11,770.

65. *In re* Shaw, 109 Fed. 780. *Compare In re* Merrill, 17 Fed. Cas. No. 9,466; wherein it was held that although the bankrupt be dead, the creditor is competent to prove his claim against the bankrupt's estate; that proving a debt was a proceeding *in rem* and not an action against the bankrupt or his personal representative if dead.

66. *In re* Keller, 109 Fed. 118, wherein it is held that in such case the witnesses, including the bankrupt, must be recalled, unless the claimant consents to the use of the testimony as it appears in the proceedings.

67. Canby *v.* McLear, 13 Nat. Bank. Rep. 22, 5 Fed. Cas. No. 2,378.

68. Canby *v.* McLean, 13 Nat. Bank. Rep. 22, 5 Fed. Cas. No. 2,378.

the bankrupt to show that the proposed composition is not to the best interest of all the creditors,[69] although it has been held that the register had no power to require any person other than the bankrupt to testify.[70]

2. Examination of the Bankrupt. — It has been held that a creditor opposing the adoption of an offer of composition is entitled to examine the bankrupt touching the question whether the composition is for the best interests of all concerned, and to require him to produce his books and papers.[71]

V. DISCHARGE OF THE BANKRUPT.

1. Matters in Opposition. — A. BURDEN OF PROOF. — Creditors who oppose the application of a bankrupt for his certificate of discharge have the burden of proving the grounds alleged by them in opposition thereto;[72] but after they have established a *prima facie*

69. *In re* Keller, 14 Fed. Cas. No. 7,654.

"**A Date and Place.** with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation." Act 1898, Sec. 12, subd. C.

"**A Certified Copy of an Order Confirming a Composition** shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart." Act 1898, Sec. 21, subd. G.

70. *In re* Dobbins, 18 Nat. Bank. Rep. 268, 7 Fed. Cas. No. 3,943.

71. *In re* Ash, 17 Nat. Bank. Rep. 19, 2 Fed. Cas. No. 571. *In re* Little, 19 Nat. Bank. Rep. 234, 15 Fed. Cas. No. 8,392.

Extent of Examination.— The examination, however, is not to be a general one, as in bankruptcy proceedings, but is merely for the purpose of assisting the creditors to determine whether or not they shall accept the proposition made to them. *In re* Proby, 17 Nat. Bank. Rep. 175, 20 Fed. Cas. No. 11,439.

Examination by Execution Creditor.— In *In re* Schwab, 8 Ben. 353, 21 Fed. Cas. No. 12,499, a claim was proved upon a judgment rendered against the bankrupt in a state court, on which execution had been issued, which was still unsatisfied. The proof of debt further stated that no manner of satisfaction or security had been received for the debt whatsoever, "except the said judgment, execution and lien thereunder, if any, and any right or title which said creditor may have under an alleged assignment claimed to have been made prior to the proceedings, by the said debtors, for the benefit of their creditors, but the said liens or claims, if any exist, are not security for the full amount of the said debt, but the amount of value thereof is unknown to this deponent." It was held, the objection that the claimants had not the right to examine the debtors because their claim was by their own proofs secured, was without merit.

Adoption of Resolution of Composition.— *In re* Tifft, 23 Fed. Cas. No. 14,032 it was held that the adoption of a resolution of composition by a creditor, had the effect to suspend his right to examine the bankrupt under U. S. Rev. Stat. Sec. 5086.

Illness may be ground for the creditors excusing the bankrupt from being examined, even though he is present at the meeting. *In re* Wilson, 18 Nat. Bank. Rep. 300, 30 Fed. Cas. No. 17,785, *affirmed* on this point, 16 Blatchf. 112, 30 Fed. Cas. No. 17,781.

72. Baumerno *v.* Feist, 107 Fed.

case, it is then incumbent on the bankrupt to overthrow that *prima facie* case.[73]

B. Evidence to Support Objections. — a. *Competency of Creditor.* — A creditor of a voluntary bankrupt is a competent wit-

83; *In re* Thomas, 92 Fed. 912; *In re* Holman, 92 Fed. 512; *In re* Hixon, 93 Fed. 440; *In re* Schertzer, 99 Fed. 706; *In re* Hoffman, 102 Fed. 979; *In re* McGurn, 102 Fed. 743; *In re* Hirsch, 97 Fed. 571.

So Also under Former Bankruptcy Acts.— *In re* Beardsley, 1 Nat. Bank. Rep. 457, 2 Fed. Cas. No. 1,184; *In re* Hill, 2 Ben. 136, 12 Fed. Cas. No. 6,482; *In re* Moore, 17 Fed. Cas. No. 9,751; *In re* O'Kell, 2 Nat. Bank. Rep. 105, 18 Fed. Cas. No. 10,475; *In re* Orcutt, 18 Fed. Cas. No. 10,550; *In re* Herdick, 1 Fed. 242; *In re* Jewett, 3 Fed. 503.

Concealment of Property.— Where the ground of opposition to the granting of the discharge is that the bankrupt knowingly and fraudulently concealed from his trustee property belonging to his estate, the creditors have the burden of proof. *In re* Corn, 106 Fed. 143; *In re* Bryant, 104 Fed. 789. And see *In re* Bullwinkle, 111 Fed. 364; *In re* Grossman, 111 Fed. 507; *In re* Howden, 111 Fed. 723.

Concealment Must Be Fraudulent. The creditors opposing the discharge must show by convincing proof that the bankrupt, since his adjudication, has concealed property belonging to his estate from his trustee, and that the concealment was knowingly and fraudulently made. *In re* Fitchard, 103 Fed. 742 (*citing In re* McGurn, 102 Fed. 743. *In re* Cornell, 97 Fed. 31; Roberts *v.* Buckley, 145 N. Y. 215, 39 N. E. 966.)

Possession at Time of Filing Petition.— In *In re* Phillips, 98 Fed. 844, it was held that creditors opposing a discharge on the ground that the bankrupt has concealed property from his trustee have the burden of proving that the bankrupt was in possession or control of assets of substantial value at the time of the filing of the bankruptcy petition. It is not enough to merely show former ownership by him of certain property and his present inability to account for the same, but the evidence must show property in his possession or under his control. *In re* Idzall, 96 Fed. 314.

Failure to Schedule Debt. Where the objection to the discharge is that the bankrupt failed to schedule in his inventory a certain debt due to him, the burden is on the creditor to show the existence of such debt. *In re* Beardsley, 1 Nat. Bank. Rep. 457, 2 Fed. Cas. No. 1,184. And in *In re* Ferris, 105 Fed. 356, where the objection was that the bankrupt had transferred property in payment of a debt alleged to be fictitious, thus leaving him with an equitable interest in the property or its proceeds, which he failed to schedule, it was held that the fictitious nature of the debt must be affirmatively shown, that the fact that the bankruptcy examination tended directly to support the objection was not enough.

False Oath to Original Schedule. Creditors opposing the granting of the discharge on the ground that the bankrupt has knowingly and fraudulently made a false oath to the original schedule have the burden of proof. *In re* Eaton, 110 Fed. 731; *In re* Salsbury, 113 Fed. 833.

Failure to Keep Proper Books of Account.— To defeat the right to a discharge on the ground that the bankrupt did not keep proper books of account, the evidence must be such as to fairly prove that the mode of keeping the books was with a fraudulent intent to conceal the bankrupt's condition and in contemplation of insolvency; it is not enough to show merely that from the books the true financial condition of the bankrupt could not be ascertained. *In re* Brice, 102 Fed. 114.

73. *In re* Doyle, 3 Nat. Bank. Rep. 782, 7 Fed. Cas. No. 4,052.

"**The Judge Shall Hear the Application for a Discharge, and Such**

ness to support objections filed by other creditors to the bankrupt's petition for a discharge.[74]

b. *Testimony Taken on Previous Proceeding.* — Testimony of third persons taken before the referee before whom the hearing on the bankrupt's petition for a discharge is pending, is not admissible at such hearing on the bankrupt's petition.[75] But it has been held that depositions or testimony of a bankrupt taken at any time during previous proceedings should be admitted in subsequent proceedings, where the person who took the notes thereof testifies that they were truly and correctly taken.[76]

c. *Value of Interest in Property Omitted.* — On an issue as to the fraudulent intent of the bankrupt's omission to schedule an interest in property, which the creditors have interposed as ground for refusing the discharge, it is proper to show that such interest is doubtful, and that, even if it exists, it is or may be subject to exemption as a homestead.[77]

d. *Pleading of Bankrupt in Former Suit.* — On the hearing of objections to the granting of a discharge in bankruptcy, an exemplification of a sworn answer of the bankrupt to a bill lately

Proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant," except for causes expressly prescribed. Act 1898, Sec. 14, subd. b; and amendments in Act of Cong. January 12, 1903, Sec. 14, subd. b.

Explaining Facts within His Knowledge.— Creditors objecting to the discharge on the ground of fraudulent concealment of assets have the burden of proof; but when they have made out a *prima facie* case of the existence of assets, the bankrupt is then called upon to explain facts peculiarly within his own knowledge, and if he omits to do so may be presumed to admit them.

In re Wood, 98 Fed. 972, (*citing In re* Doyle, 3 Nat. Bank. Rep. 782, 7 Fed. Cas. No. 4,052.)

Explaining Shrinkage of Assets. After the creditors have shown the existence of large assets, and their disappearance or large shrinkage within a short time before the bankruptcy proceedings, the burden is then on the bankrupt to reasonably and satisfactorily explain such shrinkage. *In re* Meyers, 96 Fed. 408.

74. *In re* Day, 7 Fed. Cas. No. 3,671a.

75. *In re* Wilcox, 109 Fed. 628. *Contra.*— *In re* Cooke, 109 Fed. 631.

On a Second Application for Discharge, the issues and the parties being the same, evidence of witnesses taken on a former application is competent, on proof that the witnesses are dead or out of the jurisdiction of the court. *In re* Brockway, 12 Fed. 69. This ruling was affirmed by the circuit court. See 23 Fed. 583.

76. *In re* Bard, 108 Fed. 208. See also *In re* Leland, 8 Ben. 204, 15 Fed. Cas. No. 8,232.

Record of Examination at Creditors' First Meeting.— In *In re* Logan, 102 Fed. 876, wherein the petition for a discharge, and the creditors' specifications opposing it, which alleged that the bankrupt had sworn falsely in his original examination at the creditors' first meeting, with reference to his assets, were referred to the referee to ascertain and report the facts, it was held that the referee should not receive, or include in his report, the record of such original examination offered on behalf of the objecting creditors.

77. *In re* Todd, 112 Fed. 315.

brought against him in the state court, is competent evidence for the objectors.[78]

e. *Variance.* — Creditors opposing a bankrupt's application for a discharge are entitled to aver and prove any matter which the bankruptcy act declares shall bar the granting of the discharge;[79] but they are limited to the grounds enumerated in the act.[80]

C. COGENCY OF PROOF. — It is generally held that the burden resting on creditors objecting to the granting of a discharge in bankruptcy must be satisfied by clear and convincing evidence.[81]

2. As an Affirmative Defense. — A. BURDEN OF PROOF. — Where a party asserts a discharge in bankruptcy in avoidance of a liability sought to be enforced against him, the burden of proof is upon him to establish the discharge.[82]

3. The Certificate as an Instrument of Evidence. — A. ADMISSIBILITY. — **Under Former Bankruptcy Acts,** it was held that a certificate of discharge in bankruptcy, made according to the forms prescribed in the act, was receivable in evidence in any court, to prove the fact of the discharge and its regularity,[83] although it was

78. Anonymous, 1 N. Y. Leg. Obs. 349, 1 Fed. Cas. No. 463.

79. *In re* Rhutassel, 96 Fed. 597.

80. *In re* Kaiser, 99 Fed. 689; *In re* Thomas, 92 Fed. 912; *In re* Hixon, 93 Fed. 440; *In re* Rhutassel, 96 Fed. 597. *Compare In re* Marshall Paper Co., 95 Fed. 419.

81. *In re* Wetmore, 99 Fed. 703; *In re* Gaylord, 106 Fed. 833; *In re* Bryant, 104 Fed. 789; *In re* Hirsch, 97 Fed. 571.

Proof beyond Reasonable Doubt is not necessary, although the objection involves the charge of an offense punishable by imprisonment. *In re* Steed, 107 Fed. 682. But the evidence must be clear. Smith *v.* Keegan, 111 Fed. 157. *Compare In re* Moore, 17 Fed. Cas. No. 9,751, holding that a specification that the bankrupt had sworn falsely on his examination before the register, knowingly and wilfully, must be proven beyond a reasonable doubt.

82. Gregory *v.* Edgerly, 17 Neb. 374, 22 N. W. 703. Cooper *v.* Cooper, 9 N. J. Eq. 566.

Georgia.— Blake *v.* Bigelow, 5 Ga. 437.

Indiana.— Hays *v.* Ford, 55 Ind. 52.

Kentucky.— Waller *v.* Edwards, 6 Litt. 348.

Louisiana.— Miller *v.* Chandler, 29 La. Ann. 88.

Nebraska.— Smith *v.* Kinney, 6 Neb. 447.

Pennsylvania.— Boas *v.* Pitzel, 3 Pa. St. 298.

83. Although the federal bankrupt act may make the certificate of discharge evidence, only when the discharge has been duly granted, yet it need not be first shown that the requirements of the act have been complied with. The law will presume that the discharge was duly granted until the contrary is made to appear. Morse *v.* Cloyes, 11 Barb. (N. Y.) 100.

Nor does it make any difference that the discharge is offered, not in behalf of the bankrupt, but in favor of a third person. Morse *v.* Cloyes, 11 Barb. (N. Y.) 100. "The rule by which jurisdiction in fact is presumed from its exercise, does not attach by reason of the situation or character of the parties to the litigation, but by reason of the character of the court by which the decree is granted and it is that character that gives efficacy to the decree without proof of the preliminary proceedings to show jurisdiction."

is necessary, however, that the certificate of discharge be authenticated by the clerk or the judge. Dorsey *v.* Maury, 10 Smed. & M. (Miss.) 298.

also held that the fact of the discharge was also provable by a decree which showed an absolute discharge and also that the bankrupt was entitled thereto.[84]

By Express Enactment in the Bankruptcy Act of 1898, a certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, is made evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.[85]

B. Impeachment and Revocation of Discharge. — a. *Direct Attack.* — **(1.) General Rule.** — The present bankruptcy act in express terms provides for the revocation of a discharge in bankruptcy by proper application and upon the showing made as therein provided.[86]

(2.) Mode of Proving Particular Grounds of Attack. — Inasmuch as the mode of proving the grounds of attacking a certificate of discharge involves no rules of evidence peculiar to the title bankruptcy, or different from those for proving such facts whenever in issue, irrespective of the character of the action, no good purpose can be served by segregating the cases on such questions and the reader is referred generally to titles appropriate for the treatment of these facts.[87]

b. *Collateral Attack.* — **(1.) Division of Authorities.** — (A.) In General. — The question whether a certificate of discharge duly granted by a court of bankruptcy under the provisions of the bankruptcy act, which has been pleaded in bar of the liability sought to be enforced, may be attacked collaterally by showing such facts as will avoid the certificate, is one as to which the authorities are divided. This division, however, results, as will be shown later, not from a conflict of opinion, but from the fact that certain provisions contained in some of the acts were not contained in others.

(B.) Rule Under Act of 1841. — Thus it was held that a certificate

And it should appear in the authentication that the person signing as clerk of the federal district court, was in fact such at the time of the certificate. Pennell *v.* Percival, 13 Pa. St. 197.

A defect in the form and manner of authentication of a certificate of discharge, may be obviated by producing upon the argument at bar, a certificate duly exemplified and authenticated. Dresser *v.* Brooks, 3 Barb. (N. Y.) 429.

84. Viele *v.* Blanchard, 4 G. Greene, (Iowa) 299. Or by an entire and full record of the proceedings, containing an order for the discharge. Thompkins *v.* Bennett, 3 Tex. 36.

85. Sec. 21, subd. F.

86. "The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge." Act 1898, Sec. 15. *In re* Hansen, 107 Fed. 252; *In re* Hoover, 105 Fed. 354.

87. *See* articles "Fraud;" "Fraud-

granted under the bankruptcy act of 1841 could be attacked on a collateral proceeding and its effect as a bar avoided by evidence that the certificate was fraudulently obtained;[88] that the bankrupt intentionally and fraudulently concealed assets which he should have turned over;[89] that he fraudulently omitted the plaintiff's claim from his schedule of debts;[90] that he had preferred certain creditors in contemplation of bankruptcy;[91] or that the court granting the certificate was without jurisdiction to that end.[92]

(C.) RULE UNDER ACT OF 1867. — But it was held that a certificate of discharge granted under the bankruptcy act of 1867 and subsequent amendatory acts thereto could not be so impeached,[93]

ULENT CONVEYANCES;" "JURISDICTION."

88. *United States.*— Fellows *v.* Hall, 3 McLean 487, 8 Fed. Cas. No. 4,723.

89. Dresser *v.* Brooks, 3 Barb. (N. Y.) 429; Sanders *v.* Smallwood, 8 Ired. (N. C.) 125; State *v.* Bethune, 8 Ired. (N. C.) 139; Robinson *v.* Wadsworth, 8 Metc. (Mass.) 67.

Compare. — Humphreys *v.* Sweet, 31 Me. 192.

90. Batchelder *v.* Low, 43 Vt. 662.

91. Beekman *v.* Wilson, 9 Metc. (Mass.) 434; Swan *v.* Littlefield, 4 Cush. (Mass.) 574; Bereton *v.* Hull, 1 Denio (N. Y.) 75; Caryl *v.* Russell, 13 N. Y. 194.

Compare. — North Am. F. Ins. Co. *v.* Graham, 5 Sandf. (N. Y.) 197.

92. Stiles *v.* Lay, 9 Ala. 795; Smith *v.* Engle, 44 Iowa 265; Wells *v.* Brackett, 30 Me. 61; Hennessee *v.* Mills, 1 Baxt. (Tenn.) 38; Morse *v.* Presley, 28 N. H. 299.

Compare. — Laidley *v.* Cummings, 83 Ky. 606; Reed *v.* Vaughan, 15 Mo. 137, 55 Am. Dec. 133; Jones *v.* Knox, 51 Ala. 367; Morrison *v.* Woolson, 29 N. H. 510; Hubbell *v.* Cramp, 11 Page (N. Y.) 310.

93. *United States.* — Chapman *v.* Brewer, 114 U. S. 158; Palmer *v.* Hussey, 119 U. S. 96, 30 L. Ed. 362.

Alabama. — Oates *v.* Parish, 47 Ala. 157 (*citing* Slocum *v.* Mayberry, 2 Wheat. 1; Gelston *v.* Hoyt, 3 Wheat. 246).

Dakota. — Sawyer *v.* Rector, 5 Dak. 110, 37 N. W. 741.

Indiana. — Blair *v.* Hanna, 87 Ind. 298; Begein *v.* Borhem, 123 Ind. 160, 23 N. E. 496.

Kentucky.—Payne *v.* Able, 7 Bush. 344; Ewell *v.* Pitman (Ky.), 27 S. W. 870.

Maine. — Corey *v.* Ripley, 57 Me. 69, 2 Am. Rep. 19 (*approved* in Symonds *v.* Barnes, 59 Me. 192); Bailey *v.* Caruthers, 71 Me. 172.

Massachusetts.—Way *v.* Howe, 108 Mass. 502, 11 Am. Rep. 386; Burpee *v.* Sparhawk, 108 Mass. 111, 11 Am. Rep. 320; Black *v.* Blazo, 117 Mass. 17.

Michigan. — Benedict *v.* Smith, 48 Mich. 593, 12 N. W. 866; Grover *v.* Fox, 36 Mich. 453.

Missouri. — Thornton *v.* Hogan, 63 Mo. 143.

Nebraska. — Seymour *v.* Street, 5 Neb. 85.

New Hampshire. — Marshall *v.* Summer, 59 N. H. 218, 47 Am. Rep. 194; Parker *v.* Atwood, 52 N. H. 181.

New York. — Ocean Nat. Bank *v.* Olcott, 46 N. Y. 12; Crouse *v.* Whittlesey, 20 N. Y. Supp. 965; Dusenbury *v.* Hoyt, 53 N. Y. 521, 13 Am. Rep. 543.

Ohio. — Smith *v.* Ramsey, 27 Ohio St. 339; Rayle *v.* Lapham, 27 Ohio St. 452; Brown *v.* Kroh, 31 Ohio St. 492; Howland *v.* Larson, 28 Ohio St. 625.

Pennsylvania. — Lawver *v.* Gladden, 1 Atl. 659.

Tennessee. — Morris *v.* Creed, 11 Heisk. 155; Hudson *v.* Bignam, 12 Heisk. 58.

Texas. — Brown *v.* Causey, 56 Tex. 340; Alston *v.* Robinett, 37 Tex. 56.

Compare. — Jones *v.* Knox, 51 Ala. 367; Batchelder *v.* Low, 43 Vt. 662, 5 Am. Rep. 311; Beardsley *v.* Hall, 36 Conn. 270, 4 Am. Rep. 74, which,

because that act itself expressly provided a mode of direct attack within a certain time, which, it was held, was the remedy to the exclusion of all others, to which any party so desiring to so attack the certificate was compelled to resort.[94]

(D.) Rule Under Act of 1898. — The bankruptcy act of 1898 contains the same mode of direct attack on a certificate of discharge as that contained in the act of 1867, and hence although there seem to be no reported cases ruling on the question under the present act,

however, is characterized by the court in Way *v.* Howe, 108 Mass. 502, 11 Am. Rep. 386, as appearing to have been decided without a thorough examination of the provisions of the bankruptcy act.

The discharge in bankruptcy is the judgment of the court, and stands upon the footing of judgments. Opportunity is afforded to contest it. If not availed of in the mode, within the time and in the court, allowed, all remedy to annul it is cut off. The state court has jurisdiction over all subjects arising out of the question, whether the debt in litigation is, or is not, embraced in the class or classes of liabilities from which the debtor is not absolved, and upon which his discharge has no effect; if it be replied to the plea of discharge that the particular debt belongs to a class excepted out of the operation of the discharge, the state court may entertain that inquiry and adjudicate it. Stevens *v.* Brown, 49 Miss. 597.

In Poillon *v.* Lawrence, 77 N. Y. 207, it was held that a discharge might be attacked by a creditor, in an action in a state court to recover his debt, for a fraud which is not one of those specified in the bankruptcy act and which does not necessarily affect the validity except as to the creditor.

94. Statement of Rule. — In Way *v.* Howe, 108 Mass. 502, the court said: "The intention of Congress in giving a new proceeding by which any creditor, whose debt was proved or provable, may, upon proving a fraudulent act of the bankrupt, have the discharge set aside and annulled, if that act was unknown to him before the discharge was granted, but not otherwise, appears to us to have been, that the question of the discharge of the bankrupt from all his debts and claims whatever (except of those classes which are declared not to be affected by any certificate of discharge) should be finally and conclusively settled by the court of bankruptcy within a moderate time, leaving the bankrupt, if he prevails on such trial of that issue, free from future suit, molestation or embarrassment on account thereof; and that every creditor should be obliged to try the question of the validity of the discharge, if at all, while the facts upon which it depends are comparatively recent, and in such manner as to inure to the benefit of all the creditors if the discharge is annulled, and should not be allowed to wait until the period prescribed by the general statutes of limitations has nearly expired, and the bankrupt has perhaps established himself anew in business and suffered the means of disproving the charges against him to pass beyond his reach, and then bring a suit to which the other creditors are not parties, and thus harass him on account of his old debts, and obtain an inequitable advantage over them. It follows that the remedy given by application to a district court of the United States under § 34 of the bankrupt act is exclusive of any other mode of impeaching the validity of a discharge, either in the federal or in the state courts, on account of a fraudulent conveyance by the bankrupt in violation of the bankrupt act." Simms *v.* Slacum, 3 Cranch 300; Crocker *v.* Marine National Bank, 101 Mass. 240, and authorities cited.

the cases cited in the immediately preceding section, would seem to be authority for the question under the present act.[95]

(2.) Identifying Subject Matter of Discharge. — (A.) In General. When, however, a defendant relies upon a discharge in bankruptcy to bar the liability sought to be enforced, it is competent for the plaintiff to show that such liability belongs to a class excepted out of the operation of the discharge.[96]

(B.) Burden of Proof. — The burden of proof in such case is on the plaintiff,[97] even though the defendant has alleged that the liability was not within the exception.[98]

95. *Compare* the bankruptcy acts of 1867 and 1898 in this respect, and the cases cited in the two preceding notes.

96. *Indiana.* — Donald *v.* Kell, 111 Ind. 1, 11 N. E. 782.

Mississippi. — Stevens *v.* Brown, 49 Miss. 597.

New Hampshire. — Stewart *v.* Emerson, 52 N. H. 301.

New Jersey. — Linn *v.* Hamilton, 34 N. J. Law 305.

New York. — Argall *v.* Jacobs, 21 Hun 114 (*affirming* 87 N. Y. 110, 41 Am. Rep. 357); Freund *v.* Patton, 10 Abb. N. C. 311.

Ohio. — Howland *v.* Carson, 28 Ohio St. 625.

See also Broadhay *v.* Bradford, 50 Ala. 770; Cole *v.* Putnam, 62 N. H. 616.

When a defendant relies on a discharge in bankruptcy in avoidance of the liability sought to be enforced, it is competent for the plaintiff to show that the defendant concealed a part of his property. Robinson *v.* Wadsworth, 8 Metc. (Mass.) 67.

Pleadings Contradicting Plaintiff's Contention. — If the pleadings on their face, however, show that the liability was a debt provable under the bankruptcy act, the rule is otherwise. Donald *v.* Kell, 111 Ind. 1, 11 N. E. 782.

97. Burnham *v.* Noyes, 125 Mass. 85; Gregory *v.* Edgerly, 17 Neb. 374, 22 N. W. 703; Culver *v.* Torrey, 69 N. Y. Supp. 919; Stevens *v.* King, 44 N. Y. Supp. 803.

98. Sherwood *v.* Mitchell, 4 Denio (N. Y.) 435.

BANKS AND BANKING.—See Accounts Stated; Bills and Notes; Books of Account; Corporations; Notice; Principal and Agent.

BAPTISM.—See Age; Certificates; Declarations; Entries in Regular Course of Business.

BARGAIN.—See Bargain and Sale; Contract; Sale.

BARRATRY.—See Attorney and Client; Insurance.

BASTARDY.

By Herbert G. Richardson.

I. ADULTERINE.

Presumption of Legitimacy. — It was a maxim of the Roman Law and one which the common law copied, that the presumption is always in favor of legitimacy, and that he is the father whom the marriage indicates.[1]

1. **Presumption of Legitimacy.** *England.* — Co. Litt. 123; Bury's Case, 5 Coke 98b; Co. Litt. 126 a; Banbury Peerage Case, 1 Sim. & S. 155, 24 Rev. Rep. 159.
United States. — Stegall *v.* Ste-

Presumption Rebuttable. — But, according to the modern doctrine, this presumption may be rebutted by proof of facts and circum-

gall, 2 Brock. 256; 22 Fed. Cas No. 13,351; Patterson *v.* Gaines, 6 How. 550.

California. — Baker *v.* Baker, 13 Cal. 88.

Georgia. — Sullivan *v.* Hugly, 32 Ga. 316; Wright *v.* Hicks, 12 Ga. 155, 56 Am. Dec. 451.

Illinois. — Illinois Land & Loan Co. *v.* Bonner, 75 Ill. 315; Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. 631.

Indiana. — Moran *v.* State, 73 Ind. 208; Dean *v.* State, 29 Ind. 483; Doyle *v.* State, 61 Ind. 324.

Iowa. — Niles *v.* Sprague, 13 Iowa 198; State *v.* Romaine, 58 Iowa 46, 11 N. W. 721; State *v.* Shoemaker, 62 Iowa 343, 17 N. W. 589, 49 Am. St. Rep. 146; State *v.* Lavin, 80 Iowa 555, 46 N. W. 553.

Kentucky. — Strode *v.* Magowan, 2 Bush 621; Remmington *v.* Lewis, 8 B. Mon. 606; Goss *v.* Froman, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102.

Louisiana. — Tate *v.* Penne, 9 Mart. 662; Clapier *v.* Banks, 10 La. 60.

Maine. — Grant *v.* Mitchell, 83 Me. 23, 21 Atl. 178.

Maryland. — Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488.

Massachusetts. — Hemmenway *v.* Towner, 1 Allen 209; Phillips *v.* Allen, 2 Allen 453; Sullivan *v.* Kelly, 3 Allen 148.

Michigan. — Egbert *v.* Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260.

Minnesota. — State *v.* Worthingham, 23 Minn. 528; Fox *v.* Burke, 31 Minn. 319, 17 N. W. 861.

Mississippi. — Herring *v.* Goodson, 43 Miss. 392.

Missouri. — Johnson *v.* Johnson, 30 Mo. 72, 77 Am. Dec. 598.

New York. — Montgomery *v.* Montgomery, 3 Barb. Ch. 132; Van Aernam *v.* Van Aernam, 1 Barb. Ch. 375; Cross *v.* Cross, 3 Paige 139, 23 Am. Dec. 778; Canjolle *v.* Ferrie, 26 Barb. 177, 4 Bradf. 28 *affirmed*, 23 N. Y. 90.

North Carolina. — State *v.* McDowell, 101 N. C. 734, 7 S. E. 785; State *v.* Pettaway, 3 Hawks 623; State *v.* Wilson, 10 Ired. Law 131; State *v.* Herman, 13 Ired. Law 502; Rhyne *v.* Hoffman, 6 Jones Eq. 335; State *v.* Allison, Phil. Law 346.

Oklahoma. — Bell *v.* Territory, 8 Okla. 75, 56 Pac. 853.

Pennsylvania. — Com. *v.* Shepherd, 6 Binn. 283, 6 Am. Dec. 449; Com. *v.* Wentz, 1 Ashm. 269; Page *v.* Dennison, 1 Grant's Cas. 377; Dennison *v.* Page, 29 Pa. St. 420, 72 Am. Dec. 644; Tioga Co. *v.* South Creek Township, 75 Pa. St. 433; Janes' Estate, 147 Pa. St. 527, 23 Atl. 892; Kleinert *v.* Ehlers, 38 Pa. St. 439.

Rhode Island. — Viall *v.* Smith, 6 R. I. 417.

South Carolina. — Vaughan *v.* Rhodes, 2 McCord 227, 13 Am. Dec. 713; Johnson *v.* Johnson, 1 Dese. Eq. 595; Dinkins *v.* Samuel 10 Rich. Law 66; Wilson *v.* Babb, 18 S. C. 59; State *v.* Shumpert, 1 S. C. (1 Rich.) 85; Shuler *v.* Bull, 15 S. C. 421.

Tennessee. — Cannon *v.* Cannon, 7 Hump. 410.

Virginia. — Bowles *v.* Bingham, 2 Munf. 442, 5 Am. Dec. 497; Smith *v.* Perry, 80 Va. 563; Scott *v.* Hillenberg, 85 Va. 245, 7 S. E. 377.

When Presumption Conclusive. In very ancient times this presumption of legitimacy was only *presumptior juris;* but it was subsequently raised into a conclusive presumption, if the husband was within the four seas at any time during the pregnancy of the wife. Co. Litt. 244a; Rex *v.* Alberton, 1 Lord Raym. 395; Reg *v.* Murrey, 1 Salk. 122.

The maxim "*pater est quem nuptiae demonstrant*" holds even when the parties are living apart by mutual consent; but not when they are separated by a sentence pronounced by a court of competent jurisdiction, in which case obedience to the sentence of the court will be presumed. St. George's *v.* St. Margaret's, 1 Salk. 123; Sidney *v.* Sidney 3 P. Wms. 269.

stances which show that the husband could not have been the father.[2]

2. Rebuttability of Presumption. In Pendrel *v.* Pendrel, 2 Stra. 925, decided in 1732, the doctrine of making the question of legitimacy depend conclusively upon the fact of the husband being *infra quator maria* was done away with and it was left to the jury to determine whether there had been access by the husband.

The rule is stated by Mr. Stephen as follows, Digest of Evidence, art. 98: "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within such a time after the dissolution thereof, and before the celebration of another valid marriage, that his mother's husband could have been his father, is conclusive proof that he is the legitimate child of his mother's husband, unless it can be shown either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both to the date of birth and the physical condition of the husband, or that the circumstances of their access (if any) were such as to render it highly improbable that sexual intercourse took place between them when it occurred."

In the case of Goodright *v.* Saul, 4 T. R. 356, it was held for the first time, that the child of a married woman, begotten and born while her husband was within the country, may be proved a bastard by other evidence than that of the husband's non-access.

And in Rex *v.* Luffe, 8 East 193, 9 Rev. Rp. 406, it was decided that non-access of the husband need not be proved during the whole period of the wife's pregnancy; but that the child is a bastard, though born, or begotten and born, during marriage, if the circumstances show a natural impossibility that the husband could be the father.

Proof Necessary to Establish Adulterine Bastardy. — In Hargrave *v.* Hargrave, 9 Beav. 552, it is said: "A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by showing that the husband was, first, incompetent; second, entirely absent, so as to have no intercourse or communication of any kind with the mother; third, entirely absent at the period during which the child must, in the course of nature, have been begotten; four, only present under circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question and establishes the illegitimacy of the child of a married woman.

"Throughout the investigation the presumption in favor of the legitimacy is to have its weight and influence, and the evidence against it ought to be strong, distinct, satisfactory, and conclusive." See also State *v.* Romaine, 58 Iowa, 46, 11 N. W. 721; Bell *v.* Territory, 8 Okla. 75, 56 Pac. 853; State *v.* Lavin, 80 Iowa 555, 46 N. W. 553.

In Sullivan *v.* Hugly, 32 Ga. 316, it is said the rule, as settled is, "that although the birth of a child in wedlock raises a presumption that such child is legitimate, yet that this presumption may be rebutted, both by direct and presumptive evidence; and in arriving at a conclusion upon this subject, the jury may not only take into their consideration proof tending to show the physical impossibility of the child born in wedlock being legitimate, but they may decide the question of paternity by attending to the relative situation of the parties, their habits of life, the evidence of conduct and declarations connected with conduct, and to any inductions which reason suggests." *Citing* Wright *v.* Hicks, 12 Ga. 155, 56 Am. Dec. 451, 15 Ga. 160.

If the fact of marriage be proved, nothing can impugn the legitimacy of the issue, short of the proof of facts showing it to be impossible

Non-access Not Provable by Husband or Wife. — It is a well-settled rule that neither husband nor wife will be permitted to prove non-

that the husband could be the father. Patterson *v.* Gaines, 6 How. (U. S.) 550.

In Stegal *v.* Stegal, 2 Brock. 256, 22 Fed. Cas. No. 13,351, Chief Justice Marshall held that while it was not necessary to make out that connection was not possible, the evidence should establish its non-occurrence beyond all reasonable doubt. *To the same effect* see Phillips *v.* Allen, 2 Allen (Mass.) 453; Sullivan *v.* Kelly, 3 Allen (Mass.) 148; Cross *v.* Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778; Van Aernam *v.* Van Aernam, 1 Barb. Ch. (N. Y.) 375.

What Proof Not Sufficient. — Suspicions and rumors are not sufficient to rebut the presumption of legitimacy. Strode *v.* Magowan, 2 Bush. (Ky.) 621; Canjolle *v.* Ferrie, 26 Barb. 177, 23 N. Y. 90; Vaughan *v.* Rhodes, 2 McCord (S. C.) 227, 13 Am. Dec. 713; Scott *v.* Hillenberg, 85 Va. 245, 7 S. E. 377.

Neither is general reputation of illegitimacy competent. Haddock *v.* Boston & Me. R. Co., 3 Allen (Mass.) 298, 81 Am. Dec. 656.

Presumption When Mother is Pregnant at Time of Marriage. — A child born in wedlock a month or day after marriage, is presumed to be legitimate, and when the mother was visibly pregnant at the time of the marriage, it is presumed that the child is the offspring of the husband. State *v.* Herman, 13 Ired. Law (N. C.) 502; Page *v.* Dennison, 1 Grant's Cas. (Pa.) 377.

But there is no presumption that the man who marries the mother of a bastard child is the father of it. Janes' Estate, 147 Pa. St. 527, 23 Atl. 892.

Presumption of Sexual Intercourse. — "In every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such child." Banbury Peerage Case, 1 Sim. & S. 155, 24 Rev. Rep. 159.

In Head *v.* Head, 1 Sim & S. 50, the corollary deduced from the opinions of the judges in the Banbury Peerage Case was stated as follows: "Whenever a husband and wife are proved to have been together, at a time when, in the order of nature, the husband might have been the father of an after-born child, if sexual intercourse did then take place between them, such sexual intercourse was, *prima facie*, to be presumed; and that it was incumbent upon those who disputed the legitimacy of the after-born child, to disprove the fact of sexual intercourse having taken place, by evidence of circumstances which afford irresistible presumption that it could not have taken place; and not, by mere evidence of circumstances, which might afford a balance of probabilities against the fact that sexual intercourse did take place."

See also Morris *v.* Davies, 3 Car. & P. 215; Bury *v.* Philpot, 2 Myl. & K. 349; Cross *v.* Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778; Goss *v.* Froman, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102.

When Wife Lives in Adultery. In Reg. *v.* Mansfield, 12 B. 444, it was held that if there was an opportunity of access, but the wife was notoriously living in adultery, it does not necessarily follow that a child begotten while such opportunity existed was not the husband's.

Proof of Wife's Adultery. — The presumption of legitimacy cannot be rebutted by proof of the wife's adultery while cohabiting with her husband. Grant *v.* Mitchell, 83 Me. 23, 21 Atl. 178; Hemmenway *v.* Towner, 1 Allen (Mass.) 209.

When Proof of Wife's Adultery Admissible. — Where access is expressly or impliedly admitted, proof

access for the purpose of bastardizing the offspring of the wife born or begotten during wedlock.[3]

of the wife's adultery is ordinarily inadmissible, unless it is such proof as unquestionably establishes the fact of illegitimacy, as that of the adulterous intercourse of a white woman, having a white husband, with a negro, and the birth of a negro child in the usual course of time thereafter; but where the proof shows that the husband was not capable of performing the sexual act, or that the parties abstained from doing so, then it is competent to prove adultery on the part of the wife as corroborating the main fact. Goss *v.* Froman, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102.

Married Woman May Testify to Criminal Connection. — Upon an indictment for fornication and bastardy, a married woman is competent to prove the criminal connection with her. Com. *v.* Shepherd, 6 Binn. (Pa.) 283, 6 Am. Dec. 449; Com. *v.* Wentz, 1 Ashm. (Pa.) 269. See also State *v.* Pettaway, 3 Hawks (N. C.) 623.

Proof of Impotency. — Where access by the husband is shown, his impotency must be clearly proved. Com. *v.* Wentz, 1 Ashm. (Pa.) 269. See also Legge *v.* Edmonds, 25 L. J. Ch. 125; State *v.* Goode, 10 Ired. Law (N. C.) 49; State *v.* Broadway, 69 N. C. 411.

Access. — "Access" is such access as affords opportunity for sexual intercourse. Bury *v.* Philpot, 2 Myl. & K. 349.

Access Not Presumed. — Access must be satisfactorily established. It is not to be presumed on account of the mere possibility of its occurrence. Clark *v.* Maynard, 6 Madd. 364.

3. *England.* — Rex *v.* Reading, Rep. temp. Hardw. 79; Goodright *v.* Moss, Cowp. 591; Rex. *v.* Luff, 8 East 193, 9 Rev. Rep. 406; Rex *v.* Kea, 11 East 132, 10 Rev. Rep. 448; Rex *v.* Sourton, 5 Ad. & E. 180; Wright *v.* Holdgate, 3 Car. & K. 158; Cope *v.* Cope, 1 Mos. & R. 269; Reg. *v.* Mansfield, 1 Q. B. 444; Anon *v.* Anon, 22 Beav. 481, 23 Beav. 273.

Michigan. — Egbert *v.* Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260.

New Hampshire. — Corson *v.* Corson, 44 N. H. 587; Parker *v.* Way, 15 N. H. 45.

New York. — Chamberlain *v.* People, 23 N. Y. 85, 80 Am. Dec. 255; People *v.* Overseers of Ontario, 15 Barb. 286; Cross *v.* Cross, 3 Paige 139, 23 Am. Dec. 778.

North Carolina. — Boykin *v.* Boykin, 70 N. C. 262, 16 Am. Rep. 776; State *v.* Herman, 13 Ired. Law 502; State *v.* Wilson, 10 Ired. Law 131; State *v.* Pettaway, 3 Hawks 623.

Oklahoma. — Bell *v.* Territory, 8 Okla. 75, 56 Pac. 853.

Pennsylvania. — Com. *v.* Stricker, 1 Browne 47, appendix; Com. *v.* Shepherd, 6 Binn. 283, 6 Am. Dec. 449; Tioga Co. *v.* South Creek Township, 75 Pa. St. 433; Page *v.* Dennison, 1 Grant's Cas. 377; Dennison *v.* Page, 29 Pa. St. 420, 72 Am. Dec. 644; Easley *v.* Com. (Pa. St.), 11 Atl. 220.

Wisconsin. — Mink *v.* State, 60 Wis. 583, 19 N. W. 445, 50 Am. Rep. 386.

See also Watt *v.* Owen, 62 Wis. 512, 22 N. W. 720.

Contra. — Cuppy *v.* State, 24 Ind. 389; Dean *v.* State, 29 Ind. 483.

Reason for the Rule. — In Goodright *v.* Moss, Cowp. 591, Lord Mansfield said: "It is a rule founded in decency, morality and policy, that they (father and mother) shall not be permitted to say, *after marriage*, that they have had no connection, and therefore, that the offspring is spurious." See also Canton *v.* Bentley, 11 Mass. 441.

"The rule is founded on the very highest grounds of public policy, decency, and morality. The presumption of the law in such a case is that the husband had access to the wife, and this presumption must be overcome by the clearest evidence. . . . Testimony of the wife even *tending* to show such fact, or of any fact from

II. PROCEEDINGS FOR SUPPORT OF OFFSPRING OF SINGLE WOMAN.

These Proceedings are Civil in Their Nature and they are governed by the rules of evidence that apply to civil cases.[4]

Burden of Proof. — The burden of proof to establish the paternity of the child is on the complainant.[5]

Degree of Proof. — The guilt of the defendant need not be established beyond a reasonable doubt. A preponderance of the evidence is sufficient.[6]

which non-access would be *inferred*, or of any collateral fact connected with this main fact, is to be most scrupulously kept out of the case; and such non-access and illigitimacy must be proved by other testimony." Mink *v.* State, 60 Wis. 583, 19 N. W. 445, 50 Am. Rep. 386.

In Tioga Co. *v.* South Creek Township, 75 Pa. St. 433, the Court said: "Many reasons have been given for this rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous, and this is not so much from the fact that it reveals immoral conduct upon the part of the parents, as because of the effect it may have upon the child, who is in no fault, but who must nevertheless be the chief sufferer thereby. That the parents should be permitted to bastardize the child, is a proposition which shocks our sense of right and decency, and hence the rule of law which forbids it."

Admissibility of Parents' Declaration. — If marriage be proved or admitted, declarations of the parents will not be admitted to defeat the consequences of marriage, as that the children are bastards; but where the question is *marriage vel non*, the declarations of the parties themselves, if deceased, that they were or were not married, provided they were made *ante litem motam*, are admissible evidence of the fact declared. Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323. And see Haddock *v.* Boston & Me. R. Co., 3 Allen (Mass.) 298, 81 Am. Dec. 656; Goodright *v.* Moss, Cowp. 591; Vernon *v.* Vernon, 6 La. Ann. 242.

Where there is no evidence of non-access at the time of conception the declarations and acts of the husband and wife at the birth of the child, or subsequently, are inadmissible to prove it illegitimate. Dennison *v.* Page, 29 Pa. St. 420, 72 Am. Dec. 644.

Depositions Admissible. — Richardson *v.* People, 31 Ill. 170; State *v.* Hickerson, 72 N. C. 421.

4. E. N. E. *v.* State, 25 Fla. 268, 6 So. 58; Reynolds *v.* State, 115 Ind. 421, 17 N. E. 909; State *v.* Brathovde, 81 Minn. 501, 84 N. W. 340.

5. Overlock *v.* Hall, 81 Me. 348, 17 Atl. 169; Miller *v.* State, 110 Ala. 69, 20 So. 392.

6. *Alabama* — Bell *v.* State, 124 Ala. 94, 27 So. 414.

Florida. — E. N. E. *v.* State, 25 Fla. 268, 6 So. 58.

Illinois. — Lewis *v.* People, 82 Ill. 104; People *v.* Christman, 66 Ill. 162; Allison *v.* People, 45 Ill 37; Maloney *v.* People, 38 Ill. 62; Mann *v.* People, 35 Ill. 467. See also Peak *v.* People 76 Ill. 289; Gehm *v.* People, 87 Ill. App. 158; McFarland *v.* People, 72 Ill. 368.

Indiana. — Harper *v.* State, 101 Ind. 109; Walker *v.* State, 6 Blackf. 1; Reynolds *v.* State, 115 Ind. 421, 17 N. E. 909.

Iowa. — State *v.* Severson, 78 Iowa 653, 43 N. W. 533; State *v.* Romaine, 58 Iowa 46, 11 N. W. 721; State *v.* Ginger, 80 Iowa 574, 46 N. W. 657; State *v.* McGlothlen, 56 Iowa 544, 9 N. W. 893.

Maine. — Knowles *v.* Scribner, 57 Me. 495.

Massachusetts. — Young *v.* Makepeace, 103 Mass. 50; Richardson *v.* Burleigh, 3 Allen 479.

Michigan. — Semon *v.* People, 42 Mich. 141, 3 N. W. 304; People *v.* Cantine, 1 Mich. N. P. 140.

III. COMPETENCY OF MOTHER AS WITNESS.

The mother is competent witness to testify to any facts tending to establish the paternity of the child.[7]

IV. ADMISSIONS.

1. Of Relatrix. — The admissions of the relatrix in a bastardy

Minnesota. — State *v.* Nichols, 29 Minn. 357, 13 N. W. 153.

Nebraska. — Davison *v.* Cruse, 47 Neb. 829, 66 N. W. 823; Dukehart *v.* Coughman, 36 Neb. 412, 54 N. W. 680; Olson *v.* Peterson, 33 Neb. 358, 50 N. W. 155; Strickler *v.* Grass, 32 Neb. 811, 49 N. W. 804; Altschuler *v.* Algaza, 16 Neb. 631, 21 N. W. 401.

North Carolina — State *v.* Rogers, 79 N. C. 609.

Rhode Island. — State *v.* Bowen, 14 R. I. 165.

South Dakota — State *v.* Bunker, 7 S. D. 639, 65 N. W. 33.

Tennessee. — Stovall *v.* State, 9 Baxt. 597.

Preponderance of Evidence. — *Instruction.* — In a prosecution for bastardy, an instruction that both the mother of the child and the defendant are competent witnesses, and if one swears that the defendant is the father of the child and the other that he is not, then, if they are of equal credibility, the one offsets the other, and unless further evidence given by other witnesses for the people, or circumstances proved, give the preponderance for the plaintiff, the verdict should be for the defendant, is properly refused. *Overruling* McFarland *v.* People, 72 Ill. 368; Johnson *v.* People, 140 Ill. 350, 29 N. E. 895.

Reasonable Certainty Only Required. — The plaintiff need not establish the defendant's guilt beyond a reasonable doubt, but only to the reasonable satisfaction of the jury. Knowles *v.* Scribner, 57 Me. 495.

It is not necessary that the jury should be satisfied from the evidence of the defendant's guilt to a moral certainty, or that they be "conclusively satisfied" thereof; reasonable certainty being all that is required. Miller *v.* State, 110 Ala. 69, 20 So. 392.

Alibi as Defense. — To entitle the defendant to an acquittal on the ground of an alibi, he must prove that defense by a preponderance of the evidence. Daly *v.* Melendy, 32 Neb. 852, 49 N. W. 926.

Contra. — Guilt must be proved beyond reasonable doubt. State *v.* Rogers, 119 N. C. 793, 26 S. E. 142; Van Tassel *v.* State, 59 Wis. 351, 18 N. W. 328; Norwood *v.* State, 45 Md. 68.

7. Satterwhite *v.* State, 32 Ala. 578; Connelly *v.* Burrill, 10 Cush. (Mass.) 492; Payne *v.* Gray, 56 Me. 317; State *v.* Adams, 1 Brev. (S. C.) 279; Sherman *v.* Johnson, 20 Vt. 567; Earp *v.* Com., 9 Dana (Ky.) 301.

Absence of Previous Complaint. The fact that there has been no previous complaint against the defendant as father of the child is not ground for excluding the testimony of the mother. Com. *v.* Betts, 2 Woodw. Dec. 210.

Competency Destroyed. — Where the testimony shows the mother's illicit relations with another than defendant about the time the child was begotten, her competency as a witness to prove the defendant the father of her child is thereby destroyed. Com. *v.* McCarty, 2 Clark 351.

Where the prosecuting witness has testified to the particular time when she was impregnated, and has given reasons for her belief, it is not error to refuse to instruct the jury that if they believe that the prosecuting witness had connection with another man about the time the child was begotten, this would destroy her competency as a witness to prove that the defendant was the father of her child. Kintner *v.* State, 45 Ind. 175.

proceeding cannot be introduced in evidence as the admissions of a party, but only for the purpose of impeachment.[8]

2. Of Defendant. — Admissions of the defendant tending to show that he is the father of the child are admissible in corroboration of the testimony of the complainant.[9]

When Offer of Compromise Not Admissible. — But the fact that the defendant compromised, or offered to compromise, the charge against him, without any admission of its truth, cannot be received in evidence as admission of his guilt.[10]

V. DECLARATIONS.

1. Generally. — In the absence of statutory permission, the general rule of evidence excluding declarations of parties in their own behalf, or of witnesses generally, made out of court, applies to bastardy cases.[11]

2. Of Complainant. — Declarations of the complainant, not in court, and not under oath, in which she claimed that the defendant was father of her child, are incompetent and inadmissible in confirmation of her testimony.[12]

8. Houser *v.* State, 93 Ind. 228; Tholke *v.* State, 50 Ind. 355.

Admissions Admissible as Affecting Credibility.— In Dehler *v.* State, 22 Ind. App. 383, 53 N. E. 850, there was evidence tending to show that the relatrix had made admissions out of court contradictory to her sworn testimony, and it was held proper for the court to instruct the jury that they could only consider such evidence as affecting her credibility as a witness.

9. Miene *v.* People, 37 Ill. App. 589; Fuller *v.* Hampton, 5 Conn. 416; Woodward *v.* Shaw, 18 Me. 304.

Admissions at Time of Arrest. Where at the time of being arrested, the defendant said "it was pretty bad," and upon being told by the officer, in answer to an inquiry, that the father of the woman spoke of killing him, the defendant said that "he did not know that he could blame him," such statements are competent evidence against him, and admissible in evidence. Miller *v.* State, 110 Ala. 69, 20 So. 392.

In U. S. *v.* Collins, 1 Cranch 592, the confession of the defendant having been given in evidence, he was not permitted to give evidence of his declarations at the same time, that others also had had connection with the woman.

In Phillips *v.* Hoyle, 4 Gray (Mass.) 568, a witness having been allowed to testify, "that about the time the child was born the defendant asked him if he knew of any woman who would nurse the child, if he could make a settlement of the case," the evidence was held competent to be considered by the jury with other evidence.

10. Martin *v.* State, 62 Ala. 119; Olson *v.* Petterson, 33 Neb. 358, 50 N. W. 155.

11. Stoppert *v.* Nierle, 45 Neb. 105, 63 N. W. 382; Wilkins *v.* Metcalf, 71 Vt. 103, 41 Atl. 1035; Walker *v.* State, 6 Blackf. (Ind.) 1.

12. Sidelinger *v.* Bucklin, 64 Me. 371; Stoppert *v.* Nierle, 45 Neb. 105, 63 N. W. 382; State *v.* Hussey, 7 Iowa 409; State *v.* Tipton, 15 Mont. 74, 38 Pac. 222; Richmond *v.* State, 19 Wis. 307; Wilkins *v.* Metcalf, 71 Vt. 103, 41 Atl. 1035; Palmer *v.* McDonald, 92 Me. 125, 42 Atl. 315. But see E. N. E. *v.* State, 25 Fla. 268, 6 So. 58; Mange *v.* Holmes, 7 Allen (Mass.) 136; Welch *v.* Clark, 50 Vt. 386.

In State *v.* Spencer, 73 Minn. 101, 75 N. W. 893, the court says: "The evidence (plaintiff's declarations as to paternity) was hearsay of a most injurious character, and it was not within any of the few exceptions to the general rule that hearsay evidence is not admissible. The statements

were not made under oath, and they could not be raised to the dignity of competent evidence by being repeated under oath by the person to whom they were made. The only reasonable rule is that evidence of such declarations, made out of court and not under oath, are incompetent and inadmissible."

Necessity of Accusation in Time of Travail. — In some states it was formerly necessary, as a condition precedent to a prosecution for bastardy, or to render the mother a competent witness against the alleged father of her child, that she should have accused him, during the time of her travail, of being the father, and continued constant in such accusation.

Connecticut.—Hitchcock *v.* Grant, 1 Root 107; Warner *v.* Willey, 1 Root 490.

Maine. — Dennett *v.* Kneeland, 6 Greenl. 460; Blake *v.* Junkins, 35 Me. 433; Loring *v.* O'Donnell, 13 Me. 27; Mann *v.* Maxwell, 83 Me. 146, 21 Atl. 844.

Massachusetts. — Bailey *v.* Chesley, 10 Cush. 284; Com. *v.* Cole, 5 Mass. 517; Drowne *v.* Stimpson, 2 Mass. 441; Bacon *v.* Harrington, 5 Pick. 63; M'Managil *v.* Ross, 20 Pick. 99; Maxwell *v.* Hardy, 8 Pick. 560.

New Hampshire. — R. R. *v.* J. M., 3 N. H. 135.

Accusation in Travail Not Necessary. — Since the parties to suits have been made competent witnesses by statute, the necessity of requiring the mother, in the time of her travail, to accuse the putative father, no longer exists. Hawes *v.* Gustin, 2 Allen (Mass.) 402; Leonard *v.* Bolton, 148 Mass. 66, 18 N. E. 879; Lenahen *v.* Desmond, 150 Mass. 292, 22 N. E. 903; Heath *v.* Heath, 58 N. H. 292; Robbins *v.* Smith, 47 Conn. 182.

In Booth *v.* Hart, 43 Conn. 480, the court held, that in an action by the mother on the statute of bastardy, it was not necessary, since the statute of 1848, permitting parties to suits to testify, that the mother should be put to the discovery in the time of her travail, to enable her to maintain her suit by preponderance of evidence, as in other civil actions; but that if the mother should seek the aid of the statute to make out *prima facie* case which it provides for, it would be necessary.

In Suits Prosecuted by the Town in which the mother resided, she was a competent witness without having made such accusation. Davis *v.* Salisbury, 1 Day (Conn.) 278; Chaplin *v.* Hartshorne, 6 Conn. 41.

The constancy contemplated by the statute does not relate to accusations or declarations made by the complainant prior to the formal accusation against the defendant made under oath before the magistrate. Burgess *v.* Bosworth, 23 Me. 573; Palmer *v.* McDonald, 92 Me. 125, 42 Atl. 315; Maxwell *v.* Hardy, 8 Pick. (Mass.) 560.

Variance. — The provision in the statute, that the mother of the bastard child, "shall be constant in such accusation," refers only to the man accused; and a variance as to the time, place, or circumstances stated in her accusation, goes to her credit, but not to her competency. Woodward *v.* Shaw, 18 Me. 304.

Mother May Testify to Accusation Made in Travail. — The mother is a competent witness to show, in corroboration of her testimony, that in the time of her travail she accused the defendant of being the father of her child. Reed *v.* Haskins, 116 Mass. 198; Savage *v.* Reardon, 11 Gray (Mass.) 376; Murphy *v.* Spence, 9 Gray (Mass.) 399; Payne *v.* Gray, 56 Me. 317. *Compare* Hawes *v.* Gustin, 2 Allen (Mass.) 402.

Travail Defined. — The time commences with the pains which precede, and terminates with or soon after child-birth, and may commence twenty-four hours before that event. Long *v.* Dow, 17 N. H. 470.

Sufficiency of Accusation. — If a woman, after her bastard child is born, but before the umbilical cord is severed, accuses a man of being the father of the child, this is an accusation "in the time of her travail" that he is the father of the child, within the statute. Tacey *v.* Noyes, 143 Mass. 449, 9 N. E. 830.

But, as she is the real party in interest, her declarations and admissions are evidence against her, without having her attention called to the same upon the stand.[13]

Of Affection for Others. — Evidence of declarations by the relatrix of her affection for others than the defendant is admissible.[14]

Impeachment of Complainant's Testimony. — The general rules of evidence as to the impeachment of testimony apply to that of the complainant in bastardy proceedings.[15]

3. Of Third Parties. — The defendant cannot establish by the

But see Blake *v.* Junkins, 35 Me. 433.

The declaration, required by the statute to be made by the mother during travail, is sufficient if it is capable of being understood by plain reference to surrounding circumstances and antecedent events. "I have told the truth, but W. has not," may be sufficient, if it may be understood by the aid of such reference. Rodimon *v.* Reding, 18 N. H. 431.

The accusation made at any time after the pains of labor have begun and before the delivery of the child, is "an accusation in time of travail," within the statute. Scott *v.* Donovan, 153 Mass. 378, 26 N. E. 871.

Where the complainant said, in the time of travail that the child was P. T.'s or not any one's, it was held a sufficient accusation. Tillson *v.* Bowley, 8 Greenl. (Me.) 163.

Declarations of Complainant as Corroborating Testimony. — Declarations of the complainant made during travail, as to the paternity of the child, are admissible in corroboration of her testimony. Robbins *v.* Smith, 47 Conn. 182; Hawes *v.* Gustin, 2 Allen (Mass.) 402; Fuller *v.* Hampton, 5 Conn. 416; Benton *v.* Starr, 58 Conn. 285, 20 Atl. 450.

Contra. — State *v.* Hussey, 7 Iowa 409; State *v.* Tipton, 15 Mont. 74, 38 Pac. 222; Richmond *v.* State, 19 Wis. 307.

The complainant's accusation of the respondent during her travail as the father of her child is competent evidence to corroborate her testimony, though no complaint was made or examination had till after the delivery of the child. Leonard *v.* Bolton, 148 Mass. 66, 18 N. E. 879.

But where it appears that no accusation was made in time of travail, evidence that the complainant had never accused any man but the respondent of being the father of her child, is inadmissible. Ray *v.* Coffin, 123 Mass. 365.

13. McCoy *v.* People, 71 Ill. 111.

14. Rawles *v.* State, 56 Ind. 433.

15. Impeachment of Complainant. — Thompson *v.* State, 15 Ind. 473; Meyncke *v.* State, 68 Ind. 401; People *v.* White, 53 Mich. 537, 19 N. W. 174; Nash *v.* Doyle, 40 Vt. 96; Sterling *v.* Sterling, 41 Vt. 80.

When Statements of Relatrix Are Admissible. — If the defendant, to impeach the relatrix, introduces in evidence statements made by her that the defendant was not the father of the child, her statement that he was the father, made about the same time, are admissible. Ramey *v.* State, 127 Ind. 243, 26 N. E. 818; Brookbank *v.* State, 55 Ind. 169.

And she may call witneses to sustain her general good character for truth. Sweet *v.* Sherman, 21 Vt. 23.

Conversation with Prosecutrix Inadmissible. — On a trial for bastardy, the court refused defendant's offer to prove that some time before the prosecutrix stated in a conversation that it was necessary for girls to get in the family way in order to compel some young man to marry them. The attention of the prosecutrix was not called to such conversation. *Held*, that the proposed testimony was not admissible as impeaching evidence, and that as original evidence it was too remote from the question at issue. Admitting

declarations of a third party, made in the absence of the plaintiff, that another person is the father of the child.[16]

VI. CHARACTER AND CONDUCT OF PARTIES.

1. Of Complainant. — The weight of authority declares that the character of the complainant for chastity is not in issue, and that evidence in regard to it is inadmissible.[17]

But it has been held that evidence of her general bad character is admissible to discredit her testimony,[18] and that the defendant

such evidence to be true, it had no tending to disprove the charge. Johnson *v.* People, 140 Ill. 350, 29 N. E. 895.

16. Farrell *v.* Weitz, 160 Mass. 288, 35 N. E. 783; Young *v.* Makepeace, 103 Mass. 50; Boyle *v.* Burnett, 9 Gray (Mass.) 251.

In Benton *v.* Starr, 58 Conn. 285, 20 Atl. 450, the defendant offered evidence of the declarations of a third person that he was the father of the child, and it was held that, while the defendant would have the right to prove, in his own exculpation, that such person was the father, yet the mere declarations of the latter that he was so were not admissible.

And that such declarations were not rendered admissible by the fact that they were made at so early a time that his knowledge of the woman's pregnancy would strongly tend to prove his guilt.

17. Phillips *v.* Hoyle, 4 Gray (Mass.) 568; Morse *v.* Pineo, 4 Vt. 281; Rawles *v.* State, 56 Ind. 433; Swisher *v.* Malone, 31 W. Va. 442, 7 S. E. 439; Paull *v.* Padelford, 16 Gray (Mass.) 263; State *v.* Giles, 103 N. C. 391, 9 S. E. 433; Anonymous, 37 Miss. 54.

Contra. — Short *v.* State, 4 Harr. (Del.) 568.

Chastity of Complainant. — Evidence of the unchastity of complainant, outside the period of gestation, whether in the nature of proof of her improper conduct or of her general reputation for chastity, is irrelevant. Davison *v.* Cruse, 47 Neb. 829, 66 N. W. 823.

Evidence that the general character of the complainant for chastity, previous to her connection with the respondent, was bad, and that she had previously had frequent criminal intercourse with other persons, is not admissible for the purpose of impeaching her credit as a witness. Com. *v.* Moore, 3 Pick. (Mass.) 194.

In Bookhout *v.* State, 66 Wis. 415, 28 N. W. 179, the court said: "The character for chastity of a woman who appears in court to affiliate her bastard child is pretty effectually impeached without any further proof on the subject."

In Duffies *v.* State, 7 Wis. 672, it was held not competent to ask the mother whether, for the last two years, she has been an inmate of a common brothel.

Evidence that the complainant had the general reputation of being a prostitute for the three years preceding the accusation, was held properly rejected in Sidelinger *v.* Bucklin, 64 Me. 371.

18. Sword *v.* Nestor, 3 Dana (Ky.) 453; State *v.* Coatney, 8 Yerg. (Tenn.) 210.

Rebutting Character Evidence. Where an attempt has been made, on cross examination, to impeach the credibility of the complainant as a witness, it is competent for the state, in rebuttal, to support her credibility by evidence of her general good character and of her good character for truth and veracity. Lusk *v.* State, 129 Ala. 1, 30 So. 33.

But sustaining evidence as to the character of a witness for truth and veracity is only competent where impeaching evidence has been offered. Bell *v.* State, 124 Ala. 94, 27 So. 414.

In Sweet *v.* Sherman, 21 Vt. 23, the court held that proof, from other witnesses, that the complainant

can introduce evidence of unchaste conduct on the part of the prosecutrix with others; either for the purpose of impeachment or as showing her general character, and in arriving at the truth of the charge against him.[19]

Intercourse With Other Men. — It is competent for the defendant to introduce evidence to show that the complainant had sexual intercourse with other men about the time she became pregnant; but such evidence must be limited to a period of time within which, in the course of nature, the child could have been begotten.[20]

has made statements in reference to the paternity of the child inconsistent with her testimony on the stand, entitles her to call witnesses to sustain her general good character for truth.

19. Robnett *v.* People, 16 Ill. App. 299; State *v.* Read, 45 Iowa 469; State *v.* Karver, 65 Iowa 53, 21 N. W. 161. See also State *v.* Ginger, 80 Iowa 574, 46 N. W. 657.

Evidence of Unchaste Conduct Must Bear Upon Question of Paternity. — It is not allowable to consider unchaste conduct of the complainant with other men than the defendant, unless it has a bearing upon the question of the paternity of the child. State *v.* Lavin, 80 Iowa 555, 46 N. W. 553; State *v.* Pratt, 40 Iowa 631.

In State *v.* Granger, 87 Iowa 355, 54 N. W. 79, the prosecutrix having been asked, on cross-examination, whether, about sixteen months prior to the time the child was begotten, she did not go into a barn, between two and three o'clock in the morning, with a certain married man; it was held that the question was properly excluded, in the absence of evidence, adduced or promised, to show that the man referred to was acquainted with the prosecutrix, and that his acquaintance continued up to the time the child was begotten, from which a presumption might arise that he was the father of it.

Where the defendant has shown that about the time the child was begotten, the prosecutrix was much in the company of an old beau to whom she had previously been engaged, evidence that seven or eight years before, the prosecutrix and this person had remained several hours locked up in the room of a hotel, is admissible as bearing upon the character of their associations near the time the child was begotten, and thus upon the question of the paternity of the child. State *v.* Borie, 79 Iowa 605, 44 N. W. 824.

In Odewald *v.* Woodsum, 142 Mass. 512, 8 N. E. 347, the respondent introduced evidence tending to show that in the same month in which the complainant claimed that the child was begotten, she spent an evening with another man under circumstances which naturally excite suspicions of improper relations between them, as bearing upon the question whether such third person and complainant had sexual intercourse with each other. And it was held that evidence was admissible to show that, in the preceding month, they had an interview under suspicious circumstances.

Particular Acts of Unchastity. The general reputation of the prosecutrix as to chastity may be shown, as affecing her credibility, but particular unchaste acts cannot be proved, unless they occurred at or near the time the child was begotten. State *v.* Seevers, 108 Iowa 738, 78 N. W. 705.

Evidence Immaterial Where No Time is Fixed. — Evidence that the complainant had at some previous time been seen in bed with another person other than the defendant, but not fixing any time, is immaterial. Force *v.* Martin, 122 Mass. 5.

20. *Illinois.* — Pike *v.* People, 34 Ill. App. 112; Hobson *v.* People, 72 Ill. App. 436; Scharf *v.* People, 34 Ill. App. 400.

Indiana — Benham *v.* State, 91 Ind. 82; O'Brian *v.* State, 14 Ind. 469; Duck *v.* State, 17 Ind. 210; Townsend *v.* State, 13 Ind. 357;

State *v.* Phillips, 5 Ind. App. 122, 31 N. E. 476.

Iowa — State *v.* Woodworth, 65 Iowa 141, 21 N. W. 490; State *v.* Johnson, 89 Iowa 1, 56 N. W. 504.

Kentucky. — Scantland *v.* Com. 6 J. J. Marsh. 585.

Massachusetts. — Com. *v.* Moore, 3 Pick. 194; Eddy *v.* Gray, 4 Allen 435; Paull *v.* Padelford, 16 Gray 263; Parker *v.* Dudley, 118 Mass. 602; Bowen *v.* Reed, 103 Mass. 46; Sabins *v.* Jones, 119 Mass. 167; Ronan *v.* Dugan, 126 Mass. 176; Easdale *v.* Reynolds, 143 Mass. 126, 9 N. E. 13.

Michigan. — People *v.* Kaminsky, 73 Mich. 637, 41 N. W. 833; Hamilton *v.* People, 46 Mich. 186, 9 N. W. 247.

Mississippi.—Anonymous, 37 Miss. 54.

Nebraska. — Masters *v.* Marsh, 19 Neb. 458, 27 N. W. 438; Sang *v.* Beers, 20 Neb. 365, 30 N. W. 258; Olson *v.* Peterson, 33 Neb. 358, 50 N. W. 155; Erickson *v.* Schmill, 62 Neb. 368, 87 N. W. 166.

Tennessee. — Crawford *v.* State, 7 Baxt. 41.

Vermont. — Knight *v.* Morse, 54 Vt. 432; Sterling *v.* Sterling, 41 Vt. 80.

Virginia. — Fall *v.* Overseers of Augusta Co., 3 Munf. 495.

West Virginia. — Swisher *v.* Malone, 31 W. Va. 442, 7 S. E. 439.

See also Humphrey *v.* State, 78 Wis. 569, 47 N. W. 836; Meyncke *v.* State, 68 Ind. 401.

Question of Paternity is for the Jury. — Although a doubt is raised as to the paternity of a bastard child by reason of the complainant's connection with other men at about the time it was begotten, other facts may be shown sufficient to satisfy the jury that the defendant is the father. State *v.* Pratt, 40 Iowa 631; Altschuler *v.* Algaza, 16 Neb. 631, 21 N. W. 401. See State *v.* Ginger, 80 Iowa 574, 46 N. W. 657.

Paternity of Another Bastard May Be Shown. — Where the complainant was the mother of another bastard child, born some fourteen months prior to the one in question, it was held competent, under the facts of the case, to ask her who the father of the first child was. State *v.* Woodworth, 65 Iowa 141, 21 N. W. 490.

In North Carolina it is held that evidence of illicit intercourse with others, even when approaching a habit, does not, unconnected with other evidence tending to show the falsehood of the charge, rebut the presumption of paternity given by the statute to the examination of the woman, and is incompetent when offered for that purpose. State *v.* Giles, 103 N. C. 391, 9 S. E. 433; State *v.* Bennett, 75 N. C. 305; State *v.* Parish, 83 N. C. 613.

But evidence that the prosecutrix had criminal intercourse with another man about the time when in the course of nature the child must have been begotten and that such intercourse was habitual, is admissible. State *v.* Britt, 78 N. C. 439, *Approving* State *v.* Floyd, 13 Ired. Law (N. C.) 382; *Distinguishing* State *v.* Patton, 5 Ired. Law (N. C.) 180; State *v.* Wilson, 10 Ired. Law (N. C.) 131.

Competency of Plaintiff Not Destroyed by Proof of Connection With Another Man. — In a prosecution for bastardy, where the prosecuting witness has testified to the particular time when she was impregnated, and has given reasons for her belief, it is not error to refuse to instruct the jury that if they believe that the prosecuting witness had connection with another man about the time the child was begotten, this would destroy her competency as a witness to prove that the defendant was the father of her child. Kintner *v.* State, 45 Ind. 175.

Jury Should Acquit When Paternity is Uncertain. — Where the prosecuting witness has had sexual intercourse with so many men, near the time when the child was begotten, that she cannot know which of them is the father of the child, the defendant should be acquitted. Whitman *v.* State, 34 Ind. 360; Baker *v.* State, 47 Wis. 111, 2 N. W. 110.

Instruction to Jury Where Evidence Tends to Show Prior Pregnancy. — Where there was evidence tending to show that the prosecutrix was pregnant prior to the date of

Provable on Cross-examination. — It is also competent to inquire of the complainant on cross-examination whether or not she did have such intercourse.[21]

Attempts to Procure Abortion. — The defendant is not entitled to ask the complainant, on cross-examination, whether, after discovering her pregnancy, she consulted a physician in reference to pro-

the alleged intercourse with defendant, and that defendant was absent at that time, it was error to instruct the jury that the main or only bearing of such evidence was upon the question of the credibility of the parties. The jury should have been instructed that, if they believed from the evidence that the prosecutrix was so pregnant, or that the defendant was so absent, their verdict should be for defendant. State *v.* Smith, 61 Iowa 538, 16 N. W. 585.

When Immorality of Relatrix Not a Defense. — Where there was evidence from which the jury might reasonably conclude that defendant was the father of the child, it was not error to instruct the jury that "it would make no difference how immoral the relatrix has been, or what acts of intercourse she has had with other men, as the purpose of this suit is to determine the paternity of such bastard child, and provide for its maintenance and education." Rinehart *v.* State, 23 Ind. App. 419, 55 N. E. 504.

Rumor of Undue Intimacy Inadmissible. — Evidence of a rumor that there existed an undue intimacy between complainant and a man other than the defendant at or about the time the child was begotten is not relevant to the issue. Erickson *v.* Schmill, 62 Neb. 368, 87 N. W. 166.

21. *United States.* — U. S. *v.* Collins, 1 Cranch 592.

Indiana. — Hill *v.* State, 4 Ind 112; Walker *v.* State, 6 Blackf. 1; Ford *v.* State, 29 Ind. 541, 95 Am. Dec. 658; Benham *v.* State, 91 Ind. 82; O'Brian *v.* State, 14 Ind. 469; McChesney *v.* State, 5 Ind. App. 425, 32 N. E. 339.

Kentucky. — Ginn *v.* Com., 5 Litt. 300.

Mississippi.—Anonymous, 37 Miss. 54.

Nebraska. — Stoppert *v.* Nierle, 45 Neb. 105, 63 N. W. 382.

New York. — People *v.* Schildwachter, 5 App. Div. 346 39 N. Y. Supp. 288.

Pennsylvania. — Com. *v.* Fritz, 4 Clark 219, 7 Pa. Law J. 43.

Wisconsin. — Duffies *v.* State, 7 Wis. 672.

Contra. — In Maine it is held that the complainant is not compelled to answer whether she had illicit intercourse with another man about the time the child was begotten. Low *v.* Mitchell, 18 Me. 372; Tillson *v.* Bowley, 8 Greenl. (Me.) 163.

An Innovation on Rules of Cross-examination. — In Holcomb *v.* People, 79 Ill. 409, the court said: "In this class of cases, an innovation has been made on the strict rules of cross-examination, so far as to permit the defendant to ask the woman whether, within the period of gestation, she has had intercourse with other men, for the purpose of overcoming the probability of accused being the father."

Cross-examination of Prosecutrix. *Restriction as to Time.* — In Stoppert *v.* Nierle, 45 Neb. 105, 63 N. W. 382, it was held error to restrict the cross-examination of the prosecutrix as to her intercourse with other men to a number of days less than the period of gestation, especially so when the time excluded by the restriction is the ten days or two weeks immediately prior to the date when the complainant has testified she had the first act of sexual intercourse with the defendant and also within the period of gestation.

In State *v.* Patterson, 74 N. C. 157, the prosecutrix was asked, upon cross-examination, if she had ever had sexual intercourse with a certain person, to which she replied that she had not, and it was held that the question was collateral and irrelevant to the issue and that the answer was conclusive upon the defendant. See also State *v.* Parish, 83 N. C. 613.

curing an abortion; neither is he entitled to prove by other testimony, that she did in fact have such consultation.[22]

Associates. — In a bastardy proceeding, evidence that at one time the prosecutrix associated with another person, who had previously given birth to a bastard child is wholly irrelevant.[23]

Evidence that the complainant was in the habit of associating with men whose reputation for unchastity was bad is inadmissible.[24]

So, too, is evidence that the relatrix kept company with other men at a time when the child might have been begotten, though she has denied the fact, unless it is offered for the purpose of proving sexual connection with such men.[25]

But where the testimony is conflicting as to the paternity of the child, it is competent for the defendant to prove that, about the time the alleged intercourse was had, the complainant was with a man other than the defendant, under suspicious circumstances.[26]

2. Of Defendant. — In bastardy proceedings the defendant cannot introduce evidence of his general good character,[27] and his rep-

Evidence of Intercourse After Conception. — Evidence of sexual intercourse after conception has taken place is immaterial. Hobson *v.* People, 72 Ill. App. 436.

Credibility of Complainant. — Testimony contradicting the mother's statements denying intercourse with other men is admissible for the purpose of affecting her credibility. Altschuler *v.* Algaza, 16 Neb. 631, 21 N. W. 401; McCoy *v.* People, 65 Ill. 439. See State *v.* Read, 45 Iowa 469.

Interest of Parties as Affecting Their Credibility. — Johnson *v.* People, 140 Ill. 350, 29 N. E. 895; Rawles *v.* State, 56 Ind. 433; Decker *v.* State, 53 Ind. 552; Keating *v.* State, 44 Ind. 449, *overruling* Dailey *v.* State, 28 Ind. 285, so far as it is inconsistent with the case of McCullough *v.* State, 14 Ind. 391; John *v.* State, 16 Fla. 200.

Credibility a Question for Jury. In bastardy proceedings it is fatal error for the court to instruct that the complaining witnesss and defendant are not of equal credibility as the matter is exclusively for the jury. Roberts *v.* State, 84 Wis. 361, 54 N. W. 580; State *v.* Nestaval, 72 Minn. 415, 75 N. W. 725. But see McClellan *v.* State, 66 Wis. 335, 28 N. W. 347; Kenney *v.* State, 74 Wis. 260, 42 N. W. 213.

22. Sweet *v.* Sherman, 21 Vt. 23.

Evidence that the plaintiff applied to a physician for medicine to procure an abortion and that she attempted to procure an abortion, and what she said to others on that subject is inadmissible. Sterling *v.* Sterling, 41 Vt. 80.

It is competent for the State to prove that the defendant, upon being informed of the pregnancy of the relatrix, procured for her medicine to cause an abortion. McIlvain *v.* State, 80 Ind. 69.

23. Miller *v.* State, 110 Ala. 69, 20 So. 392

24. Eddy *v.* Gray, 4 Allen (Mass.) 435.

25. Evidence of Association With Other Men Only Competent to Prove Intercourse. — Houser *v.* State, 93 Ind. 228; Haverstick *v.* State, 6 Ind. App. 595, 32 N. E. 785, 34 N. E. 99.

Evidence of the intimate relationship and association of the relatrix with a man other than the defendant, is only competent for the purpose of proving that about the time the child was begotten, the relatrix had intercourse with such man and that the child was begotten by such intercourse. Goodwine *v.* State, 5 Ind. App. 63, 31 N. E. 554.

26. Burris *v.* Court, 34 Neb. 187, 51 N. W. 745.

27. Walker *v.* State, 6 Blackf. (Ind.) 1; Lowe *v.* Mitchell, 18 Me. 372.

utation for morality cannot be admitted in evidence, where he has not been impeached as a witness.[28]

Promises to Marry. — Evidence that the defendant promised to marry the complainant is inadmissible.[29]

VII. CONCEPTION AND GESTATION.

1. Date of Conception. — The exact day on which the child was begotten is immaterial, except as it bears upon the principal question, which is whether or not the accused is the father of the bastard.[30]

Accordingly, the complainant need not prove that the child was begotten on the exact date alleged in the complaint.[31]

2. Period of Gestation. — In determining the paternity of a bastard child, it is sometimes important to make inquiries respecting the period of gestation. Lord Coke lays it down that this is fixed, by the law of England, at forty weeks.[32]

But there is no absolute rule of law upon the subject, though the term of two hundred and eighty days, or forty weeks, is recognized as the usual period, and the question is one of fact to be determined upon the evidence in each particular case.[33]

28. Houser *v.* State, 93 Ind. 228. **Reputation of Defendant for Chastity.** — The character and reputation of the defendant for chastity and virtue is not an issue in an action of bastardy; and notwithstanding proof of the facts of his having sexual connection with the complainant and of his being the father of her child may affect his reputation for chastity, he cannot invoke the aid of his previous reputation in that respect as tending to disprove such facts. Stoppert *v.* Nierle, 45 Neb. 105, 63 N. W. 382.

Conversation of Parties Not Admissible to Show Conduct. — On a prosecution for bastardy, it is not error to exclude evidence of a conversation between the defendant and the prosecuting witness, had in the presence of the testifying witness, offered to show the conduct of the parties, and not to contradict witness or as part of the *res gestae*. State *v.* Meares, 60 S. C. 527, 39 S. E. 245.

29. Chandler *v.* Com., 4 Met. (Ky.) 66. **Promise to Marry Held Admissible.** In a bastardy proceeding, testimony that the defendant, after his arrest, offered to marry the prosecutrix, is not subject to objection on the ground that it was an offer to compromise the suit; it not appearing that the offer was accompanied with the requirement or condition that the proceeding should be abandoned. Laney *v.* State, 109 Ala. 34, 19 So. 531.

In Woodward *v.* Shaw, 18 Me. 304, the admission of the respondent that he was the father of the child, and his promise to marry the mother, were admitted in evidence in corroboration of the testimony of the complainant.

30. Holcomb *v.* People, 79 Ill. 409; Ross *v.* People, 34 Ill. App. 21; State *v.* Smith, 47 Minn. 475, 50 N. W. 605. See also Hamilton *v.* People, 46 Mich. 186, 9 N. W. 247.

But, under some circumstances, the occasion, as testified to by the complainant, may become material although the exact day is not. State *v.* Ryan, 78 Minn. 218, 80 N. W. 962.

31. Francis *v.* Rosa, 151 Mass. 532, 24 N. E. 1024; Baker *v.* State, 69 Wis. 32, 33 N. W. 52; Bassett *v.* Abbott, 4 Gray (Mass.) 69; Duhamell *v.* Ducette, 118 Mass. 569.

32. Co. Lit. 123 b.

33. **Period of Gestation.** — Hargr. Co. Lit. 123 b. n. 1; Beck's Med. Jurisp. c. 9; Phillips *v.* Allen, 2 Al-

Testimony of Experts. — In a prosecution for bastardy, it is incompetent to show by the testimony of professional persons, in impeachment of mother's testimony, that it is highly improbable that impregnation can be produced by the first act of coition.[34]

And whether a child is a "full time child" is not a question for experts, but may be testified to by any physician of ordinary experience, who attended at the birth.[35]

VIII. RESEMBLANCE OF CHILD TO PUTATIVE FATHER.

Evidence of a resemblance of the child to its alleged father, or of the want of it, is inadmissible.[36]

len (Mass.) 453; Davison *v.* Cruse, 47 Neb. 829, 66 N. W. 823.

In Masters *v.* Marsh, 19 Neb. 458, 27 N. W. 438, it is said by Judge Cobb, in writing the opinion of the court, that "the period of gestation may be safely stated as a general proposition at from 252 to 285 days. Allowing the greatest latitude of inquiry, I think it should be confined to a period of time between the lowest period of time above stated and that of 300 days before the birth of the child."

In Cook *v.* People, 51 Ill. 143, it was held not essential, to support a verdict of guilty in a bastardy proceeding, that it shall appear that the period of gestation was for the usual length of time, the evidence being otherwise satisfactory in that regard.

Premature Birth of Child as Corroborative Evidence. — Where the time between the alleged intercourse, as testified to by the prosecutrix, and the birth of the child. was only about seven months, it was error to instruct the jury that evidence tending to show that the child was prematurely born was corroborative of the testimony of the prosecutrix that defendant was the father of the child. The most that should have been said was, that the premature birth was not inconsistent with such testimony. State *v.* Smith, 61 Iowa 538, 16 N. W. 585.

Appearance of Child at Birth. When the testimony shows that a fully developed child was born eight months after the defendant had connection with the relatrix, and fails to show any connection with any other person about that time, the court cannot say, from the appearance of such child that it must have been begotten before the defendant had connection with the relatrix, and consequently was not begotten by him. Hull *v.* State, 93 Ind. 128.

Judicial Notice. — That the possible period of gestation is more than 300 days is a fact which courts are not bound to know and act on in the trial of causes. Erickson *v.* Schmill, 62 Neb. 368, 87 N. W. 166.

34. Anonymous, 37 Miss. 54.

35. Immaturity of Child. — Young *v.* Makepeace, 103 Mass. 50. See Thayer *v.* Davis, 38 Vt. 163.

In Daegling *v.* State, 56 Wis. 586, 14 N. W. 593, it appeared that the time intervening between the date at which the mother testified the child was begotten by the defendant and the date of its birth was forty days less than the usual period of gestation. The physician who attended at its birth having testified that he thought the child was not fully developed, because, among other things, it had no hair and its fingers and toe nails were not fully developed, other physicians, examined as experts on behalf of the defendant, were asked if a scientific medical opinion as to the maturity or immaturity of a child, could be based on the lack of hair, eyebrows and toe nails at its birth. It was held error to sustain an objection to the question.

36. Resemblance of Child to Alleged Father. — U. S. *v.* Collins, 1 Cranch 592; Jones *v.* Jones, 45 Md. 144; Eddy *v.* Gray, 4 Allen (Mass.) 435; Keniston *v.* Rowe, 16 Me. 38; People *v.* Carney, 29 Hun 47. See also Petrie *v.* Howe, 4 Thomp. & Cook 85.

Exhibiting Child to Jury. — Upon the question of the propriety of exhibiting the child to the jury for the purpose of showing its resemblance to the defendant, the decisions of the courts are not in harmony.[37]

When Exhibition Allowed. — But in cases where the question of race or color is concerned, the child may be exhibited for the purpose of showing that it is or is not of the race or color of its alleged father.[38]

Contra. — State *v.* Britt, 78 N. C. 439; State *v.* Bowles, 7 Jones Law (N. C.) 579.

Resemblance of Child to Others. In Paulk *v.* State, 52 Ala. 427, the court said: "On an issue formed in a bastardy proceeding, it is doubtless competent for the defendant to prove that the child bears no likeness or resemblance to him, or that it resembles some other person, who had opportunities of illicit intercourse with the mother." But proof that the child resembled the children of another man, without showing in what particular, or that such children resembled their father rather than their mother, was held too vague and indefinite to be admissible in evidence.

Dissimilarity in Appearance Between Child and Person Charged by Defendant. — Testimony as to the dissimilarity in personal appearance between the child and a person charged by defendant with its paternity is inadmissible to rebut evidence introduced by the defendant to show that such person and not himself was the father. Young *v.* Makepeace, 103 Mass. 50.

37. Inspection by Jury Allowed. State *v.* Smith, 54 Iowa 104, 6 N. W. 153; Scott *v.* Donovan, 153 Mass. 378, 26 N. E. 871; Finnegan *v.* Dugan, 14 Allen (Mass.) 197; Gilmanton *v.* Ham, 38 N. H. 108; State *v.* Saidell, 70 N. H. 174, 46 Atl. 1083; Gaunt *v.* State, 50 N. J. Law 490, 14 Atl. 600; State *v.* Woodruff, 67 N. C. 89; Crow *v.* Jordan, 49 Ohio St. 655, 32 N. E. 750.

Inspection by Jury Improper. Robnett *v.* People, 16 Ill. App. 299; Risk *v.* State, 19 Ind. 152; Reitz *v.* State, 33 Ind. 187; State *v.* Danforth, 48 Iowa 43, 30 Am. Rep. 387; State *v.* Harvey, 112 Iowa 416, 84 N. W. 535; Clark *v.* Bradstreet, 80 Me. 454, 15 Atl. 56, 6 Am. St. Rep. 221; Overlock *v.* Hall, 81 Me. 348, 17 Atl. 169; Hanawalt *v.* State, 64 Wis. 84, 24 N. W. 489, 54 Am. Rep. 588; LaMatt *v.* State, 128 Ind. 123, 27 N. E. 346.

Presence of Child in Court Not Improper. — In Hutchinson *v.* State, 19 Neb. 262, 27 N. W. 113, the prosecutrix being called as a witness took with her to the stand the child, the paternity of whom was in question, said child being only about seven months old, and it was held not error for the trial court to refuse to order the child to be removed, there being no reference made to it during the trial or argument, and no comparison being made between it and the alleged father.

Directing Attention of Jury to Supposed Resemblance of Child. Calling the attention of the jury to the supposed resemblance of the child to the defendant, who was charged with being its father, is improper, on the part of the prosecuting attorney, as tending to prejudice the jury. State *v.* Brathovde, 81 Minn. 501, 84 N. W. 340. See also Ingram *v.* State, 24 Neb. 33, 37 N. W. 943; Hannawalt *v.* State, 64 Wis. 84, 24 N. W. 489, 54 Am. Rep. 588.

In People *v.* Wing, 115 Mich. 698, 74 N. W. 179, it was held that a conviction in bastardy proceedings will not be reversed because the jury were asked by the people's counsel to consider an alleged resemblance between defendant and the child. *Following* People *v.* White, 53 Mich. 537, 19 N. W. 174.

38. Question of Race or Color.

IX. CORROBORATIVE EVIDENCE.

In the absence of statute, it is not necessary that the testimony of the complainant be corroborated by other evidence.[39]

Intimacy and Intercourse of the Parties. — In bastardy proceedings, evidence of acts of intimacy and sexual intercourse, both before and after the alleged act resulting in conception, is admissible to show the relations of the parties, and as bearing upon the probability of the intercourse at the time stated in the complaint.[40]

Warlick *v.* White, 76 N. C. 175; State *v.* Saidell, 70 N. H. 174, 46 Atl. 1083; Morrison *v.* People, 52 Ill. App. 482.

In Clark *v.* Bradstreet, 80 Me. 454, 15 Atl. 56, 6 Am. St. Rep. 221, the court said: "No one will doubt the propriety or reason upon which these decisions are based when the question is one of race or color, for it is well understood that there are marked distinctions, physical and external, between the different races of mankind, which may enable men of ordinary intelligence and observation to judge whether they are of one race or another."

39. Corroborative Evidence Not Necessary. — State *v.* McGlothlen, 56 Iowa 544, 9 N. W. 893; State *v.* Nichols, 29 Minn. 357, 13 N. W. 153; Noonan *v.* Brogan, 3 Allen (Mass.) 481; Robb *v.* Hewitt, 39 Neb. 217, 58 N. W. 88; Olson *v.* Peterson, 33 Neb. 358, 50 N. W. 155; State *v.* Tipton, 15 Mont. 74, 38 Pac. 222; People *v.* Lyon, 83 Hun 303, 31 N. Y. Supp. 942. See also McClellan *v.* State, 66 Wis. 335, 28 N. W. 347.

On a prosecution for bastardy, it was not error to refuse to charge that the testimony of the mother should be corroborated in some material particular before a verdict of guilty could be rendered. State *v.* Meares, 60 S. C. 527, 39 S. E. 245.

Corroborative Evidence Required in England. — The English statutes require that the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the justices before an order of affiliation can be made. Stat. 7 and 8 Vict. C. 101, § 3; 8 & 9 Vict. c, 10, § 6; 35 & 36 Vict. c 65, § 4. The repealed enactment, Stat. 4 & 5 Will. 4, c. 76, § 72, contained a similar provision. See also Hodges *v.* Bennett, 5 Hurlst & N. 625; Reg. *v.* Read, 9 Ad. & G. 619.

40. Intimacy of Parties. — Miller *v.* State, 110 Ala. 69, 20 So. 392; Marks *v.* State, 101 Ind. 353; Strickler *v.* Grass, 32 Neb. 811, 49 N. W. 804; Francis *v.* Rosa, 151 Mass. 532, 24 N. E. 1024; Goodwine *v.* State, 5 Ind. App. 63, 31 N. E. 554.

Evidence of a rumor that the defendant had been improperly intimate with the relatrix is incompetent, even on cross-examination of a witness who has testified to the defendant's good character. Saint *v.* State, 68 Ind. 128.

Previous Sexual Intercourse. Norfolk *v.* State, 28 Conn. 309; Ramey *v.* State, 127 Ind. 243, 26 N. E. 818; LaMatt *v.* State, 128 Ind. 123, 27 N. E. 346; People *v.* Keefer, 103 Mich. 83, 61 N. W. 338; Gemmill *v.* State, 16 Ind. App. 154, 43 N. E. 909; People *v.* Schilling, 110 Mich. 412, 68 N. W. 233; Kremling *v.* Lallman, 16 Neb. 280, 20 N. W. 383; People *v.* Jewel, 32 App. Div. 625, 52 N. Y. Supp. 418; State *v.* Peoples, 9 N. D. 146, 82 N. W. 749; Baker *v.* State, 69 Wis. 32, 33 N. W. 52.

Proof of sexual intercourse between the parties, which took place three years previous to the time when the child was begotten, has been held admissible as bearing upon the probability of the alleged sexual intercourse which is the subject of the prosecution. Thayer *v.* Davis, 38 Vt. 163.

Cross-examination of Defendant. A defendant, testifying in his own behalf, having denied that he had intercourse at the time stated in the complaint and in the evidence of the complainant, may be required on

Letters of Defendant. — Letters of the respondent to the complainant which show the intimacy of the relations existing between them, are admissible in evidence in corroboration of the complainant's testimony.[41]

Procuring Medicine to Produce Abortion. — In a prosecution for bastardy, it is competent to prove that the defendant procured medicine for the relatrix to cause an abortion.[42]

X. PRELIMINARY PROCEEDINGS.

1. Generally. — Neither the sworn complaint filed with the justice, the warrant and return, the justice's transcript, nor the recognizance, is admissible in evidence.[43]

2. Examination of Mother. — The written examination of the mother before the justice of the peace is admissible in evidence where she has died pending the proceedings.[44]

And in some States such examination is expressly made admissible by statute.[45]

cross-examination to answer whether he had such intercourse at another time. State *v.* Klitzke, 46 Minn. 343, 49 N. W. 54.

Subsequent Intercourse. — Testimony as to subsequent acts of intercourse between the parties is admissible. State *v.* Smith, 47 Minn. 475, 50 N. W. 725; People *v.* Jamieson, 124 Mich. 164, 82 N. W. 835.

Former Child by Defendant. — The complainant cannot introduce evidence that five or six years previously she had a child by the respondent, which he and his relations acknowledged as his. Boyle *v.* Burnett, 9 Gray (Mass.) 251.

Evidence Restricted to Period of Time Within Which Child Could Have Been Begotten. — Barnett *v.* State, 16 Ark. 530.

Record of Judgment in Action for Seduction Inadmissible. — In a bastardy proceeding, the record of a judgment in an action of seduction by the relatrix against the defendant is not admissible to prove the fact of sexual intercourse. Glenn *v.* State, 46 Ind. 368.

41. Sullivan *v.* Hurley, 147 Mass. 387, 18 N. E. 3; Beers *v.* Jackman, 103 Mass. 192; Walker *v.* State, 92 Ind. 474; Scharf *v.* People, 34 Ill. App. 400.

42. McIlvain *v.* State, 80 Ind. 69.

43. Hicks *v.* State, 83 Ind. 483; Broyles *v.* State, 64 Ind. 460. But see Sidelinger *v.* Bucklin, 64 Me. 371; Gallary *v.* Holland, 15 Gray (Mass.) 50.

44. Broyles *v.* State, 47 Ind. 251; Hicks *v.* State, 83 Ind. 483; Dodge County *v.* Kemnitz, 28 Neb. 224, 44 N. W. 184, 32 Neb. 238, 49 N. W. 226, *affirmed*, 38 Neb. 554, 57 N. W. 385. See People *v.* Schildwachter, 87 Hun 363, 34 N. Y. Supp. 352.

45. Stoppert *v.* Nierle, 45 Neb. 105, 63 N. W. 382; Hoff *v.* Fisher, 26 Ohio St. 7.

BATTERY.—See Assault and Battery.

BATTURE.—See Waters and Water Courses.

BAWDY HOUSE.—See Prostitution.

BEACH.—See Waters and Water Courses.

BEASTS.—See Animals.

BEER.—See Intoxicating Liquors.

BELIEF.

I. PROVING ONE'S BELIEF.

1. Belief of Party. — A. By His Own Testimony. — a. *At Instance of Adversary.* — A party called to testify by his adversary[1] or upon cross examination, may be asked his belief as to a matter in issue or relevant to the issues.[2]

1. Hugeley *v.* Holstein, 35 Ga. 371; 2 Dan. Ch. Pr. 246, 256, 402.

2. The reason is that if a party believes a fact against his interest the court and jury may believe it, too. Pitts *v.* Hooper, 16 Ga. 445.

When a party claims a legal right, and has put himself on the stand as a witness, his credibility is affected by an unexplained statement of his that he believes that he has no such right, and the fact of his statement is so unusual and so against his interest, that it is, as cross-examination, a proper mode of approaching to his knowledge of material facts which may be the foundation of such belief. When a part of the case or defense consists of the state of mind of a party, it is proper to ask of him on the witness stand his declaration as to his state of mind, at a subsequent time, in reference to subjects

b. *In His Own Behalf.* — (1.) **Generally.**—Where a party's belief is a relevant fact he may (except in Alabama[3]) testify as to it in his own behalf[4] as in actions for deceit where the plaintiff must show that he believed the representations made,[5] and in the same actions defendant may testify to his belief and good faith.[6] So in actions for malicious prosecution defendant may testify to his be-

alleged by him to have induced that state of mind which is essential to his cause of action or defense. Livingston *v.* Keech, 2 Jones & S. (N. Y.) 547.

3. Baker *v.* Trotter, 73 Ala. 277; Brewer *v.* Watson, 71 Ala. 299; Sledge *v.* Scott, 56 Ala. 202; McCormick *v.* Joseph, 77 Ala. 236.

4. "The condition of a man's mind with reference to what he thinks, feels, believes, intends, and his motives is always a fact, and it is a fact which is often required to be ascertained both in civil and in criminal cases; and only one person in the world has any actual knowledge concerning that fact, and that person is the one whose condition of mind is in question; and where he is a competent witness to prove such condition, he may testify to the same directly. Other witnesses can testify only to extraneous facts tending to prove this condition. He may also testify to such extraneous facts, but he may testify directly as to what the condition of his own mind is or was, at any particular time, or on any particular occasion." Gardom *v.* Woodward, 44 Kan. 758, 25 Pac. 199, 21 Am. St. Rep. 310; Smith *v.* Countryman, 30 N. Y. 655; Bayliss *v.* Cockcroft, 81 N. Y. 363; McKown *v.* Hunter, 30 N. Y. 625; Parrish *v.* Thurston, 87 Ind. 437; State *v.* Harrington, 12 Nev. 125; Fraser *v.* Davie, 11 S. C. 56; Watson *v.* Chesire, 18 Iowa 202, 87 Am. Dec. 382.

See also Baldridge & C. B. Co. *v.* Cartrett, 75 Tex. 628, 13 S. W. 8; Fagnau *v.* Knox, 66 N. Y. 525.

In Seekel *v.* Fletcher, 53 Iowa 330, 5 N. W. 200, plaintiff was asked whether or not, it was understood by him that the persons with whom he dealt, were partners. The court said that it did not appear that this testimony was in the nature of an opinion; it was, rather the expression of a belief that there was a partner; that there was no reason why the plaintiff should not be allowed to state to the jury that it was in that belief that he acted when he made the sale and took the note. It was for the jury to say whether the facts justified his belief.

5. Watson *v.* Chesire, 18 Iowa 202, 87 Am. Dec. 382. *Contra.* Shaw *v.* Stine, 8 Bosw. (N. Y.) 157.

Testimony of parties as to what they believed and intended and relied upon was admissible, for the issue involved knowledge of falsity on the part of defendants, and reliance on representations made on the part of the plaintiff. In such a case, mental condition as to belief, or intent, may be testified to by the person whose mental condition was in question. Body *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769.

Plaintiff was allowed to say that he believed the representations made by him to the defendant. The impracticability of contradicting a witness when he is allowed to testify to the operation of his own mind forms no objection to the admissibility of such testimony. It is to be received and the weight to be given to it is a question for the jury. Thorne *v.* Helmer, 2 Keyes (N. Y.) 27.

Whenever the motive, belief, or intention of any person is a material fact to be proved under the issue on trial, it is competent to prove it by the direct testimony of such person whether he happens to be a party to the action or not. The expression to the contrary by a majority of the court in Hathaway *v.* Brown, 18 Minn. 414, was *obiter*. The case of People *v.* Saxton, 22 N. Y. 309, did not involve the question. Berkeley *v.* Judd, 22 Minn. 287.

6. Germania Fire Ins. Co. *v.* Stone, 21 Fla. 555.

lief,[7] and in actions to set aside conveyances as fraudulent,[8] so too in assault and battery[9] and in prosecutions for crime.[10] Such testimony is not conclusive of the fact,[11] the weight of it being for the jury[12] and of this the jury should be informed.[13]

(2.) Weight and Conclusiveness. — Some courts have deprecated the use of such testimony.[14] Where a party testifies to his belief

7. Goodman *v.* Stroheim, 4 Jones & S. (N. Y.) 210. In the case of Dillon *v.* Anderson, 43 N. Y. 231, it is said: "One sued for a malicious prosecution may testify that in setting on foot legal proceedings, he believed that there was cause for them."

In the case of McKown *v.* Hunter, 30 N. Y. 625, the defendant was allowed to testify that he believed the evidence given by the plaintiff (on which the defendant attempted a prosecution against him for perjury,) was material, and that he believed at the time he made the complaint against the defendant for perjury that the defendant was guilty of the charge made against him. The court held that these answers tended to rebut the reputation of malice.

8. Gardom *v.* Woodward, 44 Kan. 758, 25 Pac. 199, 21 Am. St. Rep. 310. The seller was permitted to testify that he made the sale in good faith. The court say that no objection is perceived to this testimony, that if desired, the opposite party had the right on cross-examination to ascertain all the particulars of the transaction. It is generally recognized that it is correct practice to ask general questions of this character, leaving the other side to call for details. Miner *v.* Phillips, 42 Ill. 123.

9. In Plank *v.* Grimm, 62 Wis. 251, 22 N. W. 470, an action for damages for assault and battery, the defendant was allowed to testify what he thought the plaintiff was about to do with an ax that the plaintiff had in his hand, "as having tendency to establish a justification for the assault made by the defendant upon the plaintiff."

10. State *v.* Harrington, 12 Nev. 125. In Com. *v.* Woodward, 102 Mass. 155, defendant was allowed to testify that he struck because he thought the deceased was going to strike him. The criminal purpose or intent is usually inferred from the character and circumstances of the offense. Now that the defendant himself is admitted as a witness, it must be competent for him to testify directly to that which is always a subject of proof or disproof, by indirect evidence.

11. Watson *v.* Chesire, 18 Iowa 202, 87 Am. Dec. 382; Thorne *v.* Helmer, 2 Keyes (N. Y.) 27; Berkeley *v.* Judd, 22 Minn. 287.

In the case of State *v.* Harrington, 12 Nev. 125, a case of homicide, the defense being self-defense, defendant was asked whether at the moment of the discharge of the pistol at the deceased, defendant really believed that he was in danger of losing his life, or receiving great bodily harm. The court say: "It is true that a defendant in a criminal action has inducements to misstate the motives that actuated him, as well as his beliefs at the time. So too as relative to any other fact. The law, however, does not make that a reason why he shall not be allowed to make his statement to the jury upon all matters concerning which he has a right to testify, and let the jury judge of the veracity of his testimony."

12. Germania Fire Ins. Co. *v.* Stone, 21 Fla. 555; McKown *v.* Hunter, 30 N. Y. 625; Goodman *v.* Stroheim, 4 Jones & S. (N. Y.) 210.

13. Watson *v.* Chesire, 18 Iowa 202, 87 Am. Dec. 382.

14. In Watson *v.* Chesire, 18 Iowa 202, 87 Am. Dec. 382, the court admitted "That it is going a great ways to allow this to be done, especially where the witness is a party to the suit testifying in his own behalf."

In the case of Bayliss *v.* Cockcroft, 81 N. Y. 363, the question being one of usury, the plaintiff was permitted to testify that he believed a certain certificate given by the defendant to the effect that the note in suit was business paper, the court

liberal scope will be allowed in cross examination.[15]

B. By Circumstances. — Circumstances may be shown from which a party's belief is inferable.[16]

C. Admissions. — Such belief may be proved by his admissions.[17]

2. Belief of One Not a Party. — The same rules apply in those cases where the mental condition of one not a party is relevant.[18]

II. BELIEF IN SENSE OF INFERENCE.

1. Relevancy. — Witnesses, not experts, are as to some matters allowed to testify to belief in the sense of opinion or inference.[19]

2. Grounds of. — This is sometimes permitted on the ground that the statement of the witness's belief or inference is the best way of conveying to the jury what he saw or heard.[20]

said: "We do not encourage the reception of this kind of testimony; yet we know that parties have been permitted to speak as to their mental operations in the doing of an act that is called in question when the intent with which it is done serves to characterize it."

15. Watson *v.* Chesire, 18 Iowa 202, 87 Am. Dec. 382; Miner *v.* Phillips, 42 Ill. 123.

16. Shaw *v.* Stone, 8 Bosw. (N. Y.) 157; Com. *v.* Woodward, 102 Mass. 155; Baker *v.* Trotter, 73 Ala. 277; Sledge *v.* Scott, 56 Ala. 202; McCormick *v.* Joseph, 77 Ala. 236; Brewer *v.* Watson, 71 Ala. 299; Gardom *v.* Woodward, 44 Kan. 758, 25 Pac. 199, 21 Am. St. Rep. 310.

In Parrish *v.* Thurston, 87 Ind. 437, "It is perhaps generally true that belief or understanding is to be inferred from circumstances."

17. Com. *v.* Woodward, 102 Mass. 155; Livingston *v.* Keech, 2 Jones & S. (N. Y.) 547.

18. Miner *v.* Phillips, 42 Ill. 123; Sledge *v.* Scott, 56 Ala. 202.

19. *See* "Customs and Usages;" "Bloodstains;" "Identity;" "Handwriting;" "Opinion Evidence;" "Refreshing Memory;" "Drunkenness;" "Value;" "Quantity."

State *v.* Babb, 76 Mo. 501; State *v.* Harvey, 131 Mo. 339, 32 S. W. 1110; Com. *v.* Moinehan, 140 Mass. 463, 5 N. E. 259; People *v.* Rolfe 61 Cal. 540; Farmer's Bank *v.* Saling, 33 Or. 394, 54 Pac. 190.

The general rule is that witnesses must state facts, and not their individual opinion, but there are exceptions to the rule as well established as the rule itself. When the subject of inquiry is so indefinite and general in its nature as not to be susceptible of direct proof, the opinions of witnesses are admissible. Eyerman *v.* Sheehan, 52 Mo. 221. See also Greenwell *v.* Crow, 73 Mo. 638, which involved a question of negligence on the part of an administrator in keeping money belonging to his office in his house; the sheriff was called as a witness to testify that it was as safe to keep money at that house at that time as to keep it in any other part of the county.

20. In State *v.* Lytle, 117 N. C. 799, 23 S. E. 476, a witness called to identify a person as the defendant, said that he had known the defendant ten years, had seen him often; that if he had spoken to the person whom he saw, he would have called him Lytle; that he took him to be Lytle; the court distinguishes the case from that of State *v.* Thorpe, 72 N. C. 186, and holds the evidence admissible, as being only the expression of the result produced on his senses, but that it would not have been proper had the witness made his conclusions from other sources—as if he had said that he judged it was Lytle, because he had heard that Lytle went up the road that day.

In Leonard *v.* Allen, 11 Cush. (Mass.) 241, an action for slander, witnesses were allowed to testify what they understood defendant to mean by certain expressions, gestures

A. Must Be Facts Perceived. — And the belief must be the result of facts perceived as distinguished from a mere supposition.[21]

B. Stating. — And witnesses may be required to state fully the facts on which the belief is founded.[22]

C. Memoranda. — It has even been permitted a witness to testify to a belief based on his faith in the truth of memoranda made by him of facts concerning which he retains no recollection.[23]

III. BELIEF AS QUALIFYING ASSERTIONS.

1. Generally.— And where such inferences are not competent,

and intonations; both as to the person intended and in regard to the charge made against them, saying that when the charge is made by gestures and signs, and not solely in words, it is necessary to allow a departure from the strict rule, that certainly to some extent prevails, of refusing to permit a witness to state what meaning he understood the defendant to convey by the words used.

In Hamilton *v.* Nickerson, 13 Allen (Mass.) 351, in proving a custom, it was held competent for the witness to say, after showing his familiarity with the business involved, what he believed the general custom to be, from a knowledge of the business, and of the custom, although he could not state individual cases; that he knew it in the way men generally gather knowledge. The court say that the fact to be proved was not a single isolated act or occurrence, but the result or conclusions derived from the series of acts creating in the mind of the witness a conviction or belief of the complex or comprehensive facts to the existence of which he was called upon to testify. In such case, belief is knowledge, and constitutes direct and primary evidence. In regard to such a matter, a distinction between knowledge and belief is altogether too nice and metaphysical to be introduced in the rules of evidence by which justice is to be practically administered. *Citing* 1 Stark Ev. 173; 1 Greenl. § 9, 440, and Shore *v.* Wiley, 18 Pick. (Mass.) 558.

In Griffin *v.* Brown, 2 Pick. (Mass.) 304, witness was allowed to testify that H. lived extravagantly and spent a good deal of money; from $800 to $1,000, as he verily believed. The court say this was necessarily a matter of conjecture, and the fact that he lived expensively could only be illustrated by stating a sum which the witness thought the debtor spent.

21. In Orr *v.* Cedar Rapids & M. C. R. Co., 94 Iowa 423, 62 N. W. 851, a witness was asked as to the ringing of the bell before the collision, and testified that it was rung. He then stated he supposed it rang more than once. The court held that his supposition was properly stricken out.

In Goodwyn *v.* Goodwyn, 20 Ga. 600, witnesses stated that they thought Goodwyn resided a part of the time with his mother; they thought he was residing with his father at the time of the execution of the will; that they believed the slaves were all the time in the possession of Goodwyn. The court said that this testimony was improper unless the witnesses stated the facts upon which the belief was founded.

22. Goodwyn *v.* Goodwyn, 20 Ga. 600.

23. In Dodge *v.* Bache, 57 Pa. St. 421, a witness having refreshed his recollection from entries in his books, said he believed that a certain person worked for him between certain dates. The court said that it may be assumed 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. *See* article "Refreshing Memory."

expressions such as "I believe,"[24] "it is my impression,"[25] "I presume,"[26] or "I think," used to indicate less than absolute certainty of recollection or perception do not render the testimony incompetent.[27]

24. Duvall *v.* Darby, 38 Pa. St. 56. The expression of a witness that he had seen the note in question eighteen months before and believed it to be the note sued upon, but was not positive of the fact, is not the expression of an opinion in the proper sense of that term. It is the assertion of the existence of a fact qualified by the admission that the recollection of the witness is not so clear and distinct but that he may be mistaken. This qualification though it weakened the force of the testimony did not authorize the court to reject it. Head *v.* Shaver, 9 Ala. 791.

It has been said that the witness should testify to his knowledge that the paper is lost, and not merely his belief. But the difference is, after all, nothing more than in the degree of certainty. With regard to things which make not a very deep impression on the memory, it may be called belief. Knowledge is nothing more than a man's firm belief. Hatch *v.* Carpenter, 9 Gray (Mass.) 271.

25. Carrington *v.* Ward, 71 N. Y. 361; Swinney *v.* Booth, 28 Tex. 114; Lovejoy *v.* Howe, 55 Minn. 353, 57 N. W. 57; Duvall *v.* Darby, 38 Pa. St. 56; Humphries *v.* Parker, 52 Me. 502; McRee *v.* Morrison, 13 Ired. Law (N. C.) 46; Clark *v.* Bigelow, 16 Me. 246; State *v.* Ward, 61 Vt. 153, 17 Atl. 483; Franklin *v.* City of Macon, 12 Ga. 257.

As a basis for the introduction of secondary evidence of the contents of a document, the plaintiff filed an affidavit, that his impression was that he had torn up the document and that he was not certain that he tore it up, and did not recollect doing so, but that such was his impression. The court said: "An impression is an image fixed in the mind, it is belief; and believing the paper was destroyed has been deemed sufficient to let in the secondary evidence." Riggs *v.* Tayloe, 9 Wheat (U. S.) 483.

In Snell *v.* Moses, 1 Johns. (N. Y.) 96, a witness said that he could not recollect the expressions used but would give his impressions as to the substance of the conversation. The court said there was no doubt as to the admissibility of this evidence.

26. In Hammock *v.* McBride, 6 Ga. 178, the payee of a note said he presumed it was renewed at 16 per cent. but would not state positively. The court said: "If the word presume is to be construed etymologically, then the court was right, for it means according to the lexicon, to believe without examination; and in this sense is a weaker term than belief, for to believe is to put credit or confidence in the veracity of testimony, whereas to presume is to affirm a thing to be true without proof. Neither the witnesses, however, nor the commissioners who take their testimony are always dictionary-makers, and it will not do, therefore, to subject this testimony to so severe a test. Language must be construed in its ordinary import and it will be found that persons usually employ the word presume to admit or affirm modestly or hesitatingly a positive fact within their knowledge.

Hovey *v.* Chase, 52 Me. 304, 83 Am. Dec. 514, where it was held no error to exclude an answer of the witness to the effect that he could not tell, but presumed the fact might be as stated in the interrogatory. The court said that the presumption of a witness as to the existence or nonexistence of facts, are not admissible in evidence. But see Hammock *v.* McBride, 6 Ga. 178.

27. Lewis *v.* Freeman, 17 Me. 260; Hallahan *v.* N. Y., L. E. & W. R. Co, 102 N. Y. 194, 6 N. E. 287; Humphries *v.* Parker, 52 Me. 502; Voisin *v.* Conn. Mut. Ins. Co., 60 App. Div. 139, 70 N. Y. Supp. 147.

It was objected that witnesses introduced their statements with such expressions as "I think," "I took it," "We concluded," "We inferred," "We supposed," and like expressions. The court said that was for the consideration of the jury; that there is no rule of law requiring

2. Must Imply Recollection. — But such expressions must appear to signify not a mere inference or conclusion, but a recollection, an act of memory not of reasoning.[28]

3. Where Meaning Doubtful. — A. WITNESS TO EXPLAIN.

a witness to be absolutely positive in his statement of fact; that the positive witness is often entitled to less consideration than the more cautious. State *v.* Porter, 34 Iowa 131.

In Blake *v.* People, 73 N. Y. 586, a witness was allowed to testify that he could not swear as to a certain action, but did not think that it occurred. The court saying it was competent for the witness to testify to an impression or belief on the subject, it being the matter of which the witness was an eye witness. The witness was also allowed to testify "the one that was shot was down, and the other was helping him up to the best of my knowledge," and also in answer to the question whether the hold of the prisoner and the deceased was friendly or unfriendly, he was allowed to answer that he did not know; he believed it was a friendly grasp.

A witness swore that he thought it was a certain person who made a certain statement to him. The court said that the answer was objectionable for uncertainty, that the witness ought to be positive as to the person who made the statement; that the repetition of mere oral statements is subject at best to much mistake, and can only be satisfactory when deliberately made and precisely identified. It would seem, therefore, that there ought to be no uncertainty as to the person who made them. Morris *v.* Stokes, 21 Ga. 552.

In Rittenhouse *v.* Harman, 7 W. Va. 380, the court makes a distinction between the word "thinks" and the word "believes" in an affidavit. The existence of evidence and consideration of its due credit and force, and the conviction of its sufficiency are not implied in a statement that affiant thinks a thing is true to the same extent and in like degree that they are implied in a statement that he believes it is true.

28. Swinney *v.* Booth, 28 Tex. 114 Parker *v.* Chambers, 24 Ga. 518; Crowell *v.* Western Reserve Bank, 3 Ohio St. 406; Duvall *v.* Darby, 38 Pa. St. 56; Carrington *v.* Ward, 71 N. Y. 361; Butler *v.* Benson, 1 Barb. (N. Y.) 526; State *v.* Thorp, 72 N. C. 186.

"Impression is an equivocal term. It may have been derived from the information of others, or from some deduction of the mind; from premises not well established; unless it can be made to appear that it is derived from recollection, it cannot be safely or legally received.' Clark *v.* Bigelow, 16 Me. 246.

In Lovejoy *v.* Howe, 55 Minn. 353, 57 N. W. 57, the court said in regard to the testimony of a witness with reference to conversations, "a witness cannot be permitted to state what the impression left in his mind by a conversation is unless he swears to such impression as a matter of recollection and not of inference."

In Elbin *v.* Wilson, 33 Md. 135, it is said that a witness must state either the language or substance of what was said. It would be a dangerous innovation upon the well-established rules of evidence to allow him to give the impressions which the parties' declaration made upon the mind of the witness. In that case the witness had testified that he did not remember the language used on certain occasions, and that he could state it was such as convinced him that the plaintiff strongly sympathized with the rebellion. The objection to this testimony was sustained.

In Hoitt *v.* Moulton, 21 N. H. 586, witness testified that she saw a person come from a certain room with a letter, which letter witness took to be the one she had frequently seen in that room. She judged it to be that particular letter because she did not see the letter in that room after that time. This was excluded as a matter of inference. The witness stated an expression used by the plaintiff, from which expression the witness said, "I supposed the plaintiff had dismissed my brother." This also was excluded as a mere inference.

Where the sense in which such words are used is doubtful the witness may be required to explain himself.[29]

B. If Explanation Not Demanded. — And if no explanation is demanded the testimony should go to the jury with proper instructions.[30]

4. Weight. — It is for the jury to fix the weight of such testimony.[31]

5. Perjury. — Perjury will lie on such testimony if false.[32]

The witness said in narrating a conversation, "I think she said," etc. This was held admissible. The word "think" being held to be a mere qualification of the certainty of the witness's recollection. In the same case the witness was allowed to testify that he believed a certain letter was in the handwriting of a certain person with whose handwriting he was familiar.

In Cutler *v.* Carpenter, 1 Cow. (N. Y.) 81, a witness had said that there was nothing in a certain conversation from which he could say that it alluded to a certain time. He was then asked what he believed was the time referred to. The court said that it was error to permit the witness to state his belief after he had sworn there was nothing in the conversation from which he could say that the plaintiff referred to the time of sale.

29. State *v.* Flanders, 38 N. H. 324.

In Humphries *v.* Parker, 52 Me. 502, the court say that it is a very common practice for witnesses, when testifying from recollection, to use the expression, "it is my impression," "I think," etc. Such answers are not objectionable. An impression is defined as a slight, indistinct remembrance. I have an impression that the fact was stated to me, but I cannot clearly recollect it. The word "think" is defined as follows: to recollect, to call to mind. When the answer is susceptible of two meanings, one of which would render it admissible, and the other not, the witness should be required to explain his meaning before asking the judge to exclude the answer.

30. Humphries *v.* Parker, 52 Me. 502.

In State *v.* Flanders, 38 N. H. 324, witness testified that he read a certain bond hastily when he signed it; could not say whether it had been altered or not, but had an impression in regard to it. The court said an impression may mean personal knowledge of the fact as it rests in the memory, though the remembrance is so faint as not to amount to an undoubting recollection. In this sense the impression of the witness is evidence, however indistinct and unreliable the recollection may be. Impression, however, may mean an understanding or belief of the fact derived from other sources than personal observation; or it may mean an inference drawn from a knowledge of other facts. So used it is not evidence. If it was apparent to the court that the word was so used the objection was well taken. The court, however, concluded that impression might be taken in the former sense. If it was susceptible of that construction it could not be excluded by the court merely because a different interpretation might be put upon it which would render it incompetent. If the parties choose to leave the testimony of a witness doubtful by refraining to draw from him an explicit declaration of his meaning when it is susceptible of two interpretations, one of which renders it competent, and the other incompetent, it must be submitted to the jury with proper instructions, of course, how they are to regard it when they have ascertained what his meaning really was.

31. Head *v.* Shaver, 9 Ala. 791; State *v.* Porter, 34 Iowa 131; Rhode *v.* Louthain, 8 Blackf. (Ind.) 413.

32. Simpkins *v.* Malott, 9 Ind. 543; Butler *v.* Benson, 1 Barb. (N. Y.) 526.

BENCH WARRANT.—See Attendance of Witnesses; Contempt.

BENEFICIAL ASSOCIATIONS.

By J. M. Kerr.

I. IN GENERAL.

1. As to Organization. — A. Generally. — Beneficial societies are *sui generis.* By reason of the contractural relations of the members, they are not public charities, but private voluntary associations, in some respects resembling partnerships, but not strictly partnerships.[1]

B. For Charitable Purposes. — Where such associations are formed for charitable purposes, pure and simple, they are governed

1. Laford *v.* Deems, 81 N. Y. 507; McMahan *v.* Rauhr, 47 N. Y. 67; Ash *v.* Guie, 97 Pa. St. 493, 39 Am. St. Rep. 818; see *In re* St. James Club, 16 Jur. 1075, 13 Eng. L. & Eq. 589; Bear *v.* Bromley, 16 Jur. 450, 11 Eng. L. & Eq. 414; Beaumont *v.* Meredith, 3 Ves. & B. 180.

Partnership or Corporation.— At one time, in this country, every organized body,— for moral, benevolent or social purposes,— was regarded as either a partnership or a corporation. See Gorman *v.* Russell, 14 Cal. 531.

Contrary Doctrine has more recently been held. Otto *v.* Journeymen Taylors' Protective and Benevolent Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156; Industrial Trust

by the general rules of law and evidence, except as hereinafter noticed.[2]

C. For Social Purposes and for Improvement. — Where organized for social purposes and for purposes of improvement, they are governed by the same general rules of law and evidence.

D. For Benevolent Purposes. — Where organized for benevolent purposes, such as providing a fund to care for the sick, the disabled, and the needy members, or for paying burial expenses, or to pay the beneficiaries or the dependents of a deceased member a sum of money, they take on the character of insurance companies, and are governed accordingly.[3]

2. As to Internal Controversies. — Where a voluntary association is organized, not in pursuance of any statute, and the terms of membership are not fixed by principles of the common law, the agreement which the members make among themselves on the subject must establish and determine the rights of the parties,[4] so long as there is nothing immoral, or contrary to public policy, or in contravention of the law of the land,[5] and all rules of evidence bend to these provisions, in so far as they are affected by them.

Remedies of Members as Between Themselves, not being regulated by the articles of association or agreement of the parties, the general law of partnership applies,[6] and the general rules of evidence as to partnerships are applicable.[7]

3. As to External Controversies. — Members of benevolent associations, not incorporated, in their relations to third persons, are sometimes regarded as partners,[8] and in other cases as agencies;[9] when to be regarded as partners, the general rules of evidence applicable in cases of partnership govern,[10] and when regarded as agencies, the general rules of evidence applicable to agencies,[11] govern in all judicial investigations.

Co. *v.* Green, 17 R. I. 586, 23 Atl. 914, 17 L. R. A. 202. See cases first above cited.

2. See *post,* notes 16 and 17.

3. See *post,* II.

4. Belton *v.* Hatch, 109 N. Y. 593, 17 N. E. 225, 4 Am. St. Rep. 495; White *v.* Brownell, 2 Daly (N. Y.) 329, 4 Abb. Pr. (N. S.) 193; Fischer *v.* Raab, 57 How. Pr. (N. Y.) 87; Fritz *v.* Muck, 62 How. Pr. (N. Y.) 69; Hyde *v.* Woods, 2 Sawy. C. C. 655, 659, *affirmed* in 94 U. S. 523.

Voluntary Associations organized in conformity with a constitution and by-laws, are to be regarded as governed by the special agreement adopted by the *coparceners,* and binding upon them among themselves,— regardless of substantive law and the rules of evidence. See Tyrrell *v.* Washburn, 6 Allen (Mass.) 149, 466.

5. See Hyde *v.* Wood, 2 Sawy. C. C. 655, *affirmed* 94 U. S. 523; White *v.* Brownell, 2 Daly (N. Y.) 329, 4 Abb. Pr. (N. S.) 193.

6. Bullard *v.* Kinney, 10 Cal. 60.

7. *See* title "Partnership."

8. Babb *v.* Reed, 5 Rawle (Pa.) 151, 28 Am. Dec. 650. See Hess *v.* Werts, 4 Serg. & R. (Pa.) 356.

9. See Flemyng *v.* Hector, 2 Mees & W. 172; Todd *v.* Emly, 7 Mees & W. 427; Caldecotte *v.* Griffiths, 8 Exch. 898.

10. *See* title "Partnership."

11. *See* title "Principal and Agent."

II. AS INSURANCE COMPANIES.

1. Generally. — The Contract. — Beneficial associations, in so far as they are not formed for pecuniary profit, but for the purpose of rendering assistance to their members, or the families and dependents of members, in case of sickness or inability to work, and to pay a certain sum to the widows, heirs or dependents of deceased members, are not distinguishable from, and are to be deemed, insurance companies, except in those cases where a statute regulating has provided otherwise,[12] subject to the same laws and governed by the same rules as insurance companies, and their certificates of membership or policies of insurance are to be regarded in the nature of mutual insurance policies,[13] which, so far as they

12. Com. *v.* Wetherbee, 105 Mass. 160. See State *v.* Whitmore, 75 Wis. 332, 43 N. W. 1133. See authorities in note 13.

Charter of Benefit Associations is dual; First, fraternal, second and incidentally, financial. Block *v.* Valley Mut. Ins. Assn., 52 Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 167.

Former Doctrine.— It has been held that benevolent associations, with the sick benefit and insurance feature, are not to be regarded as insurance companies, notwithstanding the fact they require the payment of membership fees and assessments, to create an endowment fund. Commercial League Association *v.* People *ex rel* Needles, 90 Ill. 166; State *ex rel* Auditor *v.* Iowa Mut. Aid Assn., 59 Iowa 125, 12 N. W. 782; Supreme Council Order of Chosen Friends *v.* Fairman, 62 How. Pr. (N. Y.) 386; State *ex rel* Attorney-General *v.* Central Ohio Relief Assn. 29 Ohio St. 399; State *ex rel* Attorney-General *v.* Mutual Protection Assn., 26 Ohio St. 19; Com. *v.* National Mut. Aid Soc., 94 Pa. St. 481; State *v.* Whitmore, 75 Wis. 332, 43 N. W. 1133.

13. *Alabama.* — Supreme Commandery Knights of Golden Rule *v.* Ainsworth, 71 Ala. 436, 46 Am. Rep. 332.

Arkansas.— Block *v.* Valley Mut. Assn., 52 Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 167.

Illinois.— Martin *v.* Stubbins, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620.

Iowa.— Graham *v.* Miller, 66 Iowa 26, 23 N. W. 241.

Kansas.— Endowment & Benevolent Assn. *v.* State, 35 Kan. 253, 10 Pac. 872; State *ex rel* Attorney-Gen. *v.* Vigilant Ins. Co., 30 Kan. 385, 2 Pac. 840; State *ex rel* Attorney-Gen. *v.* Bankers' & Merchants' Mut. Ben. Assn. 23 Kan. 499.

Kentucky.— Sherman *v.* Com., 82 Ky. 102.

Maine.— Bolton *v.* Bolton, 73 Me. 299.

Massachusetts.— Com. *v.* Wetherbee, 105 Mass. 160.

Missouri.— State *ex rel* Attorney-Gen. *v.* Merchants' Exc. Mut. Ben. Assn. 72 Mo. 146; State *v.* Brawner, 15 Mo. App. 597; State *ex rel* Beach *v.* Citizens' Ben. Assn. 6 Mo. App. 163.

Nebraska.— State *ex rel* Attorney-Gen. *v.* Farmers' Mut. Ben. Assn., 18 Neb. 276, 25 N. E. 81; State *ex rel* Attorney-Gen. *v.* Northwestern Mut. Live Stock Assn., 16 Neb. 549, 20 N. W. 859.

New York.— People *ex rel* Blossom *v.* Nelson, 46 N. Y. 477.

Pennsylvania.— Nat. Mut. Aid Soc. *v.* Lupold, 101 Pa. St. 111.

Texas.— Farmer *v.* State, 69 Tex. 561, 7 S. W. 220.

For the Purpose of Commencing Suit on their certificates, mutual benefit and aid associations must be regarded as insurance companies under the insurance laws of Michigan. Miner *v.* Michigan Mut. Benefit Assn., 63 Mich. 338, 29 N. W. 582. See Carmichael *v.* Northwestern Mut. Benefit Assn., 51 Mich. 494, 16

go, are the measure of the rights of the parties.[14]

2. Evidence. — A. GENERAL RULES. — The certificate of membership, carrying with it a right to benefits, and the policy of insurance, in a beneficial society, or mutual aid association, being substantially a contract of insurance, in all actions to recover thereon, as well as all actions against the society or the association, the general rules of evidence governing which, are applicable to regular insurance companies and in the trial of issues of fact.[15]

B. MODIFICATIONS. — It is to be noted, however, that the general rules of evidence have been modified in important particulars. Thus, the general rule excluding parol evidence to explain, contradict, or modify a written instrument, has received important modifications; and other modifications of the general rules of evidence have been found necessary to give effect to the principles of

N. W. 871; Sick *v.* Michigan Mut. Aid Assn., 49 Mich. 51, 12 N. W. 905.

Purpose Declared by the By-Laws being to offer relief, and also declaring that relief shall be given to "representatives, legal heirs, or assigns of those of their number whom death may strike down,"— the contract of insurance is to be regarded as an ordinary insurance policy. Block *v.* Valley Mut. Ins. Co., 52 Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 167; Com. *v.* Wetherbee, 105 Mass. 160. See State *ex rel* Graham *v.* Miller, 66 Iowa 26, 23 N. W. 241; State *ex rel* Beach *v.* Citizens' Benefit Assn., 6 Mo. App. 163; People *ex rel* Blossom *v.* Nelson, 46 N. Y. 477; Farmer *v.* State, 69 Tex. 561, 7 S. W. 220.

A Contrary Doctrine has been announced in those cases holding that benevolent societies are not insurance companies. See Northwestern Masonic Aid Assn. *v.* Jones, 154 Pa. St. 99, 26 Atl. 253, 35 Am. St. Rep. 810; Com. *v.* Equitable Beneficial Assn., 137 Pa. St. 412, 18 Atl. 1112.

14. Chartrand *v.* Brace, 16 Colo. 19, 26 Pac. 152, 25 Am. St. Rep. 235; State Ins. Co. *v.* Horner, 14 Colo. 391, 23 Pac. 788; Supreme Council Order of Chosen Friends *v.* Forsinger, 125 Ind. 52, 25 N. E. 129, 21 Am. St. Rep. 196, 9 L. R. A. 501; Holland *v.* Taylor, 111 Ind. 121, 12 N. E. 116; Bolton *v.* Bolton, 73 Me. 299; Com. *v.* Wetherbee, 105 Mass. 160; Knights of Honor *v.* Nairn, 60 Mich. 44, 26 N. W. 826; State *ex rel* Attorney-General *v.* Farmers' Mut. Benefit Assn., 18 Neb. 276, 25 N. W. 81; Wiggin *v.* Knights of Pythias, 31 Fed. 122.

Rights of Persons Insured, either in a beneficial society or a mutual insurance company, arise out of and depend upon the contract between the parties, and must be ascertained and fixed by that contract, regardless of the character of the company; and the fact that the object of the latter in entering into the contract may be benevolent, can impart no new meaning to the unambiguous terms of the contract. Block *v.* Valley Mut. Ins. Assn., 52 Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 167.

15. Contracts Between Beneficial or Mutual Aid Societies and Their Members, by certificate of membership, or policy of insurance, do not ordinarily differ in any essential particular from an ordinary policy of mutual life insurance. They have all the characteristics of an insurance contract, and are, in many respects governed by the rules of law applicable to the latter. Elkhart Mut. Aid Assn. *v.* Houghton, 98 Ind. 149, 2 N. E. 763. See Supreme Commandery Knights of Golden Rule *v.* Ainsworth, 71 Ala. 436, 46 Am. Rep. 332.

Exception Exists so far as these rules must be deemed to be modified by the peculiar organization, objects

justice without too strict a regard to mere technicalities.[16] But these modifications are not so exclusively applicable to beneficiary societies as to require a detailed treatment in this place; they will be found fully discussed elsewhere.[17]

and policy of the association (Martin *v.* Stubbins, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620), but this exception does not affect the rules of evidence to establish facts entitling to benefits or depriving of rights and privileges.

16. *See* Appleton *v.* Phoenix Mut. Ins. Co., 59 N. H. 541, 47 Am. Rep. 220; McCorkle *v.* Texas Benefit Assn., 71 Tex. 149, 8 S. W. 516; New York Life Ins. Co. *v.* Eggleston, 96 U. S. 572.

17. *See* title "INSURANCE."

BENEFICIARIES.—See Insurance; Trusts.

BENEFIT ASSOCIATIONS.—See Beneficial Associations.

BENEVOLENT ASSOCIATIONS.—See Beneficial Associations.

BEQUESTS.—See Wills.

BEST AND SECONDARY EVIDENCE.

By Clark Ross Mahan.

Cross References. — For matters applying the rules of Best and Secondary Evidence to particular kinds of documents, see titles pertaining thereto, as for example — "Bills and Notes," "Bonds," "Private Writings," "Records," "Public Documents," etc.

For matters applying the rules of Best and Secondary Evidence to particular facts, see titles pertaining thereto, as for example — "Copies," "Partnership," "Payment," etc. See also "Presumptions" and "Spoliation."

I. DEFINITIONS.

1. Best or Primary Evidence. — Best evidence may be defined as being that species or class of evidence which does not of itself disclose, that for the purpose for which it is sought to be used, there remains better evidence in existence.[1]

2. Secondary or Substitutionary Evidence. — And conversely all evidence which does so show that there is better evidence in existence is classed as secondary evidence.[2]

II. NECESSITY OF PRODUCING BEST EVIDENCE.

1. In General. — It is a well established rule of the law of evidence which runs alike through civil and criminal proceedings that the best evidence must be produced of which the nature of the case

1. Primary Evidence. — "The best evidence of which the nature of the case admits." Standard Dict., title "EVIDENCE."

"*Best evidence* means the best evidence of which the nature of the case admits, not the highest or strongest evidence which the nature of the thing proved admits of — *e. g.*, a copy of a deed is not the best evidence; the deed itself is better." 1 Bouv. Law Dict., title "BEST EVIDENCE," *citing* Gilbert Ev. 15; Starkie Ev. 437; 2 Camp. 605; 3 Camp. 236; 1 Esp.. 127; 1 Pet. 591; 6 Pet. 352; 7 Pet. 100.

Primary or Best Evidence. — "The highest evidence of which a case in its nature is susceptible, that kind of proof, which, under any possible circumstances, affords the greatest certainty of the fact in question." Anderson Law Dict., title "EVIDENCE," p. 420.

Best Evidence. — "Primary Evidence, as distinguished from secondary; original as distinguished from substitutionary; the best and highest evidence of which the nature of the case is susceptible. A written instrument is itself always regarded as the primary or best possible evidence of its existence and contents; a copy, or the recollection of a witness, would be secondary evidence." Black Law Dict., title "BEST EVIDENCE," p. 130.

"**Primary Evidence,** the best evidence as distinguished from secondary evidence; or evidence of such a nature as to imply (unless explanation is given) that better evidence exists and is kept back. Thus if it is sought to prove the contents of a written contract, the instrument itself is the best evidence of the contents, and it must be produced, or satisfactory excuse must be given before witnesses can be allowed to testify what the contents were. But among such witnesses the testimony of the writer of it, though more satisfactory than that of others, is not therefore deemed the best or primary evidence in the technical sense." Cent. Dict., title "EVIDENCE."

The Georgia Code, (§5164), defines primary evidence to be such as in itself does not indicate the existence of other and better proof.

2. Putnam *v.* Goodall, 31 N. H. 419; Greeley *v.* Quimby, 22 N. H. 335.

Secondary Evidence. — "Evidence not primary but which having some tendency to prove the fact at issue is received, it being first shown that the primary evidence is not obtainable." Standard Dict., title "EVIDENCE."

Secondary Evidence. — "That species of proof which is admissible in case of the loss of primary evidence, and which becomes in that event the first evidence." 1 Bouv. Law Dict. title "BEST EVIDENCE," *citing* 3 Bouv. Inst. n. 3055.

Secondary Evidence. — "Such proof, as, in the nature of the case, supposes that better evidence exists or has existed." Anderson Law Dict., title "EVIDENCE," p. 420.

Secondary Evidence. — "That species of evidence which becomes admissible as being the next best, when the primary or best evidence of the fact in question is lost or inaccessible;

is capable; that is, that no evidence shall be received which presupposes better evidence behind in the party's possession or power,[3] and if from the nature of the case it be manifest that a more satisfactory kind of evidence does exist and is attainable, the party will be required to produce it, or account for its nonproduction under the

as when a witness details orally the contents of an instrument which is lost or destroyed." Black Law Dict., title "SECONDARY EVIDENCE," p. 1071.

Secondary Evidence. — "Evidence not primary, but which may be admitted upon showing proper reasons for failure to obtain primary evidence." Cent. Dict., title "EVIDENCE."

The Georgia Code (§5164) defines secondary evidence to be such as from necessity in some cases is substituted for stronger and better proof.

3. Necessity of Best Evidence Attainable. — *England.* — Whitfield *v.* Fausset, 1 Ves. 389; Cole *v.* Gibson, 2 Ves. 505.

Canada. — Gilbert *v.* Sleeper, 3 U. C. Q. B. (O. S.) 135.

United States. — Tayloe *v.* Riggs, 1 Pet. 591, 7 L. ed. 275; Dwyer *v.* Dunbar, 5 Wall. 318; Anglo-American Packing & Prov. Co. *v.* Cannon, 31 Fed. 313; Tobin *v.* Roaring Creek & C. R. Co., 86 Fed. 1020.

Alabama. — Wiggins *v.* Pryor, 3 Port. 430; Lewis *v.* Hudmon, 56 Ala. 186.

Arkansas. — Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54; Taylor *v.* The Auditor, 4 Ark. 574.

California. — Macy *v.* Goodwin, 6 Cal. 579.

Colorado. — Crane *v.* Andrews, 6 Colo. 353.

Connecticut. — Richards *v.* Stewart, 2 Day 328.

Delaware. — State *v.* Caldwell, 1 Marv. 555, 41 Atl. 198.

Florida. — Orman *v.* Barnard, 5 Fla. 528.

Georgia. — Fitzgerald *v.* Adams, 9 Ga. 471; Pritchett *v.* Davis, 101 Ga. 236, 28 S. E. 666, 65 Am. St. Rep. 298.

Idaho. — Idaho Mercantile Co. *v.* Kalauquin, (Idaho), 66 Pac. 933.

Illinois. — Farrell *v.* West Chicago Park Coms. 182 Ill. 250, 55 N. E. 325; Vigus *v.* O'Bannon, 118 Ill. 334, 8 N. E. 778; McNemar *v.* McKennan, 79 Ill. App. 354.

Indiana. — Jackson *v.* Cullum, 2 Blackf. 228, 18 Am. Dec. 158; Masons' Union Life Ins. Assn. *v.* Brockman, 20 Ind. App. 206, 50 N. E. 493.

Iowa. — State *v.* Penny, 70 Iowa 190, 30 N. W. 561; Williams *v.* Williams, 108 Iowa 91, 78 N. W. 792.

Kansas. — Beeler *v.* Highland University Co., 8 Kan. App. 89, 54 Pac. 295; Bemis *v.* Becker, 1 Kan. 226.

Kentucky. — Hielman Mill Co. *v.* Hotaling, 21 Ky. L. Rep. 950, 53 S. W. 655; Moore *v.* Beale, 20 Ky. L. Rep. 2029, 50 S. W. 850.

Louisiana. — Ticknor *v.* Calhoun, 29 La. Ann. 277; Succession of Woods, 30 La. Ann. 1002.

Maine. — Bean *v.* Maine Water Co., 92 Me. 469, 43 Atl. 22; Morton *v.* White, 16 Me. 53.

Massachusetts. — Com. *v.* Kinison, 4 Mass. 646; Com. *v.* James, 1 Pick. 375.

Michigan. — People *v.* Coffman, 59 Mich. 1, 26 N. W. 207.

Mississippi. — Storm *v.* Green, 51 Miss. 103.

Missouri. — Bank of North America *v.* Crandall, 87 Mo. 208; Bent *v.* Lewis, 88 Mo. 462; Ritchie *v.* Kinney, 46 Mo. 298.

Nebraska. — State *v.* School District of City of Superior, 55 Neb. 317, 75 N. W. 855; Knights *v.* State, 58 Neb. 225, 78 N. W. 508, 76 Am. St. Rep. 78; Bee Pub. Co. *v.* World Pub. Co., 59 Neb. 713, 82 N. W. 28.

New Hampshire. — Putnam *v.* Goodall, 31 N. H. 419; Foye *v.* Leighton, 24 N. H. 29.

New Jersey. — Hoffman *v.* Rodman, 39 N. J. Law 252; Lomerson *v.* Hoffman, 24 N. J. Law 674.

New York. — Loomis *v.* Mowry, 4 Hun 271; Reddington *v.* Gillman, 1 Bosw. 235.

North Carolina. — Scott *v.* Bryan,

rules of law shown in subsequent sections of this title as requiring the nonproduction of the primary evidence to be explained before resort to inferior evidence can be had.[4]

Interlocutory Proceedings. — And it has been held that on a hearing on an interlocutory application, the rule requiring the production of the best evidence in the power of the parties is not dispensed with.[5]

2. Origin of the Rule. — As long ago as the fourteenth century the courts of England laid down the rule that a party must bring the best evidence he can and that if he did this, no more was required.[6]

3. Distinction Between Quality and Strength of Evidence. — The rule requiring the production of the best evidence, of which a case from its nature is susceptible, does not mean that a party must pro-

73 N. C. 582; Bradford *v.* Reed, 125 N. C. 311, 34 S. E. 443.

Ohio. — Heeney *v.* Kilbane, 59 Ohio St. 499, 53 N. E. 262.

Oklahoma. — Richardson *v.* Fellner, 9 Okla. 513, 60 Pac. 270.

Oregon. — Huffman *v.* Knight, 36 Or. 581, 60 Pac. 207.

Pennsylvania. — Schornberger *v.* Hackman, 37 Pa. St. 87; Johnston *v.* Callery, 184 Pa. St. 146, 39 Atl. 73.

South Carolina. — State *v.* Stalmaker, 2 Brev. 1.

Tennessee. — Sims *v.* Sims, 5 Humph. 370; Vaughan *v.* Phebe, 1 Mart. & Y. 1, 17 Am. Dec. 770.

Texas. — Cotton *v.* Campbell, 3 Tex. 493; Porter *v.* State, 1 Tex. App. 394; Green *v.* White, 18 Tex. Civ. App. 509, 45 S. W. 389.

Virginia. — Pendleton *v.* Com. 4 Leigh 694, 26 Am. Dec. 342

Wisconsin. — Sexsmith *v.* Jones, 13 Wis. 565.

"**The Effect of the Rule is**, that when, from the nature of the transaction, superior evidence may be presumed to be within the power of the party, that which is inferior will be excluded. But when it is manifest that evidence of a higher degree is not within the power of the party, that of a lower degree will be received and the general rule never excludes the best evidence which can then be produced." Jackson *v.* Cullum, 2 Blackf. (Ind.) 228, 18 Am. Dec. 158.

4. See *infra* III., *Admissibility of Secondary Evidence.*

5. Stamps *v.* Birmingham W. & S. V. R., 7 Hare 255, *holding* accordingly that the purport and effect of a document capable of production should not be stated by affidavit. 6 Br. Ab. Assize 258 (1340); Dr. Leyfield's Case, 10 Co. 88 (1610); Earl of Suffolk *v.* Greenvil, 3 Rep. in Ch. 89 (1631).

6. Ford *v.* Hopkins, 1 Salk. 283, decided in 1699, wherein Holt, C. J., said: "The best proof that the nature of the thing will afford is only required." And in Altham *v.* Anglesea, 11 Mod. 210, decided in 1709, the same judge said: "The law requires the best evidence that can be had."

So in Gilbert Evid. (2d ed. 1760) 4, 15-17, it is said that: "The first, therefore, and most signal rule in relation to evidence, is this, that a man must have the utmost evidence the nature of the fact is capable of; for the design of the law is to come to rigid demonstration in matters of right, and there can be no demonstration of a fact without the best evidence that the nature of the thing is capable of; less evidence doth create but opinion and surmise, and does not leave a man the entire satisfaction that arises from demonstration." Gilbert Evid., 2d ed. 1760, 4. See also Lewellen *v.* Mackworth, 2 Atk. 40 (1740; Lord Hardwicke); Villiers *v.* Villiers, 2 Atk. 71 (1740); Omichund *v.* Barker, 1 Atk. 21, 49, (1744); Brant *v.* Gould, 2 H. Bl. 104 (1792; Lord Loughborough); 3 Bl. Com. 368.

duce the strongest evidence[7] nor the best witnesses[8] within his power.

4. Distinction Between Quality and Legality of Evidence. — Nor does the rule requiring the production of the best evidence mean the best evidence the exigencies of the particular case admit of; and hence the inability of a party, through accident or misfortune, to adduce legal evidence, does not authorize the admission of illegal evidence.[9]

5. Purpose of the Rule. — The purpose of the rule requiring the production of the best evidence is the prevention of fraud, because if a party is in possession of such 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

7. Distinction Between Quality and Strength of Evidence. — *United States.* — U. S. *v.* Wood, 14 Pet. 430, 10 L. ed. 527; U. S. *v.* Reyburn, 6 Pet. 352.

Connecticut. — Barnum *v.* Barnum, 9 Conn. 242.

New Hampshire. — Furber *v.* Hilliard, 2 N. H. 480.

Texas. — Porter *v.* State, 1 Tex. App. 394; Rodriguez *v.* State, 5 Tex. App. 256.

Vermont. — Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007.

Wisconsin. — Althouse *v.* Town of Jamestown, 91 Wis. 46, 64 N. W. 423.

Statement of Rule. — In requiring the production of the best evidence of which the case in respect to a particular fact is susceptible, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had; but where there is no substitution of evidence, but only the selection of weaker, instead of stronger proof, or an omission to supply all the proof capable of being produced, the rule is not infringed. Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007. See also Western Union Tel. Co. *v.* Stevenson, 128 Pa. St. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515.

Gilbert said: "When we say the law requires the highest evidence that the nature of the thing is capable of, 'tis not to be understood that in every matter there must be all that force and attestation that by any possibility might have been gathered to prove it, and that nothing under the highest assurance possible should have been given in evidence to prove any matter in question. To strain the rule to that height would be to create an endless charge and perplexity, for there are almost infinite degrees of probability, one under the other, and if nothing but matters of the highest assurance might be given in evidence, the way of illustration of right would be the most troublesome and expensive that can be imagined." Gilbert Evid. 2d ed. 1760, 15-17.

When All the Evidence is of a Primary Character it must go to the jury, and cannot be excluded because more conclusive proof might have been offered. Patton *v.* Rambo, 20 Ala. 485.

Illustration of Rule. — The warden of a penitentiary would perhaps be able to give the strongest proof that a person had been at a particular time a convict imprisoned in a penitentiary, because he keeps a register in which is noted the exact time of admission and discharge of the convict; but the fact may be shown by any other competent proof. Howser *v.* Com. 51 Pa. St. 332.

8. See *infra Application of Rule. Witnesses.*

9. Distinction Between Quality and Legality of Evidence. — Comer *v.* Hart, 79 Ala. 389.

Rule Stated. — "When the best evidence the nature of the case will admit of cannot possibly be had, the best evidence that can be had shall

purposes which its production would expose and defeat [10] although this is not a conclusive presumption;[11] in short, the purpose of the rule is to prevent the reception of evidence of a purely substitutionary character so long as the original or primary evidence is susceptible of being produced.[12]

6. Application of the Rule. — A. GENERALLY. — The application of this rule is most usually invoked in respect of writings, to prove whose contents an attempt is made by evidence other than the writing itself.[13] It should be stated, however, that in showing the application of the "best evidence rule" in the succeeding sections, only general principles can here be stated for the reasons that when an attempt is made to apply the rule to particular instruments, matter and cases more appropriately belonging to other titles will necessarily be duplicated; and accordingly for the application of this rule to particular instruments the reader is referred to the appropriate titles therefor.[14]

be allowed. It signifies nothing more than that if the best *legal* evidence cannot possibly be produced the next best *legal* evidence shall be admitted. Secondary evidence is as accurately defined by the law as primary evidence." Gray *v.* Pentland, 2 Serg. & R. (Pa.) 23.

10. Purpose of Best Evidence Rule. — *England.* — Strother *v.* Barr, 5 Bing. 136; Twyman *v.* Knowles, 3 Barn. & A. 302.

United States. — Clifton *v.* U. S. 4 How. 242, 11 L. ed. 959; U. S. *v.* Wood, 14 Pet. 430, 1 L. ed. 527.

Alabama. — Wiggins *v.* Pryor, 3 Port. 430.

California. — Bagley *v.* McMickle, 9 Cal. 430.

Georgia. — Fitzgerald *v.* Adams, 9 Ga. 471.

Maryland. — Spring Garden M. Ins. Co. *v.* Evans, 9 Md. 1, 66 Am. Dec. 308.

Pennsylvania. — Church *v.* Church, 25 Pa. St. 278.

Virginia. — Pendleton *v.* Com. 4 Leigh. 694, 26 Am. Dec. 342.

Statement of Rule. — "The rule requiring the production of the best evidence of which the case in its nature is susceptible, is adopted for the prevention of fraud, and is declared to be essential to the pure administration of justice." Anglo-American Pkg. & Prov. Co. *v.* Cannon, 31 Fed. 313.

And in Dwyer *v.* Collins, 7 Ex. 639, it was said that the great desire of the court in insisting upon the best evidence of the contents of a paper, by requiring its production on notice, or proof under a commission, before receiving secondary evidence of its contents, is to save the party to be affected by it from a party-colored account of the paper when better evidence can be had.

11. Presumption from Withholding Superior Evidence Not Conclusive. — Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007.

12. *England.* — Queen's Case, 2 Br. & B. 284, 22 Rev. Rep. 662.

United States. — Tayloe *v.* Riggs, 1 Pet. 591; U. S. *v.* Reyburn, 6 Pet. 352.

Colorado. — Crane *v.* Andrews, 6 Colo. 353.

Georgia. — Newsom *v.* Jackson, 26 Ga. 241, 71 Am. Dec. 206.

Texas. — Cotton *v.* Campbell, 3 Tex. 493.

13. Prof. Greenleaf divided the consideration of this question into three classes: (1) Those instruments which the law requires should be in writing; (2) those contracts which the parties have put in writing and (3) all other writings the existence of which is disputed and which are material to the issue. Greenl. Evid. § 85.

14. *See* for example, "BILLS AND NOTES," "COPIES," "OWNERSHIP." "TITLE," "RECORDS," "JUDGMENTS," "DEEDS," "SALES," "CORPORATIONS."

B. Original Records and Documents as Primary Evidence.

a. *Proof of Contents.* — (1.) **Private Writings.** — (A.) Generally. The rule is that the best evidence of the contents of every private writing is the writing itself, and that the writing be produced for that purpose,[15] except in certain cases to be subsequently

15. Writing the Best Evidence of Its Own Contents. — *United States.* Tobin *v.* Roaring Creek & C. R. Co., 86 Fed. 1020; U. S. *v.* Lynn, 2 Cranch C. C. 309, 26 Fed. Cas. No. 15,649.

Alabama. May *v.* May, 1 Port. 229. Yarbrough *v.* Hudson, 19 Ala. 653.

Arkansas. — Stone *v.* Waggoner, 8 Ark. 204.

Idaho. — Idaho Mercantile Co. *v.* Kalanquin, (Idaho), 66 Pac. 933.

Iowa. — Fischer *v.* Johnson, 106 Iowa 181, 76 N. W. 658.

Maine. — Morton *v.* White, 16 Me. 53.

Michigan. — Hood *v.* Olin, 80 Mich. 296, 45 N. W. 341.

Mississippi. — Ketchum *v.* Brennan, 53 Miss. 596.

New Jersey. — Emery *v.* King, 64 N. J. Law 529, 45 Atl. 915.

New York. — Crosby *v.* Hotaling, 99 N. Y. 661, 2 N. E. 39.

Oregon — Wicktowitz *v.* Farmers Ins. Co., 31 Or. 569, 51 Pac. 75; Price *v.* Wolfer, 33 Or. 15, 52 Pac. 759.

Pennsylvania. — Vanhorn *v.* Frick, 3 Serg. & R. 278.

South Carolina. — Ford *v.* Whitaker, 3 Brev. 244.

Texas. — Cason *v.* Lamey, (Tex. Civ. App.), 27 S. W. 420; Sager *v.* State, 11 Tex. App. 110.

Virginia. — Rucker *v.* Lowther, 6 Leigh 259.

Performance of Written Condition Precedent. — Where it is incumbent on a plaintiff in a suit upon a subscription to a written endowment fund to show the performance of the condition upon which the subscription becomes binding, oral evidence is not competent to show such performance on his part where the condition itself is in writing and is a part of the written subscription. Beeler *v.* Highland University Co., 8 Kan. App. 89, 54 Pac. 295.

A Printed Instruction Contained in a Catalogue furnished by the manufacturers of machinery as to the management of such machinery, is the best evidence to prove such instructions. Richardson *v.* Douglas, 100 Iowa 239, 69 N. W. 530.

The Contents of a Printed Rule Book issued by a railroad company cannot be proved by parol evidence in the absence of an explanation of its non-production. Georgia Pac. R. Co. *v.* Propst, 89 Ala. 1, 7 So. 635; Sobieski *v.* St. Paul & D. R. Co., 41 Minn. 169, 42 N. W. 863.

Stipulations. — In Butler *v.* Mail & Express Pub. Co. 171 N. Y. 208, 63 N. E. 951, it was held that secondary evidence of the contents of a stipulation, the making of which was denied by one of the alleged parties thereto, could not be proved by secondary evidence in the absence of proper foundation laid therefor.

In Gilbert *v.* Sleeper, 3 U. C. Q. B. (O. S.) 135, assumpsit on an agreement to deliver goods, after the plaintiff had proved a verbal agreement, the delivery of part of the goods, and an undertaking by the plaintiff that he would not carry on a certain trade within a fixed distance of the plaintiffs, the defendant gave in evidence a copy of the affidavit of debt made in the cause and of an agreement in writing incorporated therein, sworn to by one of the plaintiffs, and then called upon the plaintiffs to produce the original agreement, not, however, having served any previous notice to produce, and the copy of the agreement in the affidavit of debt, not stating anything about that part of the undertaking proved by the plaintiffs concerning the carrying on of the defendant's trade. It was held that no notice to produce was necessary because the plaintiffs had shown themselves in the possession of the agreement by their affidavit of debt and that as the writing was the best evidence it should have been produced, and that that part of the evidence concerning the defendant's

shown.[16]

The Application of This Rule is not affected by the character of the writing; but it applies with equal force to all kinds of writings, whether as mere instruments of evidence whose contents are a relevant fact to be proved, as for example, written declarations,[17] written confessions,[18] newspapers,[19] letters,[20] and the like; or as embodying what the parties to the writing have agreed upon in respect to the matters in controversy.[21] Nor does the fact that the writing is

carrying on his trade, not being contained in it should have been rejected.

Contradiction of Witness. — In an action for medical services rendered and medicines furnished, the defendant, for the purpose of showing that the plaintiff had at different times stated the amount of his bill differently from the amount claimed, cannot introduce oral evidence to that effect without producing the statement presented or accounting for its non-production. Stratford *v.* Ames, 8 Allen (Mass.) 577.

The Contents of a Written Demand made by the owner of live stock upon a railroad company for the value of the stock killed by the latter are not provable by parol without first accounting for its non-production. Central Branch U. P. R. Co. *v.* Walters, 24 Kan. 504.

16. See *infra* notes 25 *et seq.*, and text therefor for the exceptions referred to.

17. A Written Declaration Made by a Deaf Mute to another is the best evidence of such declaration. State *v.* DeWolf, 8 Conn. 93, 20 Am. Dec. 90.

Dying Declarations. — Parol evidence is admissible to prove a dying declaration, if not signed by the declarant; but if signed, the writing itself should be produced or accounted for before secondary evidence can be resorted to. (Binns *v.* State, 46 Ind. 311.) But the fact that a declaration has been reduced to writing will not preclude evidence of unwritten declarations made on another occasion. Dunn *v.* People, 172 Ill. 582, 50 N. E. 137. *See* article "DYING DECLARATIONS."

18. A Written Confession Signed and Sworn to by Defendant in a criminal prosecution is the best evidence of its own contents. Williams *v.* State, 38 Tex. Crim. App. 128, 41 S. W. 645. *See* article "CONFESSIONS," for full discussion of this question.

It is not error to admit oral evidence of statements and declarations made by the defendant in a criminal prosecution other than those contained in his written confession; the latter is not the best or any evidence of anything but its own contents. People *v.* Cokahnour, 120 Cal. 253, 52 Pac. 505.

19. Bond *v.* Central Bank of Georgia, 2 Ga. 92; Ormsby *v.* Louisville, 79 Ky. 197.

20. Letters. — Nodin *v.* Murray, 2 Camp. 228; Seibert *v.* Ragsdale, 19 Ky. L. Rep. 1869, 44 S. W. 653; Western Assur. Co. *v.* Polk, 104 Fed. 649; Westinghouse Co. *v.* Tilden, 56 Neb. 129, 76 N. W. 416; Steele *v.* Etheridge, 15 Minn. 501; Stern *v.* Stanton, 184 Pa. St. 468, 39 Atl. 404. *See* also title "LETTERS."

Identifying Subject Matter. — In Rosenberger *v.* Marsh, 108 Iowa 47, 78 N. W. 837, the defendant was asked if he did not write to the plaintiff, who was a manufacturer of cigars, to get up something new for a leader. It was held that this was not calling for the contents of a letter, but simply calling his attention to the subject matter thereof, for the purpose of identification.

21. Contract in Writing the Best Evidence of Its Contents. — *Canada.* Wallen *v.* Mapes, 5 U. C. Q. B. (O. S.) 96.

United States. — Wilson *v.* Young, 2 Cranch C. C. 33, 30 Fed. Cas. No. 17,849; Bouldin *v.* Massie, 7 Wheat. 122, 5 L. ed. 414; Sebree *v.* Dorr, 9 Wheat. 558, 6 L. ed. 160.

Alabama. — Alabama M. R. Co. *v.* Coskry, 92 Ala. 254, 9 So. 202.

a sealed instrument change the rule.[22]

(B.) Writing Executed in Several Parts. — Each part of a writing executed in several parts is primary evidence of the writing.[23]

California. — Poole *v.* Gerrard, 9 Cal. 593; People *v.* Hust, 49 Cal. 653.

Connecticut. — Pitkin *v.* Brainerd, 5 Conn. 451, 13 Am. Dec. 79.

Georgia. — Gunn *v.* Slaughter, 83 Ga. 124, 9 S. E. 772.

Illinois. — Hoyt *v.* Shepherd, 70 Ill. 309.

Indiana. — Gimbel *v.* Hufford, 46 Ind. 125.

Kansas. — Pilcher *v.* Atchison, T. & S. F. R. Co., 34 Kan. 46, 7 Pac. 613; Kingman *v.* Hett, 9 Kans. App. 533, 58 Pac. 1022.

Kentucky. — Condict *v.* Stevens, 1 T. B. Mon. 73.

Louisiana. — Marks *v.* Winter, 19 La. Ann. 445.

Maine. — Dyer *v.* Fredericks, 63 Me. 592.

Maryland. — Hayward *v.* Carroll, 4 Har. & J. 518; Trundle *v.* Williams, 4 Gill 313.

Massachusetts. — Boynton *v.* Reese, 8 Pick. 329, 19 Am. Dec. 326.

Minnesota. — Steele *v.* Etheridge, 15 Minn. 501.

Mississippi. — Baldwin *v.* McKay, 41 Miss. 358; Weiler *v.* Monroe Co., 74 Miss. 682, 21 So. 969, 22 So. 188.

Nebraska. — Sylvester *v.* Carpenter Paper Co., 55 Neb. 621, 75 N. W. 1092.

New Jersey. — Sterling *v.* Potts, 5 N. J. Law 773.

North Carolina. — Ledbetter *v.* Morris, 1 Jones Law 545; Gwynn *v.* Setzer, 3 Jones Law 382.

Pennsylvania. — Barnett *v.* Barnett, 16 Serg. & R. 51.

South Carolina. — Hurt *v.* Davis, 1 Brev. 304.

Tennessee. — Creed *v.* White, 11 Humph. 549.

Texas. — Kennon *v.* Bailey, (Tex. Civ. App.), 38 S. W. 377.

Virginia. — Dawson *v.* Graves, 4 Call 127.

Wisconsin. — Orr *v.* Le Claire, 55 Wis. 93, 12 N. W. 356; Campbell *v.* Moore, 3 Wis. 767.

Statement of Rule. — In Hooper *v.* Chism, 13 Ark. 496, the court said, "There is no rule of law that ought, upon the ground of public policy, to be better settled than this, that wherever parties have reduced their contract or agreement to writing, the instrument itself is the best and highest evidence of what the contract or agreement really was. No matter what the conversation or representations on either side that preceded it may have been, they are all supposed to be merged in the written instrument, which is to be regarded as the conclusion agreed upon between them. A contract is the law which the parties have prescribed unto themselves, and the object of reducing it to writing is, that a memorial of its terms and provisions may be preserved, and not left to depend, for proof of them upon the uncertain and imperfect recollection of witnesses. No man's rights would be safe, and no prudence could guard against fraud, if this were not the law; and the exceptions to it, which ought to be admitted with great caution, are more apparent than real. The rule rests upon the supposition that there is a written contract, as in the case now before the court is conceded by both parties."

"**The Human Memories at Best are Fallible,** and people reduce their contracts to writing in order that there may be no mistake or uncertainty as to what the agreements are; and in the absence of fraud or mistake the recitals of a written contract are the best and only competent evidence of the agreements of the parties thereto." State Bank of Ceresco *v.* Belk, 56 Neb. 710, 77 N. W. 58.

22. **Sealed Instruments.** — Poorman *v.* Miller, 44 Cal. 269; Georgia Pac. R. Co. *v.* Strickland, 80 Ga. 776, 6 S. E. 27, 12 Am. St. Rep. 282; Benjamin *v.* Shea, 83 Iowa 392, 49 N. W. 989; Clarke *v.* State, 8 Gill & J. (Md.) 111; Ebersole *v.* Rankin, 102 Mo. 488, 15 S. W. 422; Lodge *v.* Berrier, 16 Serg. & R. (Pa.) 297; Belomnan *v.* State, 16 Tex. 130.

23. **Writing Executed in Several Parts.** — Brown *v.* Woodman, 6 Car.

(C.) Writing Executed in Counterpart. — Each counterpart of a writing executed in counterpart is primary evidence against the party executing it.[24]

(D.) Result of Examination of Numerous Papers. — When the facts sought to be proved are of such a character and the papers are so voluminous or numerous that the examination thereof during the trial would consume much time and it would be difficult for the jury to understand and reach the necessary result, the rule requiring the production of the papers themselves is so relaxed that the court may, in its discretion, permit a competent witness who has examined the papers with reference to the points sought to be established, to testify to the result of such examination.[25]

& P. 206; Colling *v.* Treweek, 6 Barn. & C. 394; Cleveland & Toledo R. Co. *v.* Perkins, 17 Mich. 296; Gardner *v.* Eberhart, 82 Ill. 316; State *v.* Garner, 15 Kan. 111; Dyer *v.* Fredericks, 63 Me. 592; Hubbard *v.* Russell, 24 Barb. (N. Y.) 404.

If a Contract Required by the Statute of Frauds to be in writing is claimed to be contained in several separate papers, one referring to the other, oral testimony cannot be introduced to ascertain what papers are referred to. This must appear from the face of the document itself. Scarritt *v.* St. John's M. E. Church, 7 Mo. App. 174.

24. Writings Executed in Counterpart. — Steph. Dig. Evid. art. 64.

England. — Roe *v.* Davies, 7 East 363; Houghton *v.* Kœnig, 18 C. B. 235.

Delaware. — Jefferson *v.* Conoway, 5 Harr. 16.

Indiana. — Weaver *v.* Shipley, 127 Ind. 526, 27 N. E. 146.

Maryland. — Totten *v.* Bucy, 57 Md. 446.

Michigan. — Crane *v.* Partland, 9 Mich. 493; Cleveland & Toledo R. Co. *v.* Perkins, 17 Mich. 296.

Missouri. — Mathews *v.* Union Pac. R. Co., 66 Mo. App. 663; Catron *v.* German Ins. Co., 67 Mo. App. 544.

New York. — Nicoll *v.* Burke, 8 Abb. N. C. 213.

South Dakota. — Zipp *v.* Colchester Rubber Co., 12 S. D. 218, 80 N. W. 367.

In Loring *v.* Whittemore, 13 Gray (Mass.) 228, an action upon arbitration bond which the defendant had in his possession and refused to produce upon notice, it was held that the plaintiff might introduce a bond signed by him precisely like the one declared on, and having like agreements endorsed thereon by both parties.

Copy Accompanying Letter. Where a letter in which is enclosed a paper, states that such paper is a copy of an original, the recipient of the letter may read the copy without producing, or accounting for the non-production of the original, if the latter itself would be competent if produced. Ansell *v.* Baker, 3 Car. & K. 145.

Printed Pamphlets. — In Lockard *v.* State, (Tex. Crim. App.), 63 S. W. 566, a prosecution for libel, it was complained that error was committed in allowing the State to introduce witnesses to testify whether they had seen a copy of a certain pamphlet offered in evidence, which pamphlet was set out in the statement of facts; and it was held that inasmuch as a close scrutiny of the pamphlet set out, and the one on which the charge was based failed to disclose any difference, there was no error committed, because the pamphlet offered in evidence was not secondary evidence, and no effort was necessary to produce the original.

25. Result of Examination of Voluminous Papers. — *United States.* Burton *v.* Driggs, 20 Wall. 125.

California. — People *v.* Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50, (Cal. Code Civ. Proc. § 1855, subd. 5).

Connecticut. — Elmira Roofing Co. *v.* Gould, 71 Conn. 629, 42 Atl. 1002.

(E.) Proving What Writing Does Not Contain. — Where it appears that a contract has been reduced to writing, and duly executed, it is just as much forbidden to prove by parol what the writing does not contain, as to attempt to prove by parol what it does contain.[26]

(F.) Contents of Writings Collateral to Issue. — Where the contents of a writing come collaterally in question, such writing need not be produced, but its contents may be established by parol evidence[27] as illustrated by some cases set out in the note

Iowa. — State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700.

Louisiana. — State *v.* Mathis, 106 La. 263, 30 So. 834.

Maryland. — Blenn *v.* State, 94 Md. 375, 51 Atl. 26.

Minnesota. — Wolford *v.* Farnham, 47 Minn. 95, 49 N. W. 528.

Missouri. — State *v.* Findley, 101 Mo. 217, 14 S. W. 185.

Nebraska. — Bartley *v.* State, 53 Neb. 310, 73 N. W. 744.

Texas. — Burton *v.* Harper, (Tex. Civ. App.), 42 S. W. 788.

Compare. — People *v.* Lovejoy, 37 App. Div. 52, 55 N. Y. Supp. 543, a prosecution against a clerk whose duty required him to keep books and cash accounts and who had charge of the bank deposits, it was held error to permit an accountant to testify to the result of the examination of the books kept by the defendant covering the entire period of the defendant's employment; that the books themselves were the best evidence.

26. Crossman *v.* Crossman, 95 N. Y. 145; Lewis *v.* Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; Holliday *v.* Griffith, 108 Ga. 803, 34 S. E. 126; Aspinwall *v.* Chisholm, 109 Ga. 437, 34 S. E. 568. See also Abeel *v.* Levy, (Tex. Civ. App.), 61 S. W. 937.

Oral Evidence to Show No Entry in Record. — In Blackburn *v.* Crawfords, 3 Wall. (U. S.) 175, it was proposed to show that a certain marriage had not taken place by oral evidence, that there was no entry of such a marriage in a record kept by a minister of marriage ceremonies performed by him; allowing the inference to be drawn that the marriage had not occurred from the fact that no entry of it was found to exist in such record; but it was held that if it had been desired to prove the fact of marriage, the production of the record would have been the best evidence, and that the same considerations applied to show that the marriage had not taken place.

27. Contents of Writings Collateral to Issue Provable by Parol. *United States.* — Klein *v.* Russell, 19 Wall. 433; Scullin *v.* Harper, 78 Fed. 460; Andrews *v.* Cregan, 7 Fed. 477.

Alabama. — Wollner *v.* Lehman, Durr & Co., 85 Ala. 274, 4 So. 643; Rodgers *v.* Gaines, 73 Ala. 218; Bunzel *v.* Maas, 116 Ala. 68, 22 So. 568; Griffin *v.* State, 129 Ala. 92, 29 So. 783; Dixon *v.* Barclay, 22 Ala. 370; Foxworth *v.* Brown, 120 Ala. 59, 24 So. 1; Floyd *v.* State, 79 Ala. 39.

Arkansas. — Triplett *v.* Rugby Distilling Co., 66 Ark. 219, 49 S. W. 975.

Indiana. — Carter *v.* Pomeroy, 30 Ind. 438; Lumbert *v.* Woodard, 144 Ind. 335, 43 N. E. 302, 55 Am. St. Rep. 175; Coonrod *v.* Madden, 126 Ind. 197, 25 N. E. 1102.

Maine. — Phinney *v.* Holt, 50 Me. 570.

Massachusetts. — Smith *v.* Abington Sav. Bank, 171 Mass. 178, 50 N. E. 545.

New Jersey. — Gilbert *v.* Duncan, 29 N. J. Law 133, 521; New Jersey Zinc & Iron Co. *v.* Lehigh Zinc Co., 59 N. J. Law 189, 36 Atl. 915.

New York. — Daniels *v.* Smith, 28 N. Y. St. 351, 8 N. Y. Supp. 128; Engel *v.* Eastern Brewing Co., 19 Misc. 632, 44 N. Y. Supp. 391; Bowen *v.* Nat. Bank of Newport, 11 Hun 226; Fairchild *v.* Fairchild, 64 N. Y. 471; Sommer *v.* Oppenheim, 19 Misc. 605, 44 N. Y. Supp. 396.

recognizing and applying this rule.[28]

Title to Real Estate. — So when the title to real estate is only collaterally involved, the title deeds need not necessarily be produced, but parol evidence may be received.[29]

North Carolina. — Archer *v.* Hooper, 119 N. C. 581, 26 S. E. 143; Carden *v.* McConnell, 116 N. C. 875, 21 S. E. 923; Pollock *v.* Wilcox, 68 N. C. 46; Carrington *v.* Allen, 87 N. C. 354; State *v.* Ferguson, 107 N. C. 841, 12 S. E. 574.

Pennsylvania. — Grier *v.* Sampson, 27 Pa. St. 183; Shoenberger *v.* Hackman, 37 Pa. St. 87.

South Carolina. — Elrod *v.* Cochran, 59 S. C. 467, 38 S. E. 122; Lowry *v.* Pinson, 2 Bail. Law 324, 23 Am. Dec. 140.

Texas. — Sheley *v.* State, 35 Tex. Crim. App. 190, 32 S. W. 901; Long *v.* State, 10 Tex. App. 186; Oaks *v.* West, (Tex. Civ. App.), 64 S. W. 1033.

28. Identity With or Diversity From Other Writing. — Parol evidence may be given of the contents of a writing the absence of which is not accounted for, if the object of such evidence is merely to prove its identity with or diversity from another writing. West *v.* State, 22 N. J. Law 212.

Official Character. — In State *v.* Surles, 117 N. C. 720, 23 S. E. 324, a witness testified that he was the managing officer of a certain association, and that there was a minute of his election on the books of such association. It was insisted that this was a matter of record, and should be proved by the record itself. But it was held that the testimony was proper inasmuch as the fact to be proved was merely a collateral matter.

Notice Warning Public.—In State *v.* Credle, 91 N. C. 640, it was held that the contents of a notice posted by the prosecutor forbidding all persons trading for or buying his cattle, might be proved by parol without showing the loss or destruction of the paper. The court said: "The notice, whether written or printed, was collateral to the issue; the defendant was not a party to it; it contained no agreement between himself and any other person; it did not purport to be evidence of a contract between parties; it did not recite facts agreed upon by parties; it was not intended to be preserved, but to serve a temporary purpose and disappear; it was not to be lodged with any person for safe keeping; it was a loose, casual paper, and what it contained might be proved like any other fact or event. The rule that a written instrument cannot be contradicted, modified, or added to by parol proof, has no application to it. It was competent to speak of it and what it contained, without producing it or showing that it was destroyed or lost."

Where a Loan is Evidenced by an Order on a Third Person, parol evidence characterizing the writing and stating the amount for which it was drawn may be received, the writing need not be produced. Daniels *v.* Smith, 130 N. Y. 696, 29 N. E. 1098.

Newspaper Clipping. — In Torrey *v.* Burney, 113 Ala. 496, 21 So. 348, a will contest, the trial court admitted testimony of the contents of a clipping from a newspaper without producing the original or accounting for its loss. The clipping in question purported to give an account of the bigamous marriage of the testator's son and contestant of the will. The theory upon which the evidence was admitted was that it was merely collateral; but the court held that the clipping itself would have been admitted for the purpose of accounting for the fact of the contesting son having been disinherited; and as the witness had handed the clipping to the testator himself who had read it, it was the original and best evidence of its contents.

Property Covered by Chattel Mortgage. — In Kennedy *v.* Yoe, (Tex. Civ. App.), 39 S. W. 946, on an issue between a chattel mortgagee and a purchaser of the property claimed to be covered by the mortgage under an execution sale against the mortgagor, it was held competent to receive the testimony of the mortgagor that the property in question was covered by the mortgage.

29. Gross *v.* Fehan, 110 Iowa 163,

Records. — And when records are only incidentally, or collaterally involved, their production is not necessary in order to prove their contents.[30]

(G.) EXAMINATION OF WITNESS ON VOIR DIRE. — On the examination of a witness on his *voir dire*, it is permissible for him to testify to the contents of writings which are not produced.[31]

(H.) CROSS-EXAMINATION OF WITNESS. — **Testing Credibility.** — Where the contents of a writing are not relevant to the merits, but are drawn out on cross-examination for the sole purpose of testing the temper and credibility of the witness the rule requiring the production of the writing itself does not apply;[32] and such contents may be proved by any one who heard or saw him make a statement contrary to what he said on the stand as a witness.[33]

Impeachment. — But, for the purpose of impeaching him, a witness cannot, upon cross-examination, be asked whether he did or did not make certain statements in a writing then in the hands of the examining party, but the writing itself must be produced.[34]

81 N. W. 235; State *v.* Elder, 21 La. Ann. 157; State *v.* Wilson, 1 Ired. Law (N. C.) 32; State *v.* Jaynes, 78 N. C. 504; Hodson *v.* Goodale, 22 Or. 68, 29 Pac. 70; Pelzer Mfg. Co. *v.* Sun Fire Office, 36 S. C. 213, 15 S. E. 562; Wilson *v.* State, (Tex. Crim. App.), 24 S. W. 649; Bexar Co. *v.* Terrell, (Tex.), 14 S. W. 62.

Where No Issue is Made as to the Title of Property burned through the alleged negligence of a railroad company, it is proper to show a *prima facie* right of ownership in the property by testimony of one of the plaintiffs that it belonged to himself and his coplaintiff. Chicago, St. P. M. & O. R. Co. *v.* Gilbert, 52 Fed. 711, 3 C. C. A. 264. See also Phillips *v.* City of Huntington, 35 W. Va. 406, 14 S. E. 17, wherein it is held that the possession and ownership of lots contiguous to a sidewalk on which a person received injuries may be shown by parol, without showing the deeds or other record evidence. And in Babcock *v.* Beaver Creek Township, 65 Mich, 479, 32 N. W. 653, it was held that plaintiff in an action to recover taxes paid under protest on lands not owned by him, might testify what lands he did own, without producing his title deeds.

Parol Evidence of a Person's Interest in a Town Site is admissible where the object of the proof is to show that he was associated with others in the establishment of a town and not to establish a claim to real estate. Cooper *v.* Breckenridge, 11 Minn. 241.

30. Record Collateral to Issue. Stewart *v.* Massengale, 1 Overt. (Tenn.) 479; Wabash & Erie Canal Co. *v.* Reinhart, 22 Ind. 463. See further, on this point, *infra*, *Oral Evidence as Primary or Best Evidence; Matters Evidenced by Writing; Writings Collateral to Issue.*

31. Herndon *v.* Givens, 16 Ala. 261.

32. Klein *v.* Russell, 19 Wall. (U. S.) 433; Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296; McNeal *v.* State, (Tex. Crim. App.), 43 S. W. 792.

If the fact that a witness has knowledge of the existence and of the amount of an insurance policy is relevant merely as affecting the credibility of the witness such matter is a proper matter of inquiry, and it is not error to allow the witness to testify thereto, and in so doing to state the amount of the policy, if the witness knows it as a substantive fact independent of the policy. Kearny *v.* State, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344.

33. Gooch *v.* Addison, 13 Tex. Civ. App. 76, 35 S. W. 83.

34. Queen's Case, 2 Br. & B. 284, 22 Rev. Rep. 662; Newcombe *v.* Griswold, 24 N. Y. 298.

In Burks *v.* State, 40 Tex. Crim. App. 167, 49 S. W. 389, it was held

(I.) Sufficiency of Proof of Existence of Writing. — Testimony of a witness that according to his best recollection, written evidence of a fact exists, is sufficient, in the absence of opposing proof, to exclude secondary evidence;[35] but testimony merely that the witness had heard that there was a writing is not enough to require the production of the writing.[36]

(2.) Official Writings. — Again, it is a general rule that official records and documents are the best evidence of their contents, and should be produced or their absence accounted for.[37]

(3.) Judicial Writings. — The records themselves are the best evidence of the contents of judicial records, suits and proceedings, and they should be produced or their absence accounted for.[38] So

that after the defendant had proved in order to impeach a witness, that he had been indicted on a criminal charge, it was competent for the State in rebuttal to show by the witness himself that he had been acquitted of such charge without regard to record evidence of that fact.

35. Scarborough *v.* Reynolds, 12 Ala. 252. *Compare.*— Hadden *v.* Linville, 86 Md. 210, 38 Atl. 37, 900, wherein it was held that an objection to oral proof of a transaction on the ground that such transaction was evidenced by a writing was properly overruled because the objector testified that he "only thought" there was such a writing.

36. Hearsay. — Watson *v.* King, 3 C. B. 608. See also Taggart *v.* Ross, 13 U. C. Q. B. (Can.) 611, an action of ejectment, where one of the plaintiff's witnesses swore that the defendant took possession of the land under a verbal agreement of purchase with the plaintiff, and on cross-examination swore that several days afterwards he heard the plaintiff say that there was some writing between himself and the defendant, it was held that this did not constitute sufficient evidence of the existence of a written agreement to necessitate its production by the plaintiff.

In Clements *v.* State, (Tex. Crim. App.), 66 S. W. 301, a prosecution for larceny, testimony that the defendant told the witness that he had bought the property in question and that he had a bill of sale for it and drew the instrument from his pocket and handed it to the witness to look at, which the witness did and handed it back to the defendant, is not such testimony as discloses that there is better testimony, to wit, the written bill of sale, so as to require notice on the defendant to produce it.

37. Official Records and Documents. — *Arkansas.* — Henckey *v.* Standiford, 66 Ark. 535, 52 S. W. 1; State *v.* Kirkpatrick, 32 Ark. 117.

Georgia. — Peterson *v.* Taylor, 15 Ga. 483, 60 Am. Dec. 705.

Iowa. — Powesheik Co. *v.* Stanley, 9 Iowa 511.

Louisiana. — Buford *v.* Johnson, 10 Rob. 456.

Maine. — Chase *v.* Savage, 55 Me. 543.

Maryland. — Mayor etc. of Baltimore *v.* Hughes, 1 Gill & J. 480, 19 Am. Dec. 243.

Missouri.— Benton *v.* Craig, 2 Mo. 198.

Pennsylvania. — Frisch *v.* Miller, 5 Pa. St. 310.

Texas. — Kaffenberger *v.* State, 34 Tex. Crim. App. 142, 29 S. W. 779.

For a full discussion of this question, *see title* "Records;" "Public Documents."

38. *United States.* — Smallwood *v.* Violet, 1 Cranch C. C. 516, 22 Fed. Cas. No. 12,962.

Arkansas. — Clarke *v.* Oakley, 4 Ark 236.

California. — Leviston *v.* Henninger, 77 Cal. 461, 19 Pac. 834.

Colorado. — Rose *v.* Otis, 5 Colo. App. 472, 39 Pac. 77.

Delaware. — Downs *v.* Rickards, 4 Del. Ch. 416.

Illinois. — Moore *v.* Bruner, 31 Ill. App. 400.

Indiana. — Bible *v.* Voris, 141 Ind. 569, 40 N. E. 670; Clim *v.* Gibson, 23 Ind. 11.

also a decree of another court can be proved only by a duly authenticated transcript of the record thereof, and not by parol testimony of the clerk of the court.[39] For the purposes of this article, however, only these general rules are here stated; as a full discussion of this question is elsewhere to be found in this work.[40]

b. *Matters Required by Law to Be Written.* — **(1.) In General.** Whenever a fact or transaction is required by law to be reduced to, or evidenced by, a writing, that writing is itself the best evidence of such fact or transaction, and no other proof can be substituted therefor so long as the writing itself is in existence and in the power of the party.[41] It has been held, however, that unless a statute providing that a certain thing shall prove a certain fact

Iowa. — Miller *v.* Wolf, 63 Iowa 233, 18 N. W. 889; Parsons *v.* Hedges, 15 Iowa 119.

Kansas. — La Clef *v.* Campbell, 3 Kans. App. 756, 45 Pac. 461.

Louisiana. — State *v.* Brooks, 39 La. Ann. 817, 2 So. 498.

Massachusetts. — Fitch *v.* Randall, 163 Mass. 381, 40 N. E. 182.

Mississippi. — Standifer *v.* Bush, 8 Smed. & M. 383.

Missouri. — Smith *v.* Phillips, 25 Mo. 555.

New York. — McVity *v.* Stanton, 10 Misc. 105, 30 N. Y. Supp. 934.

North Carolina. — Baker *v.* Garris, 108 N. C. 218, 13 S. E. 2.

South Dakota. — Woodward *v.* Stark, 4 S. D. 588, 57 N. W. 496.

Tennessee. — Brown *v.* Wright, 4 Yerg. 57.

39. Decree of Sister State. Teter *v.* Teter, 88 Ind. 494; Whittle *v.* State, 79 Miss. 327, 30 So. 722; Anderson *v.* Ackerman, 88 Ind. 481. See also Flourenoy *v.* Durke, 2 Brev. (S. C.) 256.

40. *See* "JUDGMENTS," "RECORDS."

41. Original Writings Required by Law as Constituting Primary Evidence. — *Arkansas.* — Dunn *v.* State, 2 Ark 229, 35 Am. Dec. 54.

California. — Bode *v.* Trimmer, 82 Cal. 513, 23 Pac. 187; Prentice *v.* Miller, 82 Cal. 570, 23 Pac. 189; People *v.* Reinhart, 39 Cal. 449.

Connecticut. — Sherman *v.* Tolman, 2 Root 139, 1 Am. Dec. 63; Sanford *v.* Pond, 37 Conn. 588 (return of levy of writ of attachment showing property attached).

Georgia. — Fitzgerald *v.* Adams, 9 Ga. 471.

Kansas. — Hinton *v.* School District No. 2, 12 Kan. 573.

Massachusetts. — Mayhew *v.* Gay Head District, 13 Allen 129; Com. *v.* Quin, 5 Gray 478.

Missouri. — Kane *v.* School District, 48 Mo. App. 408.

New Hampshire. — Greeley *v.* Quimby, 22 N. H. 335.

New York. — Mandeville *v.* Reynolds, 68 N. Y. 528.

South Carolina. — Baker *v.* Delieseline, 4 McCord 372.

Vermont. — Henry *v.* Tilson, 19 Vt. 447.

West Virginia. — Dryden *v.* Swinburne, 20 W. Va. 89.

Wisconsin. — Rosholt *v.* Corlett, 106 Wis. 474, 82 N. W. 305.

Corporate Records. — It has been held that the fact that a written record of all the proceedings of the board of directors of a corporation is required by law, or by its articles of organization, is not ground for excluding other proper evidence of the facts required so to be kept, in the absence of such written record. Weber *v.* Fickey, 52 Md. 500; DuQuoin Star Coal Min. Co. *v.* Thorwell, 3 Ill. App. 394. See also Bay View Homestead Assn. *v.* Williams, 50 Cal. 353; Pickett *v.* Abney, 84 Tex. 645, 19 S. W. 859. And *see* the *title* "CORPORATIONS."

Consent to Sell Mortgaged Property. — Where a statute requires the written consent of an encumbrancer of personal property permitting the mortgagor to sell it, evidence of a verbal consent to such a sale is inadmissible. Anderson *v.* So. Chicago Brewing Co., 67 Ill. App. 300.

explicitly so provides, other proper evidence is not thereby excluded.[42] But when evidence of a particular kind, required by a statute containing no negative words, is inaccessible but not through the negligence of the party needing it, he may resort to the next best evidence.[43]

(2.) Writings Conveying Real Property. — So also, upon an issue directly involving the paper title to real estate, parol evidence is not admissible as primary evidence; the deed of conveyance is the best evidence and should itself be produced, if attainable.[44] So also, under this best evidence rule, parol evidence of a contract for the conveyance of land is not admissible.[45]

(3.) Official Writings. — And where the law requires a written record of an official act, the writing is the best evidence of such act;[46] although it is held that unless the law expressly and im-

An Express Trust in real property cannot be proved by parol. Columbus H. & G. R. Co. *v.* Braden, 110 Ind. 558, 11 N. E. 357; Dick *v.* Dick, 172 Ill. 578, 50 N. E. 142. *See* the article "TRUSTS."

Official Certificate. — In Duke *v.* Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472, the charter of a navigation corporation provided for the appointment of a commission whose duty it was to report to the governor when the river was in such condition to defeat the right of the corporation to receive tolls. It was held that the commissioners' certificate was the only evidence properly admissible to show such condition of the river. And in Hammondsport & Bath Plankroad Co. *v.* Brundage, 13 How. Pr. (N. Y.) 448, it was held that where the certificate of the inspectors was declared, by statute, to be evidence of the completion of a plank road parol evidence was inadmissible both under the statute and on general principles.

In Illinois, by a Statute, papers, records, and entries of any corporation may be proved by a copy thereof, certified under the hand of the proper keeper of the same. And in Mandel *v.* Swan Land & Cattle Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313, it was held that the originals and the evidence provided for by this statute are the original evidence.

42. When Statutory Mode of Proof Exclusive. — Town of Bethlehem *v.* Town of Watertown, 51 Conn. 490. See also Glenn *v.* Rogers, 3 Md. 312.

Record of Notary Public. — In Terbell *v.* Jones, 15 Wis. 253, it was held that a statute requiring a notary to keep a record of all notices of nonpayment of notes served by him was merely for the protection of the holders of commercial paper; and that accordingly when a notary has neglected to keep such a record, he may testify to the contents of a notice served by him. And *see* title "NOTICE."

43. Kendall *v.* Inhabitants of Kingston, 5 Mass. 524. See also *infra* IV. *Excuses for Non-Production of Primary Evidence; Primary Evidence Inaccessible.*

44. Withers *v.* State, 120 Ala. 394, 25 So. 568; Phillips *v.* O'Neal, 87 Ga. 727, 13 S. E. 819; Brackett *v.* Evans, 1 Cush. (Mass.) 79; Jordan *v.* McKinney, 144 Mass. 438, 11 N. E. 702; Woodbury *v.* Evans, 122 N. C. 779, 30 S. E. 2; Martin *v.* Bowie, 37 S. C. 102, 15 S. E. 736; Rogers *v.* Wallace, (Tex. Civ. App.), 28 S. W. 246.

A Parol Gift of Land by a Father to his son cannot be proved by oral testimony of the son. Weshgyl *v.* Schick, 113 Mich. 22, 71 N. W. 323.

For a full discussion of this question, *see title* "DEEDS," "TITLE," etc.

45. North *v.* Bunn, 122 N. C. 766, 29 S. E. 776; Patterson *v.* Bloss, 4 La. (O. S.) 374, 23 Am. Dec. 486.

46. Oath of Office. — Thus, when the law under which an officer is ap-

peratively requires all matters to appear of record and makes the record the only evidence, other proper evidence is admissible to prove the things omitted to be stated in the record.[47]

(4.) Judicial Writings. — Again, judicial proceedings are generally required to be in writing and a part of the record of such proceedings, and hence as to such matters the writings so kept are the best evidence.[48] This rule, however, does not apply to matters, although judicial in their nature, which are not necessarily a part

pointed requires his oath of office to be in writing, parol evidence is not admissible to prove that he did so take his oath of office; but where it is not so required to be in writing, and there is no record of the fact, parol evidence is admissible. **Dallas** P. & S. E. R. Co. *v.* Day, 3 Tex. Civ. App. 353, 22 S. W. 538; Pease *v.* Smith, 24 Pick. (Mass.) 122; Farnsworth Co. *v.* Rand, 65 Me. 19; State *v.* Green, 15 N. J. Law 88; Whiting *v.* Ellsworth, 85 Me. 301, 27 Atl. 177.

Compare. — Com. *v.* Sherman, 5 Pick. (Mass.) 239. *See* further on this question, the title "OATH."

Pardon of Convict. — On an issue as to the competency of a witness objected to on the ground that he is an unpardoned convict, the fact of his pardon can be proved by oral testimony only after proof that the original has been lost and that a certified copy cannot be produced. Redd *v.* State, 65 Ark. 475, 47 S. W. 119.

A Written Report by an Officer of a City Made to His Superior Officer, as required by law, as to the condition of side walks, is the best evidence of that fact; and a record of such report not shown to be one authorized by the law is secondary. Lorig *v.* City of Davenport, 99 Iowa 479, 68 N. W. 717.

The Authority of a Deputy to Act as the Agent of the Sheriff and to bind him by his actions, can only be proved by the production of his appointment as deputy by the sheriff in writing under his hand and seal. It cannot be proved by a certified copy of such appointment, nor by evidence that the deputy acted as such. Curtis *v.* Fay, 37 Barb. (N. Y.) 64.

47. **Records Not Exclusive Evidence Unless Statute Expressly so Provides.** — *United States.* — German Ins. Co. of Freeport Ill. *v.* School District of Milford, Iowa, 80 Fed. 366.

Illinois. — School Directors *v.* Kimmel, 31 Ill. App. 537; Chicago *v.* McGraw, 75 Ill. 566.

Indiana. — Jay Co. *v.* Brewington, 74 Ind. 7.

Iowa. — Jordan *v.* Osceola Co., 59 Iowa 388, 13 N. W. 344; Zolesky *v.* Iowa State Ins. Co., 102 Iowa 512, 70 N. W. 187, 71 N. W. 433.

Kansas. — Gillett *v.* Lyon Co., 18 Kan. 410.

Kentucky. — Sweeney *v.* Cook, 19 Ky. L. Rep. 1422, 43 S. W. 434.

Massachusetts. — Pease *v.* Smith, 24 Pick. 122.

Minnesota. — State *v.* District Court, Ramsey Co., 29 Minn. 62, 11 N. W. 133.

Pennsylvania. — Sidney School Furniture Co. *v.* Warsaw Township School District, 158 Pa. St. 35, 27 Atl. 856.

Vermont. — Hutchinson *v.* Pratt, 11 Vt. 402.

Washington. — Fouts *v.* New Whatcom, 14 Wash. 49, 44 Pac. 111.

Wyoming. — Board of Com. of Laramie Co. *v.* Stone, 7 Wyo. 280, 51 Pac. 605.

Date of Official Act. — Where the date of an official act is material and the official record is silent in relation thereto, it is competent to prove such date by any competent witness who was present and knew the facts. Ratcliff *v.* Teters, 27 Ohio St. 66.

Whether or Not a Constable's Official Bond was Received or Rejected may be proved by parol where no written entry was made concerning it. Westerhaven *v.* Clive, 5 Ohio 136.

48. *Alabama.* — Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443; Done-

of the records,[49] or which do not necessarily imply that there is any record of them.[50]

gan *v.* Wade, 70 Ala. 501 (grounds alleged for contest of will).

Arkansas. — Southern Ins. Co. *v.* White, 58 Ark. 277, 24 S. W. 425 (conviction of infamous crime).

California. — Leviston *v.* Henninger, 77 Cal. 461, 19 Pac. 834.

Connecticut. — Morgan *v.* Thames Bank, 14 Conn. 99.

Georgia. — Clark *v.* Cassidy, 64 Ga. 662.

Illinois. — McNeill *v.* Donohue, 44 Ill. App. 42; Moore *v.* Bruner, 31 Ill. App. 400; Weis *v.* Tiernan, 91 Ill. 27 (recovery of a judgment.)

Iowa. — West *v.* St. John, 63 Iowa 287, 19 N. W. 238.

Louisiana. — Payne *v.* James, 45 La. Ann. 381, 12 So. 492.

Maryland. — Smith *v.* Wilson, 17 Md. 460, 79 Am. Dec. 665.

Massachusetts. — Sheldon *v.* Frink, 12 Pick. 568 (discontinuance of suit).

Missouri. — Dawson *v.* Quillen, 61 Mo. App. 672; Milam *v.* Pemberton, 12 Mo. 598.

New Hampshire. — Flanders *v.* Lane, 54 N. H. 390.

New York. — Boomer *v.* Lane, 10 Wend. 525.

South Carolina. — State *v.* McElmurray, 3 Strob. 33 (decree of divorce); Etters *v.* Etters, 11 Rich. Law 413.

Texas. — Glasscock *v.* Stringer, (Tex. Civ. App.), 32 S. W. 920.

West Virginia. — Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752 (dismissal of suit); State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930.

For a Full Discussion of the application of this rule, *see* particular titles, such as "JUDGMENTS," "PLEADINGS," and the like.

Amount of Judgment. — The testimony of a judge of probate as to the amount of a claim allowed by him is inadmissible, where the record is in existence and accessible. Bellamy *v.* Hawkins, 17 Fla. 750. See also Watson *v.* Hahn, 1 Colo. 385; Bartow *v.* Morris, 13 N. J. Law 8.

Ordinarily the Best Evidence of a Levy and Sale is the return of the execution; but where the execution has not been returned, or has been lost or destroyed, and it is proved otherwise than from the record that there was a judgment and execution, a recital in a sheriff's deed is *prima facie* evidence of the levy and sale, they being official acts of the sheriff. Rollins *v.* Henry, 78 N. C. 342.

Parol Declarations of a Defendant in a Suit are not admissible to prove the existence of a judgment. Tuttle *v.* Jackson, 6 Wend. (N. Y.) 213, 21 Am. Dec. 306.

Seizure under Attachment. In an action by a claimant of property attached as belonging to another, for the wrongful taking and conversion of the property, it is not incumbent on the plaintiff to prove the seizure by the court records and the files of a case to which he is not a party; but he may, if he can, show this by the testimony of eye-witnesses. Reithmann *v.* Goodsman, 23 Colo. 202, 46 Pac. 684. *See* also title "ATTACHMENT."

49. Matters in Pais. — The question how many terms of court were held in a certain year, what judge presided, and whether juries were in attendance, though facts which might appear from the records, are in the nature of matters *in pais* and are susceptible of proof by parol. Massey *v.* Westcott, 40 Ill. 160.

Date of Judgment. — Extrinsic evidence may be given of the day on which judgment was rendered. Clark *v.* Ely, 2 Root (Conn.) 380.

The Subject Adjudicated upon can be shown by parol, but not what the adjudication was. Zimmerman *v.* Zimmerman, 15 Ill. 85. See also Walsh *v.* Harris, 10 Cal. 392.

Where a Surety upon a Recognizance Surrenders His Principal, failure of the justice to give a certificate of the surrender will not prevent the use of other competent evidence to prove the fact of the surrender. State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930.

50. An Arrest does not necessarily imply that there was any record; and hence a witness on cross-examination may be asked if he was

(5.) Effect of Statute Requiring Record. — A record of an instrument pursuant to a statute requiring it to be filed or recorded, does not operate to make the original instrument secondary evidence.[51]

C. ORAL EVIDENCE AS PRIMARY OR BEST EVIDENCE. — a. *Matters Resting in Parol.* — **(1.) In General.** — From the nature of the case the rules concerning best and secondary evidence as the same are applied to writings can have no application to matters and transactions resting entirely in parol, and of course in such case the best and only evidence of which the case is susceptible is the testimony of persons having personal knowledge thereof.[52]

Foreign Laws. — When foreign laws and regulations are not

not arrested for vagrancy, on objection that the record is the best evidence. People *v.* Manning, 48 Cal. 335. See also State *v.* McFarlain, 42 La. Ann. 803, 8 So. 600; Jones *v.* State, 100 Ala. 88, 14 So. 772; State *v.* Murphy, 45 La. Ann. 958, 13 So. 229.

Testimony of an Attorney That He Had Entered Into a Stipulation with opposing counsel agreeing to delay prosecuting the action in question until the final determination of another suit then pending, is admissible. Chattanooga Grocery Co. *v.* Livingston, (Tenn.), 59 S. W. 470.

Election by Widow in Favor of Testamentary Provision. — In Reville *v.* Dubach, 60 Kan. 572, 57 Pac. 522, it was held that although a statute provides for the formal election by a widow whether she will take under the will of her deceased husband in lieu of the share which the law allows her, an election may be made by acts *in pais*, and that hence the record is not the only proof of such election; and that statements made by her at the time of her filing the petition for the probate of the will, and accompanying that act indicative of a positive and unmistakable intention to so elect, were proper to be received in evidence.

51. Effect of Statute Requiring Record. — Chapman *v.* Gate, 54 N. Y. 132; Haddow *v.* Lundy, 59 N. Y. 320.

52. Transaction Resting in Parol Provable by Parol. — *Alabama.* Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159.

District of Columbia. — Bailey *v.* D. C., 9 App. D. C. 360.

Kansas. — Beyle *v.* Reid, 31 Kan. 113, 1 Pac. 264.

Louisiana. — Roberts *v.* Riley, 15 La. Ann. 103, 77 Am. Dec. 183.

Massachusetts. — City of Holyoke *v.* Handley Water-Power Co., 174 Mass. 424, 54 N. E. 889; Gould *v.* Norfolk Lead Co., 9 Cush. 338, 57 Am. Dec. 50.

Michigan. — Cady *v.* Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834.

New Hampshire. — Pearson *v.* Wheeler, 55 N. H. 41.

Texas. — Missouri, K. & T. R. Co. *v.* Milam, (Tex Civ. App.), 50 S. W. 417.

Testimony of the Existence of a Rule Generally in Force amongst men of the same occupation as the witness is not objectionable as being secondary evidence, where it does not show better evidence than his statements of the existence of the rule. Galveston, H. & S. A. R. Co. *v.* Henning, (Tex. Civ. App.), 39 S. W. 302. See also Pittsburg C. C. & St. L. R. Co. *v.* Martin, 157 Ind. 216, 61 N. E. 229, so holding where an employee of a railroad company testified that he had never seen or heard of any printed rules or regulation governing operations of trains and that the employees of the road were not supplied with any such.

Consideration for Transfer. — In Feldman *v.* McGuire, 34 Or. 309, 55 Pac. 872, it was held that an agreement by the defendant to pay the amount of an encumbrance due to the plaintiff in consideration of the encumbrancer conveying to the defendant the lands encumbered, need

shown to be in writing as public edicts, they may be proved by parol.[53]

Possession. — Within this rule possession of real estate or chattels is a fact provable by parol.[54]

(2.) Transaction Partly Oral and Partly Written. — So, it is held that where an agreement is partly oral and partly evidenced by a writing oral testimony may be received in proof thereof.[55]

(3.) Transaction Subsequently Reduced to Writing. — And it is also held that parol evidence of a valid and completed verbal agreement is not to be excluded by the fact that the agreement is subsequently reduced to writing,[56] or that written instruments have been

not be in writing under the Statute of Frauds and that hence it was provable by parol evidence.

The Fact That a Sheriff's Term of Office Had Expired and that his successor was in office at the time of sale under a levy by the former sheriff, may be proved by parol, especially where the sheriff's deed which was made by the successor sets forth these facts, and the return of the sale upon the writ of *venditioni exponas* is made and signed by the former sheriff as such. Bank of Tennessee *v.* Beatty, 3 Sneed, (Tenn.), 305, 65 Am. Dec. 58.

Appointment of Corporate Officers. If no evidence be given of the written appointment of a corporate officer, parol evidence is admissible that the person alleged to be such officer acted as such in the various duties of that office, as tending to show his appointment. Barrington *v.* Washington Bank, 14 Serg. & R. (Pa.) 405. *See* further on this point, title "CORPORATIONS."

53. Church *v.* Hubbart, 2 Cranch 187, 237; Livingston *v.* Maryland Ins. Co., 6 Cranch 274, 3 L. ed, 222; Raynham *v.* Canton, 3 Pick. 293; Charlotte *v.* Chouteau, 25 Mo. 465; Dyer *v.* Smith, 12 Conn. 384; Watson *v.* Walker, 23 N. H. 471; Robert's Will, 8 Paige (N. Y.) 446; Glasgow *v.* Stevenson, 6 Mart (N. S.) (La.) 367; Newsom *v.* Adams, 2 La. (O. S.) 153, 22 Am. Dec. 126. And *see* the title "LAWS."

54. Jacob Tome Institute of Port Deposit *v.* Davis, 87 Md. 591, 41 Atl. 166; Knapp *v.* Smith, 27 N. Y. 277; Fisher *v.* Bennehoff, 121 Ill. 426, 13 N. E. 150. And *see* title "POSSESSION" for a full discussion of this question.

55. Bailey *v.* D. C., 9 App. D. C. 360. See also Potter *v.* Hopkins, 25 Wend. (N. Y.) 417.

56. Conrad *v.* Marcotte, 23 Minn. 55. See also Shiels *v.* Stark, 14 Ga. 429.

In Tisdale *v.* Harris, 20 Pick. (Mass.) 9, the defendant had agreed verbally with the plaintiff's agent to transfer certain corporate shares to the plaintiff, and had written a letter to an agent to transfer the shares into the plaintiff's name and transmit the certificate to the defendant, subsequently the plaintiff's agent signed a memorandum agreeing to pay the defendant the price of the shares when the defendant should furnish the certificate. It was held that there was not a contract in writing on the part of the defendant, and hence parol evidence of his contract was not objectionable on that ground.

A Verbal Sale of Chattels Perfected by Delivery may be proved by parol testimony notwithstanding a bill of sale is subsequently executed by, and accepted from the vendor; and it is not necessary to produce the writing. Sanders *v.* Stokes, 30 Ala. 432. "If a man acquires title to personal property by verbal sale, his mere subsequent acceptance of the bill of sale from his vendor, without any rejection of the verbal sale cannot estop or exclude him from proving and relying on his title acquired under the verbal sale. The design and intention of the parties in executing such bill of sale may have been simply to furnish more certain evidence of the subsist-

subsequently executed in part execution of the verbal agreement.[57]

b. *Matters Evidenced by Writing.* — **(1.) In General.** — Where a fact or transaction is not required by any law or rule to be reduced to, or evidenced by, a writing, it has been held that parol evidence to establish such fact or transaction is not to be rejected on the ground that it is secondary merely because there is a writing evidencing such fact or transaction, provided, of course, the evidence offered is not substitutionary.[58]

(2.) Basis of Rule. — The basis of this rule is that the oral testimony of the witness is as near to the fact testified to as is the writing itself,[59] as is illustrated by the cases set out below.[60]

ing contract of sale. Caraway *v.* Wallace, 2 Ala. 542; Adams *v.* Davis, 16 Ala. 748. But in such a case the failure to produce the bill of sale or to account for its non-production does not have the effect of excluding evidence of the prior verbal sale. Allen *v.* Pink, 4 Mees. & W. 140."

57. Barker *v.* Bradley, 42 N. Y. 316, 1 Am. Rep. 521, where the court said: "Here the agreement was not reduced to writing. It was intended by the parties to rest in parol, and the written instruments were subsequently executed in part execution of the parol agreement, and not for the purpose of putting that agreement in writing. It is well settled, that a written instrument, thus executed, does not supersede a prior parol agreement."

58. Matters Not Required to Be in Writing. — *United States.* — Morrow *v.* Whitney, 95 U. S. 551, 24 L. ed. 456.

Alabama. — Wiggins *v.* Porter, 8 Port. (Ala.) 430.

California. — Jolley *v.* Foltz, 34 Cal. 321.

Illinois. — Board of Education *v.* Taft, 7 Ill. App. 571.

Indiana. — Jay County *v.* Gillum, 92 Ind. 511.

Maine. — Rollins *v.* Nudgett, 16 Me. 336.

Massachusetts. — Inhabitants of Wayland *v.* Inhabitants of Ware, 104 Mass. 46.

Michigan. — Van Kleck *v.* Eggleston, 7 Mich 511.

Mississippi. — Phillip *v.* Burrus, 13 Smed & M. 31.

Missouri. — McQuade *v.* St. Louis, 78 Mo. 46.

New Hampshire. — Pierce *v.* Richardson, 37 N. H. 306.

South Carolina. — Kilpatrick *v.* Vandiver, 2 Mill. 341.

Texas. — Ewing *v.* State, (Tex. Crim. App.) 38 S. W. 618; Houston & T. C. R. Co. *v.* State, 39 Tex. 148.

Utah. — Peay *v.* Salt Lake City, 11 Utah 331, 40 Pac. 206.

Vermont. — Lycoming Ins. Co. *v.* Wright, 60 Vt. 515, 12 Atl. 103.

59. Basis of Rule. — Duffie *v.* Phillips, 31 Ala. 571; Prater *v.* Frazier, 11 Ark. 249; Lathrop *v.* Bramhall, 64 N. Y. 365.

60. In Rutledge *v.* Hudson, 80 Ga. 266, 5 S. E. 93, oral testimony of the indebtedness of a person at a certain time based on the witness's knowledge of the fact is competent evidence, and it is not necessary to produce the written evidence. See also Duffie *v.* Phillips, 31 Ala. 571; Gordon *v.* Mulhare, 13 Wis. 22; Hogan & Co. *v.* Reynolds, 8 Ala. 59.

Account Used at Settlement by Note. — Testimony of an agent that prior to the taking of a note in settlement, he had presented to the debtor an account current between the debtor and his principal, and that he and the debtor had examined the account and concluded upon the amount then due, is competent evidence without the production of the account current to show that the amount so concluded upon was due at the time the note was made. Molson *v.* Hawley, 1 Blatchf. 409, 17 Fed. Cas. No. 9702.

Insolvency of Judgment Debtor. In Jennings *v.* Nat. Bank of Athens, 74 Ga. 783, it was held that an entry of *nulla bona* on a *fi. fa.* is one method of showing the insolvency of the judgment debtor, but that it is

(3.) Application of Rule. — (A.) THE FACT OF PARTNERSHIP may be proved by the oral testimony of the partners themselves in suits with third persons, even if there be written articles of co-partnership, or by evidence of the partners having held themselves out as

not the only way; and that any other legal evidence is equally competent to establish that fact and any witness who knows the condition of the debtor may testify thereto.

Sale of Note. — In an action for the purchase money of a note sold by the plaintiff to the defendant, parol evidence of the sale may be given without producing the note or accounting for its absence. Lamb *v.* Moberly, 3 T. B. Mon. (Ky.) 179.

Interest of Witness. — A witness may testify that he has released his interest in the event of a suit, notwithstanding such relinquishment is in writing, without producing the writing or accounting for its non-production. McGehee *v.* Hill, 1 Ala. 140. The court said, however, that it would have been different if the release had been given to the witness instead of by him.

Where a Written Communication Is Accompanied by a Verbal One to the same effect, proof of the latter may be received as independent evidence, though not to prove the contents of the writing, nor as a substitute for it. Glenn *v.* Rogers, 3 Md. 312.

Testimony That Certain Notes Described in a Memorandum and identified were sent to the correspondents of the bank holding them for collection, and that the amount thereof had been received, and when received, is not giving parol testimony of the contents of a writing. Cecil Bank *v.* Snively, 23 Md. 253.

Delivery Pursuant to Written Directions. — In Lee *v.* Hills, 66 Ind. 474, it was held that the delivery of personal property in pursuance of the written direction could be proved by parol, and that the written orders under which the delivery was made was not the best nor proper evidence of that fact. "The manner and time of the delivery of the goods were facts which had existence, if they existed at all, entirely independent of any written order, and as such they might be proved without production of the order, by any competent witness cognizant of such facts." *Compare* Brafford *v.* Reed, 125 N. C. 311, 34 S. E. 443.

Testimony of Witness Before Grand Jury. — In Indiana, a statute requires the clerk of the grand jury "to take minutes of the evidence given before them;" but in Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157, it was held that it was evident that the statute does not intend to require the evidence of the witnesses to be fully written down, and that accordingly oral evidence of what a witness testified to before the grand jury was not secondary evidence. *See* also the article "FORMER TESTIMONY."

Number of Passengers on Street Car. — The conductor of a street-car may testify to his recollection of the number of passengers on his car at a given time and place, notwithstanding he kept a slip taken from the register on the car and left it at the company's office, which showed the number of passengers carried on that trip. Wynn *v.* City & Suburban R. Co., of Savannah, 91 Ga. 344, 17 S. E. 649. "The slip taken from the register on the street car," said the court, "showing the number of passengers carried on a given trip and which the conductor was required to leave at the company's office, is not the best evidence nor, indeed, any evidence at all of the number of passengers on his car at any particular time or place."

Ownership of Animals Replevied. In a civil action wherein sheep were replevied, bills of sale or a certified copy of a recorded brand are competent evidence of ownership or right of possession; but any other competent evidence may be introduced to establish the same facts or the identity of the animals. Gale *v.* Salas, (N. M.), 66 Pac. 520.

In Lowry *v.* Tuttle, 4 Vt. 504, 24 Am. Dec. 628, an action to recover the value of property attached by

such, or having made admissions to that effect;[61] although if the terms on which the partnership is formed become material, the writings should be produced.[62]

(B.) Official Character. — It has been held that official character may be proved by parol even though a written appointment exists, without the production of the writing; that it is not material how the question arises, whether in civil or criminal actions, or whether the officer is himself a party to the action, unless he undertakes to justify his own conduct as done by virtue of his authority.[63]

(C.) Payment of Money. — The weight of authority is to the effect that parol testimony as to the fact of money paid may be received, although it appears that at the time a receipt was given, which is not produced and whose absence is not accounted for[64]

plaintiff and delivered to the defendant upon his receipt in writing for safe keeping, it was held that the attachment itself might in such case be proved by other evidence than the attachment; and that the receipt itself, if one was taken, was the appropriate and proper evidence for that purpose.

61. Gilbert *v.* Whidden, 20 Me. 367; Dixon *v.* Hood, 7 Mo. 414, 38 Am. Dec. 461. *See* fully on this question title "Partnership."

62. Field *v.* Tenney, 47 N. H. 513.

63. Tatom *v.* White, 95 N. C. 453; State *v.* Lyon, 89 N. C. 568. To same effect, see Pentecost *v.* State, 107 Ala. 81, 18 So. 146; Allen *v.* State, 21 Ga. 217, 68 Am. Dec. 457; State *v.* Zeibert, 40 Iowa 169; State *v.* Taylor, 70 Vt. 1, 39 Atl. 447, 67 Am. St. Rep. 648, 42 L. R. A. 673. And *see* fully on this question the title, "Officers."

In Barnum *v.* Barnum, 9 Conn. 242, parol testimony was offered to prove that a certain ticket in a lottery had drawn a blank, the witness testifying that he was a manager of the lottery; that he attended the drawing of it, and that the ticket with the combination of numbers in question drew a blank. This testimony was objected to; because the appointment of witness as a manager could be proved only by the record; but it was held that the testimony was admissible.

64. Payment of Money Receipted for Provable by Parol. — *England.* Jacob *v.* Lindsay, 1 East 460.

United States. — Mead *v.* Keane, 3 Cranch C. C. 51, 16 Fed. Cas. No. 9373.

Alabama. — Wiggins *v.* Pryor, 3 Port. 430; Planters' & Merchants' Bank *v.* Borland, 5 Ala. 531.

Arkansas. — Greenfield *v.* Wright, 16 Ark. 186; Conway *v.* State Bank, 13 Ark. 48.

California. — Estate of Moore, 72 Cal. 335, 13 Pac. 880.

Connecticut. — Willimantic School Soc. *v.* First School Soc., 14 Conn. 457.

Delaware. — Donely *v.* McGrann, 1 Harr. 453.

Illinois. — West Chicago St. R. Co. *v.* Piper, 165 Ill. 325, 46 N. E. 186; Loughry *v.* Mail, 34 Ill. App. 523.

Kansas. — Wolf *v.* Foster, 13 Kan. 91.

Maine. — Sibley *v.* Lumbert, 30 Me. 253.

Massachusetts. — Williams *v.* Gridley, 9 Metc. 482.

New Jersey. — Berry *v.* Berry, 17 N. J. L. 440.

New Hampshire. — Kingsbury *v.* Moses, 45 N. H. 222.

New York. — Stafford *v.* Williams, 12 Barb. 240.

Tennessee. — State *v.* Davis, 92 Tenn. 634, 23 S. W. 59.

Texas. — McAlpin *v.* Ziller, 17 Tex. 508. *Compare* — Cotton *v.* Campbell, 3 Tex. 493

Vermont. — Hayden *v.* Rice, 18 Vt. 353.

Wisconsin. — Hawes *v.* Woolcock, 30 Wis. 213.

although there are cases to the contrary.[65]

(D.) PAYMENT ON WRITTEN ORDER. — It has been held, however, that where it is claimed that money has been paid out on written orders, the orders themselves are the best evidence, and if accessible, the first medium of proof.[66]

(E.) PAYMENT BY ORDER. — So, also, when the fact of payment is sought to be proved by the giving of an order, the order itself is the best evidence and should be produced, or its absence accounted for before secondary evidence should be received.[67]

(F.) MEMORANDA. — A mere memorandum is not a contract, agreement or writing provable only by the production of documentary evidence, and hence does not preclude oral evidence concerning the matters stated therein.[68]

(G.) WRITING INADMISSIBLE. — It has been held that where a written instrument, if produced, could not be received as evidence of the fact to which it relates, parol evidence of such fact may be received.[69]

For a full discussion of this question, *see* titles, "PAYMENT;" "RECEIPT."

A Receipt Is No Better Evidence of the Facts It Is Intended to Evidence than the testimony of witnesses, and such facts may be shown without producing the receipt, although if the question be upon the receipt itself, by whom signed, what its contents, or the like, it then becomes the highest evidence and should be produced. Humphries *v.* McCraw, 5 Ark. 61, *citing* Southwick *v.* Hayden, 7 Cow. (N. Y.) 334; Heckert *v.* Haine, 6 Binn. (Pa.) 16; Romayne *v.* Duane, 3 Wash. (U. S.) 246; Townsend *v.* Atwater, 5 Day (Conn.) 298. See also Steed *v.* Knowles, 97 Ala. 573, 12 So. 75.

Date of Payment of Judgment. Though parol evidence of the existence or contents of a judgment in a former action is inadmissible, the time that such judgment was paid may be shown by such evidence. Downs *v.* Rickards, 4 Del. Ch. 416.

65. Jackson *v.* Lewis, 32 S. C. 593, 10 S. E. 1074; Sloan *v.* Ault, 8 Iowa 229.

Knowledge of Witness. — In Hamlin *v.* Atchison, 6 Rand. (Va.) 574, it was decided that though a receipt for money was given, it is competent to prove the payment by parol testimony if the witness can speak to the fact without reference to knowledge derived from having seen the receipt itself; but if he does not know of the payment and only speaks from having seen the receipt, the paper, as the best evidence of the fact of which it alone had imparted information, must be produced.

See also Wiggins *v.* Pryor, 3 Port. (Ala.) 430.

Parol Evidence of the Receipt of a Judgment is inadmissible where there is a receipt in writing. If the receipt is upon the record, the record, or a transcript of it, must be produced. Williams *v.* Jones, 12 Ind. 561.

66. Mason *v.* School District, 34 Mich. 228.

67. Chambers *v.* Hunt, 22 N. J. Law. 552.

68. Matters Stated in Memorandum Provable by Parol. — Weaver *v.* Crocker, 49 Ill. 461; Adams *v.* Sullivan, 100 Ind. 8; Allerkamp *v.* Gallagher, (Tex. Civ. App.), 24 S. W. 372; Donahue *v.* McCosh, 70 Iowa 733, 30 N. W. 14; Tuckwood *v.* Hanthorn, 67 Wis. 326, 30 N. W. 705. And *see* fully, the title "PRIVATE WRITINGS."

69. Sparks *v.* Rawls, 17 Ala. 211; Ware, Murphy & Co. *v.* Morgan, 67 Ala. 461; Charleston *v.* Allen, 6 Vt. 633.

Dying Declarations. — In Saylor *v.* Com. 97 Ky. 184, 30 S. W. 390, it was said that if in any case where the

(4.) Oral Evidence as Superior to Writing. — And there are cases in which oral evidence is received as the best evidence to prove a fact of which there is also written evidence.[70]

The Basis of This Doctrine is that the testimony of a witness testifying to the fact of his own knowledge is nearer to the fact in issue than the writing itself; the testimony is direct, while the writing

writing produced as the dying declaration of the deceased, cannot be admitted as evidence because the statements are irrelevant or otherwise inadmissible; then the court should admit parol evidence to prove the dying declarations.

70. Writer of Letter in Court. In Bue *v.* Splane, 9 Rob. (La.), 6, it was held that a letter from the plaintiff's attorney to the defendant was not admissible for the defendant where the attorney was in court willing to be examined as a witness. And in Bland *v.* Dowling, 9 Gill & J. (Md.), 19, it was held that the letters of an agent written to his principal, touching on the conduct of a slave whom the principal, as owner of the slave, had agreed to set free on certain conditions, was not admissible evidence, but that the writer of the letters, who produced the letters in court should have testified, himself, to the facts stated in the letters.

In Vasse *v.* Mifflin, 4 Wash. (U. S.), 519, on an issue as to whether or not the claim in contest had been passed upon by certain commissioners, a witness for the plaintiff was shown a copy of a letter from himself to the plaintiff's agent respecting the award of the commissioners, and on his acknowledging it to be a true copy it was offered in evidence. It was held that even if the original letter were produced, the contents as to the facts stated in it, were inferior to the testimony of the witness himself who was on the stand and could have been examined thereto.

Whereabouts of Person. — In Foster *v.* Davis, 1 Litt. (Ky.) 71, on an issue as to whether or not the plaintiff was in a city in a foreign country on a certain date, it was held that a certificate by the U. S. Consul at that city to the effect that the plaintiff was there at the time in question was not admissible to prove the fact stated, but that the testimony by deposition of the Consul should have been procured.

Oath of Office. — In Dollarhide *v.* Muscatine Co., 1 Greene (Iowa) 158, it was held that the testimony of the officer administering the oath to certain public officers, as required by the law, was better and more reliable evidence than the report of this officer containing a recital of their having been so sworn.

Opinions of Experts in the Form of Reports as to the cost of insurance and recommendations of readjustment in the manner of doing business interspersed with opinions as to the equities of certain members of the association are not admissible in evidence; if an expert be possessed of any information which the party desires he should be produced as a witness. Covenant Mut. L. Assoc. *v.* Kentner, 188 Ill. 431, 58 N. E. 966.

Payment of Taxes. — In Powell *v.* Hendricks, 3 Cal. 427, it was held that the certificate of the tax collector showing payments of taxes offered for the purpose of proving that there had been no abandonment of the premises taxed, was not competent evidence where the tax collector himself could be called as a witness; but that in his absence his receipt for the taxes, with proof of its execution, would be admissible.

Performance of Duty. — In Hancock *v.* Whybark, 66 Mo. 672, it was held that the affidavit of the trustee under a trust deed, that he had complied with the requirements of the deed as to notices of sale, was not competent evidence, but that the trustee himself should have been called as a witness.

Cost of Goods. — In Shawyer *v.* Chamberlain, 113 Iowa 742, 84 N. W. 661, an invoice of the cost price of certain goods was introduced in evi-

may be mere hearsay,[71] as will be seen by the illustrations set out below.[72]

(5.) Identification of Physical Objects. — The rule requiring the production of the best evidence does not require the production of a banner or flag carried about by the leaders of a riot in order to prove an inscription thereon;[73] or a parcel to prove an address written upon it;[74] or the tag on a parcel to prove an address written thereon;[75] but such matters are provable by parol. So also oral evidence of the contents of a writing may be given without showing any reason for not producing it when the evidence is offered

dence, and the maker of the invoice was allowed to testify orally to the wholesale cost thereof; and it was held that the mere fact that a memorandum was made did not preclude other competent evidence on the same subject so long as the witness had knowledge independent of the invoice.

Pictures in Catalogue. — Pictures in a catalogue cannot be received in evidence to show that certain goods were offered for sale by the person issuing the catalogue, when such person or someone else having actual knowledge of the facts can be produced as a witness. Perkins *v.* Buass (Tex. Civ. App.), 32 S. W. 240.

71. Savannah F. & W. R. Co. *v.* Hoffmayer, 75 Ga. 410.

72. **Writing Hearsay.**—In Churchill *v.* Lee, 77 N. C. 341, the plaintiff offered in evidence a paper purporting to be a transfer of the property in suit executed by a person not a party to the litigation to plaintiff's intestate bearing a certain date. The defendant offered evidence tending to prove that such third person was on the day following that date, in a distant State, and asked the witness if he had received a letter from such person shortly previous to that date, to the effect that the writer was compelled to leave the State immediately. The letter was not produced, but the witness said he could produce it. It was held that the letter itself, even if produced, would not have been admissible, because it was mere hearsay, and that the writer himself was a competent witness to prove his whereabouts on the day in question.

In Young *v.* Mertens, 27 Md. 114, on an issue as to the quantity of coal loaded on a boat on a particular trip, the testimony of the steersman of the boat that he had for a long time prior to that trip been engaged in boating coal, and had frequently seen boat loads of coal weighed, thereby acquiring a knowledge of the quantity loaded on different boats, and that he was satisfied that the load on the trip in question was a certain quantity, was objected to as being inferior to a way-bill stating the exact quantity, and that the way-bill should have been produced. The course of dealing showed that the way-bill in question was a mere copy of the statements of weights made up at the mines, and was given to the master of the boat for a particular purpose; and it was held that under the circumstances the way-bill was not better than, if as good testimony as, that of the steersman; that the way-bill was but "a copy of a copy, whereas the oral evidence was direct and positive as such testimony in the nature of things could be."

Historical Works. — In McKinnon *v.* Bliss, 21 N. Y. 206, it was stated that it was doubtful whether any historical work can be read in evidence while the author is living and can be called as a witness to state the sources of his knowledge. See also Morris *v.* Harmer's Heirs, 7 Pet. (U. S.) 554.

73. Rex *v.* Hunt, 3 Barn. & A. 566.

74. Burrell *v.* North, 2 Car. & K. 679.

75. Com. *v.* Morrill, 99 Mass. 542. In this case the court said that the tag referred to was not a document, but an object to be identified. The words written upon it served to identify it. Oral evidence was ad-

merely for the purpose of identifying an article to which the writing was attached[76] or as forming a part of the description of the place where the writing was found.[77]

(6.) Condition of Physical Object. — Whenever evidence of the condition of, or marks upon, a certain object is competent, such condition or marks may be described by a witness without producing the object itself.[78]

c. *Existence of Writing.* — The existence of a writing as a fact may be proved by oral evidence, although it be not produced or its absence accounted for,[79] as for example a party may testify to

missible for that purpose, and it was not necessary to produce the tag. The court said that of course the jury might be better satisfied with an inspection themselves of the tag, but that that was merely a question of credibility, and not admissibility.

76. Com. *v.* Hills, 10 Cush. (Mass.) 530. See also Com. *v.* Blood, 74 Mass. 530; Com. *v.* Morrell, 99 Mass. 542; Com. *v.* Powers, 116 Mass. 337.

Identity of Property Described by Papers. — On an issue as to whether or not an animal alleged to have been stolen, fitted the description given in a bill of sale, given by a person prosecuted for the theft of such animal, the bill of sale is not the primary evidence, the question being the identity of the animal. Hailes *v.* State, 10 Tex. App. 490.

77. Com. *v.* Brown, 124 Mass. 318.

78. Com. *v.* Pope, 103 Mass. 440; Com. *v.* Welch, 142 Mass. 473, 8 N. E. 342; State *v.* McAfee, 148 Mo. 370, 50 S. W. 82; Heneky *v.* Smith, 10 Or. 349, 45 Am. Rep. 143.

79. Existence of Written Instrument Provable by Parol. — *Alabama.* Snodgrass *v.* Branch Bank at Decatur, 25 Ala. 161, 60 Am. Dec. 505; Elliott *v.* Dyche, 80 Ala. 376.

California. — Marriner *v.* Dennison, 78 Cal. 202, 20 Pac. 386.

Connecticut. — Dyer *v.* Smith, 12 Conn. 384; Stoddard *v.* Mix, 14 Conn. 12; Supples *v.* Lewis, 37 Conn. 568.

Georgia. — Central R. Co. *v.* Whitehead, 74 Ga. 441.

Indiana. — Stanley *v.* Sutherland, 54 Ind. 389.

Iowa. — St. Louis & C. R. Co. *v.* Eakins, 30 Iowa 279.

Kentucky. — Lamb *v.* Moberly, 3 T. B. Mon. 179.

Louisiana. — State *v.* Sterling, 41 La. Ann. 679, 6 So. 583.

Michigan. — Kalamazoo Nov. Mfg. Wks. *v.* Macalister, 40 Mich. 84; Hanselman *v.* Doyle, 90 Mich. 142, 51 N. W. 195.

New Hampshire. — Jenness *v.* Berry, 17 N. H. 549.

New York. — Hooker *v.* Eagle Bank of Rochester, 30 N. Y. 83, 86 Am. Dec. 351; Heimerdinger *v.* Lehigh Val. R. Co., 26 Misc. 374, 56 N. Y. Supp. 188.

South Carolina. — Sims *v.* Jones, 43 S. C. 91, 20 S. E. 905; DeLoach *v.* Sarratt, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441.

Texas. — Howard *v.* Britton, 71 Tex. 286, 9 S. W. 73.

Utah. — Scott *v.* Crouch (Utah), 67 Pac. 1068.

Statement of the Rule.—"Whenever the existence of a deed or other writing is directly involved in a judicial proceeding, whether as proof of the precise question in issue or of some subordinate matter that tends to establish the ultimate fact or facts upon which the case turns, such deed or other writing, itself, must be produced, or its absence accounted for, before secondary evidence of its contents is admissible. Yet, while this rule is fully conceded, it is also true that a witness, when testifying, may, for the purpose of making his statements intelligible, and giving coherence to such of them as are unquestionably admissible in evidence, properly speak of the execution of deeds, the giving of receipts, the writing of a letter, and the like, without producing the instrument or writ-

the fact of letters having passed between himself and another.[80]

d. *Matters of Public Interest.*—So, also, matters of general public interest may be proved by parol evidence,[81] as for example the fact that certain public records are missing.[82]

D. DIRECT AND CIRCUMSTANTIAL EVIDENCE. — The rule requiring the production of the best evidence attainable has been held to apply in respect of direct evidence, and when it is disclosed that

ing referred to. To hold otherwise would certainly be productive of great inconvenience, and in some cases would defeat the ends of justice. Reference to written instruments by a witness, for the purpose stated, is to be regarded as but mere inducement to the more material parts of his testimony." Massey *v.* Farmers' Nat. Bank of Virginia, 113 Ill. 334. See also Green *v.* Jordan, 83 Ala. 220, 3 So. 513, 3 Am. St. Rep. 711.

Affidavit Produced Before Justice. Testimony of a justice of the peace is admissible, in an action for false arrest made on a warrant issued by a justice, to prove the fact that a written affidavit was produced before him on which he issued the warrant, but not the contents of the affidavit. Ashley *v.* Johnson, 74 Ill. 392.

The Existence of a Note May Be Proved by an Indorser, without producing it, where it has been cancelled and delivered up to the maker. Bank of Washington *v.* Peirson, 2 Cranch C. C. 685, 2 Fed. Cas. No. 953.

Note as Evidence of Value. In an action to recover the value of services, it is competent to prove that a promissory note had been given by the defendant payable after his death, without producing or accounting for the note, for the purpose of showing the value he placed on the services. Jack *v.* McKee, 9 Pa. St. 235.

Proposition of Compromise. — A witness may testify to the fact that debtor made a written proposition of compromise without producing the writing or accounting for its absence. Snodgrass *v.* Branch Bank of Decatur, 25 Ala. 161, 60 Am. Dec. 505.

Notwithstanding a Statute May Require a Writing evidencing the transfer of property, parol evidence may be given of the existence of such a writing to show the nature of the possession accompanying it without producing the writing itself. Spiers *v.* Willison, 4 Cranch (U. S.) 398.

80. Conoway *v.* Shelton, 3 Ind. 334; Holcombe *v.* State, 28 Ga. 66. And *see* title "LETTERS."

Testimony Which Does Not in Fact Call for the Contents of a letter but merely upon what subject the letter was written, is not objectionable as secondary evidence, the letter itself not being material. Knapp *v.* Wing, 72 Vt., 334, 47 Atl. 1075.

Telegram Notifying Fact of Accident. — Parol evidence is competent to show the fact that one employee notified his superior officer by telegraph of an injury to a co-employee, but not to show the contents of the message, in the absence of notice to produce it or proof of its loss or destruction. Cairo & St. L. R. R. Co. *v.* Mahoney, 82 Ill. 73, 25 Am. Rep. 299.

81. **Matters of Public Interest.** Young *v.* Kansas City F. S. & M. R. Co., 39 Mo. App. 52.

In Brooks *v.* Fairchild, 36 Mich. 232, it was held that where it becomes material on an issue as to the legality of certain school taxes to show that certain lands are within a particular school district, that fact may be proved by parol.

82. Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002. "It was a matter of public interest," said the court in this case, "and upon this ground would be admissible; and it would be more valuable and reliable as coming from persons most interested and who would be expected to have the best information attainable at the time upon the subject. Such a fact could hardly be established at all unless in a way attempted on the trial of this case."

direct evidence of the material fact is probably in existence, circumstantial evidence of that fact cannot be resorted to without first accounting for the absence of the direct evidence.[83]

E. Admissions as Primary Evidence. — a. *Rule in England.* In England the rule is well settled that oral admissions of a party against himself and those claiming under him, although relating to the contents of a writing, deed or record, are primary evidence.[84]

b. *Rule in the United States.* — **(1.) Admissions as Secondary Evidence.** — In the United States, however, the authorities are conflicting on this question. On the one hand there are cases repudiating the English rule and holding that admissions, as they rank only with oral testimony, are competent only when oral evidence would be received to prove the same facts[85] unless made in open

83. Direct and Circumstantial Evidence. — Garbielsky *v.* State, 13 Tex. App. 428; Melton *v.* State, 12 Tex. App. 488; Porter *v.* State, 1 Tex. App. 394; Hoadley *v.* M. Seward & Son Co., 71 Conn. 640, 42 Atl. 997.

In Williams *v.* East India Co., 3 East 192, Lord Ellenborough held that circumstantial evidence should not be received, while a living witness to the facts is not called, although such witness be an agent of the adverse party. But Prof. Thayer, in his selected cases on Evidence, in commenting on this case, says that it is no doubt a misapplication of the "Best Evidence" principle. Thayer Cas. Evid. p. 732.

In Breedlove *v.* State, 26 Tex. App., 445, 9 S. W. 768, a prosecution for murder, it was held that circumstantial evidence to prove the defendant's guilt, was properly admitted as against the objection that the direct testimony of a person who was present with the deceased when killed, should have been produced, because it did not appear that such person saw or knew who did the shooting or that he knew any fact which would have aided the jury in arriving at the truth.

For a full discussion of this question, *see* title "Circumstantial Evidence."

84. Admissions as Primary Evidence. — Earle *v.* Pickin, 5 Car. & P. 542; Slatterie *v.* Pooley, 6 Mees. & W. 664, 10 L. J. Ex. 8; Newhall *v.* Holt, 6 Mees. & W. 662, 4 Jur. 610; King *v.* Cole, 2 Ex. 628; Howard *v.* Smith, 3 Man. & G. 254, 3 Scott (N. R.) 574; Reg. *v.* Welch, 1 Den. Cr. C. 199; Reg. *v.* Baringstrole, 14 Q. B. 611; Steph. Dig. Evid. art. 64. *Compare.* — Taylor Evid. § 411, *et seq.* Where the rule as thus stated is recognized, but its correctness questioned.

Acknowledgment of Debt. — Evidence of an admission by the maker of a bill of exchange, acknowledging his indebtedness thereunder, is admissible, although no notice to produce the bill had been given. Fryer *v.* Brown, R. & M. 145. So also, although such admission and a promise to pay the same be at once reduced to writing and signed by the party making it. Singleton *v.* Barrett, 2 C. & J. 368, 2 Tyr. 409.

85. Admissions Competent to Prove Facts Provable by Parol. *Alabama.* — Morgan *v.* Patrick, 7 Ala. 185; Ware *v.* Roberson, 18 Ala. 105; Fralick *v.* Presley, 29 Ala. 457, 65 Am. Dec. 413.

Arkansas. — Bivens *v.* McElroy, 11 Ark. 23, 52 Am. Dec. 258.

Florida. — Bellany *v.* Hawkins, 17 Fla. 750.

Illinois. — Jameson *v.* Conway, 10 Ill. 227; Mason *v.* Park, 4 Ill. 532.

New York. — Sherman *v.* People, 13 Hun 575; Bryant *v.* Woodruff, 5 N. Y. Leg. Obs. 139.

North Carolina. — Roberts *v.* Roberts, 82 N. C. 29.

Legal Proceedings. — In Jenner *v.* Joliffe, 6 Johns. (N. Y.) 9, there was an attempt to prove the existence of legal proceedings by the confession of the party. The court said: "The confessions of a party have never

court,[86] and that, as in the case of other secondary evidence, the

been considered competent evidence of the execution of a specialty, and much less ought they to be admitted as proof of matters of record. The seizure under the attachment was set up by way of justification, and the defendant was bound to furnish the best evidence the nature of the case would admit, of the existence and legality of the attachment."

Fact of Incorporation. — The admissions of a defendant in a suit against him by a corporation can not be substituted for record evidence or written evidence to prove the fact of incorporation. "If the admission of a defendant at the suit of a corporation," said the court, "was competent evidence of the legal existence of such corporation, or if its existence was to be inferred from the contract with it by its corporate name, unless rebutted, how could the defendant disprove the effect of such admission or inference? What means has he within his control to prove that the plaintiffs have not been duly chartered by some foreign regal, or legislative power, even if the fact is so?" Welland Canal Co. *v.* Hathaway, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51.

Execution of Bond. — In Fox *v.* Riel, 3 Johns. (N. Y.) 477, the confession of the defendant that he executed the bond which was offered in evidence was excluded as incompetent proof of the fact.

Parol Evidence That the Defendant Confessed That He Was Subpoenaed is not proof of that fact when the plaintiff has the subpœna in his possession, and does not produce it. Hasbrouck *v.* Baker, 10 Johns. (N. Y.) 248.

A Party is Not Bound to Accept in Evidence an Admission in Lieu of a Record when the admission is not broad enough to embrace all the facts disclosed by the record; and parol admissions of a party made *in pais* are competent only to prove those facts which may lawfully be proved by parol evidence, but are not competent to supply the place of existing evidence by matter of record. Bank of North America *v.* Crandall, 87 Mo. 208.

Ownership. — In Spirey *v.* State, 26 Ala. 90, a prosecution for theft, it was held that on an issue as to whether the defendant honestly believed that the person from whom he obtained the property was the real owner, and as such real owner had conferred on him the right to take away and sell the property, and under such belief he did take away and sell the property, it was proper for the defendant to introduce declarations of such person tending to show a sale to defendant although they referred to a document which was not produced and whose absence was not accounted for.

86. An Admission on the Trial by a witness, that he had been a short time before the trial, convicted of a misdemeanor, dispenses with further proof of the fact of the conviction. Cash *v.* Cash, 67 Ark. 278, 54 S. W. 744.

A Grantor's Intent to Defraud His Creditors by a transfer of his property may be shown by his statements made on an examination in proceedings supplementary to execution testified to by a person who heard him make them. Kain *v.* Larkin, 62 Hun 621, 17 N. Y. Supp. 223.

Letter-Press Copy Made Primary Evidence. — In Haas *v.* Storner, 21 Misc. 661, 47 N. Y. Supp. 1100, the defendant was asked whether she had not received a certain paper from the plaintiff's assignor, and to look at a paper shown her, and to state whether it was not a letter-press copy of the paper she had signed; to which the objection was made that the original was the best evidence and should be produced. The court overruled the objection and the defendant answered that the paper was such copy, and that she indentified the signature thereto as her handwriting; whereupon the paper was admitted in evidence. It was held that inasmuch as she had admitted the letter-press copy was a copy of the agreement signed by

absence of the primary evidence must first be accounted for before resort can be had to admissions.[87]

Admissions or Confessions of a Party to the Title to Real Property, although they may be good to support a tenancy or to satisfy doubts in case of possession, are not to be received against written evidence of title.[88]

(2.) Admissions as Primary Evidence. — But the more numerous authorities follow the rule as laid down in England,[89] refusing

her, this certainly bound her as an admission against interest and made the evidence primary in its nature; and after admitting these facts she could not insist that her rights were in any way prejudiced by the refusal to require the production of the original writing. *See* title "ADMISSIONS," Vol. I, for an exhaustive discussion of "JUDICIAL ADMISSIONS."

87. When No Notice Had Been Given to Produce a Bill of Sale, and no attempt made to account for its absence, the oral admissions or declarations of the alleged maker are not admissible to prove its contents. Threadgill *v.* White, 11 Ired. (N. C.) 591.

88. Jackson *v.* Shearman, 6 Johns. (N. Y.) 19.

In Jackson *v.* Denison, 4 Wend. (N. Y.) 558, it was held that a plaintiff in ejectment might recover upon the parol admissions of the tenant, having no title himself, that the plaintiff was the owner of the premises.

89. Admissions as Primary Evidence. — *Connecticut.* — Morey *v.* Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611.

Georgia. — Liggett *v.* McLendon, 66 Ga. 725.

Illinois. — Butler *v.* Cornell, 148 Ill. 276, 35 N. E. 767.

Indiana. — Combs *v.* New Albany Rail Mill Co., (Ind.), 46 N. E. 16.

Maine. — Blackington *v.* City of Rockland, 66 Me. 332.

Maryland. — Maurice *v.* Worden, 54 Md. 233, 38 Am. Rep. 384.

Massachusetts. — Smith *v.* Palmer, 6 Cush. 513; Loomis *v.* Wadhams, 8 Gray, 557; Clarke *v.* Warwick Cycle Mfg. Co., 174 Mass. 434, 54 N. E. 887.

Ohio. — Wolverton *v.* State, 16 Ohio, 173, 47 Am. Dec. 373; Edgar *v.* Richardson, 33 Ohio St. 581, 31 Am. Rep. 571.

Pennsylvania. — Edwards *v.* Tracy, 62 Pa. St. 374.

Texas. — Hoefling *v.* Hambleton, 84 Tex. 517, 19 S. W. 689; *Compare* Williams *v.* Durst, 25 Tex. 667, 78 Am. Dec. 548.

Virginia. — Taylor *v.* Peck, 21 Gratt. 11.

Statement of Rule. — "The rule that oral admissions of a party against himself and those claiming under him, although relating to the contents of a writing, deed or record, are primary evidence, seems to be well established. . . It is established in England and the American courts as shown by the authorities cited. Primary evidence means the document itself, produced for the inspection of the court . . . or an admission of its contents proved to have been made by a party whose admissions are relevant." Morey *v.* Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611.

"The general principles as to the production of written evidence as the best evidence do not apply to the admissions of parties; as what a party admits against himself may reasonably be taken to be true." Smith *v.* Palmer, 6 Cush. (Mass.) 513.

In a writ of entry, parol declarations that demandant was in under a lease are admissible to show a claim of title in demandant, without producing the lease. Straw *v.* Jones, 9 N. H. 400.

Admissions of Indebtedness. Admissions made by the maker of the note that he owed a certain sum of money that was payable to the plaintiff for certain lands bought of him, are good against him, and title deeds need not be produced nor the

sanction to the theory that admissions rank only with parol testimony.[90]

A Witness May Testify as to What Was Read to Him as being the contents of a letter. He is not thereby testifying as to what was the contents of the letter, but what was read to him.[91]

F. WITNESSES. — It is very generally held that the distinction between primary and secondary evidence has no application in the case of the oral testimony of witnesses.[92] Thus the testimony of

consideration be more fully proven. Edgerton *v.* Edgerton, 8 Conn. 6.

Amount of Judgment. — In Davis *v.* Kingsley, 13 Conn. 285, the issue was as to the amount of a judgment lien existing on certain land; and it was held that admissions of the judgment creditor as to the amount were competent evidence.

Confessions by Grantor that he had conveyed certain land are evidence against him and his executor of the identity of the land referred to in the deed; but evidence of declarations or acts of his subsequent to the deed is not admissible to defeat the grant by showing that it was not the lot referred to. Patton *v.* Goldsborough, 9 Serg. & R. (Pa.) 47.

90. "The Admissions of a Party Are Not Open to the Same Objection Which Belongs to Parol Evidence from Other Sources. A party's own statements and admissions are, in all cases, admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed or record." Smith *v.* Palmer, 6 Cush. (Mass.) 513.

For a Further Discussion of this question, *see* "ADMISSIONS," Vol. I, p. 600.

91. Paige *v.* Loring, 1 Holmes 275, 18 Fed. Cas. No. 10,672.

92. U. S. *v.* Gibert, 2 Sumn. (U. S.) 19. See also Western Union Tel. Co. *v.* Stevenson, 128 Pa. St. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515; Governor *v.* Roberts, 2 Hawks (N. C.) 26; Austin *v.* Boyd, 23 Mo. App. 317; State *v.* Cain, 9 W. Va. 559, (where the testimony of a person whose age was in question was received, although both of his parents were living.) Com. *v.* Pratt, 137 Mass. 98; Green *v.* Cawthorne, 4 Dev. Law (N. C.) 409.

A Person Who Was Present at the Time a Document Was Written and a letter-press copy taken thereof, is competent to show that the document so copied was the same which he afterwards served on another person and is not to be excluded as being a witness inferior to the person who wrote the document itself. Althouse *v.* Town of Jamestown, 91 Wis. 46, 64 N. W. 423.

Autopsy. — In People *v.* Willson, 109 N. Y. 345, 16 N. E. 540, it was held that a physician who was present at, although he did not actively participate in, an autopsy, was properly allowed to describe what was done and what appeared to be the fact from the acts of the other physician, as against the objection that the latter should have been called.

In Smith *v.* Valentin, 19 Minn. 452, it was held that the testimony of the clerk of the courts was competent to prove a decree which was lost, notwithstanding that the judge who signed the decree was living and accessible as a witness. "Parol evidence on the subject, however, whether of the judge or the clerk was all of the same kind. That of the clerk did not differ in degree from that of the judge. That a certain decree was once in existence being the fact to be shown it might be that the man whose duty it was to sign it would be more likely to recall the facts than the man whose duty it was to file it, and it might be otherwise; but such considerations have nothing to do with the quality of the evidence. The witnesses in either case testify only from their recollection and there is no legal presumption that the recollection of the one is better than that of the other."

A constable who served a summons and a justice of the peace succeeding the one who issued it in that office may prove and identify it. The

a witness testifying to handwriting from his knowledge thereof and acquaintance therewith is not inferior to testimony of the person whose handwriting is in question.[93]

The Testimony of a Person Present at the Time a Survey Was Made and hence testifying thereto of his own knowledge, is not inferior in grade to that of the surveyor himself.[94]

The Testimony of a Person Who Overheard a Conversation is not secondary evidence.[95]

Non-consent to Theft of Goods. — In prosecutions for theft, it is held that if the law expressly requires proof of the owner's non-consent, the testimony of the owner is the best evidence, and the absence of his testimony must be satisfactorily explained before other evidence can be received.[96]

justice who issued it need not be called. Sellars *v.* Cheney, 70 Ga. 790.

In Hines *v.* Johnston, 95 Ga. 629, 23 S. E. 470, it was held that a witness who was neither the clerk of the Superior Court nor the deputy was, over an objection that he was not the legal custodian of that court, competent to testify that he had examined the records thereof, and that no instrument of a certain import appeared thereon. The court said: "Official character does not give to any person exclusive competency to testify to any matter concerning which the public, or any other person, may be as well informed as he. Any witness who had read the records in the clerk's office would know as well as the clerk himself, whether a particular deed was recorded there. If it was not so recorded, he could testify to such a fact, as well as the clerk. But if, on the other hand, it was sought to show that a particular paper was recorded in the clerk's office, this fact could not be proven by any witness other than the clerk, nor by him, except by a certified copy of such record under his hand and seal. The certificate of the clerk is sufficient to authenticate any record existing in his office, but his certificate to the fact that a particular record was not in his office could not be admissible evidence. In the latter case, any witness who knew the fact could testify to its truthfulness."

In Greany *v.* L. I. R. Co., 101 N. Y. 419, 5 N. E. 425, it was held that the testimony of passengers upon railway train causing injuries for which plaintiff was suing, who were in such position that it would not have been impossible for them to have heard signals by the engine, to the effect that they heard no signals, was competent. The court said that the best evidence of the fact in dispute would undoubtedly have been the testimony of the persons having the management and custody of the engine, but that inasmuch as they were in the employ of the defendant the law would not require the plaintiff to resort to evidence in the hands of the defendant; although it was expressly stated that the testimony of all other persons than those in charge of the engine would be secondary in character.

93. Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767; McCaskle *v.* Amarine, 12 Ala. 17; Royce *v.* Gazam, 76 Ga. 79; Smith *v.* Prescott, 17 Me. 277; Lefferts *v.* State, 49 N. J. Law 26, 6 Atl. 521; McCully *v.* Malcom, 9 Humph. (Tenn.) 193; Foulkes *v.* Com., 2 Rob. (Va.) 836. *Contra* Cheritree *v.* Roggen, 67 Barb. (N. Y.) 124; Haun *v.* State, 13 Tex. App. 383, 44 Am. Rep. 706. *See* title "HANDWRITING."

94. Wheeler *v.* State, 114 Ala. 22, 21 So. 941; Richardson *v.* Milburn, 17 Md. 67.

95. People *v.* Smith, 8 Rich. (S. C.) 90.

96. Smith *v.* State, 13 Tex. App. 507. See also Hunter *v.* State, 13 Tex. App. 16; Stewart *v.* State, 9 Tex. App. 321.

III. ADMISSIBILITY OF SECONDARY EVIDENCE.

1. In General. — The rule requiring the best evidence of which the nature of the case is susceptible is only another form of expression for the idea that when the higher proof is lost, or unattainable, the best attainable may be given. The case admits of no better evidence than that which the party possesses, if the superior proof is out of his power without his fault. The rule does not mean that a party's rights are to be sacrificed and be lost because he cannot produce evidence beyond his control. It only means that so long as the higher or superior evidence is within his possession or may be reached by him, he shall give no inferior proof in relation to it. Particular rules always relax themselves to meet absolute necessity, or that necessity which is occasioned by occurrences common amongst men.[97]

2. Effect of Failure to Object. — And, in the absence of a proper and timely objection that a case is not made for the reception of secondary evidence, such evidence may be received and then becomes primary evidence.[98] Nor can the party whose secondary evidence is thus received subsequently object to his adversary resorting to evidence of a like character relative to the same matter at issue.[99]

3. Relevancy of Evidence Offered. — The admissibility of secondary evidence must of course depend upon its legitimate tendency to prove the facts sought to be established; and where such evidence has no such tendency it is not error to exclude it, even although the proper foundation has been laid for its admission.[1] But immateriality of the document constituting the primary evi-

So where a person has the control, care, or management of property owned by another, the testimony of each is the best evidence to show his non-consent. Bowling *v.* State, 13 Tex. App. 338, following Wilson *v.* State, 12 Tex. App. 481.

See also Williamson *v.* State, 12 Tex. App. 169.

97. Thomas *v.* Thomas, 2 La. (O. S.) 166; Goodrich *v.* Mott, 9 Vt. 395. And see discussion in succeeding sections in illustration of this question.

98. Graff *v.* Adams, 100 Iowa 481, 69 N. W. 539. See also Williams *v.* Wilcox, 8 Ad. & E. 314; Hattersley *v.* Burrows, 4 Colo. App. 538, 36 Pac. 889; Lehigh Val. Coal Co. *v.* Ward, 149 Pa. St. 119, 24 Atl. 183; Orr & Lindsley Shoe Co. *v.* Hance, 44 Mo. App. 461.

99. Furbush *v.* Goodwin, 28 N. H. 425. *Contra.* — Shedden *v.* Patrick, 2 Sw. & Tr. 170, 30 L. J. Mat. 217. *See* fully as to this principle, title "OBJECTIONS TO EVIDENCE."

1. Siebert *v.* Ragsdale, 19 Ky. L. Rep. 1869, 44 S. W. 653.

When secondary evidence is offered, it is clearly necessary for the court to be informed in advance what is proposed to be proved thereby, in order that it may pass intelligently on the question of the admissibility of the evidence offered. Berkowsky *v.* Cahill, 72 Ill. App. 101.

It is not error to exclude secondary evidence although the proper foundation has been laid therefor, where it does not appear that the evidence was either competent or material. Stevens *v.* State, 50 Kan. 712, 32 Pac. 350.

dence in one view of the pleadings does not excuse the necessity of accounting for its non-production so long as it is in fact material in any aspect of the pleadings.[2]

4. Existence of the Primary Evidence. — A. Burden of Proof. a. *General Rule.* — Of course, involved in the right to resort to secondary evidence is the fact of the existence of the primary evidence; and hence before secondary evidence of the contents of a writing can be given, the party offering such evidence must first establish the existence of the original writing as a genuine instrument.[3] Nor does an agreement to allow secondary evidence of the contents of a paper alleged to be lost dispense with proof of its execution.[4] But secondary evidence is not to be excluded on the ground that there is no proof of the legal existence of the

2. Trammell *v.* Hudman, 86 Ala. 472, 6 So. 4. *Compare,* Nye *v.* Gribble, 70 Tex. 458, 8 S. W. 608.

3. Burden of Proving Existence of Primary Evidence. — *England.* Whitfield *v.* Fausset, 1 Ves. 389.

Canada. — Ansley *v.* Breo, 14 U. C. C. P. 371.

United States. — U. S. *v.* Knight, 1 Black 227, 17 L. ed. 76.

Alabama. — Hughes *v.* Southern Warehouse Co., 94 Ala. 613, 10 So. 133; Hanna *v.* Price, 23 Ala. 826; Anderson *v.* Snow & Co., 8 Ala. 504; Singer Mfg. Co. *v.* Riley, 80 Ala. 314.

California. — Reynolds *v.* Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449; People *v.* Hust, 49 Cal. 653.

Colorado.—See Reynolds *v.* Campling, 23 Colo. 105, 46 Pac. 639.

Connecticut. — Kelsey *v.* Hammer, 18 Conn. 311.

Illinois. — Crane Co. *v.* Tierney, 175 Ill. 79, 51 N. E. 715.

Indiana. — Forsythe *v.* Park, 16 Ind. 247.

Iowa. — Cadwell *v.* Dullaghan, 74 Iowa, 239, 37 N. W. 178; Williams *v.* Williams, 108 Iowa 91, 78 N. W. 792.

Kentucky. — Embry *v.* Millar, 1 A. K. Marsh. 300, 10 Am. Dec. 732; Helton *v.* Asher, 103 Ky. 730, 46 S. W. 22, 82 Am. St. Rep. 601; Combs. *v.* Com., 15 Ky. L. Rep. 660, 25 S. W. 590.

Maine. — Kimball *v.* Morrill, 4 Me. 368; Moor *v.* Cary, 42 Me. 29.

Maryland. — Young *v.* Mackall, 4 Md. 362; Wright *v.* State, 88 Md. 436, 41 Atl. 795; Gunther *v.* Bennett, 72 Md. 384, 19 Atl. 1040.

Minnesota. — Groff *v.* Ramsey, 19 Minn. 44; Board of Education *v.* Moore, 17 Minn. 412; Stocking *v.* St. Paul Trust Co., 39 Minn. 410, 40 N. W. 365.

Mississippi. — Eakin *v.* Vance, 10 Smed. & M. 549, 48 Am. Dec. 770; Weiler *v.* Monroe Co., 74 Miss. 682, 22 So. 188.

Missouri. — Oatman *v.* Curry, 25 Mo. 433; Gould *v.* Trowbridge, 32 Mo. 291; Brinkman *v.* Luthers, 60 Mo. App. 512; Holman *v.* Bacchus, 24 Mo. App. 629.

New Hampshire. — Bachelder *v.* Nutting, 16 N. H. 261.

New York. — McPherson *v.* Rathbone, 7 Wend. 216; Nichols *v.* Kingdon Iron Ore Co., 56 N. Y. 618; Scott *v.* Shugerland, 44 Hun 254.

Pennsylvania.—McReynolds *v.* McCord, 6 Watts 288; Baskin *v.* Seechrist, 6 Pa. St. 154; Rhodes *v.* Seibert, 2 Pa. St. 18; McCredy *v.* Schuylkill Nav. Co., 3 Whart. 424, 440; Flinn *v.* McGonigle, 9 Watts & S. 75; Porter *v.* Wilson, 13 Pa. St. 641.

Texas. — Hampshire *v.* Floyd, 39 Tex. 103; Harvey *v.* Edens, 69 Tex. 420, 6 S. W. 306.

Deposition Not Returned into Court. — Secondary evidence of the contents of a deposition is inadmissible, when the original has not been returned into court as required by law, nor filed in the cause, nor is among the papers in the case. Carter *v.* Davis, 81 Me. 668.

4. Moor *v.* Cary, 42 Me. 29.

primary evidence where the witness had previously been allowed to testify to its existence without objection.[5]

Letters.— Where secondary evidence as to the contents of a letter claimed to have been written by one of the parties is sought to be introduced, it must first be established by competent evidence that the letter was written by such party or signed by him.[6]

Statutes. — Sometimes it is expressly required by statute that there must be proof of the existence of a genuine instrument as essential to the admissibility of secondary evidence.[7]

b. *Judicial Records and Documents.* — So, also, the rule in respect of judicial records and documents is that before inferior evidence can be received of their contents, their existence must first be established.[8]

c. *Deeds.* — So, secondary evidence of the contents of a deed[9] or of bond for a deed[10] cannot be received without proof of an original duly executed.

d. *Ancient Documents.* — When the primary evidence, which is lost, would, if produced, be admissible as an ancient instrument, the rule admitting ancient instruments without proof of their execution applies to secondary evidence of its contents.[11]

5. Terry *v.* Husbands, 53 S. C. 69, 30 S. E. 826.

6. Stevens *v.* State, 50 Kan. 712, 32 Pac. 350. *See* also Shea *v.* Seelig, 89 Mo. App. 146.

Reply to Letter. — Where a party has not made proper proof of a letter from himself to the adverse party, it is not competent for him to testify to the contents of reply letters alleged by him to have been lost without first establishing the genuineness of the signatures thereto. Linn *v.* New York Life Ins. Co., 78 Mo. App. 192.

7. In Georgia, the code (§ 3769) expressly requires such proof. Doe *ex dem*, Winchester *v.* Aiken, 31 Fed. 393. See also Doe *v.* Biggers, 6 Ga. 188; Oliver *v.* Persons, 30 Ga. 391, 76 Am. Dec. 657; Baker *v.* Adams, 99 Ga. 135, 25 S. E. 28.

8. Morrison *v.* Whiteside, 17 Md. 452, 79 Am. Dec. 660. See also Weatherhead *v.* Baskerville, 11 How. (U. S.) 329; Smith *v.* Wilson, 17 Md. 460, 79 Am. Dec. 665. And *see* fully on this question, title "RECORDS."

9. Burden of Proving Due Execution of Deeds. — *Florida.* — Neal *v.* Spooner, 20 Fla. 38.

Georgia. — Dasher *v.* Ellis, 102 Ga. 830, 30 S. E. 544; Bagley *v.* Kennedy, 94 Ga. 651, 20 S. E. 105; Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351; Smith *v.* Smith, 106 Ga. 303, 31 S. E. 762.

Illinois. — Mariner *v.* Saunders, 10 Ill. 113.

Kentucky. — Elmondorf *v.* Carmichael, 3 Litt. 472, 14 Am. Dec. 86.

Maine. — Dunlap *v.* Glidden, 31 Me. 510; Elwell *v.* Cunningham, 74 Me. 127.

Missouri — Hardin *v.* Lee, 51 Mo. 241.

New York. — Edwards *v.* Noyes, 65 N. Y. 125.

North Carolina. — Tooley *v.* Lucas, 3 Jones Law 146.

Pennsylvania. — Jack *v.* Woods 29 Pa. St. 375.

South Carolina — Howell *v.* House, 2 Mill Const. 80; Wollfolk *v.* Graniteville Mfg. Co., 22 S. C. 332.

Texas. — Cox *v.* Rust, (Tex. Civ. App.), 29 S. W. 807.

For a Full Discussion of This Question *see* the titles, "DEEDS," "RECORDS," "TITLE."

10. Helton *v.* Asher, 103 Ky. 730, 46 S. W. 22, 82 Am. St. Rep. 601.

11. Presumption of Execution of Ancient Documents. — Baucum *v.* George, 65 Ala. 259; Beall *v.* Dearing, 7 Ala. 124; Smith *v.* Cavitt, 20 Tex. Civ. App. 558, 50 S. W. 167;

e. *Existence of Primary Evidence Not Disclosed by Case.*—When the nature of the case does not disclose the existence of better and higher evidence, the party objecting to the evidence offered on the ground that it is secondary must not only prove its existence,[12] but also that it was known to the other party in time to have produced it on the trial.[13]

B. Mode of Proof. — a. *Oral Evidence.* — The rule of evidence prohibiting parol evidence to prove the contents of written instruments or records does not apply to parol evidence of the existence of such writings preliminary to their introduction or proof of their loss or destruction.[14] But the witness offered for this purpose must have knowledge of the fact.[15]

b. *Attesting Witnesses.* — If the original instrument was attested by witnesses, they should be called to prove its execution, or their absence accounted for.[16]

c. *Admissions.* — Admissions and confessions of the opposite party admitting the existence of the original writing have been received as proper evidence.[17]

d. *Circumstances.* — Before the execution or former existence of a deed can be established by circumstances, so as to let in sec-

Walker *v.* Peterson, (Tex. Civ. App.), 33 S. W. 269. And *see* the title "Ancient Documents."

A Sale Under Execution Made in Another State Nearly Thirty Years Before the Trial may be proved by parol without the production of the execution and return. Fretwell *v.* Neal, 11 Rich. Eq. (S. C.) 559.

12. Allen *v.* State, 8 Tex. App. 67; Minneapolis Times Co. *v.* Nimocks, 53 Minn. 381, 55 N. W. 546. See also Burton *v.* Driggs, 20 Wall. (U. S.) 125; Com. *v.* Goodwin, 122 Mass. 19; Conger *v.* Converse, 9 Iowa 554.

13. Minneapolis Times Co. *v.* Nimocks, 53 Minn. 381, 55 N. W. 546; Wilson *v.* South Park Comrs., 70 Ill. 46; Lewis *v.* San Antonio, 7 Tex. 288.

14. Oral Evidence to Prove Existence of Written Evidence. — *Indiana.* Stoner *v.* Ellis, 6 Ind. 152.

Iowa. — Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305.

Kentucky. — Gill *v.* Dewitt, 7 Ky. L. Rep. 594.

Louisiana. — Thomas *v.* Thomas, 2 La. (O. S.) 166.

Nebraska. — Ponca *v.* Crawford, 18 Neb. 551, 26 N. W. 365, 23 Neb. 662, 37 N. W. 609.

Tennessee. — Read *v.* Statton, 3 Hayw. (Tenn.) 159, 9 Am. Dec. 740.

Texas. — Hall *v.* York, 16 Tex. 18.

The Existence of a Record may be proved by parol for the purpose of showing the regularity of legal proceedings where the original is lost or destroyed, as in the case of any other lost instrument. *In re* Warfield's Will, 22 Cal. 51, 83 Am. Dec. 49. And the testimony of a justice is competent to prove the former existence of a judgment rendered by him. Read *v.* Statton, 3 Hay. (Tenn.) 159, 9 Am. Dec. 740.

Entry of an Acknowledgment of a Deed Made in Open Court is not the best evidence to prove the execution of the deed in laying the foundation for secondary evidence of the contents, but that fact may be proved by parol. Henderson *v.* Henderson, 55 Mo. 543.

15. Edisto Phosphate Co. *v.* Stanford, 112 Ala. 493, 20 So. 613.

16. Benjamin *v.* Ellinger, 4 Ky. L. Rep. 317.

For a Full Discussion of this question *see* the title, "Private Writings."

17. Proof of Existence of Primary Evidence by Admissions. — Fralick *v.* Presley, 29 Ala. 457, 65 Am. Dec.

ondary evidence thereof, it must be made to appear that no direct evidence of such fact can be procured.[18]

e. *Copy.* — It has been held that an office copy of a deed not authorized to be recorded is not of itself and alone competent evidence to show the existence of the alleged original deed.[19]

A Copy of an Instrument from a Public Record Duly Certified as such is *prima facie* evidence of the existence of the instrument as a valid instrument only where the law requires the instrument to be recorded.[20]

C. Cogency of Proof. — The amount of evidence to establish the existence of the primary evidence will vary with the circumstances of each particular case. Where no direct issue is made upon the fact slight evidence will be sufficient;[21] and while the

413; Burlington Lumber Co. *v.* Whitebreast Coal & Min. Co., 66 Iowa 292, 23 N. W. 674; Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347. And *see* title "Private Writings."

Acquiescence in Acts Done Under Writing. — The execution of a lost written contract is properly shown by evidence of acquiescence in acts which, it must be held, a party knew could not be done except under authority of a written contract. Veghte *v.* Raritan Water Power Co., 19 N. J. Eq. 142.

18. Proof of Existence of Primary Evidence by Circumstances. — Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491; Bright *v.* Young, 15 Ala. 112; Jackson *v.* Woolsey, 11 Johns. (N. Y.) 446; McBurney *v.* Cutler, 18 Barb. (N. Y.) 203; Patrick *v.* Badger, (Tex. Civ. App.), 41 S. W. 538.

In Johnson *v.* Lyford, 9 Tex. Civ. App. 85, 29 S. W. 57, it was objected that the testimony to show the loss of the original instrument was not sufficient because the witness did not state that he ever saw such instrument or had actual knowledge of its existence, and because there was no direct evidence from any one that it ever existed. But the court, in overruling the contention, said: "If an affiant who proposes to establish by circumstantial evidence, the execution of a lost instrument must first swear that he or some one else had seen it or had actual knowledge of its existence, such requirement would limit and restrict the rule of evidence now well established, that the execution and delivery of a deed may be shown by a train of circumstances, to cases in which a deed purporting to be such a one as that which it is proposed to establish is first shown by direct or positive evidence to have once existed. We do not understand the rule to be restricted to such cases."

Ex Parte Affidavit. — An instrument which purports to be a copy of an original, following the acknowledgment of which is an affidavit that the copy is a true and substantial copy of the original, sworn to by the party in whose favor the original purports to have been made, who has since deceased, is not competent as a circumstance to show the existence of the original. Masterson *v.* Jordan, (Tex. Civ. App.), 24 S. W. 549. "What is this instrument,' said the court, "but an *ex parte* affidavit of Morris made in his own interest? It is nothing more than the declaration of a person since deceased that another had conveyed to him certain lands. Declarations of deceased persons are admissible for certain purposes but not a purpose of this character. It is easy to perceive that if the instrument offered could become evidence it would constitute direct proof of the existence of the conveyance instead of a circumstance tending to prove that fact."

19. Wendell *v.* Abbott, 43 N. H. 68. And *see* title "Private Writings."

20. Kelsey *v.* Hanmer, 18 Conn. 311.

21. Slight Evidence of Existence

evidence should not be vague and shadowy,[22] a strong degree of probability of its existence is enough.[23] But if an issue is made by the pleadings as to the existence of the primary evidence the court ought to require some more cogent and satisfactory evidence.[24] And it has been held that the execution of a lost deed must be quite as strictly proved as if the deed were itself produced in court.[25]

IV. EXCUSES FOR NON-PRODUCTION OF PRIMARY EVIDENCE.

1. In General. — The theory on which evidence of a secondary or substitutionary character is admitted is, that the production of

of Primary Evidence Sufficient. Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638 (*citing* 1 Greenl. Evid. 558; Haun *v.* State, 13 Tex. App. 383, 44 Am. Rep. 706; Flinn *v.* McGonigle, 9 Watts & S. [Pa.] 75.)

In Georgia, by Express Statute, the amount of evidence necessary to show the existence of the genuine original must vary with the circumstances of each case. If no direct issue is made upon the fact, slight evidence is sufficient. Doe *ex dem.* Winchester *v.* Aiken, 31 Fed. 393. See also Poulet *v.* Johnson, 25 Ga. 403; Ellis *v.* Smith, 10 Ga. 253.

Where it is fairly and reasonably inferable from the evidence of the plaintiff, as a witness in her own behalf, that a paper offered in evidence is a copy of another paper which had been signed by her, and attested by two witnesses since deceased, and the lost original having been accounted for, the copy, being relevant to the issue, is admissible in evidence over an objection that there was no proof of the existence and execution of the original. Baker *v.* Adams, 99 Ga. 135, 25 S. E. 28.

22. Vague and Shadowy Testimony Not Enough. — Porter *v.* Wilson, 13 Pa. St. 641.

23. Strong Degree of Probability of its existence is enough, according to Bouldin *v.* Massie, 7 Wheat. (U. S.) 122, 5 L. ed. 414.

24. Oliver *v.* Persons, 30 Ga. 391, 76 Am. Dec. 657. And see Berg *v.* Carroll, 40 N. Y. St. 811, 16 N. Y. Supp. 175, wherein it is held that to justify reversal for excluding secondary evidence the proof relied upon to show that the primary evidence did at one time exist should be so conclusive that it would be error of law for the court to hold otherwise. See also Nichols *v.* Kingdom Iron Ore Co., 56 N. Y. 618.

Where the Only Evidence of the Existence of a Receipt Is a Party's Own Testimony that the other party gave it to him, which the latter denies, secondary evidence is not admissible. Slocum *v.* Bracy, 65 Minn. 100, 67 N. W. 843.

Testimony Conflicting. — Error, if any, in refusing to strike out oral evidence of a fact on the ground that there was a writing evidencing such fact, is without merit where the testimony is conflicting as to whether there was in fact a writing in existence. Ingram *v.* Sumter Music House, 51 S. C. 281, 28 S. E. 936.

25. Mariner *v.* Saunders, 10 Ill. 113.

See More Fully on This Question the title "DEEDS."

The existence of an alleged original deed is not sufficiently proved by the testimony of one of the grantors. Goldee *v.* Bressler, 105 Ill. 419. See also Smith *v.* Brannan, 13 Cal. 107.

Parol Evidence That One Party Conveyed the Land to Another, but with no testimony as to the identity, quality, or quantity of the estate conveyed, is not sufficient to establish a deed. Stewart *v.* Stewart, 19 Fla. 846.

But proof that a deed was made, showing the grantors, its date, the consideration, whether warranty or quit claim, and the property conveyed, sufficiently shows the execution and delivery of the deed to let in secondary evidence. To require more would in most instances practically amount to an exclusion of

the better evidence is out of the party's power,[26] and accordingly all that the law requires is a reasonable assurance that the better

oral evidence in the case of a lost or destroyed deed. Perry *v.* Burton, 111 Ill. 138. And in Belton *v.* Briggs, 4 Des. (S. C.) 465, it was held that the existence of title deeds in fee simple to land were sufficiently established by evidence of the execution of conveyances of the land in question, and of the payment of the purchase money equal to the value of the fee simple.

26. Theory of Admissibility of Secondary Evidence. — *England.* Whitfield *v.* Fausset, 1 Ves. 389.

United States. — Anglo-American Pkg. & Prov. Co. *v.* Cannon, 31 Fed. 313; U. S. *v.* Reyburn, 6 Pet. 352; Bouldin *v.* Massie, 7 Wheat. 122; Riggs *v.* Tayloe, 9 Wheat. 483.

Alabama. — Bogan *v.* McCutchen, 48 Ala. 493; Georgia Pac. R. Co. *v.* Propst, 89 Ala. 1, 7 So. 635.

Arkansas.—Taylor *v.* The Auditor, 4 Ark. 574.

California. — Marriner *v.* Dennison, 78 Cal. 202, 20 Pac. 386.

Colorado. — Reynolds *v.* Campling, 23 Colo. 105, 46 Pac. 639; Hobson *v.* Porter, 2 Colo. 28.

Connecticut. — Jewet *v.* Worthington, 1 Root 226.

Georgia. — Allen *v.* State, 21 Ga. 217, 68 Am. Dec. 457; Hayden *v.* Mitchell, 103 Ga. 431, 30 S. E. 287.

Idaho. — Idaho Mercantile Co. *v.* Kalanquin, (Idaho), 66 Pac. 938.

Indiana. — Manson *v.* Blair, 15 Ind. 242; Newton *v.* Donnelly, 9 Ind. App. 359, 36 N. E. 769.

Iowa. — State *v.* Penny, 70 Iowa 190, 30 N. W. 561.

Kansas. — Perkins *v.* Erniel, 2 Kan. 325; Vancil *v.* Hagler, 27 Kan. 407.

Kentucky. — Hughes *v.* Eastin, 4 J. J. Marsh. 572, 20 Am. Dec. 230; Buckwalter *v.* Arnett, 17 Ky. L. Rep. 1233, 34 S. W. 238.

Louisiana. — Hall *v.* Acklen, 9 La. Ann. 219; Spencer *v.* Conrad, 9 Rob. 78; Thomas *v.* Thomas, 2 La. (O. S.) 166.

Maryland. — Marshall *v.* Haney, 9 Gill 185, 52 Am. Dec. 690.

Massachusetts. — Com. *v.* Jeffries, 7 Allen 548, 83 Am. Dec. 712; Com. *v.* Emery, 2 Gray 80.

Michigan. — Simpson *v.* Waldby, 63 Mich. 439, 30 N. W. 100.

Minnesota. — State *v.* Taunt, 16 Minn. 109.

Mississippi. — Doe *v.* McCaleb, 2 How. 756.

Missouri. — Benton *v.* Craig, 2 Mo. 198.

New Hampshire. — Manchester & L. R. *v.* Fisk, 33 N. H. 297; Bachelder *v.* Nutting, 16 N. H. 261.

New Jersey.—Johnson *v.* Arnwine, 42 N. J. Law 451 36 Am. Rep. 527.

New York. — Griswold *v.* Metropolitan Elevated R. Co., 14 Daly 484; Cary *v.* Campbell, 10 Johns. 363; Hartman *v.* Hoffman, (App. Div.), 72 N. Y. Supp. 982.

North Carolina. — Rumbough *v.* Southern Imp. Co., 112 N. C. 751, 17 S. E. 536, 34 Am. St. Rep. 528; Reman *v.* Green, 3 Ired, Eq. 54, Ashe *v.* DeRossett, 8 Jones L. 240.

Oregon. — Wiseman *v.* Northern Pac. R. Co., 20 Or. 425, 26 Pac. 272, 23 Am. St. Rep. 135.

Pennsylvania. — Stern *v.* Stanton, 184 Pa. St. 468, 39 Atl. 404; Carland *v.* Cunningham, 37 Pa. St. 228.

South Carolina. — DeLoach *v.* Sarratt, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441.

Tennessee. — Creed *v.* White, 11 Humph. 549.

Texas. — Wade *v.* Work, 13 Tex. 482.

Utah. — State *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295.

Virginia. — Lunsford *v.* Smith, 12 Gratt. 554.

Wyoming. — Cornish *v.* Ter. 3 Wyo. 95, 3 Pac. 793.

The Rule of Law is that when a document is to be regarded as the best evidence of its contents and therefore to be produced in the first instance, the rule requiring a party to produce the best evidence only holds when such production is possible; and on its being shown that for some reason not within the control of the party the best evidence cannot be introduced, secondary evi-

evidence is not withheld or suppressed.[27] But if the circumstances will justify a well-grounded suspicion that the higher evidence is kept back by design the secondary evidence cannot be received.[28] And testimony as to the contents of an instrument not produced in court, nor its non-production accounted for, is properly stricken out.[29]

The Mere Declaration of the Witness That He Has Not the Original With Him is not sufficient to let in secondary evidence of its contents.[30]

2. Party Absent from State. — Nor is it enough to let in secondary evidence that the party on whose behalf it is offered is absent from the place of trial and in a distant state and has the primary evidence in his possession.[31]

3. Primary Evidence Excluded on Objection. — Where a writing is excluded on objection of one of the parties, such party certainly cannot then object to the introduction of parol evidence of the contents of the writing by the other party.[32]

4. Alteration of Original Instrument. — Where a paper has been

dence may be given. New York Car Oil Co. *v.* Richmond, 6 Bosw. (N. Y.) 213.

Privileged Communications. — In Calcroft *v.* Guest, (1898) 1 Q. B. 759, 67 L. J. Q. B. 505, 78 L. T. 283 46 W. R. 420, it was held that the fact that a document belonging to a party of which the opposite party has taken copies is privileged from compulsory production and use as evidence does not preclude the party using the copies as evidence in his favor. Following Lloyd *v.* Mostyn, 10 Mees. & W. 478, 12 L. J. Ex. 1.

27. Clark *v.* Hornbeck, 17 N. J. Eq. 430. And see succeeding sections.

Secondary Evidence of Bank Notes Offered by the Prosecution on an indictment for their theft, is not to be rejected, if the best that can then be produced, merely because the inability to produce the originals is the result of inexcusable negligence on the part of the bank officers. State *v.* Taunt, 16 Minn. 109.

The fact that an attorney in the case and a witness each supposed that the other had the letters and would bring them to the trial does not excuse the non-production of the primary evidence. Maye *v.* Carberry, 2 Cranch 336, 16 Fed. Cas. No. 9339.

Injunction Proceedings. — In Davis *v.* Covington & M. R. Co., 77 Ga. 322, 2 S. E. 555, it was held that on the hearing of an application for an injunction, the question of receiving secondary evidence is somewhat in the discretion of the presiding judge, and that he need not require absolutely that all means of discovering the primary evidence should be exhausted.

28. Renner *v.* Bank of Columbia, 9 Wheat. (U. S.) 581; People *v.* Lange, 90 Mich. 454, 51 N. W. 534.

29. Huffman *v.* Knight, 36 Or. 581, 60 Pac. 207.

30. Large *v.* Van Doren, 14 N. J. Eq. 208.

31. West *v.* Cameron, 39 Kan. 736, 18 Pac. 894; Alabama G. S. R. Co. *v.* Mt. Vernon Co., 84 Ala. 173, 4 So. 356.

32. Nebeker *v.* Harvey, 21 Utah 363, 60 Pac. 1029; Burnett *v.* Crawford, 50 S. C. 161, 27 S. E. 645; Dull *v.* Gordon, 24 La. Ann. 478.

Corporate Records Excluded. Parol evidence may be received to show who are the acting officers of a corporation after the exclusion of the corporate records because the corporation was not legally organized. People *v.* Leonard, 106 Cal. 302, 39 Pac. 617.

Writing Excluded for Want of Proof of Execution. — Where the law requires a fact to be evidenced by a writing, and the writing is rejected because its execution has not

altered, but under such circumstances as not to exclude it, secondary evidence is admissible.[33]

5. Primary Evidence Secreted. — Upon the trial of an indictment for passing a forged instrument, when the instrument alleged to have been forged has been secreted to protect the offender, the person whose name is charged to have been forged and who has seen and copied the instrument is a competent witness to prove the instrument forged, and the production of the instrument itself is not necessary.[34]

6. Primary Evidence Lost or Destroyed. — A. GENERALLY. — It is a well settled rule that secondary evidence is admissible to prove the contents of a written instrument where the original has been lost or destroyed, and the loss or destruction was not at the instance, or with the consent of either of the parties thereto.[35] This rule

been proved, the fact in question cannot then be proved by parol. Street *v.* Kelly, 67 Ala. 478; Street *v.* Nelson, 67 Ala. 504; Hovey *v.* Deane, 13 Me. 31; Gage *v.* Wilson, 17 Me. 378; Epping *v.* Mockler, 55 Ga. 376.

Plaintiff, in an action for malicious prosecution, cannot after the court has excluded the record of the judgment of acquittal, introduce oral evidence of the determination of the prosecution. Comiskey *v.* Breen, 7 Ill. App. 369.

33. Medlin *v.* Platte County, 8 Mo. 235, 40 Am. Dec. 135. *Compare* Chesley *v.* Frost, 1 N. H. 145, holding that no testimony of a parol character can be received to supply the absence of a deed which is inadmissible because of an alteration therein.

34. Com. *v.* Snell, 3 Mass. 82.

35. Primary Evidence Lost or Destroyed. — *England.* — Smith *v.* Blakey, 8 B. & S. 157, L. R. 2 Q. B. 325, Anon., 2 Camp. 390; Blackie *v.* Pidding, 6 C. B. 196; Charnley *v.* Grundy, 14 C. B. 608, 2 C. L. R. 822.

United States. — Stebbins *v.* Duncan, 108 U. S. 32; Minor *v.* Tillotson, 7 Pet. 99; Renner *v.* Bank of Columbia, 9 Wheat. 581; U. S. *v.* Lambell, 1 Cranch C. C. 312, 26 Fed. Cas. No. 15,553.

Alabama. — Davidson *v.* Kahn, 119 Ala. 364, 24 So. 583.

Arizona. — Rush *v.* French, 1 Ariz. 99.

Arkansas. — Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54; James *v.* Biscoe, 10 Ark. 184.

California. — Fresno Canal & Irr. Co. *v.* Dunbar, 80 Cal. 530, 22 Pac. 275.

Colorado. — Oppenheimer *v.* Denver & R. G. R. Co., 9 Colo. 320, 12 Pac. 217.

Connecticut. — Bank of U. S. *v.* Sill, 5 Conn. 106, 13 Am. Dec. 44.

Georgia. — Schley *v.* Lyon, 6 Ga. 530; Livingston *v.* Hudson, 85 Ga. 835, 12 S. E. 17.

Illinois. — Mayfield *v.* Turner, 180 Ill. 332, 54 N. E. 418; Miller *v.* Shaw, 103 Ill. 277; Orne *v.* Cooke, 31 Ill. 238; Cairo & St. L. R. Co. *v.* Mahoney, 82 Ill. 73, 25 Am. Rep. 299.

Indiana. — Curme, Dunn & Co. *v.* Rauh, 100 Ind. 247; Langsdale *v.* Woollen, 99 Ind. 575; Anderson Bridge Co. *v.* Applegate, 13 Ind. 339.

Indian Territory. — Bohart *v.* Hull, (Ind. Ter.), 47 S. W. 306.

Iowa. — Rea *v.* Jaffray & Co., 82 Iowa 231, 48 N. W. 78; Davis, Sawyer & Co. *v.* Strohm, 17 Iowa 421; Bell *v.* Bryerson, 11 Iowa 233, 77 Am. Dec. 142.

Kansas. — Western Union Tel. Co. *v.* Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515.

Kentucky. — Grimes *v.* Talbot, 1 A. K. Marsh. 205; Doty *v.* Deposit B. & L. Assn., 20 Ky. L. Rep. 625, 46 S. W. 219.

Louisiana. — Cochran *v.* Cochran, 46 La. Ann. 536, 15 So. 57; Compton *v.* Mathews, 3 La. (O. S.) 128, 22 Am. Dec. 167; Succession of Kidd, 52 La. Ann. 2113, 28 So. 353; State *v.* Mathis, 106 La. 263, 30 So. 834.

Massachusetts. — Hunt *v.* Roylance, 11 Cush. 117, 59 Am. Dec. 140; Taun-

applies, however, only when the primary evidence proves to be lost, and not when it belongs to the adverse party.[36]

B. Rule Applied to Particular Writings. — a. *Writing Re-*

ton & S. B. Turnpike Corp. *v.* Whiting, 10 Mass. 327, 6 Am. Dec. 124; Clark *v.* Houghton, 12 Gray 38; Jones *v.* Fales, 5 Mass. 101.

Michigan. — People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338; Cook *v.* Bertram, 86 Mich. 356, 49 N. W. 42.

Minnesota. — Hargreaves *v.* Reese, 66 Minn. 434, 69 N. W. 223.

Mississippi. — Harmon *v.* James, 7 Smed. & M. 111, 45 Am. Dec. 296; Jelks *v.* Barrett, 52 Miss. 315; Walton *v.* Forsdick, (Miss.), 25 So. 668.

Missouri. — Morley *v.* Weakley, 86 Mo. 451; Davis *v.* Kroyden, 60 Mo. App. 441; Wilson *v.* Reeves, 70 Mo. App. 30.

Montana. — Finch *v.* Kent, 24 Mont. 268, 61 Pac. 658.

Nebraska. — Meyers *v.* Bealer, 30 Neb. 280, 46 N. W. 479.

New Hampshire. — Pickard *v.* Bailey, 26 N. H. 152.

New Jersey. — Johnson *v.* Arnwine, 42 N. J. Law 451, 36 Am. Rep. 527.

New York. — Peck *v.* Valentine, 94 N. Y. 569; Ford *v.* Walsworth, 19 Wend. 334; Church *v.* Hempsted, 27 App. Div. 412, 50 N. Y. Supp. 325.

North Carolina. — Garland *v.* Goodloe, 2 Hayw. 537; State *v.* Durham, 121 N. C. 546, 28 S. E. 22.

Ohio. — John *v.* John, Wright 584, *affirmed* 6 Ohio 272.

Oklahoma. — Johnson & L. D. G. Co. *v.* Cornell, 4 Okla. 412, 46 Pac. 860.

Pennsylvania. — Gould *v.* Lee, 55 Pa. St. 99; Koch *v.* Melhorn, 25 Pa. St. 89, 64 Am. Dec. 685; McGarr *v.* Lloyd, 3 Pa. St. 474.

South Carolina. — Jackson *v.* Lewis, 32 S. C. 593, 10 S. E. 1074; Cook *v.* Wood, 1 McCord, 139; Reynolds *v.* Quattlebum, 2 Rich. Law 140; Perry *v.* Jeffries, 61 S. C. 292, 39 S. E. 515.

Tennessee. — Smith *v.* Martin, 2 Over. 208; Ward, Courtney & Co. *v.* Tennessee Coal, I. & R. Co., (Tenn.), 57 S. W. 193.

Texas. — Colorado Nat. Bank *v.* Scott, (Tex.), 16 S. W. 997.

Utah. — Nelson *v.* Southern Pac. Co., 18 Utah 244, 55 Pac. 364.

Vermont. — Spear *v.* Tilson, 24 Vt. 420; Stanton *v.* Simpson, 48 Vt. 628.

Virginia. — Timberlake *v.* Jennings, (Va.), 13 S. E. 28.

Washington. — Service *v.* Denning Inv. Co., 20 Wash. 668, 56 Pac. 837; Spears *v.* Lawrence, 10 Wash. 368, 38 Pac. 1049, 45 Am. St. Rep. 789.

West Virginia. — Edgell *v.* Conaway, 24 W. Va. 747.

Wisconsin. — Goldberg *v.* Ahnapee & W. R. Co., 105 Wis. 1, 80 N. W. 920, 76 Am. St. Rep. 899, 47 L. R. A. 221.

Evidence Though Secondary May Become Primary by the loss of that which was primary. Jelks *v.* Barrett, 52 Miss. 315.

Advertisement of the Loss of a Document is not a pre-requisite in Louisiana of the admissibility of secondary evidence of the contents of the document when its loss is established. Willett *v.* Andrews, 106 La. 319, 30 So. 883; Benton *v.* Benton, 106 La. 99, 30 So. 137. *Compare* Tickner *v.* Calhoun, 29 La. Ann. 277.

In State *v.* Head, 38 S. C. 258, 16 S. E. 892, the prisoner, while in jail wrote a letter, and, after sealing it up and addressing it, placed it in the hands of a third person with directions to deliver it to the addressee. Such third person testified that she so delivered the letter to the addressee who opened it and then requested the witness to read it, and as soon as this was done burned the letter. It was held that the witness could properly testify to the contents of the letter.

Paper Relating to Extinct Organization. — Secondary evidence is not admissible to prove the contents of paper on the ground of its loss merely because it relates to the business of an extinct political organization. The original must be accounted for. Smith *v.* Large, 1 Heisk. (Tenn.) 5.

36. Smallwood *v.* Mitchell, 2 Hayw. (N. C.) 318.

quired by Law. — The rule requiring the production of the best evidence attainable in no way conflicts with the admission of secondary evidence of a lost instrument even though it be one which the law requires to be in writing.[37]

b. *Sealed Instruments.* — So, also, secondary evidence may be received to prove the contents of a sealed instrument which has been lost or destroyed.[38]

c. *Records.* — Again, the contents of records may be proved by secondary evidence when the originals have been lost or destroyed.[39] This question, however, is fully treated elsewhere in this work.[40]

d. *Wills.* — The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence.[41]

e. *Writings Executed in Duplicate.* — When an instrument is

37. Devoe *v.* Atkinson, 113 Iowa 4, 84 N. W. 923, where the writing in question was an ante-nuptial contract. See also Tayloe *v.* Riggs, 1 Pet. (U. S.) 591; Wilson *v.* Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768; Spencer *v.* Boardman, 118 Ill. 553, 9 N. E. 330; McNutt *v.* McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; West *v.* Walker, 77 Wis. 557, 46 N. W. 819.

While a Conveyance of a Mining Claim Cannot be Made Except by Deed in Writing executed and delivered, yet, when the deed is lost and cannot be found, such conveyance may be shown by other legal evidence that it was in fact so executed and delivered. Scott *v.* Crouch, 24 Utah 377, 67 Pac. 1068.

38. *England.* — Saltern *v.* Melkuish, Ambl. 247.

United States. — Lewis *v.* Baird, 3 McLean, 56, 15 Fed. Cas. No. 8,316.

Alabama. — Gresham *v.* Taylor, 51 Ala. 505.

Arkansas. — Steward *v.* Scott, 57 Ark. 153, 20 S. W. 1088.

Connecticut. — Kelley *v.* Riggs, 2 Root 126.

Georgia. — Graham *v.* Campbell, 56 Ga. 258.

Illinois. — Gillespie *v.* Gillespie, 159 Ill. 84, 42 N. E. 305.

Kentucky. — Stokes *v.* Prescott, 4 B. Mon. 37.

Louisiana. — Gordon *v.* Fahrenberg, 26 La. Ann. 366.

Maine. — Moses *v.* Morse, 74 Me. 472.

Missouri. — Smith *v.* Lindsey, 89 Mo. 76, 1 S. W. 88.

New Hampshire. — Downing *v.* Pickering, 15 N. H. 344.

New Mexico.—Wagner *v.* Romero, 3 N. M. 131, 3 Pac. 50.

New York. — Metcalf *v.* Van Benthuysen, 3 N. Y. 424.

North Carolina. — Jennings *v.* Reeves, 101 N. C. 447, 7 S. E. 897.

Ohio. — Blackburn *v.* Blackburn, 8 Ohio 81.

Pennsylvania. — Gorgas *v.* Hertz, 150 Pa. St. 538, 24 Atl. 756.

South Carolina.—Congdon *v.* Morgan, 14 S. C. 587.

Tennessee. — Amis *v.* Marks, 3 Lea 568.

Vermont. — Oatman *v.* Barney, 46 Vt. 594.

Virginia. — Taylor *v.* Peyton, 1 Wash. 252.

Instrument Deposited in Escrow. Where the original instrument has been deposited as an escrow, its contents cannot be proved by parol as a lost instrument. McCreedy *v.* Schuylkill Nav. Co., 3 Whart. (Pa.) 424.

39. Freeman *v.* Arkell, 3 D. & R. 669, 2 B. & C. 494, 1 Car. & P. 135, 326; Price *v.* Woodhouse, 3 Ex. 616, 18 L. J. Ex. 271; Cox *v.* Beaufort Co. Lumber Co., 124 N. C. 78, 32 S. E. 381; Duggan *v.* McCullough, 27 Colo. 43, 59 Pac. 743; Belcher *v.* Belcher, 21 Ky. L. Rep. 1460, 55 S. W. 693.

40. *See* title "RECORDS."

41. Sugden *v.* St. Leonards, 45 L. J. P. 49, 1 P. D. 154, 34 L. T. 369, 24 W. R. 479. For a full discussion of this question *see* title "WILLS."

executed in duplicate, the loss of all its parts must be proved in order to let in secondary evidence of the contents.[42]

f. *Authenticated Copy.* — Parol evidence of the contents of a copy may be admitted when the loss of both the original and the copy, which was authenticated, are proved.[43]

g. *Contents of Portion of Paper Detached.* — Where the adverse party produces upon notice what he claims to be all of the paper called for, the other party may show by parol that there was another paper attached to the paper in question which had been detached, and may then show the contents of the part detached and not produced.[44]

C. Loss or Destruction by Adverse Party. — And the rule permitting the introduction of secondary evidence when the primary evidence is lost or destroyed is applicable to a case in which there is evidence tending to show that the primary evidence once existed but has been destroyed by the adverse party.[45]

D. Loss or Destruction by the Party or With His Consent. a. *General Rule.* — It is not a matter of course, however, that secondary evidence of the contents of a writing may be received upon proof of its loss or destruction. If the destruction was voluntary and deliberate by, or was done with the consent of, the party seeking to resort to secondary evidence, the admissibility of the secondary evidence will depend upon the cause or motive of the party in effecting, or consenting to, the destruction of the primary evidence.[46] The naked fact of voluntary destruction is generally

42. Writings Executed in Duplicate. — Mathews *v.* Union Pac. R. Co., 66 Mo. App. 663; New York L. Ins. Co. *v.* Goodrich, 74 Mo. App. 355; Holden Steam Mill Co. *v.* Westervelt, 67 Me. 446; Abeel *v.* Levy, (Tex. Civ. App.), 61 S. W. 937.

In Gilpin Co. Min. Co. *v.* Drake, 8 Colo. 586, 9 Pac. 787, it was held that where a duplicate agreement setting out the terms and conditions of a contract for the sale of a mining claim was lost, oral evidence of its contents was admissible, under Colo. Civil Code, § 382.

43. Howe *v.* Taylor, 9 Or. 288. See also Winn *v.* Paterson, 9 Pet. (U. S.) 663; Hedrick *v.* Hughes, 15 Wall. (U. S.) 123.

44. Bell *v.* Chicago, B. & Q. R. Co., 64 Iowa 321, 20 N. W. 456. And in Thompson *v.* State, 30 Ala. 28, a prosecution for forgery, it was held that if the instrument alleged to have been forged is set out literally in the indictment, and is proved to have been mutilated, the state may resort to secondary evidence of the contents of the mutilated part after first proving the existence of the writing before mutilation as described; and in connection with such secondary evidence may then offer in evidence the mutilated writing itself.

45. Loss or Destruction by Adverse Party. — Kelley *v.* Cargill Elev. Co., 7 N. D. 343, 75 N. W. 264; McNutt *v.* McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372. See also Avan *v.* Frey, 69 Ind. 91.

46. Bagley *v.* McMickle, 9 Cal. 430; Bryan *v.* Persons, 1 Murph. (N. C.) 152.

Where a Paper Has Become of No Importance by reason of the execution of a new writing covering the same subject matter between the same parties, secondary evidence may be given of its contents on proof by the party that he has made diligent search for it but cannot find it, but that he supposes he destroyed it, since the destruction of the original paper under such circumstances

held such presumptive evidence of fraudulent design as to preclude all secondary evidence,[47] unless the party affirmatively shows that the destruction was not from an impure motive, and repels every suspicion of such fraudulent design,[48] in the absence of which the

would furnish no proof, nor create any suspicion of a fraudulent design in its destruction. Oriental Bank *v.* Haskins, 3 Metc. (Mass.) 332, 37 Am. Dec. 140. See also Davis *v.* Teachout, 126 Mich. 135, 85 N. W. 475.

Destruction by Plaintiff's Assignor. — In Smith *v.* Truebody, 2 Cal. 341, an action founded upon a claim in writing which had been assigned to the plaintiff, and which writing the assignor had destroyed before the assignment and under such circumstances as indicated that he no longer considered it as evidencing further liability of the promisor, and which it in fact did not, it was held error to receive the testimony of the assignor to prove the contents of the writing.

Wrapping Paper. — In Wright *v.* State, 88 Md. 436, 41 Atl. 795, the sole usefulness of a document constituting the primary evidence, was as a wrapper or carrier for the article enclosed in it, and there was no occasion for its preservation for any purpose. When the article reached the purchaser's home, and was placed upon his table, the wrapper was naturally and properly consigned to the kitchen stove or the waste paper basket. The statement of the purchaser that he had not kept a paper of that character, and that he did not know where it was, was held to be equivalent to saying it had been thrown away as useless, and its nonproduction was legally accounted for.

Document Lost in Mails. — In Bank of U. S. *v.* Sill, 5 Conn. 106, 13 Am. Dec. 44, for the purpose of safely transmitting a bank bill, the holder cut the same in two and sent one half by mail on a certain day, which was duly received. Later he deposited the other half in the post office in a letter addressed to the party, which was duly forwarded, but which was lost in transit. It was held that although the act was indeed voluntary, it was not such a voluntary destruction of the original bill as precluded the reception of secondary evidence of its contents.

47. Blade *v.* Noland, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126; Bagley *v.* McMickle, 9 Cal. 430. *Compare* Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581, where it is held that the act of destruction must be willful.

Destruction After Suit Begun. In Baldwin *v.* Threlkeld, 8 Ind. App. 312, 34 N. E. 854, an objection to proof of the contents of certain letters given by a party after he had practically admitted that he had destroyed the letters, was sustained, and the court in upholding this ruling held that it was right to deduce from the act of destruction after the commencement of the suit, the inference of a fraudulent design to do away with the letters themselves, and upon this theory the exclusion of the evidence was held proper.

Destruction of Deed After Repayment of Purchase Price. — A grantor cannot, after the destruction of a deed with his consent, and on repayment by the grantee of the purchase price, give secondary evidence of the contents of the deed for the purpose of sustaining a claim of title to the land. Gugins *v.* Van Gorder, 10 Mich. 523, 82 Am. Dec. 55.

48. **Presumption from Destruction Must be Overcome.** — *United States.* Riggs *v.* Tayloe, 9 Wheat. 483; Anglo American Pkg. & Prov. Co. *v.* Cannon, 31 Fed. 313.

Alabama. — Rodgers *v.* Crook, 97 Ala. 722, 12 So. 108.

California. — Bagley *v.* McMickle, 9 Cal. 430.

Colorado. — Breen *v.* Richardson, 6 Colo. 605.

Illinois. — Blake *v.* Fash, 44 Ill. 302; Palmer *v.* Goldsmith, 15 Ill. App. 544.

Indiana. — Baldwin *v.* Threlkeld, 8 Ind. App. 312, 34 N. E. 854; Rudolph *v.* Lane, 57 Ind. 115.

presumption becomes conclusive.[49]

Mere Suspicion of Willful Destruction of the primary evidence is not enough to authorize rejection of the proffered secondary evidence.[50]

b. *Destruction Under Misapprehension, etc.* — But the destruction by a party of the document constituting the primary evidence under a misapprehension and without fraudulent intent;[51] or at a time when none of the parties to it had reason to think it necessary to preserve it,[52] is no ground for excluding secondary evidence of its contents.

c. *Destruction by Accident, Etc.* — If, however, the destruction,

Kentucky. — Shields *v.* Lewis, 20 Ky. L. Rep. 1601, 49 S. W. 803.

Maine. — Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547.

Massachusetts. — "The Count Joannes" *v.* Bennett, 6 Allen 169; Gage *v.* Campbell, 131 Mass. 500; Stone *v.* Lamborn, 104 Mass. 319.

New Jersey. — Broadwell *v.* Stiles, 8 N. J. Law 58; Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401.

New York. — Blade *v.* Noland, 12 Wend. 173, 27 Am. Dec. 126.

Pennsylvania. — Wallace *v.* Harmstad, 44 Pa. St. 492.

Wisconsin. — Wilke *v.* Wilke, 28 Wis. 296.

Adequate Motive Shown. — When an adequate motive for the destruction is assigned, and clearly confirmed by the evidence, the court will not, upon mere conjecture, impute an inadequate and dishonest motive. Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401. See also People *v.* Sharp, 53 Mich. 523, 19 N. W. 168.

Destruction by Advice of Others. Where a party who has destroyed the original document testifies in explanation of his conduct that he did so upon the advice and opinion of others, and upon cross examination he names the persons who had so advised him, it is proper to call such persons so named to contradict him in this respect. Butler *v.* Cornell, 148 Ill. 276, 35 N. E. 767.

49. Presumption Conclusive if Not Repelled. — Bagley *v.* McMickle, 9 Cal. 430.

50. Foster *v.* Mackay, 7 Metc. (Mass.) 531.

51. Bowen *v.* Reed, 103 Mass. 46; Riggs *v.* Tayloe, 9 Wheat. (U. S.) 483; Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401; Dearing *v.* Pearson, 8 Misc. 277, 28 N. Y. Supp. 714.

The Cause or Motive of the Destruction is Then the Controlling Fact which must determine the admissibility of secondary evidence in such cases. Bagley *v.* McMickle, 9 Cal. 430. And in Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547, a breach of promise suit, it appeared that the plaintiff was induced to suppose that her letters from the defendant would not be used in the trial of a suit against him in her favor, and had yielded to the advice of one in whom she had reposed unlimited confidenc that it would be desirable that they should not be exposed to the perusal of those who would read them, at least in her opinion, merely to gratify their curiosity, and had destroyed the letters. The court held secondary evidence admissible, stating that her acts in so destroying the letters should be treated as a misapprehension, an accident, a mistake.

Compare Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401, wherein it is held that the voluntary destruction of a will under the belief that it had become inoperative, although done without any fraudulent design, precluded secondary evidence of its contents.

52. Davis *v.* Teachout, 126 Mich. 135, 85 N. W. 475.

Destruction of Paid Notes. — The rule excluding secondary evidence because the party offering it has voluntarily destroyed the primary evidence does not apply to a case in which the writing was destroyed when it was not, and was not likely to become evidence in the party's favor, and was destroyed in the usual course of business, as for example a note paid

although caused by the party himself, was the result of accident secondary evidence is generally admissible.[53]

d. *Destruction by Mutual Consent.* — The destruction by one of the parties by mutual consent, of a paper with the intent to rescind a contract which they all knew was illegal, does not preclude secondary evidence of its contents.[54]

e. *Presumption from Inability to Find Paper.* — A party will not be presumed, in the absence of all evidence of the fact, voluntarily to have destroyed an instrument which he was interested in preserving. As a general rule the legal presumption arising from proof that it can not be found is that it is lost.[55]

f. *Destruction by Nominal Party.* — Although there may be good reason to believe that a nominal party to the record, whose present whereabouts are unknown, has designedly destroyed the primary evidence, still this is not, as against the real party in interest, who shows due diligence in his efforts to produce the primary evidence sufficient ground to exclude secondary evidence unless the destruction took place before the real party in interest acquired his title and rights under the primary evidence.[56]

g. *Relevancy of Evidence Destroyed.* — In order to invoke the presumption that where the primary evidence has been destroyed by a party, such evidence would have been against his interests, it must appear that the document destroyed was in fact relevant to the case.[57]

h. *Evidence Repelling Inference of Fraud.* — To repel the inference of fraud arising from the destruction of primary evidence, a witness who was present and advised the destruction of the same, may be allowed to state his declarations made to the party at the time, such declarations being admissible as part of the *res gestae,* and as explanatory of the motive which influenced the party to the destruction.[58]

7. Proof of Loss or Destruction. — A. Burden of Proof. — A party offering secondary evidence upon the ground of the loss or

and delivered up to the maker. Pollock *v.* Wilcox, 68 N. C. 46.

The Destruction of Paid Drafts by the Drawee in accordance with his usual custom, and without any fraudulent intent, and before any differences had arisen between him and the drawers, does not deprive him of proving the acceptance and payment of the drafts, without producing them. Steele *v.* Lord, 70 N. Y. 280, 26 Am. Rep. 602.

53. See Renner *v.* Bank of Columbia, 9 Wheat. (U. S.) 581.

In Riggs *v.* Tayloe, 9 Wheat. (U. S.) 483, the party swore, that if he tore up the paper, it was from a belief that he would have no further use for it, which belief proved to be a mistaken one, and it was held that he was not to be deprived of using secondary evidence.

54. Skinner *v.* Henderson, 10 Mo. 205.

55. Clark *v.* Hornbeck, 17 N. J. Eq. 430.

56. Foster *v.* Mackay, 7 Metc. (Mass.) 531.

57. Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581.

58. Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547. For a full discussion of this principle, *see* title "Fraud."

destruction of the primary evidence has the burden of proving the ground laid.[59] But when the loss of the instrument sued upon is alleged and not denied, proof of its loss is not necessary before secondary evidence can be received.[60]

B. Mode of Proof. — *a. Parol Testimony.* — (1.) **In General.** The loss or destruction of the primary evidence, as a ground for the introduction of secondary evidence, may be established by the testimony of any person having knowledge of the fact,[61] even although a statute permits such proofs to be made by an affidavit of the party.[62]

59. Burden of Proving Loss or Destruction. — *England.* — Whitfield *v.* Faussett, 1 Ves. 389.

Arkansas. — Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212.

California. — Lewis *v.* Burns, 122 Cal. 358, 55 Pac. 132; Fresno Canal & Irr. Co. *v.* Dunbar, 80 Cal. 530, 22 Pac. 275.

Indiana. — Jackson *v.* Cullum, 2 Blackf. (Ind.) 228, 18 Am. Dec. 158; Coffing *v.* Carnahan, 122 Ind. 427, 23 N. E. 855.

Iowa. — Hanson *v.* American Ins. Co., 57 Iowa 741, 11 N. W. 670; Bell *v.* Bryson, 11 Iowa 233, 77 Am. Dec. 142.

Kentucky. — Helton *v.* Asher, 103 Ky. 730, 46 S. W. 22, 82 Am. St. Rep. 601.

Louisiana. — Pendery *v.* Crescent Mut. Ins. Co., 21 La. Ann. 410.

Maine. — Dyer *v.* Fredericks, 63 Me. 173; Elwell *v.* Cunningham, 74 Me. 127.

Massachusetts. — Smith *v.* Brown, 151 Mass. 338, 24 N. E. 31.

North Carolina. — Loftin *v.* Loftin, 96 N. C. 94, 1 S. E. 837.

Pennsylvania. — Emig *v.* Diehl, 76 Pa. St. 359; Baskin *v.* Seechrist, 6 Pa. St. 154.

Tennessee. — Girdner *v.* Walker, 1 Heisk. 186.

60. Commercial Bank *v.* Muirhead, 4 U. C. C. P. (Can.) 434. *See* fully on this question title "Private Writings."

61. Oral Evidence to Prove Loss of Primary Evidence. — *Iowa.* — Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305.

Louisiana. — Thomas *v.* Thomas, 2 La. (O. S.) 166.

Massachusetts. — Foster *v.* Mackay, 7 Metc. 531.

Michigan. — Cilley *v.* Van Patten, 68 Mich. 80, 35 N. W. 831.

New York. — Smith *v.* Young, 2 Barb. 545.

North Carolina. — Stuart *v.* Fitzgerald, 2 Murph. 255.

Tennessee. — Hale *v.* Darter, 10 Humph. 92; Smith *v.* Large, 1 Heisk. 5.

Texas. — Kinney *v.* Vinson, 32 Tex. 126; Johnson *v.* Skipworth, 59 Tex. 473.

The Testimony of a Justice is competent to prove the fact of the loss of a judgment rendered by him. Read *v.* Staton, 3 Hay. (Tenn.) 159, 9 Am. Dec. 740.

The parish judge who received the sheriff's bond is a competent witness to prove the loss of the bond. Villere *v.* Armstrong, 4 Mart. (N. S.) (La.) 11.

A Witness Who Has Examined the Records of Courts where a will would probably be recorded may testify that such records do not contain any record of the will. Atkinson *v.* Smith, (Va.), 24 S. E. 901.

One Who Has Assisted in Searching in the Office of the County Clerk under his direction for a deed left therein for record is competent to prove the loss of the deed in order to lay a foundation for secondary evidence. It is not necessary to call the clerk to establish the loss *prima facie* of the deed. Buchanan *v.* Wise, 34 Neb. 695, 52 N. W. 163.

Testimony of a Witness Who Cannot Read that she has destroyed a paper which she understood to be the paper in question, cannot be received to prove the destruction of a paper. Mitchell *v.* Mitchell, 3 Stew. & P. (Ala.) 81.

62. Statute Permitting Proof of

(2.) Testimony of Last Custodian. — And the person in whose custody the paper belonged, or who is last known to have had possession of it, may be called and sworn as a witness to testify to its loss or destruction.[63]

(3.) Testimony of the Party. — The preliminary proof of the loss or destruction of the primary evidence may be made by the testimony of the party himself, if the facts are within his knowledge.[64] And this was the rule even before parties were competent witnesses to testify on their own behalf.[65] And there is authority to the effect that he must himself make such proof,[66] although this last is not a universal and inflexible rule.[67] Sometimes, however, there are statutes requiring it.[68]

Loss by Affidavit of Party Not Exclusive. — Smith *v.* Cavitt, 20 Tex. Civ. App. 558, 50 S. W. 167: Park *v.* Caudle, 58 Tex. 216; Gray *v.* Thomas, 83 Tex. 246, 18 S. W. 721; Dohoney *v.* Womack, 1 Tex. Civ. App. 354, 19 S. W. 883, 20 S. W. 950.

Under an Illinois Statute the party has his option to either file an affidavit or testify orally in court to the loss of the primary evidence, or to introduce his agent or attorney as a witness for that purpose. Scott *v.* Bassett, 174 Ill. 390, 51 N. E. 577. See also Weis *v.* Tiernan, 91 Ill. 27; Nixon *v.* Cobleigh, 52 Ill. 387; Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219; Newsom *v.* Luster, 13 Ill. 175.

The Texas Statute requiring a copy of the instrument to be filed three days before the trial does not apply when the copy is made an exhibit to the original petition. Watson *v.* Blymer Mfg. Co., 66 Tex. 558, 2 S. W. 353.

63. Testimony of Last Custodian. McCann *v.* Beach, 2 Cal. 25; Bass *v.* Brooks, 1 Stew. (Ala.) 44; Glassell *v.* Mason, 32 Ala. 719; Smith *v.* Large, 1 Heisk. (Tenn.) 5; Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219; Weis *v.* Tiernan, 91 Ill. 27; Vaughan *v.* Biggers, 6 Ga. 188.

64. Testimony of the Party to Prove Loss of Primary Evidence. Bass *v.* Brooks, 1 Stew. (Ala.) 44; Glassell *v.* Mason, 32 Ala. 719; Bagley *v.* McMickle, 9 Cal. 430; Ravenscroft *v.* Giboney, 2 Mo. 1; Garland *v.* Goodloe, 2 Hayw. (N. C.) 537.

Depositions may be used to prove the loss of a document with like effect as if the deponent had been placed on the stand. Gould *v.* Trowbridge, 32 Mo. 291. See also Canfield *v.* Squire, 2 Root (Conn.) 300, 1 Am. Dec. 71.

Rule of Court. — In Poulet *v.* Johnson, 25 Ga. 403, it was held that the oath of a party in accordance with Court Rule No. 52, stating his belief of the loss or destruction of the original, and that it was not in his possession or power, was sufficient foundation for the introduction of a second copy of the original.

65. Woods *v.* Gassett, 11 N. H. 442; Chamberlain *v.* Gorham, 20 Johns. (N. Y.) 144; Palmer *v.* Logan, 4 Ill. 56; Jackson *v.* Frier, 16 Johns. (N. Y.) 193; Jackson *v.* Davis, 5 Cow. 123, 15 Am. Dec. 451; Smith *v.* Axtell, 1 N. J. Eq. 494; Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Beirne *v.* Rosser, 26 Gratt. (Va.) 537; Fitch *v.* Bogue, 19 Conn. 285. *Compare* Donelson *v.* Taylor, 8 Pick. (Mass.) 390.

66. Blanton *v.* Miller, 1 Hayw. (N. C.) 4.

67. Foster *v.* Mackay, 7 Metc. (Mass.) 531; Smith *v.* Young, 2 Barb. (N. Y.) 545.

68. See Watson *v.* Blymer Mfg. Co., 66 Tex. 558, 2 S. W. 353; Bird *v.* Smith, 3 McCord (S. C.) 300.

In Missouri the oath, or *ex parte* affidavit, of the party wishing to use secondary evidence showing the loss of the primary evidence is sufficient. (Rev. Stat. 1889, § 2428), Hume *v.* Hopkins, 140 Mo. 65, 41 S. W. 784.

Primary Evidence Destroyed by Party. — Where a party has himself designedly destroyed the primary evidence, he is a competent witness to prove its loss, but often not its contents.[69]

(4.) Cross Examination of Witness. — It has been held error to refuse to allow the cross-examination of a party testifying to the loss of the primary evidence.[70]

(5.) Impeachment of Witness. — A witness called merely to testify to the loss of the primary evidence does not come within the rule forbidding a party to impeach his own witnesses.[71]

b. *Documentary Evidence.* — **(1.) In General. — Recitals.** — The loss of an ancient deed may be established by recitals in another deed made by one having knowledge, after there is some evidence of the loss, the witnesses being all dead and possession not having been contrary to the deed.[72]

Record of Instrument. — An extra official entry in the receiving book of the reception, record and receipt of the person to whom delivered, of an instrument is competent evidence in proving the loss of the instrument, although the instrument was not entitled to record.[73]

Pleadings of Another Action. — A petition by a grantee under a sheriff's deed praying for the execution of a new deed on the ground of the loss of the original, together with his attorney's affidavit of such loss, is competent evidence in behalf of one claiming under such deed, to prove its loss, after proof of the sheriff's sale and of the acknowledgment of a sheriff's deed to the grantee in question.[74]

(2.) Affidavit of the Party. — (A.) GENERALLY. — It has been held that the rule requiring the testimony of witnesses to matters directly in issue to be so taken as to subject them to cross-examination, does not apply to the proof of the loss of a paper, but that such fact may be established by the *ex parte* affidavit of the party seeking to resort to secondary evidence.[75]

69. Blade *v.* Noland, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126, wherein the court in so holding, said: "It would be an unreasonable indulgence and a violation of the just maxim that no one shall take advantage of his own wrong to permit this testimony where he has designedly destroyed it." See also Ricks *v.* Wofford, 31 Tex. 411.

70. Scott *v.* Bassett, 174 Ill. 390, 51 N. E. 577.

71. The party calling him as such a witness does not give credit to him as a witness generally, or even in the one particular as to which he was interrogated; because if he had denied the facts sought to be proved, the party is then in the position of having made every effort to produce the primary evidence and he would have followed by evidence of execution of the document and its terms independent of such witness, although such evidence would flatly contradict him. Morris *v.* Guffey, 188 Pa. St. 534, 41 Atl. 731.

72. Garwood *v.* Dennis, 4 Binn. (Pa.) 314.

73. Groff *v.* Ramsey, 19 Minn. 44. *Compare* Harker *v.* Gustin, 12 N. J. Law 42, wherein it was held that a marginal entry on the books of mortgages by the clerk, of the fact of the destruction of the mortgage was not competent.

74. Gray *v.* Coulter, 4 Pa. St. 188.

75. **Affidavits of Party to Prove Loss of Original.** — *United States.*

Riggs *v.* Taylce, 9 Wheat. 486; Nicholls *v.* White, 1 Cranch C. C. 58, 18 Fed. Cas. No. 10,235; Boyle *v.* Arledge, 1 Hempst. 620, 3 Fed. Cas. No. 1,758.

California. — Bagley *v.* Eaton, 10 Cal. 126.

Illinois. — Taylor *v.* McIrvin, 94 Ill. 488.

Indiana. — Cleveland *v.* Worrell, 13 Ind. 545.

Maine. — Mason *v.* Tallman, 34 Me. 472.

Massachusetts. — Donelson *v.* Taylor, 8 Pick. 390; Almy *v.* Reed, 10 Cush. 421; Mitchell *v.* Shauley, 12 Gray 206.

New Hampshire. — Woods *v.* Gassett, 11 N. H. 442; Bachelder *v.* Nutting, 16 N. H. 261.

Ohio. — Wells *v.* Martin & Co., 1 Ohio St. 386.

Tennessee. — Johnson *v.* Hall, 9 Baxt. 351.

Contra. — Gould *v.* Trowbridge, 32 Mo. 291.

Compare Bagley *v.* McMickle, 9 Cal. 430 (wherein it was questioned, but not decided) whether or not such affidavits are competent when the party and his witnesses can be examined in court.

Rule Stated. — In Tayloe *v.* Riggs, 1 Pet. (U. S.) 591, the court, in commenting upon the use of party's affidavits to show the loss of the primary evidence, said that if the party's own affidavit could not be received, the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, would amount to a complete loss of his rights, at least in a court of law. The objection to receiving the affidavit of a party was that no man could be a witness in his own cause; the court said that this was no doubt a sound rule which ought never to be violated, but that the rule would not apply to the testimony of the party for the purpose of proving the loss of the primary evidence.

In Cameron *v.* Kersey, 41 Ga. 40, it was held that where a party sought to introduce the copy of a grant in evidence, he must make oath that the original was not in his power or possession and that he does not know where it is, before the copy could be received.

In Flinn *v.* McGonigle, 9 Watts & S. (Pa.) 75, it was held that after a *bona fide* and diligent search had been unsuccessfully made at the place where the primary evidence was most likely to be found, if the nature of the case admitted of such proof, the party's own affidavit was admissible to the fact of its loss.

In McRae *v.* Morrison, 13 Ired. Law (N. C.) 46, it was held that a party might prove by his own affidavit the loss of the primary evidence unless the paper constituting such be a negotiable instrument. See also Fisher *v.* Carroll, 6 Ired. Eq. (N. C.) 485. The reason why the party was not competent to prove the loss of a paper when it is a negotiable instrument was the want of power to require an indemnity as a condition to the judgment. And in Hansard *v.* Robinson, 7 Barn. & C. 90, 14 Eng. C. L. 20, 31 Rev. Rep. 166, the further reason was given that when the action was against the indorsee, the holder had no legal right to require payment unless he delivered up the note so as to give the defendant his remedy over.

Rule of Court.—In Smith *v.* Atwood, 14 Ga. 402, a rule of court required the party making the oath to swear to the loss or destruction of the original document, that it was not in his possession, power or custody; and it was held that an affidavit stating that the original was lost or mislaid, and that after diligent search the affiant could not find it, was a substantial compliance with such rule.

In Martin *v.* King, 3 How. (Miss.) 125, it was held that an *ex parte* affidavit of a party was not sufficient to prove that the original document was lost, or that the instrument produced was a copy.

Form of Affidavit.—An affidavit of the loss of the primary evidence, for the purpose of letting in secondary evidence, may be made in the body of the bill or by a separate affidavit. Evans *v.* Boling, 5 Ala. 550.

Venue of Affidavit. — A party's affidavit that a paper has been lost must be made before the court where the suit is pending. Tyree *v.* Magness, 1 Sneed (Tenn.) 276.

(B.) Under Statutes. — And in some states there are statutes permitting [76] and even requiring [77] the use of such affidavits.

Stating Facts Showing Loss of Document Sufficient. — The mere fact that an affidavit, made for the purpose of introducing secondary evidence of the contents of a document on the ground of its loss, does not use the word "lost," is not ground for excluding the secondary evidence, if it does in fact state facts reasonably showing that the document was lost.[78]

(3.) Affidavit of Attorney. — And sometimes the loss of the original may be proved by the affidavit of the party's attorney.[79]

(4.) Affidavit of Third Persons. — Again it has been held proper to receive the *ex parte* affidavits of third persons to prove the loss of an original paper,[80] although there are cases to the contrary.[81]

c. *Circumstantial Evidence.* — The loss of the primary evidence may be established by circumstantial evidence,[82] as for example that

76. See Watson *v.* Blymer Mfg. Co., 66 Tex. 558, 2 S. W. 353; Gravier *v.* Rapp, 12 La. (O. S.) 162 (La. Civ. Code, art. 2258;) Scott *v.* Bassett, 174 Ill. 390, 51 N. E. 577.

Time of Making. — The affidavit need not be made before the trial begins. Ross *v.* Kornrumpf, 64 Tex. 390.

A party's affidavit is not insufficient because he could give no description of the contents. Gravier *v.* Rapp, 12 La. (O. S.) 162.

An Additional Affidavit may be made by a party after his first one has been adjudged insufficient from vagueness. Bateman *v.* Bateman, 21 Tex. 432.

77. Thus in South Carolina, Bird *v.* Smith, 3 McCord 300 (Act of 1803, Rev. Stat. 1803, § 2360.)

Time of Making Affidavit. — The affidavit of the loss of the original grant, required by S. C. Act 1803 in order to authorize the introduction of evidence of an office copy, need not be made at the time of the trial, so long as it is made after the commencement of the suit. Linning *v.* Crawford, 2 Bail. (S. C.) 591.

Several Parties. — To entitle the plaintiffs or defendants where there are more than one, to give in evidence a certified copy of an original grant, they must all make the affidavit required by S. C. Act 1803 that the original is lost or destroyed, etc., the affidavit of one only is not enough. Linning *v.* Crawford, 2 Bail. (S. C.) 591.

78. Evans *v.* Womack, 48 Tex. 230.

79. Southall *v.* Southall, 6 Tex. Civ. App. 694, 26 S. W. 150 (Tex. Rev. Stat. art 5.)

80. **Affidavits of Third Persons.** Taylor *v.* McIrvin, 94 Ill. 488; Viles *v.* Moulton, 13 Vt. 510; Weidman *v.* Kohr, 4 Serg. & R. (Pa.) 174 (affidavit of custodian.)

The Affidavit of an Arbitrator to Whom the Submission Has Been Delivered is the best evidence of its loss; and that of the party is not competent so long as that of the arbitrator can be obtained. Pryor *v.* McNairy, 1 Stew. (Ala.) 150.

81. McFarland *v.* Dey, 69 Ill. 419, holding as to affidavits of persons not parties, and who are competent witnesses. See also Poignand *v.* Smith, 8 Pick. (Mass.) 272; Young *v.* Mackall, 3 Md. Ch. 301.

In South Carolina, the affidavit of the party and not of a third person, is the mode of proving the loss of a paper in order to admit secondary evidence. Marane *v.* Carroll, 2 Bay (S. C.) 525.

82. **Circumstantial Evidence to Prove Loss of Primary Evidence.** McLaurin *v.* Talbot, 2 Hill (S. C.) 525; Clark *v.* Foster, 2 Pos. Unrep. Cas. (Tex.) 704; Moore *v.* Beattie, 33 Vt. 219.

Carelessness and Negligence of Public Officers in respect of their duties at the time a record should have been made and subsequently is

its place of deposit has been destroyed by fire.[83]

Surrender of Bond to Obligor. — The presumption is that a bond which has been surrendered to the obligor has been destroyed and secondary evidence of its contents is admissible.[84]

d. *Admissions.* — The loss or destruction of an original instrument as the ground for the admission of secondary evidence of its contents may be proved by the admissions of one of the parties to the instrument of that fact,[85] and the fact that such admission is subsequent to the offer of the secondary evidence is immaterial where the admission is not accompanied by any reservation of the right to object to the secondary evidence, but seems rather to be intended to remove any such objection by rendering unnecessary any proof of loss.[86]

competent evidence. Stevenson *v.* McReary, 12 Smed. & M. 9, 51 Am. Dec. 102. See also Whitney *v.* Sprague, 23 Pick. (Mass.) 198.

83. **That the Place of Deposit of a Document Has Been Destroyed by Fire** is enough to raise the presumption of the loss of the document. See Clapter *v.* Banks, 10 La. (O. S.) 60. But not where it is not shown that the document was a part of the records destroyed, nor any fact proved to raise that presumption, the paper itself not being necessarily a part of the papers destroyed. Borland *v.* Phillips, 3 Ala. 718. See also Heard *v.* McKee, 26 Ga. 332, where it is held that proof that a party's house was burned cannot be shown in order to raise a presumption of the destruction of a certain writing, where the evidence tends to show that the writing never existed. Nor is the mere fact that a document was in its place of deposit several months before the place was burned enough to raise the presumption of its loss. Watson *v.* State, 63 Ala. 19.

Partial Destruction by Fire. Evidence that the library and the papers of the party were destroyed by fire, except a few papers, although accompanied by evidence of search for the particular paper, is not enough, as the paper in question may have been one of those saved. Folsom *v.* Scott, 6 Cal. 460. To same effect see U. S. *v.* Knight, 1 Black (U. S.) 227, 17 L. ed. 76.

84. Whittmore *v.* Moore, 9 Dana (Ky.) 315.

85. Cooper *v.* Maddan, 6 Ala. 431; Rhode *v.* McLean, 101 Ill. 467. See also Pentecost *v.* State, 107 Ala. 81, 18 So. 146, where the party having custody of the primary evidence testified that he himself nad lost it.

The Mere Silence of the maker of a note when informed of the loss of a note, implies no admission of its loss where he has no means of knowing whether the statement was true or false. White *v.* Brown, 19 Conn. 577. In this case, an action on a promissory note, a witness offered to prove the loss of the primary evidence, testified that "he informed the defendant that the plaintiff said she had lost her note against him, and requested him to give her another, which the defendant refused to do, remarking, that if he should, and the old note should come to light, he should be accountable for both." Another witness testified that "the defendant said to him that the plaintiff had told him she had lost her note and wanted him to give her another; and that he told her he would if she would give him a writing to kill the first mentioned note, if it should ever come against him." It was held that his evidence, although it showed an admission by the defendant that he once gave a note to the plaintiff which remained unpaid, did not tend to prove the loss of it.

86. Culver *v.* Culver, 31 N. J. Eq. 448, so holding, where the secondary evidence when offered was inadmissible because the loss of the primary evidence was not shown.

e. *Hearsay Evidence.* — The loss of primary evidence cannot be established by hearsay evidence,[87] although admission of such evidence does not constitute fatal error where the loss has been proved by other competent evidence.[88]

C. Cogency of Proof. — a. *Generally.* — The rule, as established by the modern decisions is that the amount of evidence necessary to prove the loss of a written instrument, for the purpose of admitting secondary evidence of its contents, depends, in a great measure, upon the nature of the instrument and the circumstances of the case.[89] If any suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made as to the reasons for its non-production. But when there is no such suspicion,

87. Bratt *v.* Lee, 7 U. C. C. P. (Can.) 280; Chapin *v.* Taft, 18 Pick. (Mass.) 379; Cooper *v.* Maddan, 6 Ala. 431. And see Gaither *v.* Martin, 3 Md. 146; Governor *v.* Barkley, 4 Hawks (N. C.) 20.

Compare Budges *v.* Hyatt, 2 Abb. Prac. (N. Y.) 449, holding that such evidence being for the court, is not governed by the same rules of evidence as govern evidence for the jury. See also McKinnon *v.* Bliss, 21 N. Y. 206; Taunton Bank *v.* Richardson, 5 Pick. (Mass.) 436; Scott *v.* Slingerland, 44 Hun (N. Y.) 254; Rex. *v.* Rowden, 2 Ad. & E. 156.

Declarations of a Deceased Person relative to her seizure and disposition of a lost paper are admissible to prove presumption of loss or destruction. Harper *v.* Scott, 12 Ga. 125.

Mere Statements of Having Heard of the Destruction of the primary evidence, or of having read such fact in a newspaper, are not sufficient to prove the destruction of the primary evidence. Weis *v.* Hierhan, 91 Ill. 27.

Declarations of the Administrator of the Last Custodian that he could not find the paper amongst those of his intestate, should not be received to prove the loss of the paper where it does not appear that there is any obstacle in the way of procuring his testimony as a witness. Governor *v.* Barkley, 4 Hawks (N. C.) 20. See also Masterson *v.* Jordan, (Tex. Civ. App.), 24 S. W. 579; Justice *v.* Luther, 94 N. C. 702, wherein the court said: "The evidence to prove the loss of a paper must be reasonably sufficient to account for the absence of the original and this must be on oath, not mere hearsay."

In Taunton Bank *v.* Richardson, 5 Pick. (Mass.) 436, it was held that the testimony of a cashier of a bank that a letter was received either by himself or a director, and that each of them had searched for it, but that it was probably lost during a fire which had occurred in the bank, was not sufficient to let in secondary evidence without the affidavit of the director also, because the testimony of the cashier that the director had searched for it is but hearsay; but that if the cashier had further testified that the letter was kept in the files of the bank, secondary evidence would then have been admissible.

88. Brooke *v.* Jordan, 14 Mont. 375, 36 Pac. 450.

89. Cogency of Proof of Loss Generally. — Brewster *v.* Sewell, 3 Barn. & C. 296, 5 Eng. C. L. 291, 22 Rev. Rep. 395; Freeman *v.* Arkell, 1 Car. & P. 135, 326, 9 Eng. C. L. 159; Beall *v.* Dearing, 7 Ala. 124; Waller *v.* School District of Milford, 22 Conn. 326; Wittier *v.* Latham, 12 Conn. 392; Kelsey *v.* Hanmer, 18 Conn. 311.

Rule Stated. — In Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448, the court said, "No certain rule can be laid down as to the proof necessary to establish a loss; the degree of diligence must depend on the nature of the transaction to which the paper relates, its apparent value, and other circumstances. The rigor of the common law, it is said, has been relaxed in this respect, and the non-

a much less perfect case need be shown.[90] And, while the evidence should satisfy the court that further or better evidence is not within the power of the party,[91] in the practical application of the rule, proof of the loss so fully as to exclude every hypothesis of the ex-

production of instruments is now excused for reasons more general and less specific, upon grounds more broad and liberal than were formerly admitted. If any suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made into the reason of its nonproduction. But when there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original — in fact, courts in such cases are extremely liberal."

A Stipulation that a witness testifying to the contents of judicial records which he had read, would testify that all the papers in causes adjudicated or pending at a certain time were destroyed by fire, is sufficient to admit his secondary evidence. *In re* Edwards, 58 Iowa 431, 10 N. W. 793.

In State *v.* Erving, 19 Wash. 435, 53 Pac. 717, it was held that testimony of a recipient of a letter that he did not know where the letter was, that he could not produce it in court, and that he had no idea where it could be found, justified the admission of secondary evidence of its contents.

In McMillan *v.* Bethold, Smith & Co., 35 Ill. 250, an action by the payee upon a promissory note, the agent of the defendant testified that the note was, while in his possession, either picked from his pocket, or mislaid, or lost, and that it was not indorsed; and it was held that this was sufficient to let in secondary evidence.

90. Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527; Minor *v.* Tillotson, 7 Pet. (U. S.) 99; Morehead *v.* U. S., Hoff. Op. 404, 17 Fed. Cas. No. 9,792; Renner *v.* Bank of Columbia, 9 Wheat. (U. S.) 581; U. S. *v.* Doebler, Baldw. 519, 25 Fed. Cas. No. 14,977; Phœnix Ins. Co. *v.* Taylor, 5 Minn. 492; Bierne *v.* Rosser, 26 Gratt. (Va.) 537; Shields *v.* Byrd, 15 Ala. 818; Jones *v.* Scott, 2 Ala. 58.

In Berg *v.* Carroll, 40 N. Y. St. 811, 16 N. Y. Supp. 175, the letter was alleged to have been reinclosed in an envelope, addressed to the writer, and deposited in the mail. The place of mailing and the person mailing was not stated; and no attempt was made to explain in any other way inability to produce the letter; it was held that this did not sufficiently show the loss or destruction of the letter.

Where a party testifies on his examination in chief, that the primary evidence is lost, but on his cross-examination by the court, by the evasive answers which he gives to direct questions, leaves it in doubt as to whether he is fairly and honestly testifying, his offer of secondary evidence is properly rejected. Isaacs *v.* Cohn, 75 N. Y. St. 1176, 41 N. Y. Supp. 779.

91. *United States.* — De Haven *v.* Henderson, 1 Dall. 424; U. S. *v.* Sutter, 21 How. 170.

Colorado. — Hobson *v.* Porter, 2 Colo. 28.

Illinois. — Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 65 Am. St. Rep. 401.

Indiana. — Newton *v.* Donnelly, 9 Ind. App. 359, 36 N. E. 769.

Iowa. — Hanson *v.* American Ins. Co., 57 Iowa 741, 11 N. W. 670.

Kansas. — Stevens *v.* State, 50 Kan. 712, 32 Pac. 350.

Louisiana. — Winston *v.* Prevost, 6 La. Ann. 164; Tate *v.* Penne, 7 Mart. (N. S.) 548.

Maine. — Hammond *v.* Ludden, 47 Me. 447.

New Hampshire. — Woods *v.* Gassett, 11 N. H. 442.

New York. — Jackson *v.* Frier, 16 Johns. 193.

Pennsylvania. — Parks *v.* Dunkle, 3 Watts & S. 291.

Statement of Rule. — In Jernigan *v.* State, 81 Ala. 58. 1 So. 72, the court, in commenting on the

istence of the original is not required. It is not necessary to prove exhaustively that the paper nowhere exists.[92]

Conclusion of Witness Not Enough. — Testimony merely to the effect that the primary evidence is "lost or destroyed," without a search or other facts in support thereof, is not enough. The court will not adopt the conclusion of the party.[93]

Belief of a Party however, that the primary evidence is lost or destroyed has been held sufficient.[94]

amount of proof of the loss of the primary evidence necessary, said, "In accounting for the absence of a writing, material testimony in the cause, so as to let in secondary evidence of its contents, no universal rule can be declared which will be applicable to every case; the testimony is addressed to the presiding judge, and he pronounces on its sufficiency. He must be reasonably convinced that it has been destroyed, or lost, or is beyond the reach of the court's process. A material inquiry in such cases is whether or not there was a probable motive for withholding this highest and best evidence. Whenever the court is able to answer this inquiry in the negative less evidence will satisfy its conscience than if suspicious circumstances attended the transaction.

When parties rely upon parol evidence to establish contents of a written agreement claimed to be lost they should be required to explain fully the circumstances of the loss or destruction of the paper so as to relieve themselves from any reasonable suspicion of having connived at its loss. Shuler *v.* Bonander, 80 Mich. 531. 45 N. W. 487.

Document Thrown Overboard Ship. The fact that a mail bag containing the original document desired was thrown overboard when the vessel was being chased by an enemy during the time of war, justifies the admission of secondary evidence of the document. Anderson *v.* Robson, 2 Bay (S. C.) 495.

92. Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527; Price *v.* Johnston, 1 Ohio St. 390; Longstreth *v.* Korb, 64 N. J. Law 112, 44 Atl. 934. See also Mayfield *v.* Turner, 180 Ill. 332, 54 N. E. 418, wherein the court said that while it is not sufficient to merely prove as a conclusion that a diligent search has been made, yet it is not necessary to go to the other extreme and negative every remote possibility that may exist.

Statement of Rule. — "The rule of law which requires the best evidence within the power or control of the party to produce should not be relaxed, and the court should be satisfied that the better evidence has not been wilfully destroyed nor voluntarily withheld. But the rule on the subject does not exact that the loss or destruction of the document of evidence should be proved beyond all possibility of a mistake. It only demands that a moral certainty should exist that the court has had every opportunity for examining and deciding the cause upon the best evidence within the power of the litigant to produce." U. S. *v.* Sutter, 21 How. (U. S.) 170, 16 L. ed. 119.

93. Anglo-American P. & Prov. Co. *v.* Cannon, 31 Fed. 313. *Compare* New York N. H. & H. R. Co. *v.* O'Leary, 93 Fed. 737, wherein it was held that a witness's positive statement that he could not find the paper constituting the primary evidence is sufficient to justify the court in admitting proof of its contents, in the absence of anything showing that either party desires to examine the witness further.

94. Ratteree *v.* Nelson, 10 Ga. 439. See also Meakin *v.* Anderson, 11 Barb. (N. Y.) 215.

"Belief" of Witness Sufficient. In Riggs *v.* Tayloe, 9 Wheat. (U. S.) 483, the affiant to the fact of the loss of the primary evidence stated that his impression was that he tore up the document, believing he would have no further use for the paper, but that he was not certain that he tore

b. *Application of the Rule.* — **(1.) In General.** — Generally reasonable proof of the loss, stronger or weaker according to the circumstances of the case, seems to be all that is required.[95]

(2.) Nature and Value of Instrument. — As has been just stated, there should be a distinction noted between such instruments as have ceased to be of any value and such as are made the basis of a claim. As to the first, the slightest proof of a loss is sufficient to justify secondary evidence;[96] while as to instruments of the latter class, the rule of evidence is much more strict.[97]

(3.) Quality of Secondary Evidence Offered. — Much stronger proof

it up; but if he did not tear it up, it had become lost or mislaid, and that he had searched vainly for it amongst his papers. It was objected that his testimony was not sufficiently certain or positive as to the loss of the original; but the court, in holding this objection untenable, said: "An impression is an image fixed in the mind, it is belief; and believing the paper in question was destroyed, has been deemed sufficient to letting in the secondary evidence. (*Citing* Phill. on Evid. 399, 7 East 66; 8 East 284.) The alternative alluded to is, 'if he did not tear it up it has become lost or mislaid.' Now if he tore it up it was destroyed; if it was not destroyed, it was lost or mislaid; in either event it was not in the power or possession of the affiant, which we think is sufficiently certain and positive to let in secondary evidence." To the same effect, Myers *v.* Russell, 52 Mo. 26.

95. Longstreth *v.* Korb, 61 N. J. Law 112, 44 Atl. 934.

Where the contention relates rather to the execution of the original document than its loss, the court will not be so strict as to evidence of loss. Morehead *v.* U. S., Hoff. Op. 404, 17 Fed. Cas. No. 9,792.

Where articles of co-partnership are charged by each partner to be in the possession of the other, and positively denied by each, parol evidence is admissible to prove its contents as a lost instrument. Jones *v.* Morehead, 3 B. Mon. (Ky.) 377.

In Witter *v.* Latham, 12 Conn. 392, it was necessary to prove a debtor's discharge in insolvency, and, not being able to produce the certificate, proof was made by the commissioners that they had given such a certificate and made return of their doings to the court; and by the debtor that he had received such a certificate, but that he had not seen it for years, did not know where it was, though he did not state that he had searched for it; and by the clerk of the court that he had searched the records and could find neither the certificate nor the return. And parol evidence of the contents of the certificate was held admissible.

In Compton *v.* Mathews, 3 La. (O. S.) 128, 22 Am. Dec. 167, it was held that the oath of the party negativing all idea that the primary evidence was in his possession or within his power accompanied by testimony showing circumstances which rendered probable the loss of the primary evidence was a sufficient compliance with the Louisiana Code so as to admit secondary evidence.

96. Where the document constituting the primary evidence from its very nature has only a transitory interest and does not appear to have any such obvious importance as to require its preservation, slight proof of loss is sufficient. American Life Ins. and Trust Co. *v.* Rosenagle, 77 Pa. St. 507. See also Wells *v.* Adams, 7 Colo. 26, 1 Pac. 698, so holding of a letter or the superscription upon an envelope which is not likely to ever become useful. Bouldin *v.* Massie, Wheat. (U. S.) 122, 5 L. ed. 414.

97. Jackson *v.* Root, 18 Johns. (N. Y.) 60. See also Waller *v.* School District of New Milford, 22 Conn. 326; Little *v.* Marsh, 2 Ired. Eq. (N. C.) 18.

has been held necessary where parol evidence is sought to be used, than when a copy of a record not suspicious is sought to be used.[98]

(4.) Lapse of Time. — Strict proof of the loss of a paper is not required where there has been a great lapse of time since the execution of the paper.[99] Otherwise, however, where the party seeking to use secondary would be benefited by the loss of the original.[1]

(5.) Paper Collaterally in Issue. — It is held that proof of probable loss is sufficient to let in secondary evidence of the contents of a paper which is only collaterally in issue, and whose existence is satisfactorily shown.[2]

c. *Presumption From Unsuccessful Search.* — **(1.) In General.** The loss or destruction of the primary evidence, however, is not always susceptible of proof by evidence directly or positively tending to support such an issue. In such case, a presumption of its loss, arising from proof that it cannot be found after a diligent search for it, is enough.[3]

98. Lavergne *v.* Elkins, 17 La. (O. S.) 220.

99. Lewis *v.* Baird, 3 McLean 56, 15 Fed. Cas. No. 8,316; Daniels *v.* Smith, 28 N. Y. St. 351, 8 N. Y. Supp. 128. See also Spencer *v.* Conrad, 9 Rob. (La.) 78; Rochell *v.* Holmes, 2 Bay (S. C.) 487, where it was held that the loss or destruction of a document might be presumed from length of time and the ravages of war.

In Rodgers *v.* Gaines, 73 Ala. 218, an action of trover for property which the plaintiff claimed under purchase at a tax sale, it was held that oral evidence was properly admitted of the facts and contents of the posted notices of sale, because they had been put up more than a year before the trial in exposed places, and the presumption was that they had been destroyed.

1. People *v.* Lord, 67 Barb. (N. Y.) 109.

2. Lumbert *v.* Woodard, 144 Ind. 335, 43 N. E. 302, 55 Am. St. Rep. 175, *citing* Coonrod *v.* Madden, 126 Ind. 197, 25 N. E. 1102. "Indeed," said the court, "it may be doubted if the contents were not subject to proof by parol without proof of loss, since the instrument and its contents were but collaterally in issue."

Evidence of a Surrender of a Mortgage to the Mortgagor by the Mortgagee under an agreement for the return to the mortgagee of the property mortgaged, accompanied by proof of the execution of the mortgage, is sufficient to admit secondary evidence of the contents of the mortgage on behalf of the mortgagee on an issue between him and the third person as to the title of the property mortgaged. Huls *v.* Kimball, 52 Ill. 391.

3. Presumptive Evidence of Loss Sufficient. — *Connecticut.* — Elwell *v.* Mersick, 50 Conn. 272.

Colorado. — Brevoort *v.* Hughes, 10 Colo. App. 379, 50 Pac. 1050.

Georgia. — Harper *v.* Scott, 12 Ga. 125; Vaughn *v.* Biggers, 6 Ga. 188.

Indiana. — McCormick Harv. Mach. Co. *v.* Gray, 114 Ind. 340, 16 N. E. 787.

Kansas. — Western Union Tel. Co. *v.* Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515.

Maryland. — Jones *v.* Jones, 45 Md. 144; Union Banking Co. *v.* Gittings, 45 Md. 181; Wright *v.* State, 88 Md. 436, 41 Atl. 795.

Massachusetts. — Taunton Bank *v.* Richardson, 5 Pick. 436; Central Turnpike Corporation *v.* Valentine, 10 Pick. 142.

Michigan. — Howd *v.* Breckenridge, 97 Mich. 65, 56 N. W. 221.

Minnesota. — State *v.* Spaulding, 34 Minn. 361, 25 N. W. 793; Phœnix Ins. Co. *v.* Taylor, 5 Minn. 492.

Missouri. — Hume *v.* Hopkins, 140 Mo. 65, 41 S. W. 784.

New Jersey. — Clark *v.* Hornbeck,

(2.) Extent and Diligence of Search.— (A.) Generally. — From the nature of the subject, there is great difficulty in laying down any general rule defining the extent and diligence of the search a party must make before the court may conclude that the primary evidence is lost or destroyed, as each case must necessarily depend upon its own peculiar circumstances.[4] All courts agree, however, that the search must have been diligent,[5] and that the party must have exhausted, to a reasonable degree,[6] all the sources of information and means of discovery suggested by the nature of the case and accessible to him,[7] and while the search is not required to be such as would be

17 N. J. Eq. 430; Sussex Co. Mut. Ins. Co. *v.* Woodruff, 26 N. J. Law 541.

Pennsylvania. — Parks *v.* Dunkle, 3 Watts & S. 291.

South Carolina. — Peay *v.* Picket, 3 McCord 318.

Texas. — Cheatham *v.* Riddle, 8 Tex. 162; Haun *v.* State, 13 Tex. App. 383, 44 Am. Rep. 706.

In Murphy *v.* Olberding. (Iowa), 78 N. W. 205, the defendant testified that he, at one time, had the primary evidence, but that it had been blurred with ink by his children; that he put some grease on it to bring out the writing, made a copy which he offered in evidence and threw the original away believing it to be of no further use; and that he had made search for the original but could not find it. It was held that the copy was admissible, notwithstanding it was made after the commencement of the suit; that if there were any suspicious circumstances connected with the loss of the original, it was for the jury. *Citing* Livingston *v.* Rogers, 2 Johns. Cas. (N. Y.) 488; Jackson *v.* Woolsey, 11 Johns. (N. Y.) 453; Smith *v.* Inhabitants of Holyoke, 112 Mass. 517.

4. Cheatham *v.* Riddle, 8 Tex. 162; Simpson *v.* Norton, 45 Me. 281; Mariner *v.* Saunders, 10 Ill. 113; Slocum *v.* Bracy 65 Minn. 100, 67 N. W. 843; Miller *v.* Miller, 2 Bing. (N. C.) 76, 2 Scott 123; Tiffany *v.* McCumber, 13 U. C. Q. B. (Can.) 159.

5. **Mere Evidence of Search** is not enough, as the search may not have been diligent. Folsom *v.* Scott, 6 Cal. 460.

A Partial Search of the place of custody of a document is not sufficient. Perez *v.* State, 10 Tex. App. 327.

Testimony that the witness is not in the habit of keeping his letters; that he had looked for the letter in question in his waste paper basket but it was too late, as it had been destroyed with other letters, warrants the admission of secondary evidence. Shrimpton *v.* Netzorg, 104 Mich. 225, 62 N. W. 343.

6. **Reasonable Diligence Under the Circumstances of the Case is All That is Required.** — Spaulding *v.* Bank of Susquehanna Co. 9 Pa. St. 28; Kelsey *v.* Hanmer, 18 Conn. 311; Boyle *v.* Wiseman, 10 Ex. 647, 24 L. J. Ex. 160, 10 Jur. (N. S.) 115; Hart *v.* Hart, 1 Hare 1, 11 L. J. Ch. 9.

Every Reasonable Effort Which it Appears Might Have Resulted in the Production of the primary evidence should be shown to have been made without avail before secondary evidence should be received. Boulden *v.* State, 102 Ala. 78, 15 So. 341. See also Holbrook *v.* School Trustees, 28 Ill. 187.

7. *England.*—Rex *v.* Piddlehinton, 3 Barn. & A. 460.

Arkansas. — Wilburn *v.* State, 60 Ark. 141, 29 S. W. 149.

California. — Folsom *v.* Scott, 6 Cal. 460.

Colorado. — Bruns *v.* Clase, 9 Colo. 225, 11 Pac. 79.

District of Columbia. — Pierce *v.* Jacobs, 7 Mackey 498.

Georgia. — Ellis *v.* Smith, 10 Ga. 253; Molyneaux *v.* Collier, 13 Ga. 406.

Illinois. — Berdel *v.* Eagan, 125 Ill. 298, 17 N. E. 709.

Maine. — Wing *v.* Abbott, 28 Me. 367; Kidder *v.* Blaisdell, 45 Me. 461,

made for stolen property or negative every possibility of the document having been kept back,[8] yet if it appears that the search was hasty and evidently unsatisfactory to the party himself, secondary evidence should not be received.[9] But the bare possibility that the

holding that in the absence of such proof, the presumption is that the person legally entitled to its custody has possession of the primary evidence. Glen *v.* Rogers, 3 Md. 312; Brashears *v.* State, 58 Md. 563; Windom *v.* Brown, 65 Minn. 394, 67 N. W. 1028; Brinkman *v.* Luhrs, 60 Mo. App. 512.

New Jersey. — Longstreth *v.* Korb, 64 N. J. Law 112, 44 Atl. 934; Johnson *v.* Arnwine, 42 N. J. Law 451, 36 Am. Rep. 527.

New York. — Dan *v.* Brown, 4 Cow. 483, 15 Am. Dec. 395; Kearney *v.* New York, 92 N. Y. 617; Bannon *v.* Levy, 23 Misc. 130, 50 N. Y. Supp. 659.

North Carolina. — Eure *v.* Pittman, 3 Hawks 364.

Oregon. — Sperry *v.* Wesco, 26 Or. 483, 38 Pac. 623; Harmon *v.* Decker, (Or.), 68 Pac. 1111.

Texas. — Haun *v.* State, 13 Tex. App. 383, 44 Am. Rep. 706; Johnson *v.* Hollamoa, 2 Pos. Unrep. Cas. 294.

Vermont. — Proprietors of Braintree *v.* Battles, 6 Vt. 395.

Evidence of possession of a note by the holder two days prior to his death and that after his death his widow searched amongst his papers but could not find it is enough. Gray *v.* Thomas, 83 Tex. 246, 18 S. W. 721.

The Fact That Counsel Had Possession of the Original Document and read it in evidence on a trial before the same justice in whose legal custody it then was, does not raise any presumption that he retained possession of it afterwards so as to necessitate a search amongst his papers. Rash *v.* Whitney, 4 Mich. 495.

Testimony of the Recipient of a Letter that he had lost it; that he had looked for it a great deal, and that he thought at one time that he might have left it at the office of his attorney, and had looked for it there but was unable to find it, is sufficient to let in secondary evidence of its contents. Samonset *v.* Mesnager, 108 Cal. 354, 41 Pac. 337.

Papers Scattered. — In Whiteside *v.* Watkins, (Tenn.), 58 S. W. 1107, it was held that testimony by the party that he had made search for the document in question and could not find it; that his papers have recently been scattered, without any evidence as to search made in the different places where the papers have been scattered, or in fact any evidence that the paper could not be found by diligent search was not enough.

8. Brashears *v.* State, 58 Md. 563. See also Mayfield *v.* Turner, 180 Ill. 332, 54 N. E. 418.

9. Hazen *v.* Pierson & Co., 83 Ill. 241; State *v.* Wayman, 2 Gill & J. 254; Huids *v.* Evans, 2 Spear (S. C.) 17; Blondeau *v.* Sheridan, 81 Mo. 545.

The testimony of an agent to the effect that at the close of the year he assorted his papers and destroyed such as he regarded as of no value; that he had frequently looked over his papers and had not lately seen the paper in question; that he had never looked for it, and had no recollection that it had been destroyed, although he was satisfied that it was, because he had not seen it for some time in looking over his papers for other objects, is not sufficient to let in secondary evidence; he had not looked for the paper itself — *non constat*, but that it was in existence and among the papers of his principal in his possession at the time of the trial. Green *v.* State, 41 Ala. 410.

In Dishaw *v.* Wadleigh, 15 App. Div. 205, 44 N. Y. Supp. 207, it was held that testimony by the addressee of a letter that he did not know where the letter was; that he thought it had been destroyed, but was not sure; that he had not been asked to produce the letter, was insufficient to justify the admission of secondary evidence without further evidence of the search having been made.

document might have been found on a more diligent search is not good reason for excluding the secondary evidence.[10]

(B.) Place of Deposit. — If the last place of deposit of the primary evidence be known, it must be shown that an unsuccessful search was made there.[11] If such place of deposit be not known, the natural inquiry would be, where would the primary evidence naturally

10. Pendleton *v.* Com. 4 Leigh (Va.) 694, 26 Am. Dec. 342.

In Studebaker Mfg. Co. *v.* Dixon, 70 Mo. 272, the attorney for the party with whom the latter had placed the original paper, testified that he had always kept his client's papers together, and that he had made a thorough search in his office everywhere said paper would be likely to be found, and could not find it; although on cross examination he stated the paper might possibly be in his office, and if so it had been folded into some file box or pigeon hole, and it was held that his evidence disclosed a diligent search for, and an honest effort to find the missing paper was sufficient.

11. *Alabama.* — Jernigan *v.* State, 81 Ala. 58, 1 So. 72; Bogan *v.* McCutcheon, 48 Ala. 493.

California. — Taylor *v.* Clarke, 49 Cal. 671.

Colorado. — Wells *v.* Adams, 7 Colo. 26, 1 Pac. 698.

Connecticut. — Kelsey *v.* Hanmer, 18 Conn. 311.

Delaware. — Roe *v.* Gemmill, 1 Houst. 9.

Illinois. — Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Cook *v.* Hunt, 24 Ill. 535.

Maryland. — Shorter *v.* Rozier, 3 Har. & McH. 238.

New York. — Leland *v.* Cameron, 31 N. Y. 115; Bronner *v.* Fraunthal, 9 Bosw. 350.

Pennsylvania. — Parke *v.* Bird, 3 Pa. St. 360.

Vermont. — Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98; Royalton *v.* Royalton & W. Transp. Co., 14 Vt. 311.

Statement of Rule. — "As a general rule, however, we may say, that when from the ownership, nature or object of a paper, it has properly a particular place of deposit, or where, from the evidence, it is shown to have been in a particular place, or in particular hands, then that place must be searched by the witness, proving the loss, or the person produced, into whose hands it has been traced. The extent of the search to be made in such place or by such person must depend in a great degree upon the circumstances. Ordinarily, it is not sufficient that the paper is not found in its usual place of deposit, but all the papers in the office or place should be examined, etc. On the whole, the court must be satisfied that the paper is destroyed and cannot be found. It is true the party need not search every possible place where it might be found, for then the search might be interminable, but he must search every place where there is a reasonable probability that it may be found." Mariner *v.* Saunders, 10 Ill. 113.

"**This Rule is Founded in Reason and Justice,** and to require of the party a less degree of diligence, would be to defeat the object of reducing contracts to writing, and the object of the legislature in requiring conveyances to be by deed. It would leave the tenure to real estate dependent on the frail memory and imperfect understanding of witnesses, who would in many instances be illiterate and ignorant of the legal effect of contracts. The party wishing to avail himself of the benefit of such secondary evidence, should be required to make at least the same effort that is expected the party would make if he were to lose the benefit of the evidence if the instrument were not found." Rankin *v.* Crowe, 19 Ill. 626.

Proof that after diligent but unsuccessful search for the papers, according to the best of the witness's recollection and belief, he had given them to another person who was too sick to come into court, and who said he did not have them, but was under

and most likely be found, and accordingly search made in that place.[12] And of course as a necessary consequence of following these rules, it is proper to admit secondary evidence upon proof of

the impression that he had handed them over to the defendant is not sufficient proof of their loss, assuming the declarations of such third person to be admissible. Gaither *v.* Martin, 3 Md. 146.

Diligent Search in the Proper Office for Papers Belonging There, some of which only are found, with evidence that others had never been recorded is a sufficient foundation for the introduction of secondary evidence. Williams *v.* Colbert Co., 81 Ala. 216, 1 So. 74.

Evidence of a Search by an Executor among the Papers of the Testator for the latter's will; that he had searched everywhere he knew, and taken every means he could, without being able to find it, is enough to let in secondary evidence. McConnell *v.* Wildes, 153 Mass. 487, 26 N. E. 1114. See also Hutchins *v.* Bacon, 46 Tex. 408.

In Ransdale *v.* Grove, 4 McLean C. C. 282, 20 Fed. Cas. No. 11,570, it was held that evidence merely showing that the original document had been left with one of the purchasers of property or that it had been lost in crossing a river, was not a sufficient showing of the loss of the original to let in secondary evidence; that it should have been made to appear that the purchasers did not have the document in their possession.

Testimony of a justice of the peace from whom the case on trial had been appealed, merely that a paper had been used in evidence before him and by him transmitted to the upper court, and testimony of the deputy clerk of that court that he had been unable to discover any such paper amongst his files, is not sufficient; it should also be shown in point of fact that the paper reached the upper court and that a search among the files or records of that court failed to disclose it. Swink *v.* Bohn, 6 Colo. App. 517, 41 Pac. 838.

12. *England.* — Reg. *v.* Hinckley, 3 B. & S. 885.

Alabama. — Phœnix Assur. Co. *v.* McAuthor, 116 Ala. 659, 22 So. 903, 67 Am. St. Rep. 154; Foster *v.* State, (Ala.), 7 So. 185; Singer Mfg. Co. *v.* Riley, 80 Ala. 314.

Colorado. — Billen *v.* Henkel, 9 Colo. 394, 13 Pac. 420.

Illinois. — Case *v.* Lyman, 66 Ill. 229; Carr *v.* Miner, 42 Ill. 179; Dayle *v.* Wiley, 15 Ill. 576; Blakely Prtg. Co. *v.* Pease, 95 Ill. App. 341.

Indiana. — Bascom *v.* Toner, 5 Ind. App. 229, 31 N. E. 856; Meek *v.* Spencer, 8 Ind. 118.

Maryland. — Glen *v.* Rogers, 3 Md. 312.

Michigan.—Deerfield Twp. *v.* Harper, 115 Mich. 678, 74 N. W. 207.

New York. — Jackson *v.* Frier, 16 Johns. 193.

Pennsylvania. — Porter *v.* Wilson, 13 Pa. St. 641; Flinn *v.* McGonigle, 9 Watts & S. 75.

Texas. — Walker *v.* Peterson, (Tex. Civ. App.), 33 S. W. 269.

Vermont. — Viles *v.* Moulton, 11 Vt. 470; Rutland & B. R. Co. *v.* Thrall, 35 Vt. 536.

Reasonable Search Shall Be Made in the Place Where the Paper is Last Known to Have Been, and if not found there, then its present place of deposit shall be searched out in the usual mode by making inquiry of those most likely to know its whereabouts; and that is, of course, of the person last known to have had its custody. Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98. See also Lawrence *v.* Burris, 13 La. Ann. 611; Hobson *v.* Porter, 2 Colo. 28.

And where the party had put the paper in his pocket to have with him for a legitimate purpose shown, and on looking for it discovered its loss, it is enough if he made every reasonable effort to find it by looking in places where he knew he had been after he placed it in his pocket. Brevoort *v.* Hughes, 10 Colo. App. 379, 50 Pac. 1050.

In Glen *v.* Rogers, 3 Md. 312, a witness stated that he had never looked for the particular paper amongst

diligent but ineffectual search in such place of deposit.[13] But proof of search for a document is not enough where it is not shown that the document was ever deposited at the place where the search was made.[14]

But where the paper is of such nature that the law does not presume the possession to be in the party desiring to use the evidence and he has not in fact had its possession, he will not be required to show a diligent search among his papers.[15]

Where it is doubtful whether a letter is in possession of the addressee or of the party who wishes to prove its contents, it must be shown

those of his intestate, although he had made a general examination for such as were of value or importance, that he had found no such paper, but that it might then possibly be among the papers; and it was held that this was not sufficient evidence of the loss of the paper to admit secondary evidence of its contents.

13. *England.* — Pardoe *v.* Price, 13 Mees. & W. 267, 14 L. J. Ex. 212; Harper *v.* Cook, 1 Car. & P. 139; McGahey *v.* Alston, 2 Mees. & W. 206, 2 Gale 238.

Alabama. — Jernigan *v.* State, 81 Ala. 58, 1 So. 72; Poe *v.* Dorrah, 20 Ala. 288, 56 Am. Dec. 196; Sledge *v.* Clopton, 6 Ala. 589.

California. — People *v.* Clingan, 5 Cal. 389.

Georgia. — McDowell *v.* Irwin, 32 Ga. 39.

Iowa. — Pastel *v.* Palmer, 71 Iowa 157, 32 N. W. 257; Watson *v.* Richardson, 110 Iowa 673, 80 N. W. 407.

Michigan. — Higgins *v.* Watson, 1 Mich. 428.

Mississippi. — Tigner *v.* McGehee, 60 Miss. 185.

Missouri. — State *v.* Flanders, 118 Mo. 227, 23 S. W. 1086; Lindeau *v.* Meyberg, 27 Mo. App. 171.

New Jersey. — Clark *v.* Hornbeck, 17 N. J. Eq. 430; Kingwood *v.* Bethlehem, 13 N. J. Law 221.

Pennsylvania. — Hemphill *v.* McClimans, 24 Pa. St. 367.

South Carolina. — Elrod *v.* Cochran, 59 S. C. 467, 38 S. E. 122.

In Longstreet *v.* Korb, 64 N. J. Law 112, 44 Atl. 934, the recipient of a letter testified that the letter was taken from the envelope and laid upon his desk; that he had occasion to refer to and read it several times, and that it lay upon his desk quite awhile; that when a dispute came up concerning it, he looked for it but could not find it there; whereupon he searched for it through his desk and other desks in his office, through his pockets, his home; and in fact everywhere he could think that it might possibly be laid, and also offered a reward for it. Upon this showing secondary evidence was admitted.

In Deaver *v.* Rice, 2 Ired. Law (N. C.) 280, it was held that the loss of an execution which had been in the hands of a constable was not sufficiently shown by evidence that the constable had removed to another state, and had left his papers generally with an agent who testified that the execution was not to be found amongst the papers.

14. Cooper *v.* Maddan, 6 Ala. 431; Reg. *v.* St. Mary's Islington, 1 W. R. 34.

The Loss of a Paper Which Is Not Required to Be Recorded cannot be shown by evidence of an unsuccessful search in the recorder's office. Nitchie *v.* Earle, 117 Ind. 270, 19 N. E. 749.

15. Wells *v.* Miller, 37 Ill. 276. See also Lester *v.* Blackwell, (Ala.), 30 So. 663.

In Rex *v.* Denio, 7 Barn. & C. 620, 1 M. & Ry. 204, S. C. *sub. nom.*; Rex *v.* Rhodeg[illegible]idio, 6 L. J. M. C. (O. S.) 10, it was held that where a party desiring a document is told by the person entitled to its possession that it is in the hands of a third person, he should, in addition to proof of a search by such third person, produce his informant, if alive, to prove the possession of such third person.

that it could not be found in the possession of either.[16]

Paper Belonging to Adverse Party. — Very much less diligence in searching for a paper, before offering secondary evidence of its contents, will be required when the paper in question belongs to the adversary, than when it belongs to the party offering the testimony.[17]

(C.) Nature of Instrument. — The character and importance of the paper are matters to be considered in determining whether or not the search has been sufficiently diligent.[18] If the paper be one of importance and such as the owner has a direct interest in preserving, greater diligence in the search for it is required than in cases where the paper is of little or of no value in the preservation of which one is not expected to exercise such care.[19]

If the Paper be one of importance chiefly to third persons, search amongst the papers of such of the parties as would have an interest in the preservation of the paper, or would under the circumstances be likely to have it in possession, will be sufficient.[20]

If the paper be one of public concern and there be, by law, a place where such papers, in due course of law, should be deposited, search in that place is all that will be required.[21]

Voluminous Papers and Records. — The fact that the search for the primary evidence will necessitate the search of voluminous papers and records will not excuse the necessity of a diligent search.[22]

(D.) Time of Search — It is not enough to show merely that long previous to the trial the person in whose custody the paper had last been had made an ineffectual search for it without also showing that

16. Bogan *v.* McCutchen, 48 Ala. 493.

17. Desnoyer *v.* McDonald, 4 Minn. 515.

18. Union Banking Co. *v.* Gittings, 45 Md. 181; Haun *v.* State, 13 Tex. App. 383, 44 Am. Rep. 706; Wright *v.* State, 88 Md. 436, 41 Atl. 795; Hayden *v.* Mitchell, 103 Ga. 431, 30 S. E. 287; Slocum *v.* Bracy, 65 Minn. 100, 67 N. W. 843; Bateman *v.* Bateman, 16 Tex. 541; Wiseman *v.* Northern Pac. R. Co., 20 Or. 425, 26 Pac. 272, 23 Am. St. Rep. 135; American Life Ins. & Trust Co. *v.* Rosenagle, 77 Pa. St. 507; Gully *v.* Exeter, 4 Bing. 290, 12 Moore 591, 29 Rev. Rep. 565.

19. Bartlett *v.* Wilbur, 53 Md. 485; Union Banking Co. *v.* Gittings, 45 Md. 181; Taunton Bank *v.* Richardson, 5 Pick. (Mass.) 436; Spaulding *v.* Bank of Susquehanna Co., 9 Pa. St. 28; Bogan *v.* McCutchen, 48 Ala. 493.

In Haywood *v.* Bryan, 6 Jones Law (N. C.) 82, it was held that where the writings constituted the primary evidence had, after being used for the purpose for which they were made, been thrown aside as useless it was not necessary to show that search had been made for them preliminary to the introduction of secondary evidence.

20. Reg. *v.* Hinckley, 3 B. & S. 885; Kingwood *v.* Bethlehem, 13 N. J. Law 221.

21. Harmon *v.* Decker, (Or.), 68 Pac. 1111.

And in the absence of grounds of suspicion that the original is fraudulently withheld this will justify the admission of secondary evidence without calling the persons who have had access to the paper and might have the original in their possession. Johnson *v.* Arnwine, 42 N. J. Law 451, 36 Am. Rep. 527.

22. Perez *v.* State, 10 Tex. App. 327.

he had not in the meantime found it or that it was still inaccessible or lost.[23]

(E.) Purpose of Proof. — The purposes for which it is proposed to use the evidence on the trial will have an important bearing in determining the degree of diligence required in searching for the original.[24]

(3.) Proof of Search. — (A.) Generally. — The court should be distinctly informed by one having personal knowledge of the facts as to the extent of the search for the primary evidence, and of whom inquiries were made, in order to be able to pass intelligently upon the question of diligence.[25]

(B.) Producing Last Custodian. — And it has been held necessary to produce as a witness to show diligent search the person to whose custody the paper belonged or who is last known to have had possession of it,[26] and that if he is beyond the jurisdiction of the court,

23. Lott *v.* Buck, 113 Ga. 640, 39 S. E. 70. See also Porter *v.* Wilson, 13 Pa. St. 641. *Compare* Fitz *v.* Rabbits, 2 M. & Rob. 60.

Search Made Over Three Years Before the Trial, for a lost instrument executed twelve years before the trial, is not enough. Burr *v.* Kase, 168 Pa. St. 81, 31 Atl. 954.

24. Wiseman *v.* Northern Pac. R. Co., 20 Or. 425, 26 Pac. 272, 23 Am. St. Rep. 135.

25. Smith *v.* Coker, 110 Ga. 650, 36 S. E. 105.

Prima Facie Case Sufficient. — The admission of secondary evidence against the objection that the loss of the original has not been sufficiently shown, will not be held error where the evidence of its loss was sufficient to make out a *prima facie* case, or the party objecting made no cross examination as to the thoroughness of the search which had been made. Bottomley *v.* Goldsmith, 36 Mich. 27.

Proof by One of Several Persons Making Search. — Although the search was made by three persons acting together and on two separate occasions, the mere fact that the preliminary proof of loss and search is made by only one of the three persons the other two being in a distant part of the state, will not be ground for excluding the secondary evidence, if his testimony shows his search sufficiently diligent within the rule. Jernigan *v.* State, 81 Ala. 58, 1 So. 72.

26. Producing Last Custodian.

England. — Freeman *v.* Arkell, 3 D. & R. 669, 1 Car. & P. 135, 326.

Canada. — Grover *v.* Clark, 5 U. C. Q. B. (O. S.) 208.

United States. — Ransdale *v.* Grove, 4 McLean C. C. 282, 20 Fed. Cas. No. 11,570.

Alabama. — Bogan *v.* McCutchen, 48 Ala. 493.

California. — Norris *v.* Russell, 5 Cal. 249.

Illinois. — Lumberg *v.* Machenheuser, 4 Ill. App. 603; Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Rankin *v.* Crowe, 19 Ill. 626; Cook *v.* Hunt, 24 Ill. 535.

Indiana. — Murray *v.* Buchanan, 7 Blackf. 549; Little *v.* Indianapolis, 13 Ind. 364.

Kansas. — Brock *v.* Cottingham, 23 Kan. 383.

Maryland. — Rusk *v.* Sowerwine, 3 Har. & J. 97.

Mississippi. — Freeland *v.* McCaleb, 2 How. 756.

Missouri. — Apperson *v.* Ingram, 12 Mo. 59.

New Hampshire. — Woods *v.* Gassett, 11 N. H. 442.

New York. — Kearney *v.* New York, 92 N. Y. 617.

North Carolina. — Harper *v.* Hancock, 6 Ired. Law 124.

Pennsylvania. — Hartz *v.* Woods, 8 Pa. St. 471; Empire Transp. Co. *v.* Steel, 70 Pa. St. 188; Ralph *v.* Brown, 3 Watts & S. 395.

his deposition must be taken or a sufficient excuse be shown for not doing so.[27] But when the evidence shows the loss or destruction of the primary evidence, it is not then necessary to produce as a witness the person in whose hands the evidence was last traced,[28]

Tennessee. — Pharis *v.* Lambert, 1 Sneed 228.

Texas. — Baldwin *v.* Goldfrank, (Tex. Civ. App.), 26 S. W. 155; Pennypacker *v.* Hazlewood, (Tex. Civ. App.), 61 S. W. 153.

Vermont. — Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

Evidence of a Search by a Person Other Than Owner of a Safe in which it appears the document probably is, is not sufficient to lay the ground for the introduction of parol evidence of its contents. The owner of the safe himself is the proper person to make the search. Kankakee Coal Co. *v.* Crane Bros. Mfg. Co., 38 Ill. App. 555.

Proof of Search by the Party's Agent or Attorney in Fact, and inquiry by him of the grantor in a deed, without proof that the party himself has not possession or control of the original, is not sufficient to let in secondary evidence. His affidavit in the absence of other evidence should be offered on the point. Fallon *v.* Dougherty, 12 Cal. 104.

Secondary evidence of the contents of an instrument, charged to have been forged, which is alleged in the indictment to have been destroyed or withheld by the defendants, cannot be resorted to on proof that it was last seen on the trial of a *habeas corpus* suit of another one of the defendants in the possession of his attorney who is not called upon to answer as to its possession. Morton *v.* State, 30 Ala. 527.

In Richardson *v.* Fellner, 9 Okla. 513, 60 Pac. 270, a suit on a promissory note which was alleged to be lost the proof showed that the note was delivered to an agent of the payee who transmitted the note to the payee by mail, that it was assigned to the plaintiff by the payee while yet in the hands of an agent, and that the defendant had never received the note; but there was no attempt to prove by the payee that he had never received the note or that he had no knowledge of its whereabouts; and it was held that the evidence was insufficient to justify secondary evidence.

Evidence That a Handbill Had Been Put Up in a Former Office four years before, that a search had been unsuccessfully made therefor at the present office of the party, the former office where it was posted being then occupied by others, and that they had also searched without avail at other places named is sufficient to warrant secondary evidence. Whitesell *v.* Crane, 8 Watts & S. (Pa.) 369.

Testimony That Witness Had Given the Writing to Grand Jury, and had not seen it since, though he had searched diligently throughout his own papers, and, together with the solicitor, through the grand jury papers, is not enough. Boulden *v.* State, 102 Ala. 78, 15 So. 341. See also Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797; O'Neil *v.* McKinna, 116 Ala. 606, 22 So. 905. *Compare* Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527.

The fact that a note was sent by mail in a letter directed to a postmaster in another state to have its execution proved and that it had not been returned, is not, without some evidence as to the disposition made of such note by the postmaster, sufficient to let in secondary evidence. Depew *v.* Wheelan, 6 Blackf. (Ind.) 485.

Where a paper has been traced into the hands of a third person whose office, where he keeps such papers, has been burned, with its contents, it is not enough to show merely the fact of the burning, but such third person should be called as a witness that he received and placed the paper in his office, and that it was there at the time the office was burned. Chicago & N. W. R. Co. *v.* Ingersoll, 65 Ill. 399.

27. Vaughn *v.* Biggers, 6 Ga. 188.

28. Dickenson *v.* Breeden, 25 Ill. 167; Rhode *v.* McLean, 101 Ill. 467.

nor is it necessary to produce such custodian where a witness has testified to a search caused by him amongst the papers of such custodian which failed to produce the paper desired.[29]

(C.) Custodian Deceased. — The fact that the person into whose possession the document has been last traced, is dead, requires less strictness of proof of the loss or destruction of the document; still it is incumbent on the party to show inquiry of the personal representative or widow of such person or the person likely to have custody of his papers, if to be found, and to have search made amongst said papers for the document in question.[30]

(D.) Opinions and Conclusions. — A witness's mere opinion or conclusion is not enough. He should state the facts showing the diligence exercised by him in searching for the document.[31] And it is not enough that the party testifies merely that he thinks the primary evidence is lost or destroyed.[32] But where the custodian of a

Destruction by Custodian.—Where a custodian of a paper testifies that he destroyed it, there is no reason for requiring testimony as to exhaustive search for it before allowing secondary evidence. Hawley *v.* Robeson, 14 Neb. 435, 16 N. W. 438.

29. Waggoner *v.* Alvord, 81 Tex. 365, 16 S. W. 1083. In this case the court said: "It would not be sufficient diligence for a party to apply to its last custodian for a lost paper, if he was accessible. The object of such an inquiry is to procure the instrument, and, if not voluntarily delivered to him, it would be the duty of the party to avail himself of such process as the law furnishes for its production. But when the application is made, and especially when, as in this case a search among the papers of the party who was last known to have possession of the deeds was made, we can see no good reason for bringing more than one witness to testify to the same fact. If circumstances existed to cast suspicion upon the veracity or good faith of the party, the court might, as it could with regard to any other evidence, decline to believe the party, and demand other evidence, or rule against him. Ordinarily, a party is not expected to summon as a witness one who declares he knows nothing about the transaction."

30. Girdner *v.* Walker, 1 Heisk. (Tenn.) 186; Baldwin *v.* Goldfrank, (Tex. Civ. App.), 26 S. W. 155.

31. Johnson *v.* Mathews, 5 Kan. 118; Palmer *v.* Logan, 4 Ill. 56; Rankin *v.* Crow, 19 Ill. 626; Mayfield *v.* Turner, 180 Ill. 332, 54 N. E. 418; Shepherd *v.* Pratt, 16 Kan. 209.

See also Smith *v.* Axtell, 1 N. J. Eq. 494; Davidson Lumber Co. *v.* Jones, (Tenn.), 62 S. W. 386.

In Crowe *v.* Capwell, 47 Iowa 426, the witness stated merely that he had searched for the original document "at home" but could not find it; and it was held that the search was too general and indefinite to justify secondary evidence.

Where the Paper Is of the Utmost Importance to the Party, evidence made by him that he searched for it but could not find it, without stating whether the search was made in the places where it was usually kept, and without stating the degree of diligence used in making the search, does not show that he made a diligent search, and had reasonably exhausted all the sources of information ordinarily accessible to him. Bartlett *v.* Wilbur, 53 Md. 485.

32. Bogan *v.* McCutcheon, 48 Ala. 493. In this case the witness testified that he had looked amongst his papers but could not find the primary evidence; that he might have overlooked it, but thought it might have been lost or destroyed.

document testifies positively to the loss thereof, the fact of search may be implied upon such testimony, and if the opposite party does not see fit to cross examine him upon this point, it is not necessary that his evidence should affirmatively show a search.[33]

D. Order of Proof. — When evidence of the contents of a writing alleged to be lost is proposed to be given the natural order of making the proof is to show (1) that the original existed; (2) that it has been lost, and (3) its contents.[34] But these facts are so frequently blended together, and have such a mutual relation, and dependence upon each other, that it is difficult and often impossible to observe strictly the logical order of proof, and, in such case it is not considered fatal error for the court to change the order of proof, so long as the facts themselves are established by proper and sufficient evidence.[35]

E. Questions of Law and Fact. — The question whether the loss of the primary evidence has been satisfactorily proved so as to let in secondary evidence is one for the court,[36] and to justify a re-

33. Smith *v.* Brown, 151 Mass. 338, 24 N. E. 31.

34. Shrowders *v.* Harper, 1 Har. (Del.) 444.

Compare. — Perry *v.* Jeffries, 61 S. C. 292, 39 S. E. 515, where it was said that proof of the loss of primary evidence was necessary before secondary evidence could be received. State *v.* McCoy, 2 Speer, (S. C.) 711; Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305; Laster *v.* Blackwell, (Ala.), 30 So. 663, wherein it is held that evidence as to the contents of a document offered in advance of the preliminary proof is properly disallowed.

35. Minor *v.* Tillotson, 7 Pet. (U. S.) 99; Morehead *v.* U. S., Hoff. Op. 404, 17 Fed. Cas. No. 9,792; Cross *v.* Williams, 72 Mo. 577; Fitch *v.* Bogue, 19 Conn. 285; Den *v.* Pond, 1 N. J. Law 379; Maxwell *v.* Bolles, 28 Or. 1, 41 Pac. 661.

The Order of Proof in Respect of the Preliminary Proof of Loss and evidence of the contents of primary evidence may not always be rigidly enforced by the court, although it seems most advisable in general to procure it and to require the foundation to be first laid before receiving the secondary evidence; but it is indispensable that the legal proof required to warrant secondary evidence should be satisfactorily made out either before or after. Parks *v.* Dunkle, 3 Watts & S. (Pa.) 291. See also Hewlett *v.* Henderson, 9 Rob. (La.) 379.

The error in admitting secondary evidence without sufficiently accounting for the non-production of the primary evidence is cured where it appears later in the trial that the primary evidence had been destroyed. Leebrick *v.* Stahl, 68 Iowa 515, 27 N. W. 490.

36. *Canada.* — Russell *v.* Fraser, 15 U. C. C. P. 375.

Alabama. — Glassell *v.* Mason, 32 Ala. 719.

Colorado. — Hobson *v.* Porter, 2 Colo. 28.

Connecticut. — Ellwell *v.* Mersick, 50 Conn. 272.

Georgia. — Allen *v.* State, 21 Ga. 217, 68 Am. Dec. 457; Ellis *v.* Smith, 10 Ga. 253; Hayden *v.* Mitchell, 103 Ga. 431, 30 S. E. 287; Vaughn *v.* Biggers, 6 Ga. 188.

Maine. — Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547.

Maryland. — Union Banking Co. *v.* Gittings, 45 Md. 181.

Massachusetts. — Bourne *v.* Buffington, 125 Mass. 481.

Missouri. — Hume *v.* Hopkins, 140 Mo. 65, 41 S. W. 784.

New Hampshire. — Woods *v.* Gassett, 11 N. H. 442.

New Jersey. — Johnson *v.* Arnwine, 42 N. J. Law 451, 36 Am. Rep. 527

versal of the ruling of the court excluding secondary evidence, it has been held that the proof of the loss or destruction of the primary evidence should be so conclusive that it would be error of law for the court to hold otherwise.[37] There are cases to the effect, however, that this whole question is one of discretion with the court and his ruling thereon cannot be reviewed on error.[38]

8. Primary Evidence Inaccessible. — A. GENERALLY. — Again it is a general rule that the non-production of the primary evidence is sufficiently excused, so as to let in secondary evidence where it is shown that because of the primary evidence being inaccessible, it is not within the power of the party to produce it.[39]

New York. — Jackson *v.* Frier, 16 Johns. 193.

Pennsylvania. — Flinn *v.* McGonigle, 9 Watts & S. 75.

Texas. — Cheatham *v.* Riddle, 8 Tex. 162.

Virginia. — Bierne *v.* Rosser, 26 Gratt. 537.

It is for the court to determine whether the destruction of the primary evidence was not the result of dishonest purpose. Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547.

37. Kearney *v.* New York, 92 N. Y. 617; Longstreth *v.* Korb, 64 N. J. Law 112, 44 Atl. 934; Camden *v.* Belgrade, 78 Me. 204, 3 Atl. 652; Pendleton *v.* Com. 4 Leigh (Va.) 694, 26 Am. Dec. 342; Smith *v.* Brown, 151 Mass. 338, 24 N. E. 31.

In deciding the preliminary question whether or not there has been sufficient proof of the loss of the primary evidence to justify the admission of secondary evidence, it is possible that the judge may commit an error of law in the violation or misapplication of the rules of evidence, and therefore his exercise of discretion may be appealed from, and the appeal will lie, not because of any so-called "abuse of discretion," because, as the court said in Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797 that phrase implies "a bad motive or wrong purpose," but because his ruling may appear to have been made on grounds, and for reasons, clearly untenable. This principle is recognized in Thrumbo *v.* Findley, 18 S. C. 305, where the court said that the exercise of a judge's discretion, "as a rule, will not be disturbed unless it deprives a party of substantial right which he can show he is entitled to under the law."

Ordinarily, questions of diligence in respect of the evidence of the loss or destruction of a writing are addressed to the court whose judgment will not be interfered with; but when the production of secondary evidence is material to the elucidation of questions before the jury and the loss of the original is under the rules of the law sufficiently accounted for, the reviewing court will direct its admission that the rights of parties may be properly and legally presented to the jury for their intelligent adjudication. Hawes *v.* Paul, 41 Ga. 609. See also Haun *v.* State, 13 Tex. App. 383, 44 Am. Rep. 706; Mays *v.* Moore, 13 Tex. 85.

38. Elwell *v.* Mersick, 50 Conn. 272. See also Bagley *v.* McMickle, 9 Cal. 430; Elrod *v.* Cochran, 59 S. C. 467, 38 S. E. 123.

39. *United States.* — The Julia, 1 Gall. 594, 14 Fed. Cas. No. 7,575.

Alabama. — Graham *v.* Lockhart, 8 Ala. 9; Jones *v.* Hagler, 95 Ala. 529, 10 So. 345.

Illinois. — Bishop *v.* American Preservers Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317.

Kansas. — Marshall *v.* Shibley, 11 Kan. 114.

Louisiana. — Kreautler *v.* U. S. Bank, 12 Rob. 456.

Massachusetts. — Tucker *v.* Welsh, 17 Mass. 160, 9 Am. Dec. 137; Burghardt *v.* Turner, 12 Pick. 534; Miles *v.* Stevens, 142 Mass. 571, 8 N. E. 426.

Nevada.—O'Meara *v.* North American Min. Co., 2 Nev. 112.

B. Primary Evidence Physically Unattainable. — Within this rule it is permissible for the court to receive evidence of an inferior grade where it appears the production of the best evidence is physically impossible,[40] as for example written libels,[41] printed placards,[42] and inscriptions on walls.[43] It must appear, however, that the paper is so attached to the wall that it cannot be removed.[44]

An Inscription on a Tombstone, showing the date of the death of the person buried is admissible to show that fact.[45]

C. Possession Traced to Third Person. — a. *General Rule.* When the primary evidence has passed into the hands of a person not a party to the action, either party thereto may resort to secondary evidence to prove its contents,[46] although there is authority to the

Tennessee — Smith *v.* Martin, 2 Overt. 208; Denton *v.* Hill, 4 Hayw. 73.

Texas. — Wade *v.* Work, 13 Tex. 482.

In Thomas *v.* Harding, 8 Me. 417, four defendants were sued as co-partners and served with notice to produce the original articles of co-partnership. Three of them defaulted, the fourth appearing and denying the co-partnership. The agreement not being produced it was held that the plaintiff might give parol evidence of its contents after having first proved that it was seen in the hands of one of the other defendants, and that the defendant appearing had acknowledged that he had signed it.

In Bullard *v.* Hascall, 25 Mich. 132, plaintiff and defendants had been co-partners, and upon their dissolution the defendant had assigned to the plaintiff all the firm assets, including a claim against the government for which the defendant subsequently received a draft, receipting therefor in the firm name, which was afterwards paid. It was held competent to show these facts without producing the draft itself.

Evidence that the adverse party, who is the grantee, has possession of the deed; that his whereabouts are unknown; that the party has had no opportunity to procure it; but that it is in existence, although he does not know where it is; justifies the admission of secondary evidence. Robertson *v.* Moorer, 25 Tex. 428.

When a duly approved copy of the writing alleged to be inaccessible is actually admitted in evidence; it is immaterial whether or not error was committed in admitting testimony offered to establish the fact of inaccessibility. Shedden *v.* Heard, 110 Ga. 461, 35 S. E. 707.

Secondary evidence cannot be received where the evidence can be obtained by the employment of patient industry to a reasonable extent, although it may take some time. De Loach *v.* Sarratt, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441.

40. Tracy Peerage Case, 10 Cl. & F. 154; Sayer *v.* Glossop, 2 Ex. 409, 12 Jur. 465; Jones *v.* Tarleton, 9 Mees. & W. 675, 6 Jur. 348; Rex *v.* Fursey, 6 Car. & P. 81, 25 Eng. C. L. 293; Shrewsbury Peerage, 7 H. L. Cas. 1.

In Kansas Pac. R. R. Co. *v.* Miller, 2 Colo. 442, it was held proper to receive evidence as to inscriptions on packing boxes without requiring the production of the boxes themselves.

41. Mortimer *v.* McCallan, 6 Mees. & W. 67.

42. Bartholemew *v.* Stephens, 8 Car. & P. 728.

43. In Slaney *v.* Wade, 7 Sim. 595, 1 Myl. & C. 338, the inscription on the wall of a chancel in a church having been effaced, copies thereof, one of which had been made in pencil and subsequently retraced with ink, were received as evidence of its contents.

44. Jones *v.* Tarleton, 9 Mees. & W. 675, 6 Jur. 348.

45. Smith *v.* Patterson, 95 Mo. 525, 8 S. W. 567.

46. Chamberlain *v.* Vanderen, 1 Dall. (Pa.) 64.

effect that in such case reasonable diligence must be used to procure the testimony of that person before secondary evidence is admissible.[47]

b. *Parties Not Entitled to Possession.* — Where the primary evidence is of such a nature that the party resorting to secondary evidence is not entitled to its custody or possession, the secondary evidence may be received without any further showing.[48] So also when it is of such character that neither party is presumed to have possession of it.[49]

c. *Criminal Prosecutions.* — Merely showing that the primary evidence is not in the possession of the prosecuting witness is not enough, as he is not the party offering the evidence.[50]

d. *Custodian Privileged from Production.* — Tracing the primary

Where one of a series of notes secured by chattel mortgage and given to secure the purchase price of an article has, on payment, been returned to the vendee and cannot be produced, secondary evidence of its contents is admissible. D. M. Osborne Co., *v.* Ayers, (Tex. Civ. App.), 32 S. W. 73.

Secondary evidence of an assignment of a judgment is not admissible upon showing by the assignee that he had left it with his attorney who had sent it to the clerk for record and that it had not been returned. The assignment was held by the clerk for the assignee, and did not, by the change of custody, cease to be under his control. Hawkins *v.* Rice, 40 Iowa 435.

Where it appears that the custodian of the original document has fled the country and up to the time of the trial his whereabouts are unknown, secondary evidence may properly be received. West Philadelphia Nat. Bank *v.* Field, 143 Pa. St. 473, 22 Atl. 829, 24 Am. St. Rep. 562.

47. Vaughn *v.* Biggers, 6 Ga. 188.

Where an original document is traced into the possession of a resident of the county wherein the suit is pending, although by the wrongful act of the opposite party, the party desiring to introduce secondary evidence should endeavor to procure the original itself by means of a *subpoena duces tecum*, or show that the original cannot be thus procured. Auten *v.* Jacobus, 21 Misc. 632, 47 N. Y. Supp. 1119. See also Wooldridge *v.* Wilkins, 3 How. (Miss.) 360.

In Greenough *v.* Sheldon, 9 Iowa 503, where a witness who had been served with a *subpoena duces tecum*, admitted that he had the document in his pocket at the time but was not asked to produce the paper, it was held that secondary evidence of its contents was properly rejected.

In Lathrop *v.* Mitchell, 47 Ga. 610, suit on indorsement of a promissory note, the defendant pleaded that he had given to the plaintiff's agent notice to sue upon the note and that suit had not been brought within three months, and it became necessary for the defendant to go into the contents of the written notice; and it was held that application to the agent, and a denial by him of the custody of the notice, was not sufficient to allow secondary evidence; the presumption being that he had transmitted it to his principal, and search for it, by the agent, or inquiry of him did not exhaust the duty to search further, but that the principal himself should have been inquired of.

48. Coleman *v.* Wolcott, 1 Conn. 285; Bixby *v.* Carskaddon, 55 Iowa 533, 8 N. W. 354; Ward *v.* Fuller, 15 Pick. (Mass.) 185; Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; Walker *v.* Newhouse, 14 Mo. 373; Stevens *v.* Reed, 37 N. H. 49; Irwin *v.* Cox, 5 Ired. Law, (N. C.) 521.

49. Blanchard *v.* Young, 11 Cush. (Mass.) 341.

50. State *v.* Penny, 70 Iowa 190, 30 N. W. 561.

evidence to the possession of one interested in its retention and who, although called, could not be compelled to produce it because it would tend to criminate him, is enough to let in secondary evidence.[51]

e. *Custodian Interested in Concealment.* — So also where the primary evidence is in the hands of a person whose interest it is to conceal it, secondary evidence may be given without such custodian having first been subpœnaed and ordered to produce the primary evidence.[52]

f. *Public Documents.* — The originals of public documents cannot be produced without great inconvenience, and hence it is the general practice, both at common law and sometimes by express statute, to permit their contents to be proved by exemplifications or other duly authenticated copies, as is elsewhere in this work fully shown.[53]

g. *Custodian in Another Jurisdiction.* — (1.) **In General.** — If books and papers necessary as evidence in one jurisdiction be in the possession of a third person living in another jurisdiction and who is accordingly not within the reach of process, secondary evidence without further showing may be given to prove the contents of such books and papers; and a notice to produce them is not necessary.[54]

51. State *v.* Kimbrough, 2 Dev. Law (N. C.) 431. See also Reg. *v.* Leatham, 3 El. & El. 658, 7 Jur. (N. S.) 674; Lloyd *v.* Mostyn, 10 Mees. & W. 478, 12 L. J. Ex. 1.

Documents Incriminating Custodian. — When the custodian of the primary evidence, although within the reach of process of the court, cannot be compelled to produce it, because it would tend to criminate him, and convict him on an indictment then pending against him, secondary evidence is properly received. It is then a case in which no exertions of the party, and no process from the court would enable him to produce the primary evidence. It is absolutely out of their power to attain it. U. S. *v.* Reyburn, 6 Pet. (U. S.) 354.

52. Stockdale *v.* Escaut, 4 Mart. (O. S.) (La.) 564.

53. *See* article "PUBLIC DOCUMENTS."

54. *England.* — Cocks *v.* Nash, 6 Car. & P. 154, 25 Eng. C. L. 329.

United States. — U. S. *v.* Reyburn, 6 Pet. 354.

Alabama. — Ware, Murphy & Co., *v.* Morgan, 67 Ala. 461; Memphis & C. R. Co. *v.* Hembree, 84 Ala. 182, 4 So. 392; Young *v.* East Ala. R. Co., 80 Ala. 100; Martin *v.* Brown, 75 Ala. 442; Snow *v.* Carr, 61 Ala. 363, 32 Am. Rep. 3; Manning *v.* Maroney, 87 Ala. 563, 6 So. 343.

Arkansas. — Bozeman *v.* Browning, 31 Ark. 364.

California. — Gordon *v.* Searing, 8 Cal. 49.

Colorado. — Owers *v.* Olathe, Silver Min. Co., 6 Colo. App. 1, 39 Pac. 980.

Connecticut. — Shepard *v.* Giddings, 22 Conn. 282; Elwell *v.* Mersick, 50 Conn. 272; Stirling *v.* Buckingham, 46 Conn. 461; Sherwood *v.* Hubbel, 1 Root 498. *Compare* Townsend *v.* Atwater, 5 Day 298.

District of Columbia. — Jackson *v.* Clifford, 5 App. D. C. 312.

Florida. — Bell *v.* Kendrick, 25 Fla. 778.

Georgia. — Miller *v.* McKinnon, 103 Ga. 553, 29 S. E. 467; Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254; Shirley *v.* Hicks, 105 Ga. 504, 31 S. E. 105.

Indiana. — German-American Bldg. Assn. *v.* Droge, (Ind. App.), 41 N. E. 397.

Louisiana. — State *v.* Sterling, 41 La. Ann. 679, 6 So. 583; Montgomery *v.* Routh, 10 La. Ann. 316.

Compare Lewis *v.* Beatty, 8 Mart. (N. S.) 287.

There is authority to the effect, however, that the mere fact that the primary evidence is out of the jurisdiction of the court is not sufficient to justify secondary evidence; but that it must also be shown that its absence is not through the instrumentality of the party offering the secondary evidence,[55] and that reasonable efforts have

Massachusetts. — Miles *v.* Stevens, 142 Mass. 571, 8 N. E. 426; Eaton *v.* Campbell, 7 Pick. 10; Amherst Bank *v.* Conkey, 4 Metc. 459.

Michigan. — People *v.* Seaman, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326; Knickerbocker *v.* Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595; People *v.* Howard, 50 Mich. 239, 15 N. W. 101. *Compare* Phillips *v.* U. S. Ben. Soc. 120 Mich. 142, 79 N. W. 1, in which it was held that the fact that a writing is out of the jurisdiction of the court, does not of itself justify the admission of secondary evidence, since the law provides a way for securing the testimony by deposition.

Missouri. — Brown *v.* Wood, 19 Mo. 475; Harvey Lumb. Co. *v.* Herriman & Curd Lumb. Co., 39 Mo. App. 214.

New Hampshire. — Burnham *v.* Wood, 8 N. H. 334; Lord *v.* Staples, 23 N. H. 148; Beattie *v.* Hilliard, 55 N. H. 428.

New Jersey. — Roll *v.* Rea, 50 N. J. Law, 264, 12 Atl. 905.

New York. — Mauri *v.* Hefferman, 13 Johns. 58; Bailey *v.* Johnson, 9 Cow. 115; Maxwell *v.* Hofheimer, 81 Hun 551, 30 N. Y. Supp. 1090.

Ohio. — Reed *v.* State, 15 Ohio 217.

South Dakota. — Hagaman *v.* Gillis, 9 S. D. 61, 68 N. W. 192.

Texas. — McBride *v.* Willis, 82 Tex. 141, 18 S. W. 205; Smith *v.* Trader's Nat. Bank, 82 Tex. 368, 17 S. W. 770. *Compare* Clifton *v.* Lilley, 12 Tex. 130; Veck *v.* Holt, 71 Tex. 715, 9 S. W. 743.

Utah. — Dwyer *v.* Salt Lake City Copper Mfg. Co., 14 Utah 339, 47 Pac. 311.

West Virginia. — Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

Wisconsin. — Bonner *v.* Home Ins. Co., 13 Wis. 677; Wisconsin River Lumb. Co. *v.* Walker, 48 Wis. 614, 4 N. W. 803.

Wyoming. — Cornish *v.* Territory, 3 Wyo. 95, 3 Pac. 793.

In Kentucky secondary evidence of a paper proved to be out of the state was admitted, the court likening the case to that of a subscribing witness who was absent from the state. The fact that there was such a paper came out on cross-examination, and the question whether notice to produce it was required was not mooted. Boone *v.* Dyke, 3 T. B. Mon. (Ky.) 529. To same effect see Waller *v.* Cralle, 8 B. Mon. (Ky.) 11; Combs *v.* Breathitt Co., 20 Ky. L. Rep. 529, 46 S. W. 505; Moody *v.* Com. 4 Met. (Ky.) 1.

In Zellerbach *v.* Allenberg, 99 Cal. 57, 33 Pac. 786, it was held that a document which is beyond the territorial limits of the state is "lost" within the meaning of the California Code, so as to allow secondary evidence of its contents.

Where a party proves *prima facie* that the original, if in existence, has been taken from the state, it would seem, said the court in Lemon *v.* Johnson, 6 Dana (Ky.) 399, that, in the absence of all other countervailing proof, and of any presumption that the writing is or has been in his power, he should be permitted to use the inferior grade of evidence.

In State *v.* Sterling, 41 La. Ann. 679, 6 So. 583, it was held that the objection to a proof of copy of a letter on the ground that it was not the best evidence in the absence of proof that the original had been lost or destroyed, was shown to be without merit, because the statement of the judge as to the foundation that had been laid for the introduction of the copy, showed that it had been made from the original and had been critically compared with it by the witness; that due effort had been made to obtain the original which was traced to the possession of a person who had left the state, and to whom application had been made for it in vain.

55. In Shaw *v.* Mason, 10 Kan.

been made to obtain the primary evidence and have failed.[56]

Refusal to Attach Original to Deposition. — Secondary evidence may be received when the original appears to be in the possession of a stranger who is beyond the jurisdiction of the court, and who, after being sworn as a witness for the purpose of taking his deposition and asked to produce the original, refuses so to do.[57] But where

184, the court said that while a writing is out of the state, "its production cannot be compelled. But the question as to how it happens to be in that state may become material. Was it placed there through the instrumentality of the party seeking to introduce the secondary evidence? Has the custodian been applied to for the instrument, or, if applied to, refused to deliver? In this case the record is silent upon all the questions suggested. For aught that appears the custodian may have left the state the day before the trial, at the instance of the plaintiff, to avoid the production of the contract, and intending to return on the day succeeding. We may not go outside the record and appeal to our personal knowledge of the parties or witnesses, but must decide the case simply upon the record, and upon that we are constrained to say there was not such proof of diligence as justified the admission of secondary evidence." *Compare* Deitz *v.* Regnier, 27 Kan. 94.

56. *Illinois.* — Bishop *v.* American Preservers Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317. See also West Chicago St. R. Co. *v.* Piper, 165 Ill. 325, 46 N. E. 186.

Minnesota. — Thomson-Houston Elec. Co. *v.* Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536. *Compare* Kleeberg *v.* Schrader, 69 Minn. 136, 72 N. W. 59; Wood *v.* Cullen, 13 Minn. 394.

New Mexico.—Kirchner *v.* Laughlin, 6 N. M. 300, 28 Pac. 505.

North Carolina. — Threadgill *v.* White, 11 Ired. Law 591; Davidson *v.* Norment, 5 Ired. Law 555; Justice *v.* Luther, 94 N. C. 793.

Oregon. — Wiseman *v.* Northern Pac. R. Co., 20 Ore. 425, 26 Pac. 272; 23 Am. St. Rep. 135; Bowick *v.* Miller, 21 Ore. 25, 26 Pac. 861.

Pennsylvania. — De Baril *v.* Pardo, (Pa.), 8 Atl. 876; McGregor *v.* Montgomery, 4 Pa. St. 237. *Compare* Ralph *v.* Brown, 3 Watts & S. 395.

In South Carolina parol evidence of a paper which was in the hands of the party's agent, who had gone to another state, was held inadmissible, because no commission had been sent to examine the agent, or ascertain what had become of the paper, and there was, besides, some reason for suspecting a design to suppress it. The question whether notice to produce was necessary did not arise, as the evidence was offered by the principal, but the judgment is important in this respect; it attributes the suppression of the paper to the principal, because it was presumed to be in his control; and if the other party had offered the evidence, it would have been admitted, provided notice to produce it had been given. Bunch *v.* Hurst, 3 Des. Eq. (S. C.) 273, 5 Am. Dec. 551.

57. Thomson-Houston Elec. Co., *v.* Palmer, 52 Minn. 174, 53 N. W. 1137, 37 Am. St. Rep. 536; Fisher *v.* Greene, 95 Ill. 94; Bullis *v.* Easton, 96 Iowa 513, 65 N. W. 395; Wicktorwitz *v.* Farmers' Ins. Co., 31 Ore. 569, 51 Pac. 75; Forrest *v.* Forrest, 6 Duer (N. Y.) 102; Binney *v.* Russell, 109 Mass. 55; Sayles *v.* Bradley & Metcalf Co., 92 Tex. 406, 49 S. W. 209.

An Abortive Attempt to Take the Deposition of a Non-resident in whose possession the original is last seen is equivalent to a demand for the original, which, when the original is in the possession of a non-resident is sufficient. Mordecai *v.* Beall, 8 Port. (Ala.) 529; Swift *v.* Fitzhugh, 9 Port. (Ala.) 39; Beall *v.* Dearing, 7 Ala. 124.

it appears that the original is in the possession of the party at whose instance the deposition was taken, he must produce it.[58]

The non-residence of the grantor of a deed is not enough to let in secondary evidence. The presumption is that the grantee has possession of it, and he must be notified to produce it, or its loss or non-existence be established.[59]

(2.) Custody of Foreign Court. — Where the original instrument is on file and forms a part of the record of the court of another state, secondary evidence of its contents may be received,[60] especially if the original cannot, under the practice of the other court, be withdrawn.[61] There is authority, however, to the effect that in such case the party desiring to prove the contents of such a writing by secondary evidence should first apply to the other court for leave to withdraw the original, and whether granted or refused the fact of having made the application would show diligence.[62]

58. Ruthven *v.* Clarke, 109 Iowa, 25, 79 N. W. 454.

59. Hussey *v.* Roquemore, 27 Ala. 281.

Compare Scott *v.* Rivers, 1 Stew. & P. (Ala.) 19.

60. Owers *v.* Olathe Silver Min. Co., 6 Colo. App. 1, 39 Pac. 980; Lord *v.* Staples, 23 N. H. 448; Otto *v.* Trump, 115 Pa. St. 425, 8 Atl. 786; Patten *v.* Park, Anth. N. P. (N. Y) 46.

Compare Shillito *v.* Robbins, 7 Ohio. Wkly. L. Bull. 74; The Alice, 12 Fed. 923.

Contra. — Davidson *v.* Davidson, 10 B. Mon. (Ky.) 115; Putnam *v.* Goodall, 31 N. H. 419; Handley *v.* Fitzhugh, 1 A. K. Marsh. (Ky.) 24.

The admission of secondary evidence cannot be objected to where the parties have agreed thereto and the party objecting aided in placing the original in the record of another court. Mount *v.* Scholes, 21 Ill. App. 192, *affirmed,* 120 Ill. 394, 11 N. E. 401.

In Smith *v.* State, 28 Ga. 19, a criminal prosecution in which the evidence was not required to be taken down by statute, the parties agreed that the minutes taken down by the court could be used on the motion for a new trial and on a hearing on error, but being accessible for this reason, it was held, upon a second trial of the case, that the copy retained in that court was admissible in behalf of the defendant, since the original was not accessible because it was on file in the Supreme Court.

In Long *v.* Champion, 2 Barn. & A. 285, it was held that a copy of a letter written by the plaintiff's agent, and referred to by the plaintiff in his answer to a bill in chancery, the original of which letter, instead of being filed at the master's office, had, by consent of the parties, been deposited for inspection with the plaintiff's clerk in court in the chancery suit, was admissible on the part of the defendant at law without reading the answer in chancery.

61. Casey *v.* Williams, 6 Jones, Law, (N. C.) 578.

62. Bauman *v.* Chambers, (Tex. Civ. App.), 28 S. W. 917. See also Dare *v.* McNutt, 1 Ind. 148; Williams *v.* Munnings, R. & M. 18; Crispin *v.* Doglioni, 3 Sw. & Tr. 44, 32 L. J. P. 109.

In Dowden *v.* Wilson, 108 Ill. 257, *affirming* 12 Ill. App. 297, depositions duly taken had been destroyed by fire, and in a second suit between the same parties and embracing the same subject matter, the parties agreed to admit the transcript of the record of the first suit filed in the supreme court. The supreme court denied an application for leave to withdraw the transcript to be so used as evidence in the trial court. It was held that copies of depositions of a party in the first suit, duly certified by the

A paper deposited in a court by a party who has leave to withdraw it, is sufficiently under his control and power to let in secondary evidence of its contents, after notice and refusal to produce it.[63]

(3.) Custody of Foreign Government. — Where the primary evidence is a part of the archives of a foreign government and hence, presumably, cannot be withdrawn, it is proper to prove the same by secondary evidence.[64]

(4.) Custody of General Government. — Where it is impossible for a party to produce an original document because of its being on file as a part of the archives of the general government, secondary evidence may be received.[65]

D. Possession Traced to Attorney of Adverse Party. — Proof merely that the primary evidence is in the possession of the adverse party's attorney is not of itself enough to let in secondary evidence. The attorney should be called or a reason given for not doing so.[66] And there is authority to the effect that the attorney should be notified to produce the document.[67]

clerk of the supreme court, were competent evidence on the hearing of the second suit.

63. Rush *v.* Peacock, 2 Mo. & Rob. 162; Jackson *v.* Shearman, 6 Johns. (N. Y.) 19.

64. De LeGarza *v.* Macmanus, (Tex. Civ. App.), 44 S. W. 704.

65. Beauvais *v.* Wall, 14 La. Ann. 199; Carpenter *v.* Bailey, 56 N. H. 283.

In Gulf, Colo. & Santa Fe R. R. Co., *v.* Dimmitt, 17 Tex. Civ. App. 255, 42 S. W. 583, it was held that papers on file with the inter-state commerce commission, could be proved by secondary evidence, because the records of such commission could not be reached by the process of the court; and because there was no statute authorizing certified copies from such records to be used in evidence.

66. Bird *v.* Bird, 40 Me. 392. See also Morgan *v.* Jones, 24 Ga. 155, wherein it was held that upon an affidavit by a party that an original paper is in the custody of the adverse party's attorney, the attorney should be compelled to answer on motion whether or not he has such original, and to produce it if he has.

In Cheeseman *v.* Hart, 42 Fed. 98, defendant's attorney, on being asked by the plaintiff to produce a document stated that he had looked for it and had not found it, but that he would examine further and if he had it, would bring it into court. And it was held that in the absence of any further request by plaintiff for the production of the paper, the plaintiff had waived his right to insist on giving secondary evidence of its contents.

In Rhoades *v.* Selin, 4 Wash. C. C. 715, 20 Fed. Cas. No. 11,740, it was held that counsel as a witness in the case might be asked whether he had a certain document in his possession, and if he answered that he had, he might be immediately served with a notice to produce it if he had it in his immediate possession, so as on his refusal to produce it, to let in parol evidence of its contents; and that it was not ground of objection that the paper so called for was delivered to him by his client, because the possession of the attorney is that of his client. See also Jackson *v.* McVey, 18 Johns. (N. Y.) 330.

67. Notice to Produce. — A party wishing to avail himself of a paper in the possession of the attorney of his adversary, must give notice to produce it; he cannot have the benefit of the evidence by subpœnaing the attorney to produce it, and compelling him to testify if it were delivered to him by his clients as supporting the action or the defense. McPherson *v.* Rathbone, 7 Wend. (N. Y.) 216.

It is not necessary to call the attorney, however, when the attorney is a non-resident,[68] or where his possession is under such circumstances that he cannot be compelled to produce it.[69]

Mere belief that the original is in the hands of the opposite party's agent does not of itself sufficiently account for the original to let in secondary evidence.[70]

E. Possession Traced to Adverse Party. — a. *Necessity of Notice to Produce.* — **(1.) In General.** — But secondary evidence of a paper, not in the possession or control of the party offering it, is not authorized by the mere fact that the party against whom the secondary evidence is offered has the possession or control of the primary evidence, but notice to such party to produce the primary evidence must first be given,[71] and sometimes such notice is required by

68. Halsey *v.* Fanning, 2 Root, (Conn.) 101.

69. Lynde *v.* Judd, 3 Day, (Conn.) 499.

70. Wills *v.* McDole, 5 N. J. Law, 501.

71. *England.* — Stulz *v.* Stulz, 5 Sim. 460; Sugg *v.* Bray, 51 L. T. 194, 54 L. J. Ch. 132; Irwin *v.* Lever, 2 F. & F. 296; Robinson *v.* Brown, 3 C. B. 754, 16 L. J. C. P. 46.

Canada. — Hood *v.* Cronkite, 29 U. C. Q. B. 98; Quebec *v.* Quebec Cent. R. Co., 10 Sup. Ct. 563.

United States. — Underwood *v.* Huddlestone, 2 Cranch C. C. 76, 24 Fed. Cas. No. 14,339; Bank of Washington *v.* Kurtz, 2 Cranch C. C. 110. 2 Fed. Cas. No. 950; U. S. *v.* Winchester, 2 McLean 135, 28 Fed. Cas. No. 16,739.

Alabama.—Payne *v.* Crawford, 102 Ala. 387, 14 So. 854; Olive *v.* Adams, 50 Ala. 373; Potier *v.* Barclay, 15 Ala. 439.

Arkansas. — Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212.

California. — Grimes *v.* Fall, 15 Cal. 63.

Colorado. — Rockwell S. & L. Co. *v.* Castroni, 6 Colo. App. 528, 42 Pac. 182.

Delaware. — Jefferson *v.* Conoway, 5 Harr. 16.

District of Columbia. — Main *v.* Aukam, 4 App. D. C. 51.

Florida. — Hanover F. Ins. Co. *v.* Lewis, 23 Fla. 193, 1 So. 863, Pensacola & A. R. Co. *v.* Braxton, 34 Fla. 471, 16 So. 317.

Georgia. — McAdam *v.* Weikel & Smith Spice Co., 64 Ga. 441; Brown *v.* Tucker, 47 Ga. 485.

Illinois. — Wright *v.* Raftree, 181 Ill. 464, 54 N. E. 998; La Salle P. B. Co., *v.* Coe, 53 Ill. App. 506; Holbrook *v.* Trustees of Schools, 22 Ill. 539.

Indiana. — State *v.* Lockwood, 5 Blackf. 144; Anderson Bridge Co. *v.* Applegate, 13 Ind. 339.

Indian Territory. — Perry *v.* Archard, 1 Ind. Ter. 487, 42 S. W. 421.

Iowa. — Burlington Lumb. Co. *v.* Whitebreast Coal & Min. Co., 66 Iowa 292, 23 N. W. 674; Patterson *v.* Linder, 14 Iowa 414.

Kansas. — Roberts *v.* Dixon, 50 Kan. 436, 31 Pac. 1083; Central Branch U. P. R. Co. *v.* Walters, 24 Kan. 504.

Kentucky. — Dupey *v.* Ashby, 2 A. K. Marsh. 11; Heilman Mill Co. *v.* Hotaling, 21 Ky. L. Rep. 950, 53 S. W. 655.

Louisiana. — Abat *v.* Rion, 9 Mart. (O. S.) 465, 13 Am. Dec. 313; Williams *v.* Benton, 12 La. Ann. 91.

Maryland. — Kennedy *v.* Fowke, 5 Har. & J. 63; Robertson *v.* Parks, 3 Md. Ch. 65.

Massachusetts. —Bourne *v.* Boston, 2 Gray 494; Com. *v.* Emery, 2 Gray 80; Gould *v.* Norfolk Lead Co., 9 Cush. 338, 57 Am. Dec. 50; Draper *v.* Inhabitants of Hatfield, 124 Mass. 53.

Michigan. — Ferguson *v.* Hemingway, 38 Mich. 159.

Mississippi. — Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646.

Missouri. — State *v.* Reppetto, 66 Mo. App. 251; Farmers' and Mer-

chants' Bank *v.* Lonergan, 21 Mo. 46; Coffman *v.* Niagara F. Ins. Co., 57 Mo. App. 647; Lewin *v.* Dille, 17 Mo. 64.

Nebraska. — Westinghouse Co. *v.* Tilden, 56 Neb. 129, 76 N. W. 416; Birdsall *v.* Carter, 5 Neb. 517.

New Hampshire. — Webster *v.* Clark, 30 N. H. 245; Field *v.* Tenney, 47 N. H. 513.

New Jersey. — Ford *v.* Munson, 4 N. J. Law 93.

New York. —Foster *v.* Neubrough, 58 N. Y. 481; Weeks *v.* Lyon, 18 Barb. 530; Rogers *v.* Van Hoesen, 12 Johns. 221; Waring *v.* Warren, 1 Johns. 340.

North Carolina. — Whitley *v.* Daniels, 6 Ired. Law 480; Smallwood *v.* Mitchell, 2 Hayw. 318; Murchison *v.* McLeod, 2 Jones Law 239.

Pennsylvania. — Alexander *v.* Coulter, 2 Serg. & R. 494; Patton *v.* Ash, 7 Serg. & R. 116. Garland *v.* Cunningham, 37 Pa. St. 228; Eilbert *v.* Finkbeimer, 68 Pa. St. 243, 8 Am. Rep. 176.

South Carolina. — Durwell & Dur Co. *v.* Chapman, (S. C.), 38 S. E. 222; Gist *v.* McJunkin, 2 Rich. Law 154.

Tennessee. — Kimble *v.* Joslin, 1 Overt. 380; Farnsworth *v.* Sharp, 5 Sneed 615.

Texas. — First Nat. Bank *v.* Oliver, 16 Tex. Civ. App. 428, 41 S. W. 414; Hunter *v.* Lanius, 82 Tex. 677, 18 S. W. 201; Dean *v.* Border, 15 Tex. 298; McCormick H. M. Co., *v.* Millett, (Tex. Civ. App.), 29 S. W. 80.

Utah. — State *v.* Daly Min. Co. 19 Utah 271, 57 Pac. 295.

Vermont. — Murray *v.* Mattison, 67 Vt. 553, 32 Atl. 479.

In Read *v.* Chambers, (Tex. Civ. App.), 45 S. W. 742, it appeared that the primary evidence was in the possession of one of the parties who was in another state, and it was held that in the absence of any attempt made to procure it, or to show why it was not procured, secondary evidence was not admissible.

In Jameson *v.* Officer, 15 Tex. Civ. App. 212, 39 S. W. 190, an action on a lost note, it appeared that the note was in the possession of one of the parties as to whom the suit had been dismissed and who had left the country; but it was held that the case did not come within the rule which excuses a party from producing an instrument proved to be in the possession of the opposite party who has been given notice to produce the same; but that the plaintiff should have exercised due diligence to have ascertained the whereabouts of such custodian, and to have procured the note.

In Smith *v.* Holbrook, 99 Ga. 256, 25 S. E. 627, it was held that the contents of letters could not be proved by parol, notwithstanding the fact that they were addressed to and remained in the possession of a non-resident plaintiff because no notice to produce the same had been served on the local attorney of such plaintiff; the court holding that, as their production could have been compelled in this matter, the letters were not inaccessible.

In Perry *v.* Archard, 1 Ind. Ter. 487, 42 S. W. 421, an action on a note given for a life insurance premium, the defendant testified to his having made a written application for such insurance. No diligence of effort was shown by him to obtain the production of the written application in court; no written notice to produce it was ever served on the plaintiff at any time; and no verbal notice to produce was given to the plaintiff until after the trial had commenced. The possession of the written application was not traced to the plaintiff. It was held that proper notice had not been given for the production of the original so as to let in secondary evidence.

In Com. *v.* Emery, 2 Gray (Mass.) 80, it was said that if upon notice to the adverse party to produce an original and the tender of a paper in answer to the notice, the party calling for it should deny that the paper tendered was the paper called for, it would be easy to ascertain the identity of the paper by a comparison of the contents of the paper tendered with the copy offered.

In Jobes *v.* Lows, 63 Kan. 886, 66 Pac. 627, it appeared that the defendant had been the receiver under an appointment by the court but had been discharged, and had turned over

a rule of court,[72] or by a statute.[73]

Actions on Contracts. — The defendants in an action on a contract, are entitled, without notice to the plaintiff, to the production of all documents which form any part of the contract.[74]

(2.) Purpose of the Rule. — The rule of law requiring notice to produce to be served upon an opposite party who is in possession of the primary evidence was adopted to prevent surprise upon a party possessed of documentary evidence by requiring him to produce it, when he could not reasonably be expected to come prepared with it without being previously notified that it would become material on the trial.[75]

(3.) Rule Applied. — (A.) Ignorance of Whereabouts of Document. The necessity of such a notice to a party in whose possession the original document is presumed to be is not excused by the fact that the party desiring to prove its contents claims to be ignorant of its whereabouts.[76]

(B.) Writing Executed in Duplicate. — Where an instrument is executed in duplicate, and one of the parts has been destroyed or lost, and the other is in the custody of the opposite party, secondary evidence cannot be received in the absence of a notice to such cus-

to his successor all papers pertaining to the receivership; and it was held that secondary evidence was not admissible upon a mere service of a *subpoena duces tecum* on the defendant because he was not in possession or control of the papers called for.

72. Dwinell *v.* Larrabee, 38 Me. 464. See also Dyer *v.* Fredericks, 63 Me. 592; Belfast *v.* Washington, 46 Me. 460.

73. Thus, in Indiana, a statute, (Rev. St. 1894, § 487) provides how a party may be served with a notice to produce a paper in his possession which is to be used in evidence, and parol evidence of its contents may be given only on failure to produce. Newton *v.* Donnelly, 9 Ind. App. 359, 36 N. E. 769. *Compare* the various codes and statutes on this question.

74. De Witt *v.* Prescott, 51 Mich. 298, 16 N. W. 656.

75. Kellar *v.* Savage, 20 Me. 199. **Statement of the Rule.** — "The object of the notice is not to compel the party to produce the paper; for no such power is assumed, either directly or indirectly, by placing him under a disadvantage if he does not produce it. Its object is, to enable the prisoner to protect himself against the falsity of the secondary evidence, which the law presumes may be false, as its very name imports. The copyist may make a mistake in transcribing; he may corrupt; so may the witnesses who give evidence of the contents. It is but reasonable therefore, that the accused should have an opportunity of correcting a falsity in the evidence, if one should exist. Notice is given for that purpose, and that alone; and whatever may be its form in common practice, it is in substance a notification that the secondary evidence will be offered." State *v.* Kimbrough, 2 Dev. Law (N. C.) 431.

See also Perry *v.* Archard, 1 Ind. Ter. 487, 42 S. W. 421. It is merely intended to let the opposite party give other evidence of its contents, and of putting it into his power to produce the best evidence which the nature of the case admits of, on showing that the original is in his adversary's possession. Reed *v.* Colcock, 1 Nott & McC. (S. C.) 592, 9 Am. Dec. 729.

76. Horseman *v.* Todhunter, 12 Iowa 230.

todian to produce the part in his possession and his refusal to comply therewith.[77]

(C.) Original Document in Court. — It has been held that proof that the adverse party or his attorney has the primary evidence in court does not dispense with the necessity of the notice to produce, since the object of the notice is not only to produce the paper, but also to give the party an opportunity to provide the proper testimony to support or impeach it.[78]

(4.) Matters Excusing Notice. — (A.) Generally. — When the effect of a notice to produce would be nugatory, however, it is not necessary to give the notice,[79] as for example, where the party in whose custody the primary evidence is supposed to be, denies that he has it or ever had it,[80] or denies the fact of its

77. Mathews *v.* Union Pack. R. Co., 66 Mo. App. 663; New York L. Ins. Co., *v.* Goodrich, 74 Mo. App. 355; Cleveland & T. R. Co. *v.* Perkins, 17 Mich. 296.

In Rex *v.* Watson, 2 Stark. 129, where the defendant had taken from the printers' placards identical with those posted in public places, it was held that one of the remaining placards might be read in evidence without a preliminary proof as to the original manuscript, and without notice to the defendant to produce the copies he had, since the whole impression was in the nature of duplicate originals.

Burden of Proof. — Where a party offers oral evidence of the contents of a paper upon which he relies and which was originally executed in duplicate, the burden is upon him to show that neither of the parts can be produced; and if he has reason to believe that there is a reasonable probability that the paper can be produced, it is his duty to move the court for leave to summon the owner to produce it; and if he does not do this he cannot object to his adversary's use of oral evidence to rebut like evidence adduced by himself. Dyer *v.* Fredericks, 63 Me. 593.

78. Milliken *v.* Barr, 7 Pa. St. 23; *citing* 2 Tidds Prac. 803; 1 Stark. 225; Greenl. Ev. 560, 22.

Contra. — Hampton *v.* Ray, 52 S. C. 74, 29 S. E. 537.

79. Union Banking Co *v.* Gittings, 45 Md. 181, so holding where the party or his attorney admits or swears that the primary evidence is not in the possession or control of either of them. See also Wells *v.* Miller, 37 Ill. 276; Taylor *v.* McIrwin, 94 Ill. 488.

Service of Notice Evaded. It is not necessary to give notice to an adverse party to produce a document where the testimony shows that he had evaded service of the notice, and avoided the production of the original. Bright *v.* Pennywit, 21 Ark. 130.

80. Roberts *v.* Spencer, 123 Mass. 397. See also Pond *v.* Lockwood, 8 Ala. 669; Pecos Val. Bank *v.* Evans-Snider-Buel Co., 107 Fed. 654.

Receipt of Letter Denied. Notice to produce a letter shown to have been posted, properly addressed and postage prepaid, is not necessary where the addressee denies the receipt of the letter. The notice would be attended with no result, and would be a mere idle ceremony, which the law does not require. Briggs *v.* Hervey, 130 Mass. 186.

In Shields *v.* Byrd, 15 Ala. 818, it was held that where a party when applied to for a deed, denied having it in his possession, but expressed his belief that it was in the register's office, and ineffectual search was made for it in that office and also in the office of the lawyer who once had it in his possession, this was sufficient to justify the admission of secondary evidence without other notice to the party to produce the deed. The court said, that "under the circumstances it was not incumbent on the plaintiff to notify the defendant to produce the deed; but it might rest upon

existence.[81]

(B.) Voluntary Offer to Produce. — The notice to an adverse party to produce a document in his possession is dispensed with by the voluntary offer to produce the document.[82]

(C.) Original Document Lost or Destroyed. — Notice to produce the primary evidence is not necessary where it is shown that the primary evidence has been lost or destroyed.[83]

his statement that he did not have it, and having searched for it diligently where it was supposed it would probably be found, the secondary evidence was legitimate."

81. St. Louis Dredging Co. *v.* Crown Coal & Tow Co., 77 Mo. App. 362. See also Pecos Val. Bank *v.* Evans-Snider-Buel Co., 107 Fed. 654. *Compare* Clary *v.* O'Shea, 72 Minn. 105, 75 N. W. 115, 71 Am. St. Rep. 465, where the plaintiff offered evidence to prove that a certain written contract made by the parties, was then in the possession of the defendant and without having given any notice to the defendant to produce it, offered secondary evidence to prove its contents. Defendant objected and denied that any such instrument had ever existed. It was held that such denial would not excuse the want of such notice.

Error in receiving secondary evidence of the contents of a writing alleged to be in the possession of the adverse party without previous notice to him to produce is cured by subsequent proof by the objecting party that no such paper ever existed. Reading R. R. Co. *v.* Johnson, 7 Watts & S. (Pa.) 317.

The necessity for a notice to produce the primary evidence is not dispensed with by the subsequent testimony of the party in whose possession such evidence presumably was, that it had been handed to a co-defendant, and that he had presumed that it had been delivered to the other party, especially where there was no proof offered by the other party of any search or unavailing effort to trace the primary evidence to give rise to the presumption of its loss or destruction. Main *v.* Aukam, 4 App. D. C. 51.

82. The matter then stands as if a previous notice had been given and want of notice at that stage of the proceedings is waived. Dwinell *v.* Larrabee, 38 Me. 464. See also State *v.* Black, 12 Mo. App. 531.

83. *England.* — Rex. *v.* Haworth, 4 Car. & P. 254; Foster *v.* Pointer, 9 Car. & P. 718; How *v.* Hall, 14 East 274, 12 Rev. Rep. 515.

United States. — Cornett *v.* Williams, 20 Wall. 226; Burton *v.* Driggs, 20 Wall. 125.

Indiana. — McCreary *v.* Hood, 5 Blackf. 316; Pape *v.* Ferguson, 28 Ind. App. 298, 62 N. E. 712; Continental Ins. Co. *v.* Chew, 11 Ind. App. 330, 38 N. E. 417, 54 Am. St. Rep. 506.

Maryland. — Union Banking Co. *v.* Gittings, 45 Md. 181.

Nebraska. — Barmby *v.* Plummer, 29 Neb. 64, 45 N. W. 277.

New York. — Jackson *v.* Neely, 10 Johns. 374.

North Carolina. — McAulay *v.* Earnhart, 1 Jones Law 502; Robards *v.* McLean, 8 Ired. Law 522.

Pennsylvania. — Fox *v.* Wood, 1 Rawle 143.

Destruction Denied. — If the fact that the destruction of the instrument claimed to have been forged is not clearly proved and is denied by the prisoner, notice to produce it is not dispensed with. Doe *v.* Morris, 3 Ad. & E. 46.

Presumption of Destruction. Where the maker of notes had received them several years previous and delivered the notes of third persons in payment for them, it may be presumed that they were destroyed or otherwise cancelled so as to let in secondary evidence without a notice to produce them in a controversey in respect to the substituted paper. Pond *v.* Lockwood, 8 Ala. 669. See also Mead *v.* Brooks, 8 Ala. 840.

When a Part of a Written Con-

(D.) Possession Obtained by Fraud — So when a party has fraudulently obtained possession of an instrument belonging to the opposite party, a notice to him to produce it is not necessary.[84]

(E.) Paper Relating to Collateral Circumstance. — When the paper relates to collateral circumstances only, and an inference is deducible from its existence and execution, and not from its contents, notice to produce it is not necessary,[85] as for example where the purpose of the testimony is to test the temper and credibility of the witness on cross-examination.[86]

(F.) Notice To Produce Notice. — In England, the question whether or not a notice to produce is necessary where the original

tract Is Torn Off by Violence by a Party who has signed and delivered it, he is presumed to have destroyed it, and secondary evidence of its contents may then be given without notice to produce it. Scott *v.* Pentz, 5 Sandf. (N. Y.) 572.

Testimony of the secretary of a corporation that he is the custodian of its papers, that he made search among his letter files, and brought with him all the letters which he found passing between the parties, but not stating that he made a special search for the letter in question, or that it was lost or destroyed, or that it was in fact not received, but merely declaring that he has no recollection of ever having seen it, is not such an admission of its loss or destruction as will excuse the necessity of previous notice to produce. Burlington Lumber Co. *v.* Whitebreast Coal & Min. Co., 66 Iowa 292, 23 N. W. 674.

84. Gray *v.* Kernahan, 2 Mills Const. (S. C.) 65; Morgan *v.* Jones, 24 Ga. 155. See also Grimes *v.* Kimball, 3 Allen (Mass.) 518; Almy *v.* Reed, 10 Cush. (Mass.) 421.

In Mitchell *v.* Jacobs, 17 Ill. 235, the defendant's attorney found a document amongst the papers in the cause not marked filed, but which had been used upon the trial of the case in a lower court, and was an important piece of evidence for the plaintiff, and instead of returning it to the plaintiff to whom it belonged he attached it to a *dedimus* and sent it to another state; and it was held that under the circumstances the plaintiff was properly allowed to put in secondary evidence of the contents of the document.

In Davis *v.* Spooner, 3 Pick. (Mass.) 284, where a grantor of land had surreptitiously obtained possession of the deed on the pretense that he would have it recorded, and afterwards conveyed to a person who had knowledge of the former conveyance, it was held in an action by an heir of the first grantee against the second that the demandant having traced the deed into the hands of the grantor might give parol evidence of its contents without calling him as witness, although released by the tenant to prove the loss, and without showing that it was not in the register's office.

In Medley *v.* People, 49 Ill. App. 218, a prosecution for conspiracy, it was insisted that the court erred in allowing a witness to testify to the contents of a letter written to her by one of the defendants. Her evidence disclosed the fact that such defendant had been in correspondence with her, and when the other defendant visited her for the purpose of procuring a bill of sale for certain property, such defendant took from her possession and without her consent the letter in question; and it was held that under the state of facts so disclosed there was no error in allowing proof of the contents of the letter.

85. Lowry *v.* Pinson, 2 Bail. (S. C.) 324, 23 Am. Dec. 140; Hampton *v.* Ray, 52 S. C. 74, 29 S.E. 537; Bowen *v.* Nat. Bank of Newport, 11 Hun (N. Y.) 226.

86. Klein *v.* Russell, 19 Wall. (U. S. 433.

document is itself a notice before parol evidence can be resorted to, is one upon which the authorities are not entirely in accord.[87]

In the United States the broad rule is laid down by numerous authorities that notice to produce a notice is not necessary,[88] but an examination of the cases in which the contents of the notice in question were allowed to be proved by parol evidence without a previous notice to produce shows that, although they do not go to the length of holding as has sometimes been argued that written notices which form a part of the foundation of a case cannot be so proved without first accounting for their absence,[89] the notices in question were di-

87. Notice of Dishonor. — In Kine *v.* Beamont, 3 Br. & B. 288, 7 Eng. C. L. 440, 24 Rev. Rep. 678, it was held that the copy of an original letter giving notice of the dishonor of the bill in suit was admissible in evidence without notice to produce the original. See also Roberts *v.* Bradshaw, 1 Stark. 28, 2 Eng. C. L. 281. *Compare* Langdon *v.* Hulse, 5 Esp. 156; Shaw *v.* Markham, Peake 165.

Notice to Quit. — In Fleming *v.* Somerton, 7 Q. B. 58, 9 Jur. 775, it was held that a copy of a written notice to quit was competent without notice to produce the original.

Notice of Attorney's Bill. — In Colling *v.* Treweek, 6 Barn. & C. 394, 3 D. & R. 456, 30 Rev. Rep. 366, assumpsit to recover the amount of an attorney's bill, it was held that a copy of the bill, although not signed by the attorney, the original of which duly signed had been delivered to the defendant was admissible in evidence without notice to produce the original.

An examined copy of a letter containing notice of the dishonor of a bill of exchange which is not produced nor is the subject matter of the action is not competent without notice to produce the letter sent. Lanauze *v.* Palmer, 1 M. & M. 31, 22 Eng. C. L. 239, 31 Rev. Rep. 709.

In Jory *v.* Orchard, 2 Bos. & P. 39, 5 Rev. Rep. 537, trespass for taking plaintiff's cattle, taken as a distress for non-payment of a poor rate under a magistrate's warrant, which was produced and read, the defendant called on the plaintiff to prove a demand of the copy of a warrant pursuant to statute and upon which a paper was produced by a witness who swore it was a copy of such demand. Lord Eldon in holding the copy admissible said, "the practice of allowing duplicates of this kind to be given in evidence seems to be sanctioned by this principle, that the original being in the hands of the defendant, it is in his power to contradict the duplicate original by producing the other if they vary."

In Grove *v.* Ware, 2 Stark. 174, 3 Eng. C. L. 300, an action against the defendant as surety under an agreement for the debt of another to be paid by the defendant after notice specified showing the amount of the debt, it was held that the plaintiff could not give evidence of such notice without previous notice to the defendant to produce same because the notice required was not properly mere notice, but was in fact a statement of the account between the plaintiff and the debtor.

88. Thus in Christy *v.* Horn, 24 Mo. 242, the court in holding that the defendant might give parol evidence of a notice served by him upon the plaintiff to begin suit against the principal makers on a note upon which he was surety, said that "the general rule is that notice to produce a notice is not necessary, and the party may resort at once to parol proof of the contents of the notice unless it appear that higher evidence is in his power." And see cases cited in the succeeding notes.

89. Notice to Remove Obstruction. In McFadden *v.* Kingsbury, 11 Wend. (N. Y.) 667, an action against commissioners of highways to recover a penalty for neglect to prosecute an overseer of highways for not

rectly traced into, or were under the circumstances presumed to be in, the possession of the opposite party,[90] as for instance notice of

removing an obstruction from the highway, the plaintiffs offered to prove as part of their case that the commissioners had given directions to such overseer to remove the obstructions in question, and it was held that because in that particular case special notice to remove obstructions from the road was not necessary and consequently was not a material fact to be proved, parol evidence of the contents of the notice was admissible.

In Faribault *v.* Ely, 2 Dev. Law (N. C.) 67, the court said, "a notice given during the progress of the cause to produce a paper for the purpose of evidence is formal in its character and comes within the reason of the exception. But a notice which has been given before the commencement of the suit — which makes an essential part of the cause of action — which is a link in the chain of plaintiff's right to recover and is of a different character and would seem to require the best evidence the nature of the case would admit, and of the cautions which the rule of evidence prescribed." The court in that case, however, held that the contents of a letter directed to an indorser of a bill of exchange at his residence giving him notice of its dishonor was provable by parol evidence without notice to produce the original: following the cases cited *infra* in note 90.

Published Notice of Assessments. In Rutland & B. R. Co. *v.* Thrall, 35 Vt. 536, a corporate charter provided that the contractors after making assessments upon the subscribers to stock should give notice thereof by publishing them in a newspaper for a certain time, and it was held that such a notice did not stand upon the same ground as ordinary notices, but were essential to the cause of action and should be proved by the best evidence.

In Young *v.* Mertens, 27 Md. 114, it was held that testimony that the witness knew of the plaintiff's having stopped the payment of money claimed to be due to the defendant from a third person, by a notice filed with such third person was giving parol evidence of a written instrument without first accounting for its non-production.

In Lombardo *v.* Ferguson, 15 Cal. 372, an action to recover a mining claim, it was held that the defendant could not read in evidence a copy of the notice shown to have been posted on the claim in question and purporting to have been a notice signed by the plaintiff and those from whom he purchased, without first laying the foundation necessary for such secondary evidence by a notice to produce or otherwise.

90. Notice to Defendant to Remove Obstruction from Highway. Morrow *v.* Com., 48 Pa. St. 305.

Notice to Repair Division Fence. Willoughby *v.* Carleton, 9 Johns. (N. Y.) 136.

Notice of Withdrawal from Building and Loan Association. Prairie State L. & B. Ass'n *v.* Gorrie, 64 Ill. App. 325.

Notice of Assessment on Insurance Premium Note. — Williams *v.* German Mut. F. Ins. Co., 68 Ill. 387.

Notice by Sheriff of Resale under Execution unless Purchase Price Paid. — Gaskell *v.* Morris, 7 Watts & S. (Pa.) 32.

Notice to Railroad Company of Live Stock Killed. — Brentner *v.* C. M. & St. P. R. Co., 58 Iowa 625, 12 N. W. 615; Smith *v.* K. C., St. J. & C. B. R. Co., 58 Iowa 622, 12 N. W. 619.

Notice Rescinding Contract. Gethin *v.* Walker, 59 Cal. 502.

Notice to Liquor Dealer Forbidding Selling to Husband. Loranger *v.* Jardine, 56 Mich. 518, 23 N. W. 203.

Notice of Sale under Power of Sale in Mortgage. — McMillan *v.* Baxley, 112 N. C. 578, 16 S. E. 845.

Notice of Appeal from the Decision of One Court to Another. Hughes *v.* Hays, 4 Mo. 209.

Notice by Postal Card by a Railway Company to the consignee of the arrival of goods. Collins *v.* Ala-

abandonment,[91] notice of dishonor,[92] notice to produce,[93] notice to quit,[94] notice to a holder of a note to put the note in suit,[95] notice protesting against the payment of taxes,[96] notice served in the progress of a cause,[97] and the like.

A copy of a notice retained by the party is to be regarded as a dupli-

bama G. S. R. Co., 104 Ala. 390, 16 So. 140.

Notice of the Filing of Interrogatories. — Quinley *v.* Atkins, 9 Gray (Mass.) 370.

Notice of the Dissolution of a Co-Partnership published in newspapers provable by parol without previous notice to produce. Salisbury *v.* Iddings, 29 Neb. 736, 46 N. W. 267.

Notices Posted on Land Warning Against Trespassing. — Harper *v.* State, 109 Ala. 28, 19 So. 857.

In Young *v.* Keller, 16 Mo. App. 551, it was held that as the notice of garnishment was not an issue in the case it was competent for the plaintiff to state that he stopped payment of his check because he was served with a notice of garnishment without introducing the notice.

In Edwards *v.* Bonneau, 1 Sandf. (N. Y.) 610, trespass for the unlawful seizure of property which the defendant justified under a distress warrant for wharfage of a vessel issuable by a statute only on failure to pay after service of a written notice, it was held that parol evidence of the written notice given to the plaintiff was admissible without a previous notice to produce it at the trial.

Notice by a town treasurer sent to a particular property owner naming a time and place, when and where he would be present to receive taxes due, is provable by parol without previous notice to produce. Waterman *v.* Davis, 66 Vt. 83, 28 Atl. 664.

91. Peyton *v.* Hallett, 1 Caines (N. Y.) 364.

92. *United States.* — Lindenberger *v.* Beall, 6 Wheat. 104, 5 L. ed. 216.

Kentucky. — Taylor *v.* Bank of Illinois, 7 T. B. Mon. 576.

Louisiana. — Abat *v.* Rion, 9 Mart. (O. S.) 415, 13 Am. Dec. 313

Maine. — Central Bank *v.* Allen, 16 Me. 41; Brooks *v.* Blaney, 62 Me. 456.

Maryland. — Atwell *v.* Grant, 11 Md. 101.

Massachusetts. — Eagle Bank *v.* Chapin, 3 Pick. 180.

Missouri. — Johnston *v.* Mason, 27 Mo. 511.

New Hampshire. — Leavitt *v.* Simes, 3 N. H. 14; Moses *v.* Ela, 43 N. H. 557, 82 Am. Dec. 175.

New Jersey. — Burgess *v.* Truland, 24 N. J. Law 71, 59 Am. Dec. 408.

New York. — Paton *v.* Lent, 4 Duer 231.

Pennsylvania. — Smyth *v.* Hawthorn, 3 Rawle 355.

In Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212, an action against an indorser of a promissory note, there was proof that one copy of a written notice of non-payment was served upon the defendant, but there was no proof as to the other copy, nor had the indorser been notified to produce it on trial; and it was held that parol testimony was inadmissible to prove the contents of the notice.

93. Tower *v.* Wilson, 3 Caines (N. Y.) 174.

94. Falkner *v.* Beers, 2 Dougl. (Mich.) 117.

Warning against Trespassing. In Watson *v.* State, 63 Ala. 19, a prosecution for unlawfully entering the premises of a prosecuting witness after having been warned not to do so, it was held that the notice warning the defendant was of the same nature as a notice to quit, and it was provable by secondary evidence without a notice to produce the original.

95. Brown *v.* Booth, 66 Ill. 419. See also Christy *v.* Horn, 24 Mo. 242. *Compare* Frank *v.* Longstreet, 44 Ga. 178.

96. Michigan L. & I. Co. *v.* Republic Township, 65 Mich. 628, 32 N. W. 882.

97. See McFadden *v.* Kingsbury, 11 Wend. (N. Y.) 667; Faribault *v.* Ely, 2 Dev. Law (N. C.) 67.

cate original and is competent evidence without notice to produce original.[98]

(G.) Action or Pleadings as Notice. — Nor does the rule requiring notice to produce a paper apply to cases where the action is for the paper, or is of such a nature that it of itself is notice,[99] as for

98. Johnson *v.* Haight, 13 Johns. (N. Y.) 470; Smith *v.* Hawthorn, 3 Rawle (Pa.) 355; Com. Ins. Co. *v.* Monninger, 18 Ind. 352 (Notice of loss by fire given to an insurance company.) See also Waterman *v.* Davis, 66 Vt. 83, 28 Atl. 664. And in Eisenhart *v.* Slayker, 14 Serg. & R. (Pa.) 153, the court in holding that a copy of a notice to quit was competent without notice to produce the original said, "every written notice is for the best of all reasons to be proved by a duplicate original; for if it were otherwise the notice to produce the original could be proved only in the same way as the original itself; and thus a fresh necessity would be constantly arising *ad infinitum* to prove notice of the preceding notice; so that the party would at every step be receding instead of advancing."

"Copy, in the Sense Here Used does not mean that the notices served were first written and the retained paper then made like them. Its natural sense and interpretation is that each is a copy of the others in the sense that one newspaper is a copy of each and every other newspaper printed at that time and on that form; or that one book of a given edition is a copy of every other book of the same edition." Westbrook *v.* Fulton, 79 Ala. 510.

99. *England.* — Hammond *v.* Place, Peake Ad. Cas. 90; Colling *v.* Treweek, 6 Barn. & C. 394, 9 D. & R. 456, 30 Rev. Rep. 366; Bucher *v.* Jarratt, 3 Bos. & P. 143; Scott *v.* Jones, 4 Taunt. 865, 14 Rev. Rep. 68; How *v.* Hall, 14 East 274, 12 Rev. Rep. 515.

United States. — Bissill *v.* Farmers' & Mechanics' Bank, 5 McLean 495, 3 Fed. Cas. No. 1446.

Illinois. — Continental Ins. Co. *v.* Rogers, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810.

Maine. — State *v.* Mayberry, 48 Me. 218; Kellar *v.* Savage, 20 Me. 199.

Missouri. — Cross *v.* Williams, 72 Mo. 577; Hart *v.* Robinett, 5 Mo. 11.

New Hampshire. — Morrill *v.* Boston & M. R. Co., 58 N. H. 168; Leavitt *v.* Simes, 3 N. H. 14; Nealley *v.* Greenough, 28 N. H. 325.

New York. — Lawson *v.* Bachman, 81 N. Y. 616; Hooker *v.* Eagle Bank of Rochester, 30 N. Y. 83, 86 Am. Dec. 351; Wilson *v.* Gale, 4 Wend. 623; Howell *v.* Huyck, 2 Abb. Dec. 423; Hardin *v.* Kretsinger, 17 Johns. 293; Edwards *v.* Bonneau, 1 Sandf. 610; Hammond *v.* Hopping, 13 Wend. 505; Forward *v.* Harris, 30 Barb. 338.

North Carolina. — Murchison *v.* McLeod, 2 Jones Law 239.

North Dakota. — Nichols & Shepard Co. *v.* Charlebois, 10 N. D. 446, 88 N. W. 80.

Ohio — Railroad Co. *v.* Cronin, 38 Ohio St. 122, 3 Ohio L. J. 515.

South Dakota. — Zipp *v.* Colchester Rubber Co., 12 S. D. 218, 80 N. W. 367.

Texas. — Hamilton *v.* Rice, 15 Tex. 382; Battaglia *v.* Stahl, (Tex. Civ. App.), 47 S. W. 683.

Vermont. — Dana *v.* Conant, 30 Vt. 246.

Where the Plaintiff's Suit is Founded upon a Written Instrument Described in His Pleading, the suit itself is sufficient notice to the defendant to produce the original if in his possession, although the pleading does not charge him with the possession of it; nor can he object to the introduction of secondary evidence in such a case, especially where the notice to produce was given at the trial. Ellis *v.* Sharp, 20 Tex. Civ. App. 482, 49 S. W. 409.

Telegrams. — Under the rule stated in the text, secondary evidence of a telegram may be received in an action for damages for delay in its delivery, without previous notice to the

instance an action of trover for the conversion of a written instrument,[1] an action against an officer to recover funds collected by him under execution which he fails and refuses to account for,[2] or an action against a carrier for the non-delivery of written instruments.[3]

A demand before suit brought, for a settlement and accounting under a written agreement, or the delivery of the instrument, is not sufficient to let in secondary evidence without a notice to produce notwithstanding the suit is based on refusal to comply with the demand.[4]

A plea of the statute of limitations to a note which is the basis of a suit does not dispense with a notice to the plaintiff to produce the note.[5]

Timely Notice. — Where pleadings of such a nature as to charge the opposite party with the possession of the document, thereby rendering notice upon him to produce such document unnecessary, are filed, however, so short a time before the trial as not to amount to seasonable notice to produce, the party so charged, if not prepared to go to trial upon the issues as made up should ask for a continuance; if he goes to trial he cannot afterward object to the want of timely notice to produce the document.[6]

Criminal Prosecutions. — And this rule dispensing with notice applies to a criminal prosecution in which the indictment itself charges the accused with the possession of the writing,[7] or where the evi-

telegraph company to produce the original. Western Union Tel. Co. *v.* Thompson, 18 Tex. Civ. App. 609, 45 S. W. 429.

Forged Paper.—Upon showing that a note is in the hands of the defendant and that it is forged, it is not necessary to give the defendant notice in the declaration to produce the note. Ross. *v.* Bruce, 1 Day (Conn.) 100.

1. Smith *v.* Robertson, 4 Har. & J. (Md.) 30; Rose *v.* Lewis, 10 Mich. 483; Bissel *v.* Drake, 19 Johns. (N. Y.) 66; Hays *v.* Riddle, 1 Sandf. (N. Y.) 248; McClean *v.* Hertzog, 6 Serg. & R. (Pa.) 154; Oswald *v.* King, 2 Brev. (S. C.) 471; Hotchkiss *v.* Mosher, 48 N. Y. 478; Tilly *v.* Fisher, 10 U. C. Q. B. (Can.) 32.

Nor does it vary the case that it appears by the evidence that the note, which is shown to have come into the defendant's possession, is afterwards found in the possession of the maker. In the absence of proof to the contrary the presumption is that the defendant placed it there, and that it is still under his control. Blevins *v.* Pope, 7 Ala. 371.

2. Story *v.* Patten, 3 Wend. (N. Y.) 486.

3. Jolley *v.* Taylor, 1 Camp. 143.

4. Muller *v.* Hoyt, 14 Tex. 49.

5. Worth *v.* Norton, 60 S. C. 293, 38 S. E. 605.

6. Hamilton *v.* Rice, 15 Tex. 382.

7. State *v.* Mayberry, 48 Me. 218; Baldwin *v.* State, 6 Ohio 15; People *v.* Holbrook, 13 Johns. 90; McGinnis *v.* State, 24 Ind. 500; Com. *v.* Messinger, 1 Binn. (Pa.) 273, 2 Am. Dec. 441; Pendleton *v.* Com. 4 Leigh (Va.) 694, 26 Am. Dec. 342. *Compare* Rollins *v.* State, 21 Tex. App. 148.

The Right to Offer Secondary Evidence in Such Cases "proceeds upon the theory that, the indictment having set out a copy of the forged or stolen instrument, the defendant has notice of what he may be expected to meet upon his trial, and hence another notice to produce the writing is unnecessary. The indictment having set out the alleged false telegram in substance, the defendant is thereby notified of what the state expected to prove. This being so, secondary evidence of its contents,

dence traces it to his possession,[8] or to that of an accomplice who could refuse to produce it on the ground of criminating tendency.[9]

The reason is that the prosecution has not the power to compel the defendant to produce the original to be used as evidence against himself.[10]

b. *Requisites of Notice.* — **(1.) Form.** — No particular form is required. Anything will do coming from a proper source which apprises the party that secondary evidence will be offered on the trial unless he produces the original.[11]

Verbal or Written. — A notice to produce should be in writing so that the party notified may know with certainty and precision what evidence is wanted, and not be compelled to rely on his memory

without additional notice, infringed no substantial right of the defendant, while the proof of a notice to produce a written instrument, and his failure or refusal to comply therewith, might have prejudiced his interest in the minds of the jury. If the indictment, however, had not set out what purported to be a copy of the alleged telegram, notice to the defendant and a reasonable time before the trial to produce it would have been necessary before secondary evidence of its contents could have been admitted. The telegram was so intimately connected with the offense charged in the indictment, and the execution of the bill of exchange so dependent upon the alleged false token, that we think there was no error in admitting secondary evidence of its contents without notice to the defendant to produce the original." State *v.* Hanscom, 28 Or. 417, 42 Pac. 167.

On a Prosecution of a Postoffice Employee for Stealing Letters, the prosecution may show how the letter was addressed, although no notice to produce the letter has been given. Reg. *v.* Clube, 33 Jur. (N. S.) 698.

On an issue as to whether or not a person has a license to sell intoxicating liquors, the want of such license may be proved by the city records without notice to such person to produce his license. Com. *v.* Foss, 14 Gray (Mass.) 50; Briggs *v.* Rafferty, 14 Gray (Mass.) 525, where the court in so holding, said that such evidence was not an attempt to give secondary evidence of the contents of a writing, but was to show by the records that no such writing existed.

In Williams *v.* State, 16 Ind. 461, a prosecution for larceny from the person, it was held that the state could not prove the contents of the bank notes alleged to have been stolen without first showing that they had been lost or destroyed or that notice had been given to the defendant to produce them. See also Armitage *v.* State, 13 Ind. 441, where it was held that on an indictment for having in the defendant's possession counterfeit bank notes, notice must be given to the defendant to produce them before parol evidence of their contents could be introduced.

8. State *v.* Gurnee, 14 Kan. 93.

The Production of a Paper Belonging to a Wife and which is in the custody, either of herself or her attorney, cannot be compelled for the purpose of using the same as evidence for the state in the trial of a criminal prosecution against her husband; and accordingly the paper in question is so far inaccessible as that secondary evidence of its contents is admissible. Farmer *v.* State, 100 Ga. 41, 28 S. E. 26.

9. U. S. *v.* Doebler, 1 Baldw. 519, 25 Fed. Cas. No. 14,977. And see Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560.

10. State *v.* Gurnee, 14 Kan. 93.

11. State *v.* Kimbrough, 2 Dev. Law (N. C.) 431.

A notice to produce filed with and embodied in a plea is sufficient. Burke *v.* Stewart, 9 Heisk. (Tenn.) 175.

alone for its identity.[12] There have been cases, however, in which a verbal notice has been held sufficient.[13]

(2.) Specifying Document Desired. — Literal accuracy cannot be expected in the description of the evidence desired to be produced. It is enough if the description be such as will apprise a person of ordinary intelligence of the evidence desired,[14] although it be informal and inaccurate in particulars.[15]

A notice entitled in another cause to produce books and papers, merely filed in the cause on trial, without proof of service, raises no inference against the party to whom the notice is addressed. Allender *v.* Trinity Church, 3 Gill (Md.) 166.

Title of Action. — In Harvey *v.* Morgan, 2 Stark. 17, an action by the plaintiffs as "assignees of C." it was held that a notice entitling the action as one by plaintiffs as "assignees of C. & D.," was insufficient although the plaintiffs were in fact assignees of C. & D.

12. Cummings *v.* McKinney, 5 Ill. 57; Burke *v.* Stewart, 9 Heisk. (Tenn.) 175.

In Wardlaw *v.* Hammond, 9 Rich. Law (S. C.) 454, it was held that the sixty days notice required by the act of 1823, before an official copy of a will of real estate could be given in evidence, must be in writing.

13. In Kerr *v.* McGuire, 28 N. Y. 446, the plaintiff at a previous meeting before the referee had given the defendant verbal notice to produce all bills rendered, and receipts given to him pertaining to the matters in controversy, and it was held that this was sufficient. The court said: "The general rule of practice requiring written notice to produce papers has reference to the preliminary preparation for trial. The reason of the rule does not apply to a notice given in the presence and hearing of the court while the trial is in progress from day to day and the materiality and pertinency of the document is apparent, and each party is at least presumed to have present all papers bearing on the case."

14. Bogart *v.* Brown, 5 Pick. (Mass.) 18; Burke *v.* Stewart, 9 Heisk. (Tenn.) 175; Howard *v.* Galbraith, (Tex. Civ. App.), 30 S. W. 689; Thomas *v.* Hodgson, 4 Whart. (Pa.) 492; Duvall *v.* Farmer's Bank, 2 Bland (Md.) 686.

It is sufficient if the notice is so framed that it is impossible for the party to doubt what paper is intended. Bemis *v.* Charles, 1 Metc. (Mass.) 440.

Discretion of Court. — The sufficiency of a notice to produce a paper shown to be in the possession of a party is a matter within the discretion of the court; and if it be impossible to procure it between the time of giving notice and the trial, that fact should be made to appear. Burke *v.* La Forge, 12 Cal. 403.

15. Frank *v.* Manny, 2 Daly (N. Y.) 92; Jones *v.* Parker, 20 N. H. 31.

Misnomer. — In Lockhart *v.* Camfield, 48 Miss. 470, in a notice to produce papers at a trial a bond for title was improperly described as a deed, but the party took no exception and produced the bond. At a second trial exceptions were taken to the misnomer of the instrument in the notice and for that reason the bond was not produced. It was held that the production of the paper on the first trial under the notice was a waiver of the misnomer and acquiescence in the meaning intended by the notice, and that secondary evidence was properly received on a second trial after refusal to produce the bond.

In an action to charge one as a dormant partner, notice was given to him to produce the original articles of co-partnership, a copy of which was annexed to the notice. It was held that, notwithstanding the supposed copy differed materially in one particular from the original, the notice was sufficient to let in secondary evidence, it not being suggested that there was more than one contract of the like kind, and no claim of sur-

Letters Relating to Action. — A notice to produce at the trial all letters received by the party notified from the party giving the notice, relating to the subject matter of the suit from the date the controversy arose to the date of notice, is sufficient.[16] But a notice to produce all letters and papers from a certain date to the date of trial, covering a period of five years, but which in no way indicates either by date or subject, or reference to any particular transaction, what letters are desired, is too vague to justify secondary evidence.[17]

Notice Good in Part. — Where a notice to produce books and papers is too extensive in range, and, as to a part of it, too vague in description, the court, after holding the notice good in part and bad in part, may decline to require an immediate answer and may continue the case to give time to answer so much of the notice as is sufficient.[18]

prise being set up. Bogart *v.* Brown, 5 Pick. (Mass.) 18.

16. McDowell *v.* Aetna Ins. Co., 161 Mass. 444, 41 N. E. 665. See also Bemis *v.* Charles, 1 Metc. (Mass.) 440; Bogart *v.* Brown, 5 Pick. (Mass.) 18; Jones *v.* Parker, 20 N. H. 31; Jacob *v.* Lee, 2 M. & Rob. 33; Morris *v.* Hauser, 2 M. & Rob. 392; Rogers *v.* Custance, 2 M. & Rob. 179; Vasse *v.* Mifflin, 4 Wash. C. C. 519, Fed. Cas. No. 16,895. *Compare* France *v.* Lucy, R. & M. 341, 21 Eng. C. L. 452, holding that a notice to produce "all letters, papers and documents touching or concerning the bill of exchange mentioned in the declaration and the debt sought to be recovered" was too general.

Notice to an attorney of a defendant to produce a certain letter written by the plaintiff to the defendant concerning a certain document which was produced on a former trial of the same cause, and all other papers in his custody or power relating to the matter in controversy is sufficiently explicit to apprise the attorney that the document referred to was one of the papers which he was called upon and expected to produce, especially when it is shown that on the former trial the letter and document were produced by the attorney himself and he must have known that it was the principal paper wanted. Walden *v.* Davison, 11 Wend. (N. Y.) 65.

Letter Enclosed in Envelope. In U. S. *v.* Duff, 6 Fed. 45, the notice to produce an original letter, described the letter as enclosed in an envelope, and it was held that this sufficiently indicated an intention to call for both the envelope and its enclosure so as to let in secondary evidence of the address upon the envelope, the court stating that a notice to produce a letter covers the envelope of the letter.

Letter Referring to Enclosure. And a notice to produce a letter which refers to an enclosure, will admit secondary evidence of the enclosure upon its non-production. Engall *v.* Druce, 9 W. R. 536.

Letters to Third Persons. — A notice to a party to produce letters received in answer to letters written on his behalf by a certain person is not sufficient to admit evidence of the contents of letters written to such person. Mobile L. Ins. Co. *v.* Egger, 67 Ala. 134.

17. Arnstine *v.* Treat, 71 Mich. 561, 39 N. W. 749. "A party who is prepared with secondary evidence," said the court in this case, "knows what he wishes to prove. To compel a business man to rummage his files for several years without any indication of what is wanted, is unreasonable. The notice should always be such as to reasonably enable the parties notified to understand what is wanted. Without such knowledge he cannot prepare to meet or explain the facts sought to be shown by the documents. There is no authority for making a drag-net out of such a notice." See also Julius King Optical Co. *v.* Treat, 72 Mich. 599, 40 N. W. 912.

18. Parish *v.* Weed S. M. Co., 79 Ga. 682, 7 S. E. 138.

(3.) Facts to be Proved. —It has also been held that the notice should specify the facts to be proved by the evidence desired.[19]

c. *Service of Notice.* —(1.) Time. — (A.) Generally. — It is difficult, if not impossible, to lay down a precise rule as to what notice is necessary in order to let in secondary evidence. Much depends upon the circumstances of the particular case.[20] It can be safely stated, however, that the better practice is to give the party such reasonable notice as will give him, under the known circumstances of the case, an opportunity to comply with the call.[21] But when a party announces

19. Duvall *v.* Farmers' Bank, 2 Bland (Md.) 686.

20. In ruling upon the question of the sufficiency of the notice to produce, in respect of its seasonable service, the court is authorized to consider the time which the party would require to obtain the primary evidence and whether or not a reasonable time for that purpose has been given. Brock *v.* Des Moines Ins. Co., 106 Iowa 30, 75 N. W. 683.

If the party to whom the notice is given has had *prima facie* sufficient time to produce the paper, and is still unable to do so, if he is unwilling that its contents should be proved by parol he may apply for a continuance. Jefford *v.* Ringgold, 6 Ala. 544.

In Divers *v.* Fulton, 8 Gill & J. (Md.) 202, the plaintiff having given notice to the plaintiff's attorney at 4 o'clock P.M. on Monday, of the first day of the term to produce a paper to be read on the trial which came on the following Wednesday, it was held to be sufficient notice to admit secondary evidence although it was admitted that the paper was in the possession of the plaintiff himself and that his attorney did not see him until the intervening Tuesday at a quarter past four P.M.

Service on Foreigner. — In Drabble *v.* Donner, 1 Car. & P. 188, R. & M. 47, it was held that service of notice on the defendant to produce certain of plaintiff's letters to him four days before trial was reasonable as against the objection that the defendant, who was a foreigner, had only arrived the day of service and that he might have left the letters abroad.

A notice to produce a paper at the trial in order to let in secondary evidence is not in season unless served on the attorney previous to the circuit, where the party resides a distance from the circuit and the paper is left at his residence. Gorham *v.* Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549.

Notice Given after the Commencement of a Circuit, and four days previous to the trial is sufficient where the residence of the party is within twelve miles of the place of the trial. Hammond *v.* Hopping, 13 Wend. (N. Y.) 505; People *v.* Holbrook, 13 Johns. 92.

21. *England.* — Reg. *v.* Barber, 1 F. & F. 316; Sturge *v.* Buchanan, 2 P. & D. 573, 10 Ad. & E. 598; Rowlandson *v.* Wainwright, 5 Ad. & E. 520, 2 H. & W. 391.

Alabama. — Jefford *v.* Ringgold, 6 Ala. 544.

Illinois.—Cummings *v.* McKinney, 5 Ill. 57; Bushnell *v.* Bishop Hill Colony, 28 Ill. 204.

Maine. — Lowell *v.* Flint, 20 Me. 401.

Maryland. — Divers *v.* Fulton, 8 Gill & J. 202; Glen *v.* Rogers, 3 Md. 312; Morrison *v.* Whiteside, 17 Md. 452, 79 Am. Dec. 661.

Nebraska. — Barnby *v.* Plummer, 29 Neb. 64, 45 N. W. 277.

New York. — Jackson *v.* Marsh, 1 Caines 153; Utica Ins. Co. *v.* Caldwell, 3 Wend. 296.

North Carolina. — McDonald *v.* Carson, 95 N. C. 377; State *v.* Hester, 2 Jones Law 83.

Statement of Rule. — In Morrison *v.* Whiteside, 17 Md. 452, 79 Am. Dec. 661, the court said: "The general rule is, that the party desiring the production of an original entry or paper has the right to demand it at any time before the trial is conclu-

his readiness for trial after having been served with notice to produce, he cannot afterwards object that the notice was not timely.[22]

A notice giving the party barely time by telegraphing for the document called for, to procure it by the next mail, does not give such reasonable time as will authorize the admission of secondary evidence.[23]

A notice served two days before the trial to produce a paper which the party knew his adversary would want on the trial, and is of such a nature that the law will presume it was in the possession of the party's counsel for that purpose, is sufficient in point of time.[24]

A notice served a day or two before the trial is not in time where it is admitted that the attorney upon whom it was served had not the document in his possession and that there had not been time since the notice to have obtained it from the place where it was in another state.[25]

Service on the Evening Before the Trial, too late for counsel to communicate with his client, is not reasonable,[26] otherwise, however, where the party's place of business is but a short distance from the place of trial.[27]

ded, and the refusal to present the one or the other gives to the demandant the right to offer secondary evidence of the contents. This rule is subject to the exception, that if the paper be shown to be in a place so remote from that of the trial that it cannot be produced at the trial between the time when the notice is given and the conclusion of the evidence, such notice will not be deemed sufficient to authorize the party giving the notice to offer secondary evidence of its contents."

22. State *v.* Green, 69 N. C. 313.

23. Julius King Optical Co. *v.* Treat. 72 Mich. 599, 40 N. W. 912. See also DeWitt *v.* Prescott, 51 Mich. 298, 16 N. W. 656.

A Notice Given the Day Previous to the Trial to produce a paper which is eighty miles distant from the place of trial in the possession of another person, is sufficient to justify the admission of secondary evidence. "The court cannot take judicial notice that by the use of the means afforded for communication by telegraph and railroad, that the party could not, by using slight efforts, have produced the original by the time it was required on the trial." Cody *v.* Hough, 20 Ill. 43. The court said, however, that if, in answer to a rule it had appeared that the party could not control the paper, or that by reasonable efforts he could not have produced it; then the introduction of the secondary evidence would have been erroneous.

24. Warner *v.* Campbell, 26 Ill. 282.

25. Bushnell *v.* Bishop Hill Colony, 28 Ill. 204.

26. Byrne *v.* Harvey, 2 M. & Rob. 89, See also Atkins *v.* Meredith, 4 D. P. C. 658; Holt *v.* Miers, 9 Car. & P. 191; Howard *v.* Williams, 9 M. & W. 725, 6 Jur. 585. *Compare* Sugar Pine Lumber Co. *v.* Garrett, 28 Or. 168, 42 Pac. 129.

Service on Saturday evening preceding the trial, which is called for Monday, is not reasonable. Houseman *v.* Roberts, 5 Car. & P. 394.

Service on the Party's Counsel on the Day Before the Trial and at a distance from the place of business is not reasonable. Hughes *v.* Budd, 4 Jur. 150, 8 D. P. C. 315.

27. Shreve *v.* Dulany, 1 Cranch C. C. 499, 22 Fed. Cas. No. 12,817.

Although a party to a cause is a non-resident, if he employs counsel to conduct it, it will be presumed that non-resident, if he employs counsel to material to the cause, so that service of the notice to produce served on such counsel on the evening before

A notice to produce a document served on the morning of the day of the trial is sufficient if the document be in or near the court.[28]

Service Before Deposition is Taken. — In order to prove by a deposition the contents of a paper in the hands of the adverse party it is not necessary that notice to produce should be given prior to the taking of the deposition. The deposition will be admissible if the notice to produce is given a reasonable time before the trial.[29]

Service on Sunday. —Service of a notice on Sunday to produce is bad.[30]

(B.) Service During Trial. — But a notice given at the bar during the trial of the case to produce the primary evidence is not enough to let in secondary evidence,[31] unless it is made to appear that the

trial is enough. Bryan *v.* Wagstaff, 5 Barn. & C. 314, 8 D. & R. 208.

In U. S. *v.* Duff, 6 Fed. 45, it was proved that the notice to produce the original was served upon the party's attorney late on the afternoon of the day before the trial. The original not being produced, secondary evidence was received. It was held that this was not error, the court quoting from 2 Russ. on Crimes 743, that "in town cases, service of notice on the attorney of the evening before the trial is in general sufficient."

Notice to Produce the Document Served on the Day of the Trial is not seasonable where it appears that the document is not in the custody of a counsel at the place of trial but is in the custody of the party in a distant state. Linn *v.* New York Life Ins. Co., 78 Mo. App. 192. See also Pitt *v.* Emmons, 92 Mich. 542, 52 N. W. 1004, so holding also where the parties were in anotner state and their attorney disclaimed any knowledge of the document itself.

28. Board of Justices *v.* Fennimore, 1 N. J. Law 242.

A notice given to the party's counsel to produce certain documents served on the morning of the day of the trial is not seasonable where the defendants are not in court, and only appear there by counsel to disclaim having the documents in hand and insist that if any such exist, they are in the hands of their clients then in another state. Mortlock *v.* Williams, 76 Mich. 568, 43 N. W. 592.

In McNamara *v.* Pengilly, 64 Minn. 543, 67 N. W. 661, fifteen minutes before the trial begun, the plaintiff served notice on the defendant to produce a certain paper on the trial. Defendant refused to produce it, and the court held that notice was not given a sufficient length of time before trial to enable the defendant to produce it. Thereupon the written notice to produce containing the contents of the paper was received in evidence. It was held that this was error; that such a notice may be produced to the judge, but should not be received in evidence, which means that it may and does go to the jury.

Two Hours' Notice to produce a document is not in season where the document is not in court but is in a different county from the place of trial when called for. Worth *v.* Norton, 60 S. C. 293, 38 S. E. 605.

29. Harris *v.* Sturtevant, 34 Me. 63, 56 Am. Dec. 635; Illinois Car & Equip. Co. *v.* Linstrath Wagon Co., 112 Fed. 737.

30. Hughes *v.* Budd, 4 Jur. 150, 8 D. P. C. 315.

Compare Sugar Pine Lumber Co. *v.* Garrett, 28 Or. 168, 42 Pac. 129, where it is held that a notice to produce papers at a trial is good, although given on a non-judicial day.

31. Hammond *v.* Hopping, 13 Wend. (N. Y.) 505; People *v.* Holbrook, 13 Johns. (N. Y.) 92; Durkee *v.* Leland, 4 Vt. 612, *citing* 1 Stark. Ev. 539; Glen *v.* Rogers, 3 Md. 312 (notice served when jury was being drawn); Barker *v.* Barker, 14 Wis. 131; Barton *v.* Kane, 17 Wis. 37, 84 Am. Dec. 728; Greenough *v.* Shelden, 9 Iowa 503; Hastings *v.* Pe rs 1 Tyler (Vt.) 272; Choteau *v.* Raitt, 20 Ohio 132.

primary evidence is in possession of the party notified or his attorney in court, or so near to the place of trial that it can be obtained without delaying the trial.[32]

Notice given at the trial to produce a document does not warrant the admission of secondary evidence on the mere statement by the party notified that neither he nor his counsel could then produce it,

In Dade *v.* Aetna Ins. Co., 54 Minn. 336, 56 N. W. 48, an action to recover for loss by fire under an insurance policy, notice at the trial to the defendant's attorney to produce proofs of loss sent by the plaintiff to the company in a distant state, it not appearing that they were within reach of its attorney at that time, was held insufficient to lay the foundation of secondary evidence.

Inconvenience or absence from the state is not an excuse for omitting a notice to produce on the opposite party unless that party could not be found after diligent inquiry. Carland *v.* Cunningham, 37 Pa. St. 228.

In Bourne *v.* Buffington, 125 Mass. 481, at the beginning of the trial, the defendant's counsel verbally requested the plaintiff's counsel to produce a certain document which the plaintiff's counsel stated was not in plaintiff's possession, and it was held that seasonable notice had not been given so as to let in secondary evidence, the court stating that the answer of counsel, that his client did not have it in his possession, might well be understood to mean that he did not then have it with him.

Where notice is given to plaintiff on his examination, after being examined as a witness as to certain letters, to produce all letters, papers and accounts relating to the transaction in suit which he refuses to do against the instructions of his counsel, although making no claims that he has not such papers, secondary evidence is admissible. Dole *v.* Belden, 16 N. Y. St. 899, 1 N. Y. Supp. 667.

32. *England.* — Dwyer *v.* Collins, 7 Ex. 639, 16 Jur. 639.

United States.— Chadwick *v.* U. S., 3 Fed. 750; Rhoades *v.* Selin, 4 Wash. C. C. 715, 20 Fed. Cas. No. 11,740.

Alabama. — Brown *v.* Isbell, 11 Ala. 1009.

Illinois. — Cummings *v.* McKinney, 5 Ill. 57.

Kentucky. — Buckner *v.* Morris, 2 J. J. Marsh. 121.

Maine. — Overlock *v.* Hall, 81 Me. 348, 17 Atl. 169; Lowell *v.* Flint, 20 Me. 401.

Maryland. — Atwell *v.* Miller, 6 Md. 10, 61 Am. Dec. 294.

New Hampshire.— Downer *v.* Button, 26 N. H. 338.

New York. — Hammond *v.* Hopping, 13 Wend. 505; People *v.* Holbrook, 13 Johns. 92; McPherson *v.* Rathbone, 7 Wend. 216.

"The authorities conflict on this question," said the court in Bates *v.* Ridgeway, 48 Ala. 611, "whether notice to produce a writing which is in possession of the opposite party or his attorney in court; or so near that it can be obtained without delaying the trial, is sufficient when given after the trial has commenced. It would be obviously unreasonable to compel a party or his attorney to leave the court in quest of papers, when perhaps during the interval, the cause may be reached. But it is certainly incumbent on the party desiring the paper who gives notice of its production after the trial has commenced, to show by direct evidence or clear presumption that it can be obtained without delay."

Notice Given at the Adjournment of Court to produce papers at the continuation of the trial next morning, is such reasonable notice as would justify secondary evidence in the absence of everything appearing to the contrary, or that the adverse party was in any way prejudiced by its admission, especially where he makes no claim that a written notice was not served, but on the contrary admits that such a paper was received, and thinks he threw it away. Park *v.* Viernow, 16 Mo. App. 383.

The Design of the Notice is that the party may be apprised of the

because the document was at the party's home several miles distant from the place of trial.[33]

But where the facts of the case are such as will justify the court in inferring that a party notified to produce a document has that document with him at the trial, a notice given to him during the trial is sufficient.[34]

So also where the attorney for the party notified states that he has them in his possession but refuses to produce them,[35] or where a party notified states positively that he did not have the documents called for and never did have them.[36]

Denial of Existence of Paper. - When the party served denies the existence of the paper called for, any insufficiency of the notice to produce as to its being served in time will not operate to exclude secondary evidence.[37]

(C.) Subsequent Trials. —A notice to a party that a paper is wanted at one trial is sufficient notice to produce the paper at any subsequent trial of the same cause.[38]

(2.) The Party Served. — (A.) Generally. — The notice to produce

necessity of bringing the document. If it is already there, demand of its production is sufficient notice. Dana *v.* Boyd, 2 J. J. Marsh. (Ky.) 587.

In McDowell *v.* Hall, 2 Bibb (Ky.) 610, the document constituted the party's source of title to the property in question and of right belonged to him. There had been previously a trial between the same parties in another circuit relative to the same subject at which the writing was used in evidence; under an order of the other court he had procured possession of the writing. And it was held that although no notice was given before the commencement of the trial to produce the writing, yet notice given several days before its termination, was sufficient because the party must have known that the writing would be necessary in the last trial.

33. Sims *v.* Southern Ry. Co., 59 S. C. 246, 37 S. E. 836.

34. Barker *v.* Barker, 14 Wis. 131. In this case the party and his counsel, when called on to produce it, said nothing and afterwards offered to show that the party "resided at a distance of 40 miles," but did not state or offer to show that he had not the paper with him, and it was held that upon such conduct the court was justified in assuming that he had the paper with him. See also Reynolds *v.* Quattlebum, 2 Rich. Law (S. C.) 140.

35. Andrews *v.* Ohio & M. R. Co., 14 Ind. 169. *Compare* Atwell *v* Miller, 6 Md. 10, 61 Am. Dec. 294.

36. Dunbar *v.* U. S., 156 U. S. 185.

37. Foster *v.* Pointer, 9 Car. & P. 718.

38. Rawson *v.* Knight, 73 Me. 340; Hope *v.* Beadon, 17 Q. B. 509, 16 Jur. 80.

Notice to produce on a trial to be had "this day" is not confined to a trial on that particular day but extends to a trial at any subsequent term. State *v.* Kimbrough, 2 Dev. Law. (N. C.) 431.

In Patton *v.* Goldsborough, 9 Serg. & R. (Pa.) 47, where three executors of the defendant who had been notified of a former trial between the same parties to produce a paper, and on the present trial one of them had been notified who swore that he had made inquiry of the members of the family and that a diligent but ineffectual search had been made, the notice was held sufficient.

Notice to Produce in evidence upon the trial of a cause a written document, given in a suit before the justice is good and operative in the Common Pleas Court to which the

may be given to the party himself,[39] or to his attorney.[40] And service upon the attorney of record at the time is available as a call for the production of the paper on the trial conducted by a substituted attorney without new service upon the latter.[41]

Service on Attorney of Nominal Party. — In a suit brought in the name of one person for the use of another, a notice to the attorney of record of plaintiff to produce a writing which merely described the suit as being between the nominal plaintiff and the defendant, is sufficient. The fact that the attorney has been retained by the real instead of the nominal plaintiff is unimportant.[42]

suit has been removed upon appeal. Wilson *v.* Gale, 4 Wend. (N. Y.) 623; Reab *v.* Moore, 19 Johns. (N. Y.) 337.

In Jackson *v.* Shearman, 6 Johns. (N. Y.) 19, the defendant previous to the circuit in 1808 notified the plaintiff to produce a certain document in his attorney's possession. The trial did not take place until 1809, when the plaintiff did not produce the document. It was held that plaintiff could give oral evidence of its contents; that the notice did not extend to the circuit of 1808 only, but to the time of trial whenever that should be.

Trial Postponed. — Where the trial is postponed, a notice to produce which is sufficient in point of time for the trial set is available for the postponed trial. Reg. *v.* Robinson, 5 Cox C. C. 183.

39. Hughes *v.* Budd, 8 D. P. C. 315, 4 Jur. 150, so holding although the party has retained counsel to appear for him at the trial.

In Boyd *v.* Leith, (Tex. Civ. App.), 50 S. W. 618, notice was served long before the trial, on defendant, addressed to "defendant or his attorney," requesting them to produce original notes, otherwise copies on file would be used. Defendant's attorney stated that, if he had the notes, he would produce them, and on trial he was served with a *subpoena duces tecum.* Plaintiff's attorney testified that he had afterwards asked a third person for them, who told him that defendant's attorney had them; but the latter was unable to find them in response to the subpœna. It was held that secondary evidence was admissible.

A Sufficient Service of a notice to produce, on the party himself, is not affected by a subsequent insufficient service on his attorney. Hughes *v.* Budd, 8 D. P. C. 315, 4 Jur. 150.

40. Bishop *v.* American Preservers Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317; Lagow *v.* Patterson, 1 Blackf. (Ind.) 327; Cates *v.* Winter, 3 Term R. 306; Reg. *v.* Boucher, 1 F. & F. 486; Thayer *v.* Middlesex, Mut. F. Ins. Co., 10 Pick. (Mass.) 326; Sessions *v.* Palmeter, 58 N. Y. St. 289, 26 N. Y. Supp. 1076. See also Thomas *v.* Hodgson, 4 Whart. (Pa.) 492; Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805.

Copies of original deeds under which the defendant claims title may be given in evidence after a notice to produce them has been served on the defendant's attorney, who was proved formerly to have been in possession of them as attorney for another defendant, in an action brought by the plaintiff for a part of the same premises, although the original deeds were not proved ever to have been in the possession of the defendant. Popino *v.* McAllister, 7 N. J. Law 46.

Where the opposite party in whose possession a document is presumed to be, is out of the state, notice to his counsel to produce the original is sufficient to warrant the introduction of secondary evidence. Matlocks *v.* Stearns, 9 Vt. 326.

41. Bright *v.* Young, 15 Ala. 112; Martin *v.* Martin, 1 M. & Rob. 242.

42. Simington *v.* Kent, 8 Ala. 691. "Where he represents the one party or the other," said the court, "either himself or his client are presumed to be in possession of the

Statutes. — And independently of the general practice of notifying the parties through their attorneys to produce documents desired as evidence, this matter is sometimes regulated by statute.[43]

(B.) Document in Hands of Attorney for Adverse Party. — Notice to a party to produce a paper which is traced into his attorney's hands is enough.[44]

(C.) Document in Hands of Third Persons. — Although the original document called for by the notice to produce is in the hands of a third person, secondary evidence may still be given of its contents, if the party notified to produce it has such control of it that he may do so, but refuses without proper excuse.[45]

papers which may be material on trial of the cause. If he has them not then he should advise his client of the requisition, but whether he pursues this course or not if the papers are not produced after a reasonable notice, then parol evidence will be received; although the paper demanded may be such as belongs to the nominal plaintiff, yet notice to the beneficial plaintiff or his attorney is regular." See also Brown *v.* Littlefield, 7 Wend. (N. Y.) 454.

43. Thus in Alabama a written notice to the attorney of record of a party to produce a paper to be used as evidence is declared by statute to be valid and legal to all intents and purposes as if served on the party in person. Simington *v.* Kent, 8 Ala. 691. And in Bethea *v.* McCall, 3 Ala. 449, it was held that proof that a deed was made in 1824 by the defendant to the plaintiff and given to the mother of the plaintiff, an infant, for safe keeping, who, ten years afterward was married to the defendant and that notice had been given to the defendant's attorney to produce the deed — was held sufficient to authorize secondary evidence of the contents of the deed.

44. Desnoyer *v.* McDonald, 4 Minn. 515. See also Newell *v.* Clapp, 97 Wis. 104, 72 N. W. 367.

45. As for example where it is in possession of his agent or attorney. Irwin *v.* Lever, 2 F. & F. 296. See also Baldney *v.* Ritchie, 1 Stark. 338; Sinclair *v.* Stephenson, 1 Car. & P. 582, 2 Bing. 514; Partridge *v.* Coates, R. & M. 156, 1 Car. & P. 534. (so holding as to bank checks drawn by the party and paid by his banker.) Burton *v.* Pane, 2 Car. & P. 520, 31 Rev. Rep. 692.

A notice to produce a document given to a *cestui que* trust under a trust deed after the death of the trustee is not of itself sufficient to authorize the admission of secondary evidence; since the title deed of the trust estate devolves upon the trustee's personal representatives along with the trust. Powell *v.* Knox, 16 Ala. 364.

In Kennedy *v.* Geddes, 3 Ala. 581, 31 Am. Dec. 714, where a bill had been presented to a drawee for acceptance and was at his request left with him, it was held that a notice to his executors to produce it on the trial of an action against them for the refusal of their testator to accept, authorized secondary evidence of its contents, although their executors deny that it ever came into their possession.

Where an original document is proved to have been last seen in the hands of the real party in interest in the suit, although not a party to the record, and notice to him to produce it has been given, secondary evidence is admissible. Norton *v.* Heywood, 20 Me. 359.

In Hazlewood *v.* Pennybacker, (Tex. Civ. App.), 50 S. W. 199, it was held that the defendant in an action by the heirs of a deceased person should be permitted to testify to the contents of letters written by him to such deceased person after notice to the plaintiffs to produce the same.

Where it appears with reasonable certainty that a written instrument was delivered to the assignee therein who is a party to the action on trial,

d. *Materiality of Evidence.* — It is sometimes necessary, before a notice to produce is available as a ground for the admission of secondary evidence, that the party or his agent must have made oath that the affiant had reason to believe that the evidence required to be produced is material to the issue.[46]

e. *Consequences of Production.* —**(1.) In General.**— An examination of the authorities treating of the question of the consequence of a party producing a document which he has been called upon to produce, shows (1) that the mere calling for the document is not enough to make it evidence; (2) that whether calling for the document and inspecting it and doing nothing more, makes the document evidence is a much mooted point; (3) and that the document when produced on a notice, if inspected by the party calling for it and actually used as evidence by him is thereby made evidence for the other party.[47]

(2.) Execution of Document. — A paper produced on notice by the adverse party must be proved by him who offers it in like manner as if he had himself produced it unless the party producing it be a party to it or claim a beneficial interest under it.[48]

(3.) Effect on Offer of Secondary Evidence. — Secondary evidence should not be received when the party notified to produce the primary evidence has produced it as notified.[49]

it is for him to account for and produce it on due notice; and if he does not the opposite party may introduce secondary evidence as to its contents. Lovejoy *v.* Howe, 55 Minn. 353, 57 N. W. 57.

Stakeholder. — Where the third person in possession of the document called for is a mere stakeholder between the party and a third person, non-production of the document upon notice served upon the party does not warrant secondary evidence. Parry *v.* May, 1 M. & Rob. 279.

46. Sinclair *v.* Gray, 9 Fla. 71; McKellip *v.* McIlhenny, 4 Watts (Pa.) 317, 28 Am. Dec. 711; Earnest *v.* Napier, 15 Ga. 306.

47. Com. *v.* Davidson, 1 Cush. (Mass.) 33; Morrison *v.* Whitesides, 17 Md. 452, 79 Am. Dec. 661.

For the purposes to be best served in this article, only this general statement of these rules is made; and for a full treatment of this question reference is made to the title "PRIVATE WRITINGS."

48. Rhoades *v.* Selin, 4 Wash. C. C. 715, 20 Fed. Cas. No. 11,740; Campbell *v.* Roberts, 66 Ga. 733; Herring *v.* Rogers, 30 Ga. 615; State *v.* Wisdom, 8 Port. (Ala.) 511.

49. Dean *v.* Carnahan, 7 Mart. (N. S.) (La.) 258. If a party properly notified to produce a document which is in his possession produces the document with an offer to verify it with his oath, the party calling for it cannot refuse it on his allegation that the document produced is not the original, and thereupon and in its presence, and upon the footing of his own denial merely, resort to secondary evidence.

Stitt *v.* Huidekopers, 17 Wall. (U. S.) 384, "The court was right," said the reviewing court, "in refusing to admit in the first instance what was conceded to be a copy when that which was at least *prima facie*, the original, was in court to answer the notice of the party desiring to use the copy. How far the plaintiff could have been permitted to show a variance of the defendant's paper from the genuine after it was once introduced, we need not inquire. But a copy could not be introduced until what seemed to be the original had

(4.) Waiver of Insufficiency of Notice. — Producing the paper called for on a notice, waives any insufficiency in the notice.[50]

f. *Consequence of Non-Production on Notice.* — **(1.) In General.** Where the adverse party has the possession or control of the primary evidence, and fails or refuses to produce it, resort may be had to secondary evidence,[51] as illustrated in the cases set out be-

been before the court and become the subject of inspection by the jury."

50. Willard *v.* Germer, 1 Sandf. (N. Y.) 50.

51. Consequences of Non-production. — *England.* — Robb *v.* Starkey, 2 Car. & K. 143; Liebman *v.* Pooley, 1 Stark. 167, 18 Rev. Rep. 756; Stuart *v.* Mellish, 2 Atk. 611; Ward *v.* Suffield, 5 Bing. (N. C.) 381, 7 Scott 352. *Compare* Knight *v.* Waterford, 4 Y. & Coll. 284, 10 L. J. Ex. Eq. 57; Jesus College *v.* Gibbs, 1 Y. & Coll. 145.

United States. — Dunbar *v.* U. S. 156 U. S. 185; Riggs *v.* Tayloe, 9 Wheat. 483; Hanson *v.* Eustace, 2 How. 653; Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 Sup. Ct. 534; Florida Cent. & P. R. Co. *v.* Bucki, 68 Fed. 864, 16 C. C. A. 42.

Alabama. — Fralick *v.* Presley, 29 Ala. 457, 65 Am. Dec. 413; Tennessee & C. R. Co. *v.* Danforth, 99 Ala. 331, 13 So. 51; Loeb *v.* Huddleston, 105 Ala. 257, 16 So. 714; Smith *v.* Collins, 94 Ala. 394, 10 So. 334.

Arkansas. — Cross *v.* Johnson, 30 Ark. 396; Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212.

California. — Jones *v.* Jones, 38 Cal. 584; Harloe *v.* Lambie, 132 Cal. 133, 64 Pac. 88.

Connecticut. — State *v.* Swift, 57 Conn. 496, 18 Atl. 664; Douglas *v.* Chapin, 26 Conn. 76; Rose *v.* Bruce, 1 Day 100.

Georgia. — Hines *v.* Johnston, 95 Ga. 629, 23 S. E. 470; Crawford *v.* Hodge, 81 Ga. 728, 8 S. E. 208.

Illinois. — Marlow *v.* Marlow, 77 Ill. 633; Berry *v.* Allen & Co., 59 Ill. App. 149.

Indiana. — Indianapolis & C. R. Co. *v.* Jewett, 16 Ind. 273; Barkley *v.* Mahon, 95 Ind. 101; Duringer *v.* Moschino, 93 Ind. 495

Indian Territory. — Missouri R. & T. R. Co. *v.* Elliott, 2 Ind. Ter. 407, 51 S. W. 1067.

Iowa — Greenough *v.* Sheldon, 9 Iowa 503; State *v.* Chase, 89 Iowa 38, 56 N. W. 275; Gafford *v.* American Mtge. and Inv. Co., 77 Iowa 736, 42 N. W. 550.

Kentucky. — Benjamin *v.* Ellinger, 80 Ky. 472; Bank of Kentucky *v.* McWilliams, 2 J. J. Marsh. 256.

Louisiana. — Hills *v.* Jacobs, 7 Rob. 406; Hotard *v.* Texas & P. R. Co., 36 La. Ann. 450.

Maine. — Lowell *v.* Flint, 20 Me. 401.

Maryland. — Walsh *v.* Gilmor, 3 Har. & J. 383, 6 Am. Dec. 502.

Massachusetts. — Gilmore *v.* Whitcher, 6 Allen 113; Chamberlin *v.* Huguenot Mfg. Co., 118 Mass. 532; Morse *v.* Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Day *v.* Floyd, 130 Mass. 488; Loring *v.* Whittemore, 13 Gray 228; Fletcher *v.* Powers, 131 Mass. 333; Com. *v.* Goldstein, 114 Mass. 272; Com. *v.* Shurn, 145 Mass. 150, 13 N. E. 395.

Michigan. — Keagle *v.* Pessell, 91 Mich. 618, 52 N. W. 58; Pangborn *v.* Continental Ins. Co., 62 Mich. 638, 29 N. W. 475; Johnson *v.* Johnson, 77 Mich. 65, 37 N. W. 712.

Minnesota. — Lovejoy *v.* How, 55 Minn. 353, 57 N. W. 57; Hobe *v.* Swift, 58 Minn. 84, 59 N. W. 831.

Mississippi. — Cooper *v.* Granberry, 33 Miss. 117.

Missouri. — Phillips *v.* Scott, 43 Mo. 86, 97 Am. Dec. 369.

New Hampshire. — Hacker *v.* Young, 6 N. H. 95; Sias *v.* Badger, 6 N. H. 393.

New Jersey. — Truax *v.* Truax, 2 N. J. Law 153.

New York. — King *v.* Lowry, 20 Barb. 532; Brokman *v.* Myers, 59 Hun 623, 13 N. Y. Supp. 732; Jackson *v.* Livingston, 7 Wend. 136; Jackson *v.* Woolsey, 11 Johns. 446.

North Carolina. — Robards *v.* McLean, 8 Ired. Law 522.

low.[52] So, also where the party when notified to produce it disclaims

Ohio. — John *v.* John, Wright 584, *affirmed* 6 Ohio 271.

Oregon. — Sugar Pine Lumber Co. *v.* Garrett, 28 Or. 168, 42 Pac. 129.

Pennsylvania. — Strawbridge *v.* Clamom Tel. Co. (Pa. St.), 45 Atl. 677; American Underwriters Assn. *v.* George, 97 Pa. St. 238; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573.

South Carolina. — Rose *v.* Winnsboro Nat. Bank, 41 S. C. 191, 19 S. E. 487; Boyce *v.* Foster, 1 Bailey 540.

Tennessee. — Lannum *v.* Brook, 4 Hayw. 122; Farnsworth *v.* Sharp, 5 Sneed 615.

Texas. — Galveston H. & S. A. R. Co. *v.* Robinett, (Tex. Civ. App.), 54 S. W. 263; Northern Assur. Co. *v.* Samuels, 11 Tex. Civ. App. 417, 33 S. W. 239; Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797; Behee *v.* Missouri P. R. Co., 71 Tex. 424, 9 S. W. 449; Newsom *v.* Davis, 20 Tex. 419; Pennington *v.* Schwartz, 70 Tex. 211, 8 S. W. 32.

Vermont. — Orr *v.* Clark, 62 Vt. 136, 19 Atl. 929; Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007.

Virginia. — Maxwell *v.* Light, 1 Call 117.

Wisconsin. — Tewksbury *v.* Schulenburg, 48 Wis. 577, 4 N. W. 757; Torrey *v.* Nixon, 43 Wis. 142.

Rule Stated. — In Cooper *v.* Granberry, 33 Miss. 117, it is said that "The general rule certainly is, that the writing evidencing the contract must be produced, for the reason, that it is the best evidence which the parties have made for themselves; but this rule, like other rules of evidence, must yield to circumstances, and must be applied, if possible, for advancing and not defeating the ends of justice. A party will not be permitted to take advantage of his own wrong, by insisting that his adversary shall introduce a particular kind of evidence, when such party wrongfully withholds it, or renders its production impossible. The plaintiff resorted to secondary evidence, not from choice, but from a necessity caused by the defendant. It was equally the right of both parties that the best evidence of which the case admitted should be introduced, but, while this is true, it at the same time does not lie in the mouth of the party who withholds such evidence to insist on its production."

In Bas *v.* Steele, 3 Wash. C. C. 381, 2 Fed. Cas. No. 1,088, it was held that when a party is called upon to produce papers he may make oath that he has not them in his possession. See also Harvey *v.* Mitchell, 2 M. & Rob. 361.

52. In Johnson *v.* Brown, 31 N. H. 405, an action to foreclose a mortgage which had been executed to secure three notes, one of which had been transferred to the plaintiff and the other two to a third person who had refused to let the plaintiff have any use of, or control over the mortgage, it was held that plaintiff might resort to secondary evidence.

In Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646, an action of ejectment, it was held that the plaintiff could properly give in evidence a copy of a deed, made to the defendant, which the latter had furnished with a bill of particulars of his title, because he had declined to furnish the original on request made at the trial.

In Barnett *v.* Wilson, 132 Ala. 375, 31 So. 521, the plaintiff before the trial gave the defendant notice to produce the notice given to him to mark the record of a certain mortgage satisfied. The defendant produced the written notice which he testified was the only one he received from the plaintiff. The plaintiff testified that this was not the notice he gave the defendant, and produced a copy of one which he did give to the defendant. The defendant objected to the introduction of the paper upon the ground that it was secondary evidence, that notice had not been given to produce the original; and it was held that as notice had been given to produce the original which the defendant failed to do, the plaintiff was entitled to introduce what he swore was a copy of it, and

all knowledge of it;[53] or where he states that he has destroyed it;[54] or has removed it from the state and beyond his adversary's reach.[55] And, after proper notice to produce has been served, the fact that the party had subsequently delivered the document to a third person does not excuse its non-production so as to warrant the exclusion of secondary evidence of its contents.[56] But where a party answers on oath that he has not possession of a document which he has been notified to produce, and that although he has searched diligently for it he cannot find any such document, it has been held that secondary evidence of the contents of such alleged document should be excluded.[57]

Where the papers are of such nature that it cannot be presumed that either party is in possession of them, the mere failure of either to produce them, on a notice by the other, is not enough to let in secondary evidence of their contents.[58]

A Stipulation by the Respective Counsel to Produce Upon Notice at the trial any papers which may be in his possession does not operate to include a paper which the law presumes to be in the possession of persons other than the parties or their counsel.[59]

(2.) Basis of Doctrine. — Secondary evidence is admitted in such cases not because the adverse party, who is shown to be in possession of the primary evidence, refuses to produce it, but because it is then the best evidence of which the case is susceptible.[60]

(3.) Scope of Proof. — A notice to produce papers for any purpose is sufficient to admit parol proof of any fact which their production would show.[61]

(4.) Presumption in Aid of Insufficient Secondary Evidence. — The refusal of a party to produce books and papers upon notice given does not warrant the presumption that they would show the facts alleged

that whether or not it was a copy was a question for the jury under all the evidence.

53. Jones *v.* Jones, 38 Cal. 584. See also Dunbar *v.* U. S., 156 U. S. 185; Rogers *v.* Fenimore, (Del), 41 Atl. 886.

54. In Shortz *v.* Unangst, 3 Watts & S. (Pa.) 45, a nominal plaintiff in a suit having disclaimed and being in an adverse position was notified to produce a policy of indemnity given to him by the person who had used his name in bringing the suit; and it was held that on his admitting in court that he burned it, secondary evidence was properly admitted.

Where a party in whose favor a writing has been executed, testifies that he has turned it over to one of the parties to the action who has been notified to produce the writing, but states that it is not in his custody, and that it is his impression that it has been destroyed, secondary evidence is properly admitted to prove its contents. Lumbert *v.* Woodard, 144 Ind. 335, 43 N. E. 302, 55 Am. St. Rep. 175.

55. Suburban R. R. Co. *v.* Balkwill, 94 Ill. App. 454.

56. Wood *v.* Lawrence, 59 Hun 618, 13 N. Y. Supp. 441.

57. Vasse *v.* Mifflin, 4 Wash. C. C. 519, 28 Fed. Cas. No. 16,895.

58. Thompson *v.* Ires, 11 Ala. 239.

59. Turner *v.* Yates, 16 How. (U. S.) 14.

60. State *v.* Kimbrough, 2 Dev. Law (N. C.) 431; Weeks *v.* Lyon, 18 Barb. (N. Y.) 530; Milliken *v.* Barr, 7 Pa. St. 23.

61. Howell *v.* Huyck, 2 Abb. Dec. (N. Y.) 423 (payment endorsed).

by the party giving notice; the only effect of such refusal is, that parol evidence of their contents may be given.[62] But if such secondary evidence be imperfect, vague and uncertain, every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence.[63] But some general

62. Jewell *v.* Center, 25 Ala. 498; Spring Garden M. Ins. Co. *v.* Evans, 9 Md. 1, 66 Am. Dec. 308; Hanson *v.* Eustace, 2 How. (U. S.) 653.

According to Hunt *v.* Collins, 4 Iowa 56, while the rule stated in the text was recognized, it was held that such a refusal would, under the circstances, constitute an item to be considered by the jury and from which they might make an inference; but that it did not raise an absolute and definite presumption of law. See also Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547.

In Merwin *v.* Ward, 15 Conn. 377, it was held that although a refusal of a party who has possession of the original document which he does not produce but attempts to make out his case by other evidence, raises a strong presumption that the legitimate evidence would operate against him, this rule is not applicable to documents which he has no right to give in evidence without the consent of the opposite party, the only effect of the refusal in such case being to authorize the adverse party to give secondary evidence of the contents of the documents withheld.

63. *England.* — Lumley *v.* Wagner, 1 D. G. M. & G. 604, 21 L. J. Ch. 898.

Canada. —Ockley *v.* Masson, 6 Ont. App. 108.

United States. — Missouri, K. & T. R. Co. *v.* Elliott, 102 Fed. 96; Southern Pac. Co. *v.* Johnson, 69 Fed. 559; Sharon *v.* Hill, 26 Fed. 337.

Illinois. — Rector *v.* Rector, 8 Ill. 105.

Iowa. — Hunt *v.* Collins, 4 Iowa 56.

Kentucky. — Benjamin *v.* Ellinger, 80 Ky. 472; Bowler *v.* Blair, 6 Ky. L. Rep. 658.

Minnesota.—McGuinness *v.* School Dist. No. 10, 39 Minn. 499, 41 N. W. 103.

New Hampshire. — Cross *v.* Bell, 34 N. H. 82; Foye *v.* Leighton, 24 N. H. 29.

New York. — Life & F. Ins. Co. *v.* Mechanics F. Ins. Co., 7 Wend. 31; Barber *v.* Lyon, 22 Barb. 622; Cahen *v.* Continental F. Ins. Co., 69 N. Y. 300; Jackson *v.* McVey, 18 Johns. 330.

North Carolina. — Reavis *v.* Orenshaw, 105 N. C. 369, 10 S. E. 907.

Oregon — Shreyer *v.* Turn r Flouring Mills Co., 29 Or. 1, 43 Pac. 719.

Wyoming. — Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073.

Statement of Rule. — "The rule to be extracted from the authorities would appear to be this, that where the books or papers are shown to be in the hands of the opposing party, but no evidence is given of their contents, the refusal to produce them is not to be regarded as *prima facie* evidence that they would show if produced, what the party calling for them alleges they contain. In such a case there is no legal presumption as to their contents. But where, after notice and refusal to produce them, and it is shown or admitted that they are under the control of the party, and secondary evidence is given, and such evidence is imperfect, vague and uncertain, every intendment and presumption is to be made against the party who might remove all doubt by producing the higher evidence." Cross *v.* Bell, 34 N. H. 82.

"**Failure or Refusal to Produce the Documents Called for by the Notice Cannot be Considered as Evidence of the Truth** of what plaintiff claims he would be able to prove by them; that is, to a greater or less extent they would have a tendency to prove his case. It did, however, open wide the doors for the introduction of secondary evidence; and if any such were introduced, from which the truth of such claims could reasonably be inferred, the non-production of the primary evidence, unless attended

evidence of such parts of their contents as are applicable to the case must be first given before any foundation is laid for any inference or intendment on account of their non-production.[64]

(5.) Secondary Evidence of Papers Not Produced. — A party will not

with some sufficient or reasonable excuse therefor, would strengthen the inference. As the introduction of inferior evidence, when higher or primary evidence is at hand, would create a presumption that the higher or primary would be adverse if produced, so, if a party, when legally called upon to produce the best evidence, if within his power to do so, fails to comply with the demand, and allows his adversary to proceed with the introduction of secondary evidence, the presumption will obtain that the higher evidence would be more hurtful to him than the secondary, and thus strengthen the inference to be drawn therefrom." Schreyer *v.* Turner Flouring Mills Co., 29 Or. 1, 43 Pac. 719.

In Clifton *v.* U. S., 4 How. (U. S.) 242, a trial as to the rightfulness of a seizure of goods upon suspicion of having been fraudulently imported, it was held that after the prosecution had shown sufficient ground for a conclusion that probable cause existed, and notice had been given to the claimant to produce his books and papers relating to the goods in question, which he refused to do, it was proper for the court to instruct the jury that they were at liberty to presume that if produced, the books and papers would have operated unfavorably to his cause.

Where an insurance company as defendant in a suit on a policy issued by it, refuses to produce the original proofs of loss furnished, without assigning any reason, and the plaintiff has given secondary evidence thereof, the defendant cannot object that the contents of such proofs were not sufficiently proved. Northern Assur. Co. *v.* Samuels, 11 Civ. App. 417, 33 S. W. 239. "Even if the defects were not waived," said the court, "such action [on the part of the defendant] would at least be strong presumptive evidence that the proofs were sufficient, and if they were not sufficient, the insufficiency could have been fully established by the defendants, doing just what the plaintiff requested it to do,— produce the original." In this case it was also held that the insurance company could not introduce evidence for the purpose of showing the insufficiency of the proofs of the loss.

In Leese *v.* Clark, 29 Cal. 664, upon the hearing of an order to show cause upon affidavits filed, it was held that where one of the parties presenting affidavit to which was attached a copy of a deed under his control, refuses to produce the original deed upon the demand of his adversary, the copy of the deed under the circumstances was entitled to no weight whatever, and the refusal to produce the original when called upon to do so without any excuse whatever, tended strongly to weaken the statement in the affidavit relating to it.

In Bush *v.* Guion, 6 La. Ann. 797, a suit for the settlement of partnership affairs, one of the partners being called upon to produce the original invoices for purchases made for the firm by him, produced a large number but not all, and those which were produced showed overcharges by him; it was held that the court was authorized to presume that the invoices not produced, would, if produced, have shown similar overcharges.

Where a party notified to produce a paper answers that the paper is in the hands of a third person by whom it is held for himself and others, but does not state that the paper is not under his control, it is error for the court to take the contents of the paper as stated by the plaintiff in his pleading to be true. Munford *v.* Wilson, 19 Mo. 669.

64. Life & F. Ins. Co. *v.* Mechanic F. Ins. Co., 7 Wend. (N. Y.) 31; Southern Pac. Co. *v.* Johnson, 69 Fed. 559; Bott *v.* Wood, 56 Miss. 136; Cross *v.* Bell, 34 N. H. 82; Foye *v.* Leighton, 24 N. H. 29.

be allowed to give secondary evidence of papers which are in his possession and which he has failed to produce upon notice.[65]

(6.) **Subsequent Production of Document.** — When secondary evidence of the contents of a document has been given, because the opposite party has refused to produce the document upon a proper call, the party so refusing cannot afterwards make use of the document for any purpose.[66] But it is held that this rule does not apply to a document which relates directly to the case of the party holding it.[67] Nor can the party so refusing to produce a paper called for put the paper into the hands of his adversary's witnesses for the purpose of cross-examination.[68]

F. Proof of Possession or Control. — a. *Burden of Proof.* The burden of proving that the primary evidence is without the

Slight Evidence of the Contents of a Paper is sufficient as against the party who might remove all doubts by producing the original which is in his possession and which he has been called upon to produce but refuses. Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 223; Platt *v.* Platt, 58 N. Y. 646.

65. Dole *v.* Belden, 16 N. Y. St. 899, 1 N. Y. Supp. 667.

Where Paper Called for Is in Fact Lost, the party is not then precluded from introducing secondary evidence by reason of his non-compliance with the call. Spears *v.* Lawrence, 10 Wash. 368, 38 Pac. 1049, 45 Am. St. Rep. 789.

66. Thompson *v.* Hodgson, 4 P. & D. 142, 12 Ad. & E. 135; Collins *v.* Gashon, 2 F. & F. 47; Doon *v.* Donaher, 113 Mass. 151; Kingman *v.* Tirrell, 11 Allen (Mass.) 97; Gage *v.* Campbell, 131 Mass. 566; Tyng *v.* U. S. Submarine & T. B. Co., 1 Hun (N. Y.) 161.

The Reason is Obvious: the court will not permit a party to speculate on the chances. If a party, who upon notice refuses to produce a paper which is in his possession and thereby forces his adversary to resort to secondary evidence should be permitted afterwards to introduce the paper as a part of his own evidence he would thus be afforded the opportunity of taking chances whether the secondary evidence offered should prove to be satisfactory or unsatisfactory. If the latter, he would then have the opportunity of correcting it by producing the paper itself, which, of course is the highest evidence of its contents; but if the former, then he could by omitting to offer the paper in evidence suppress the best evidence of the facts in issue; and this no court, charged with the administration of justice, will for a moment countenance. Powell *v.* Pearlstine, 43 S. C. 403, 21 S. E. 328.

The rule precluding a party who has refused to produce a document called for from afterwards introducing the document itself does not apply to a document differing from the one called for as to its terms, although pertaining to the same matters in controversy. Scott *v.* Sandford, 14 Jones & S. (46 N. Y. Super. Ct.) 544.

In Bogart *v.* Brown, 5 Pick. (Mass.) 18, it was held that a party on whom a notice to produce the original document had been served, to which notice was attached an alleged copy of the original, could not use as evidence for himself the supposed copy and the affidavit of the other party of his belief that it was a true copy.

67. Moulton *v.* Mason, 21 Mich. 364. "Such a rule," said the court, "is not calculated to further the eliciting of the truth. It is simply an attempt to punish one party by allowing his adversary to recover what does not belong to him or to defend unjustly against a proper claim. Any rule which refuses certain proof for uncertain, deserves very little respect."

68. Doe *v.* Cockell, 6 Car. & P. 525.

jurisdiction of the court is upon the party asserting that fact as excusing its non-production.[69] And a notice to produce a document does not warrant the introduction of secondary evidence where the document is of such a character that it is presumed that it is not in the possession of the party notified to produce it;[70] and hence in such case the possession of the document by the party notified must be shown.[71] But where the paper belongs exclusively to the party and ought to be in his possession according to the course of business, very slight evidence is enough to raise presumption of possession.[72]

The Presumption That the Addressee of a Letter properly addressed, mailed, and postage prepaid, received the letter in due course of mail,[73] has been invoked so as to allow the writer of the letter to introduce secondary evidence of its contents after proper notice of it by him to the addressee to produce it, even although the latter denies that he ever received it.[74]

And when it is necessary that a notice to produce be given, it is incumbent on the party who depends on that fact as ground for resorting to secondary evidence to prove it.[75]

69. Knickerbocker *v.* Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595; Harvey *v.* Edens, 69 Tex. 420, 6 S. W. 306.

In McCracken *v.* McCrary, 5 Jones Law (N. C.) 399, where the original was in the hands of a person who had left the state, and there was no evidence of its loss or destruction, it was held that giving notice to the opposite party to produce it on the trial would not justify the reception of secondary evidence.

70. Bell *v.* Chandler, 23 Ga. 356.

71. Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212; Gafford *v.* American Mtge. & Inv. Co., 77 Iowa 736, 42 N. W. 550; Johnson *v.* Johnson, 77 Mich. 65, 37 N. W. 712. See also Vogel *v.* Rhind, 9 N. Y. St. 377.

In Berg *v.* Carroll, 40 N. Y. St. 811, 16 N. Y. Supp. 175, it was held that notice to plaintiff to produce a letter, which was alleged to have been written by plaintiff's assignor to defendant and by defendant returned to the writer was not good, since there was no evidence and it was not even claimed, that plaintiff ever had possession of the letter.

Compare Neosho Val. Inv. Co. *v.* Hannum, 63 Kan. 621, 66 Pac. 631. The presumption is that the original of a written instrument is not in the possession of a stranger, and it is sufficient in the absence of evidence to the contrary to admit secondary evidence of its contents.

72. Rose *v.* Winnsboro Nat. Bank, 41 S. C. 191, 19 S. E. 487.

73. In Vasse *v.* Mifflin, 4 Wash. C. C. 519, 28 Fed. Cas. No. 16,895, it was held that a letter shown to have been written to the plaintiff and properly addressed was presumed to be in his possession or under his control and accordingly secondary evidence was not admissible.

74. Rosenthal *v.* Walker, 111 U. S. 185, 28 L. Ed. 395, (so holding, but holding further that it was for the jury to determine ultimately whether the letter had actually been received). Sugar Pine Lumb. Co. *v.* Garrett, 28 Or. 168, 42 Pac. 129. *Compare* Freeman *v.* Morey, 45 Me. 50, 71 Am. Dec. 527; James *v.* State, 40 Tex. Crim. App. 190, 49 S. W. 401, where it was held incompetent to prove the contents of a letter shown to have been written by the witness to another without some proof that the latter had received the letter; that the mere mailing of the letter was not plenary proof of that fact. In this case no notice to produce had been given and this was held an additional reason for excluding the secondary evidence.

75. Weeks *v.* Lyon, 18 Barb. (N.

b. *Mode of Proof.* — **(1.) Parol Testimony.**— Parol testimony is competent to show that it is not within the power of a party to produce the primary evidence.[76]

(2.) Affidavit of Party or Agent. — The affidavit showing a party's inability to produce the primary evidence and as to who in fact has possession or control thereof may be made by either the party himself[77] or his agent.[78]

(3.) Documentary Evidence. — A letter to the custodian of a document, and his reply assigning his reasons for refusing to deliver up the document, are, upon proof of their genuineness competent evidence in order to justify the admission of secondary evidence of its contents.[79]

c. *Cogency of Proof.* — It is not sufficient to show in general terms that it is not in the party's power to produce the primary evidence, but the circumstances of the particular case must be shown from which the court can see for itself that it is out of the party's power to produce it.[80]

d. *Order of Proof.* — Whether proof of the notice to produce

Y.) 530; Carland *v.* Cunningham, 37 Pa. St. 228; Holbrook *v.* School Trustees, 22 Ill. 539.

76. Hall *v.* York, 16 Tex. 18.

77. Morgan *v.* Jones, 24 Ga. 155; Smith *v.* Martin, 2 Overt. (Tenn.) 208. See also Earnest *v.* Napier, 15 Ga. 306 (required by rule of court). *Compare* Willard *v.* Germer, 1 Sandf. (N. Y.) 50, wherein it was held that proof of the custody of a document in an opposite party cannot be made by affidavit; it should be made by oral examination of witnesses in court in order that they may be cross examined.

78. Affidavit by Agent. — An affidavit showing the party's inability to produce the original should, if made by an agent, state the reason why it was not made by the party himself. Smith *v.* Martin, 2 Overt. (Tenn.) 208.

79. Maurice *v.* Worden, 54 Md. 233, 39 Am. Rep. 384.

80. Booth *v.* Cook, 20 Ill. 129. "It is for the court," said the court, "and not for the party, to draw conclusions whether or not it is in his power to produce the original; and it is the duty of the party to state the facts and circumstances from which the court may be enabled to draw a correct conclusion on the subject. He must show the court that he has in good faith made every reasonable effort to produce the original, and he must show in detail what those efforts have been. . . . These facts must appear to the satisfaction of the court." See also Roberts *v.* Haskell, 20 Ill. 59.

In Choteau *v.* Raitt, 20 Ohio 132, the only evidence upon the question of possession of the party notified to produce a letter was that such a letter had been deposited in the post-office of another city and directed to him; but it was held that in the face of his denial that he had the letter or had ever received it and in the absence of any testimony that it had ever been in his possession secondary evidence could not be received. The court in so holding, however, distinguishes between a letter so mailed and directed and a notice of protest of a bill or note deposited in a post-office in due time and properly directed.

In Wills *v.* McDole, 5 N. J. Law 501, it was held that a mere belief that the original document was in another person's possession without any reason for such belief, and unaccompanied by any testimony that it had ever been seen there, or had been entrusted to him by the parties is not sufficient.

In Jackson *v.* Shearman, 6 Johns.

shall be made before proof of the existence of the primary evidence, or *vice versa*, is a matter within the discretion of the court.[81]

e. *Questions for Court.* — The sufficiency of the excuse for not producing a document which the custodian has been notified to produce, is addressed to the discretion of the trial judge and his discretion is conclusive.[82] So, also, whether or not it has been made to appear that an original document is not in the custody or control of a person offering secondary evidence is a question for the court to decide.[83]

V. QUALITY OF SECONDARY EVIDENCE.

1. Rules as to Degrees. — A. Rule in England. — In England the courts do not recognize the existence of any degrees of secondary evidence, but hold that where resort to secondary evidence may properly be had, the party entitled thereto may give any evidence attainable provided of course, it be not otherwise objectionable.[84]

B. Rule in the United States.— a. *Cases Denying Existence of Degrees.* — In the United States, however, the courts are divided on this question. Some of the courts follow the rule laid down by the courts in England,[85] holding that the quality of the

(N. Y.) 19, the document was deposited in another court but it was held that as it did not appear by what means it came there it must be presumed that it was placed there by the party entitled to its custody and who had been notified to produce it, and was liable to be withdrawn upon his application and that hence for the purposes of the notice it was still to be considered as under his control and in his possession.

81. In Matlocks *v.* Stearns, 9 Vt. 326, the court admitted evidence of notice to the opposite party to produce a document before any evidence was given of the existence of the document; and the document, not being produced, admitted secondary evidence of its contents. It was held that the order of introducing the testimony in such a case is within the discretion of the court. The court said that the introduction of evidence of the existence of the document before evidence of the notice to produce would have been more in accordance with the recent forms of proceeding; but inasmuch as no objection had been made at the court below and the existence as well as the contents of the document was shown there was no error.

82. Herndon *v.* Givens, 16 Ala. 261.

83. Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868.

84. Rowlandson *v.* Wainwright, 1 N. & P. 598, 5 Ad. & E. 520; Brown *v.* Woodman, 6 Car. & P. 206, 25 Eng. C. L. 358; Rex *v.* Hunt, 3 Barn. & A. 566, 5 Eng. C. L. 377; Coyle *v.* Cole, 6 Car. & P. 359, 25 Eng. C. L. 438; Doe *v.* Ross, 7 M. & W. 102, 8 D. P. C. 389; Whitfield *v.* Fausset, 1 Ves. Sr. 389. *Compare* Villiers *v.* Villiers, 2 Atk. 71.

85. *Connecticut.* — Platt *v.* Hubinger, 58 Conn. 153, 19 Atl. 527.

Indiana. — Carpenter *v.* Dame, 10 Ind. 125, *overruling* Coman *v.* State, 4 Blackf. 241. *Compare* Barnett *v.* Lucas, 27 Ind. App. 441, 61 N. E. 683; Jones *v.* Levi, 72 Ind. 586.

Massachusetts. — Com. *v.* Smith, 151 Mass. 491, 24 N. E. 677; Smith *v.* Brown, 151 Mass. 338, 24 N. E. 31; Goodrich *v.* Weston, 102 Mass. 362, 3 Am. Rep. 469.

Nebraska. — Rawlings *v.* Y. M. C. A., 48 Neb. 216, 66 N. W. 1124.

New York. — Oldenburg *v.* New York C. & H. R. R. Co., 29 N. Y. St.

secondary evidence affects its weight, but not the order of its admissibility.[86]

656, 9 N. Y. Supp. 419; Schroeder *v.* Frey, 60 Hun 58, 14 N. Y. Supp. 71; Wilcox *v.* Wilcox, 46 Hun 32; Van-Dyne *v.* Thayre, 19 Wend. 162; Robertson *v.* Lynch, 18 John. 451. *Compare* Scott *v.* Slengerland, 44 Hun 254; Hazzaro *v.* Maughan, 10 Misc. 230, 30 N. Y. Supp. 1066; Reddington *v.* Gilman, 1 Bosw. 235.

South Carolina. — Hodges *v.* Tarrant, 31 S. C. 608, 9 S. E. 1038.

Texas. — Allerkamp *v.* Gallagher, (Tex. Civ. App.), 24 S. W. 372; Clayton *v.* Rehm, 67 Tex. 52, 2 S. W. 45; Lewis *v.* San Antonio, 7 Tex. 288; Simpson *v.* Edens, 14 Tex. Civ. App. 235, 38 S. W. 474.

West Virginia. — Chenowith *v.* Ritchie County Court, 32 W. Va. 628, 9 S. E. 910.

In Rawlings *v.* Y. M. C. A., 48 Neb. 216, 66 N. W. 1124, the book in which the subscription sued upon was entered, was proved to have been lost; it was held that the plaintiff might prove its contents by parol testimony, notwithstanding that there were in existence similar books also used for subscription purposes substantially like the one in question, which might have been offered in evidence, but were not.

In Barnett *v.* Lucas, 27 Ind. App. 441, 61 N. E. 683, an action on an attachment bond, it was held that a copy of the bond might be read in evidence, or a witness might testify from recollection refreshed by it. There is a *dictum* in this case to the effect that proof of a lost record or document should be made by the best obtainable evidence, and that an examined copy ranks next to a certified copy.

In Dorsey *v.* Gassaway, 2 Har. & J. (Md.) 402, 3 Am. Dec. 557, it was held that where a deed was lost or not in the power of the party to produce it, it is only necessary to show an examined copy or prove the contents of the paper.

In Michigan the cases are not harmonious. Thus in Eslow *v.* Mitchell, 26 Mich. 500, it was said, "there is no rule of law that requires secondary evidence to be of one kind rather than another where the writing is a private writing and no counterpart is legally presumed or required to exist." This statement was characterized in Phillips *v.* U. S. Ben. Soc., 125 Mich. 186, 84 N. W. 57, as a *dictum*. In Day *v.* Backus, 31 Mich. 241, the court again said: "Without reference to the much mooted question whether there are any degrees of secondary evidence or whether mere parol evidence of the contents of Day's letter could be given so long after it was written when it was shown that three copies were taken by disinterested persons immediately after it was received," from which it appears that the question was not regarded as settled. There seem to be no cases in the courts of that state where the precise question is presented as squarely as it was in the Phillips case. In that case the court speaking through Grant J., holding that the rule is that a sworn copy must be produced if attainable in which two other judges concurred, but to which the Chief Justice and another judge dissented, stating that the rule in Michigan is that there are no degrees in secondary evidence. *Compare* Platt *v.* Haner, 27 Mich. 167, in which parol evidence of the contents of a U. S. patent which had been lost or was inaccessible was held inadmissible, but that proof by exemplification from the general land office should have been obtained.

86. Statement of Rule. — In Goodrich *v.* Weston, 102 Mass. 362, 3 Am. Rep. 469, the court in ruling on this question said: "When the source of original evidence is exhausted, and resort is properly had to secondary proof, the contents of private writings may be proved like any other fact, by indirect evidence. The admissibility of evidence offered for this purpose must depend upon its legitimate tendency to prove the facts sought to be proved, and not upon the comparative weight or value of one or another form of proof. The jury will judge of its weight, and may give due consideration to the

Where a Deed is Lost and the Only Copy Thereof is Lost, evidence of the contents of such copy by one who has seen it, is certainly the best evidence of which the case is susceptible.[87]

b. *Cases Recognizing Existence of Degrees.* — In other jurisdictions where the English rule is not followed, the practice varies, although they do recognize the existence of degrees of secondary evidence.[88] The rule as generally applied in these jurisdictions, however, is to the effect that where satisfactory proof is made of the loss or inability to produce an instrument which the law does not make provision for recording and copying,[89] and the evidence fails to disclose the existence of any copy or other evidence better than parol known to the offering party and within his power to produce, and there is nothing appearing to indicate a copy, or fraud, or deception, then the presumption arises that there is no copy or other evidence better than parol within the power of the party to produce, and a *prima facie* case is made for the admission of parol testimony of the contents of the instrument.[90]

fact that a less satisfactory form of proof is offered while a more satisfactory one exists and is withheld, or not produced when it might have been readily obtained. But there are no degrees of legal distinction in this class of evidence. Although there has been much diversity of practice, and the decisions are far from uniform, more frequently turning upon special circumstances and facts than upon a general principle, the tendency of authority is, as we think, toward the establishment of the rule here stated."

87. Kelly *v.* Cargill Elev. Co., 7 N. D. 343, 75 N. W. 264.
See article "Copies."

88. In Tobin *v.* Roaring Creek & C. R. Co., 86 Fed. 1020, the court characterized oral testimony as secondary evidence of the lowest degree.

To admit secondary evidence it must not only appear to be the best, but it must be the best legal evidence under the circumstances. Philipson *v* Baits, 2 Mo. 116, 22 Am. Dec. 444.

89. In U. S. *v.* Long Hop, 55 Fed. 58, a proceeding under the Chinese Exclusion Act, for the purpose of procuring the deportation of the defendant, it was attempted to be proved by a witness that he saw defendant's name on a list of Chinese at New Orleans in transit through from San Francisco to Cuba; but it was held that the list being one required by law to be kept, was provable by a certified copy thereof, as the only legal evidence of its contents in the absence of the original.

In State *v.* Spaulding, 34 Minn. 361, 25 N. W. 793, upon an issue as to the proof by secondary evidence of the contents of a warrant it was contended that the court should have required the production of the complaint as the next best evidence in degree, but the court said that conceding the right to require the best evidence accessible, yet as a warrant need only recite the substance of the complaint and not a copy of it, the reception of parol evidence was proper.

90. *United States.* — Riggs *v.* Taylor, 9 Wheat. 483; Cornett *v.* Williams, 20 Wall. 226; Stebbins *v.* Duncan, 108 U. S. 32; Church *v.* Hubbard, 2 Cranch 187; Renner *v.* Bank of Columbia, 9 Wheat. 581; Consequa *v.* Billings, Pet. C. C. 301, 30 Fed. Cas. No. 17,767; U. S. *v.* Britton, 2 Mason 464, 24 Fed. Cas. No. 14,650; Robinson *v.* Clifford, 2 Wash. C. C. 1, 20 Fed. Cas. No. 11,948; Winn *v.* Patterson, 9 Pet. 663; Williams *v.* Conger, 125 U. S. 397.

Alabama. — Harvey *v.* Thorpe, 28 Ala. 250, 65 Am. Dec. 344; Georgia Pac. R. Co. *v.* Propst, 89 Ala. 1, 7

Letter-Press Copies. — It has been held that press copies of letters are the best secondary evidence of the contents of the letters themselves, and that oral evidence should not be received where it is shown that such press copies are in existence.[91]

Duplicate Original. — So, too, it has been held that an instrument given by one party to the other as a copy or duplicate of the original and accepted by the latter as such, was as between the parties thereto of equal authenticity with the original, and next to the original was the best evidence and should be produced or its non-production accounted for before resorting to parol evidence.[92]

c. *Statutes.* — And there are statutes which in express terms recognize the existence of degrees in secondary evidence.[93]

So. 635; Edisto Phosphate Co. *v.* Stanford, 112 Ala. 493, 20 So. 613.

Arkansas. — Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54.

Illinois. — Palmer *v.* Logan, 4 Ill. 56; Ellis *v.* Huff, 29 Ill. 449; Cleveland C. C. & St. L. R. Co. *v.* Newlin, 74 Ill. App. 638; Mariner *v.* Saunders, 10 Ill. 113; Ill. Land & Loan Co. *v.* Bonner, 75 Ill. 315.

Iowa. — Conger *v.* Converse, 9 Iowa 554; Higgins *v.* Reid, 8 Iowa 298, 74 Am. Dec. 305.

Louisiana. — Roebuck *v.* Curry, 2 La. Ann. 998; Johnston *v.* Cox, 13 La. (O. S.) 536; Duplessis *v.* Miller, 6 La. Ann. 683; Coleman *v.* Breaud, 6 Mart. (N. S.) 208.

Montana. — Belk *v.* Meagher, 3 Mont. 65.

New Jersey. — Popino *v.* McAllister, 7 N. J. Law 46.

North Carolina. — Kello *v.* Maget, 1 Dev. & B. Law 414; Governor *v.* Roberts, 2 Hawks 26. See also Hargett *v.* ————, 2 Hayw. (N. C.) 243 (lost record).

Pennsylvania. — Stevenson *v.* Hoy, 43 Pa. St. 191; Kerns *v.* Swope, 2 Watts 75.

Vermont. — Lowry *v.* Tuttle, 4 Vt. 504, 24 Am. Dec. 628. *Compare* Matlocks *v.* Stearns, 9 Vt. 326.

Virginia. — And see Pendleton *v.* Com., 4 Leigh 694, 26 Am. Dec. 342.

In Seton *v.* Delaware Ins. Co., 2 Wash. C. C. 175, 21 Fed. Cas. No. 12,675, it was held that parol evidence to prove a commercial regulation of the Cuban government was not admissible until evidence was given to prove that it was not within the party's power to obtain a certified copy.

91. Ford *v.* Cunningham, 87 Cal. 209, 25 Pac. 298.

Where the party to be affected by a letter is a merchant, it will be presumed that he kept a letter-book, which would have afforded better evidence than mere parol proof of the contents of the letter. Therefore, when sufficient notice to produce the letter book has not been given, an extract from the lost letter cannot be given in evidence. Dennis *v.* Barber, 6 Serg. & R. (Pa.) 420; Coxe *v.* England, 65 Pa. St. 212.

92. White *v.* Herrman, 62 Ill. 73.

93. In Georgia the civil code (§ 5173) declares that "there are degrees in secondary evidence and the best should always be produced. Thus, a duplicate is better than a copy; an examined copy better than oral evidence." Shedden *v.* Heard, 110 Ga. 461, 35 S. E. 707. See also Williams *v.* Waters, 36 Ga. 454; Graham *v.* Campbell, 56 Ga. 258.

In Cross *v.* Johnson, 65 Ga. 717, it was held that where an original letter was lost, it was competent to introduce a copy or to go into the contents thereof by parol; and that there was no necessity of establishing a copy by separate proceedings. See also Bridges *v.* Thomas, 50 Ga. 378.

The Georgia Statute defining the distinction as to the quality of secondary evidence and requiring the production of written evidence as of a higher grade than oral has no application where the determination of an issue as to what were the contents of a lost writing depends entirely upon oral evidence. Georgia Home Ins. Co. *v.* Campbell, 102 Ga.

Burden of Proof. — In all these cases, of course, recognizing the existence of degrees in respect to secondary evidence, the strength of the proposition consists in the fact that there is secondary evidence in its nature and character better than that which the party offers and that it is in his power to produce it. He certainly must be allowed to show that what appears to be secondary evidence of a higher degree is not so in fact. In other words, he should be allowed to show that a paper purporting to be a copy is not such in fact and in truth.[94]

2. Knowledge of Witness. — Whenever oral evidence is proper to be received in proof of the contents of a written instrument, any person who has read it, or otherwise has actual knowledge of its contents may testify thereto,[95] and, although he must be able to speak at least to the substance of it,[96] the fact that he cannot tell particularly the contents should not deprive him of the right to

106, 29 S. E. 148, where the controversy was as to how and when a certain word got into the writing in question as to which no other evidence than parol was introduced.

94. Harvey *v.* Thorp, 28 Ala. 250, 65 Am. Dec. 344.

95. Appeal of Richards 122 Pa. St. 547, 15 Atl. 903; Coxe *v.* England, 65 Pa. St. 212; Anon. 2 Camp. 390; Huls *v.* Kimball, 52 Ill. 391; Nolen *v.* Gwynn, 16 Ala. 725; People *v.* Clingen, 5 Cal. 389; Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212; Sugden *v.* St. Leonard, 45 L. J. P. 49, 1 P. D. 154; Stebbins *v.* Duncan, 108 U. S. 32; Blakely Prtg. Co. *v.* Pease, 95 Ill. App. 341. See also Butler *v.* Mapes, 9 Wall. (U. S.) 766.

In Nelson *v.* Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148, it was held that it was not necessary to call the officer who served a writ of attachment which was lost, in order to prove the attachment, although he was within the reach of process; but that such facts might be proved by a person who saw the officer write his return on the writ. "The testimony of (the witness) in regard to that of the officer cannot be deemed secondary. It does not presuppose the existence of evidence of a higher nature which must first be adduced. In regard to the writ itself, both are secondary; but after proof of its loss, the memory of any one who saw it and can testify to its contents is of as high a nature as that of another offered to prove the same fact."

Subscribing Witness. — On proof of the loss of a document testimony of a subscribing witness stating who were the parties thereto, what the subject matter thereof was, the goods stated, the date, and that it was signed, sealed and delivered in the presence of himself and another who subscribed as a witness should be referred to the consideration of the jury as evidence of its contents. McDowell *v.* Irwin, 32 Ga. 39.

96. Appeal of Richards, 122 Pa. St. 577, 15 Atl. 903; Coxe *v.* England, 65 Pa. St. 212; Laster *v.* Blackwell, (Ala.), 30 So. 663; Potts *v.* Coleman, 86 Ala. 94, 5 So. 780; Posten *v.* Rassette, 5 Cal. 467; Camden *v.* Belgrade, 78 Me. 204, 3 Atl. 652; Com. *v.* Roark, 8 Cush. (Mass.) 210.

It is no objection to secondary evidence that the witness does not say that he recollects the whole of the substance of the paper if he testifies to its substance. If he omitted any essential part of it, it is competent for the other side to supply such omission by parol evidence. Clark *v.* Houghton, 12 Gray (Mass.) 38.

In Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547, the witness said that she could not recollect the whole but could state the substance, and it was held that she was properly allowed to state what she could recollect of its contents.

It is error for the court to allow

state his best recollection.[97] But a witness, whose only knowledge of its contents is based on having heard another person read it, is not competent to testify.[98] Nor should the oral testimony of a witness be received in proof of the contents of a writing which the witness has never seen nor read.[99]

The Contents of Letters which are lost may be proved by the testimony of any one who has seen them; the person to whom they are written is not the only competent witness for that purpose.[1] There is authority, however, to the effect that a witness testifying

an alleged copy of a document to be read to a witness in order that he may testify in regard to its contents and whether or not it corresponded with his recollection of the original. Singer Mfg. Co. *v.* Riley, 80 Ala. 314.

97. Case *v.* Lyman, 66 Ill. 229. See also Liebman *v.* Pooley, 1 Stark. 167, 18 Rev. Rep. 756; People *v.* McKinney, 49 Mich. 334, 13 N. W. 619.

In Howard *v.* Chesapeake & Ohio R. Co., 11 App. D. C. 300, the contents of a lost railroad ticket were allowed to be proved by the testimony of the general passenger agent of the railroad issuing the ticket, based upon his recollection of the forms of tickets then in use by the railroad company all of which had been prepared under his direction, although he had not seen that particular ticket.

In Jackson *v.* McVey, 18 Johns. (N. Y.) 330, it was held that the evidence of a witness called to prove the contents of a deed which the opposite party has in his possession in court after refusal to produce on notice, is not to be rejected because the witness, although he had often perused the deed, was unable to recollect any of the courses stated in the description of the premises contained therein; the object of the inquiry being to show that the premises in question were included in the deed.

Vague and Shadowy Recollections. A witness who states that his recollection of the contents of a writing was too vague and shadowy, although he thought he might perhaps state the substance, is not admissible. Graham *v.* Chrystal, 37 How. Pr. 279. *Compare* Benjamin *v.* Ellinger, 80 Ky. 472.

Stating Purported Contents of Writing. — Where the proper foundation has been laid for the admission of secondary evidence, it is proper to permit a witness testifying to the contents to state what purported to be such contents. Gordon *v.* McCall, 20 Tex. Civ. App. 283, 48 S. W. 1111.

98. Nichols *v.* Kingdom Iron Ore Co., 56 N. Y. 618. *Compare* Laster *v.* Blackwell, (Ala.), 30 So. 663, wherein it is held that the fact that a witness's knowledge of the contents of a document is derived from hearing the document read instead of his own inspection does not render his testimony incompetent. However, its weight may be affected by that circumstance.

In Coxe *v.* England, 65 Pa. St. 212, the witness stated that she had looked over her husband's shoulder for an instant as he was reading the document. She remembered the words of the beginning of the document; but beyond this, she could only remember seeing that the words were what her husband was reading aloud; she could not say that she remembered any instances of the letter word for word after they were written or read aloud. It was held that under the circumstances her testimony was mere hearsay. *Citing* Dennis *v.* Barber, 6 Serg. & R. (Pa.) 420.

99. Phillips *v.* U. S. Ben. Soc., 125 Mich. 186, 84 N. W. 57.

1. Drish *v.* Davenport, 2 Stew. (Ala.) 266.

Transactions with Deceased Persons. — In Sawyer *v.* Choate, 92 Wis. 533, 66 N. W. 689, it was held that a person who had read a letter to the receiver, because such receiver was unable to read, is a competent witness to testify to the contents of the letter after its loss; and that such testimony does not come within the inhibition against testifying to transactions had

to the contents of a letter must have knowledge of the handwriting of the writer of the letter before he can so testify.[2]

3. Circumstantial Evidence. — Where the evidence shows the destruction of the primary evidence, parol evidence, both direct and circumstantial of its contents is admissible.[3]

4. Documentary Evidence. — A letter setting forth the terms of a contract contained in another letter between the same parties is evidence to go to the jury of the original contract.[4]

Rough Drafts. — It has been held that a rough draft of a deed in the possession of the opposite party who has refused to produce the deed, is admissible as good secondary evidence.[5]

A Tracing of a Writing made before a mutilation that destroyed the part desired to be proved and made by a person having experience in making such tracing, accompanied by evidence showing that the tracing accurately represents the writing in question is admissible as secondary evidence.[6]

5. Declarations. — Declarations of a party to a writing who has since died, are competent evidence to prove the contents of a document which has been lost.[7] But a mere hearsay statement to the effect that the contents of documents produced were similar to those of the document whose contents are in question is not com-

with deceased persons because the writer of the letter had subsequently died.

2. Bone *v.* State, 86 Ga. 108, 12 S. E. 205. See also Dorsey *v.* Dorsey, 3 Har. & J. (Md.) 315. *Compare* Painter *v.* Ledyard, 109 Mich. 568, 67 N. W. 901, where a witness was allowed to testify to the contents of a letter which he had seen, although it was not shown that he had any knowledge of the writer's handwriting.

Expert Testimony. — In Baxter *v.* Rollins, 99 Iowa 226, 68 N. W. 721, after proof of the loss of a letter a witness was called who qualified himself as an expert witness in handwriting and said he had compared the signature to the letter with that of the purported writer of the agreement in controversy and that they were made by the same person; and it was held error to exclude his testimony as to what the letter contained.

3. Patrick *v.* Badger, (Tex. Civ. App.), 41 S. W. 538; Bradbury *v.* Dwight, 3 Metc. (Mass.) 31, where the court said: "The presumption which arises from the uniform conduct of men under a given state of facts enters essentially into almost every case which is tried. Very few cases are established by positive proof. If the fact alleged by one party and denied by the other be unusual, unaccountable and not warranted by the circumstances, it will not be likely to obtain credit with the jury. If the wood which was standing on the defendant's lot was worth far more than $1.25 per cord, is it reasonable to suppose and presume that he would have sold it at that reduced price? We cannot think that such a presumption could be raised from such premises. . . . The rejected evidence would indeed only raise a presumption which might be rebutted by some particular circumstances that might have operated on the defendant to sell for less than the known value. But this would not affect the admissibility of the evidence."

4. Nelson *v.* Patrick, 2 Car. & K. 641.

5. Sutcliffe *v.* James, 40 L. J. 875, 27 W. R. 750. See also Waldy *v.* Gray, L. R. 20 Eq. 238, 32 L. T. 531.

6. Considine *v.* U. S., 112 Fed. 342.

7. Scott *v.* Slingerland, 44 Hun (N. Y.) 254.

petent to prove the contents of the latter document and should not be admitted for that purpose.[8]

6. Previous Negotiations. — Evidence of negotiations between the parties prior to the execution of the writing as to what was to be contained therein, is not admissible to show the contents of the writing which is lost.[9]

7. Opinions and Conclusions. — The contents of a document cannot be proved by the oral statements of the witness's opinion or conclusions.[10]

Belief of Witness. — And the law requires something stronger than the belief of a witness as to the contents of a writing.[11]

8. Houston & T. C. R. Co. *v.* Johnson, (Tex. Civ. App.), 66 S. W. 72. **Declarations Preliminary to Signing Paper.** — In Mallard *v.* Moody, 105 Ga. 400, 31 S. E. 45, a suit upon a contract, where the material issue involved is whether the contract has been completed by the plaintiff, the testimony of a witness introduced by the plaintiff to the effect that the architect had said to the witness that the contract had been completed, was admitted over the objection of the defendant, the defendant not being present when this conversation occurred. The purpose of the testimony was to prove the contents of the final certificate of the architect as to the completion of the building, which was lost. The court said that the witness could have testified to the fact that he saw the architect sign the certificate and the contents of the certificate after it had been signed, but held that the declarations of the architect leading up to the signing of certificate were inadmissible.

Where an alleged copy of an instrument, the original of which is in a foreign country, is shown to the party who purports to have executed it, and his attention called to the very terms of the instrument and an opportunity afforded to him to read it, his subsequent declaration that it was a true copy, is not merely an admission of its legal effect or a *confessio juris*, but is a *confessio facti*, or an admission of the fact that he had executed precisely such a document containing precisely such provisions as were stated in the paper before him. Cociancich *v.* Vazzoler, 48 App. Div. 462, 62 N. Y. Supp. 893. It was objected in this case that the reception of such testimony was dangerous on account of the ease with which testimony might be fabricated to show such admission. But the court said that this objection went to the care with which evidence of this character should be scrutinized and the weight which should be given to it rather than its competency.

9. McBurney *v.* Cutler, 18 Barb. (N. Y.) 203; Nicholson *v.* Tarpey, 124 Cal. 442, 51 Pac. 457; Richardson *v.* Robbins, 124 Mass. 105. *Compare* Kerr *v.* Topping, 109 Iowa 150, 80 N. W. 321.

On an issue as to the contents of a lost contract, evidence of custom of the parties and of conversations between them respecting the general nature of such contracts and the meaning given to certain terms used therein, is not irrelevant or immaterial. Biederbecke *v.* Merchants' Disp. Transp. Co., 39 Iowa 500.

10. Mandel *v.* Swan Land & Cattle Co., 154 Ill., 177, 40 N. E. 462. 45 Am. St. Rep. 124, 27 L. R. A. 313; Laster *v.* Blackwell, (Ala.), 30 So. 663.

In Burr *v.* Kase, 168 Pa. St. 81, 31 Atl. 954, it was held that the secondary evidence to prove the contents of a document was insufficient because the testimony instead of being the statement of the literal contents of the paper or its substance was nothing but the declaration of the witness's opinion as to its legal effect.

11. Givens *v.* Briscoe, 3 J. J. Marsh. (Ky.) 529.

VI. CREDIBILITY OF SECONDARY EVIDENCE.

When secondary evidence has been admitted, it then becomes the province of the jury to judge of its credit and weight. It takes the place of the primary evidence and is entitled to the same consideration. The distinction between primary and secondary evidence has reference to its quality, and not to its strength.[12]

VII. SUFFICIENCY OF SECONDARY EVIDENCE.

When a writing is to be proved, not by itself, but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the writing itself. The substance should be proved satisfactorily.[13]

12. Porter *v.* Judson, 1 Gray (Mass.) 175; Jackson *v.* Betts, 9 Cow. (N. Y.) 208; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

13. Tayloe *v.* Riggs, 1 Pet. (U. S.) 591; Hooper *v.* Chism, 13 Ark. 496; Bennett *v.* Waller, 23 Ill. 97; Edwards *v.* Noyes, 65 N. Y. 125; Jones *v.* Ward, 3 Jones Law (N. C.) 24, 64 Am. Dec. 590.

The Vague Recollections of Witnesses Are Not Sufficient. — The substance of the writing ought to be proved satisfactorily, and if that cannot be done the party is in the condition of every other suitor in court who has no witness to support his claim. When the parties reduce their contract to writing the obligation and duties of each are described and limited by the writing itself. The safety which is expected from them would be much impaired if they could be established upon uncertain and vague impressions of witnesses. Rankin *v.* Crow, 19 Ill. 626.

In Tisdale *v.* Tisdale, 2 Sneed (Tenn.) 596, 64 Am. Dec. 775, the court said that "the strictness of the rule on the subject of the contents of lost papers is somewhat relaxed where they have been lost, withheld, or destroyed by the person to be charged, as spoliators cannot claim the advantage of the strict rule," but, expressly disclaiming any desire to abate the rigidity of the principle as laid down by the authorities, held that in that particular case the proof left no reasonable doubt upon their minds of the "substantial parts of the paper" in question.

In Friel *v.* People, 4 Colo. App. 259, 35 Pac. 676, on an issue as to the existence of a public highway, where the records have been destroyed by fire, it was held that evidence of those who were supposed to have participated in laying it out, was too indefinite and uncertain to establish any regular formality requisite to the legal existence of the highway.

The refusal, after reasonable notice, to produce a document in possession which the adverse party is entitled to introduce in evidence, authorizes proof by parol evidence; but it does not dispense with such proof as is attainable, and does not allow the tenor of the instrument to be made out by anything less than satisfactory evidence of all that is essential. Moulton *v.* Mason, 21 Mich. 364; Schouler *v.* Bonander, 80 Mich. 531, 45 N. W. 487; Jones *v.* Hays, 3 Ired. Eq. (N. C.) 502, 44 Am. Dec. 78; Potts *v.* Coleman, 86 Ala. 94, 5 So. 780, *disapproving* Tayloe *v.* Riggs, 1 Pet. (U. S.) 591, as to the holding in the latter that the proof should leave no reasonable doubt.

In Foye *v.* Leighton, 24 N. H. 29, where the witness testifying to the contents of a document stated that he thought the document read thus, following such statement by the language which he thought was contained therein, it was held that the contents of the document were shown with sufficient precision and that it was competent for the jury to weigh

the evidence and therefrom to determine what were the contents of the document; and that it was proper to refuse to instruct the jury that the evidence as to "the contents of the receipt should show precisely its contents in order to be of any effect and that it should not be left to them to weigh probabilities as to the contents of the paper."

BESTIALITY.—See Sodomy.

BETTING.—See Gaming.

BEYOND REASONABLE DOUBT.—See Reasonable Doubt.

BIAS.

CROSS-REFERENCES.

Competency, Impeachment, Witnesses.

I. INTRODUCTION.

1. Scope of Article. — The word "bias" is thought to be the generic term, including all the various classes or degrees of bias, whether actual or implied, which are commonly designated as hostility, ill-will, malice, prejudice, race-prejudice, religious-prejudice, partisan-prejudice, and the like; and will be so treated in the discussion in this article.

II. IN JURORS.

1. In General. — Bias, in any of its forms, may be shown in a proposed juror as going to his qualifications to serve.[1]

2. Where May Be Shown. — A. GENERALLY. — a. *Challenge.* It has been said that there must be a challenge for bias before the question of the bias of a juror can be inquired into, because otherwise there is no issue to be tried. "A party has no right to examine the juror or any other person by way of fishing for some ground of exception."[2]

1. Some Bias or Prejudice is not necessarily disqualifying. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

2. Bales *v.* State, 63 Ala. 30; King *v.* State, 5 How. (Miss.) 730; State *v.* Flower, Walk. (Miss.), 318; State *v.* Zellers, 7 N. J. Law 220;

B. Motion or Request. — A motion or request that the panel be put on their *voir dire* as to their qualifications has been held to be substantially a motion of challenge to each of the jurors within the above rule.[3]

C. Discretion of Court. — The better rule is thought to be that it is discretionary with the trial court whether or not to allow a party to interrogate a juror as to his qualification without first interposing a challenge.[4]

3. Burden of Proof. — A challenge for bias in a juror must be supported by proof showing bias of such a character as to disqualify.[5]

Presumption that juror summoned is qualified must be overcome by positive and clear proof.[6]

4. Examination of Venireman. — A. Generally. — On challenge for bias the issue may be had by the examination of the venireman[7] or by extrinsic evidence. Each party has a right, sub-

State *v.* Creasman, 10 Ired. Law (N. C.) 395; Matilda *v.* Mason, 2 Cranch C. C. 343, 16 Fed. Cas. No. 9,280; Rex *v.* Edmonds, 4 Barn. & A. 471, 6 Eng. C. L. 401, 23 Rev. Rep. 350. See People *v.* Hamilton, 62 Cal. 377.

3. Howell *v.* Howell, 59 Ga. 145. See People *v.* Backus, 5 Cal. 275.

4. State *v.* Lautenschlager, 22 Minn. 514; Powers *v.* Presgroves, 38 Miss. 227.

"**Usual Everywhere** to ask the juror if he has formed or expressed an opinion as to the guilt or innocence of the accused, but in the present case the court refused to allow the question to be asked, and the prisoner was compelled to prejudice his case by first challenging the jurors, and then having the fact of their bias determined by triers appointed by the court. Before being thus compelled to challenge he should have been allowed to ascertain whether there was any fact from which the presumption of bias or prejudice would arise, and, this fact having been ascertained, then the challenge would properly have followed." People *v.* Backus, 5 Cal. 275.

5. Scranton *v.* Stewart, 52 Ind. 68. See State *v.* Potter, 18 Conn. 166; Smith *v.* Eames, 4 Ill. 76, 36 Am. Dec. 515; Bradford *v.* State, 15 Ind. 347; Moses *v.* State, 10 Humph. (Tenn.) 456; Osiander *v.* Com. 3 Leigh (Va.) 780, 24 Am. Dec. 693; Black *v.* State, 42 Tex. 377; Freeman *v.* People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216.

Reasonable Doubt as to impartiality should be resolved in favor of the accused in criminal cases. Holt *v.* People, 13 Mich. 224.

Challenge for Principal Cause Rejected, the same evidence used on that challenge may be made the basis of a challenge to the favor. Stewart *v.* State, 13 Ark. 720; People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

6. **Presumption** that venireman has intelligence to know his duty and integrity to perform it, and that he is under no influence impelling him to do wrong. That presumption is no less fair and reasonable, though it should be deemed proper to test the state of his mind and of his feelings in regard to the matter to be tried through the more searching detection of an examination upon oath. Clore's Case, 8 Gratt. (Va.) 606. See Holt *v.* People, 13 Mich. 224.

7. Pringle *v.* Huse, 1 Cow. (N. Y.) 432.

ject to the discretion of the court, to put pertinent questions within reasonable limits, to show bias or qualification.[8]

B. As to Oath. — The examination of the venireman should be under oath,[9] but right to have venireman sworn will be waived by permitting examination without.[10]

5. Extraneous Evidence. — In a challenge on account of bias, in addition to calling the venireman as a witness, the party is entitled to put in extraneous evidence[11] to support the challenge.[12]

6. Scope of Inquiry. — A. Generally. — On challenge of venireman for bias the inquiry is permitted to take a wide range in order to ascertain the state of his mind and feelings, and learn whether he stands indifferent between the parties.[13] The party

8. See Watson *v.* Whitney, 23 Cal. 376; Justices *v.* Griffin & W. P. Plank R. Co., 15 Ga. 39; People *v.* Christie, 2 Park. Cr. Cas. (N. Y.) 579, 2 Abb. Pr. 256; State *v.* Ellington, 7 Ired. Law (N. C.) 61; State *v.* Godfrey, Brayt. (Vt.) 170.

9. Trullinger *v.* Webb, 3 Ind. 198; State *v.* Zellers, 7 N. J. Law 220; Lord *v.* Brown, 5 Denio (N. Y.) 345; Rex *v.* Edmonds, 4 Barn. & A. 471, 6 Eng. C. L. 491, 23 Rev. Rep. 350. See Jeffries *v.* Randall, 14 Mass. 205.

Otherwise Where Common Law Rule Not Adopted in the absence of any regulating statute. State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

10. Statements of Veniremen, not under oath, held to be sufficient by Judge Storey in the case of United States *v.* Cornell, 2 Mason 91, 25 Fed. Cas. No. 14,868. In this case two Quakers were set aside upon their unsworn statements without any objection being made to them by either side. This case is cited on this point in Williams *v.* State, 32 Miss. 389, 66 Am. Dec. 615; Montague *v.* Com. 10 Gratt. (Va.) 767; Sutton *v.* Fox, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744; Logan *v.* United States, 144 U. S. 263, 12 Sup. Ct. 628; U. S. *v.* Wilson, Baldw. 78, 28 Fed. Cas. No. 16,730; Trullinger *v.* Webb, 3 Ind. 198; Lord *v.* Brown, 5 Denio (N. Y.) 345; Carnal *v.* People, 1 Park. Cr. Cas. (N. Y.) 272.

Mississippi Rule Otherwise.—King *v* State, 5 How. 730; State *v.* Flower, Walk. 318.

11. Old English Doctrine was that bias must be established by extraneous evidence, and could not be shown by the challenged venireman. Cook's Case, 1 Salk. 153, 1 Chit. Cr. L. 550, 3 Bac. Abr. E. 12, 766.

12. Extraneous Proofs not being offered, the court is bound, according to every principle of practice and of law, to credit the disclosures which the venireman makes on his *voir dire*, as to his own belief of the state of his mind, which can be known only to himself; and not to disbelieve an unimpeached witness, made a witness, not by his own act but the act of the court, and who is subjected to those sanctions of truth the most solemn which can be applied to the consciences of men. Where no positive inconsistencies appear in his examination, suspicion should not be indulged in unnecessarily creating them. Neither should there be overstrained efforts to overlook inconsistencies. The whole of the examination should receive a candid and reasonable construction. If there be no irreconcilable inconsistencies discovered, then there is a concurrence of presumption and of testimony which should overrule and silence every objection to the qualification of the juror. Clore's Case, 8 Gratt. (Va.) 606.

13. State *v.* Shields, 33 La. Ann. 991; Pearcy *v.* Michigan Mut. Life Ins. Co., 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673; Freeman *v.* People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; People *v.* Bodine, 1 Denio (N. Y.) 281; Thompson *v.* People,

has a right to examine as to things not in themselves disqualifying where, taken in connection with other things, they show, or tend to show, bias[14] as to matters calculated or liable to affect the juror's mind and create bias or prejudice,[15] but he has no right to go into the merits of the cause.[16]

Full and Free Examination may be allowed if necessary to ascertain the true state of the person's mind, there being so many matters which of themselves are supposed to constitute a valid objection, and the causes that may influence the triers of the challenge to the favor being, as it were, intangible.[17]

Accused Is Required to Use Due Diligence, in a criminal cause, to ascertain whether the proposed juror possesses all the usual and most notable qualifications as a juror.[18]

B. DISCRETION OF COURT. — Generally, the extent to which a party should be allowed to go in the examination as to bias or qualification of a person called as a juror, is not and can not be

3 Park. Cr. Cas. 467; Comfort *v.* Mosser, 121 Pa. St. 455, 15 Atl. 612; State *v.* Chapman, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432.

14. Mechanics' and Farmers' Bank *v.* Smith, 19 Johns. (N. Y.) 115.

15. See Comfort *v.* Mosser, 121 Pa. St. 445, 15 Atl. 612.

16. Hudson *v.* Ross, 76 Mich. 173, 42 N. W. 1099.

17. Any Fact or Circumstance from which bias or prejudice may justly be inferred, although in a weak degree, is admissible evidence before the triers. People *v.* Bodine, 1 Denio (N. Y.) 281.

Slight and Indecisive Evidence of Bias is admissible. People *v.* Honeyman, 3 Denio (N. Y.) 121.

Inquiry Not Confined to the state of the mind of the venireman before coming into court; if anything has occurred in court which has produced on his mind an impression of the guilt or innocence of the accused, it is a sufficient reason for finding the proposed juror not to be indifferent between the parties. Thompson *v.* People, 3 Park. Cr. Cas. 467.

"**Causes of Challenge to Favor are Numerous,** and depend on a variety of circumstances, as that the juror challenged and the opposite party are in habits of great intimacy, or are partners in business, and the like. The question to be tried, in such case, is whether the juror stands altogether indifferent between the parties. In the nature of things no rule can be laid down that will enable the triers, in every case, to determine with certainty, that the juror is or is not biased. It is not a question of law, but is matter of fact to be submitted to the common sense of the triers, who must find that the juror stands impartial, or they should reject him. The court may direct what evidence is admissible upon the question of indifference; but its weight and influence in proving the allegation of favor or bias, are for the triers alone to determine." Milan *v.* State, 24 Ark. 346.

Notwithstanding the Declarati of the Juror, that his opinion was hypothetical or founded on rumor, and left no bias on his mind, the triers might conclude from other evidence and against his own testimony that he was not indifferent. Stewart *v.* State, 13 Ark. 720.

18. Hudspeth *v.* Herston, 64 Ind. 133; Rice *v.* State, 16 Ind. 298.

"**In the Absence of Something to Suggest Extended Inquiry,** it is doubtless not to be expected that the accused shall, in any event, be required to ask questions not involved in some one of the principal causes for challenge." Block *v.* State, 100 Ind. 357, *citing* Williams *v.* State, 3 Ga. 453.

governed by any fixed rule. Much rests in the discretion of the court as to what questions may or may not be put and answered.[19]

C TOUCHING SCRUPLES. — A venireman may be asked questions touching his religious and other scruples, where the answer would probably disclose facts affecting his impartiality; as scruples against finding a man guilty of an offense which would subject him to the punishment of death,[20] or against finding such a verdict on circumstantial evidence.[21]

19. State *v.* Chapman, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432.

20. *United States.*— U. S. *v.* Wilson, Baldw. 78, 28 Fed. Cas. No. 16,730; U. S. *v.* Ware, 2 Cranch C. C. 477, 28 Fed. Cas. No. 16,641; U. S. *v.* Cornell, 2 Mason 91, 25 Fed. Cas. No. 14,868.

Alabama. — Garrett *v.* State, 76 Ala. 18; Jackson *v.* State, 74 Ala. 26; Waller *v.* State, 40 Ala. 325.

Arkansas. — Atkins *v.* State, 16 Ark. 568.

California. — People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295; People *v.* Sanchez, 24 Cal. 17; People *v.* Stewart, 7 Cal. 140; People *v.* Tanner, 2 Cal. 257.

Florida. — Metzger *v.* State, 18 Fla. 481.

Georgia. — Monday *v.* State, 32 Ga. 672, 79 Am. Dec. 314; Williams *v.* State, 3 Ga. 453.

Indiana. — Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216; Greenley *v.* State, 60 Ind. 141; Fahenstock *v.* State, 23 Ind. 231; Driskill *v.* State, 7 Ind. 338; Gross *v.* State, 2 Ind. 329.

Louisiana. — State *v.* Clark, 32 La. Ann. 558; State *v.* Mullen, 14 La. Ann. 570; State *v.* Reeves, 11 La. Ann. 685; State *v.* Melvin, 11 La. Ann. 535; State *v.* Kennedy, 8 Rob. 590.

Massachusetts. — Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711; Com. *v.* Twambly, 10 Pick. 480.

Mississippi. — Cooper *v.* State, 59 Miss. 267; Spain *v.* State, 59 Miss. 19; Russell *v.* State, 53 Miss. 367; White *v.* State, 52 Miss. 216; Williams *v.* State, 32 Miss. 389, 66 Am. Dec. 615.

Missouri. — State *v.* West, 69 Mo. 401.

Nebraska. — St. Louis *v.* State, 8 Neb. 405.

Nevada. — State *v.* Hing, 16 Nev. 307.

New Hampshire. — Pierce *v.* State, 13 N. H. 536.

New York. — O'Brien *v.* People, 36 N. Y. 276, 48 Barb. 274; Gordon *v.* People, 33 N. Y. 501; Walter *v.* People, 32 N. Y. 147; Lowenburgh *v.* People, 5 Park. Cr. Cas. 414; People *v.* Wilson, 3 Park. Cr. Cas. 199; People *v.* Damon, 13 Wend. 351.

Ohio. — Martin *v.* State, 16 Ohio 364.

Pennsylvania. — Com. *v.* Lesher, 17 Serg. & R. 155.

Texas. — Caldwell *v.* State, 41 Tex. 86; Kennedy *v.* State, 19 Tex. App. 618; Burrell *v.* State, 18 Tex. 713; Hyde *v.* State, 16 Tex. 445, 67 Am. Dec. 630; White *v.* State, 16 Tex. 207; Etheridge *v.* State, 8 Tex. App. 133.

Vermont. — State *v.* Ward, 39 Vt. 225.

Virginia. — Montague *v.* Com., 10 Gratt. 767; Clore's Case, 8 Gratt. 606.

21. People *v.* Ah Chung, 54 Cal. 398; Gates *v.* People, 14 Ill. 433; State *v.* Bunger, 11 La. Ann. 607; Jones *v.* State, 57 Miss. 684; State *v.* West, 69 Mo. 401; Chouteau *v.* Pierre, 9 Mo. 3; State *v.* Pritchard, 15 Nev. 74; Clanton *v.* State, 13 Tex. App. 139; Shafer *v.* State, 7 Tex. App. 239.

Some Prejudice Against Convicting on circumstantial evidence is not sufficient to disqualify. State *v.* Shields, 33 La. Ann. 991.

Not Enumerated in Statute as Ground for Challenge is immaterial, because it was not intended to exclude others not enumerated which affect the integrity or indifference, or the intelligence of the juror, and which, if disallowed, would disappoint the objects of a trial by jury. Smith *v.* State, 55 Ala. 1.

D. Touching Bias Against Crime. — While a venireman may be interrogated as to the facts and circumstances and actual bias or prejudice itself, he cannot be interrogated as to his bias or prejudice against crime in general[22] or a particular crime.[23]

E. Touching Prejudice Against Business. — The prejudice of a person called as a juror against the calling or business in connection with which the action arose may be inquired into to ascertain whether the state of mind of the venireman is such as likely to influence his verdict,[24] as where by reason of that prejudice he cannot give to the testimony of the defendant, if he is called in the cause, the same credit that he would to that of any other person.[25]

22. Higgins *v.* Minaghan, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L. R. A. 138.

See Parker *v.* State, 34 Ga. 262; Williams *v.* State, 3 Ga. 453; Robinson *v.* Randall, 82 Ill. 521; U. S. *v.* Hanway, 2 Wall. Jr. 139, 26 Fed. Cas. No. 15,298.

Prejudice Against Crime. — "A man may have prejudice against crime; against a mean action; against dishonesty, and still be a competent juror. This is proper, and such prejudice will never force a juror to prejudice an innocent man." Winnesheik Ins. Co. *v.* Schueller, 60 Ill. 465.

"**All Honest Men Have a Prejudice**, so to speak, against larceny and other crimes, but if no prejudice exists against a party charged with the crime, that of itself is not ground for challenge for cause." Albrecht *v.* Walker, 73 Ill. 69. See United States *v.* Borger, 7 Fed. 193.

Prejudice in Favor of Enforcing the Law does not disqualify a person for setting in the trial of one charged with a breach of the law. U. S. *v.* Noelke, 17 Blatchf. C. C. 554, 1 Fed. 426.

23. See Boyle *v.* People, 4 Colo. 176, 34 Am. Rep. 76; Robinson *v.* Randall, 82 Ill. 521; Music *v.* People, 40 Ill. 268; U. S. *v.* Borger, 7 Fed. 193; U. S. *v.* Nolke, 17 Blatchf. C. C. 554, 1 Fed. 426.

Prejudice Against Anarchy and Communism does not disqualify a person capable, as a juror, of trying that issue fairly and impartially. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

24. Robinson *v.* Randall, 82 Ill. 521; Fletcher *v.* Crist, 139 Ind. 121, 38 N. E. 472; Keiser *v.* Lines, 57 Ind. 431; Atchison, T. & S. F. R. Co. *v.* Chance, 57 Kan. 40, 45 Pac. 60; Theisen *v.* Jolins, 72 Mich. 285, 40 N. W. 727.

Prejudice of a Bigoted and Responsible Character Disqualifies. Where a venireman testified on his *voir dire* that he had a prejudice against insurance companies generally, that this prejudice was founded on the fact that he could not comprehend their proceedings; but prejudice would not affect his verdict. The court say: "As to this juror, the feeling he entertained against the insurance company was of a bigoted and reprehensible character. It was not founded upon any knowledge or information or conduct which would condemn them, but merely upon the fact of his inability to understand the proceedings of these companies. . . . His prejudice, based upon the reason assigned, must have been deep-seated, and would necessarily have affected his verdict. . . . It would have required as much evidence to remove his unfounded prejudice as to convince him of the justness of the defense." Winnesheik Ins. Co. *v.* Schueller, 60 Ill. 465.

Prejudice Against Landlords generally has been held sufficient to justify excusing a venireman. Lawlor *v.* Linforth, 72 Cal. 205, 13 Pac. 496.

25. Robinson *v.* Randall, 82 Ill.

Prejudice Must Be Against Individual rather than against his calling, to disqualify.[26]

F. Touching Prejudice Against Class of Causes or Defense. — Prejudice against class of causes to which the one on trial belongs may be inquired into, to ascertain whether it is such as to influence the venireman's verdict.[27]

Prejudice Against Defense set up may be inquired into, to ascertain whether bigoted and unreasonable.[28]

G. Prejudice Against Nationality. — A prejudice against a nationality may in like manner be inquired into.[29]

H. Religious Belief and Prejudices. — A person called as a juror cannot usually be interrogated regarding his religious beliefs and prejudices,[30] yet he will not be excused from answering whether he has a prejudice against a religious sect,[31] but may not be asked whether he would give to the testimony of a person of a named religious faith as much credit as to the testimony of witnesses of any other faith.[32]

521; Brockway *v.* Patterson, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708.

See Shields *v.* State, 95 Ind. 299; Eliott *v.* State, 73 Ind. 10; U. S. *v.* Borger, 7 Fed. 193; U. S. *v.* Duff, 6 Fed. 45.

Prejudice Against Corporations cannot be inquired into in an action against a corporation to recover damages for personal injuries. Atlantic & D. R. Co. *v.* Rieger, 95 Va. 418, 28 S. E. 590. See Winnesheik Ins. Co. *v.* Schueller, 60 Ill. 465.

26. Albrecht *v.* Walker, 73 Ill. 69; U. S. *v.* Borger, 7 Fed. 193.

27. Butler *v.* State, 97 Ind. 378; Anson *v.* Dwight, 18 Iowa 241; People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584, *affirming* 38 Hun (N. Y.) 490.

Bias Such as Law-abiding Citizens Ought to Have does not disqualify. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

28. Towl *v.* Bradley, 108 Mich. 409, 66 N. W. 347. See Butler *v.* State, 97 Ind. 378; People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584, *affirming* 38 Hun (N. Y.) 490; Hall *v.* Com., (Pa.), 12 Atl. 163.

29. Race Prejudice. — See Milan *v.* State, 24 Ark. 346; Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75; Balbo *v.* People, 80 N. Y. 484, *affirming* 19 Hun (N. Y.) 242.

Chinaman on Trial proper to ask a juror whether, other things being equal, he would take the word of a Chinaman as soon as that of a white man; and whether, if the defendant should be sworn as a witness in his own behalf, the juror would give his testimony the same credit he would give to the story told by a white person, under the same circumstances. People *v.* Car Soy, 57 Cal. 102.

30. Com. *v.* Buzzell, 16 Pick. (Mass.) 153.

"A Juror Shall Not Be Examined on Oath as to His Religious Opinions, on the subject of slavery, nor will the court, on a challenge for favor, suffer evidence to be given to the triers as to the prevailing opinion of individuals of the religious sect to which the juror belongs." Reason *v.* Bridges, 1 Cranch C. C. 477, 20 Fed. Cas. No. 11,617.

Contrary Rule laid down in Chouteau *v.* Pierre, 9 Mo. 3, where it was held that a question to a venireman as to whether he felt "bound in conscience to find a verdict of freedom," should be put.

31. People *v.* Christie, 2 Park. Cr. Cas. (N. Y.) 579.

32. Horst *v.* Silverman, 20 Wash. 233, 55 Pac. 52, 72 Am. St. Rep. 97.

Bigoted and Unreasonable Religious Prejudice maintained in opposition to provisions of law may be shown.[33]

I. As to Feelings. — The feelings of a person called as a juror is not a proper subject of inquiry,[34] unless it be shown to be such as would probably influence his verdict.[35]

J. As to Relations With Parties Interested. — On the examination of a juror on his *voir dire,* it is proper to fully ascertain the situation of the juror to the parties interested in the suit,[36] and when it is admitted that a stranger to the record is thus interested, it is proper to inquire concerning the relations of a juror to such party.[37] Relation of debtor to either party is not a legitimate subject of inquiry.[38]

33. Morman Churchman believing the practice of polygamy to be God-directed not competent juror in trial of fellow-churchman on charge of polygamy. U. S. *v.* Miles, 2 Utah 19, 103 U. S. 304; Reynolds *v.* U. S. 98 U. S. 145.

34. Difficulty With Employers. In an action to recover wages a venireman having testified on his *voir dire,* in reply to questions put, that he once had difficulty with his employers touching payment of wages. Thereupon the counsel for the defendant inquired of him whether the trouble or difficulty in question would prejudice him against the defendant in the trial of the cause at bar. The trial judge excluded the question. *Held* properly excluded. Fish *v.* Glass, 54 Ill. App. 655.

35. See Lombardi *v.* California St. R. Co., 124 Cal. 311, 57 Pac. 66.

36. Meyer *v.* Gundlach-Nelson Mfg. Co., 67 Mo. App. 389. See Denver, S. P. & P. R. Co. *v.* Discoll, 12 Colo. 520, 21 Pac. 708, 13 Am. St. Rep. 243.

Clerk to a party. Hubbard *v.* Rutledge, 57 Miss. 7.

Counsel to party in relation to matter in suit. People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

Client of Prisoner accused of felony qualified to sit as juror in trial of cause. Reg. *v.* Geach, 9 Car. & P. 499, 38 Eng. C. L. 195.

Deputy to party. Block *v.* State, 100 Ind. 357.

Partner of party. Stumm *v.* Hummell, 39 Iowa 478.

Stockholder in same company. Brittain *v.* Allen, 2 Dev. Law (N. C.) 121.

Employee of Stockholder not within the rule. Fredericton Boom Co. *v.* McPherson, 13 New Brun. (Can.) 8.

Employee of party. Central R. Co. *v.* Mitchell, 63 Ga. 173; Louisville, N. O. & T. R. Co. *v.* Mask, 64 Miss. 738, 2 So. 360; Hubbard *v.* Rutledge, 57 Miss. 7.

Employee in Another Suit involving the same issue, brought in the same court and set for the same day, not disqualified on ground of implied bias. Calhoun *v.* Hannan, 87 Ala. 277, 6 So. 291.

Former Employment by one of the parties is not within the rule. East Line & R. R. R. Co. *v.* Brinker, 68 Tex. 500, 3 S. W. 99.

Landlord of one of parties not disqualified for that reason alone. People *v.* Bodine, 1 Denio (N. Y.) 281; Cummings *v.* Gann, 52 Pa. St. 484.

Tenant of one of the parties, same rule applies. Hathaway *v.* Helmer, 25 Barb. (N. Y.) 29; Pipher *v.* Lodge, 16 Serg. & R. (Pa.) 214; Harrisburgh Bank *v.* Forster, 8 Watts (Pa.) 304; Anonymous, 1 Dyer 176a, pl. (27); Co. Litt. 157a.

Same rule applies to tenant and of person having contingent interest. Brown *v.* Wheeler, 18 Conn. 199; Marsh *v.* Coppock, 9 Car. & P. 480, 38 Eng. C. L. 193.

37. Meyer *v.* Gunlach-Nelson Mfg. Co., 67 Mo. App. 389.

38. Richardson *v.* Planters' Bank, 94 Va. 130, 26 S. E. 413.

Taxpayer in Municipal Corporation is legitimate subject of inquiry, because where relation exists it disqualifies.[39]

K. Interest in Cause. — The interest of venireman in cause to be tried, whether direct [40] or contingent [41] may be inquired into.

L. Acquaintance with Counsel. — The acquaintance of a person called as a juror with counsel for either party is a legitimate subject of inquiry, under the discretion of the court,[42] for the purpose of ascertaining whether the relation of attorney and client exists.[43]

M. Kinship. — Relationship, by consanguinity or affinity, may properly be inquired into,[44] both in respect to a party to the suit [45] and to one beneficially interested therein.[46]

N. Membership in Secret Societies, Church Organizations, Etc. — In examining jurors on their *voir dire,* parties have a right to inquire whether they are members of designated secret societies [47]

39. Ford *v.* Umatilla Co., 15 Or. 313, 16 Pac. 33.

40. See Pearcy *v.* Michigan Mut. Life Ins. Co., 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673; Courtwright *v.* Strickler, 37 Iowa 382; Clark *v.* Lamb, 2 Allen (Mass.) 396; Diveny *v.* City of Elmira, 51 N. Y. 506; Wood *v.* Stoddard, 2 Johns. (N. Y.) 194; Silvis *v.* Ely, 3 Watts & S. (Pa.) 420.

Any Pecuniary Interest, even the smallest. Burdine *v.* Grand Lodge, 37 Ala. 478.

See Russell *v.* Hamilton, 3 Ill. 56; Hawkes *v.* Inhabitants Kennebeck Co., 7 Mass. 461; Page *v.* Contoocook Val. Co., 21 N. H. 438; Brittain *v.* Allen, 2 Dev. Law (N. C.) 121; Wood *v.* Stoddard, 2 Johns. (N. Y.) 194; Lynch *v.* Horry, 1 Bay (S. C.) 229.

41. Kundinger *v.* City of Saginaw, 59 Mich. 355, 26 N. W. 634; Smull *v.* Jones, 6 Watts & S. (Pa.) 122; Phelps *v.* Hall, 2 Tyler (Vt.) 401.

Similar Suit Pending. — Davis *v.* Allen, 11 Pick. (Mass.) 460, 22 Am. Dec. 386; Flagg *v.* City of Worcester, 8 Cush. (Mass.) 69.

42. Attorney of Record where believed by counsel to be interested in the cause. O'Hare *v.* Chicago, M. & N. R. Co., 139 Ill. 151, 28 N. E. 923.

43. Vandalia (City of) *v.* Seibert, 47 Ill. App. 477; Northern Pac. R. Co. *v.* Holmes, 3 Wash. Ter. 202, 14 Pac. 688. See Lowe *v.* Webster, 19 Ky. L. Rep. 1208, 43 S. W. 217.

44. Tegarden *v.* Phillips, (Ind.), 39 N. E. 212.

45. See Williamson *v.* Mayer, 117 Ala. 253, 23 So. 3; Buddee *v.* Spangler, 12 Colo. 716, 20 Pac. 760; Geiger *v.* Payne, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571; Morrison *v.* McKinnon, 12 Fla. 552; Dailey *v.* Gaines, 1 Dana (Ky.) 529; Mahaney *v.* St. Louis & H. R. Co., 108 Mo. 191, 18 S. W. 895; Sims *v.* Jones, 43 S. C. 91, 20 S. E. 905; Davidson *v.* Wallingford, (Tex. Civ. App.), 30 S. W. 286; Jaques *v.* Com., 10 Gratt. (Va.) 690.

46. Trullinger *v.* Webb, 3 Ind. 198.

47. Burgess *v.* Singer Mfg. Co., (Tex. Civ. App.), 30 S. W. 1110.

Compare Van Skike *v.* Potter, 53 Neb. 28, 73 N. W. 295, in which it is held that in a case involving neither directly nor indirectly any religious or secret society, it is not permissible to interrogate veniremen on their *voir dire* as to whether they belong to any church organization or secret society. The court say: "We must not be understood as holding that in no case is it proper to ask a juror, on his *voir dire,* whether he belongs to a church organization or secret society. All that we decide is that the district court did not abuse its discretion in this case in refusing to permit persons called as jurors to state whether they

or societies for the suppression of crime or a particular crime.[48]

Membership in Oath-Bound Societies or associations may be inquired into.[49]

O. Interrogation as to Opinion Formed as to Credibility of Witness. — A party is not entitled to have veniremen interrogated as to whether they have formed or expressed an opinion as to the credibility of a witness, who is relied upon to make out the issue for the plaintiff.[50]

7. Questions That May Be Asked. — A. Generally. — Great latitude is allowed in the examination of jurors on their *voir dire*,[51] and any pertinent and proper question may be asked;[52] but a juror is not to be asked whether he thinks the crime charged against the defendant ought to be punished by law, or ought to receive a different punishment from that which the law prescribes.[53]

B. Discretion of Court. — What questions may be asked on his *voir dire* of a person called as a juror, and what range or scope such examination may take, is a matter committed to the sound discretion of the trial judge.[54] No general rule can be laid down which

belonged to any church organization or secret society."

48. Lavin *v.* State, 69 Ill. 303; State *v.* Mann, 83 Mo. 589; People *v.* Christie, 2 Park. Cr. Cas. (N. Y.) 579. See Com. *v.* Livermore, 4 Gray (Mass.) 18.

49. **Know-Nothings.** — In the case of People *v.* Reyes, 5 Cal. 347, venireman was asked the following questions: "1. Are you not a member of a secret and mysterious order known as, and called, Know-Nothings, which has imposed on you an oath or obligation, beside which, an oath, administered to you in a court of justice, if in conflict with that oath or obligation, would be by you disregarded? 2d. Are you a member of any secret association, political or otherwise, by your oaths or obligations to which, any prejudice exists in your mind against Catholic foreigners? 3d. Do you belong to any secret political society known as, and called by the people at large in the United States, Know-Nothings? And if so, are you bound by an oath, or other obligation, not to give a prisoner of foreign birth, in a court of justice, a fair and impartial trial? *Held*, that the court erred in ruling out these questions.

In Prosecution for Counterfeiting venireman may be asked on his *voir dire* whether he has taken an oath to acquit all persons of counterfeiting if at any time he might happen to be placed on a jury. The court say: "The interrogatory certainly is unusual and extraordinary, and one which the person interrogated might well decline to answer. But the condition of the community, at some period and in some places, may be so peculiar that it might be dangerous to limit to a prescribed formula the interrogations to be propounded, on either side, in the preliminary trial, as to the competency of jurors." Fletcher *v.* State, 6 Humph. (Tenn.) 249.

50. Com. *v.* Porter, 4 Gray (Mass.) 423.

51. Tegarden *v.* Phillips, (Ind.), 39 N. E. 212; Ensign *v.* Harney, 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344. See Johnson *v.* Tyler, 1 Ind. App. 387, 27 N. E. 643; Fletcher *v.* State, 6 Humph. (Tenn.) 249.

52. Donovan *v.* People, 139 Ill. 412, 28 N. E. 964.

As to Whether a Married Man may properly be inquired of a veniremen on his *voir dire*. Union Pac. R. Co. *v.* Jones, 21 Colo. 340, 40 Pac. 891.

53. Com. *v.* Buzzell, 16 Pick. (Mass.) 153.

54. Ryder *v.* State, 100 Ga. 528, 28

would be a safe guide in all cases. The scope of such an examination and the pertinency of the questions propounded, are to be determined from the nature of the cause on trial,[55] and possibly be affected by the conditions prevailing in a community at the time.[56] Questions propounded must be pertinent and of a nature to show the venireman not sufficiently free from bias to sit as an impartial juror.[57]

C. Tending to Disgrace. — Questions, the answers to which might tend to degrade or disgrace a venireman cannot be propounded to him on his *voir dire*.[58]

D. Tending to Show Guilt. — Questions should not be put on the *voir dire*, the answers to which may tend to show the venireman guilty of crime.[59] Thus, a juror may be examined on his *voir dire* as to opinions honestly formed, but if the opinion has been made up and expressed under circumstances which involve dishonor and guilt, and where such expression may be visited with punishment, he ought not to be required to testify so as to criminate himself.[60]

E. Opinion Formed or Expressed. — Inquiry may be made by a venireman on his *voir dire* as to opinion honestly formed or expressed, on the merits,[61] or whether he has made up his

S. E. 246, 62 Am. St. Rep. 334, 38 L. R. A. 721; Van Skike *v.* Potter, 53 Neb. 28, 73 N. W. 295. See State *v.* Coleman, 8 Rich. (S. C.) 237; Reg. *v.* Lacey, 3 Cox C. C. 517.

55. Van Skike *v.* Potter, 53 Neb. 28, 73 N. W. 295; *citing* Basye *v.* State, 45 Neb. 261, 63 N. W. 811.

56. Fletcher *v.* State, 6 Humph. (Tenn.) 249.

57. State *v.* Coleman, 8 Rich. (S. C.) 237; Stagner *v.* State, 9 Tex. App. 440; Reg. *v.* Lacey, 3 Cox C. C. 517.

58. Ryder *v.* State, 100 Ga. 528, 28 S. E. 246, 62 Am. St. Rep. 334, 38 L. R. A. 721; Hudson *v.* State, 1 Blackf. (Ind.) 317; State *v.* Mann, 83 Mo. 589; Mechanics' & Farmers' Bank *v.* Smith, 19 Johns. (N. Y.) 115; People *v.* Fuller, 2 Park. Cr. Cas. (N. Y.) 16; Burt *v.* Panjaud, 99 U. S. 180. **"It Cannot Be Asked a Juror** whether he has been either charged with, imprisoned for, or convicted of a crime, or if he is a villain and an outlaw, because these questions tend to his disgrace." Jones *v.* State, 2 Blackf. (Ind.) 475.

59. Venireman Guilty of Crime which would disqualify him, not required to disclose the fact on oath. Burt *v.* Panjaud, 99 U. S. 180. *Compare* U. S. *v.* Blodgett, 35 Ga. 336; State *v.* Marshall, 8 Ala. 302. **Disqualification May Be Proved** by other evidence. U. S. *v.* Reynolds, 1 Utah 319.

60. State *v.* Benton, 2 Dev. & B. Law (N. C.) 196.

61. State *v.* Benton, 2 Dev. & B. Law (N. C.) 196; Algier *v.* Steamer Maria, 14 Cal. 167; Scranton *v.* Stewart, 52 Ind. 68; Dew *v.* McDivitt, 31 Ohio St. 139; Williams *v.* Godfrey, 1 Heisk. (Tenn.) 299; Houston & T. C. R. Co. *v.* Terrell, 69 Tex. 650, 7 S. W. 670; U. S. *v.* Wilson, Baldw. 78, 28 Fed. Cas. No. 16,730. **Opinion Without Hearing the Testimony** or having a personal knowledge of the facts, bias or partiality presumed. People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Armistead *v.* Com., 11 Leigh (Va.) 657, 37 Am. Dec. 633. **Juror Declaring Upon Voir Dire** that he has not formed or expressed an opinion, where it appears that he sat on a jury which rendered a verdict against the defendant on an indictment, is not competent in an action of trespass against the same defendant, involving the same ques-

mind,[62] not referable to partiality or malevolence.[63] And whether a challenge for such cause be tried by the court or by triers upon the oath of the juror,[64] or upon other evidence,[65] the first inquiry is, whether the juror has formed or divered an opinion on the issue, or any material fact to be tried.[66]

F. Hypothetical Questions. — The weight of authority and the better opinion is thought to be that on the examination of a venireman on his *voir dire*, hypothetical questions should not be allowed to be propounded.[67] The only purpose in examining a juror

tions and relating to the same subject matter. Spear *v.* Spencer, 1 Greene (Iowa) 534.

62. Houston & T. C. R. Co. *v.* Terrell, 69 Tex. 650, 7 S. W. 670.

63. State *v.* Benton, 2 Dev. & B. Law (N. C.) 196.

64. Venireman May Be Sworn to support a challenge to the favor because he does not stand indifferent between the parties, and if he states that he has formed or expressed an opinion adverse to the challenging party upon rumors which he had heard, but that he had not heard a full statement of the case, and that his mind was not so made up as to prevent the doing of impartial justice to the party,— the court found him to be indifferent; and it having so found as a matter of fact, will not be reversed on appeal. State *v.* Ellington, 7 Ired. Law (N. C.) 61.

65. Extraneous Evidence may be offered. Thus, grossly improper remarks by a juror before his qualifications may be explained by a bystander to have been made "in a joking way." See Moughon *v.* State, 59 Ga. 308.

66. Presumption is that the venireman is disqualified where such is shown to be the fact. Stewart *v.* State, 13 Ark. 720.

67. Illinois. — "If taken upon the jury, and the evidence was equally balanced upon both sides just as much one way as the other, which way would you decide?" Exclusion held proper in Chicago & A. R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406, *overruling* Galena & S. W. R. Co. *v.* Haslam, 73 Ill. 494; Chicago & A. R. Co. *v.* Buttolf, 66 Ill. 347; Chicago & A. R. Co. *v.* Adler, 56 Ill. 344. But see Richmond *v.* Roberts, 98 Ill. 472, where such a question was allowed to be put.

Evidence Equally Balanced juror says he would find for the party upon whom the law casts the burden of proof, he may be excluded. Queen *v.* Hepburn, 7 Cranch (U. S.) 290; McFadden *v.* Wallace, 38 Cal. 51; Montgomery *v.* Wabash, St. L. & P. R. Co., 90 Mo. 446, 2 S. W. 409; Hudson *v.* St. L. K. C. & N. R. Co., 53 Mo. 525.

Indiana. — "In a case where the plaintiff is a young man, and the defendant a farmer and an old man, upon a note payable in bank, assigned before maturity without notice of any defense, and where the evidence shows that the note was executed by the defendant on the belief that he was only executing an agency agreement, and for which he received no consideration, for whom would you find, the plaintiff or defendant?" *Held,* properly excluded. Woollen *v.* Wire, 110 Ind. 251, 11 N. E. 230.

Iowa. — The question: "If the defense in this case should be the insanity of the defendant, have you formed or expressed an opinion upon that subject?" was excluded. The court say: "That the inquiry would be proper under some circumstances, we think is very clear. We hardly think it would be a safe rule, however, to permit counsel to state a defense that they may or not make, and base thereon an inquiry into the expressed or formed opinion of jurors. Suppose that jurors state that they have, then if the inquiry is pertinent or proper, they should be excluded. And though the defense should not be made on the trial, the defendant has had the advantage of an improper challenge. If the inquiry is correct as

is to ascertain whether he can try the case fairly; what he would do under a given state of proof, is not a proper matter of examination.[68]

8. Form of Question. — A. GENERALLY. — The trial judge, in his discretion, may restrict the form of the questions to be propounded so that they shall not be unnecessarily prolix or unnecessarily broad and comprehensive in their scope.[69] Where questions

to insanity, so it is as to any defense special in its nature, that counsel may state that they propose making. The better rule is to direct the investigation to the general question of opinion as to the guilt or innocence of the prisoner. The purpose of the inquiry is to ascertain the existence or non-existence of actual bias. This is shown when it appears that the juror has that state of mind, which prevents him from acting with entire impartiality. And this state of mind must be ascertained by directing his attention to the offense and defense as a whole. This is certainly the safer and better rule as implied to the general inquiry. There is no objection to counsel changing the form of inquiry, so as to bring to the mind of jurors facts, circumstances and even hypothetical cases, and fully present his right to challenge for cause. It is very different, however, when they state a supposed case, in the first instance, and base thereon a right to challenge for actual bias." State *v.* Arnold, 12 Iowa 479. See State *v.* Leicht, 17 Iowa 28; State *v.* Sheeley, 15 Iowa 404.

68. Fish *v.* Glass, 51 Ill. App. 655.

Cannot Be Interrogated as to Which Side he favors in examination on *voir dire*. People *v.* Williams, 6 Cal. 206; People *v.* Hamilton, 62 Cal. 377 (in absence of challenge for that cause); Stagner *v.* State, 9 Tex. App. 440. See State *v.* Leicht, 17 Iowa 28; State *v.* Sheeley, 15 Iowa 404; State *v.* Shelledy, 8 Iowa 477.

North Carolina Rule requires, where the venireman states he has formed or expressed an opinion, that the examination shall proceed further, and the venireman be interrogated as to the direction of his opinion. See State *v.* Efler, 85 N. C. 585.

The court say: "An opinion fully made up and expressed, touching that which is the subject-matter of an action, whether civil or criminal, constitutes a good cause of principal challenge for that party only against whom the bias supposed to be created by such declaration operates, and it is therefore incumbent on him who challenges, to show himself to be the party likely to be prejudiced. State *v.* Benton, 2 Dev. & B. Law (N. C.) 196.

Michigan Rule is that it is permissible to ask a venireman which party he would favor, if the evidence were evenly balanced, so as to ascertain his bias for the purpose of exercising the right of peremptory challenge. Township of Otsego Lake *v.* Kirsten, 72 Mich. 1, 40 N. W. 26, 16 Am. St. Rep. 524; Monaghan *v.* Agricultural Fire Ins. Co., 53 Mich. 238, 18 N. W. 797.

69. State *v.* Bennett, 14 La. Ann. 651.

"**The Usual and Proper Question** by which one offered as a juror on a trial for the murder is examined on his *voir dire* as to his bias against the defense, 'have you formed and expressed the opinion that the prisoner at the bar is guilty?' refers to every grade of unlawful homicide, and obviates the necessity of specially interrogating the juror as to whether or not he has formed and expressed the opinion that the prisoner is 'guilty of either murder or manslaughter.' Especially is this so when the ordinary formula is explained by the judge, in the presence of the juror offered, as including manslaughter." State *v.* Matthews, 80 N. C. 417. See State *v.* Benton, 2 Dev. & B. Law (N. C.) 196.

Impression of a Venireman cannot be inquired of on a challenge for principal cause, but it is otherwise when the challenge is for favor on the ground of bias. People *v.* Honeyman, 3 Denio (N. Y.) 121.

are improperly formed, the trial judge may properly refuse to allow them to be put.[70]

B. STATUTORY FORM. — It has been said that where the statute prescribes the form of questions to be propounded to veniremen on their *voir dire,* no other should be propounded;[71] but the better opinion is thought to be that it is a matter within the sound discretion of the trial judge, whether questions other than those prescribed by statute shall be propounded.[72]

III. IN WITNESSES.

1. Generally. — Bias of a witness, however strong, is not ground for his exclusion, but it may always be shown for the purpose of affecting his credibility and the weight to be given to his testimony.[73]

70. Improperly Formed Questions. — When, in a criminal case, the question was asked a juror, examined on his *voir dire,* "Have you or not formed or expressed the opinion, from what you have heard of the case, that the defendant is guilty?" *Held,* that the question was not in legal form, and that the district judge in refusing to allow it to be answered, did not abuse the discretionary power to overrule interrogatories not in legal form. State *v.* Bennett, 14 La. Ann. 651.

In the examination of a juror on his *voir dire,* the question was asked him, "In case the defendant is found guilty of murder, have you made up your mind, as to what degree of punishment ought to be inflicted upon him?" *Held,* that the question was not properly put, and that the district judge did not err in refusing to allow it to be answered. State *v.* Bennett, 14 La. Ann. 651. See State *v.* Ward, 14 La. Ann. 673.

71. See Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814; Monday *v.* State, 32 Ga. 672, 79 Am. Dec. 314; King *v.* State, 21 Ga. 220; Pines *v.* State, 21 Ga. 227; Bishop *v.* State, 9 Ga. 121; Williams *v.* State, 3 Ga. 453.

Venireman Answering Statutory Questions satisfactorily *prima facie* competent; party thereafter objecting must try him and prove him incompetent. Dumas *v.* State, 63 Ga. 600. See Carter *v.* State, 56 Ga. 463.

Court May Examine Juror to see whether he correctly apprehends the terms used. Henry *v.* State, 33 Ga. 441; Mitchell *v.* State, 22 Ga. 211, 68 Am. Dec. 493; Pierce *v.* State, 13 N. H. 536.

72. See Com. *v.* Gee, 6 Cush. (Mass.) 174; Lester *v.* State, 2 Tex. App. 432; Com. *v.* Trasher, 11 Gray (Mass.) 55.

Examination Not to Be Confined Strictly to questions formulated in the statute, but should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require, in order to obtain a fair and impartial jury whose minds were free and clear from all such bias, interest, or prejudice as might militate against their finding a just and true verdict. Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75.

73. *Alabama.* — Preferred Accident Ins. Co. of N. Y. *v.* Gray, 123 Ala. 482, 26 So. 517.

Maine. — Belmont *v.* Vinalhaven, 82 Me. 524, 20 Atl. 89.

Michigan. — Langworthy *v.* Green Township, 95 Mich. 93, 54 N. W. 697; Tolbert *v.* Burke, 89 Mich. 132, 50 N. W. 803.

New York. — Pyne *v.* Broadway & Seventh Ave. R. Co., 46 N. Y. St. 662, 19 N. Y. Supp. 217; Morgan *v.* Frees, 15 Barb. 352; People *v.* Webster, 139 N. Y. 73, 34 N. E. 730.

Pennsylvania. — Batdorff *v.* Farmers' Bank, 61 Pa. St. 179.

Anything Tending to Show Bias or prejudice may be brought out on cross-examination; such matters affect the credit of the witness, and it is

Witness Testifying Under Circumstances Calculated to Create Bias, although otherwise unimpeached, if he states what is, in its nature, incredible, his testimony may be disregarded.[74]

2. How Shown. — A. GENERALLY. — Bias in a witness is shown by proving relationship, sympathy, hostility, or prejudice.[75]

B. BY CROSS-EXAMINATION. — a. *Generally* — The bias of a witness may be shown by cross-examination.[76] One of the objects of the cross-examination of a witness is to discover the motives, inclinations, and prejudices of the witness for the purpose of reducing the effect which might otherwise be given to the evidence.[77]

b. *Leading Questions Excluded When.* — In those cases in which a strong bias or interest in favor of the cross-examining party is shown, the trial judge, in the exercise of a sound discretion may refuse to allow leading questions to be put by the party.[78]

c. *What Questions May Be Asked.* — On cross-examination, the party against whom a witness is produced, within the well-established rules of evidence[79] has a right to interrogate him regarding everything which may in the slightest degree affect his credit. Any question is proper and admissible which has a tendency to show the personal situation, feeling, relation, or interest of the witness which may have influenced him in giving his testimony on direct examination.[80] Thus, he may be interrogated regarding the

therefore material, and such inquiry should be freely indulged. See State *v.* Krum, 32 Kan. 372, 4 Pac. 621; Attorney-General *v.* Hitchcock, 11 Jur. 478.

74. U. S. *v.* Borger, 7 Fed. 193; The Helen R. Cooper, 7 Blatchf. 378, 11 Fed. Cas. No. 6,334.

75. People *v.* Webster, 139 N. Y. 73, 34 N. E. 730.

76. See Turner *v.* Austin, 16 Mass. 181; People *v.* Webster, 139 N. Y. 73, 34 N. E. 730; Garnsey *v.* Rhodes, 138 N. Y. 461, 34 N. E. 199; People *v.* Brooks, 131 N. Y. 321, 30 N. E. 189; Miles *v.* Sackett, 30 Hun (N. Y.) 68; Crist *v.* State, 21 Tex. App. 361, 17 S. W. 260.

Right to Cross-examine as to Bias, hostility, prejudice, interest in the cause, or any other matter affecting the credibility of the witness. Mears *v.* Cornwall, 73 Mich. 78, 40 N. W. 931.

Controversy With the Party Against Whom Called May be shown on cross-examination, and the witness may be inquired of whether he has not threatened to be revenged on him, for the purpose of discrediting his testimony; and should the witness answer in the negative, he may be contradicted by other witnesses. Atwood *v.* Welton, 7 Conn. 66; State *v.* Krum, 32 Kan. 372, 4 Pac. 621.

77. Miles *v.* Sackett, 30 Hun (N. Y.) 68; Pyne *v.* Broadway & Seventh Ave. R. Co., 46 N. Y. St. 662, 19 N. Y. Supp. 217.

78. Rush *v.* French, 1 Ariz. 99, 25 Pac. 816; Clingman *v.* Irvine, 40 Ill. App. 606; Moody *v.* Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317.

79. Cameron *v.* Montgomery, 13 Serg. & R. (Pa.) 128; Daffin *v.* State, 11 Tex. App. 76; Blunt *v.* State, 9 Tex. App. 234.

Rules as to Form and Requisites of Question must be observed. Thus, a question on cross-examination as to whether the witness had not recently stated to different persons, in talking about the matter in suit, that he wanted the plaintiff to recover, because then he would get his pay, on objection, was properly excluded because of failure to specify time and place. Oil Co. *v.* Van Etten, 107 U. S. 325, 1 Sup. Ct. 178.

80. Atchison & T. S. F. R. Co. *v.*

state of his mind or feelings towards the party against whom produced;[81] regarding a reward offered, to which the witness will be entitled in whole or in part.[82]

C. Necessity for Cross-Examination. — It has been said that it is incompetent to introduce evidence to show bias, feeling, or partiality of a witness towards the person introducing him, without having first questioned the witness upon that point;[83] but the better rule is that bias and hostility of a witness towards a party against whom he is called or his interest in the cause may be proved by any competent evidence, either on cross-examination or by the testimony of other persons who can swear to facts showing it.[84]

3. Hostility and Favor. — A. Towards Party Against Whom Called. — Hostility or favor, or any other form of bias in a witness, for or against either party may be shown by any competent evidence, either on cross-examination or by direct testimony of another swearing to facts showing it.[85] Thus, it may be shown on

Blackshire, 10 Kan. 477; Brewer *v.* Crosby, 11 Gray (Mass.) 29.

In the case of Watson *v.* Twombly, 60 N. H. 491, the court say: "Evidence irrelevant to the issue may be material as affecting the credibility of a witness, when it tends to show interest, prejudice, bias, or the relationship and feelings of the witness toward the party. It is the right of the party to show the state of feeling of an opposing witness, and this may be done by cross examination or by independent testimony. For this purpose it is competent to inquire of the witness concerning acts, declarations and circumstances showing the existence of hostile feelings or prejudice."

81. Day *v.* Stickney, 14 Allen (Mass.) 255; Collins *v.* Stephenson, 8 Gray (Mass.) 438; Watson *v.* Twombly, 60 N. H. 491; Sumner *v.* Crawford, 45 N. H. 416; Carr *v.* Moore, 41 N. H. 131; Combs *v.* Winchester, 39 N. H. 13.

82. Reward Offered. — To which witness is entitled is no objection to his competency; but the fact may be shown as affecting the credibility and weight of his testimony. Taylor *v.* U. S. 89 Fed. 954, 32 C. C. A. 449; U. S. *v.* Wilson, Baldw. 78, 28 Fed. Cas. No. 16,730.

83. People *v.* Benson, 52 Cal. 380; Edwards *v.* Sullivan, 8 Ired. Law (N. C.) 302; *citing* Ingram *v.* Watkins, 1 Dev. & B. Law (N. C.) 442; Selby *v.* Clark, 4 Hawks (N. C.) 265; State *v.* Patterson, 2 Ired. Law (N. C.) 346, 38 Am. Dec. 699.

84. "No Reason for Holding that the witness must first be examined as to his hostility, and that then, and not until then, witness may be called to contradict him, because it is not a case where the party against whom the witness is called is seeking to discredit him by contradicting him. He is simply seeking to discredit him by showing his hostility and malice, and as that may be proved by any competent evidence, we see no reason for holding that he must first be examined as to his hostility. And such we think is the drift of the decisions in this state and elsewhere." People *v.* Brooks, 131 N. Y. 321, 30 N. E. 189. See Atwood *v.* Welton, 7 Conn. 66; New Portland *v.* Kingfield, 55 Me. 172; Newton *v.* Harris, 6 N. Y. 345.

85. Daffin *v.* State, 11 Tex. App. 76.

Friendly Feeling for Other Party may be shown. Thus, the witness may be asked whether the party for which he is a witness did not purchase the witness's real estate, at the request of the witness. Cameron *v.* Montgomery, 13 Serg. & R. (Pa.) 128.

In Action of Trover and Conversion. — The defendant's counsel has a right, on cross examination to show that the plaintiff knew an attachment was out at the time he claimed to have purchased the prop-

cross-examination, or by witnesses, that a witness called had said that she knew nothing about the cause except what her husband had told her,[86] that witness had declared the deceased could be spared better than any other man in the community,[87] that the witness belonged to a secret society organized for the purpose of repressing a class or sect to which the defendant belonged.[88]

B. Party for Whom Called. — The general rule is that where a witness is hostile or biased against the party by whom he is called, such party cannot introduce evidence tending to show such hostility or bias.[89]

4. Interested in Prosecuting Same Kind of Cause. — In those cases where a witness called on behalf of the plaintiff is interested

erty, and that he had aided in other suits against the defendant by becoming surety in the cases. Mears *v.* Cornwall, 73 Mich. 78, 40 N. W. 931.

Hostility May Be Shown by questioning witness as to statements made indicating such a feeling; and if he denies making such statements, they may be proved by other witnesses. Newton *v.* Harris, 6 N. Y. 345; Starks *v.* People, 5 Denio (N. Y.) 106.

In the case of Newton *v.* Harris, 6 N. Y. 345, the court say: "The reasons for allowing such inquiries are well stated by Beardsley, C. J., in Starks *v.* People, 5 Den. (N. Y.) 108. He there says: 'It is always competent to show that a witness is hostile to the party against whom he is called that he has threatened revenge, or that a quarrel exists between them. A jury should scrutinize, more closely and doubtingly, the evidence of a hostile than of an indifferent or friendly witness. Hence it is always competent to show the relations which exist between the witness and the party against, as well as the one for, whom he is called.'" *Citing* Atwood *v.* Welton, 7 Conn. 66; Cowen & Hill's Notes, 729, 730, 765.

One Who Belongs to the Defendant's Party, having stood by during the assault, being called as a witness in his behalf, the prosecution may, on cross examination, for the purpose of ascertaining whether he is an impartial witness, ask if he wanted to see the deceased get a thrashing. People *v.* Keating, 61 Hun 260, 16 N. Y. Supp. 748; People *v.* Webster, 139 N. Y. 73, 34 N. E. 730. See Garnsey *v.* Rhodes, 138 N. Y. 461, 34 N. E. 199; People *v.* Brooks, 131 N. Y. 321, 30 N. E. 189.

Competent to Prove Statements of Witness made before the trial, of facts, which, if true, would tend to show bias on his part for the party calling him. U. S. *v.* Schindler, 18 Blatchf. C. C. 227, 10 Fed. 547.

86. Husband Told Witness the Story She Must Tell, with the caution that she must tell the same story twice alike or she would spoil all. Davis *v.* Roby, 64 Me. 427.

87. In Trial for Homicide.—State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

88. On Trial of Several Defendants for Riot, it was held competent to require of a witness, who had been called and testified on the part of the prosecution, to answer on his cross examination, whether he was a member of such secret society. People *v.* Christie, 2 Park. Cr. Cas. (N. Y.) 579.

Hostility to Religious Denomination. — In the trial of defendants for a Roman Catholic riot, a witness may be cross examined as to whether he belongs to a particualr secret society, as the Order of United Americans, for the purpose of showing that such order was established with prejudice against, and to oppose Irish and Roman Catholics, such facts being proper for the jury to receive, to enable them to determine how much, if any, the witness's evidence was warped by the principles of that order. People *v.* Christie, 2 Abb. Pr. (N. Y.) 256.

89. *In re* Mellen's Estate, 56 Hun 553, 9 N. Y. Supp. 929.

in prosecuting similar suits, this fact may be shown by the defendant as tending to show bias, and the jury in weighing their testimony should take into consideration the extent of their interest, pecuniary and otherwise, in the result of the action on trial.[90]

5. Relations of Parties. — A. Intimate Personal Relations. The personal relations existing between a witness and the party against, as well as the party for whom he is called is always competent to be inquired into, as tending to show bias, and to affect the weight and credibility of his testimony.[91]

The Rule Applicable in Case of Hostile Witness, must prevail where the relations of the witness to the party who produces him are more intimate and friendly than those which ordinarily exist in social or business intercourse.[92]

B. Immoral Personal Relations. — Where a witness has given important testimony in the cause, it is always proper to show by cross-examination the fact of immoral relations subsisting between the witness and the party for whom called,[93] or between the witness and another person called as a witness upon the same

90. Sidenberg *v.* Robertson, 41 Fed. 763.

91. *California.*—People *v.* Furtado, 57 Cal. 345.

Connecticut. — Atwood *v.* Welton, 7 Conn. 66.

Iowa. — Dance *v.* McBride, 43 Iowa 624.

Massachusetts. — Com. *v.* Gallagher, 126 Mass. 54.

New York. — People *v.* Webster, 139 N. Y. 73, 34 N. E. 730; Starks *v.* People, 5 Denio 106.

North Carolina. — State *v.* Byers, 100 N. C. 512, 6 S. E. 420; Ferrall *v.* Broadway, 95 N. C. 551; State *v.* Hardee, 83 N. C. 619; Flynt *v.* Bodenhamer, 80 N. C. 205; State *v.* Nash, 8 Ired. Law 85; State *v.* Nat, 6 Jones Law 114.

North Dakota.— State *v.* McGahey, 3 N. D. 293, 55 N. W. 753.

Oregon. — State *v.* Bacon, 13 Or. 143, 9 Pac. 393, 57 Am. Rep. 8.

Pennsylvania. — Cameron *v.* Montgomery, 13 Serg. & R. 128.

Texas. — Crist *v.* State, 21 Tex. App. 361, 17 S. W. 260; Blunt *v.* State, 9 Tex. App. 234.

Relation of Witness to the Accused, or bias against him, and the extent of the bias, may be developed on cross-examination. Daffin *v.* State, 11 Tex. App. 76.

Relation and Interest Taken in Suit. — It is proper to show what relation witness bears to the party calling him, and what interest or part he has taken in the prosecution or defense, as showing his bias or motive, and bearing on his credibility. Michigan Condensed Milk Co. *v.* Wilcox, 78 Mich. 431, 44 N. W. 281.

92. More Than Ordinarily Intimate and Friendly Relations.— Evidence that the relations of a witness to a party who produced him are more intimate and friendly than those which ordinarily exist in social or business intercourse is especially valuable in criminal prosecutions, for there are no cases in which party sympathy, personal friendship, family affection operate, as a rule, so effectively as where life and liberty are at stake. People *v.* Webster, 139 N. Y. 73, 34 N. E. 730.

93. Woman Living With Defendant. — Witness having given important testimony tending to exonerate the defendant in an assault case, it is competent to ask her on cross-examination if she is not separated from her husband, and if the defendant is not living in the house with her, in order to show her bias and motives. Crist *v.* State, 21 Tex. App. 361, 17 S. W. 260.

side [94] as tending to show bias or motive by which influenced.[95]

6. Relationship to Party. — Relationship of witness to party may be shown as tending to establish bias, and affect the credit and weight of his evidence;[96] but a witness who swears positively

94. Wife of Defendant Living With Another Witness for State. In a trial for murder, where a woman has testified for the prosecution to the fact that the crime was committed by the defendant and her husband, who was also indicted therefor, she may be asked on cross-examination whether since her husband's arrest she has not been living with another witness for the prosecution, and they have not agreed to live together as husband and wife if the husband is convicted, for the purpose of showing material facts bearing upon the bias and motive, character and credibility of the witness. Tla-Koo-Yel-Lee *v.* U. S. 167 U. S. 274, 17 Sup. Ct. 855.

95. Proposal to Marry Wife of Accused. — It is competent on cross-examination to ask the principal witness for the prosecution whether he has not said to the wife of the defendant, that if he secured the conviction of her husband he would marry and take care of her. Taylor *v.* U. S., 89 Fed. 954, 32 C. C. A. 449.

Former Immoral Relations. — In State *v.* McGahey, 3 N. D. 293, 55 N. W. 753, a prosecution for shooting with intent to kill, the defendant produced as a witness the wife of the assaulted man. On cross-examination, over objection, she was interrogated at length as to her relations to, and criminal intercourse with, the defendant *Held* proper. The court say: "The State had the right to show the relations existing between the witness and the party at whose instance, and presumably in whose interest, she was testifying. It had the right to expose to the jury every motive and desire of the witness that might naturally and reasonably be supposed to produce that bias that would affect the character of her testimony." *Citing* State *v.* Bacon, 13 Or. 143, 9 Pac. 393, 57 Am. Rep. 8; Batdorff *v.* Farmers' Nat. Bank, 61 Pa. St. 179; Cameron *v.* Montgomery, 13 Serg. & R. (Pa.) 128.

96. *Alabama.* — Jernigan *v.* Flowers, 94 Ala. 508, 10 So. 437.

Arkansas. — Wallace *v.* State, 28 Ark. 531.

California. — People *v.* Wong Ah Foo, 69 Cal. 180, 10 Pac. 375.

Illinois. — Brown *v.* Walker, 32 Ill. App. 199.

Indiana. — Wabash R. Co. *v.* Ferris, 6 Ind. App. 30, 32 N. E. 112.

Iowa. — Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906.

Louisiana. — Rachal *v.* Rachal, 4 La. Ann. 500; Hamblin *v.* Hook, 6 La. (O. S.) 73; Bernard *v.* Vignaud, 10 Mart. (O. S.) 482.

North Carolina. — State *v.* Byers, 100 N. C. 512, 6 S. E. 420; Ferrall *v.* Broadway, 95 N. C. 551; State *v.* Ellington, 7 Ired. Law 61; State *v.* Hardee, 83 N. C. 619; Flynt *v.* Bodenhamer, 80 N. C. 205; State *v.* Nat, 6 Jones Law 114.

Law Regards With Suspicion, the testimony of near relatives giving evidence for each other. Wallace *v.* State, 28 Ark. 531.

Testimony of Such Witness to Be Weighed With Great Caution. U. S. *v.* Ford, 33 Fed. 861.

Near Relations Testifying on Behalf of the Accused, in a trial for homicide or other serious criminal charge, evidence of their relationship is admissible, and the jury may be instructed that they are to consider the manner in which they might be interested in the verdict, the very grave interest they must feel in it, and to consider whether their position and interest might not affect their credibility or color their testimony. People *v.* Bush, 71 Cal. 602, 12 Pac. 781.

"The law takes notice that some relations are so close, that persons standing in them, though they might tell the truth, cannot be trusted in general; and therefore it excludes them altogether. The rule does not, indeed, embrace parents and children, or brethren. Yet all writers upon evidence say, that, though it does not

should not be discredited merely because related to the party in whose behalf he testifies,[97] although this is a circumstance to be weighed in a doubtful case.[98]

7. Association and Business Relations. — The social and business relations[99] subsisting between a witness and the party calling him

make them incompetent, it goes to their credit, because we know that such relations create a strong bias, and that it is an infirmity of human nature sometimes, in instances of great peril to one of the parties, to yield to the bias produced by a depth of sympathy and identity of interest between persons so closely connected." State *v.* Ellington, 7 Ired. Law (N. C.) 61.

Mother's Credibility when testifying in behalf of a child's husband is subject matter for the consideration of the jury. Groves *v.* Steel, 2 La. Ann. 480, 46 Am. Dec. 551.

Testimony of a mother of the accused on trial for a capital offense is regarded with suspicion. State *v.* Nash, 8 Ired. Law (N. C.) 35.

97. **Relation by Consanguinity,** or any other domestic or social relation, to either of the parties to the action, does not necessarily affix a legal discredit to their testimony. It *may* but not *must*, go to their credibility. Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329.

98. *In re* Gangwere's Estate, 14 Pa. St. 417, 53 Am. Dec. 554.

99. **Business Relations** between a party and a person produced by him as a witness, is competent to be shown as affecting his bias and credibility. Totten *v.* Burhans, 103 Mich. 6, 61 N. W. 58.

Natural Bias of Servants or Employees is a matter properly shown. Central R. Co. *v.* Mitchell, 63 Ga. 173.

Testimony of Clerks and Servants of a common carrier in its behalf, must be received with great caution. Bond *v.* Frost, 8 La. Ann. 297.

"Goods delivered to a common carrier are no longer under the eye of the owner; he seldom follows or sends a servant with them to the place of destination. If they should be lost, or injured by the grossest negligence of the carrier or his servants, or stolen by them or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves." Riley *v.* Horne, 5 Bing. 217, 15 Eng. C. L. 423, 30 Rev. Rep. 576.

Relation of Witness as Employee is a matter of proof proper for the consideration of the jury in the light of the evidence, if it does not appear that the testimony of the witness has been influenced by such relation, it should be disregarded. What influence, if any, such relation may have had on the testimony of the witness is to be estimated by the jury in the light of all the evidence. Illinois Cent. R. Co. *v.* Haskins, 115 Ill. 300, 2 N. E. 654.

Fear of Being Discharged by his employer unless he should testify favorably to the latter in a given suit, may be shown on cross-examination or otherwise. St. Louis A. & T. H R. Co. *v.* Walker, 39 Ill. App. 388.

Blacklisting Employee should he state the facts regarding an accident may be shown, as may also the fact that he has so stated, may be shown as affecting his credibility. Pyne *v.* Broadway & Seventh Ave. R. Co., 46 N. Y. St. 662, 19 N. Y. Supp. 217. *Compare* Marquette H. & O. R. Co. *v.* Kirkwood, 45 Mich. 51. 7 N. W. 209, 40 Am. Rep. 453, holding that while there may appear on the trial, or on cross-examination, such bias or behavior on the part of the servants and employees testifying, as to warrant the counsel in commenting thereon in argument to the jury, it will not warrant the court in suggesting to or instructing the jury, that any suspicion attaches to the testimony by reason of their employment, or that they have any such interest as required them to be dealt with differently from other witnesses.

is always a subject of legitimate inquiry on cross-examination, in order to show his bias or motive and thus affect his credibility and the weight to be given to his testimony.[1]

8. Interest in Controversy. — Interest of witness in event of suit may be shown on cross-examination, for the purpose of affecting the credibility of the witness[2] and the weight to be given to his

Wages Received by Employee used as a witness against a party may be shown. Tenn. Coal, Iron & R. Co. *v.* Haley, 85 Fed. 534, 29 C. C. A. 328.

1. Where one of three persons charged with the same offense is on trial, it is competent, on cross-examination to ask a witness as to his friendly relations with the other two, and whether he has not lent money to another person, the father of one of these two and the grandfather of the other, to aid in the defense of the person who is on trial. Brockett *v.* State, 90 Ga. 452, 16 S. E. 102.

On cross-examination it is competent to ask a witness produced by the defendant if he did not leave home to enable defendant to procure a continuance; this fact, if shown, being pertinent to show the interest of the witness in the accused's cause. Gage *v.* State, 127 Ind. 15, 26 N. E. 667.

On cross-examination of witness produced by a defendant being tried on a charge of highway robbery, he may be asked whether he has been arrested for a robbery committed in connection with the defendant for the purpose of showing their relations, and his interest in the suit. State *v.* Bacon, 13 Or. 143, 9 Pac. 393, 57 Am. Rep. 8.

The fact that a physician is called in to examine an injured person not for the purpose of giving medical aid, but for the purpose of giving medical testimony in a suit to be brought, does not, for that reason alone, make him an incompetent witness, but the fact may be considered by the jury as affecting the credibility of the witness, and the weight the jury should give to his testimony. Jones *v.* Village of Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437.

2. Suit Against Witness for Same Cause by Plaintiff may be shown on cross-examination, and also whether that suit has been fully determined. "Its tendency is, if slight, to show the interest of the witness against the defendant." Bessemer Land & Imp. Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26.

Competent to show, on cross-examination, the bias of a witness, by showing that he was sued by the plaintiff for a portion of the property subject to the same mortgage which was held by the plaintiff on the property in controversy, and also that the defense to each suit was the same. Drum *v.* Harrison, 83 Ala. 384, 3 So. 715.

Wife of Plaintiff Interested Witness. — Where a decision adverse to the plaintiff would tend to convict her of fraud against defendant, her testimony is subject to discredit, although she may not have been contradicted, and though her veracity may not have been impeached. Coyle *v.* Metropolitan Life Ins. Co., 54 N. Y. St. 792, 25 N. Y. Supp. 90.

In Case of Injury. — *Interest in Cause. — Employees of Corporation.* In a trial of a cause to recover damages resulting from collision with train, the engineer and fireman of the train complained of, have such an interest in the outcome of the cause, because of the question of their own responsibility which is involved, as will weigh against their credibility, and is a matter to be considered by the jury in arriving at their verdict. Ellis *v.* Lake Shore & M. S. R. Co., 138 Pa. St. 506, 21 Atl. 140, 21 Am. St. Rep. 914.

In the case of Chicago, B. & Q. R. Co *v.* Triplett, 38 Ill. 483, the court say in such a case the credit of witness other than the employees are entitled to greater weight than that of the employees of the defendant, "for the obvious reason that so far as appears, they are free from all bias, while a very heavy moral responsi-

testimony,[3] but this interest of the witness in the subject-matter of the controversy, can be shown only in the mode in which other controverted facts are proved.[4]

9. Corrupt Motive. — The motive or bias of a witness is always a legitimate subject of inquiry on cross-examination, and interrogatories may be propounded tending to show a corrupt motive, as affecting the credibility of the witness and the weight to be given to his testimony.[5]

10. Volunteer Witnesses. — The voluntary appearance by a witness without a subpœna, is not, in and of itself, sufficient to discredit him; but the opposite party has a right to cross-examine him

bility attached to the adverse witnesses (the engine-driver and fireman of the train) from the burden of which they have the strongest inducement to relieve themselves if possible, by their own testimony."

3. *United States.* — Taylor *v.* U. S., 89 Fed. 954.

Alabama. — Bessemer Land & Imp. Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26; Jernigan *v.* Flowers, 94 Ala. 508, 10 So. 437.

Massachusetts. — Turner *v.* Austin, 16 Mass. 181

New York. — Newton *v.* Harris, 6 N. Y. 345; Garfield *v.* Kirk, 65 Barb. 464, People *v.* Cunningham, 1 Denio 524, 43 Am. Dec. 709.

Wisconsin. — Suit *v.* Bonnell, 33 Wis. 180; Cornell *v.* Barnes, 26 Wis. 473; Phœnix Ins. Co. *v.* Sholes, 20 Wis. 38.

Affray at Town Meeting. — *Witness Participant.* — On cross examination of a witness produced by a person charged with assault and battery, committed during an affray at a town meeting, he may be asked whether he had not been indicted for an assault committed on that day, the fair inference being that the witness was one of the participants in the affray, and the question is competent to show the position he occupied in respect to the controversy out of which the affray arose; and his interest in the litigation and as showing prejudice and bias. Ryan *v.* People, 79 N. Y. 593.

Reward for Conviction. — Proper to prove by any competent evidence that the prosecuting witness is to receive a large reward if the defendant is convicted. Taylor *v.* U. S., 89 Fed. 954, 32 C. C. A. 449.

4. Declaration Not Under Oath made by the witness, not in the presence of the party against whom offered, with respect to his interest in the subject-matter of the suit, cannot be given in evidence. Ingram *v.* Watkins, 1 Dev. & B. Law (N. C.) 442.

5. State *v.* Miller, 9 Hous. (Del.) 564, 32 Atl. 137.

Corrupt Motive. — In the case of Miles *v.* Sackett, 30 Hun (N. Y.) 68, during the progress of the trial, a witness was produced on the part of the plaintiff, whose testimony very directly tended to establish the defendant's liability upon the note sued on, and upon her cross-examination she was asked whether it was not after a request by the executors to pay the sum they alleged she owed the estate, that she first gave the information in relation to the facts to which she testified on the trial. *Held* to be error to refuse to allow the question to be put.

Corrupt Arrangement With Prosecuting Officer. — In the case of State *v.* Krum, 32 Kan. 372, 4 Pac. 621, it was held that on cross-examination of a witness interrogatories tending to show a corrupt arrangement with the prosecuting officer are admissible. It may also be proved by independent evidence. Thus, where one Ritchie was arrested on the complaint of the defendant, for assault with intent to kill, it is competent for the defendant to show that Ritchie had agreed with the prosecuting attorney to furnish evidence sufficient to convict the defendant of the charge set forth in the information, upon the condition that Ritchie be permitted

regarding such appearance and the reasons and motives inducing it, and the jury may take this fact into consideration in connection with a consideration of any interest the witness may appear to have, or any bias or prejudice, or any unfairness manifested by him.[6]

to plead guilty, upon the complaint filed against him by the defendant, to an assault and battery, and be fined five dollars only.

6. State *v.* Keys, 53 Kan. 674, 37 Pac. 167.

Volunteer Witness. — "The fact that a witness attends a trial as a volunteer may, under some circumstances betray an interest in or feeling for, or against, one of the parties, which the jury would have the right to consider." Wabash R. Co. *v.* Ferris, 6 Ind. App. 30, 32 N. E. 112.

BIBLE.—See Age; Declarations; Pedigree.

BIGAMY.

I. GENERALLY.

Bigamy is a statutory crime. Cases where the former marriage has been declared void, or has been annulled, and where the first husband or wife has been absent and not known to be living, for a certain number of years, are almost universally excepted by statutes.

II. BURDEN OF PROOF.

The burden of proof is on the prosecution to show a first marriage of the defendant valid by the laws of the place where it was contracted,[1] and that at the time of the second marriage the lawful wife was still in being.[2] Where the defendant relies upon statutory exceptions, the burden of proof is upon him to establish them [3] as it also is to rebut presumptions raised by the evidence for the prosecution.[4]

1. Proof of First Marriage. — The first marriage must be clearly established by competent evidence. This may be done by record;[5]

1. Arnold *v.* State, 53 Ga. 574; Squire *v.* State, 46 Ind. 459.
2. Parker *v.* State, 77 Ala. 47, 54 Am. Rep. 43.
3. Com. *v.* Boyer, 7 Allen (Mass.) 306.
4. Parker *v.* State, 77 Ala. 47, 54 Am. Rep. 43.
5. Johnson *v.* State, 60 Ark. 308, 30 S. W. 31; State *v.* Dooris, 40 Conn. 145; State *v.* Matlock, 70 Iowa 229, 30 N. W. 495; State *v.* White, 19 Kan. 445, 27 Am. Rep. 137; Rice *v.* State, 7 Humph. (Tenn.) 14; State *v.* Edminston, 160 Mo. 500, 61 S. W. 193.

Copy of Marriage Certificate Sufficient. — State *v.* Clark, 54 N. H. 456; Tucker *v.* People, 117 Ill. 88, 7 N. E. 51.

Where First Marriage is Foreign How Proved. — A paper purporting to be a marriage certificate of marriage in another State, signed by a person there as justice of the peace, is not alone competent evidence of the marriage. It should be excluded in a trial for bigamy. There must be evidence that such person was justice of the peace and under the laws of that State such an officer had authority to solemnize marriage, and the signature of the certificate is genuine. State *v.* Horn,

by the testimony of witnesses who were present at the marriage and saw the ceremony performed;[6] by the admissions of defendant;[7] or by proof of cohabitation, and that the defendant held the other party out to the world as his spouse.[8]

2. Weight and Sufficiency. — Admissions, proof of cohabitation, and general reputation are always admissible evidence to prove the fact of marriage, but there has been a variance as to the weight and sufficiency of such evidence, one line of decisions holding that the fact of the previous marriage may be conclusively shown by clear proof of either.[9] The other line that two or more of such evidences must concur.[10]

43 Vt. 21; Faustre *v.* Com. 92 Ky. 34, 17 S. W. 189.

Clerical Character of the Minister or the authority of the officer may be shown by parol. Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318.

6. State *v.* Nadal, 69 Iowa 478, 29 N. W. 451; State *v.* Hughes, 58 Iowa 165, 11 N. W. 706; State *v.* Hodgskins, 19 Me. 155, 36 Am. Dec. 742; Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; People *v.* Perriman, 72 Mich. 184, 40 N. W. 425; People *v.* Whigham, 1 Wheel. Crim. (N. Y.) 115; Bashaw *v.* State, 1 Yerg. (Tenn.) 177.

Testimony of the Officiating Justice of the Peace is sufficient. State *v.* Clark, 54 N. H. 456.

Witnesses Who Were Present and Saw the Respective Marriages were introduced and no other evidence produced as to such marriages. *Held* that other evidence was not necessary. State *v.* Williams, 20 Iowa 98.

7. Williams *v.* State, 54 Ala. 131, 25 Am. Rep. 665; State *v.* Armington, 25 Minn. 29; Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; Squire *v.* State, 40 Ind. 459; State *v.* Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195; Parker *v.* State, 77 Ala. 47, 54 Am. Rep. 43; Miles *v.* U. S. 103 U. S. 304; State *v.* Seals 16 Ind. 352; Reg. *v.* Simonston, 1 Car. & K. 164; Libby *v.* State, 44 Me. 469, 69 Am. Dec. 115; State *v.* Plym, 43 Minn. 385, 45 N. W. 848; State *v.* Wylde, 110 N. C. 500, 15 S. E. 5.

In Wolverton *v.* State, 16 Ohio 173, 47 Am. Dec. 373, the prosecutor offered the admissions of the defendant of the former marriage. The court admitted this evidence over defendant's objection, and the bill of exceptions was based entirely upon this alleged error. The ruling of the court was sustained.

8. Com. *v.* Jackson, 11 Bush (Ky.) 679, 21 Am. Rep. 225.

Circumstantial Evidence sufficient to establish former marriage. Crane *v.* State, 94 Tenn. 98, 28 S. W. 317.

Form of Marriage. — A marriage to be sufficient upon which to base a charge of bigamy need not be a regularly solemnized and an authenticated one. But it is sufficient if there is proof of consent followed by a mutual assumption of marital rights, duties and obligations. People *v.* Beevers, 99 Cal. 286.

Marriage May Be Proved by Parol, and if *prima facie* regular it will be presumed that the technical conditions existed. Com. *v.* Holt, 121 Mass. 61.

Identification. — The first wife may be identified by photograph shown to a witness present at the former marriage. Com. *v.* Lucas, 158 Mass. 81, 32 N. E. 1033.

9. Com. *v.* Murtagh, 1 Ashm. (Pa.) 272; Warner *v.* Com. 2 Va. Cas. 95; Cayford's Case, 7 Me. 57. See also cases cited *ante* note 7.

10. State *v.* Nadal, 69 Iowa 479, 29 N. W. 451; State *v.* Seals, 16 Ind. 352; Reg. *v.* Ray, 20 Ont. 212; State *v.* Johnson, 12 Minn. 476, 93 Am. Dec. 241; State *v.* Cooper, 103 Mo. 266, 15 S. W. 327; People *v.* Edwards, 25 N. Y. Supp. 480; State *v.* Whaley, 10 S. C. 500; State *v.* Wil-

3. Validity of First Marriage. — In the absence of evidence to the contrary, the presumption is in favor of the validity of the first marriage.[11] Of course the presumption of the validity of a marriage under the *lex loci contractus,* is destroyed by proof that the marriage was not valid by those laws.[12]

A. Continuance of Life of First Wife.—That the first wife is still living may be proved by circumstantial evidence. It has been held that from proof of the fact that the former wife was still living at a certain date prior to the bigamous marriage, that it is to be presumed that she was alive at the date of such marriage.[13] This presumption is one of fact for the jury to consider in connection with other facts as to the age, health, and occupation, etc., of the party and the time intervening.[14] But it has been held that while such presumption exists, it may be neutralized by another presumption. Thus, in the prosecution for bigamy, the law presumes the innocence of the defendant and this presumption of innocence is contrary to the presumption with reference to a fact, once shown to exist, continuing; and the one presumption offsets the other.[15]

son, 22 Iowa 364; People *v.* Imes, 110 Mich. 250, 68 N. W. 157.

In Dumas *v.* State, 14 Tex. App. 464, 46 Am. Rep. 241, after marshaling the authorities the court says: "It appears to us to be well settled from these authorities that general reputation, cohabitation and admissions or confessions of the party are all admissible evidence of the fact of the first marriage. General reputation alone is insufficient, but taken in connection with cohabitation, and admissions, is competent evidence to establish a *prima facie* case sufficient to sustain a verdict and conviction for bigamy."

Proof of Cohabitation and Repute Not Sufficient to establish prior marriage, but this evidence coupled with admissions of the defendant is. State *v.* Gonce, 79 Mo. 600; State *v.* Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195; Williams *v.* State, 44 Ala. 24; Hayes *v.* People, 25 N. Y. 390, 82 Am. Dec. 364.

Proof of Marriage by Admissions and Conduct is sufficient where there is no statute to the contrary. Langtry *v.* State, 30 Ala. 536; Williams *v.* State, 54 Ala. 131, 25 Am. Rep. 665.

11. State *v.* Nadal, 69 Iowa 478, 29 N. W. 451; Com. *v.* Kenny, 120 Mass. 387; Gibson *v.* State, 38 Miss. 313; State *v.* Davis, 109 N. C. 780, 14 S. E. 55, 14 L. R. A. 206.

12. Canale *v.* People, 177 Ill. 219, 52 N. E. 310.

13. Parker *v.* State, 77 Ala. 47, 54 Am. Rep. 43.

14. State *v.* Plym, 43 Minn. 385, 45 N. W. 848.

15. One Presumption Neutralizes Another. — In People *v.* Feilen, 58 Cal. 218, 41 Am. Rep. 258, the court says: "In a prosecution for bigamy, the law presumes the innocence of the defendant until the contrary is shown. The law also presumes the existence of a person once established by proof to continue until the contrary is shown, or a different presumption arises. Which should obtain, and be adjudged superior? The rule as declared by Mr. Bishop, is that they should be held to neutralize each other; and the issue as to the continuance of life from the proof of prior evidence should be left to the jury as a naked matter of fact divested of any presumption of law." And the court adopted the rule as declared by Bishop.

Wife Living Two Years Before Second Marriage. — Where there is no direct evidence as to the life of the first wife except that she was living two years before the second

4. Proof of Second Marriage. — Admissions, declarations, conduct and reputation are admissible in proof of the second marriage, precisely as they were in proof of the first marriage.[16] It is sufficient to prove the fact of the second marriage without proof of cohabitation.[17] Testimony of the the second wife is admissible to the fact of the second marriage after the first has been established, or if it be not disputed.[18]

III. DEFENSES.

Proof that defendant contracted the bigamous marriage is sufficient without further proof of intent,[19] and in an early case it was held that an honest belief that the first wife or husband is dead, is no defense if such belief is erroneous.[20] But this rule is not well-settled and in some states a contrary doctrine prevails.[21] That de-

marriage, the presumption of continuance of life is neutralized by the presumption of innocence, and in that case there can be no conviction. Squire *v.* State, 46 Ind. 459.

16. U. S. *v.* Christopherson, (Ariz.) 11 Pac. 480; State *v.* Nadal, 69 Iowa 478, 29 N. W. 451.

It is not error to admit in evidence the marriage license and the return of the clergyman who performed the ceremony of the second marriage. Squire *v.* State, 46 Ind. 459.

17. State *v.* Lucas, 158 Mass. 81, 32 N. E. 1033; Bush *v.* State, 37 Ark. 215; Cox *v.* State, 117 Ala. 103, 23 So. 806, 67 Am. St. Rep. 166, 41 L. R. A. 760; Gise *v.* Com. 81 Pa. St. 428. Under the United States' Statute of March 22, 1882, held sufficient to prove cohabitation without sexual intercourse and evidence of actual sexual intercourse held to be incompetent, irrelevant and immaterial. Cannon *v.* U. S. 116 U. S. 55.

18. State *v.* Tucker, 20 Iowa 508; State *v.* Briggs, 68 Iowa 416, 27 N. W. 358; Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; U. S. *v.* Cutler, 5 Utah 608, 19 Pac. 145.

After the first marriage has been established, or when it is admitted, the second wife is a competent witness. Miles *v.* U. S., 103 U. S. 304.

Testimony of Lawful Wife. — Under a statute authorizing a wife to testify against the husband for personal wrongs done to her, the wife cannot testify against the husband for bigamy. People *v.* Quanstrom, 93 Mich. 254, 53 N. W. 165, 17 L. R. A. 723; Hiller *v.* People, 156 Ill. 511, 41 N. E. 181; State *v.* Hughes, 58 Iowa 165, 11 N. W. 706.

19. Record of Divorce, which the court had already decided to be annulled could not be introduced to disprove criminal intent, as defendant's mistake, if any, was one of law and was no defense. Also evidence that the defendant had legal advice that he could marry again ruled out for the same reason. State *v.* Armington, 25 Minn. 29.

Defendant's Belief as to Annulment. — It is no defense that the defendant believed that an agreement between the husband and wife to live separate, annulled the first marriage. State *v.* Zichfield, 23 Nev. 304, 46 Pac. 802, 62 Am. St. Rep. 800, 34 L. R. A. 784.

Divorce Obtained by Fraud by going into another state is no defense to a prosecution for bigamy. Thompson *v.* State, 21 Ala. 48; Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

20. Com. *v.* Mash, 7 Metc, (Mass.) 472.

21. Belief That First Wife Was Dead. — In Dotson *v.* State, 62 Ala. 141, 34 Am. Rep. 2, the court held that no other intent is necessary to support a conviction for bigamy than that which must be inferred from the second marriage knowing the first wife to be living and not having a reasonable belief of her

fendant secured reputable and legal advice and acted on it, is no defense.[22] But though one prosecuted for bigamy has contracted more than one bigamous marriage and two persons are recognized as defendant's spouse, yet, if the first and only lawful husband or wife was dead or legally divorced before the third marriage, there can be no conviction for that marriage because the second was null and void.[23]

death, and a belief of her death must be honest and not feigned, and whether honest or feigned and whether or not there was fault or negligence in not acquiring proper knowledge, are matters for the determination of the jury.

Honest Belief Based on Information. — We think the court should have charged the jury that if they believed from the evidence that the defendant had been informed that his wife had been divorced and that he had used due care and made inquiry to ascertain the truth, and had, considering the circumstances, reason to believe, and did believe at the time of his second marriage that his former wife had been divorced from him, they should have found him not guilty. Squire *v.* State, 46 Ind. 459.

22. State *v.* Armington, 25 Minn. 29; State *v.* Hughes, 58 Iowa 165, 11 N. W. 706.

23. A woman married a second husband while the first was living. The first husband died. She married the third time and while the second was living and was indicted for the third marriage. *Held* that proof that the first husband was dead at the time of the third marriage was a good defense. Lady Madison's Case, 1 Hale P. C. 693.

A husband was divorced from his first wife after marriage with the second. He then married again and was indicted for the third marriage. *Held* that the divorce from the first wife was a good defense. Holbrook *v.* State, 34 Ark. 511, 36 Am. Rep. 17.

BILL DE BENE ESSE.—See Depositions.

BILL OF DISCOVERY.—See Discovery; Depositions.

BILL OF LADING.—See Carriers.

BILLS OF PARTICULARS.

I. EVIDENCE UNDER.

1. Certainty. — Bills of particulars should be as certain and convey as much information as a special declaration,[1] and the proof must conform to them and the pleadings to which they are adjuncts.[2]

2. Written Instruments Declared on are admissible in evidence, notwithstanding the fact that they are not mentioned in the bill of particulars.[3]

3. Cannot Contradict. — A party will not be allowed to contradict his own bill of particulars in any material respect,[4] but where a bill of particulars is not warranted by law it may be contradicted

1. Babcock *v.* Thompson, 3 Pick. (Mass.) 446, 15 Am. Dec. 235.

2. Gilpin *v.* Howell, 5 Pa. St. 41, 45 Am. Dec. 720; Chicago, etc. R. Co. *v.* Provine, 61 Miss. 288; Scott *v.* Leary, 34 Md. 389; Com. *v.* Snelling, 15 Pick. (Mass.) 321.

Evidence is inadmissible unless there be a count in the declaration under which it is provable, although it be responsive to the bill of particulars furnished in the case. Riley *v.* Jarvis, 43 W. Va. 43, 26 S. E. 366.

Part of the Plea. — When a bill is furnished it is deemed a part of the declaration, plea, or notice to which it relates, and is construed in the same way as though it had been originally incorporated in it. Starkweather *v.* Kittle, 17 Wend. (N. Y.) 20.

3. Davis *v.* Freeman, 10 Mich. 188; People *v.* Waring, 4 Wend. (N. Y.) 200; Dudley *v.* Duval, 29 Wash. 528; 70 Pac. 68.

Not Control Specific Allegations of Complaint. — In an action against two persons as co-partners it was objected that evidence tending to show the joint liability of one of them was inadmissible, for the reason that the other only was named as debtor in the bill of particulars. The court, rejecting the contention, and speaking of the purpose of a bill of particulars said: "Its object is to inform the adverse party of the nature of the claim and to limit the proof to the items specified and the amount therein claimed. It is not intended to control the specific allegations of the complaint as to the parties and the like." Vannoy *v.* Klein, 122 Ind. 416, 23 N. E. 526.

4. In Hanson *v.* Smith, 94 Fed. 960, 36 C. C.A. 581, the plaintiff had pleaded a loss and specified it is a loss of a sale to Pennington. Plaintiff failed to prove a contract of sale with Pennington. He then offered proof of a verbal contract to sell to Schlessinger. If he had such contract he knew it at the time when his complaint was filed and the issue

by the party serving the same.[5] An immaterial variance, however, between the evidence and the allegations of the bill will not be considered if it is not calculated to mislead the opposing party.[6]

II. BILLS OF PARTICULARS AS EVIDENCE.

1. As Admissions. — A bill of particulars becomes evidence as an admission against the party delivering it on the trial of the issue to which it relates, and as such is proper for the consideration of the jury,[7] but it cannot be used in evidence against the party furnishing it in any case, or for any purpose, where the pleading, or notice, to which the bill relates, would not be evidence.[8]

2. To Show Matters Litigated. — Where the issue is as to what matters were or were not litigated in a former action, the facts set forth in a bill of particulars are competent evidence on that issue,[9] and where the judgment is admissible in evidence, the bill of particulars accompanying the declaration is competent evidence for the purpose of showing the subject matter and scope of the action.[10]

formed, and it was his duty then to disclose his intention to rely upon it. The court properly excluded evidence of contract to sell to Schlessinger.

5. Doss *v.* Peterson, 82 Ala. 253, 2 So. 644.

6. Furry *v.* O'Connor, 1 Ind. App. 573, 28 N. E. 103; Com. *v.* Davis, 11 Pick. (Mass.) 432; Wright *v.* Dickinson, 67 Mich. 580, 35 N. W. 164; Grady *v.* Sullivan, 112 Mich. 458, 70 N. W. 1040; Duncan *v.* Ray, 19 Wend. (N. Y.) 528; McNair *v.* Gilbert, 3 Wend. (N. Y.) 344.

Where a bill of particulars stated the demand to be for moneys received by the defendant for the use of the plaintiff's testator, specifying the amount at $605.63, and setting forth the foundation of the claim, proof that tthe defendant received $644.45 on the same account was held to be no variance. Smith *v.* Hicks, 5 Wend. (N. Y.) 48.

In Ames *v.* Quimby, 106 U. S. 342, the court held that while plaintiff could not recover for any more goods than his bill of particulars set forth, he was not bound by a mistake in carrying out the rate or price, but could show what he was actually to have.

7. Kenyon *v.* Wakes, 2 Mees. & W. 764; Hart *v.* Middleton, 2 Car. & K. 9. It would seem to be unreasonable that, while a statement casually made by a party is admissible as evidence against him, a statement deliberately made in response to a demand for the exact truth should be deemed incapable of probative force. Lee *v.* Heath, (N. J.) 39 Atl. 729.

8. Starkweather *v.* Kittle, 17 Wend. (N. Y.) 20.

9. In Scott *v.* Haines, 51 N. Y. St. 489, 22 N. Y. Supp. 711, the court says: "The issue of *res adjudicata* must be tried and determined by evidence *pro* and *con*. The former action was for work and material under special contract. The present action is for extra work which the plaintiffs were not bound to include in their action. The bill of particulars served states that the extra work was not involved in such former suit. The bill of particulars must be regarded as an amplification of the complaint and it is to be read in connection with it. So construed, it was quite consistent with the record to prove that the item of extra work was not included in the other action."

10. Marsh *v.* Pier, 4 Rawle (Pa.) 273, 26 Am. Dec. 131.

BILL OF SALE.—See Sale.

BILLS AND NOTES.

By H. L. Gear.

CROSS-REFERENCES.

Bonds;
Stamp Acts.

I. CONTENTS.

1. Date. — A. Time of Date. — *a. Presumptive Evidence.* — The date of a negotiable instrument is *prima facie* evidence of the time when the instrument was executed, in the absence of evidence to the contrary,[1] and the express date of the assignment or transfer of a note is *prima facie* evidence of the time when it was made.[2] If there

1. *United States.* — Riggs *v.* Swan, 3 Cranch C. C. 183, 18 Fed. Cas. No. 11,831.

Alabama. — Elyton Co. *v.* Hood, 121 Ala. 373, 25 So. 745.

California. — Collins *v.* Driscoll, 69 Cal. 550, 11 Pac. 244.

Illinois. — Knisely *v.* Sampson, 100 Ill. 573; Baldwin *v.* Freydendall, 10 Ill. App. 106.

Maine. — Emery *v.* Vinall, 26 Me. 295.

Maryland. — Williams *v.* Wood, 16 Md. 220.

New York. — Cowing *v.* Altman, 71 N. Y. 435.

Pennsylvania. — Claridge *v.* Klett, 15 Pa. St. 255.

Vermont. — Woodford *v.* Dorwin, 3 Vt. 82.

Blank Date. — Where the date is left blank, the payee or holder has an implied or presumed authority to fill it with the true date of its execution. Overton *v.* Matthews, 35 Ark. 146, 37 Am. Rep. 9.

Contra. — Inglish *v.* Brenemen, 9 Ark. 122, 47 Am. Dec. 735.

United States. — Goodman *v.* Simonds, 20 How. 343; Michigan Ins. Bank *v.* Eldred, 9 Wall. 544.

Illinois. — Gill *v.* Hopkins, 19 Ill. App. 74, but not to ante-date it or put therein any other than the true date.

Indiana. — Spitler *v.* James, 32 Ind. 202, 2 Am. Rep. 334; Emmons *v.* Meeker, 55 Ind. 321; Emmons *v.* Carpenter, 55 Ind. 329.

Kentucky. — Miles *v.* Major, 2 J. J. Marsh. 153.

Massachusetts. — Androscoggin Bank *v.* Kimball, 10 Cush. 373.

Missouri. — Goodman *v.* Simonds, 19 Mo. 106, unless the paper is accommodation paper delivered in blank by an accommodation maker or indorser, in which case the holder is deemed authorized to fill up the date as he sees fit, and may ante-date the same.

New York. — Mitchell *v.* Culver, 7 Cow. 336; Mechanics & Farmers Bank *v.* Schuyler, 7 Cow. 338; Page *v.* Morrell, 3 Keyes 117.

Where a note is indorsed, the date having been left blank, the presumption is that the indorsee is authorized to supply it; but the fact that the maker filled in the blank date will not discharge the indorser. Hepler *v.* Mt. Carmell Sav. Bank, 97 Pa. St. 420, 39 Am. Rep. 813.

2. Byrd *v.* Tucker, 3 Ark. 451;

is no date to the assignment or transfer, it is presumed to have been made at the date of the note,[3] or near that date, and before the date of maturity of the note.[4] An indorsement of a note by a third party

Bradley *v.* Whicker, 23 Ind. App. 380, 55 N. E. 490; Gage *v.* Averill, 57 Mo. App. 111; Meadows *v.* Cozart, 76 N. C. 450.

3. Beesley *v.* Spencer, 25 Ill. 199; Smith *v.* Nevlin, 89 Ill. 193; Hayward *v.* Munger, 14 Iowa 516; Burnham *v.* Webster, 19 Me. 232; Balch *v.* Onion, 4 Cush. (Mass.) 559; Noxon *v.* De Wolf, 10 Gray (Mass.) 343; Linn *v.* Willis, 1 Posey Unrep. Cas. (Tex.) 158.

Note Discounted in Bank.— Where a note payable to a firm, made by one of its members was indorsed by the firm name and sued upon by a bank, and testimony was introduced on behalf of the bank to show that the indorsement of the firm name on the back of the note was made before the same was negotiated to them as security for the discounts to the maker; it was held that such evidence was unnecessary, as the presumption of law, in the absence of opposing testimony, is that such an indorsement, if without date, was made at the time the note was executed, and before the same was negotiated by the holder. Michigan Bank *v.* Eldred, 9 Wall. (U. S.) 544.

4. *United States.* — Bank of British North America *v.* Ellis, 6 Sawy. 96, 2 Fed. Cas. No. 859; City of Lexington *v.* Butler, 14 Wall. 282; Chambers Co. *v.* Clews, 21 Wall. 317; New Orleans Etc. Co. *v.* Montgomery, 95 U. S. 16; San Antonio *v.* Mehappy, 96 U. S. 312; Pana *v.* Bowler, 107 U. S. 529.

Florida. — White *v.* Camp, 1 Fla. 109.

Georgia. — Georgia Nat. Bank *v.* Henderson, 46 Ga. 487, 12 Am. Rep. 590; Hogan *v.* Moore, 48 Ga. 156; Hatcher *v.* Nat. Bank, 79 Ga. 538, 5 S. E. 127.

Illinois. — Richards *v.* Betzer, 53 Ill. 466; Cisne *v.* Chidester, 85 Ill. 523; McCaffney *v.* Dustin, 43 Ill. App. 34; Bussey *v.* Hemp, 48 Ill. App. 195.

Iowa. — Patterson *v.* Hartsock, 1 Greene 252; Wilkinson *v.* Sargent, 9 Iowa 521; Fletcher *v.* Anderson, 11 Iowa 228.

Kansas. — Rahm *v.* King Wrought Iron Manufactory, 16 Kan. 530; Challiss *v.* Woodburn, 2 Kan. App. 652, 43 Pac. 792.

Kentucky. — Alexander *v.* Springfield Bank, 2 Met. 534.

Maine. — Hutchinson *v.* Moody, 18 Me. 393; Huston *v.* Young, 33 Me. 85; Walker *v.* Davis, 33 Me. 516; Webster *v.* Calden, 56 Me. 204.

Maryland. — Hopkins *v.* Kent, 17 Md. 113; McDowell *v.* Goldsmith, 6 Md. 319, 59 Am. Dec. 305.

Massachusetts. — Balch *v.* Onion, 4 Cush. 559.

Michigan. — Manistee Nat. Bank *v.* Seymour, 64 Mich. 59, 31 N. W. 140.

New Hampshire. — Burnham *v.* Wood, 8 N. H. 334.

New York. — Andrews *v.* Chadbourne, 19 Barb. 147.

Oregon. — Owens *v.* Snell, Heitshu & Woodard Co., 29 Or. 483, 44 Pac. 827.

Texas. — Smith *v.* Clopton, 4 Tex. 109; Rhode *v.* Alley, 27 Tex. 443; Smith *v.* Turney, 32 Tex. 143.

Vermont. — Washburn *v.* Ramsdell, 17 Vt. 299; Leland *v.* Farnham, 25 Vt. 553.

West Virginia. — Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

Wisconsin. — Mason *v.* Noonan, 7 Wis. 609; Gutwillig *v.* Stumes, 47 Wis. 428, 2 N. W. 771.

Prima Facie Presumption. — The presumption that an indorsement without date was made before the date of maturity is only *prima facie*, and may be rebutted by proof to the contrary. Pettis *v.* Westlake, 4 Ill. 535.

Burden of Proof. — The burden of proof is upon the defendant to overcome such *prima facie* presumption. Mobely *v.* Ryan, 14 Ill. 51, 56 Am. Dec. 488.

Indorsement by Dissolving Partnership. — Indorsement by a partnership on a bill dated shortly before its dissolution, will be presumed to have been made prior to its dissolution.

without date, is presumed to have been made at the time of the date of the note.[5] The date of the note of a corporation is presumed to be the time when the corporate liability was contracted.[6]

b. *Parol Evidence.* — Parol evidence is admissible to show that a negotiable instrument was in fact executed on a day different from its date,[7] that the assignment of a note or bond bears an erroneous

Crosby *v.* Morton, 13 La. (O. S.) 357.

5. *Illinois.* — Webster *v.* Cobb, 17 Ill. 459; White *v.* Weaver, 41 Ill. 409; Parkhurst *v.* Vail, 73 Ill. 343; Grier *v.* Cable, 45 Ill. App. 405.

Indiana. — Ewing *v.* Sills, 1 Ind. 125; Bates *v.* Pricket, 5 Ind. 22, 61 Am. Dec. 73; Cecil *v.* Mix, 6 Ind. 478; Snyder *v.* Oatman, 16 Ind. 265.

Maine. — Colburn *v.* Averill, 30 Me. 310, 50 Am. Dec. 630; Childs *v.* Wyman, 44 Me. 433, 69 Am. Dec. 111.

Massachusetts. — Union Bank *v.* Willis, 8 Metc. 504, 41 Am. Dec. 541.

Missouri. — Powell *v.* Thomas, 7 Mo. 440, 38 Am. Dec. 465.

Pennsylvania.—Amsbaugh *v.* Gearhart, 11 Pa. St. 482.

Texas. — Cook *v.* Southwick, 9 Tex. 615, 60 Am. Dec. 181; Carr *v.* Rowland, 14 Tex. 275.

Contra. — Johnston *v.* McDonald, 41 S. C. 81, 19 S. E. 65.

Presumptions Not Weakened. Where the indorsement of the name of a third person on a note is undated, the presumption that it was made at the date of the note, will not be weakened by a provision of waiver of demand and notice. Bradford *v.* Prescott, 85 Me. 482, 27 Atl. 461.

Several Indorsers. — Where the maker of a note and several indorsers who signed without date are sued jointly by the payee, the legal presumption is that all the names were signed at the date of the note. Benthall *v.* Judkins, 13 Metc. (Mass.) 265.

Guaranty. — One who indorses a note without date, as an express guarantor, is presumed to have signed the guaranty at the date of the note. Higgins *v.* Watson, 1 Mich. 428.

Rebuttal of Presumption. — The presumption that a third person indorsed the note at its date, may be rebutted by parol evidence to the contrary. Way *v.* Buttersworth, 108 Mass. 509.

6. Lemars Shoe Co. *v.* Lemars Shoe Mfg. Co., 89 Ill. App. 245.

7. *Alabama.* — Miller *v.* Hampton, 37 Ala. 342; Burns *v.* Moore, 76 Ala. 339, 52 Am. Rep. 332.

California. — Paige *v.* Carter, 64 Cal. 489, 2 Pac. 260; Collins *v.* Driscoll, 69 Cal. 550, 11 Pac. 244.

Illinois. — Baldwin *v.* Freydendall, 10 Ill. App. 106.

Louisiana. — Belot *v.* Donnavan, 1 Rob. 257.

Maine. — Drake *v.* Rogers, 32 Me. 524.

Massachusetts. — Bayley *v.* Taber, 5 Mass. 286.

Minnesota. — Almich *v.* Downey, 45 Minn. 460, 48 N. W. 197.

Mississippi. — Dean *v.* De Lazardi, 24 Miss. 424.

New York. — Germania Bank *v.* Distler, 4 Hun 633; Cowing *v.* Altman, 71 N. Y. 435.

South Carolina. — Soloman *v.* Evans, 3 McCord 274.

Note Dated on Sunday. — In an action on a note dated on Sunday, it may be proved by parol evidence, if alleged, that the instrument was in fact executed and delivered on a week day, (Aldridge *v.* Branch Bank, 17 Ala. 45), or that a note to a bank so dated was a renewal note, and was dated back in a week day in which case it may be shown that the renewed note is in the handwriting of the bank's cashier, and that he was not in the employ of the bank until after the date of the note; but the "discount register" is not admissible to show that the ante-dating was in renewal of a note maturing on Sunday, in accordance with the custom of the bank to date back to the maturity of the first note. Hauerwas *v.* Goodloe, 101 Ala. 162, 13 So. 567.

Correcting Mistake in Year. — As affecting the rights of an indorsee as a holder before maturity, a note dated January 1st of a previous year, may be shown by parol evidence to have

date,[8] and that an undated indorsement upon a note existed at the time of its date.[9] Parol evidence is admissible to identify a note bearing a different date from that described in a security as being the note intended to be secured,[10] and to show that a note and security bearing different date were delivered together, and formed one transaction.[11]

B. Place of Date. — a. *Presumption.* — It is to be presumed that a note was made at the place where it is dated,[12] and that the parties contracted with reference to the law of that place,[13] and that the maker of the note resides at the place where the note is dated.[14]

b. *Relation of Evidence to Pleading.* — An averment that the place of execution of the note was in a county named, is sufficiently supported by evidence that the note was dated at a city therein.[15]

2. Time. — A. Ambiguous Time. — Where the note is ambiguous as to the time of payment,[16] parol evidence is admissible to show

been in fact executed on the succeeding January 1st. Jessup *v.* Dennison, 2 Disn. 150. The date of a note executed in 1882 was written 1888 by mistake, and being afterwards altered by mistake of defendant to 1878, the real date may be shown by parol evidence on behalf of the defendant. Barlow *v.* Buckingham, 68 Iowa 169, 26 N. W. 58.

Removal of Ambiguity. — Extrinsic evidence is admissible to show the date of a note which is so written that the judge cannot determine whether it should read June or January. Fenderson *v.* Owen, 54 Me. 372, 92 Am. Dec. 551. The date of an instrument recited in the declaration laid under a *videlicet* need not be strictly proved, and if another date appear, it is no variance. Lothrop *v.* Southworth, 5 Mich. 436.

8. Perrin *v.* Broadwell, 3 Dana (Ky.) 597; Pressly *v.* Hunter, 1 Spear (S. C.) 133.

9. Ordeman *v.* Lawson, 49 Md. 135; Blake *v.* Coleman, 22 Wis. 415, 99 Am. Dec. 53.

10. Kiser *v.* Carrollton Dry Goods Co., 96 Ga. 760, 22 S. E. 303, Sweetser *v.* Lowell, 33 Me. 446; Hoey *v.* Candage, 61 Me. 257; Clark *v.* Houghton, 12 Gray (Mass.) 38; Baxter *v.* McIntire, 13 Gray (Mass.) 168; Williams *v.* Moniteau Nat. Bank, 72 Mo. 292.

11. Brown *v.* Holyoke, 53 Me. 9. *Compare* Ohio Life Ins. & Trust Co. *v.* Winn, 4 Md. Ch. 253.

12. Rudulph *v.* Brewer, 96 Ala. 189, 11 So. 314; Parks *v.* Evans, 5 Houst. (Del.) 576; Bronte *v.* Leslie, 30 Ill. App. 288; Hall *v.* Harris, 16 Ind. 180; Hoppins *v.* Miller, 17 N. J. Law 185.

13. Bronte *v.* Leslie, 30 Ill. App. 288; Hall *v.* Harris, 16 Ind. 180; Lines *v.* Mack, 19 Ind. 223.

Presumption. — A note dated out of the state will be presumed to be governed by the common law, unless the contrary is made to appear. Wallace *v.* Agry, 4 Mason 336, 29 Fed. Cas. No. 17,096.

14. Herrick *v.* Baldwin, 17 Minn. 209, 10 Am. Rep. 161; Plahto *v.* Patchin, 26 Mo. 389.

15. Crowley *v.* Barry, 4 Gill (Md.) 194.

16. *Canada.* — Drapeau *v.* Pominville, Rap. Jud. Quebec (C. S.) 326.

United States. — Bell *v.* First Nat. Bank, 115 U. S. 373, 6 Sup. Ct. 105.

Alabama. — Wallace *v.* Hill, Minor 70; Preston *v.* Dunham, 52 Ala. 217.

Connecticut. — Protection Ins. Co. *v.* Bell, 31 Conn. 534.

Georgia. — Neal *v.* Reams, 88 Ga. 298, 14 S. E. 617.

Maine. — Hobart *v.* Dodge, 10 Me. 156; 25 Am. Dec. 214; Rice *v.* West, 11 Me. 323; Chadwick *v.* Portland, 46 Me. 44.

Massachusetts. — Newman *v.* Kettelle, 13 Pick. 418.

Michigan. — Washington Co. Bank *v.* Jerome, 8 Mich. 490.

the intention of the parties.[17]

B. Extension of Time. — *a. Original Agreement.* — Parol evidence is not admissible to show an original agreement co-temporaneous with a negotiable instrument modifying, enlarging or extending the time of payment expressed therein,[18] though it is admissible

Missouri. — Collins *v.* Trottes, 81 Mo. 275.

New Hampshire. — Shaw *v.* Shaw, 43 N. H. 170.

New York. — Henschel *v.* Mahler, 3 Hill 132.

North Carolina. — Davis *v.* Glenn, 72 N. C. 319.

17. McGhee *v.* Alexander, 104 Ala. 116, 16 So. 148; Des Moines County *v.* Hinkley, 62 Iowa 637, 17 N. W. 915; Union Bank *v.* Meeker, 4 La. Ann. 189, 50 Am. Dec. 559; Head *v.* Cleburne Bldg. & Loan Assn., (Tex. Civ. App.), 25 S. W. 810.

Parol Evidence to Explain Ambiguities. — Parol evidence is admissible to explain a note payable at a time, certain, containing the ambiguous expression "to be paid for when stated," Lockhard *v.* Avery, 8 Ala. 502; to show the intention of the parties where a bill or note is payable a blank time after date, Boykin *v.* Bank of Mobile, 72 Ala. 262. *Contra.* — Nichols *v.* Frothingham, 45 Me. 220, 71 Am. Dec. 539, to prove by bankers and merchants that a note payable "on the 6-9 January" indicated the apparent maturity by the figure "6," and the last day of grace by the figure "9," Kelsey *v.* Hibbs, 13 Ohio St. 340; to show that a note dated in December and made payable on a specified day in December "next" was intended to refer to Dec. instant, McCrary *v.* Caskey, 27 Ga. 54, to show that a note specifying no time of payments was intended to mature at the marriage of the payee, Horner *v.* Horner, 23 Atl. 441, 145 Pa. St. 258, to show the intention of the parties in a note dated May 3d, 1861, and payable April 1, 1866, Miller *v.* Clayton, 3 Thomp. & C. (N. Y.) 360; to explain a note dated March 4, and payable "on the 5th of March after date," Neal *v.* Reams, 14 S. E. 617, 88 Ga. 298, and to show that a sight draft attached to a bill of lading of goods purchased, was to be paid before the bill was delivered. Burditt *v.* Howe, 69 Vt. 563, 38 Atl. 240.

18. *Alabama.* — Litchfield *v.* Falconer, 2 Ala. 280; Nicholas *v.* Krebs, 11 Ala. 230; Doss *v.* Peterson, 82 Ala. 253, 2 So. 644.

Arkansas. — Joyner *v.* Turner, 19 Ark. 690; Borden *v.* Peay, 20 Ark. 293.

California. — Bullion & Exchange Bank *v.* Spooner, (Cal.), 36 Pac. 121; Citizens Bank of Los Angeles *v.* Jones, 121 Cal. 30, 53 Pac. 354.

Colorado. — Dorsey *v.* Armor, 10 Colo. App. 255, 50 Pac. 726.

Georgia. — James *v.* Benjamin, 72 Ga. 185.

Illinois. — Murchie *v.* Peck, 160 Ill. 175, 43 N. E. 356; Adams *v.* Chicago Trust & Sav. Bank, 54 Ill. App. 672; Moore *v.* Prussing, 62 Ill. App. 496.

Indiana. — Miller *v.* White, 7 Blackf. 491; Graves *v.* Clark, 6 Blackf. 183; Jewett *v.* Salisbury, 16 Ind. 370; Foglesong *v.* Wickard, 75 Ind. 258.

Iowa. — Stucksleger *v.* Smith, 27 Iowa 286.

Kansas. — Getto *v.* Binkert, 55 Kan. 617, 40 Pac. 925.

Kentucky. — Kincaid *v.* Higgins, 1 Bibb 396; Allen *v.* Thompson, 22 Ky. L. Rep. 164, 56 S. W. 823; Kennedy *v.* Gaddie, 17 Ky. L. Rep. 735, 32 S. W. 408.

Maine. — Eaton *v.* Emerson, 14 Me. 335; Houston *v.* Young, 33 Me. 85; Ockington *v.* Law, 66 Me. 551.

Massachusetts. — Newman *v.* Kettelle, 13 Pick. 418; Currier *v.* Hale, 8 Allen 47; Wooley *v.* Cobb, 165 Mass. 503, 43 N. E. 497; Hall *v.* First Nat. Bank, 173 Mass. 16, 53 N. E. 154, 44 L. R. A. 319.

Missouri. — Inge *v.* Hance, 29 Mo. 399; First Nat. Bank *v.* Hunt, 25 Mo. App. 170; Bond *v.* Worley, 26 Mo. 253; Blackburn *v.* Harrison, 39 Mo. 303.

Nebraska. — Van Etten *v.* Howell, 40 Neb. 850, 59 N. W. 389; Thomas

to identify a written contract referred to in a memorandum indorsed on the note, affecting the time of payment,[19] and to show that a memorandum extending the time of payment was written before delivery.[20]

b. *Subsequent Agreement.* — Parol evidence is admissible to establish a subsequent agreement extending the time of payment.[21]

v. Nebraska Moline Plow Co., 56 Neb. 383, 76 N. W. 876.

New Hampshire. — Crosby *v.* Wyatt, 10 N. H. 318.

New Jersey. — Stiles *v.* Vandewater, 48 N. J. Law 67, 4 Atl. 658; Manning *v.* Young, 28 N. J. Eq. 568.

New York. — Fuller *v.* Acker, 1 Hill 473; Martin *v.* Rapelye, 3 Edw. Ch. 229; Fleury *v.* Roget, 5 Sandf. 646; Thompson *v.* Ketchum, 8 Johns. 190, 5 Am. Dec. 332; Fitzhugh *v.* Runyon, 8 Johns. 375; Van Allen *v.* Allen, 1 Hilt. 524; Farmers', etc. Bank *v.* Whinfield, 24 Wend. 419; Bailey *v.* Lane, 21 How. Pr. 475; Canda *v.* Zeller, 21 N. Y. St. 164, 3 N. Y. Supp. 128; Skillen *v.* Richmond, 48 Barb. 428; Willse *v.* Whitaker, 22 Hun 242; Belter *v.* Ripp, 1 Abb. Dec. 78; Sheldon *v.* Heaton, 88 Hun 535, 34 N. Y. Supp. 856; Beaman *v.* Lyon, 27 Weekly Dig. 168; McLeod *v.* Hunter, 29 Misc. 558, 61 N. Y. Supp. 73; Block *v.* Stevens, 76 N. Y. Supp. 213.

North Carolina. — Geddy *v.* Stainback, 1 Dev. & B. Eq. 475; Terrell *v.* Walker, 66 N. C. 244.

Pennsylvania. — Hill *v.* Gaw, 4 Pa. St. 493; Davis *v.* Cammel, Add. 233; Cook *v.* Ambrose, Add. 323; Todd *v.* Braught, 6 Pa. Dist. R. 691; Philbins *v.* Davenger, 29 Leg. Int. 325; Dodge *v.* Chessman, 10 Pa. Sup. Ct. 604; Anspach *v.* Bast, 52 Pa. St. 356; Coughenour *v.* Suhre, 71 Pa. St. 462; Chester Co. Nat. Bank *v.* Jones, 10 W. N. C. 436; Wagner *v.* Wright, 10 W. N. C. 483; Clark *v.* Allen, 132 Pa. St. 40, 18 Atl. 1071.

South Carolina. — Diercks *v.* Roberts, 13 S. C. 338.

Tennessee. — Wood *v.* Goodrich, 9 Yerg. 266; Blakemore *v.* Wood, 3 Sneed 470; Ellis *v.* Hamilton, 4 Sneed 512.

Texas. — Rockmore *v.* Davenport, 14 Tex. 602, 65 Am. Dec. 132; Reid *v.* Allen, 18 Tex. 241.

Wisconsin. — Grace *v.* Lynch, 80 Wis. 166, 49 N. W. 751; Strachan *v.* Muxlom, 24 Wis. 21.

Rule as to Prolongation. — The date of payment of a promissory note cannot be prolonged by parol proof of an original agreement except where the instrument, either by fraud, accident, or mistake, does not contain the true stipulation of the contract. Campbell *v.* Upshaw, 7 Humph. (Tenn.) 185, 46 Am. Dec. 75; Wallace *v.* Richards, 16 Utah 52, 50 Pac. 804.

19. Wilson *v.* Tucker, 10 R. I. 578.

20. Heywood *v.* Perrin, 10 Pick. (Mass.) 228, 20 Am. Dec. 518; Blake *v.* Coleman, 22 Wis. 415, 99 Am. Dec. 53.

21. *Alabama.* — Ferguson *v.* Hill, 3 Stew. 485, 21 Am. Dec. 641.

Colorado. — Drescher *v.* Fulham, 11 Colo. App. 62, 52 Pac. 685.

Illinois. — Morgan *v.* Fallenstein, 27 Ill. 31; Pierce *v.* Hasbrouck, 49 Ill. 23; German Ins. & Sav. Inst. *v.* Vahle, 28 Ill. App. 557; Reynolds *v.* Barnard, 36 Ill. App. 218.

Indiana. — Pierce *v.* Goldsberry, 31 Ind. 52.

Iowa. — Cox *v.* Carrell, 6 Iowa 349.

Kansas. — Bank of Horton *v.* Brooks, 64 Kan. 285, 62 Pac. 675.

New Hampshire. — Grafton Bank *v.* Woodward, 5 N. H. 99, 20 Am. Dec. 566.

Ohio. — Peck *v.* Beckwith, 10 Ohio St. 498.

South Carolina. — Solomans & Co. *v.* Jones, 3 Brev. 545, 6 Am. Dec. 594.

Washington. — Merchants' Bank of Port Townsend *v.* Bussell, 16 Wash. 546, 48 Pac. 242.

Wisconsin. — Grace *v.* Lynch, 80 Wis. 166, 49 N. W. 751.

Statutory Exception. — By statute in some of the states a note, as a

The payment of interest in advance is *prima facie* evidence of an extension of time to the end of the period covered thereby[22] though it is not conclusive evidence thereof in the absence of an agreement not to sue.[23] An agreement showing a

written contract can only be modified by writing or by an executed parol contract, and in such states an executory parol contract for an extension of time is invalid. Henehan *v.* Hart, 127 Cal. 656, 60 Pac. 426; Berry *v.* Pullen, 69 Me. 101; Foster *v.* Furlong, 8 N. D. 282, 78 N. W. 986.

Statute of Frauds.— An oral agreement to extend a note from year to year, not to become due until a year after notice to pay it, or of an intention to pay it, is not effective under the statute of frauds. Tunstall *v.* Clifton, (Tex. Civ. App.), 49 S. W. 244.

Merger of Oral Agreement. — An oral agreement to extend time so long as interest is paid is merged in a bond assuming to pay the note in consideration of six months extension, and parol evidence is inadmissible to vary the written contract. Mutual Life Ins. Co. of N. Y. *v.* Aldrich, 44 App. Div. 620, 60 N. Y. Supp. 195.

22. *Connecticut.* — Skelly *v.* Bristol Sav. Bank, 63 Conn. 83, 26 Atl. 474.

Georgia. — Scott *v.* Saffold, 37 Ga. 384; Randolph *v.* Fleming, 59 Ga. 776.

Illinois. — Warner *v.* Campbell, 26 Ill. 282.

Indiana. — Woodburn *v.* Carter, 50 Ind. 376; Mennet *v.* Grisard, 79 Ind. 222; Schieber *v.* Traudt, 19 Ind. App. 349, 49 N. E. 605; Hamilton *v.* Winterrowd, 43 Ind. 393; Abel *v.* Alexander, 45 Ind. 523; Jarvis *v.* Hyatt, 43 Ind. 163.

Kentucky. — Preston *v.* Henning, 6 Bush 557; Robinson *v.* Miller, 2 Bush 179.

Michigan. — Hitchcock *v.* Frackelton, 116 Mich. 487, 74 N. W. 720.

Minnesota. — St. Paul Trust Co. *v.* St. Paul Chamber of Commerce, 64 Minn. 439, 67 N. W. 350.

New Hampshire. — Crosby *v.* Wyatt, 10 N. H. 318; N. H. Sav. Bank *v.* Ela, 11 N. H. 335; N. H. Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685.

New York. — Wakefield Bank *v.* Truesdell, 55 Barb. 602.

North Carolina.— Hollingsworth *v.* Tomlinson, 108 N. C. 245, 12 S. E. 989.

Oregon. — Lazelle *v.* Miller, 40 Or. 549, 67 Pac. 307.

Tennessee. — Stone River Nat. Bank *v.* Walter, 104 Tenn. 11, 55 S. W. 301.

Utah. — Walley *v.* Deseret Nat. Bank, 14 Utah 305, 47 Pac. 147.

Vermont. — Peoples Bank *v.* Pearsons, 30 Vt. 711.

Washington. — Bank of British Columbia *v.* Jeffs, 18 Wash. 135, 51 Pac. 348.

Wyoming. — Laurence *v.* Thom, 9 Wyo. 414, 64 Pac. 339.

Usurious Interest.— The acceptance of interest at a usurious rate in advance constitutes an agreement to extend the time. Warner *v.* Campbell, 26 Ill. 282; Butterfield *v.* Trittipo, 67 Ind. 338.

23. *United States.*— Bank of Union Town *v.* Mackey, 140 U. S. 220.

Arizona. — McGlassen *v.* Tyrrell, (Ariz.), 44 Pac. 1088.

Maine. — Freemans Bank *v.* Rollins, 13 Me. 202; Mariner Bank *v.* Abbott, 28 Me. 280; Strafford Bank *v.* Crosby, 8 Me. 191.

Massachusetts. — Oxford Bank *v.* Lewis, 8 Pick. 457; Blackstone Bank *v.* Hill, 10 Pick. 129; Central Bank *v.* Willard, 17 Pick. 150; Heydenville Sav. Bank *v.* Parsons, 138 Mass. 53.

Missouri. — Hosea *v.* Rowley, 57 Mo. 357; First Nat. Bank *v.* Leavitt, 65 Mo. 562; Citizens Bank *v.* Moorman, 38 Mo. App. 484; First Nat. Bank *v.* Gardiner, 57 Mo. App. 268; Am. Nat. Bank *v.* Love, 62 Mo. App. 378.

New Hampshire.— New Hampshire Sav. Bank *v.* Gill, 16 N. H. 578.

Ohio. — Gard *v.* Neff, 39 Ohio St. 607.

Texas. — Maddox *v.* Lewis, 12 Tex. Civ. App. 424, 34 S. W. 647.

definite extension of time,[24] or a renewal by advanced pay-

Vermont. — Bank of Middlebury *v.* Bingham, 33 Vt. 621.

Payment to Agent. — A principal by accepting interest paid in advance to his agent, without knowledge that it was advance interest is not bound to an extension of time. McGlassen *v.* Tyrrell, (Ariz.), 44 Pac. 1088.

Payment Under Agreement. — The mere advance payment of interest under an agreement for a new note signed by the same parties as the old one, which was not complied with, cannot warrant an inference of an extension of time. Bank of Uniontown *v.* Mackey, 140 U. S. 220, 11 Sup. Ct. 844.

Advance Payment Supporting Agreement. — An advance payment will support an agreement to extend the time of payment.

District of Columbia.— Green *v.* Lake, 2 Mackey 162.

Illinois. — Warner *v.* Campbell, 26 Ill. 282; Flynn *v.* Mudd, 27 Ill. 323; Maher *v.* Lanfrom, 86 Ill. 513; Crossman *v.* Wohlleben, 90 Ill. 537.

Indiana. — Hamilton *v.* Winterrowd, 43 Ind. 393; Starrett *v.* Burkhalter, 70 Ind. 285; Kaler *v.* Hise, 79 Ind. 301.

Kentucky. — Kenningham *v.* Bedford, 1 B. Mon. 325; Armendt *v.* Perkins, 17 Ky. L. Rep. 1327, 32 S. W. 270.

Maine. — Lime Rock Bank *v.* Mallett, 42 Me. 349.

Missouri. — Hosea *v.* Rowley, 57 Mo. 357; Stillwell *v.* Aaron, 69 Mo. 539; Merchants Ins. Co. *v.* Hauck, 83 Mo. 21; First Nat Bank *v.* Gardner, 57 Mo. App. 268; American Nat. Bank *v.* Love, 62 Mo. App. 378.

New York. — Newsam *v.* Finch, 25 Barb. 175.

North Carolina. — Scott *v.* Harris, 76 N. C. 205.

Ohio. — Peck *v.* Beckwith, 30 Ohio St. 498; Osborn *v.* Low, 40 Ohio St. 347.

Texas. — Mann *v.* Brown, 71 Tex. 241, 9 S. W. 111.

Vermont. — Austin *v.* Dorwin, 21 Vt. 38; Dunham *v.* Downer, 31 Vt 249.

Washington.—Binninn *v.* Jennings, 14 Wash. 677, 45 Pac. 302.

West Virginia. — Glenn *v.* Morgan, 23 W. Va. 467.

Wisconsin. — Grace *v.* Lynch, 80 Wis. 166, 49 N. W. 751.

24. *Alabama.* — Branch Bank of Mobile *v.* James, 9 Ala. 949.

California. — Kontz *v.* Van Clief, 55 Cal. 345.

Colorado. — Byers *v.* Hassey, 4 Colo. 515; St. Joe & Mineral Farm Consol. Min. Co. *v.* First Nat. Bank, 10 Colo. App. 339, 50 Pac. 1055.

Georgia. — Heath *v.* Achey, 96 Ga. 438, 23 S. E. 396.

Illinois. — Flynn *v.* Mudd, 27 Ill. 323.

Indiana. — Mennet *v.* Grisard, 79 Ind. 222.

Louisiana. — Millaudon *v.* Arnous, 3 Mart. (N. S.) 596; Sagory *v.* Metropolitan Bank, 42 La. Ann. 627, 7 So. 633.

Maine. — Flanders *v.* Barstow, 18 Me. 357.

Michigan. — Morgan *v.* Butterfield, 3 Mich. 615.

New York. — Scoville *v.* Landon, 50 N. Y. 686; Place *v.* McIlvain, 1 Daly 266; Traders' Nat. Bank *v.* Parker, 130 N. Y. 415, 29 N. E. 1094; Stein *v.* Steindler, 1 Misc. 414, 20 N. Y. Supp. 839.

Ohio. — McComb *v.* Kittridge, 14 Ohio 348.

Tennessee. — Henderson *v.* Ardery, 36 Pa. St. 449.

South Dakota. — Corbett *v.* Clough, 8 S. D. 176, 65 N. W. 1074; Niblack *v.* Champeny, 10 S. D. 165, 72 N. W. 402.

Texas. — Dalton *v.* Rainey, 75 Tex. 516, 13 S. W. 34; Aiken *v.* Posey, 13 Tex. Civ. App. 607, 35 S. W. 732.

Washington. — Merchants Bank of Port Townsend *v.* Bussell, 16 Wash 546, 48 Pac. 242.

Wisconsin. — Racine Co. Bank *v.* Lathrop, 12 Wis. 466.

Presumptive Evidence of Consideration. — An indorsement of an extension of time for a definite period pursuant to agreements is presumptive evidence of consideration. St. Joe & Mineral Farm Consol. Min. Co. *v.* First Nat. Bank, 10 Colo. App. 339, 50 Pac. 1055.

Presumption as to Time of Agree-

ment,[25] or the giving of a renewal note, is proof of an extension of time.[26]

ment. — An agreement for extension of time indorsed on a note without date, will be presumed to have been indorsed before maturity. Whitney Nat. Bank *v.* Cannon, 52 La. Ann. 1484, 27 So. 948.

An extension of time until "next summer" or "fall," or until "after threshing" is sufficiently definite.

Indiana. — Abel *v.* Alexander, 45 Ind. 523, 15 Am. Rep. 220.

Texas. — Robson *v.* Brown, (Tex. Civ. App.), 57 S. W. 83.

Wisconsin. — Moulton *v.* Posten, 52 Wis. 169, 8 N. W. 621.

But an extension to some time in the summer (Miller *v.* Stem, 2 Pa. St. 286), or until after harvest (Findley *v.* Hill, 8 Or. 247) is too indefinite.

Reasonable Time. — An extension without date fixed in consideration of a new signature must be deemed to continue for a reasonable time. Traders' Nat. Bank *v.* Parker, 130 N. Y. 415, 29 N. E. 1094.

Agreement to Pay Interest for Definite Period. — An agreement to pay interest for a definite period of extension, thereby waiving the right to pay the note until its termination, is deemed sufficient to support the extension. Drescher *v.* Fulham, 11 Colo. App. 62, 52 Pac. 685.

Georgia. — Camp *v.* Howell, 37 Ga. 312.

Illinois. — Dodgson *v.* Henderson, 113 Ill. 360; Reynolds *v.* Barnard, 36 Ill. App. 218; Beuter *v.* Dillon, 63 Ill. App. 517.

Indiana. — Pierce *v.* Goldsbery, 31 Ind. 52; Huff *v.* Cole, 45 Ind. 300; White *v.* Whitney, 51 Ind. 124.

Kansas. — Eaton *v.* Whitmore, 3 Kan. App. 760, 45 Pac. 450; Royal *v.* Lindsay, 15 Kan. 591.

Kentucky. — Robinson *v.* Miller, 2 Bush 179; Alley *v.* Hopkins, 98 Ky. 668, 34 S. W. 13.

Louisiana. — Callihan *v.* Tanner, 3 Rob. 299.

Maine. — Chute *v.* Pattee, 37 Me. 102.

Mississippi. — Moore *v.* Redding, 69 Miss. 841, 13 So. 849.

Montana. — Hale *v.* Forbis, 3 Mont. 395.

Nebraska. — Kittle *v.* Wilson, 7 Neb. 76.

New Hampshire. — Wheat *v.* Kendall, 6 N. H. 504; Bailey *v.* Adams, 10 N. H. 162; Fowler *v.* Brooks, 13 N. H. 240; Wright *v.* Bartlett, 43 N. H. 548.

Ohio. — McComb *v.* Kittridge, 14 Ohio 348; Fawcett *v.* Freshwater, 31 Ohio St. 637; Osborn *v.* Low, 40 Ohio St. 347.

Texas. — Knapp *v.* Mills, 20 Tex. 123; Benson *v.* Phipps, 87 Tex. 578, 29 S. W. 1061, 41 Am. St. Rep. 128; Aiken *v.* Posey, 13 Tex. Civ. App. 607, 35 S. W. 732; Robson *v.* Brown, (Tex. Civ. App.), 57 S. W. 83.

Washington. — First Nat. Bank of Seattle *v.* Harris, 7 Wash. 139, 34 Pac. 466; Nelson *v.* Flagg, 18 Wash. 39, 50 Pac. 571.

25. Mariners Bank *v.* Abbott, 28 Me. 280; Lime Rock Bank *v.* Mallett, 34 Me. 547, 56 Am. Dec. 673.

26. *Connecticut.* — Auffmordt *v.* Stevens, 46 Conn. 411.

Georgia. — Williams *v.* Wright, 69 Ga. 759; Heath *v.* Achey, 96 Ga. 438, 23 S. E. 396.

Kansas. — Schnitzler *v.* Fourth Nat. Bank, 1 Kan. App. 674, 42 Pac. 496.

Kentucky. — Norton *v.* Roberts, 4 T. B. Mon. 491.

Louisiana. — Shaw *v.* Nolan, 8 La. Ann. 25.

Michigan. — Farmers' & Mechanics' Bank *v.* Kercheval, 2 Mich. 504.

Missouri. — First Nat. Bank *v.* Leavitt, 65 Mo. 562.

New York. — Platt *v.* Stark, 2 Hilt. 399; Eisner *v.* Keller, 3 Daly 485.

North Dakota. — First Nat. Bank of Hastings *v.* Lamont, 5 N. D. 393, 67 N. W. 145.

Ohio. — Cadiz Bank *v.* Slemmons, 34 Ohio St. 142, 32 Am. Rep. 364.

Tennessee. — First Nat. Bank *v.* Reid, (Tenn. Ch. App.), 58 S. W. 1124; Hill *v.* Bostick, 10 Yerg. 410.

Texas. — Wylie *v.* Hightower, 74 Tex. 306, 11 S. W. 1118.

3. Place of Payment. — A. PRESUMPTION. — a. *Place of Date.* In the absence of proof to the contrary, the presumption is that a note is payable at the place where it is dated,[27] or executed,[28] and that a bill of exchange was accepted where dated.[29] The drawer of a bill is presumed to contract to pay at the place where he drew the bill.[30]

b. *Place of Residence.* — Where no locality is specified, a note is presumed payable at the residence or place of business of maker[31]

Vermont.— Michigan State Bank *v.* Leavenworth, 28 Vt. 209.

Washington. — First Nat. Bank of Seattle *v.* Harris, 7 Wash. 139, 34 Pac. 466.

27. *Alabama.* — Robinson *v.* Hamilton, 4 Stew. & P. 91; Rudulph *v.* Brewer, 96 Ala. 189, 11 So. 314.

Illinois. — Lewis *v.* Headley, 36 Ill. 433; Strawbridge *v.* Robinson, 10 Ill. 470, 50 Am. Dec. 420.

Iowa. — Equitable Life Ins. Co. *v.* Gleason, 56 Iowa 47, 8 N. W. 790; Bigelow *v.* Burnham, 83 Iowa 120, 49 N. W. 104.

Kentucky. — Page *v.* Prentice, 5 B. Mon. 7.

Louisiana. — White *v.* Wilkinson, 10 La. Ann. 394.

Maryland. — Ricketts *v.* Pendleton, 14 Md. 320.

Massachusetts.—Smith *v.* Philbrick, 10 Gray 252, 69 Am. Dec. 315.

Minnesota. — Herrick *v.* Baldwin, 17 Minn. 209, 10 Am. Rep. 161.

Ohio.— Scott *v.* Perlee, 39 Ohio St. 63, 48 Am. Rep. 421.

Texas. — Bullard *v.* Thompson, 35 Tex. 313.

Note Made in One State and Dated in Another. — A note made in on state and dated in another, is presumed to be payable at the place of date, and to be governed by the laws of that place. Tillotson *v.* Tillotson, 34 Conn. 335.

Presumption as to Place of Office. A note dated at the office of one insurance company, in a designated city, and payable at the office of another insurance company of the same state is presumed to be payable at its office located at the place of date. Equitable Life Ins. Co. *v.* Gleason, 56 Iowa 47, 8 N. W. 790.

Note Made in One County and Dated in Another. — Where a note gave the postoffice address of the maker in one county, and was executed in another, in the absence of evidence to the contrary, the court may find his residence to be in either county. Adair *v.* Egland, 58 Iowa 314, 12 N. W. 277.

28. Dan *v.* Clement, 2 Ala. 392; Blodgett *v.* Durgin, 32 Vt. 361.

Presumption as to Place of Execution. — Where there is no proof of the place of execution of a note, it will be presumed to have been made and to be payable in the state where action is brought. Smith *v.* Robinson, 11 Ala. 270; Farhni *v.* Ramsee, 19 Ind. 400; Walker *v.* Woollen 54 Ind. 164; Clark *v.* Carey, 63 Ind. 105; Cook *v.* Crawford, 4 Tex. 420.

29. Blossman *v.* Mather, 5. La. Ann. 335; Wittkowski *v.* Smith, 84 N. C. 671, 37 Am. Rep. 632; *Ex parte* Heidelback, 2 Low. 526, 11 Fed. Cas. No. 6,322.

30. Freese *v.* Brownell, 35 N. J. Law 285, 10 Am. Rep. 239; Warner *v.* Citizens' Bank of Parker, 6 S. D. 152, 60 N. W. 746.

31. *United States.* — Campbell *v.* Clark, 1 Hempst. 67, 4 Fed. Cas. No. 2,335a; Burrows *v.* Hannegan, 1 McLean 309, 4 Fed. Cas. No. 2,205.

Iowa. — Hartford Bank *v.* Greene, 11 Iowa 476.

Louisiana. — Penn *v.* Watts, 11 La. Ann. 205.

Massachusetts. — Estes *v.* Tower, 102 Mass. 65. 3 Am. Rep. 439; Arnold *v.* Dresser, 8 Allen 435.

Missouri. — Simmons *v.* Belt, 35 Mo. 461.

New York. — Woodworth *v.* Bank of America, 19 Johns. 391, 10 Am. Dec. 239; Anderson *v.* Drake, 14 Johns. 114; Adams *v.* Leland, 30 N. Y. 309; Holtz *v.* Boppe, 37 N. Y. 631.

Pennsylvania. — *In re* Parisian Cloak & Suit Co.'s Estate, 173 Pa. St. 507, 34 Atl. 224.

or of the payee.[32]

c. *Designated Place.* — Commercial paper is presumed payable at the place designated in the bill,[33] or note.[34] A note payable and

North Carolina. — People's Nat. Bank *v.* Lutterlow, 95 N. C. 495.

Rhode Island.—Barnes *v.* Vaughan, 6 R. I. 259.

Tennessee. — Gardner *v.* Bank of Tenn., 1 Swan 420.

Place of Payment Not Limited. Where a note does not designate the place of payment, it is deemed payable anywhere upon demand when due and not exclusively at the office of the maker. Engler *v.* Ellis, 16 Ind. 475.

32. Bank of Newbury *v.* Richards, 35 Vt. 281; Towne *v.* Smith, 1 Wodb. & M. 115, 24 Fed. Cas. No. 14,115; Ballard *v.* Webster, 9 Abb. Pr. (N. Y.) 404.

33. Abt *v.* American Trust & Savings Bank, 159 Ill. 467, 42 N. E. 856; McClane *v.* Fitch, 4 B. Mon. (Ky.) 599; Freese *v.* Brownell, 35 N. J. Law 285, 10 Am. Rep. 239; Pierce *v.* Struthers, 27 Pa. St. 249; Struthers *v.* Kendall, 41 Pa. St. 214, 80 Am. Dec. 610; Cox *v.* National Bank, 100 U. S. 704; Picquet *v.* Curtis, 1 Sumn. 478, 19 Fed. Cas. No. 11,131.

General Acceptance. — A general acceptance, is in legal effect, an acceptance to pay at the place designated in the bill. Alden *v.* Barbour, 3 Ind. 414.

Place Fixed by Acceptance. — If a bill is accepted as payable at a particular place, it is deemed payable there. Brown *v.* Jones, 113 Ind. 46, 13 N. E. 857; Tuckerman *v.* Hartwell, 3 Me. 147, 14 Am. Dec. 225; Brooks *v.* Higby, 11 Hun (N. Y.) 235.

But if it is addressed to the drawee at a particular place, and accepted at a different place, it is deemed payable at the place designated in the bill. Niagara District Bank *v.* Fairman & Willard Machine Tool Mfg. Co., 31 Barb. (N. Y.) 403.

34. *Alabama.*— Roberts *v.* Mason, 1 Ala. 373; Boit *v.* Corr, 54 Ala. 112; Rudulph *v.* Brewer, 96 Ala. 189, 11 So. 314; Crenshaw *v.* McKiernan, Minor 295; Eason *v.* Isbell, 42 Ala. 456; Carmelich *v.* Mims, 88 Ala. 335, 6 So. 913; First Nat. Bank of Montgomery *v.* Slaughter, 98 Ala. 602, 14 So. 545, 38 Am. St. Rep. 88.

Delaware.— Allen *v.* Smith, 4 Harr. 234; Bank of Wilmington & Brandywine *v.* Cooper, 1 Harr. 10.

Florida. — Spann *v.* Baltzell, 1 Fla. 301, 46 Am. Dec. 346.

Illinois. — Guignon *v.* Union Trust Co., 53 Ill. App. 581, 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186.

Indiana. — Davis *v.* McAlpine, 10 Ind. 137; Hartwell *v.* Candler, 5 Blackf. 215.

Iowa. — First Nat. Bank *v.* Owen, 23 Iowa 185.

Louisiana. — Hart *v.* Long, 1 Rob. 83; Gale *v.* Kemper, 10 La. (O. S.) 205; Sanderson *v.* Oakey, 14 La. (O. S.) 373; New Orleans & C. R. Co. *v.* McKelvey, 2 La. Ann. 359; Barker *v.* Fullerton, 11 La. Ann. 25; Moore *v.* Britton, 22 La. Ann. 64.

Maine. — Page *v.* Webster, 15 Me. 249; Langley *v.* Palmer, 30 Me. 467, 50 Am. Dec. 634; Allen *v.* Avery, 47 Me. 287.

Maryland. — Peoples Bank *v.* Keech, 26 Md. 521, 90 Am. Dec. 118.

Massachusetts. — Berkshire Bank *v.* Jones, 6 Mass. 224, 4 Am. Dec. 175; Woodbridge *v.* Brigham, 13 Mass. 556; North Bank *v.* Abbot, 13 Pick. 465, 25 Am. Dec. 334; Shaw *v.* Reed, 12 Pick. 132; Malden Bank *v.* Baldwin, 13 Gray 154, 74 Am. Dec. 627; Hampden Fire Ins. Co. *v.* Davis, 13 Gray 156; Way *v.* Butterworth, 106 Mass. 75.

Mississippi.— Goodloe *v.* Godley, 13 Smed. & M. 233, 51 Am. Dec. 159.

Missouri. — Lawrence *v.* Dobyns, 30 Mo. 196; McKee *v.* Boswell, 33 Mo. 567; Faulkner *v.* Faulkner, 73 Mo. 327; Townsend *v.* Heer Dry Goods Co., 85 Mo. 503; Dailey *v.* Sharkey, 29 Mo. App. 518.

New Hampshire. — Smith *v.* Little, 10 N. H. 526.

New York. — Troy City Bank *v.* Grant, Hill & D. Supp. 119; Gay *v.* Paine, 5 How. Pr. 107; Ferner *v.* Williams, 37 Barb. 9.

North Carolina. — Smith *v.* McLean, N. C. Term Rep. 72, 7 Am.

negotiable at a designated bank is presumed to be offered for discount at such bank, and not elsewhere.[35] A note payable at a bank where an account of the maker is kept is presumed to be in the nature of a check.[36]. A note payable at a bank is presumed subject to the known lawful usages and customs of such bank.[37] Negoti-

Dec. 693; Sullivan *v.* Mitchell, 1 Car. Law Repos. 482, 6 Am. Dec. 546.

Rhode Island. — Barnes *v.* Vaughn, 6 R. I. 259.

Tennessee. — Gardner *v.* Bank of Tennessee, 1 Swan 420; Lane *v.* Bank of West Tennessee, 9 Heisk. 419; Bynum *v.* Apperson, 9 Heisk. 632; Douglas *v.* Bank of Commerce, 97 Tenn. 133, 36 S. W. 874.

Vermont. — Brickett *v.* Spaulding, 33 Vt. 107.

Abbreviated or Defective Statement of Place. — There is a presumption of fact that a note "payable at the Br. at Fort Wayne of the Bk. of the State of Indiana," is payable at the Branch at Fort Wayne of the Bank of the State of Indiana, (Miller *v.* Powers, 16 Ind. 410) and that a note payable at City Bank, Nobleville, Indiana, was intended to be made payable at the existing "Citizens Bank" of that place. Locke *v.* Merchants Nat. Bank, 66 Ind. 353. A note dated at P. and payable "at Bank" is presumed payable at P. at any bank which the holder may select. Hazard *v.* Spencer, 17 R. I. 561. A note made "payable at the Mad River Branch Bank at Springfield" is deemed payable at "Mad River Branch Bank" at that place in the absence of proof to the contrary. Buss *v.* Horrocks, 1 Ohio Dec. 376. A note payable at the "Union Bank at Memphis," is deemed payable at the Union Bank of Tennessee at Memphis, where it appears that there was no other Union Bank at that place. Worley *v.* Waldran, 3 Sneed (Tenn.) 548. It may be shown by parol evidence that a note payable at "First Nat. Lafayette Ind." was intended to mean, according to usage, "First Nat. Bank of Lafavette, Ind." Lane *v.* Union Nat. Bank of Massillon, 3 Ind. App. 299, 29 N. E. 613.

35. Hoffman *v.* Coombs, 9 Gill (Md.) 284.

36. Riverside Bank *v.* First Nat. Bank, 74 Fed. 276, 24 C. C. A. 187.

37. *United States.*—Mills *v.* Bank of U. S. 11 Wheat. 431; Bank of Washington *v.* Triplett, 1 Pet. 25; Bank of Alexandria *v.* Wilson, 2 Cranch C. C. 5, 2 Fed. Cas. No. 856; Smith *v.* Glover, 2 Cranch C. C. 334, 22 Fed. Cas. No. 13,051; Munroe *v.* Mandeville, 2 Cranch C. C. 187, 17 Fed. Cas. No. 9,929; Wallace *v.* Agry, 5 Mason 118, 29 Fed. Cas. No. 17,097.

Connecticut.— Osborne *v.* Smith, 14 Conn. 366 note; Bridgeport Bank *v.* Dyer, 19 Conn. 136.

Louisiana. Wallace *v.* Gwin, 15 La. (O. S.) 223, 35 Am. Dec. 202.

Maine. — Marret *v.* Brackett, 60 Me. 524.

Maryland. — Bank of U. S. *v.* Norwood, 1 Harr. & J. 423; Bank of Columbia *v.* Fitzhugh, 1 Harr. & G. 239; Bank of Columbia *v.* Magruder, 6 Harr. & J. 146, 14 Am. Dec. 271.

Massachusetts.— Lincoln & Kennebeck Bank *v.* Page, 9 Mass. 155, 6 Am. Dec. 52; Smith *v.* Whiting, 12 Mass. 6, 67 Am. Dec. 25; City Bank *v.* Cutter, 3 Pick. 414; North Bank *v.* Abbot, 13 Pick. 465, 25 Am. Dec. 334; Warren Bank *v.* Parker, 8 Gray 221.

Mississippi.— Harrison *v.* Crowder, 6 Smed. & M. 464, 45 Am. Dec. 290; Planter's Bank *v.* Markham, 5 How. 397, 37 Am. Dec. 162.

New York. — Bowen *v.* Newell, 2 Duer 584, 13 N. Y. 290, 64 Am. Dec. 550.

North Carolina. — Bank of Statesville *v.* Pinkers, 83 N. C. 377.

Parol Evidence of Usage. — Parol evidence is permissible to establish a lawful custom or usage at the place of payment. Pearson *v.* Bank of the Metropolis, 1 Pet. (U. S.) 89; Ray *v.* Porter, 42 Ala. 327; Osborne *v.* Smith, 14 Conn. 366, note; Kilgore *v.* Buckley, 14 Conn. 362; Grinman *v.* Walker, 9 Iowa 426; Bowen *v.* Newell, 2 Duer 584, 13 N. Y. 290, 64 Am. Dec. 550.

able paper is presumed to be governed by the law of the designated place of payment.[38]

38. *United States.* — Wiseman *v.* Chippella, 23 How. 368; Gaylord *v.* Johnson, 5 McLean 448, 10 Fed. Cas. No. 5,285; Indseth *v.* Pierce, 106 U. S. 546, 1 Sup. Ct. 418; Phipps *v.* Harding, 70 Fed. 468, 17 C. C. A. 202; Bainbridge *v.* Wilcocks, Baldw. 536, 2 Fed. Cas. No. 755; Illinois Bank *v.* Brady, 3 McLean 268, 2 Fed. Cas. No. 888; Oregon & W. Trust Inv. Co. *v.* Rathburn, 5 Sawy. 32, 18 Fed. Cas. No. 10,555; Drake *v.* Found Treasure Min. Co., 53 Fed. 474.

Alabama. — Todd *v.* Neal, 49 Ala. 266; Hunt *v.* Hall, 37 Ala. 702; Hanrick *v.* Andrews, 9 Port. 9.

Arkansas. — Pryor *v.* Wright, 14 Ark. 189.

Connecticut. — Webster *v.* Howe, Mach. Co., 54 Conn. 394, 8 Atl. 482.

Illinois. — McAllister *v.* Smith, 17 Ill. 328, 65 Am. Dec. 651; Wooley *v.* Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867; Lowy *v.* Andreas, 20 Ill. App. 521; Abt *v.* American Trust & Savings Bank, 159 Ill. 467, 42 N. E. 856; Skelton *v.* Dustin, 92 Ill. 49.

Indiana. — Hunt *v.* Standart, 15 Ind. 33, 77 Am. Dec. 306; Fordyce *v.* Nelson, 91 Ind. 447; Hall *v.* Harris, 16 Ind. 180; Rose *v.* Park Bank, 20 Ind. 94, 83 Am. Dec. 306; Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227.

Iowa. — Chatham Bank *v.* Allison, 15 Iowa 357; Allen *v.* Harrah, 30 Iowa 363; Thorp *v.* Craig, 10 Iowa 461.

Kentucky. — Cope *v.* Daniel, 9 Dana 415; Tyler *v.* Trabue, 8 B. Mon. 306; Stevens *v.* Gregg, 89 Ky. 461, 12 S. W. 775; Robertson *v.* Jones, 6 Ky. L. Rep. 71; Brown *v.* Todd, 16 Ky. L. Rep. 697, 29 S. W. 621; Goddin *v.* Shipley, 7 B. Mon. 575.

Louisiana. — Glenn *v.* Thistle, 1 Rob. 572; Harris *v.* Alexander, 9 Rob. 151; Murray *v.* Gibson, 2 La. Ann. 311; Roberts *v.* Wilkinson, 5 La. Ann. 369; Bacon *v.* Dahlgreen, 7 La. Ann. 599; Howard *v.* Branner, 23 La. Ann. 369.

Massachusetts. — Shoe & Leather Nat. Bank *v.* Wood, 142 Mass. 563, 8 N. E. 753.

Michigan. — Snow *v.* Perkins, 2 Mich. 238.

Mississippi. — Ellis *v.* Com. Bank, 7 How. 294, 40 Am. Dec. 63; Chew *v.* Read, 11 Smed. & M. 182; Miller *v.* Mayfield, 37 Miss. 688.

Missouri. — Kentucky Com. Bank *v.* Barksdale, 36 Mo. 563.

Nebraska. — Coad *v.* Home Cattle Co., 32 Neb. 761, 49 N. W. 757.

New Hampshire. — Little *v.* Riley, 43 N. H. 109.

New Jersey. — Healy *v.* Gorman, 15 N. J. Law 328; Ball *v.* Consolidated Franklinite Co., 32 N. J. Law 102.

New York. — Warren *v.* Lynch, 5 Johns. 239; Commerce Bank *v.* Rutland & W. R. Co., 10 How. Pr. 1; Bowen *v.* Newell, 2 Duer 584, 13 N. Y. 290, 64 Am. Dec. 550; Dickinson *v.* Edwards, 77 N. Y. 573, 33 Am. Rep. 671; Hibernian Nat. Bank *v.* Lacombe, 84 N. Y. 367, 38 Am. Rep. 518.

North Carolina. — Hatcher *v.* McMorine, 4 Dev. 122.

Pennsylvania. — Tenant *v.* Tenant, 110 Pa. St. 478, 1 Atl. 532; Mullen *v.* Morris, 2 Pa. St. 85.

South Carolina. — McCandlish *v.* Cruger, 2 Bay 377.

Tennessee. — Carter *v.* Union Bank, 7 Humph. 548, 46 Am. Dec. 89; Thompson *v.* Com. Bank, 3 Cold. 46; Cooper *v.* Sandford, 4 Yerg. 452; Pioneer Savings & Loan Co., *v.* Cannon, 96 Tenn. 599, 36 S. W. 386.

Texas. — Able *v.* McMurray, 10 Tex. 350; Summers *v.* Mills, 21 Tex. 77; Whitlock *v.* Castro, 22 Tex. 108.

Vermont. — Bryant *v.* Edson, 8 Vt. 325, 30 Am. Dec. 472; Peck *v.* Mayo, 14 Vt. 33, 39 Am. Dec. 205; Russell *v.* Buck, 14 Vt. 147; Cutles *v.* Thomas, 25 Vt. 73; Emerson *v.* Patridge, 27 Vt. 8, 62 Am. Dec. 617.

Virginia. — Wilson *v.* Lazier, 11 Gratt. 477.

Wisconsin. — Central Trust Co. of New York *v.* Burton, 74 Wis. 329, 43 N. W. 141.

Presumption Not Conclusive. — The presumption that the law of the place of payment applies to a note is only

B. Parol Evidence. — a. *Admissibility.* — Parol evidence is admissible to show an agreement as to the place of payment not appearing on the face of the instrument,[39] to make certain the designation of the place of payment,[40] to show a custom or usage explanatory of an abbreviated designation of a bank as the place of

prima facie, and not conclusive. Thornton *v.* Dean, 19 S. C. 583, 45 Am. Rep. 796; New England Mortg. Security Co. *v.* Vader, 28 Fed. 265, and the intention of the parties may appear to have the note governed by the law of the place of execution and delivery, though made payable in another state.

Georgia. — Martin *v.* Johnson, 84 Ga. 481, 10 S. E. 1092, 8 L. R. A. 170; Kilcrease *v.* Johnson, 85 Ga. 600, 11 S. E. 870; New England Mortg. Security Co. *v.* McLaughlin, 87 Ga. 1, 13 S. E. 81; Stansell *v.* Georgia Loan & Trust Co., 96 Ga. 227, 22 S. E. 898; Whitaker *v.* New England Mortg. Security Co., 97 Ga. 329, 22 S. E. 978.

Iowa. — Bigelow *v.* Burnham, 90 Iowa 300, 57 N. W. 865, 48 Am. St. Rep. 442.

Louisiana. — Depau *v.* Humphreys, 8 Mart. (N. S.) 1.

Minnesota. — Smith *v.* Parsons, 55 Minn. 520, 57 N. W. 311.

South Dakota. — Jones *v.* Fidelity Loan & Trust Co., 7 S. D. 122, 63 N. W. 553.

Proof of Foreign Law. — The law of the place of payment in another state or county must be proved as a fact, in order to have it govern the instrument.

Alabama. — Dickinson *v.* Branch Bank at Mobile, 12 Ala. 54.

Arkansas. — Pryor *v.* Wright, 14 Ark. 189.

Illinois. — Chumasero *v.* Gilbert, 24 Ill. 293; Hall *v.* Kimball, 58 Ill. 58.

Kentucky. — Surlott *v.* Pratt, 3 A. K. Marsh. 174; Ingraham *v.* Arnold, 1 J. J. Marsh. 406; Johnson *v.* Williams, 1 J. J. Marsh. 489; Pawling *v.* Sartin, 4 J. J. Marsh. 238; Roots *v.* Merriwether, 8 Bush 397.

Louisiana.— Patterson *v.* Garrison, 16 La. 557; Ripka *v.* Pope, 5 La. Ann. 61; Kuenzi *v.* Elvers, 14 La. Ann. 391, 74 Am. Dec. 434.

Maryland. — Laird *v.* State, 61 Md. 309.

Mississippi. — Swett *v.* Dodge, 4 Smed. & M. 667.

Missouri. — Lucas *v.* Ladew, 28 Mo. 342.

Texas. — Wheeler *v.* Pope, 5 Tex. 262; Whitlock *v.* Gastro, 22 Tex. 108.

Wisconsin. — Walsh *v.* Dart, 12 Wis. 635.

Presumption in Absence of Proof. In the absence of proof of the statute law of the place of execution or payment of negotiable paper, it will be presumed that it is governed by the common law. Patterson *v.* Carrell, 60 Ind. 128; Alford *v.* Baker, 53 Ind. 279; Lucas *v.* Ladew, 28 Mo. 342; Wallace *v.* Agry, 4 Mason, 336, 29 Fed. Cas. No. 17,096. Or by the law merchant respecting foreign bills of exchange or by the law of the forum. Brown *v.* Ferguson, 4 Leigh (Va.) 37, 24 Am. Dec. 707.

39. Moore *v.* Davidson, 18 Ala. 209; McKee *v.* Boswell, 33 Mo. 567; Thompson *v.* Ketcham, 4 Johns. 285; Meyer *v.* Hibsher, 47 N. Y. 265; Pearson *v.* Bank of the Metropolis, 1 Pet. (U. S.) 89.

Place of Performance of Note. Parol evidence is admissible to show an agreement made at the time of the execution of a note payable in lumber at a certain time and place, as to the particular place where the lumber should be delivered. Wyman *v.* Winslow, 11 Me. 398, 26 Am. Dec. 542.

40. Comstock *v.* Savage, 27 Conn. 184; Lane *v.* Union Nat. Bank of Massillon, 3 Ind. App. 299, 29 N. E. 613.

Note Governed by Commercial Law. It may be shown by parol that a note payable at "Anniston Loan & Trust Co., of Anniston, Ala.," has a certain place of payment under such designation in compliance with a statute requiring a certain place of payment to be designated in a note in order to be governed by commercial law. Anniston Loan & Trust Co. *v.* Stickney, 108 Ala. 146, 19 So. 63.

payment,[41] or as indicative of an agreement that the bank at which the note was negotiable should be the place of payment,[42] and to show an agreement that a note designating a place of payment, if not paid at maturity, should have a different place of payment.[43]

b. *Inadmissibility.* — Parol evidence is not admissible to contradict or vary the terms of a note as to the place of payment,[44] nor to show that a bill or note payable generally is payable at a particular bank.[45]

C. Relation of Evidence to Pleading. — a. *Material Variance.* A note or bill made payable at a particular bank or office, is not admissible in evidence under a declaration describing it as payable generally,[46] nor is a note admissible in evidence under a declaration misdescribing its legal effect as to the place of payment,[47] or misdescribing its designation of the place of payment.[48]

b. *Immaterial Variance.* — A variance in the place of payment is

41. Proof of Usage. — In an action on a note executed and payable at "First Nat., Lafayette, Ind.," extrinsic evidence is admissible to show that such designation had a definite and settled meaning in the neighborhood, by usage and custom, and meant in accordance with such usage: "First National Bank of Lafayette," and the proof of such usage and custom need not be co-extensive with the state. Lane *v.* Union Nat. Bank of Massilon, 3 Ind. App. 299, 29 N. E. 613.

42. Usage to Require Agreement. In an action upon a note negotiable at a bank, parol evidence is admissible to show a usage of the bank to require an agreement that notes negotiated at the bank should be payable there, and that they would not have negotiated it without such agreement. Pearson *v.* Bank of the Metropolis, 1 Pet. (U. S.) 89.

43. Logan *v.* Hartwell, 5 Kan. 649.

44. Montgomery R. Co. *v.* Hurst, 9 Ala. 513; Anthony *v.* Pittman, 66 Ga. 701.

Custom Not Admissible to Control Terms of Note. — Where a note was on its face payable at "People's Bank of B.," parol evidence is inadmissible to show a custom of the bank giving a different construction on account of any peculiarity in the way of expressing the place of payment. People's Bank *v.* Keech, 26 Md. 521, 90 Am. Dec. 118.

45. Owen *v.* Henderson, 7 Ala. 641; Patten *v.* Newell, 30 Ga. 271; McLaren *v.* Marine Bank of Georgia, 52 Ga. 131.

46. *Alabama.* — Puckett *v.* King, 2 Ala. 570; Clancy *v.* Hilliard, 39 Ala. 713.

Arkansas. — Dickinson *v.* Tunstall, 4 Ark. 170.

Delaware. — Thornton *v.* Herring, 5 Houst. 154.

Illinois. — Lowe *v.* Bliss, 24 Ill. 168, 76 Am. Dec. 742.

Indiana. — Alden *v.* Barbour, 3 Ind. 414.

Missouri. — Faulkner *v.* Faulkner, 73 Mo. 327.

Contra. — Clark *v.* Moses, 50 Ala. 326; Morris *v.* Poillon, 50 Ala. 403; Collins *v.* Nayler, 10 Phila. 437.

47. Statement of Legal Effect. The legal effect of a note, when stated, must be stated correctly. It is not the legal effect of a note payable to the order of plaintiffs "at their office," not designating a county, though dated at a place in C. county, that it is payable only at such office as plaintiffs had in C. county; and the variance is fatal, where the note is so declared upon. Childs *v.* Laflin, 55 Ill. 156.

48. Misdescription. — A note offered in evidence payable at the "Branch at Washing.," shows a material variance from a declaration describing it as payable at the "Branch Bank at Washington." Caruthers *v.* Real Estate Bank, 4 Ark. 447.

immaterial, where the legal effect is the same or is not substantially departed from,[49] or where the allegation is controlled by an exhibited copy of the note,[50] or the note is otherwise sufficiently identified,[51] or where the defendant is not misled by a variance in description.[52]

4. Mode of Payment. — A. PAROL EVIDENCE. — a. *Admissibility.* Parol evidence is admissible to show the intention of the parties, where there is uncertainty as to the mode of payment in "dollars,"[53]

49. Clark *v.* Moses, 50 Ala. 326; Morris *v.* Poillon, 50 Ala. 403; Collins *v.* Naylor, 10 Phila. 437.

Legal Effect Not Substantially Varied. — It was held that notes payable in bank are similar in legal effect to those described as payable generally, that a bill of exchange addressed to a person "payable at the Canal Bank" may be properly declared upon as so payable. (Walker *v.* Walker, 5 Ark. 643), that a note payable at "F. & Mechanics' Bank" is not a material variance when declared upon as payable at the "Farmers' and Mechanics' Bank" (Comstock *v.* Savage, 27 Conn. 184), that a bill payable at the "Bk. of Mo. at St. Louis" constitutes no variance from one declared upon as designating the "Bank of the State of Missouri at St. Louis" (Bank of Missouri *v.* Vaughan, 36 Mo. 90), and that there is no material variance between a note payable at the "Branch at Bedford of the Bank of Indiana," and one averred to be payable at "Bedford Bank, Lawrence County, Indiana," Stix *v.* Mathews, 63 Mo. 371.

50. Copy Attached to Complaint. Where the copy of a note attached to the complaint shows that it was payable at "Citizens, State of New Castle Indiana," and the complaint alleged it as payable at the "Citizens State Bank," etc., it was held that the complaint was sufficient, although the allegation was controlled by the copy, and might have been struck out on motion. Crandall *v.* First Nat. Bank, 61 Ind. 349.

51. Erroneous Indorsement Upon Writ. — Under the Mississippi statute requiring the cause of action to be indorsed upon a writ, in an action upon a note, if the amount of the note, time of payment, etc., are correctly stated, an erroneous statement of the place of payment will not be a fatal variance. Walker *v.* Tunstall, 3 How. (Miss.) 259.

52. Krueger *v.* Klinger, 10 Tex. Civ. App. 576, 30 S. W. 1087.

53. *United States.* — Thornington *v.* Smith, 8 Wall. 1; Atlantic T. & O. R Co. *v.* Carolina Nat. Bank, 19 Wall. 548; Cook *v.* Lillo, 103 U. S. 792.

Alabama. — Powe *v.* Powe, 42 Ala. 113; Hightower *v.* Maull, 50 Ala. 495; Whitfield *v.* Riddle, 52 Ala. 467.

North Carolina. — Sowers *v.* Earnhart, 64 N. C. 96; Bryan *v.* Harrison, 76 N. C. 360; Duke *v.* Williams, 84 N. C. 74.

South Carolina. — Austin *v.* Kinsman, 13 Rich. Eq. 259; Neely *v.* McFadden, 2 S. C. 169.

Tennessee. — Noe *v.* Hodges, 3 Humph. 162; Carmichael *v.* White, 11 Heisk. 262.

Texas. — Chambers *v.* Bonner, 33 Tex. 511; Johnson *v.* Blount, 48 Tex. 38.

Virginia. — Stearns *v.* Mason, 24 Gratt. 484.

Wisconsin. — Racine Co. Bank *v.* Keep, 13 Wis. 209.

Evidence as to Kind of Money. Parol evidence is admissible to show whether it was the intention of the parties that a note made during the Civil War was to be payable in Confederate money or in Federal money, (Scheible *v.* Bacho, 41 Ala. 423,) or in whatever money should be current or good at the end of the war, if so agreed (Craig *v.* Pervis, 14 Rich. Eq. [S. C.] 150.) Parol evidence is admissible to show that a note payable in dollars in 1827 was agreed to be payable in depreciated currency of Kentucky (Inskoe *v.* Proctor, 6 T. B. Mon. [Ky.] 311,) and that a note executed in 1860 payable in dollars, in the State of Arkansas was to be

or in "current funds,"[54] or in "currency,"[55] or in any local kind of money,[56] or in merchandise,[57] and to show that a particular mode of payment was omitted by mistake.[58] It is admissible to prove an executed agreement as to a different mode of payment from that designated,[59] and to rebut a plea of such

paid in specie, (Sessions *v.* Peay, 21 Ark. 100,) and that such a note executed in 1802 in Vermont was to be paid in United States bank bills, (Morton *v.* Wells, 1 Tyler [Vt.] 381.) In a suit on a note executed in 1863 in Texas, payable in dollars five years after date, the understanding of the parties as to the character of the money, might be shown from the nature of the transaction and the attendant circumstances. Taylor *v.* Bland, 60 Tex. 29.

Omission in Note. — The omission of the word "dollars" in the body of a note may be supplied by parol evidence. Oppenheimer *v.* Fritter, 1 White & W. Civ. Cas. Ct. App. § 372.

54. Meredith *v.* Salmon, 21 Gratt. (Va.) 762; Sexton *v.* Windell, 23 Gratt. (Va.) 534.

Evidence as to "Current Funds." Parol evidence is admissible to show that the parties by the use of the words "current funds" intended money, (Haddock *v.* Woods, 46 Iowa 433); or Confederate currency, Williams *v.* Arnis, 30 Tex. 37; Smith *v.* Prothro, 2 S. C. 371.

55. Local Meaning of "Currency." When the word "currency" has acquired a local meaning different from its usual significance, which was known to the parties to a draft payable in "currency," who contracted with reference thereto, parol evidence is admissible to show such meaning. Pilmer *v.* Branch of Des Moines State Bank, 16 Iowa 321. In an action on a bond executed in 1864, in Virginia payable in the currency used in the common business of the country at the date of the maturity, parol evidence is admissible to show what was the understanding of the parties as to the kind of currency and standard value. Calbreath *v.* Va. Porcelain & Earthenware Co., 22 Gratt. (Va.) 697.

Abbreviation of Currency. — It is the duty of the person relying on a certificate of deposit in a bank of a specified sum (Ills. Cy.) to show by parol evidence what was intended by the abbreviation. Hulbert *v.* Carver, 37 Barb. (N. Y.) 62.

56. Meaning of "Canada Money." Parol evidence is admissible to show the meaning of the words "Canada money," at the place where a note payable therein was made. Thompson *v.* Sloan, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546.

Meaning of "Texas Money." Parol evidence is admissible to explain the import of a note payable in "Texas money," at its current price in New Orleans. Roberts *v.* Short, 1 Tex. 373.

Meaning of "Pounds." — Parol evidence is admissible to show that a promise to pay a certain number of "pounds," was intended to be payable in specie, (Moore *v.* Moore, 1 N. J. Law 363); or in money current when due, McMinn. *v.* Owen, 2 Dall. U. S. 173.

57. Wyman *v.* Winslow, 11 Me. 398, 26 Am. Dec. 542; Barrett *v.* Allen, 10 Ohio 426.

58. Inskoe *v.* Proctor, 6 T. B. Mon. (Ky.) 311; Fishback *v.* Woodford, 1 J. J. Marsh. (Ky.) 84, 19 Am. Dec. 55; Huston *v.* Noble, 4 J. J. Marsh. (Ky.) 130.

59. *Alabama.* — Murchie *v.* Cook, 1 Ala. 41. Honeycut *v.* Strother, 2 Ala. 135.

California. — Braly *v.* Henry, 71 Cal. 481, 11 Pac. 385, 12 Pac. 623, 60 Am. Rep. 543.

Connecticut. — Blinn *v.* Chester, 5 Day 359.

District of Columbia. — Linville *v.* Holden, 2 McArthur 329.

Florida. — Wilson *v.* McClenny, 32 Fla. 363, 13 So. 873.

Indiana. — Tucker *v.* Tucker, 113 Ind. 272, 13 N. E. 710.

Kentucky. — Duncan *v.* Sheehan, 13 Ky. L. Rep. 780.

Minnesota. — Rugland *v.* Thompson, 48 Minn. 539, 51 N. W. 604.

agreement.[60]

b. *Inadmissibility.* — Parol evidence is, in general, inadmissible to show any different mode of payment from that designated in the instrument.[61]

B. Relation of Evidence to Pleading.— a. *Material Variance.* Under a declaration describing a note for the payment of sum *in numero* a note payable in bank notes constituting "the common currency of Alabama," is not admissible in evidence,[62] and under a declaration alleging an indebtedness upon notes for a specified

Nevada. — Foulks *v.* Rhodes, 12 Nev. 225.

New Jersey. — Buchanan *v.* Adams, 49 N. J. Law 656, 10 Atl. 662, 60 Am. Rep. 666.

New York. — Hildebrant *v.* Crawford, 6 Lans. 502.

Pennsylvania. — Hoeveler *v.* Mugele, 66 Pa. St. 348.

South Carolina. — Hagood *v.* Swords, 2 Bail. Law 305.

Wisconsin. — Jones *v.* Keyes, 16 Wis. 562; Jilson *v.* Gilbert, 26 Wis. 637, 7 Am. Rep. 100.

60. Hopkins *v.* Watts, 27 Ga. 490.

61. *United States.* — Olshausen *v.* Lewis, 1 Biss. 419, 18 Fed. Cas. No. 10,507; Bond *v.* Haas, 2 Dall. 133.

Alabama. — Clark *v.* Hart, 49 Ala. 86; Hair *v.* La Brouse, 10 Ala. 548; Tuskaloosa Cotton Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635.

Arkansas. — Featherston *v.* Wilson, 4 Ark. 154; Borden *v.* Peay, 20 Ark. 293.

California. — Conner *v.* Clark, 12 Cal. 168, 73 Am. Dec. 529; Guy *v.* Bibend, 41 Cal. 322.

Idaho. — Stein *v.* Fogarty, (Idaho), 43 Pac. 681.

Illinois. — Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 81 Am. Dec. 284; Marc *v.* Kupfer, 34 Ill.. 287; Bristow *v.* Catlett, 92 Ill. 17; Mumford *v.* Tolman, 157 Ill. 258, 41 N. E. 617.

Indiana. — Thornburgh *v.* Newcastle & D. R. Co., 14 Ind. 499; Tucker *v.* Talbott, 15 Ind. 114.

Iowa. — Barhydt *v.* Bonney, 55 Iowa 717, 8 N. W. 672; Kimball *v.* Bryan, 56 Iowa 632, 10 N. W. 218; Van Vechten *v.* Smith, 59 Iowa 173, 13 N. W. 94; Clement Bane Co. *v.* Houck, 113 Iowa 504, 85 N. W. 765.

Kentucky. —Baugh *v.* Ramsey, 4 T. B. Mon. 155.

Louisiana. — Veeche *v.* Grayson, 1 Mart. (N. S.) 133.

Maryland. — Penniman *v.* Winner, 54 Md. 127.

Massachusetts. — Currier *v.* Hale, 8 Allen 47; Perry *v.* Bigelow, 128 Mass. 129.

Michigan. — Oliver *v.* Shoemaker, 35 Mich. 464.

Minnesota. — Butler *v.* Paine, 8 Minn. 324; Harrison *v.* Morrison, 39 Minn. 319, 40 N. W. 66; Singer Mfg. Co. *v.* Potts, 59 Minn. 240, 61 N. W. 23.

Mississippi. — Smith *v.* Elder, 7 Smed. & M. 507; Wren *v.* Hoffman, 41 Miss. 616; Pack *v.* Thomas, 13 Smed. & M. 11, 51 Am. Dec. 135.

Missouri. — Cockrill *v.* Kirkpatrick, 9 Mo. 697.

New Hampshire. — Lang *v.* Johnson, 24 N. H. 302.

New York. — Gridley *v.* Dole, 4 N. Y. 486; Lewis *v.* Jones, 7 Bosw. 366; Zinsser *v.* Columbia Cab Co., 66 App. Div. 514, 73 N. Y. Supp. 287.

Ohio. — Morris *v.* Edwards, 1 Ohio 189.

Oregon. — Wilson *v.* Wilson, 26 Or. 251, 38 Pac. 185.

Tennessee. — Ellis *v.* Hamilton, 4 Sneed 512; Fields *v.* Stunston, 1 Cold. 40; Bender *v.* Montgomery, 8 Lea 586.

Texas. — Franklin *v.* Smith, 1 Posey Unrep. Cas. 229; Roundtree *v.* Gilroy, 57 Tex. 176; Davis *v.* Converse, (Tex. Civ. App.), 46 S. W. 910.

Vermont. — Gilman *v.* Moore, 14 Vt. 457.

Virginia. — Hilb *v.* Peyton, 21 Gratt. 386, 22 Gratt. 550.

62. Carlisle *v.* Davis, 7 Ala. 42.

number of dollars, notes calling for the delivery of specified articles were properly excluded from evidence, because of material variance.[63]

b. *Immaterial Variance.* — A note containing a stipulation for a specified mode of payment for the benefit of the maker, of which he neglected to avail himself, and which thereupon became absolute for the payment of money, is admissible in evidence without material variance, under a declaration describing it merely as an absolute promise to pay money without referring to the stipulation.[64]

5. Amount Payable. — A. Parol Evidence. — a. *Admissibility.* Parol evidence is admissible to show a mistake between the parties to a note or bond given in settlement,[65] to show that a claim in favor of the maker against the payee was by oral agreement to be deducted from the amount of a bill or note,[66] to show the amount of actual indebtedness upon a note held by written agreement as collateral security for balance due on settlement,[67] to show what amount or advances were secured by collateral notes,[68] to show that a note was to be held by a third person until a settlement should be had between the maker and the payee,[69] to explain a latent ambiguity in a note as to a settlement included therein,[70] to show an oral agree-

63. Phillips *v.* Dodge, 8 Ga. 51.

64. Weaver *v.* Lapsley, 42 Ala. 601, 94 Am. Dec. 671; Owen *v.* Barnum, 7 Ill. 461.

Omitted Part of Note. — Under a declaration upon an ordinary note payable in dollars, containing also a count for money had and received, omitting the words "out of any property I may possess, my body being at all times exempted from arrest." The note containing the omitted words was held admissible in evidence under either count. Chickering *v.* Greenleaf, 6 N. H. 51.

Evidence Under Money Counts. Where a note has been properly given in evidence under the money counts, proof that it was not given for money but for property or work will not defeat the action. (Hughes *v.* Wheeler, 8 Cow. [N. Y.] 77; Smith *v.* Van Loan, 16 Wend. [N. Y.] 659), except as against a surety named as such upon the note. Butler *v.* Rawson, 1 Denio (N. Y.) 105.

65. Hamilton *v.* Conyers, 28 Ga. 276; Oglesby *v.* Renwick, 26 La. Ann. 668; Tapley *v.* Herman, 95 Mo. App. 537, 69 S. W. 482; Garrett *v.* Love, 89 N. C. 205; Williams *v.* Culver, 30 Or. 375; 48 Pac. 365; Baxter *v.* Card, 59 Fed. 165.

Evidence of Computation. — Where the defendant alleged that the note in suit was given in settlement of mutual accounts, and that by mistake the amount expressed was greater than the amount due, evidence is admissible to show that a computation was subsequently made by the plaintiff in writing on the basis of the original accounts showing a less sum due than the face of the note. Low *v.* Freeman, 117 Ind. 341, 20 N. E. 242.

66. Braly *v.* Henry, 71 Cal. 481, 11 Pac. 385, 12 Pac. 623, 60 Am. Rep. 543; Bowker *v.* Johnson, 17 Mich. 42; Bohn Mfg. Co. *v.* Harrison, 13 Mont. 293, 34 Pac. 313; Bennett *v.* Tillmon, 18 Mont. 28, 44 Pac. 80; Shepperd *v.* Temple, 3 N. H. 455; Farnham *v.* Ingham, 5 Vt. 514; Noyes *v.* Hall, 28 Vt. 615. But *compare* notes 75 and 76 post and cases therein cited.

67. D. M. Osborne & Co. *v.* Stringham, 1 S. D. 406, 47 N. W. 408.

68. Bank of the University *v.* Tuck, 96 Ga. 456, 23 S. E. 467.

69. Lipscomb *v.* Lipscomb, 32 S. C. 243, 10 S. E. 929.

70. Note Upon Settlement of Partnership. — A note between partners,

ment by the maker of due bill to pay the discount on depreciated bank notes given by him and credited at par on settlement of accounts,[71] to show that a note for purchase money included illegal attorney's fees,[72] and to show an oral agreement to insert a larger amount in a note than was agreed by written contract.[73]

b. *Inadmissibility.* — Parol evidence is inadmissible to show that a bill or note was negotiated for the value expressed in marginal figures when inconsistent with the amount expressed in its body,[74] or to show that a note given absolutely to the payee was to stand in his hands merely as security for an amount to be found due upon an accounting,[75] or to show a co-temporaneous oral agreement that any sum was to be credited upon or deducted from the note.[76]

containing the words "received on settlement to the date," express a latent ambiguity, and may refer either to a settlement for the year or for the whole period of the partnership; and this ambiguity may be removed by evidence that it refers only to the last annual settlement. Clay *v.* Field, 138 U. S. 464, 11 Sup. Ct. 428.

71. Mills *v.* Geron, 22 Ala. 669.

72. Macomb *v.* Wilkinson, 83 Mich. 486, 47 N. W. 336.

73. Davidson *v.* Bodley, 27 La. Ann. 149.

74. Poorman *v.* Mills & Co., 39 Cal. 345, 2 Am. Rep. 451; Woolfolk *v.* Bank of America, 10 Bush (Ky.) 504; Smith *v.* Smith, 1 R. I. 398, 53 Am. Dec. 652.

75. Limits of Parol Evidence.— In San Jose Sav. Bank *v.* Stone, 59 Cal. 183, the court, in speaking of a note given in settlement of an account, and of the claim of the defendant that it was orally agreed that any errors there should be corrected, without regard to the amount stated in the note, and that the account should be opened and stated *de novo*, says: "There was no uncertainty as to its object or meaning and it must be presumed that it contained the entire contract between the parties. And while oral evidence was admissible to prove the consideration of the note and any errors in the account, which constituted the consideration, and thus to reduce the amount of the note so as to make the amount correspond with the balance of the account after errors in it were corrected, yet it was not admissible to prove that the note itself was not what it purported to be, or that it was not payable before suit was brought, according to its terms." In general parol evidence is not admissible to show that a note was intended not to be such, but as a mere memorandum or matter of form. Smith *v.* Burnham, 3 Sumn. 435, 22 Fed. Cas. No. 13,019; Fennell *v.* Henry, 70 Ala. 484, 45 Am. Rep. 88; Barhydt *v.* Bonnet, 55 Iowa 717, 8 N. W. 672; Perry *v.* Bigelow, 128 Mass. 129; Ives *v.* Farmer's Bank, 2 Allen (Mass.) 236; Wilson *v.* Wilson, 26 Or. 251, 38 Pac. 185; Ziegler *v.* McFarland, 1[illegible] Pa. St. 607, 23 Atl. 1045; First Nat. Bank of Nephi *v.* Foote, 12 Utah 157, 42 Pac. 205.

76. *United States.* — Wells Fargo & Co. *v.* Carr, 25 Fed. 511.

Arkansas. — Featherston *v.* Wilson, 4 Ark. 154.

Iowa. — Atherton *v.* Dearmond, 33 Iowa 353; Clute *v.* Frasier, 58 Iowa 268, 12 N. W. 327.

Maine. — Goddard *v.* Hill, 33 Me. 582.

Maryland. — Penniman *v.* Winner, 54 Md. 127.

Massachusetts. —St. Louis Perpetual Ins. Co. *v.* Homer, 9 Metc. 39; Kelley *v.* Thompson, 175 Mass. 427, 56 N. E. 713.

Minnesota. — Walters *v.* Armstrong, 5 Minn. 448; Singer Mfg. Co. *v.* Potts, 59 Minn. 240, 61 N. W. 23.

Mississippi. — O'Neal *v.* McLeod, (Miss.). 28 So. 23.

Missouri.— Higgins *v.* Cartwright, 25 Mo. App. 609.

B. Relation of Evidence to Pleading. — a. *Competency.* Evidence is competent to prove the value of a reasonable attorney fee provided for in the note, though there is no averment that an attorney was employed,[77] and under a denial of value to prove that the fee demanded is not reasonable, and that plaintiff is entitled to receive no attorney's fees.[78]

b. *Variance.* — A variance between the evidence and the pleading as to the amount stated in the note, however small, is fatal,[79] unless the complaint is amended as to the amount.[80] A variance as to attorney's fees is not material if the defendant is not misled thereby.[81] A variance not affecting the legal import of the note as to the amount, is not material.[82]

New York. — Carter *v.* Hamilton, 11 Barb. 147.

Texas. — Ablowich *v.* Greenville Nat. Bank, 22 Tex. Civ. App. 272, 54 S. W. 794; Bailey *v.* Rockwall Co. Nat. Bank, (Tex. Civ. App.), 61 S. W. 530.

Vermont. — Downs *v.* Webster, Brayt. 79.

Washington. — Catlin *v.* Harris, 7 Wash. 542, 35 Pac. 385.

Wisconsin. — Gregory *v.* Hart, 7 Wis. 532; Hubbard *v.* Marshall, 50 Wis. 322, 6 N. W. 497.

Inadmissible Evidence. — Parol evidence is inadmissible to show a contemporaneous oral agreement that a sum should be credited or indorsed on the note, or should be deducted therefrom, or to show that a mistake in settlement for which the note was given was to be corrected, nor in general to vary the amount expressed in the note. Featherston *v.* Wilson, 4 Ark. 154.

77. Harvey *v.* Baldwin, 124 Ind. 59, 26 N. E. 222; Starnes *v.* Schofield, 5 Ind. App. 4, 31 N. E. 480.

Value Not Averred. — In an action on a note providing for attorney's fees without stating any amount, the value of the attorney's services may be proved though not averred (Glenn *v.* Porter, 72 Ind. 525) within the limits of the amount claimed. Lindley *v.* Sullivan, 133 Ind. 588, 32 N. E. 738, 33 N. E. 361.

78. Prescott *v.* Grady, 91 Cal. 518, 27 Pac. 755.

Agreement of Attorney. — Evidence that plaintiff's attorney agreed to take one-fourth of the attorney's fee is admissible for the benefit of the maker. Harvey *v.* Baldwin, 124 Ind. 59, 26 N. E. 222.

79. Pilie *v.* Mollere, 2 Mart. (N. S.) (La.) 666; White *v.* Noland 3 Mart. (N. S.) (La.) 636; Bissel *v.* Drake, 19 Johns. (N. Y.) 66.

Variance From Amount Claimed. Where the complaint contains no express statement of the amount of the note, the amount must be taken to be that claimed in the complaint, and proof of a note for a different amount is a variance. Fournier *v.* Black, 32 Ala. 41.

Small Variance. — A variance of a fractional part of a cent in the description of the note between the pleading and the evidence is fatal. Spangler *v.* Pugh, 21 Ill. 85, 74 Am. Dec. 77.

Variance in Promise. — An alleged promise to pay $200 is not supported by evidence of a promise to pay $—— with marginal figure $200. Norwich Bank *v.* Hyde, 13 Conn. 279.

80. Nimmon *v.* Worthington, 1 Ind. 376; Green *v.* Jackson, 15 Me. 136; Drake *v.* Found Treasure Mining Co., 53 Fed. 474.

81. Outcalt *v.* Johnston, 9 Colo. App. 519, 49 Pac. 1058; Cummings *v.* Girton, 19 Ind. App. 248, 49 N. E. 360.

82. Glenn *v.* Porter, 72 Ind. 525.

Indorsement Not Described. — A complaint on a note, payable in a specified sum, does not misdescribe it, though the note shows an indorsement stipulating that if paid in town lots, it shall be a specified greater sum. Parker *v.* Morton, 29 Ind. 89.

Immaterial Variance. — There is

6. Interest. — A. In General. — A note the principal of which has been paid is admissible evidence in an action to recover interest thereon.[83] Evidence of payment of interest on a note and mortgage is admissible evidence of their validity.[84] A table of interest prepared by the Secretary of State of another state is not admissible evidence of the rates of interest therein.[85]

A stub from which a certificate of deposit was taken containing a memorandum of agreement to pay interest on the certificate, is admissible evidence to show such agreement.[86]

B. Parol Evidence. — Parol evidence is admissible to prove a clear mistake in the recital of the rate of interest in a note,[87] or an agreement that an increased rate of interest indorsed on the note was in consideration of an extension of time for payment of the note,[88] or that notes due at a specified time were not to bear interest after maturity,[89] or to show a parol agreement upon sufficient consideration to change the rate of interest upon a note,[90] or to allow interest on pre-payments,[91] or to pay an increased rate of interest for forbearance after maturity.[92] Parol evidence is inadmissible to show a change in the rate of interest, where the law requires a written agreement,[93] or to contradict the terms of the note,[94] or to explain a patent ambiguity as to interest.[95]

C. Relation of Evidence to Pleading. — a. *Material Variance.* A note bearing interest is inadmissible under a declaration describ-

no material variance between an averment of an unwritten authority to draw for a specified sum, and proof of written authority to draw for a blank sum (Rabaud *v.* Di Wolf, 1 Paine 580, 20 Fed. Cas. No. 11,519), nor between an alleged bill for $477.60 and one in evidence omitting the dollar mark, which is applied by legal construction (Stevens *v.* Smith, 4 Dev. [N. C.] 292), nor between a declaration for "ten hundred and fifty dollars" and proof of a note for "one thousand fifty dollars," (Salisbury *v.* Wilson, 1 App. [Ohio] 198), nor between a misdescription of a note as to its amount in the introductory part of the declaration and evidence of a note correctly described in the clause alleging the promise. White *v.* Faussett, 10 Humph. (Tenn.) 191.

83. Mensing *v.* Ayres, 2 Willson (Tex. Civ. Ct. App.) § 563.

84. Floyd Co. *v.* Morrison, 40 Iowa 188.

85. Clarke *v.* Pratt, 20 Ala. 470.

86. Thomson *v.* Beal, 48 Fed. 614.

87. Hathaway *v.* Brady, 23 Cal. 121.

88. Bradshaw *v.* Combs, 102 Ill. 428.

89. Elliott *v.* Elliott, 79 Ky. 277.

90. Hunt *v.* Hall, 37 Ala. 702.

91. Parker *v.* Moody, 58 Me. 70.

92. Draper *v.* Horton, 22 R. I. 592, 48 Atl. 945.

93. Adler *v.* Friedman, 16 Cal. 138.

94. *Illinois.* — Redden *v.* Inman, 6 Ill. App. 55.

Indiana. — Stutsman *v.* Stutsman, 3 Blackf. 231; Davis *v.* Stout, 126 Ind. 12, 25 N. E. 862.

Louisiana. — Harrod *v.* Lafarge, 12 Mart. (O. S.) 21; Bell *v.* Norwood, 7 La. (O. S.) 95; Poydras *v.* Delamare, 13 La. (O. S.) 98.

Maine. — Milliken *v.* Southgate, 26 Me. 424.

Missouri. — Koehring *v.* Muemminghoff, 61 Mo. 403, 21 Am. Rep. 402.

New York. — Read *v.* Bank of Attica, 124 N. Y. 671, 27 N. E. 250.

Washington. — Catlin *v.* Harris, 7 Wash. 542, 35 Pac. 385.

95. Griffith *v.* Furry, 30 Ill. 251, 83 Am. Dec. 185.

ing it, which makes no mention of interest,[96] and a note silent as to interest is a material variance from the note describing it as being with interest.[97]

b. *Immaterial Variance.* — A note omitting the words "per annum" is not a material variance from a declaration containing those words,[98] where it appears from all the facts that the note is the same as that declared on, a variance in the description of interest in an interrogatory in a deposition, is not sufficient to exclude the answer as evidence.[99]

7. Conditions. — A. Presumptions and Burden of Proof. — a. *Conditions in Note.* — Conditions expressed in a note are presumed to have been part of the original liability.[1] A note containing a condition for reduction for shortage in land purchase, is presumptive evidence of the indebtedness expressed on its face, and the burden is on the maker to prove such shortage.[2] An indorsement making payment of a note conditional, will be presumed, in the absence of evidence to the contrary, to have been made co-temporaneously with the note, and to be part thereof.[3]

Conditions in a note executed in a foreign state, are presumed to have been expressed with reference to the law of the state where it is payable.[4] The burden is upon the holder to prove that a condition or contingency expressed in a note or bill has taken place,[5]

96. Sawyer *v.* Patterson, 11 Ala. 523; Gragg *v.* Frye, 32 Me. 283; Coyle *v.* Gozzler, 2 Cranch C. C. 625, 6 Fed. Cas. No. 3,312; Blue *v.* Russell, 3 Cranch C. C. 102, 3 Fed. Cas. No. 1,568. See *contra* Wilson *v.* King, 1 Morris (Iowa) 106; Beach *v.* Curle, 15 Mo. 105.

97. Cooper *v.* Guy, 1 App. (Ohio) 180.

Variance in Rate.—Under a complaint describing only the note and original interest, a subsequent valid agreement for a higher rate need not be shown. Hunt *v.* Hall, 37 Ala. 702.

98. Crittenden *v.* French, 21 Ill. 598.

99. Stowell *v.* Moore, 89 Ill. 563.

1. Brown *v.* Noyes, 2 Woodb. & M. 75, 4 Fed. Cas. No. 2,023.

2. Jewett *v.* Lyon, 3 Greene (Iowa) 577.

3. *Massachusetts.* — Barnard *v.* Cushing, 4 Metc. 230, 38 Am. Dec. 362; Shaw *v.* First M. E. Soc., 8 Metc. 223.

Mississippi. — Key *v.* Cross, 23 Miss. 598; Effinger *v.* Richards, 35 Miss. 540; Bay *v.* Shrader, 56 Miss. 326.

Nebraska. — Grimison *v.* Russell, 14 Neb. 521, 16 N. W. 819, 45 Am. Rep. 126; Specht *v.* Beindorf, 56 Neb. 553, 76 N. W. 1059, 42 L. R. A. 429.

New Hampshire. — Gerrish *v.* Glines, 56 N. H. 9.

Rhode Island. — Wilson *v.* Tucker, 10 R. I. 578.

Vermont. — Fletcher *v.* Blodgett, 16 Vt. 26, 42 Am. Dec. 487.

Wisconsin. — Blake *v.* Coleman, 22 Wis. 415, 99 Am. Dec. 53.

Condition Written Upon Note. A condition written upon a note, whether indorsed thereon or written upon its margin, or beneath the note, if written at or before the time of its delivery, is deemed a substantive part of the note. Edelen *v.* Worth, 60 Mo. App. 124.

Repugnant Memorandum. — A memorandum written at the bottom of a note which is repugnant and self contradictory, is not to be deemed part of the note, and need not be set forth in a copy of it. Way *v.* Batchelder, 129 Mass. 361.

4. Farmers Trust Co. *v.* Schenuit, 83 Ill. App. 267.

5. *Alabama.* — Taylor *v.* Rhea, Minor 414.

and to show the existence of a fund out of which the instrument is made payable,[6] but it is on the maker of the note to show the happening of a condition subsequent upon which the note was not to be payable,[7] and is on the acceptor of a draft to show clearly that it was accepted conditionally.[8]

b. *Collateral Agreement.* — A note absolute in form may be legally presumed payable on condition, by the terms of a co-temporaneous written agreement, which is deemed part of the note,[9] unless

California. — Sanders *v.* Whitesides, 10 Cal. 88; Cereghino *v.* Hammer, 60 Cal. 235; McAfee *v.* Fisher, 64 Cal. 246, 30 Pac. 811.

Connecticut. — Edgerton *v.* Aspinwall, 3 Conn. 445.

Delaware. — Kennedy *v.* Murdick, 5 Harr. 263.

Georgia. — Wilson *v.* Morrison, 29 Ga. 269.

Illinois. — Stout *v.* Hill, 15 Ill. 326.

Indiana. — Low *v.* Studabaker, 110 Ind. 57, 10 N. E. 30.

Iowa. — Thompson *v.* Oliver, 18 Iowa 417.

Kansas. — Highland University Co. *v.* Long, 7 Kan. App. 173, 53 Pac. 766, Beeler *v.* Highland University Co., 8 Kan. App. 89, 54 Pac. 293.

Kentucky. — Allen *v.* Phillips, 2 Litt. 1; Hodges *v.* Holeman, 2 Dana 396; Martin *v.* Ferguson, 3 Ky. L. Rep. 445.

Louisiana. — Williams *v.* Benton, 10 La. Ann. 158; Drawn *v.* Cherry, 14 La. Ann. 694.

Michigan. — Chandler *v.* Carey, 64 Mich. 237, 31 N. W. 309.

Nebraska. — Grimison *v.* Russell, 20 Neb. 337, 30 N. W. 240; Hoagland *v.* Erck, 11 Neb. 580, 10 N. W. 498.

New Jersey. — Rice *v.* Porter, 16 N. J. Law 440.

New York. — Ingersoll *v.* Rhodes, Hill & D. Supp. 371; Work *v.* Beach, 59 Hun 625, 13 N. Y. Supp. 678. Gildersleeve *v.* Pelham & P. R. Co., 11 Daly 257.

North Carolina. — Raby *v.* Stuman, 127 N. C. 463, 37 S. E. 476.

Pennsylvania. — Patterson *v.* Juniatta Bank, 4 Watts & S. 42; Benninger *v.* Hankee, 61 Pa. St. 343.

Texas. — Rowlett *v.* Lane, 43 Tex. 274; Salinas *v.* Wright, 11 Tex. 572.

Vermont. — Henry *v.* Colman, 5 Vt. 402.

6. *Georgia.* — Wilson *v.* Morrisson, 29 Ga. 269; Marshall *v.* Clary, 44 Ga. 511.

Maine. — Head *v.* Sleeper, 20 Me. 314.

Massachusetts. — Jackman *v.* Bowker, 4 Metc. 235.

Minnesota. — Kelly *v.* Bronson, 26 Minn. 359, 4 N. W. 607.

Mississippi. — Van Vacter *v.* Flack, 1 Smed. & M. 393, 40 Am. Dec. 100.

New York. — Atkinson *v.* Manks, 1 Cow. 691; Quinn *v.* Aldrich, 70 Hun 205, 24 N. Y. Supp. 33.

Pennsylvania. — Gillespie *v.* Mather, 10 Pa. St. 28; Mason *v.* Graff, 35 Pa. St. 448.

Tennessee. — Owen *v.* Iglanor, 4 Cold. 15.

Texas. — Carlisle *v.* Hooks, 58 Tex. 420.

7. McDuffie *v.* Magoon, 26 Vt. 518.

8. Coffman *v.* Campbell & Co., 87 Ill. 98.

9. *United States.* — Thomas *v.* Page, 3 McLean 167, 23 Fed. Cas. No. 13,906.

California. — Goodwin *v.* Nickerson, 51 Cal. 166.

Connecticut. — Fellows *v.* Carpenter, Kirby 364.

Georgia. — Keaton *v.* Read, 32 Ga. 403; Marshall *v.* Cleary, 44 Ga. 511; Marietta Savings Bank *v.* Janes, 66 Ga. 286; Montgomery *v.* Hunt, 93 Ga. 438, 21 S. E. 59.

Illinois. — Davis *v.* McVickers, 11 Ill. 327.

Indiana. — Allen *v.* Nofsinger, 13 Ind. 494; Woodward *v.* Mathews, 15 Ind. 339; O'Kane *v.* Kiser 25 Ind. 168; Wood *v.* Ridgeville College, 114 Ind. 320, 16 N. E. 619; Hickman *v.* Rayl, 55 Ind. 551.

Kansas. — Round *v.* Donnel, 5 Kan. 54; Cabbell *v.* Knote, 2 Kan. App. 68, 43 Pac. 309.

it appears that the agreements are independent.[10] The burden is on the maker to show non-performance of the collateral agreement.[11]

B. Parol Evidence. — a. *Admissibility.* — Parol evidence is admissible as against the payee or holder with notice, to show an oral agreement that a delivered instrument for the payment of money was to become binding only upon a future condition or contingency which has not happened,[12] or that a note given for the price of

Kentucky. — McVicker *v.* Shropshire, 6 J. J. Marsh, 328; Davis *v.* Logan, 5 J. J. Marsh. 298.

Maine. — Davlin *v.* Hill, 11 Me. 435; McKeen *v.* Page, 18 Me. 140.

Michigan. — Rumney *v.* Coville, 51 Mich. 186, 16 N. W. 372.

New Hampshire. — Ela *v.* Kimball 30 N. H. 126; Hill *v.* Huntress, 43 N. H. 480.

New York. — Divine *v.* Divine, 58 Barb. 264; Hoag *v.* Parr, 13 Hun 95.

North Carolina. — Carrington *v.* Waff, 112 N. C. 115, 16 S. E. 1008.

Ohio. — Berry *v.* Wisdom, 3 Ohio St. 241; Serviss *v.* Stockstill, 30 Ohio St. 418; Jacobs *v.* Mitchell, 46 Ohio St. 601, 22 N. E. 768.

Pennsylvania. — Claridge *v.* Klett & Co., 15 Pa. St. 255; Reed *v.* Cossat. 153 Pa. St. 156, 25 Atl. 1074.

Texas. — Rogers *v.* Brodnax, 24 Tex. 538, 27 Tex. 238; Traders' Nat. Bank *v.* Smith, (Tex. Civ. App.), 22 S. W. 1056.

Vermont. — Goodall *v.* Rich, 13 Vt. 602.

Wisconsin. — Elmore *v.* Hoffman, 6 Wis. 68.

10. *Alabama.* — McNair *v.* Cooper, 4 Ala. 660; Comelander *v.* Bird, 11 Ala. 913; Goodwin *v.* McCoy, 13 Ala. 271.

Arkansas. — Key *v.* Henson, 17 Ark. 254.

Indiana. — Cox *v.* Wallace, 5 Blackf. 199; Robb *v.* Victory, 6 Blackf. 47; Morton *v.* Noble, 15 Ind. 508.

Iowa. — Levally *v.* Harmon, 20 Iowa 533.

Massachusetts. — Waterhouse *v.* Kendall, 11 Cush. 128; Pitkin *v.* Frink, 8 Metc. 12; Ewer *v.* Myrick. 1 Cush. 16.

Mississippi. — Gibson *v.* Newman, 1 How. 341; Leftwich *v.* Coleman, 3 How. 167.

Missouri. — Thompson *v.* Crutcher, 26 Mo. 319; Bircher *v.* Payne, 7 Mo. 462; Atwood *v.* Lewis, 6 Mo. 392.

New Hampshire. — Porter *v.* Pierce, 22 N. H. 275, 55 Am. Dec. 151; Clough *v.* Baker, 48 N. H. 254.

Oregon. — Hawley *v.* Bingham, 6 Or. 76.

11. *Alabama.* — Lockhard *v.* Avery, 8 Ala. 502; Douglass *v.* Eason, 36 Ala. 687.

California. — Haines *v.* Snedigar, 110 Cal. 18, 42 Pac. 462.

New Hampshire. — Congregational Soc. of Troy *v.* Goddard, 7 N. H. 430.

Pennsylvania. — Eckel *v.* Murphey, 15 Pa. St. 488, 53 Am. Dec. 607.

Wisconsin. — Yates *v.* Shepardson, 39 Wis. 173.

12. *United States.* — Ware *v.* Allen, 128 U. S. 590, 9 Sup. Ct. 174; Burke *v.* Dulaney, 153 U. S. 228, 14 Sup. Ct. 816; Cowen *v.* Adams, 80 Fed. 448, 78 Fed. 536, 24 C. C. A. 415.

Maryland. — Beall *v.* Poole, 27 Md. 645; Leppoc *v.* Nat. Union Bank, 32 Md. 136.

Massachusetts. — Wilson *v.* Powers, 131 Mass. 539.

Michigan. — Ferguson *v.* Davis, 65 Mich. 677, 32 N. W. 869.

Minnesota. — Westman *v.* Krumweide, 30 Minn. 313, 15 N. W. 255; Smith *v.* Mussetter, 58 Minn. 159, 59 N. W. 995.

Missouri. — Tutt *v.* Price, 7 Mo. App. 194.

New York. — Seymour *v.* Cowing, 1 Keyes 532; Brewers F. Ins. Co. *v.* Burger, 10 Hun 56; Rosenstock *v.* Montague, 28 Misc. 483, 59 N. Y. Supp. 5001, *affirming* 27 Misc. 844, 58 N. Y. Supp. 1148.

North Carolina. — Penniman *v.* Alexander, 111 N. C. 427, 16 S. E. 408.

Pennsylvania. — Elliott *v.* Adams,

property was to be returned upon the happening of a condition relating to the property,[13] or that any other oral condition on which

3 W. N. C. 44; Leary *v.* Meredith, 5 W. N. C. 37.

South Dakota. — McCormick Harvesting Machine Co. *v.* Faulkner, 7 S. D. 363, 64 N. W. 163.

Tennessee. — Bissenger *v.* Guiteman, 6 Heisk. 277.

Texas. — Proctor *v.* Evans, 1 White & W. Civ. App. § 647.

Virginia. — Solenberger *v.* Gilbert, 86 Va. 778, 11 S. E. 789.

Wisconsin.—Nutting *v.* Minnesota Fire Ins. Co., 98 Wis. 26, 73 N. W. 432.

Note for Warranted Horse. Parol evidence is admissible to show that a note for a purchased horse never became a binding contract because delivered on condition that it should be returned if the horse was not as warranted, and that it was not as warranted, but such evidence may be rebutted. Trumbull *v.* O'Hara, 71 Conn. 172, 41 Atl. 546.

Indorsed Note Delivered on Condition. — An indorser sued on a note may show by parol evidence that the indorsed note was delivered as an escrow or was delivered to the plaintiff to be held on a condition to be performed before the interest of the holder could attach. But a parol agreement that it was not to be delivered as a note indorsed until a bill of sale of a steamer was delivered by her owners to the maker and until a first lien thereon was given to the indorser, is not *per se* evidence. Ricketts *v.* Pendleton, 11 Md. 320.

Condition of Duplicate Draft. Parol evidence is admissible to show that a duplicate draft was given on condition that the drawer should not be responsible for any back laches, and that it was to take the place of the original, and create no new liability. Benton *v.* Martin, 52 N. Y. 570. The court said: "Instruments not under seal may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions, the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it or others having notice."

Condition as to Bill of Exchange. Parol evidence is admissible to show that a bill of exchange was drawn for the purpose of concealing the drawer's funds, and that it was agreed that it should take effect only in case of an attachment of the funds and that no attachment had been made. Stevens *v.* Parker, 7 Allen (Mass.) 361. See 19 *infra.*

13. Trumbull *v.* O'Hara, 71 Conn. 172, 41 Atl. 546.

Note for Price of Personal Property. — Parol evidence is admissible to show that a note given for the price of a horse was to be returned, if the horse died (Barlow *v.* Fleming, 6 Ala. 146), or if the horse was not as represented (Labbee *v.* Johnson, 66 Vt. 234, 28 Atl. 986), or to show that the horse was to be taken on probation, with the privilege of rescinding the sale and taking back the note within six months (Lyons *v.* Stills, 97 Tenn. 514, 37 S. W. 280), to show that a sewing machine for which a note was given was to be returned if it did not work well (Farar *v.* Mathews, 37 Iowa 418,) to prove the result of a test of a machine provided for in the note (Griswold *v.* Scott, 13 Ga. 210,) to prove the breach of a parol warranty of a machine (Aultman, Miller & Co. *v.* Clifford, 55 Minn. 150, 56 N. W. 593,) to show that a note for money advanced with which to buy a saloon was a mere memorandum to be returned upon a resale of the saloon to one who should give a note and chattel mortgage to the payee of the first note (Denver Brewing Co. *v.* Barets, 9 Colo. App. 341, 48 Pac. 834,) to show that a check given for the purchase of a note was to be returned, if the note could not be used by the purchaser as a set-off, Sweet *v.* Stevens, 7 R. I. 375.

Agreement for Partial Return.

an instrument was not to be payable, or was to become void, or be surrendered has taken place,[14] or that an order payable out of proceeds of sales was orally conditioned on there being a specified surplus of proceeds,[15] or that checks of a contractor for county work payable when settlement was made with the county, were orally agreed to be paid out of a fund due from the county.[16] The holder may show by parol evidence that a condition of payment has been

In an action on a note given for the purchase price of two clocks, parol evidence is admissible to show that one of the clocks was to be returned if disapproved of in support of a *pro tanto* defense or set-off to the note. Barnes & Co. *v.* Shelton, Harp. (S. C.) 33, 18 Am. Dec. 642.

Note for Price of Realty. Parol evidence is admissible to show that a conveyance for which a note was given was not intended as a sale, but that it was orally agreed that the property should be reconveyed and the note should not be paid (Schlindley *v.* Muhleiser, 45 Conn. 153,) and to show that a note for the purchase of a mine was conditioned upon an election to take the mine after prospecting it, Burke *v.* Dulaney, 153 U. S. 228, 14 Sup. Ct. 816.

14. King *v.* King, 69 Ind. 467; Adams *v.* Morgan, 150 Mass. 143, 22 N. E. 708; Juilliard *v.* Chaffee, 92 N. Y. 527; Bissinger *v.* Guiteman, 6 Heisk. (Tenn.) 277; Saunders *v.* Howe, 1 Chip. (Vt.) 363.

Condition as to Proceeds of Mill. Parol evidence is admissible to show that at time of making a note, it was orally agreed that it should be payable from the proceeds of a mill, and that if there was no proceeds it was to be returned and destroyed. Roberts *v.* Greig, 15 Colo. App. 378, 62 Pac. 574.

Note to Be Returned on Demand. Parol evidence is admissible to show that when a note was executed it was agreed that it should be returned to the maker on a certain day, if he should then demand it. McFarland *v.* Sikes, 54 Conn. 250, 7 Atl. 408.

Conditions to Note to Widow. In an action upon a note payable upon the death of a widow brought by an administrator, parol evidence is admissible to prove that the note was given upon an oral agreement that if the estimated value of one-third of the land with which the widow was endowable should be expended for her support the note should be void, and that such expenditures had been made. Crosman *v.* Fuller, 17 Pick. (Mass.) 171.

Conditional Acceptance of Draft. Where a draft was accepted to be paid after a building was completed, parol evidence is admissible to show the circumstances under which the draft was accepted, and to show an oral condition that it was not to be paid unless the drawer completed the building under his contract, and that it was not so completed. Ferguson *v.* Davis, 65 Mich. 677, 32 N. W. 892.

Return of Draft. — Parol evidence is admissible to show that a draft was to be returned to the drawer upon the happening of a contingency. Collingwood *v.* Merchants' Bank, 15 Neb. 118, 17 N. W. 359.

Note to Secure Conditions. Parol evidence is admissible to show that a note was given to secure a conditional agreement as to other notes, the condition of which had been performed. La Grande Nat. Bank *v.* Blum, 26 Or. 49, 37 Pac. 48.

Oral Condition as to Bond. Parol evidence is admissible to show that a bond was given upon an oral condition that upon the happening of a certain event, the bond was not to be payable according to the terms of it. Morrison *v.* Morrison, 6 Watts & S. (Pa.) 516; Field *v.* Biddle, 2 Dall. 171.

15. Hymers *v.* Druhe, 5 Mo. App. 580.

16. Des Moines County *v.* Hinkley, 62 Iowa 637, 17 N. W. 915.

fulfilled,[17] and that he signed an agreement not to sue on a condition which was not fulfilled.[18]

b. *Inadmissibility.* — Parol evidence is inadmissible to show that a note, bill, or other obligation for money, absolute in its terms, was to be paid only on a condition or contingency,[19] or to show that any

17. Hawes *v.* Ill. Wesleyan University, 21 Ill. App. 337.

Conditions of Escrow. — Parol evidence is admissible to show that the note was delivered in escrow, what were the conditions of the escrow, and that the conditions on which the validity of the note depends, were fulfilled. Couch *v.* Meeker, 2 Conn. 302, 7 Am. Dec. 274.

18. Holmes *v.* Crossett, 33 Vt. 116; Tutt *v.* Price, 7 Mo. App. 194.

19. *United States.* — Brown *v.* Wiley, 20 How. 442.

Alabama. — Standifer *v.* White, 9 Ala. 527; West *v.* Kelly, 19 Ala 353; Cowles *v.* Townsend, 31 Ala. 133.

Connecticut. — Converse *v.* Moulton, 2 Root 195; Burns & Smith Lumber Co. *v.* Doyle, 71 Conn. 742, 43 Atl. 483, 71 Am. St. Rep. 235.

Georgia. — Scaife *v.* Beall, 43 Ga. 333; Rodgers *v.* Rosser, 57 Ga. 319; Haley *v.* Evans, 60 Ga. 157; Dinkler *v.* Bear, 92 Ga. 432, 17 S. E. 953; Stapleton *v.* Monroe, 111 Ga. 848, 36 S. E. 428.

Illinois. — Penny *v.* Graves, 12 Ill. 287; Foy *v.* Blackstone, 31 Ill. 538, 83 Am. Dec. 246; Walker *v.* Crawford, 56 Ill. 444, 8 Am. Rep. 701; Murchie *v.* Peck, 57 Ill. App. 396, 160 Ill. 175, 43 N. E. 356; Kempshall *v.* Vedder, 79 Ill. App. 368.

Indiana. — Railsback *v.* Liberty & A. Turnpike Co., 2 Ind. 656; Swank *v.* Nichols, 20 Ind. 198; McClintic *v.* Cory, 22 Ind. 170; Swank *v.* Nichols, 24 Ind. 199.

Iowa. — Meyers *v.* Sunderland, 4 Greene 567 Atkinson *v.* Blair, 38 Iowa 156.

Kansas. — Getto *v.* Binkert, 55 Kan. 617, 40 Pac. 925.

Kentucky. — Dale *v.* Pope, 4 Litt. 166; Jaudes *v.* Fisher, 5 Ky. L. Rep. 769; Ward *v.* Jones, 11 Ky. L. Rep. 273.

Maine. — Cunningham *v.* Wardwell, 12 Me. 466; Warren Academy *v.* Starrett, 15 Me. 443; Bryant *v.* Mansfield, 22 Me. 360; Boody *v.* McKenny, 23 Me. 517.

Maryland. — McSherry *v.* Brooks, 46 Md. 103.

Massachusetts. — Adams *v.* Wilson, 12 Metc. 138, 45 Am. Dec. 240; Underwood *v.* Simonds, 12 Metc. 275; Tower *v.* Richardson, 6 Allen 351; Wooley *v.* Cobb, 165 Mass. 503, 43 N. E. 497.

Michigan. — Hyde *v.* Tenwinkel, 26 Mich. 93; Kelsey *v.* Chamberlain, 47 Mich. 241, 10 N. W. 355; Phelps *v.* Abbott, 114 Mich. 88, 72 N. W. 3; Mason & Hamlin Co. *v.* Gage, 119 Mich. 361, 78 N. W. 130.

Minnesota. — Huey *v.* Pinny, 5 Minn. 310; Schurmeier *v.* Johnson, 10 Minn. 379; Esch *v.* Hardy, 22 Minn. 65; Curtice *v.* Hokanson, 38 Minn. 510, 38 N. W. 694; Northern Trust Co. *v.* Hiltgen, 62 Minn. 361, 64 N. W. 909.

Missouri. — Jones *v.* Jeffries, 17 Mo. 577; Smith *v.* Thomas, 29 Mo. 307; Massmann *v.* Holscher, 70 Mo. 87; Jones *v.* Shaw, 67 Mo. 667; Houck *v.* Frisbee, 66 Mo. App. 16; Trustees of Christian University *v.* Hoffman, 95 Mo. App. 488, 69 S. W. 474.

North Carolina.— Geddy *v.* Stainback, 1 Dev. & B. Eq. 475.

New Jersey. — Meyer *v.* Beardsley, 30 N. J. Law 236.

New York. — Erwin *v.* Saunders, 1 Cow. 249; Pain *v.* Ladue, 1 Hill 116; Block *v.* Stevens, 76 N. Y. Supp. 213.

Ohio. — Holzworth *v.* Koch, 26 Ohio St. 33; Beecher *v.* Dunlap, 52 Ohio St. 64, 38 N. E. 795; Harley *v.* Weber, 2 Ohio C. C. 57.

Pennsylvania. — Fulton *v.* Hood, 34 Pa. St. 365, 75 Am. Dec. 664; Hacker *v.* National Oil Refining Co., 73 Pa. St. 93; Phillips *v.* Meily, 106 Pa. St. 536; Spanlove *v.* Westrup, 1 W. N. C. 156; Rodgers *v.* Donovan, 36 Leg. Int. 156; Dyott *v.* Williams, 21 W. N. C. 226.

obligor was not to be held liable upon the instrument,[20] or that the liability of an obligor was to cease upon the happening of a con-

South Carolina. — Harris *v.* Caston, 2 Bail. Law 342.

Tennessee. — Williams *v.* Terrell. 7 Humph. 551.

Texas. — Bedwell *v.* Thompson, 25 Tex. Sup. 245; Floyd *v.* Brawner, 1 White & W. Civ. Cas. Ct. App. § 135.

Vermont. — Hatch *v.* Hyde, 14 Vt. 25, 39 Am. Dec. 203.

Virginia. — Watson *v.* Hurt, 6 Gratt. 633.

Wisconsin. — Foster *v.* Clifford, 44 Wis. 569, 28 Am. R. 603; Wayland University *v.* Boorman, 56 Wis. 657, 14 N. W. 819.

Condition of Payment for Land. An oral agreement contemporaneous with a note that if certain land was not paid for, the note though payable absolutely at a time certain, was not to be paid, cannot be shown by parol evidence to defeat a recovery. Gliddens *v.* Harrison, 59 Ala. 481.

A parol agreement that the note was not to be operative or collected until certain other securities for the same debt had been exhausted, is not admissible. Moore *v.* Prussing, 62 Ill. App. 96; Fisher *v.* Briscoe, 10 Mont. 124, 25 Pac. 30.

Note of Executor. — Parol evidence is not admissible to show that a note given by an executor for medical services rendered to the testator during his last illness, was orally conditional in the allowance of a claim therefor by the probate court. McGrath *v.* Barnes, 13 S. C. 328, 36 Am. Rep. 687.

See 12 *supra.*

20. *United States.* — Armstrong *v.* Scott, 36 Fed. 63; Burnes *v.* Scott, 117 U. S. 582.

Alabama. — Bomar *v.* Rosser, 131 Ala. 215, 31 So. 430.

Arizona. — Stewart *v.* Albuquerque Nat. Bank, (Ariz.), 30 Pac. 303.

California. — Leonard *v.* Miner, 120 Cal. 403, 52 Pac. 655.

District of Columbia. — Randle *v.* Davis Coal & Coke Co., 15 App. D. C. 357.

Georgia. — Dendy *v.* Gamble, 59 Ga. 434; Hirsch *v.* Oliver, 91 Ga. 554, 18 S. E. 354.

Illinois. — Wood *v.* Surrells, 89 Ill. 107; Bright *v.* Kenefick, 94 Ill. App. 137.

Indiana. — Withrow *v.* Wiley, 3 Ind. 379.

Iowa. — Atkinson *v.* Blair, 38 Iowa 156; Altman *v.* Anton, 91 Iowa, 612, 60 N. W. 191; Farmers' Sav. Bank of George *v.* Wilka, 102 Iowa 315, 71 N. W. 200.

Kansas. — Dominion Nat. Bank of Bristol *v.* Manning, 60 Kan. 729, 57 Pac. 949.

Kentucky. — Jackson *v.* Jackson, 12 Ky. L. Rep. 388.

Maine. — Fairfield *v.* Hancock, 34 Me. 93.

Massachusetts. — Davis *v.* Randall, 115 Mass. 547, 15 Am. Rep. 146; Barnstable Sav. Bank *v.* Ballou, 119 Mass. 487; Henry Wood's Sons Co. *v.* Schaefer, 173 Mass. 443, 53 N. E. 881.

Michigan. — Gumz *v.* Giegling, 108 Mich. 295, 66 N. W. 48.

Minnesota. — Cowel *v.* Anderson, 33 Minn. 374, 23 N. W. 542.

Missouri. — Woodward *v.* McGaugh, 8 Mo. 161; Barnard State Bank *v.* Fesler, 89 Mo. App. 217.

New Hampshire. — True *v.* Shepard, 51 N. H. 501.

New Jersey. — Chetwood *v.* Britain, 2 N. J. Eq. 438, 4 N. J. Eq. 334, 5 N. J. Eq. 628; Kean *v.* Davis, 20 N. J. Law 425; Wright *v.* Remington, 41 N. J. Law 48, 32 Am. Rep. 180; Remington *v.* Wright, 43 N. J. Law 451.

Ohio. — Cummings *v.* Kent, 44 Ohio St. 92, 4 N. E. 710, 58 Am. Rep. 796; Lillie *v.* Bates, 2 Ohio C. C. 54.

Oregon. — Portland Nat. Bank *v.* Scott, 20 Or. 421, 26 Pac. 276.

Pennsylvania. — Dickson *v.* Tunstall, 3 C. P. 128; Heydt *v.* Frey, (Pa.), 13 Atl. 475; Superior Nat. Bank *v.* Stadelman, 153 Pa. St. 634, 26 Atl. 201, 32 W. N. C. 143; Ziegler *v.* McFarland, 147 Pa. St. 607, 23 Atl. 1045.

South Carolina. — McClanaghan *v.* Hines, 2 Strob. Law. 12[illegible] Smith *v.* Brabham, 48 S. C. 337, 26 S. E. 651.

Texas. — Geo. D. Barnard & Co.

dition,[21] or that the instrument was to be payable only out of a particular contingent fund.[22]

v. Robertson, (Tex. Civ. App.), 29 S. W. 697.

Utah. — First Nat. Bank of Nephi *v.* Foote, 12 Utah 157, 42 Pac. 205.

Washington. — Tacoma Mill Co. *v.* Sherwood, 11 Wash. 492, 39 Pac. 977; Bryan *v.* Duff, 12 Wash. 233, 40 Pac. 936; Hemrich *v.* Wist, 19 Wash. 516, 53 Pac. 710.

Wisconsin. — Gillman *v.* Henry, 53 Wis. 465, 10 N. W. 692.

Limitation of Liability. — Parol evidence is not admissible to show an agreement that interest only shall be paid and not the principal, (True *v.* Shepard, 51 N. H. 501; Heydt *v.* Frey, [Pa.], 13 Atl. 475), or to limit in any manner the liability of the obligor (May *v.* May, 36 Ill. App. 77; Smith *v.* Thomas, 29 Mo. 307; Ewing *v.* Clark, 76 Mo. 545; Weare *v.* Sawyer, 44 N. H. 198; Prosser *v.* Luqueer, 4 Hill [N. Y.] 420, 40 Am. Dec. 288; Norton *v.* Coons, 6 N. Y. 33; Gillmann *v.* Henry, 53 Wis. 465, 10 N. W. 692,) or to show an agreement to look only to a third person for payment. Lillie *v.* Bates, 3 Ohio C. C. 94; Portland Nat. Bank *v.* Scott, 20 Or. 421, 26 Pac. 276.

21. *Connecticut.*— Osborne *v.* Taylor, 58 Conn. 439, 20 Atl. 605.

District of Columbia. — Linville *v.* Holden, 2 McArthur 329.

Georgia. — Jones *v.* Smith, 64 Ga. 711; Lunsford *v.* Malsby, 101 Ga. 39, 28 S. E. 496.

Illinois. — Harris *v.* Galbraith, 43 Ill. 309; May *v.* May, 36 Ill. App. 77.

Iowa. — Farmer *v.* Perry, 70 Iowa 358, 30 N. W. 752.

Kansas. — Thisler *v.* Mackey (Kan.), 70 Pac. 334.

Kentucky. — Dale *v.* Pope, 4 Litt. 166; Moore *v.* Parker, 15 Ky. L. Rep. 125.

Louisiana. — Barthet *v.* Estebene, 5 La. Ann. 315.

Maine. — Sears *v.* Wright, 24 Me. 278.

Massachusetts.—Hodgkins *v.* Moulton, 100 Mass. 309.

Michigan. — McEwan *v.* Ortman, 34 Mich. 325.

Nebraska. — Western Mfg. Co. *v.* Rogers, 54 Neb. 456, 74 N. W. 849.

New York. — Ely *v.* Kilborn, 5 Denio 514; Jamestown Business College Assn. *v.* Allen, 172 N. Y. 291, 64 N. E. 952.

Pennsylvania. — Hendrickson *v.* Evans, 25 Pa. St. 441.

Texas. — C. Aultman & Co. *v.* McKinney, (Tex. Civ. App.), 26 S. W. 267.

Vermont. — Isaacs *v.* Elkins, 11 Vt. 679.

Washington. — Gurney *v.* Morrison, 12 Wash. 456, 41 Pac. 192.

Liability Upon Bonds. — Parol evidence is not admissible to show that a bond was to be void, in case of the execution of a new bond, (Jones *v.* Smith, 64 Ga. 711; Police Jury *v.* Haw, 2 La. [O. S.] 41, 20 Am. Dec. 294,) or in case t obligee's wife should convey land to a third person (Hendrickson *v.* Evans, 25 Pa. St. 441,) or to show that a bond expressing on its face that it was binding on such signer was to be void, if all the stockholders of a corporation did not sign it. Black *v.* Shreve, 13 N. J. Eq. 455.

22. Stewart *v.* Albuquerque Nat. Bank, (Ariz.), 30 Pac. 303; Bradford Investment Co. *v.* Joost, 117 Cal. 204, 48 Pac. 1083; Perry *v.* Bigelow, 128 Mass. 129; Harrison *v.* Morrison, 39 Minn. 319, 40 N. W. 66; Franklin *v.* Smith, 1 Posey Unrep. Cas. (Tex. 229.

Proceeds of Sales. — That such a note was to be paid only out of the proceeds of sales of personal property, cannot be proved by parol evidence. Guy *v.* Bibend, 41 Cal. 322, Murchie *v.* Peck, 160 Ill. 175, 43 N. E. 356; De Long *v.* Lee, 73 Iowa 53, 34 N. W. 613; Sears *v.* Wright, 24 Me. 278.

Other Contingent Funds. — Parol evidence cannot be received to show that a note by a trustee is payable only out of trust funds, (Conner *v.* Clark, 12 Cal. 168, 73 Am. Dec. 529), or that a note by a guardian is payable only out of the assets of his ward (Wren *v.* Hoffman, 41 Miss. 616,) or that an absolute note is payable only out of dividends from stock (Mumford *v.* Tolman, 54 Ill. App.

C. Other Evidence. — A written co-temporaneous agreement in writing showing the conditions upon which a note or other obligation for money was given, is admissible in evidence, as being part of the same contract.[23] An order for a specific sum payable out of a particular fund is *prima facie,* but not conclusive, evidence of a debt of the drawer to the payee.[24]

B. Parol Evidence. — Parol evidence is admissible to show an agreement between the parties that a bill given by one to the other should not be negotiated, though negotiable in form;[25] but parol evidence is inadmissible in an action by an indorsee of a note which is negotiable in form, against the maker to show an agreement between him and the payee that the note was not to be negotiated,[26] notwithstanding the indorsee may have taken with notice of the oral agreement.[27]

C. Relation of Evidence to Pleading. — Where the statute makes notes negotiable, though containing no words of negotiability, evidence of a note containing negotiable words is not material variance from a declaration omitting them.[28] In an action by the payee,

471, 157 Ill. 258, 41 N. E. 617,) or only out of commissions to the payee as agent of the maker (Van Vechten *v.* Smith, 59 Iowa 173, 13 N. W. 61,) or only out of moneys expected to be received by the payee for the maker, and not otherwise, (Currier *v.* Hale, 8 Allen [Mass.] 47,) or only out of the proceeds of an assignment for benefit of creditors (Harrison *v.* Morrison, 39 Minn. 319, 40 N. W. 66,) or only of the rents, issues and profits of leasehold property, (Lewis *v.* Jones, 7 Bosw. [N. Y.] 366,) or only out of money realized within a given time from property purchased (Beecher *v.* Dunlap, 52 Ohio St. 61, 38 N. E. 795,) or out of money realized from a business venture (Wilson *v.* Wilson, 26 Or. 251, 38 Pac. 185,) or only out of the profits of a partnership (Lee *v.* Longbottom, 173 Pa. St. 408, 34 Atl. 436,) or only out of money realized from a particular source. Am. Bapt. Pub. Soc. *v.* Erb., 44 Leg. Int. 144.

23. Cuthbert *v.* Bowie, 10 Ala. 163; Munro *v.* King, 3 Col. 238; Elmore *v.* Higgins, 20 Iowa 250; Muzzy *v.* Knight, 8 Kan. 453; Barnard *v.* Cushing, 4 Metc. (Mass.) 230, 38 Am. Dec. 362; Shaw *v.* First M. E. Soc. 8 Metc. (Mass.) 223; Effinger *v.* Richards, 35 Miss. 540; Gerrish *v.* Glines, 50 N. H. 9; Wilson *v.* Tucker, 10 R. I. 578; Fletcher *v.* Blodgett, 16 Vt. 26, 42 Am. Dec. 487.

Letters Containing Part of Contract. — Letters written in connection with the making of a note, and containing part of the contract, are admissible in a suit between the maker and one who took the note after maturity. Marietta Sav. Bank *v.* Janes, 66 Ga. 286.

Contract Part of Note. — Where at the time of the execution of a note, a contract in writing was made between the payor and payee upon a separate piece of paper which describes the note, and clearly refers to it, the note is to be used in connection with the contract as though it had been incorporated in it; and in an action on the note by the payee, the maker may prove the contract, and that the payee has broken the condition of the contract. Goodwin *v.* Nickerson, 51 Cal. 166.

24. Curle *v.* Beers, 3 J. J. Marsh. (Ky.) 170.

25. Robertson *v.* Nott, 2 Mart. (N. S.) (La.) 122, 3 Mart. (N. S.) 268.

26. McSherry *v.* Brooks, 46 Md. 103; Waddle *v.* Owen, 43 Neb. 480, 61 N. W. 731; Heist *v.* Hart, 73 Pa. St. 286; Knox *v.* Clifford, 38 Wis. 651, 20 Am. Rep. 28.

27. Heist *v.* Hart, 73 Pa. St. 286.

28. Thackaray *v.* Hansen, 1 Colo. 365; Sappington *v.* Pulliam, 4 Ill. 385; Crittenden *v.* French, 21 Ill. 598.

Rule in Missouri. — In Missouri,

under averment of a note payable to the plaintiff, a note containing negotiable words is not a material variance.[29] Evidence is admissible of a non-negotiable note, notwithstanding it was alleged to be negotiable.[30]

8. Words of Promise. — A. PLEADING AND PROOF. — In a suit on a due-bill which is set out *verbatim* in the complaint no express promise need be averred or proved.[31] A due-bill may be received in evidence, when declared upon as a promissory note.[32]

II. PARTIES.

1. Makers. — A. PRESUMPTIONS AND BURDEN OF PROOF. — a. *In General.* — The character in which parties have signed a note or bill is presumed to have been correctly exhibited by it, until the contrary is proved.[33] Where the name of the maker is the same as that of the payee, it will be presumed in favor of an assignee that they were different persons.[34] The mere fact that the same name appears as that of a maker and an indorser does not raise a presumption that they are the same person.[35] The burden is upon the plaintiff to show that the note declared on is the note of the defendant.[36]

where the complaint on a promissory note is silent as to negotiability, it is held that proof of negotiability under the statute is not a material variance. Beach *v.* Curle, 15 Mo. 105.

29. Whitney *v.* Whitney, Quincy (Mass.) 117.

Action by Indorsee. — It is said in Fay *v.* Goulding, 10 Pick. (Mass.) 122, that "if the plaintiff were an indorsee, it would have been necessary to allege that the note was payable to the payee or his order." But in Texas, it is held that in an action by an indorsee of the payee, where the note is merely described as having been made to the payee, evidence that it was made to the payee "or bearer," was not a material variance. Mason *v.* Kleberg, 4 Tex. 85.

Misdescription of Note Payable to Plaintiff. — In Missouri it is held that a variance between an allegation that the note was payable to plaintiff "or order," and evidence that it was payable to plaintiff "or bearer," is not material. Barrows *v.* Million, 43 Mo. App. 79.

30. Harrison *v.* Weaver, 2 Port. (Ala.) 542; Pleasant Hill Bank *v.* Wills, 79 Mo. 275.

Contra. — But it is held *contra* in the Circuit Court of the United States for the District of Columbia, that a note payable to plaintiff merely will not support an allegation of a note payable to plaintiff or order Carrington *v.* Ford, 4 Cranch C. C. 231, 5 Fed. Cas. No. 2,249.

31. Noonan *v.* Ilsley, 21 Wis. 140.

32. Johnson *v.* Johnson, Minor (Ala.) 263; Smith *v.* Allen, 5 Day (Conn.) 337.

33. Lord *v.* Moody, 41 Me. 127; Brunswick-Balke-Collender Co. *v.* Boutell, 45 Minn. 21, 47 N. W. 261.

34. Cooper *v.* Poston, 1 Duval (Ky.) 92, 85 Am. Dec. 610.

35. Curry *v.* Bank of Mobile, 8 Port. (Ala.) 360.

Accommodation Paper. — Paper drawn to the maker's own order, and bearing the indorsement of another person, which is presented by the maker for discount, raises a presumption that the indorsement was for the maker's accommodation. Hendrie *v.* Berkowitz, 37 Cal. 113, 99 Am. Dec. 251; Bloom *v.* Helm, 53 Miss. 21; Stall *v.* Catskill Bank, 18 Wend. 466; Erwin *v.* Shaffer, 9 Ohio St. 43, 72 Am. Dec. 613; Bowman *v.* Cecil Bank, 3 Grant's Cas. 33; Overton *v.* Hardin, 6 Cold. (Tenn.) 375; Lemoine *v.* Bank of North America, 3 Dill. 44, 15 Fed. Cas. No. 8,240.

36. Simpson *v.* Davis, 119 Mass. 269, 20 Am. Rep. 324; Giesson *v.* Giesson, 1 Code Rep. (N. S.) 414.

b. *Representative Capacity.* — It is presumed in the absence of evidence to the contrary that the signer contracted as principal debtor and not in a representative capacity, where the note or bill is signed by a person designating himself after his signature, as an executor or administrator;[37] in like manner courts have so held when

37. *Alabama.* — Kirkman *v.* Benham, 28 Ala. 501; Christian *v.* Morris, 50 Ala. 585.
Florida. — Higgins *v.* Driggs, 21 Fla. 103.
Georgia. — Harrison *v.* McClelland, 57 Ga. 531.
Illinois.—Wisdom *v.* Becker, 52 Ill. 342.
Indiana. — Carter *v.* Thomas, 3 Ind. 213.
Iowa. — Tryon *v.* Oxley, 3 Greene 289; Winter *v.* Hite, 3 Iowa 142.
Kansas. — Hostetter *v.* Hoke, 17 Kan. 81.
Kentucky. — Ellis *v.* Merriman, 5 B. Mon. 296.
Louisiana. — Gillet *v.* Rachal, 9 Rob. 276; Livingston *v.* Gaussen, 21 La. Ann. 286, 99 Am. Dec. 731; Carroll *v.* Davidson, 23 La. Ann. 428.
Maine. — White *v.* Thompson, 79 Me. 207, 9 Atl. 118.
Minnesota. — Germania Bank *v.* Minchaud, 62 Minn. 459, 65 N. W. 70, 30 L. R. A. 186.
Mississippi. — Steele *v.* McDowell, 9 Smed. & M. 193; Yerger *v.* Foote, 48 Miss. 62.
Missouri. — Studebaker Bros. Mfg. Co. *v.* Montgomery, 74 Mo. 101; Stirling *v.* Winter, 80 Mo. 141.
Montana. — First Nat. Bank *v.* Collins, 17 Mont. 433, 43 Pac. 499.
New Jersey. — Hellier *v.* Lord, 55 N. J. Law 367, 26 Atl. 986.
New York. — Laird *v.* Arnold, 25 Hun 4; Schmittler *v.* Simon, 114 N. Y. 176, 21 N. E. 162, 11 Am. St. Rep. 621.
Pennsylvania. — Tassey *v.* Church, 4 Watts & S. 346.
Tennessee. — East Tenn. Iron Mfg. Co. *v.* Gaskell, 2 Lea 742.
Texas. — Gregory *v.* Leigh, 33 Tex. 813.

Note Payable From Estate. — A note given by administrators toward payment of a debt of the deceased is presumed collectible from the assets of the estate, unless some good cause is shown for fixing an individual liability upon the administrators. Grimes *v.* Blake, 16 Ind. 160; Vogel *v.* O'Toole, 2 Ind. App. 196, 28 N. E. 209; Germania Bank *v.* Michaud, 62 Minn. 459, 65 N. W. 70, 30 L. R. A. 186; Byrd *v.* Holloway, 6 Smed. & M. (Miss.) 199; Bank of Troy *v.* Topping, 9 Wend. (N. Y.) 273.

Presumption of Assets. — It is presumed that the executor or administrator received assets sufficient to justify the note, and that he would reimburse himself out of the assets. Thompson *v.* Maugh, 3 Greene (Iowa) 342; Boyd *v.* Johnston, 89 Tenn. 284, 14 S. W. 804.

Liability of Estate. — The estate is liable for the consideration of a note given for payment of its debt by an administrator. Dunne *v.* Deery, 40 Iowa 251.

Reduction Upon Note. — An administratrix giving a note signed as such, for a claim against the estate, may show that the assets received were less than the indebtedness of the decedent, in order to reduce her liability on the note, unless some other consideration is shown for the note. Boyd *v.* Johnston, 89 Tenn. 284, 14 S. W. 804.

Burden of Proof. — The burden is on the representative to show that the note was without consideration as his individual contract, and that the payee agreed to look to the estate for payment. Rittenhouse *v.* Ammerman, 64 Mo. 197, 27 Am. Rep. 215.

Evidence of Official Capacity. In an action on a bill accepted by an executor, evidence is admissible to show that by the addition of the word "executor," all the parties, including the plaintiff, understood that the defendant bound himself only in his official capacity. Schmittler *v.* Simon, 114 N. Y. 176, 21 N. E. 162, 11 Am. St. Rep. 621. Where an administrator liquidates a debt due by his intestate on an open account by giving his promissory note therefor, and signing it in his representative character, the holder may sue the administrator in his official capacity, provided he avers

the party signed as guardian,[38] or as trustee or trustees;[39] so also

and proves the account for which the note was given. Pool *v.* Hines, 52 Ga. 500. Although an instrument signed by executors in settling transactions between their testator and a third person implies a promise to pay the ascertained balance; it may be shown by the executors that they derived no personal benefit to defeat personal liability for the amount. Hollenback *v.* Clapp, 103 Pa. St. 60. An executrix is not personally liable on a note executed in her representative capacity wherein the body of the note it is stated that she does not execute it personally. Morehead Banking Co. *v.* Morehead, 116 N. C. 413, 21 S. E. 191. The signature of an administrator as such to a note given for corn furnished to the estate to sustain live stock belonging thereto sufficiently appears to be for a debt of the estate. Jordan *v.* Brown, 72 Ga. 495.

38. Wood *v.* Truax, 39 Mich. 628; Robertson *v.* Banks, 1 Smed. & M. (Miss.) 666.

Indemnity From Estate of Ward. Though the ward is not bound by the negotiable note of the guardian, yet if it was given for the benefit of the ward, the maker may indemnify himself out of the estate. Thatcher *v.* Dinsmore, 5 Mass. 299; Forster *v.* Fuller, 6 Mass. 58, 4 Am. Dec. 87; Gibson *v.* Irby, 17 Tex. 173. But in the absence of proof either of judicial authority to make the note, or that its consideration inured to their benefit they cannot be held by the note of their tutor in his official capacity. Succession of Johnson, 4 La. Ann. 253.

Official Capacity of Guardian. Evidence is admissible to show that a note given by a former tutor of a ward, in his own name, was in fact given in his capacity of guardian, and that its consideration was a debt due from the estate of the ward, in order to bind a subsequently appointed tutor for its payment. Lenard *v.* Hudson, 12 La. Ann. 840.

39. *California.* — Conner *v.* Clark, 12 Cal. 168, 73 Am. Dec. 529.

Illinois. — Powers *v.* Briggs, 79 Ill. 493; Burlingame *v.* Brewster, 79 Ill. 515, 22 Am. Rep. 127; Trustees of Schools of Cahokia *v.* Rutenberg, 88 Ill. 219.

Indiana. — Congressional Twp. No. 11 *v.* Weir, 9 Ind. 224; Hays *v.* Crutcher, 54 Ind. 260; Hayes *v.* Matthews, 63 Ind. 412, 30 Am. Rep. 220; Hayes *v.* Brubaker, 65 Ind. 27; Williams *v.* Second Nat. Bank, 83 Ind. 237; McClellan *v.* Robe, 93 Ind. 298.

Iowa. — Coburn *v.* Omega Lodge, 71 Iowa 581, 32 N. W. 513.

Maine. — Chick *v.* Trevett, 20 Me. 462, 37 Am. Dec. 68; McKenney *v.* Bowie, 94 Me. 397, 47 Atl. 918.

Massachusetts. — Fisk *v.* Eldridge, 12 Gray 474.

Michigan. — Tilden *v.* Barnard, 43 Mich. 376, 5 N. W. 420, 38 Am. Rep. 197.

Minnesota. — Fowler *v.* Atkinson, 6 Minn. 412; Bingham *v.* Stewart, 13 Minn. 106.

Missouri. — Webster *v.* Switzer, 15 Mo. App. 346.

New York. — Brockway *v.* Allen, 17 Wend. 40.

Ohio. — Am. Ins. Co. *v.* Sorter, 4 Ohio Dec. 226.

Oregon. — Ogden City St. R. Co. *v.* Wright, 31 Or. 150, 49 Pac. 975.

Texas. — Traynham *v.* Jackson, 15 Tex. 170.

Wisconsin. — Rupert *v.* Madden, 1 Chand. 146.

Evidence of Trust Capacity. The presumption of the personal liability of trustees who designate themselves as such after their signature may be rebutted by evidence that the note was in fact given by them as trustees of a church and society, for an indebtedness due therefrom. Brockway *v.* Allen, 17 Wend. 40. Where the designation after the signature was that of trustees of a particular church, evidence may be received to show that the note was executed on behalf of the church as against an assignee of the note. Hood *v.* Hallenback, 7 Hun (N. Y.) 362. A note signed "A trustee for B," may be shown to have been known to the payee to have been made and negotiated for the benefit of the trust estate. Printup *v.* Trammel, 25 Ga. 240. A note by school trustees, with their official designation appended to their signatures may be shown to have

has it been held when the party has signed as receiver,[40] or as agent,[41] or as officer or officers of a corporation.[42]

been upon a consideration moving to the use and benefit of the school corporation of which they are trustees. Town of Montinello *v.* Kendall, 72 Ind. 91, 37 Am. Rep. 139. Where a note was given for land purchased by a community of persons, which transacted its business through a trustee, a note signed by him individually may be shown to have been given in a trust capacity. Pease *v.* Pease, 35 Conn. 131, 95 Am. Dec. 225. Where the promise is that of trustees, but the names are signed individually, evidence is admissible to show the intention of the signers to act in a trust capacity. Cleaveland *v.* Stewart, 3 Kelly (Ga.) 283; Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502; Traynham *v.* Jackson, 15 Tex. 170.

40. Towne *v.* Rice, 122 Mass. 67.

41. *Alabama.* — May *v.* Kelly, 27 Ala. 497.

Arkansas. — Anderson *v.* Pearce, 36 Ark. 293, 38 Am. Rep. 39.

California. — Sayre *v.* Nichols, 5 Cal. 487; Zeigler *v.* Wells Fargo & Co., 28 Cal. 264.

Colorado. — Tannatt *v.* Rocky Mountain Nat. Bank, 1 Colo. 278.

Georgia. — Bedell *v.* Scarlett, 75 Ga. 56; Graham *v.* Campbell, 56 Ga. 258.

Illinois. — Bickford *v.* First Nat. Bank, 42 Ill. 238; Haines *v.* Nance, 52 Ill. App. 406.

Indiana. — Kenyon *v.* Williams, 19 Ind. 44; Kendall *v.* Morton, 21 Ind. 205.

Iowa. — Am. Ins. Co. *v.* Stratton, 59 Iowa 696, 13 N. W. 763.

Louisiana. — Paillette *v.* Carr, 3 Mart. (O. S.) 489; Cooley *v.* Esteban, 26 La. Ann. 515.

Maine. — Sturdivant *v.* Hull, 59 Me. 172, 8 Am. Rep. 409.

Massachusetts. — Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150; Bedford Commercial Ins. Co. *v.* Covell, 8 Metc. 442; Williams *v.* Robbins, 16 Gray 77, 77 Am. Dec. 396; Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101.

Minnesota. — Fowler *v.* Atkinson, 6 Minn. 412.

New York. — Pentz *v.* Stanton, 10 Wend. 271; Cortland Wagon Co. *v.* Lynch, 82 Hun 173, 31 N. Y. Supp. 325.

Ohio. — Andenton *v.* Shoup, 17 Ohio St. 125; Bank *v.* Cook, 38 Ohio St. 442.

Pennsylvania. — Frazer *v.* Shelley, 6 Phila. 429.

Rhode Island. — Manufacturers' & Merchants' Bank *v.* Follett, 11 R. I. 92, 23 Am. Rep. 418.

Texas. — Syndor *v.* Hurd, 8 Tex. 98; Ezell *v.* Edwards, 2 Willson Civ. Cas. Ct. App. § 767.

Evidence of Agency. — Where the drawer of a draft signs it as "A, agent," evidence is admissible as between the original parties to remove the doubt as to whom the credit was given. Dessau *v.* Bours, 1 McAll. 20, 7 Fed. Cas. No. 3,825; La Salle Nat. Bank *v.* Tolu Rock & Rye Co., 14 Ill. App. 141.

Evidence is admissible to remove a doubt as to whether the party signing a note acted for himself or as the agent of another. Lazarus *v.* Shearer, 2 Ala. 718; Deshler *v.* Hodges, 3 Ala. 509.

Evidence is admissible to show agency in support of an action in equity against the principal upon a note signed "Agt." after the signature. Kenyon *v.* Williams, 19 Ind. 44.

Where the maker of a note affixes to his signature the word "Agt." it may be shown as between the original parties that it was executed in a representative capacity and was so understood by the payee. Keidan *v.* Winegar, 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705.

42. *Alabama.* — Drake *v.* Flewellen & Co., 33 Ala. 106.

California. — Chamberlain *v.* Pac. Woolgrowing Co., 54 Cal. 103; Hobson *v.* Hassett, 76 Cal. 203, 18 Pac. 320, 9 Am. St. Rep. 193; San Bernardino Nat. Bank *v.* Anderson, (Cal.), 32 Pac. 168.

Illinois. — Night Hawks Burlesque Co. *v.* Louisiana E. & S. L. Cons. R. R. Co., 40 Ill. App. 40; Williams *v.* Miami Powder Co., 36 Ill. App. 107;

McNeil *v.* Shober & Carqueville Lith. Co., 141 Ill. 238, 33 N. E. 31.

Iowa. — Day *v.* Ramsdell, 90 Iowa 731, 52 N. W. 208, 57 N. W. 630.

Kentucky. — Burbank *v.* Posey, 7 Bush 372.

Maine. — Rendell *v.* Harriman, 75 Me. 497, 46 Am. Rep. 421; Mellen *v.* Moore, 68 Me. 390, 28 Am. Rep. 77; McClure *v.* Livermore, 78 Me. 390, 6 Atl. 11.

Maryland. — Sumwalt *v.* Ridgely, 20 Md. 107.

Massachusetts. — Davis *v.* England, 141 Mass. 587, 6 N. E. 731.

Minnesota. — Brunswick-Balke-Collender Co. *v.* Boutell, 45 Minn. 21, 47 N. W. 261.

New Jersey. — Kean *v.* Davis, 21 N. J. Law 683, 47 Am. Dec. 182.

New York. — Haight *v.* Naylor, 5 Daly 219; Barker *v.* Mechanic Fire Ins. Co., 3 Wend. 94, 20 Am. Dec. 664; Bruce *v.* Lord, 1 Hilt. 247.

Ohio. — Robinson *v.* Kanawha Val. Bank, 44 Ohio St. 441, 8 N. E. 583, 58 Am. Rep. 829; Eells *v.* Shea, 20 Ohio Cr. Ct. Rep. 527.

West Virginia. — Scott *v.* Baker, 3 W. Va. 285.

Burden of Proof. — Notes signed by the president of a corporation, secured by shares of its stock, are presumed to be for a loan to the president individually, and the burden of proof is upon the payee in an action against the corporation to establish its liability by a preponderance of evidence. Seaburg *v.* Singer, 74 Ill. App. 324. A promissory note signed by A. B. as agent of a particular corporation named, is presumed to be a corporate obligation, and the burden of proof is upon the plaintiff to show that it was a personal obligation of the agent. Bradley *v.* McKee, 5 Cranch C. C. 298, 3 Fed. Cas. No. 1,784; McCall *v.* Clayton, Busbee Law (N. C.) 422.

Evidence of Corporate Liability. Where a bill was drawn on the drawee personally and he accepted it as treasurer of a corporation named, in order to discharge himself from personal liability he must prove that he accepted as agent by authority of the company, and that the holder had knowledge of such fact when he took the draft. Bruce *v.* Lord, 1 Hilt. (N. Y.) 247. The liability of a corporation upon drafts drawn by its president, in the company name, is shown by evidence that he was its president and drew the drafts in such capacity for the benefit of the company, and that it received the proceeds. Thompson *v.* Tioga R. Co., 36 Barb. (N. Y.) 79. Where a bill was signed by one who merely added "President" to his name, the liability of the corporation of which he was President was shown by evidence that he was authorized by the corporation to draw the bill, and that all bills so signed by him were always recognized and taken up by the corporation as its own paper, and that the bill was drawn and delivered to the payee as and for a corporate obligation, and was transferred by the payee as such, and that the corporation promised to pay it. Devendorf *v.* W. Va. Oil & Oil Land Co., 17 W. Va. 135. Where it appears doubtful upon its face whether a bill, check, or note was a private act or the official act of an agent of a corporation, evidence is admissible to show that it was an authorized official act of the corporation.

United States. — *In re* Southern Minn. R. Co., 10 N. B. R. 86, 22 Fed. Cas. No. 13,188; Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 Wheat. 326; Metcalf *v.* Williams, 104 U. S. 93.

Alabama. — Wetumpka & C. R. R. Co. *v.* Bingham, 5 Ala. 657.

California. — Bean *v.* Pioneer Min. Co., 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106; So. Pac. Co. *v.* Von Schmidt Dredge Co., 118 Cal. 368, 50 Pac. 650.

Kansas. — Benham *v.* Smith, 53 Kans. 495, 36 Pac. 997; Shaffer *v.* Hohenschild 2 Kan. App. 516, 43 Pac. 979.

Maryland. — Laflin & Rand Powder Co. *v.* Sincheimer, 48 Md. 411, 30 Am. Rep. 472.

Minnesota. — Sonhegan Nat. Bank *v.* Boardman, 46 Minn. 292, 48 N. W. 1116; Kraniger *v.* People's Bldg. Soc., 60 Minn. 94, 61 N. W. 904.

Montana. — Gerber *v.* Stuart, 1 Mont. 172.

Nevada. — Schafer *v.* Bidwell, 9 Nev. 209.

New Jersey. — Kean *v.* Davis, 21 N. J. Law 683, 47 Am. Dec. 182.

New York. — Stearns *v.* Allen, 25

c. *Several Makers.* — Two or more persons signing their names to a note as makers, are presumed to be equally bound as such,[43] and the debt evidenced thereby is presumed to have been created for the equal benefit of the joint makers, in the absence of a contrary showing.[44]

d. *Principal and Surety.* — The payee is presumed to know the relation of principal and surety between the makers of a note.[45] Where several sign a note, one of whom is the real principal and the others *prima facie* sureties of the principal and co-sureties among themselves, the burden of proof is on the party alleging the contrary.[46] The order in which the makers sign a note does not of itself raise a presumption of suretyship,[47] and there is no presumption that a draft by a member of a firm upon the firm was made for its accommodation and that the drawer is a surety.[48]

e. *Firm Notes.* — A note executed in the name of a partnership by one partner is presumed to have been given on partnership account, and the burden of proof is upon him who asserts the contrary,[49] but the authority in one member of a firm for a single en-

Hun 558; Brockway *v.* Allen, 1 Wend. 40.

Oklahoma. — James *v.* Citizens' Bank, 9 Okla. 546, 60 Pac. 290.

South Dakota. — Miller *v.* Way, 5 S. D. 468, 59 N. W. 467.

Texas. — Texas Land & Cattle Co. *v.* Carroll, 63 Tex. 48.

43. Groves *v.* Sentell, 153 U. S. 465, 14 Sup. Ct. 898; Johnson *v.* King, 20 Ala. 270; Jackson *v.* Wood, 108 Ala. 209, 19 So. 312; Orvis *v.* Newell, 17 Conn. 97; Davis *v.* Smith, 29 Ill. App. 313; Chandler *v.* Ruddick, 1 Ind. 391; Derry Bank *v.* Baldwin, 41 N. H. 434.

44. McClelland *v.* McClelland, 42 Mo. App. 32.

45. Ward *v.* Stout, 32 Ill. 399. But he may show the contrary. Hall *v.* Rogers, 114 Ga. 357, 40 S. E. 250.

46. Flanagan *v.* Post, 45 Vt. 246.

Burden of Proof as to Additional Suretyship. — Presumptively one who signed a note as surety for two other persons apparently joint principals, contracts as surety for both of them and the burden of showing that one of the apparent principals was himself a mere surety for the other, and that the one signing as surety knew the fact, is on him who asserts it. Pirkle *v.* Chamblee, 109 Ga. 32, 34 S. E. 276.

The burden of proof is upon the party whose name appears upon the note as a maker thereof to prove that in fact he was merely surety for a co-maker. Howle *v.* Edwards, 113 Ala. 187, 20 So. 956; Whitehouse *v.* Hanson, 42 N. H. 9.

47. Summerhill *v.* Tapp, 52 Ala. 227; McPherson *v.* Andes, 75 Mo. App. 204.

48. Traders' Bank *v.* Bradner, 43 Barb. (N. Y.) 379.

49. *United States.* — LeRoy-Bayard *v.* Johnson, 2 Pet. 186.

Alabama. — Knapp *v.* McBride, 7 Ala. 19; Jones *v.* Rives, 3 Ala. 11.

Georgia. — Miller *v.* Hines, 15 Ga. 197.

Indiana. — Ensmenger *v.* Marvin, 5 Blackf. 210.

Iowa. — McMullan *v.* McKenzie, 2 Greene 368; Buettner *v.* Steinbrecher, 91 Iowa 588, 60 N. W. 177.

Kansas. — Adams *v.* Ruggles, 17 Kan. 237; Lindh *v.* Crowley, 29 Kan. 756.

Kentucky. — Magill *v.* Merrie, 5 B. Mon. 168; Hamilton *v.* Summers, 12 B. Mon. 11, 54 Am. Dec. 509.

Maine. — Waldo Bank *v.* Greely, 16 Me. 419; Barrett *v.* Swann, 17 Me. 180; Holmes *v.* Porter, 39 Me. 157.

Maryland. — Thurston *v.* Loyd, 4 Md. 283; Manning *v.* Hayes, 6 Md. 5.

Michigan. — Littell *v.* Fitch, 11 Mich. 525; Carrier *v.* Cameron, 31 Mich. 373, 18 Am. Rep. 192.

Minnesota. — Van Dyke *v.* Seelye, 49 Minn. 557, 52 N. W. 215.

terprise to sign notes in the firm name will not be presumed in the absence of proof of usage or custom,[50] and where the note appears to be given for an individual debt the burden is on the payee to prove the acquiescence or consent of the members of the firm,[51] and

Mississippi. — Faler *v.* Jordan, 44 Miss. 283; Sylverstein *v.* Atkinson, 45 Miss. 81.

Missouri. — Farmers' Bank *v.* Bayliss, 41 Mo. 274; Feurt *v.* Brown, 23 Mo. App. 332; Lamwersick *v.* Boehmer, 77 Mo. App. 136.

Nebraska. — Schwanck *v.* Davis, 25 Neb. 196, 41 N. W. 141; Peck *v.* Tingley, 53 Neb. 171, 73 N. W. 450.

New York. — Doty *v.* Bates, 11 Johns. 544; Vallett *v.* Parker, 6 Wend. 615; Whitaker *v.* Brown, 16 Wend. 505; First Nat. Bank *v.* Morgan, 6 Hun 346, 73 N. Y. 594; Paul *v.* Van Da Linda, 58 Hun 611, 12 N. Y. Supp. 638.

Ohio. — Purviance *v.* Sutherland, 2 Ohio St. 478.

Pennsylvania. — Haldeman *v.* Bank of Middletown, 28 Pa. St. 440, 70 Am. Dec. 142; Hogg *v.* Orgill, 34 Pa. St. 344.

Texas. — Powell *v.* Messer, 18 Tex. 401.

Burden When Upon Plaintiff. Where the defendants deny the execution by one of them of a note for the firm, the burden is on the plaintiff to prove the authority of the one who executed the note to bind the firm. Schellenbeck *v.* Studebaker, 13 Ind. App. 437, 41 N. E. 845, 55 Am. St. Rep. 240. Where one partner draws his own draft in plaintiff's favor and accepts it in the firm name, the burden is on the plaintiff to prove that such acceptance was within the scope of the partnership business or was consented to. Bank of Commerce *v.* Selden, 3 Minn. 155.

Where the business is done in the name of one member of the firm, a note signed in that name must be proved by the plaintiff in an action thereon to have been given for money loaned to the firm, or that the name was in fact used to denote the firm. Gernon *v.* Hoyt, 90 N. Y. 631.

50. Gray *v.* Ward, 18 Ill. 32.

Burden of Proof. — Where the partnership is limited to a particular business, the burden is on the holder of a note, executed by one partner in the partnership name given for other business, to prove a *bona fide* purchase or the assent expressed or implied of the other partners. Second Nat. Bank *v.* West, 161 N. Y. 520, 55 N. E. 1080; Waller *v.* Keyes, 6 Vt. 257; Smith *v.* Sloan, 37 Wis. 285, 19 Am. Rep. 757.

51. *Alabama.* — Guice *v.* Thornton, 76 Ala. 466.

Louisiana. — Mechanics' & Traders' Ins. Co. *v.* Richardson, 33 La. Ann. 1308, 39 Am. Rep. 290; Mutual Nat. Bank *v.* Richardson, 33 La. Ann. 1312; Allen *v.* Carey, 33 La. Ann. 1455.

Minnesota. — Bank of Commerce *v.* Selden, 3 Minn. 155; Farwell *v.* St. Paul Trust Co., 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 742.

New York. — Williams *v.* Walbridge, 3 Wend. 415; Joyce *v.* Williams, 14 Wend. 141; Kemeys *v.* Richards, 11 Barb. 312.

Texas. — Powell *v.* Messer, 18 Tex. 401.

Burden Not Changed by Plea. A mere plea by one partner that the note was given for the individual debt of the partner who signed it in the firm name does not throw the burden that it was not so given upon the plaintiff. Jones *v.* Rives, 3 Ala. 11.

Burden in Case of Suretyship. Where one partner subscribes the partnership name to a note as sureties for another person, the burden of proving the consent of the other partner to such signature is on the holder of the note. Bank of Commerce *v.* Selden, 3 Minn. 155; Van Dyke *v.* Seelye, 49 Minn. 557, 52 N. W. 215; Schermerhorn *v.* Schermerhorn, 1 Wend. (N. Y.) 119; Boyd *v.* Plumb, 7 Wend. (N. Y.) 309; Mercein *v.* Andrus, 10 Wend. (N. Y.) 46; Foot *v.* Sabin, 19 Johns. (N. Y.) 154, 10 Am. Dec. 208; Fore *v.* Hitson, 70 Tex. 517, 8 S. W. 292.

The same burden exists where the partnership name is used to guarantee the payment of a note.

is on an indorsee for value to prove that he took the note without knowledge of such misapplication.[52] The burden of proof is on the holder of a note given in the firm name by one partner to show the existence of a partnership.[53]

B. Evidence. — a. *In General.* — In an action upon a note which refers to a company, evidence is admissible to show its incorporation and the character of its business,[54] and to show that by the laws of the corporation the signers of the note had authority as its officers to execute it in its behalf.[55] In an action upon a note against several makers the testimony of one of them that he knew of no such demand against a co-maker is competent evidence.[56]

b. *Parol Evidence.* — Parol evidence is held admissible to show that a note or bill signed with a representative description was made only in a representative capacity,[57] but it has been held inadmissible

Alabama. — Rolston *v.* Click, 1 Stew. 526.

Connecticut. — New York Fire Ins. Co. *v.* Bennett, 5 Conn. 574, 13 Am. Dec. 109.

Illinois. — Davis *v.* Blackwell, 5 Ill. App. 32.

Iowa. — First Nat. Bank *v.* Carpenter, 34 Iowa 433.

Maine. — Darling *v.* March, 22 Me. 184.

Massachusetts. — Sweetser *v.* French, 2 Cush. 309, 48 Am. Dec. 666.

Michigan. — Mechanics' Bank *v.* Barnes, 86 Mich. 632, 49 N. W. 475.

Minnesota. — Osborne & Co. *v.* Stone, 30 Minn. 25, 13 N. W. 922.

Mississippi. — Andrews *v.* Planters' Bank, 7 Smed. & M. 192, 45 Am. Dec. 300; Langan *v.* Hewett, 13 Smed. & M. 122.

Circumstantial Evidence. — That one partner was authorized to subscribe the firm name as accommodation sureties may be proved by circumstantial evidence. Butler *v.* Stocking, 8 N. Y. 408.

52. Munroe *v.* Cooper, 5 Pick. (Mass.) 412.

Burden Upon Firm. — Where one partner gives the firm note for borrowed money, with the intention of using it for his own purpose, the burden of proving that the payee knew or had reason to know of such intention is on the firm. Platt *v.* Koehler, 91 Iowa 592, 60 N. W. 178.

53. Byington *v.* Woodward, 9 Iowa 360; Meeker *v.* Cummings, 22 La. Ann. 317; Tellers *v.* Muir, 3 N. J. Law 317; Irving *v.* Conklin, 36 Barb. (N. Y.) 64.

54. Scanlan *v.* Keith, 102 Ill. 634, 39 Am. Rep. 302, and note 40 Am. Rep. 626.

55. Miers *v.* Coates, 57 Ill. App. 216.

56. Persons *v.* McKibben, 5 Ind. 261, 61 Am. Dec. 85.

57. *United States.* — Dessau *v.* Bours, 1 McAll. 20, 7 Fed. Cas. No. 3,825; *In re* Southern Minn. R. Co., 22 Fed. Cas. No. 13,188: Metcalf *v.* Williams, 104 U. S. 93.

Alabama. — Lazarus *v.* Shearer, 2 Ala. 718; Deshler *v.* Hodges, 3 Ala. 509; Baker *v.* Gregory, 28 Ala. 544; May *v.* Hewitt, 33 Ala. 161.

California. — Sayre *v.* Nichols, 7 Cal. 535, 68 Am. Dec. 280; Bean *v.* Pioner, 66 Cal. 451, 6 Pac. 86.

Illinois. — King *v.* Handy, 2 Ill. App. 212; La Salle Nat. Bank *v.* Tolu Rock & Rye Co., 14 Ill. App. 141.

Kansas. — Kline *v.* Bank of Tescott, 50 Kan. 91, 31 Pac. 688, 18 L. R. A. 53.

Kentucky. — Webb *v.* Burke, 5 B. Mon. 51.

Maryland. — Haile *v.* Pierce, 32 Md. 327, 3 Am. Rep. 139; Laflin & Rand Powder Co. *v.* Sincheimer, 48 Md. 411, 30 Am. Rep. 472.

Michigan. — Keidan *v.* Winegar, 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 905.

Minnesota. — Deering *v.* Thorn, 29 Minn. 120, 12 N. W. 350; Kraniger *v.* People's Bldg. Soc., 60 Minn. 94, 61 N. W. 904.

to disprove the personal liability of signers with such description, where the promise signed is personal.[58] Parol evidence is admis-

Mississippi. — Hardy *v.* Pilcher, 57 Miss. 18, 34 Am. Rep. 432.

Missouri. — Smith *v.* Alexander, 31 Mo. 193; McClellan *v.* Reynolds, 49 Mo. 312.

Montana. — Gerber *v.* Stuart, 1 Mont. 172.

Nevada. — Schaefer *v.* Bidwell, 9 Nev. 209.

New Jersey. — Kean *v.* Davis, 21 N. J. Law 683; Terhune *v.* Parrott, 59 N. J. Law 16, 35 Atl. 4.

New York. — Hood *v.* Hallenbeck, 7 Hun 362; Stearns *v.* Allen, 25 Hun 558; Brockway *v.* Allen, 17 Wend. 40; Evans *v.* Wells, 22 Wend. 325; Hicks *v.* Hinde, 9 Barb. 528; Lee *v.* M. E. Church, 52 Barb. 116; Hilliard *v.* Smith, 70 N. Y. St. 452, 35 N. Y. Supp. 717; Schmittler *v.* Simon, 114 N. Y. 176, 21 N. E. 901.

Oklahoma. — Janes *v.* Citizens Bank, 9 Okla. 546, 60 Pac. 290.

Pennsylvania. — Markley *v.* Quay, 14 Phila. 164; De Roy *v.* Richards, 8 Pa. Super. Ct. 119, 42 W. N. C. 484; Hollenbeck *v.* Clapp, 103 Pa. St. 60.

South Dakota. — Miller *v.* Way, 5 S. D. 468, 51 N. W. 467; Small *v.* Elliott, 12 S. D. 570, 82 N. W. 92.

Tennessee. — Boyd *v.* Johnston, 89 Tenn. 284, 14 S. W. 804.

Texas.—Traynham *v.* Jackson, 15 Tex. 170, 65 Am. Dec. 152; Texas Land & Cattle Co. *v.* Carroll, 63 Tex. 48.

Signature in Representative Capacity. — Parol evidence is not admissible to show that one who has signed a note in a representative capacity signed it in his individual capacity. Liebcher *v.* Kraus, 74 Wis. 387, 43 N. W. 166.

58. *United States.* — Nash *v.* Towne, 5 Wall. 689.

Alabama. — Richmond Locomotive & Mach. Works *v.* Moragne, 119 Ala. 80, 24 So. 834.

Arkansas. — Lawrence Co. Bank *v.* Arndt, 69 Ark. 406, 65 S. W. 1052.

California. — Conner *v.* Clark, 12 Cal. 168; San Bernardino Nat. Bank *v.* Anderson, (Cal.), 32 Pac. 168.

Georgia. — Bedell *v.* Scarlett, 75 Ga. 56.

Illinois. — Haines *v.* Nance, 52 Ill. App. 406.

Indiana. — Kenyon *v.* Williams, 19 Ind. 44; Prescott *v.* Hixon, 22 Ind. App. 139, 53 N. E. 391; Williams *v.* Second Nat. Bank, 83 Ind. 237.

Iowa. — Heffner *v.* Brownell, 75 Iowa 341, 39 S. W. 640; McCandless *v.* Bell Plaine Canning Co., 78 Iowa 161, 42 N. W. 635, 16 Am. St. Rep. 429, 4 L. R. A. 396; Mathews *v.* Dubuque Mattress Co., 87 Iowa 246, 54 N. W. 225, 19 L. R. A. 676.

Maine. — Sturdivant *v.* Hull, 59 Me. 172; Rendell *v.* Harriman, 75 Me. 497, 46 Am. Rep. 421.

Massachusetts. — Providence Tool Co. *v.* U. S. Mfg. Co., 120 Mass. 35; Davis *v.* England, 141 Mass. 587, 6 N. E. 731.

Mississippi. — Wren *v.* Hoffman, 41 Miss. 616.

New York. — Pentz *v.* Stanton, 10 Wend. 271.

Ohio. — Collins *v.* Buckeye State Ins. Co., 17 Ohio St. 215, 93 Am. Dec. 612; Robinson *v.* Kanawha Val. Bank, 44 Ohio St. 441, 8 N. E. 583, 58 Am. Dec. 829; Barnhard *v.* Com. Bank, 7 Ohio Dec. 533.

Oklahoma. — Keokuk Falls Imp. Co. *v.* Kingsland & D. Mfg. Co., 5 Okla. 32, 47 Pac. 484.

South Carolina. — Taylor *v.* McLean, 1 McMull. 352; Moore *v.* Cooper, 1 Spear 87.

Texas. — Gregory *v.* Leigh, 33 Tex. 813; Marx *v.* Luling Co-op. Assn., 17 Tex. Civ. App. 408, 43 S. W. 596.

Individual Signatures. — Parol evidence is inadmissible to show that persons who have signed their names individually to a note or bill signed it as the agent of a third person, to the knowledge of the payee.

California. — Richardson *v.* Scott, R. W. & M. Co., 22 Cal. 150.

Colorado. — Heaton *v.* Myers, 4 Colo. 59.

Indiana. — Hiatt *v.* Simpson, 8 Ind. 256.

Iowa. — Junge *v.* Bowman, 72 Iowa 648, 34 N. W. 612.

Kentucky. — Megibban *v.* Shanahan, 10 Ky. L. Rep. 407.

Louisiana. — Bogan *v.* Calhoun, 19 La. Ann. 472.

Maine. — Hancock *v.* Fairfield, 30 Me. 299.

sible to charge a principal ambiguously indicated,[59] or to charge a

Massachusetts. — Stackpole *v.* Arnold, 11 Mass. 27.

Missouri. — Frissell *v.* Mayer, 13 Mo. App. 331; Duncan *v.* Kertley, 54 Mo. App. 655; Sparks *v.* Dispatch Transfer Co., 104 Mo. 531, 15 N. W. 417, 24 Am. St. Rep. 351, 12 L. R. A. 714.

Nevada. — Gillig *v.* Lake Bigler Road Co., 2 Nev. 214.

New Hampshire. — Chandler *v.* Coe, 54 N. H. 561.

New York. — Lincoln *v.* Crandell, 21 Wend. 101; Newcomb *v.* Clark, 1 Denio 226; Fenly *v.* Stuart, 5 Sandf. 101; Williams *v.* Christie, 4 Duer 29; Chappell *v.* Dann, 21 Barb. 17; Galusha *v.* Hitchcock, 29 Barb. 93; Auburn City Bank *v.* Leonard, 40 Barb. 119; Babbett *v.* Young, 51 Barb. 466; Squier *v.* Norris, 1 Lans. 282; Phelps *v.* Borland, 30 Hun 362.

Ohio. — Lilie *v.* Bates, 3 Ohio C. C. 94.

Wisconsin. — Weston *v.* McMillan, 42 Wis. 567.

Note for Corporation Signed Individually. — Parol evidence is inadmissible to show that a note signed on behalf of a church, by persons signing their names individually, was not their personal obligation. Hypes *v.* Griffin, 89 Ill. 134, 31 Am. Rep. 71. But see *contra* Traynham *v.* Jackson, 15 Tex. 170, 65 Am. Dec. 152. Notwithstanding the body of the note indicates an official capacity as trustees of an academy, where they signed their names individually, parol evidence is admissible to show that credit was given to them individually. Cleaveland *v.* Stewart, 3 Kelly (Ga.) 283.

Ambiguous Note. — Under a note ambiguously signed by the president of a corporation, parol evidence is admissible to show that it is the personal note of the president. Frankland *v.* Johnson, 147 Ill. 520, 35 N. E. 480; Swarts *v.* Cohen, 11 Ind. App. 20, 38 N. E. 536.

59. *United States.* — Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326; Metcalf *v.* Williams, 104 U. S. 93.

Alabama. — Lazarus *v.* Shearer, 2 Ala. 718; Deshler *v.* Hodges, 3 Ala. 509; Wetumpka & C. R. R. Co. *v.* Bingham, 5 Ala. 657; Branch Bank of Mobile *v.* Coleman, 20 Ala. 140.

California. — Bean *v.* Pioneer Min. Co., 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106; Burgess *v.* Fairbanks, 83 Cal. 215, 23 Pac. 292, 17 Am. St. Rep. 230; So. Pac. Co. *v.* Von Schmidt Dredge Co., 118 Cal. 368, 50 Pac. 650.

Connecticut. — Hovey *v.* Magill, 2 Conn. 680; Johnson *v.* Smith, 21 Conn. 627.

Illinois. — King *v.* Handy, 2 Ill. App. 212; La Salle Nat. Bank *v.* Tolu Rock & Rye Co., 14 Ill. App. 141; Ashley Wire Co. *v.* Ill. Street Co., 60 Ill. App. 179; Scanlan *v.* Keith, 102 Ill. 634, 40 Am. Rep. 624.

Iowa. — Lacy *v.* Dubuque Lumber Co., 43 Iowa 510.

Kansas. — Benham *v.* Smith, 53 Kan. 495, 36 Pac. 997; Shaffer *v.* Hohenschild, 2 Kan. App. 516, 43 Pac. 979.

Maryland. — Haile *v.* Pierce, 32 Md. 327, 3 Am. Rep. 139.

Massachusetts. — Byington *v.* Simpson, 134 Mass. 169, 45 Am. Rep. 314.

Michigan. — Armstrong *v.* Andrews, 109 Mich. 537, 67 N. W. 567.

Minnesota. — McComb *v.* Thompson, 2 Minn. 139; Sanborn *v.* Neal, 4 Minn. 120, 77 Am. Dec. 502; Soughegan Nat. Bank *v.* Boardman, 46 Minn. 293, 48 N. W. 1116; Kraniger *v.* Peoples Bldg. Soc., 60 Minn. 94, 61 N. W. 904.

Mississippi. — Hardy *v.* Pilcher, 57 Miss. 18, 34 Am. Rep. 432.

Missouri. — Smith *v.* Alexander, 31 Mo. 193; First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Rep. 397.

Montana. — Gerber *v.* Stuart, 1 Mont. 172.

Nevada. — Gillig *v.* Lake Bigler Road Co., 2 Nev. 214; Schaefer *v.* Bidwell, 9 Nev. 209.

New Hampshire. — Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New Jersey. — Kean *v.* Davis, 21 N. J. Law 683, 47 Am. Dec. 182; Terhune *v.* Parrott, 59 N. J. Law 16, 35 Atl. 4; Simanton *v.* Vliet, 61 N. J. Law 595, 40 Atl. 595.

New York. — Hood *v.* Hallenbeck, 7 Hun 362; Stearns *v.* Allen, 25 Hun 558; Thompson *v.* Tioga R. Co., 36

principal not expressed, where agency is indicated.[60] Parol evidence is not admissible to vary the promise to pay, in a joint or joint and several note, bill or bond, as principals in an action thereupon,[61] but is admissible where material to prove the collateral fact of suretyship to the knowledge of the payee,[62] and is always

Barb. 79; Lee *v.* M. E. Church, 52 Barb. 116; Bruce *v.* Lord, Hilt. 247.

North Carolina. — Rumbough *v.* So. Imp. Co., 106 N. C. 461, 11 S. E. 528.

Ohio.—Kanawha Val. Bank *v.* Robinson, 7 Ohio Dec. 474.

Oklahoma.—Janes *v.* Citizens Bank, 9 Okla. 546, 60 Pac. 290.

South Dakota. — Miller *v.* Way, 5 S. D. 468, 59 N. W. 467.

Texas. — Traynham *v.* Jackson, 15 Tex. 170, 65 Am. Dec. 152.

Virginia. — Early *v.* Wilkinson, 9 Gratt. 68; Richmond F. & P. R. R. Co. *v.* Snead, 19 Gratt. 354, 100 Am. Dec. 670.

West Virginia. — Devendorf *v.* W. Va. Oil & Oil Land Co., 17 W. Va. 135.

60. *United States.* — Dessau *v.* Bours, 1 McAll. 20, 7 Fed. Cas. No. 3,825; *In re* Southern Minn. R. Co., 22 Fed Cas. No. 13,188.

Alabama. — Baker *v.* Gregory, 28 Ala. 544; May *v.* Hewitt, 33 Ala. 161.

Indiana. — Kenyon *v.* Williams, 19 Ind. 44.

Michigan. — Keidan *v.* Winegar, 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705.

Mississippi. — Martin *v.* Smith, 65 Miss. 1, 3 So. 33.

Nevada. — Gillig *v.* Lake Bigler Road Co., 2 Nev. 214.

New York. — Green *v.* Skeel, 2 Hun 485; Sykes *v.* Temple, 69 Hun 448, 23 N. Y. Supp. 425.

South Carolina. — Bickley *v.* Commercial Bank, 43 S. C. 528, 21 S. E. 886.

Texas. — Tex. Land & Cattle Co. *v.* Carroll, 63 Tex. 48.

61. *Alabama.* — Rice *v.* Brantley, 5 Ala. 184.

California. — Kritzer *v.* Mills, 9 Cal. 21; Aud *v.* Magruder, 10 Cal. 282; Shriver *v.* Lovejoy, 32 Cal. 574.

Connecticut. — Bull *v.* Allen, 19 Conn. 101.

Kentucky. — Neel *v.* Harding, 2 Metc. 247.

Louisiana. — Roberts *v.* Jenkins, 19 La. (O. S.) 453; Butler *v.* Ford, 9 Rob. 112.

Maine. — Mariners' Bank *v.* Abbott, 28 Me. 280.

Massachusetts. — Essex Co. *v.* Edmands, 12 Gray 273, 71 Am. Dec. 758.

Michigan. — Coots *v.* Farnsworth, 61 Mich. 497, 28 N. W. 534.

Missouri. — McMillan *v.* Parkel, 64 Mo. 286; Hardester *v.* Tate, 85 Mo. App. 624.

New Hampshire. — Exeter Bank *v.* Stowell, 16 N. H. 61, 41 Am. Dec. 716; Derry Bank *v.* Baldwin, 41 N. H. 434; Heath *v.* Derry Bank, 44 N. H. 174.

New Jersey. — Pintard *v.* Davis, 21 N. J. Law 632, 47 Am. Dec. 172; Hendrickson *v.* Hutchinson, 29 N. J. Law 180.

Ohio. — Cone *v.* Reese, 11 Ohio C. C. 632.

Vermont. — Claremont Bank *v.* Wood, 10 Vt. 582.

Washington. — Wingate *v.* Blalock, 15 Wash, 44, 45 Pac. 663.

Principals Expressly Designated. Where, by the unequivocal terms of a bond sued upon, a defendant had bound himself as principal, evidence to show that he was surety is not admissible either at law or in equity. Sprigg *v.* Bank of Mt. Pleasant, 22 Fed. Cas. No. 13,257; Coots *v.* Farnsworth, 61 Mich. 497, 28 N. W. 534. And where in a note, signers are expressly designated as principals, parol evidence is not admissible to contradict its express terms by proof of suretyship to the knowledge of the payee. McMillan *v.* Parkell, 64 Mo. 286; Exeter Bank *v.* Stowell, 16 N. H. 61, 41 Am. Dec. 716; Derry Bank *v.* Baldwin, 41 N. H. 434; Hendrickson *v.* Hutchinson, 29 N. J. Law 180.

62. *United States.* — American & Gen. Mortg. & Inv. Corp. *v.* Marquam, 62 Fed. 960; Holmes *v.* Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288; Goldsmith *v.* Holmes, 36 Fed. 484, 1 L. R. A. 816; Heckscher *v.* Binney, 3

Woodb. & M. 333, 11 Fed. Cas. No. 6,316.

Alabama. — Pollard *v.* Stanton, 5 Ala. 451; Branch Bank *v.* James, 9 Ala. 949.

California. — Harlan *v.* Ely, 55 Cal. 340; Eppinger *v.* Kendrick, 114 Cal. 620, 46 Pac. 613.

Connecticut. — Orvis *v.* Newell, 17 Conn. 97.

Georgia. — Bank of St. Marys *v.* Mumford, 6 Ga. 44; Higdon *v.* Bailey, 26 Ga. 426.

Illinois. — Rogers *v.* School Trustees, 46 Ill. 428; Ward *v.* Stout, 32 Ill. 399; Kennedy *v.* Evans, 31 Ill. 258.

Indiana. — Dickerson *v.* Ripley Co. Comrs., 6 Ind. 128.

Iowa. — Piper *v.* Newcomer, 25 Iowa 221.

Kansas. — Water Power Co. *v.* Brown, 23 Kan. 676.

Kentucky. — Emmons *v.* Overton, 18 B. Mon. 643; Hamilton *v.* Williams, 18 Ky. L. Rep. 919, 38 S. W. 851.

Maine. — Mariners' Bank *v.* Abbott, 28 Me. 280; Lime Rock Bank *v.* Mallett, 34 Me. 547, 56 Am. Rep. 673; Cummings *v.* Little, 45 Me. 183.

Maryland. — Brown *v.* Stewart, 4 Md. Ch. 284.

Massachusetts. — Harris *v.* Brooks, 21 Pick. 195; Guild *v.* Butler, 127 Mass. 386.

Michigan. — Hitchcock *v.* Frackelton, 116 Mich. 487, 74 N. W. 720.

Mississippi. — Davis *v.* Mikell, 1 Freeman Ch. 548; Moore *v.* Redding, 69 Miss. 841, 13 So. 849.

Missouri. — Garrett *v.* Ferguson, 9 Mo. 125; Scott *v.* Bailey, 23 Mo. 140; Mechanics' Bank *v.* Wright, 53 Mo. 153; Stilwell *v.* Aaron, 69 Mo. 539, 33 Am. St. Rep. 517; Citizens Ins. Co. of Mo. *v.* Broyles, 78 Mo. App. 364.

New Hampshire. — Grafton Bank *v.* Kent, 4 N. H. 221, 17 Am. Dec. 414; Davis *v.* Barrington, 30 N. H. 517; Derry Bank *v.* Baldwin, 41 N. H. 434; Whitehouse *v.* Hanson, 42 N. H. 9.

New York. — Hubbard *v.* Gurney, 64 N. Y. 457; Pain *v.* Packard, 13 Johns. 174; La Farge *v.* Herter, 11 Barb. 159; Barry *v.* Ransom, 12 N. Y. 462.

North Carolina. — Welfare *v.* Thompson, 83 N. C. 276; Cole *v.* Fox, 83 N. C. 463.

Ohio. — Smith *v.* Bing, 3 Ohio 33; Kelley *v.* Few, 18 Ohio 441.

Oklahoma. — Stovall *v.* Adair, 9 Okla. 620, 60 Pac. 282.

Oregon. — Hughes *v.* Pratt, 37 Or. 45, 60 Pac. 707; Hoffman *v.* Habighorst, 38 Or. 261, 63 Pac. 610.

Rhode Island. — Otis *v.* Van Storch, 15 R. I. 41, 23 Atl. 39.

South Carolina. — Smith *v.* Tunno, 1 McCord Ch. 453, 16 Am. Dec. 617.

Tennessee. — White *v.* Brown, 4 Humph. 292.

Texas. — Smith *v.* Doak, 3 Tex. 215; Burke *v.* Cruger, 8 Tex. 66, 58 Am. Dec. 102; First Nat. Bank *v.* Skidmore, (Tex. Civ. App.), 30 S. W. 564.

Utah. — Gillett *v.* Taylor, 14 Utah 190, 46 Pac. 1099.

Vermont. — Adams *v.* Flanagan, 36 Vt. 400; Ballard *v.* Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664.

Washington. — Harmon *v.* Hale, 1 Wash. Ter. 422, 34 Am. Rep. 816; Bank of British Columbia *v.* Jeffs, 15 Wash. 230, 46 Pac. 247.

West Virginia. — Creigh *v.* Hedrick, 5 W. Va. 140.

Wisconsin. — Riley *v.* Gregg, 16 Wis. 666; Irvine *v.* Adams, 48 Wis. 468, 4 N. W. 573.

Knowledge of Payee. — The knowledge of the payee must be shown in order to permit parol evidence as against him.

Indiana. — Lamson *v.* Vevay Bank, 82 Ind. 21; Tharp *v.* Parker, 86 Ind. 102.

Iowa. — Murray *v.* Graham, 29 Iowa 520.

Kansas. — Whittenhall *v.* Korber, 12 Kan. 618.

Kentucky. — Neel *v.* Harding, 2 Met. 247.

New York. — Neimcewicz *v.* Gahn, 3 Paige 614.

Ohio. — Cone *v.* Reese, 11 Ohio C. C. 632.

Vermont. — Sandford *v.* Norton, 17 Vt. 285.

Notice to the payee may be implied. Ward *v.* Stout, 32 Ill. 399; Cummings *v.* Little, 45 Me. 183.

It need not have been given when the note was first accepted by the payee. Branch Bank *v.* James, 9 Ala. 949.

admissible to prove the relation of principal and surety as between the signers of a negotiable instrument.[63] Parol evidence is

In Kentucky, one joint maker of a note may, for the purpose of pleading the statute of limitations applicable to sureties show by parol evidence that he was merely a surety without proving that the payee had knowledge of that fact. Craddock *v.* Lee, 22 Ky. L. Rep. 1651, 61 S. W. 22.

Parol evidence is admissible to show that the payee did not intend to contract with a surety in that relation. Hall *v.* Rogers, 114 Ga. 357, 40 S. E. 250.

The true relations of the parties to negotiable paper may be always shown except against those who have without notice acquired rights depending upon their apparent relations. Maynard *v.* Fellows, 43 N. H. 255.

Bill of Exchange.— As between the drawer, acceptor, and indorser of a bill of exchange, the true condition and responsibility of the parties, whether principals or sureties, may be proved by parol evidence. Dunn *v.* Sparks, 7 Ind. 490; Lewis *v.* Williams, 4 Bush (Ky.) 678; Suydam *v.* Westfall, 4 Hill (N. Y.) 211. But the drawer is presumed to be a surety. Hicks *v.* Hinde, 9 Barb. (N. Y.) 528. In the absence of proof of an agreement of suretyship, the acceptor cannot be presumed a surety for an indorser. Robinson *v.* Kilbreth, 1 Bond. 592, 20 Fed. Cas. No. 11,957.

Wife as Surety. — It may be shown by parol evidence that the wife signed a note jointly with her husband as surety for the husband, in order to avoid her liability.

Georgia. — Brent *v.* Mount, 65 Ga. 92; Scofield *v.* Jones, 85 Ga. 816, 11 S. E. 1032.

Illinois. — Doyle *v.* Kelly, 75 Ill. 574.

Indiana. — Coats *v.* McKee, 26 Ind. 223.

Louisiana. — Louisiana State Bank *v.* Rowell, 7 Mart. (N. S.) 341; Pillie *v.* Patin, 8 Mart. (N. S.) 692; McCarty *v.* Roach, 7 Rob. 357; Waggaman *v.* Zacharie, 8 Rob. 181.

In such case the understanding or knowledge of the payee is immaterial. Farmington Sav. Bank *v.* Buzzelle, 61 N. H. 612.

63. *United States.* — Phillips *v.* Preston, 5 How. 278.

Alabama. — Branch Bank at Mobile *v.* Coleman, 20 Ala. 140; Summerhill *v.* Tapp, 52 Ala. 227; Compton *v.* Smith, 120 Ala. 233, 25 So. 300.

Arkansas. — Kendall *v.* Milligan, 62 Ark. 629, 34 S. W. 78.

California.— McPherson *v.* Weston, 85 Cal. 90, 24 Pac. 733.

Connecticut. — Orvis *v.* Newell, 17 Conn. 97; Graves *v.* Johnson 48 Conn. 160; Bulkeley *v.* House, 62 Conn. 459, 26 Atl. 352.

Illinois. — Robertson *v.* Deatherage, 82 Ill. 511; Paul *v.* Berry, 78 Ill. 158; Klepper *v.* Borchsenius, 13 Ill. App. 318; Peterson *v.* Stege, 67 Ill. App. 147.

Indiana. — Dunn *v.* Sparks, 7 Ind. 490; Lacy *v.* Loftin, 26 Ind. 324; Harshman *v.* Armstrong, 42 Ind. 126; Nurre *v.* Chittenden, 56 Ind. 462; Kealing *v.* Vansickle, 74 Ind. 529, 39 Am. Rep. 101.

Kansas. — Water-Power Co. *v.* Brown, 23 Kan. 676.

Kentucky. — Emmons *v.* Overton, 18 B. Mon. 643; Lewis *v.* Williams, 4 Bush. 678; First Nat. Bank *v.* Gaines, 87 Ky. 597, 9 S. W. 396; Youtsey *v.* Kutz, 22 Ky. L. Rep. 1520, 60 S. W. 857.

Maine. — Crosby *v.* Wyatt, 23 Me. 156; Fernald *v.* Dawley, 26 Me. 470; Smith *v.* Morrill, 54 Me. 48.

Maryland. — Chapman *v.* Davis, 4 Gill 166.

Massachusetts. — Blake *v.* Cole, 22 Pick. 97; Carpenter *v.* King, 9 Metc. 511, 43 Am. Dec. 405; McGee *v.* Prouty, 9 Metc. 547; West *v.* Chamberlin, 7 Cush. 404; Clapp *v.* Rice, 13 Gray 403; Mansfield *v.* Edwards, 136 Mass. 15, 49 Am. Rep. 1.

Michigan. — Farwell *v.* Ensign, 66 Mich. 600, 33 N. W. 734.

Minnesota. — Metzner *v.* Baldwin, 11 Minn. 150.

Mississippi.— Hunt *v.* Chambliss, 7 Smed. & M. 532.

Missouri. — Scott *v.* Bailey, 23 Mo. 140; Leeper *v.* Paschal, 70 Mo. App.

admissible to show that a note signed by one of the members of a firm represents a firm obligation.[64]

117; Hardester *v.* Tate, 85 Mo. App. 624.

New Hampshire. — Nims *v.* Bigelow, 44 N. H. 376; Paul *v.* Rider, 58 N. H. 119.

New Jersey. — Apgar *v.* Hiler, 24 N. J. Law 812.

New York. — Robison *v.* Lyle, 10 Barb. 512; Sisson *v.* Barrett, 6 Barb. 199; Barry *v.* Ransom, 12 N. Y. 462; Easterly *v.* Barber, 66 N. Y. 433.

North Carolina. — Love *v.* Wall, 1 Hawks 313; Smith *v.* Haynes, 82 N. C. 448; Williams *v.* Glenn, 92 N. C. 253, 53 Am. Rep. 416.

Ohio. — Douglas *v.* Waddle, 1 Ohio 413; Wallace *v.* Jewell, 21 Ohio St. 163, 8 Am. Rep. 48; Oldham *v.* Broom, 28 Ohio St. 41; Hecker *v.* Mahler, 64 Ohio St. 398, 60 N. E. 555.

Oregon. — Montgomery *v.* Page, 29 Or. 320, 44 Pac. 689.

South Carolina. — Anderson *v.* Peareson, 2 Bailey Law 107; Sloan *v.* Gibbes, 56 S. C. 480, 35 S. E. 408.

Tennessee. — White *v.* Brown, 4 Humph. 292.

Vermont. — Lapham *v.* Barnes, 2 Vt. 213; Lathrop *v.* Wilson, 30 Vt. 604; Adams *v.* Flanagan, 36 Vt. 400.

Contradiction of Expressed Suretyship. — Parol evidence is admissible to contradict an expression of suretyship on the face of the instrument, and to show that the surety is a principal. Crosby *v.* Wyatt, 23 Me. 156; Mansfield *v.* Edwards, 136 Mass. 15, 49 Am. Rep. 1; Apgar *v.* Hiler, 24 N. J. Law 812; Williams *v.* Glenn, 92 N. C. 253, 53 Am. Rep. 416; Oldham *v.* Broom, 28 Ohio St. 41; Lathrop *v.* Wilson, 30 Vt. 604; Adams *v.* Flanagan, 36 Vt. 400.

It may be shown by parol evidence that an expressed surety is in fact a co-surety with an apparent principal. Fernald *v.* Dawley, 26 Me. 470; McGee *v.* Prouty, 9 Metc. (Mass.) 547; Anderson *v.* Peareson, 2 Bailey Law (S. C.) 107.

Accommodation Paper. — Parol evidence is not admissible to evade the liability of an accommodation maker to an indorser, by showing that he signed only as surety. Moore *v.* Prussing, 165 Ill. 319, 46 N. E. 184; Metzerott *v.* Ward, 10 App. D. C. 514. But as against the payee, parol evidence is admissible to show that the note was an accommodation note for his benefit. Pray *v.* Rhodes, 42 Minn. 93, 43 N. W. 838; Wilt *v.* Snyder, 17 Pa. St. 77; Lone Star Leather Co. *v.* City Nat. Bank, 12 Tex. Civ. App. 128, 34 S. W. 297. In an action by an accommodation indorser for contribution against the accommodation drawer of a bill, parol evidence is admissible to prove that they were co-sureties. Dunn *v.* Sparks, 7 Ind. 490. And parol evidence is admissible to show that a first and second indorsee of a note signed for the accommodation of the maker and were co-sureties. Smith *v.* Morrill, 54 Me. 48; West *v.* Chamberlin, 7 Cush. (Mass.) 404; Farwell *v.* Ensign, 66 Mich. 600, 33 N. W. 734; Paub *v.* Rider, 58 N. H. 119; Easterly *v.* Barber, 66 N. Y. 433; Love *v.* Wall, 1 Hawks (N. C.) 313; Douglas *v.* Waddle, 1 Ohio 413; Ross *v.* Espy, 66 Pa. St. 481, 5 Am. Rep. 394; Sloan *v.* Gibbes, 56 S. C. 480, 35 S. E. 408; Kiel *v.* Choate, 92 Wis. 517, 67 N. W. 431; Phillips *v.* Preston, 5 How. (U. S.) 278.

One indorser of a note may show by parol evidence as against another that he indorsed it for his accommodation only. Patten *v.* Pearson, 55 Me. 39.

64. Owings *v.* Trotter, 1 Bibb (Ky.) 157; Hall *v.* Tufts, 18 Pick. (Mass.) 455; Farmers' Bank *v.* Bayliss, 41 Mo. 274.

Individual Obligation. — Parol evidence is admissible to show that an obligation signed by two partners with their individual names is an individual and not a partnership obligation. Appeal of Ellinger, 114 Pa. St. 505, 7 Atl. 180.

Individual Check. — Where a member of a firm draws a check in his own name, the party seeking to recover on such check against the firm must prove that the drawer had authority to bind the firm in that manner. Patriotic Bank *v.* Coote, 3 Cranch C. C. 169, 18 Fed. Cas. No. 10,807.

C. Relation of Evidence to Pleading. — A negotiable instrument is not admissible in evidence where there is a substantial variance in the description of the maker or makers in the pleading,[65] but the variance is immaterial where the varying names are *idem sonans*,[66] or the variance consists in customary abbreviated form of signatures,[67] or in a description of representative capacity following the signature to an alleged personal note[68] or in a

65. *United States.* — Craig *v.* Brown, Pet. C. C. 139, 6 Fed. Cas. No. 3,326.

Arkansas. — State Bank *v.* Hubbard, 4 Ark. 419; Boren *v.* State Bank, 8 Ark. 500.

California. — Cates *v.* Campbell, 3 Cal. 191.

Connecticut. — Rospiter *v.* Marsh, 4 Conn. 196.

Illinois. — Becker *v.* German Mut. Fire Ins. Co., 68 Ill. 412; Desmond *v.* St. Louis A. & T. H. R. Co., 77 Ill. 631.

Indiana. — Lawton *v.* Swihart, 10 Ind. 562.

Iowa. — Hall *v.* Bennett, 2 Greene 466.

Maine. — Atkins *v.* Brown, 50 Me. 90.

Mississippi. — Leach *v.* Blow, 8 Smed. & M. 221.

Missouri. — King *v.* Clark, 7 Mo. 269.

66. Coster *v.* Thomason, 19 Ala. 717; Schooler *v.* Asherst, 1 Litt. (Ky.) 216, 13 Am. Dec. 232; Buhl *v.* Trowbridge, 42 Mich. 44, 3 N. W. 245.

Explanation of Misnomer. — A misnomer may be explained where the names of the maker and the defendant are not *idem sonans* by averment and proof that the defendant signed the note by the different name. Graham *v.* Eizner, 28 Ill. App. 269; Gaskin *v.* Wells, 15 Ind. 253; Anselm *v.* Braud, 6 La. (O. S.) 140.

67. *Alabama.* — Cantly *v.* Hopkins, 5 Stew. & P. 58; Chandler *v.* Hudson, 8 Ala. 366.

Arkansas. — State Bank *v.* Peel, 11 Ark. 750.

Illinois. — Linn *v.* Buckingham, 2 Ill. 451; Pickering *v.* Pulsifer, 9 Ill. 79; Hunter *v.* Bryden, 21 Ill. 591; Wilson *v.* Turner, 81 Ill. 402.

Indiana. — Lasselle *v.* Hewson, 5 Blackf. 161; Muirhead *v.* Snyder, 4 Ind. 486; Hunt *v.* Raymond, 11 Ind. 215; Rightsell *v.* Kellam, 48 Ind. 252; West *v.* Hayes, 104 Ind. 30, 3 N. E. 610.

Missouri — Weaver *v.* McElhenon, 13 Mo. 89.

New York. — Wood *v.* Bulkley, 13 Johns. 486.

Vermont. — Mellendy *v.* N. E. Protective Union, 36 Vt. 31.

Proof of Custom. — Evidence is admissible to prove that abbreviated signature is customary. Hunter *v.* Bryden, 21 Ill. 591; Lasselle *v.* Hewson, 5 Blackf. (Ind.) 161; Wood *v.* Bulkley, 13 Johns. (N. Y.) 486; Mellendy *v.* N. E. Protective Union, 36 Vt. 31.

It is held in Indiana that the mere production in evidence of a note signed "A. A. London," will not support a declaration upon a note alleged to have been made by Andrew A. London, without further proof to identify it as the note sued upon. London *v.* Walpole, 1 Smith (Ind.) 121. But where a copy of the note is annexed, the abbreviation is deemed to be alleged and needs no proof if not denied. Hunt *v.* Raymond, 11 Ind. 215; Rightsell *v.* Kellam, 48 Ind. 252. The court will take judicial notice of common abbreviation. Weaver *v.* McElhenon, 13 Mo. 89.

Variance in Initial. — A variance in the initial of a name may not be material. Chestnut Hill Reservoir Co. *v.* Chase, 14 Conn. 123; Claflin *v.* Griffin, 8 Bosw. (N. Y.) 689. But see *contra* King *v.* Clark, 7 Mo. 269.

68. Representative Capacity. Where the declaration on a note alleged that the own proper hand of the defendant was thereunto subscribed, a note produced in evidence subscribed "S. B. Executrix of W. B. by her agent F. G. A.," does not show a material variance. Baldwin *v.* Stebbins, Minor (Ala.) 180. But where the note declared upon is for the personal liability of the defend-

signature by an agent.[69]

2. Payees. — A. PRESUMPTIONS. — Where a note runs to two payees the presumption is of a joint and co-equal interest of them, in the absence of evidence to the contrary.[70] A note payable to one whose name is used as a firm name, is presumed, in the absence of evidence to the contrary, to have been given to him individually.[71] A note payable to one designated in a representative capacity is presumed payable to him as an individual,[72]

ants, a note containing a promise, made by them in a representative capacity shows a material variance. Leach *v.* Blow, 8 Smed. & M. (Miss.) 221; Atkins *v.* Brown, 59 Me. 90.

69. Phelps *v.* Riley, 3 Conn. 266; McMartin *v.* Adams, 16 Mo. 268; Slevin *v.* Reppy, 46 Mo. 606; C. J. L. Meyer & Sons Co. *v.* Black, 4 N. M. 352, 16 Pac. 620.

Material Variance as to Agency. Where a note signed by A. individually is declared upon as executed for and in behalf of B. by A. the variance is fatal. Rossiter *v.* Marsh, 4 Conn. 196. So also under an averment that "A." made his note individually, it is not competent to prove a note signed "B. by A." Lawton *v.* Swihart, 10 Ind. 562.

70. Tisdale *v.* Maxwell, 58 Ala. 40.

71. Boyle *v.* Skinner, 19 Mo. 82.

72. *Alabama.*—Castleberry *v.* Fennell, 4 Ala. 642; Duncan *v.* Stewart, 25 Ala. 408, 60 Am. Dec. 527; Preston *v.* Dunham, 52 Ala. 217.

Arkansas. — McClain *v.* Onstott, 3 Ark. 478; Perkins *v.* Crabtree, 5 Ark. 475; Duke *v.* Crabtree, 5 Ark. 478; Cravens *v.* Logan, 7 Ark. 103; Bingham *v.* Calvert, 13 Ark. 399.

Georgia. — Austell *v.* Rice, 5 Ga. 472; Saffold *v.* Burks, 69 Ga. 289.

Illinois. — Baker *v.* Ormsby, 5 Ill. 325; Chadsey *v.* McCreery, 27 Ill. 252; Van Buskirk *v.* Day, 32 Ill. 260; Night Hawks Burlesque Co. *v.* Louisville E. & St. L. C. R. Co., 40 Ill. App. 49; Hately *v.* Pike, 162 Ill. 241, 44 N. E. 441; Beach *v.* Peabody, 188 Ill. 75, 58 N. E. 679.

Indiana. — Thompson *v.* Weaver, 7 Blackf. 552; Speelman *v.* Culbertson, 15 Ind. 441.

Iowa. — Central State Bank *v.* Spurlin, 111 Iowa 187, 82 N. W. 493, 49 L. R. A. 661.

Louisiana. — Urquhart *v.* Taylor, 5 Mart. (O. S.) 201; Gilman *v.* Horseley, 5 Mart. (N. S.) 661; Clampitt *v.* Newport, 8 La. Ann. 124.

Maine. — Clap *v.* Day, 2 Me. 305, 11 Am. Dec. 99.

Maryland. — Turner *v.* Plowden, 2 Gill & J. 455.

Massachusetts. — Shaw *v.* Stone, 1 Cush. 228; Bartlett *v.* Hawley, 120 Mass. 92; Plimpton *v.* Goodell, 126 Mass. 119; Hill *v.* Whidden, 158 Mass. 267, 33 N. E. 526.

Mississippi. — Carter *v.* Saunders, 2 How. 851; Bonnaffee *v.* Fenner, 6 Smed. & M. 212, 45 Am. Dec. 278; Gunn *v.* Hodge, 32 Miss. 319.

Missouri. — Thomas *v.* Relfe, 9 Mo. 377; Thornton *v.* Rankin, 19 Mo. 193, 59 Am. Dec. 338; Toledo Agricultural Works *v.* Heisser, 51 Mo. 128.

New York. — Reznor *v.* Webb, 36 How. Pr. 353; Davis *v.* Garr, 6 N. Y. 124, 55 Am. Dec. 387; Litchfield *v.* Flint, 104 N. Y. 543, 11 N. E. 58; Coffin *v.* Grand Rapids Hydraulic Co., 136 N. Y. 655, 32 N. E. 1076.

North Carolina. — Horah *v.* Long, 4 Dev. & B. 274, 34 Am. Dec. 378; Savage *v.* Carter, 64 N. C. 196.

Texas. — Gayle *v.* Ennis, 1 Tex. 184; Zachary *v.* Gregory, 32 Tex. 452.

Vermont. — Johnson *v.* Catlin, 27 Vt. 87, 62 Am. Dec. 622.

Note Payable to Cashier. — A note payable to a person designated as cashier, is presumed to be the note of the bank of which he is cashier.

United States. — Blair *v.* First Nat. Bank, 2 Flip. 111, 3 Fed. Cas. No. 1,485..

Indiana. — Nave *v.* Hadley, 74 Ind. 155; Nave *v.* First Nat. Bank, 87 Ind. 204.

Massachusetts.—Commercial Bank *v.* French, 21 Pick. 486, 32 Am. Dec. 280.

Michigan. — Garton *v.* Union City Nat. Bank, 34 Mich. 279.

where the name of the payee is in blank, the holder has presumed authority to fill the blank.[73]

B. Evidence. — Parol evidence is admissible to explain a latent ambiguity with regard to the person intended as the payee,[74] to show that a note payable to a cashier was received by him as cashier and agent of a particular bank to which it belongs,[75] and

New York. — New York Bank *v.* Ohio Bank, 29 N. Y. 619; First Nat. Bank *v.* Hall, 44 N. Y. 395, 4 Am. Rep. 698.

Tennessee. — Lookout Bank *v.* Aull, 93 Tenn. 645, 27 S. W. 1014, 42 Am. St. Rep. 934.

Utah. — Bingham *v.* Mackintosh, 5 Utah 568, 18 Pac. 363.

Vermont. — Bank of Manchester *v.* Slason, 13 Vt. 334; U. S. Nat. Bank *v.* Burton, 58 Vt. 426, 3 Atl. 756. But see Horah *v.* Long, 4 Dev. & B. (N. C.) 274, 34 Am. Dec. 378; Johnson *v.* Catlin, 27 Vt. 87, 62 Am. Dec. 622.

73. *Alabama.* — First Nat. Bank *v.* Johnston, 97 Ala. 655, 11 So. 690.

Delaware. — Farmers' & Merchants' Bank *v.* Horsey, 2 Houst. 385.

Illinois. — Weston *v.* Meyers, 23 Ill. 424.

Indiana. — Wilson *v.* Kinsey, 49 Ind. 35; Greenhow *v.* Boyle, 7 Blackf. 56; Rich *v.* Starbuck, 51 Ind. 87; Armstrong *v.* Harshman, 61 Ind. 52, 28 Am. Rep. 665; Gothrupt *v.* Williamson, 61 Ind. 599; Alleman *v.* Wheeler, 101 Ind. 141.

Kentucky. — Kentucky Bank *v.* Garey, 6 B. Mon. 626.

Maryland. — Boyd *v.* McCann, 10 Md. 118; Dunham *v.* Clog, 30 Md. 284; Sittig *v.* Birkestack, 38 Md. 158.

Missouri. — Schooler *v.* Tilden, 71 Mo. 580.

New York. — Dinsmore *v.* Duncan, 4 Daly 199; Hardy *v.* Norton, 66 Barb. 527.

Oregon. — Thompson *v.* Rathbun, 18 Or. 202, 22 Pac. 837; Cox *v.* Alexander, 30 Or. 438, 46 Pac. 794.

Pennsylvania. — Winters *v.* Collings, 4 Kulp 491; Stahl *v.* Berger, 10 Serg. & R. 170, 13 Am. Dec. 666.

South Carolina. — Aiken *v.* Cathcart, 3 Rich. Law 133, 45 Am. Dec. 764.

Tennessee. — Seay *v.* Tenn. Bank, 3 Sneed 558, 67 Am. Dec. 764.

Texas. — Close *v.* Fields, 2 Tex. 232.

Virginia. — Brummel *v.* Enders, 18 Gratt. 873; Frank *v.* Lilienfeld, 33 Gratt. 377.

Wisconsin. — Van Etta *v.* Evenson, 28 Wis. 33, 9 Am. Rep. 486.

Presumption as to Payee of Check. It will be presumed in the absence of evidence to the contrary that the name of the payee was written in a check when it was signed. Fifth Nat. Bank *v.* Central Nat. Bank, 82 Hun 559, 31 N. Y. Supp. 541.

74. *Alabama.* — Mundine *v.* Crenshaw, 3 Stew. 87; Hellen *v.* Wideman, 10 Ala. 846.

Kentucky. — Jenkins *v.* Bass, 88 Ky. 397, 11 S. W. 293, 21 Am. St. Rep. 344.

Louisiana. — Grieve *v.* Sagory, 3 Mart. (O. S.) 599.

Missouri. — Cox *v.* Beltzhoover, 11 Mo. 142, 47 Am. Dec. 145; Yantis *v.* Yourie, 10 Mo. 669.

New Hampshire. — Newport Mechanics' Mfg. Co. *v.* Starbridge, 10 N. H. 123, 34 Am. Dec. 145.

South Carolina. — Barkley *v.* Tarrant, 20 S. C. 574, 47 Am. Rep. 853.

Tennessee. — Bank of Tenn. *v.* Burke, 1 Cold. 623.

Vermont. — Rutland & B. R. R. Co. *v.* Cole, 24 Vt. 33.

Payee Not Named. — Parol evidence is admissible to show that a due bill not naming any payee was delivered to and intended to acknowledge a liability to the plaintiff. Nicholas *v.* Krebs, 11 Ala. 230. In an action on a sealed note in which the payee was not named, parol evidence is admissible to prove the intended payee. Barkley *v.* Tarrant, 20 S. C. 574, 47 Am. Rep. 853. Where a note is executed to one in another rather than in his real name, he may show by parol evidence under proper averments that he was intended as the payee. Chenot *v.* Lefevre, 8 Ill. 637.

75. Walker *v.* Popper, 2 Utah 96:

to show that a note payable to a person designated in an official capacity was received in an official capacity for the plaintiff corporation.[76] The maker cannot by any evidence assail the capacity or the right of the payee to receive the note and indorse it,[77] or show that others than the payee have a beneficial interest in the note.[78]

C. Relation of Evidence to Pleading. — A note or bill is not admissible in evidence where it varies materially from the description of the payee in the declaration,[79] but the variance may be obviated by proof that the note was executed to the plaintiff by a wrong name,[80] and a slight variance in the description of the payee

Baldwin *v.* Bank of Newbury, 1 Wall. (U. S.) 234.

Ownership of Note Payable to Bank. — Parol evidence is admissible in an action upon a note payable to a bank, brought by the holder in the name of the bank for his use, to show that the note belonged to the holder, and never was the property of the bank, to avoid the effect of a tender in the bills of the bank. Graves *v.* Mississippi & A. R. Co., 6 How. (Miss.) 548.

76. Southern L. Ins. & Trust Co. *v.* Gray, 3 Fla. 262; Rutland & B. R. R. Co. *v.* Cole, 24 Vt. 33.

77. *California.* — Grangers' Business Assn. *v.* Clark, 67 Cal. 634, 8 Pac. 445; Bank of Shasta *v.* Boyd, 99 Cal. 604, 34 Pac. 337.

Indiana. — Rock *v.* Stinger, 36 Ind. 346; Pancoast *v.* Travelers' Ins. Co., 79 Ind. 172; Wolke *v.* Kuhne, 109 Ind. 313, 10 N. E. 116.

Missouri. — First Nat. Bank *v.* Gillilan, 72 Mo. 77; St. Joseph F. & M. Ins. Co. *v.* Hauck, 71 Mo. 465; Union Nat. Bank *v.* Hunt, 7 Mo. App. 42, 76 Mo. 439; Mayer *v.* Old, 57 Mo. App. 639.

Nebraska. — Platt Val. Bank *v.* Harding, 1 Neb. 461; Exchange Nat. Bank *v.* Capps, 32 Neb. 242 49 N. W. 223.

New Hampshire. — Congregational Soc. *v.* Perry, 6 N. H. 164, 25 Am. Dec. 455; Pine River Bank *v.* Hodgson, 46 N. H. 114; Nashua F. Ins. Co. *v.* Moore, 55 N. H. 48.

New York. — Holmes & Griggs Mfg. Co. *v.* Holmes & Wessel Metal Co., 53 Hun 52, 5 N. Y. Supp. 937, *affirmed* 127 N. Y. 252, 27 N. E. 831.

Ohio. — Rice *v.* Goodenow, Tapp. 126.

Pennsylvania. — Dulty *v.* Brownfield, 1 Pa. St. 497.

Vermont. — Howard Nat. Bank *v.* Loomis, 51 Vt. 349.

Bills of Exchange. — The drawee and acceptor of a bill or draft cannot by any evidence assail the competency of the drawer. So. Bank of Georgia *v.* Williams, 25 Ga. 534; Cathell *v.* Goodwin, 1 Har. & G. 468.

78. Grigsby *v.* Nance, 3 Ala. 347; Wheeler *v.* Barr, 7 Ind. App. 381, 34 N. E. 591.

79. *Arkansas.*—Murphree *v.* State Bank, 4 Ark. 448.

California. — Farmer *v.* Cram, 7 Cal. 135.

Illinois. — Connolly *v.* Cottle, 1 Ill. 364; Ingraham *v.* Luther, 65 Ill. 446.

Indiana. — McKinney *v.* Harter, 6 Blackf. 320.

Louisiana. — Flogny *v.* Adams, 11 Mart. (O. S.) 547.

Missouri. — Faulkner *v.* Faulkner, 73 Mo. 327.

Oregon. — Thompson *v.* Rathbun, 18 Or. 202, 22 Pac. 837.

South Carolina. — Cherry *v.* Fergeson, 2 McMull. 15; Harden *v.* Harden, 1 Strob. 56.

80. Jester *v.* Hopper, 13 Ark. 43; Leaphardt *v.* Sloan, 5 Blackf. (Ind.) 278.

Averments of Identity. — Proper averments as well as proofs of identity should be made to obviate an otherwise material variance in the description of the payee. Rives *v.* Marrs, 25 Ill. 277; Curtis *v.* Marrs, 29 Ill. 508; Flogny *v.* Adams, 11 Mart. (La.) (O. S.) 547. A note payable to "R. & V." is admissible to support a declaration by C. R. and O. V. where it is alleged to have been

is not material.[81] Evidence that another person was the payee who had indorsed the note in blank does not show a fatal variance from an allegation that the note is due to the plaintiff.[82]

III. EXECUTION AND DELIVERY.

1. In General. — A. Presumptions and Burden of Proof. — A note or bill is presumed to have been executed and delivered at the place of residence of the makers,[83] and at the time of its date.[84] The burden is upon the holder to prove the execution of the instrument.[85] Its delivery is presumed from possession by the

payable to plaintiffs by the name of "R. & V." Ramsay *v.* Herndon, 5 Blackf. (Ind.) 345.

81. *Alabama.* — Taylor *v.* Strickland, 37 Ala. 642.

Illinois. — Peyton *v.* Tappan, 2 Ill. 388; Stevens *v.* Stebbins, 4 Ill. 25; Greathouse *v.* Kipp, 4 Ill. 371; Ross *v.* Clawson, 47 Ill. 402.

Indiana. — Taylor *v.* Coquillard, 5 Blackf. 158; St. James Church *v.* Moore, 1 Ind. 289; Doron *v.* Crosby, 12 Ind. 634, 13 Ind. 497; Farley *v.* Harvey, 14 Ind. 377.

Maryland.—Graham *v.* Fahnestock, 5 Gill 215.

Tennessee. — Wood *v.* Hancock, 4 Humph. 465; White *v.* Fassitt, 10 Humph. 191.

Texas. — Thomas *v.* Young, 5 Tex. 253.

Immaterial Variance. — There is no material variance between the evidence and the pleading in the name of the payee "Formey" and "Formby." Taylor *v.* Strickland, 37 Ala. 642. A declaration that a note was made payable to "Alexander T." is supported by evidence of a note payable to "A. H. T." and proof that they are the same person. Peyton *v.* Tappan, 2 Ill. 388.

82. Evidence of a note payable to "Stevens S." is not a material variance from one described payable to "Steven S." Stevens *v.* Stebbins, 4 Ill. 25. Evidence of a note payable to a person described by an initial letter will support an averment of a note payable to one with the first name described in full. Greathouse *v.* Kipp, 4 Ill. 371; Ross *v.* Clawson, 47 Ill. 402; Taylor *v.* Coquillard 5 Blackf. (Ind.) 158; Doron *v.* Crosby, 12 Ind. 634, 13 Ind. 497; Farley *v.* Harvey, 14 Ind. 377. And so *vice versa* Wood *v.* Hancock, 4 Humph. (Tenn.) 465. Evidence of a note payable to "A. Agent" is not a material variance from one described as payable to "A." Graham *v.* Fahnestock, 5 Gill (Md.) 215. Evidence of a note payable to "Mrs. A. Whiting" will support a declaration of one payable to "A. Whiting." Thomas *v.* Young, 5 Tex. 253.

83. McAuliff *v.* Reuter, 61 Ill. App. 32; Harmon *v.* Wilson, 1 Dev. (62 Ky.) 322; Strawberry Point Bank *v.* Lee, 117 Mich. 122, 75 N. W. 444; Plahto *v.* Patchin, 26 Mo. 389.

84. *United States.* — Riggs *v.* Swann, 3 Cranch C. C. 183, 20 Fed. Cas. No. 11,831.

Alabama. — Elyton Co. *v.* Hood, 121 Ala. 373, 25 So. 745.

Delaware. — Parks *v.* Evans, 5 Houst. 576.

Illinois. — Baldwin *v.* Freydenhall, 10 Ill. App. 106; Knisely *v.* Sampson, 100 Ill. 573; Peoria Sav. Loan & Trust Co. *v.* Elder, 165 Ill. 55, 45 N. E. 1083; Lemars Shoe Co. *v.* Lemars Shoe Mfg. Co., 89 Ill. App. 245.

Mississippi. — Morgan *v.* Burrow, (Miss.), 16 So. 432.

Missouri. — Wells *v.* Hobson, 91 Mo. App. 379.

New Jersey. — Hopkins *v.* Miller, 17 N. J. Law 185.

Vermont. — Woodford *v.* Dorwin, 3 Vt. 82, 21 Am. Dec. 573.

85. *United States.* — Gray *v.* Tunstall, 1 Hempst. 558, 10 Fed. Cas No. 5730.

Alabama. — Knapp *v.* McBride, 7 Ala. 19; Garrett *v.* Garrett, 64 Ala. 263; Guice *v.* Thornton, 76 Ala. 466.

Colorado. — Walsenburg Water Co. *v.* Moore, 5 Colo. App. 144, 38

holder.[86] The maker has the burden of proving as against the in-

Pac. 60; Brown *v.* Tourtelotte, 24 Colo. 204, 50 Pac. 195.

Georgia. — Stanton *v.* Burge, 34 Ga. 435; Bryan *v.* Tooke, 60 Ga. 437.

Illinois. — Dietrich *v.* Mitchel, 43 Ill. 40, 92 Am. Dec. 99; Wallace *v.* Wallace, 8 Ill. App. 69; Chicago Elec. L. Renting Co. *v.* Hutchinson, 25 Ill. App. 476; McRae *v.* Houdeshell, 88 Ill. App. 428.

Indiana. — Collins *v.* Maghee, 32 Ind. 268; Hunter *v.* Probst, 47 Ind. 359; Brooks *v.* Allen, 62 Ind. 401; Wines *v.* State Bank, 22 Ind. App. 114, 53 N. E. 389.

Iowa. — Carle *v.* Cornell, 11 Iowa 374; Terhune *v.* Henry, 13 Iowa 99; Sankey *v.* Trump, 35 Iowa 267; Miller *v.* House, 67 Iowa 737, 25 N. W. 899; Carthage Bank *v.* Butterbaugh, (Iowa), 88 N. W. 954; Marshall Field Co. *v.* Oren Ruffcorn Co., (Iowa), 90 N. W. 618.

Kansas. — Holmes *v.* Riley, 14 Kan. 131; State Sav. Assn. *v.* Barber, 35 Kan. 488, 11 Pac. 330; Spencer *v.* Iowa Mortg. Co., 6 Kan. App. 378, 50 Pac. 1094.

Kentucky. — Kerley *v.* West, 3 Litt. 362.

Louisiana. — Barriere *v.* Fortier, 23 La. Ann. 274.

Maine. — Small *v.* Sacramento Nav. & Min. Co. 40 Me. 274; Reed *v.* Wilson, 39 Me. 585.

Massachusetts. — Simpson *v.* Davis, 119 Mass. 269, 20 Am. Rep. 324; Sears *v.* Moore, 171 Mass. 514, 50 N. E. 1027.

Michigan. — Mills *v.* Bunce, 29 Mich. 364; Anderson *v.* Walter, 34 Mich. 113; McRobert *v.* Crane, 49 Mich. 483, 13 N. W. 826.

Mississippi. — Patrick *v.* Carr, 50 Miss. 199.

Missouri. — Bank of Mo. *v.* Scott, 1 Mo. 744; Swearingen *v.* Knox, 10 Mo. 31; Edmonston *v.* Henry, 45 Mo. App. 346; Smith *v.* Roach, 59 Mo. App. 115; Cravens *v.* Gillilan, 63 Mo. 28.

Nebraska. — First Nat. Bank *v.* Carson, 30 Neb. 104, 46 N. W. 276; Monitor Plow Works *v.* Born, 33 Neb. 747, 51 N. W. 129.

New York. — Giesson *v.* Gierson, 1 Code Rep. (N. S.) 414.

Ohio. — Union Nat. Bank *v.* Wickham, 18 Ohio C. C. 685.

Oklahoma. — Richardson *v.* Fellner, 9 Okla. 513, 60 Pac. 270.

Pennsylvania. — Harris *v.* Harris, 154 Pa. St. 501, 26 Atl. 617, 32 W. N. C. 247; Nat. Bank *v.* Furman, 4 Pa. Super. Ct. 415.

Texas. — Brashear *v.* Martin, 25 Tex. 202; Harvey *v.* Harvey, (Tex. Civ. App.), 40 S. W. 185; Talbot *v.* Dillard, 22 Tex. Civ. App. 360, 54 S. W. 406.

Attestation of Note. — If a person writes his name to a note at the place commonly used for attestation, though without using any words of attestation, the presumption is that he did not sign as maker of the note but as a subscribing witness. Farnsworth *v.* Rowe, 33 Me. 263. The burden of proving the attestation of a witnessed note is on the party suing on the note. Reed *v.* Wilson, 39 Me. 585; Drury *v.* Vannevar, 1 Cush. (Mass.) 276.

86. *Arkansas.* — Mitchell *v.* Conley, 13 Ark. 414; Williams *v.* Williams, 13 Ark. 421.

California. — Pastene *v.* Pardini, 135 Cal. 431, 67 Pac. 681.

Indiana. — Taylor *v.* Gay, 6 Blackf. 150; Mahon *v.* Sawyer, 18 Ind. 73; Brooks *v.* Allen, 62 Ind. 401; Garrigus *v.* Home F. & F. Mis. Soc., 3 Ind. App. 91, 28 N. E. 1009.

Maryland. — Pannell *v.* Williams, 8 Gill & J. 511.

Michigan. — Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497.

New York. — Rix *v.* Hunt, 16 App. Div. 540, 44 N. Y. Supp. 988; Curtis *v.* Crane, 6 N. Y. St. 748.

North Carolina. — Pate *v.* Brown, 85 N. C. 166.

Texas. — Matula *v.* Lane, 22 Tex. Civ. App. 391, 55 S. W. 504.

Wisconsin. — Studebaker Bros. Mfg. Co. *v.* Langson, 89 Wis. 200, 16 N. W. 773.

Burden Upon Defendant. — Where the defendant got possession of earlier notes under false pretenses and still retained them, the burden is on him to make clear the delivery and acceptance of a new note. Whyte *v.* Rosencrantz, 123 Cal. 634, 56 Pac. 436. Where the defendant

dorsee that the instrument was never accepted by the payee[87] and to show that he signed after consideration had passed to other parties.[88] One who signs his initials to a note under the name of another is presumptively a joint maker.[89]

B. EVIDENCE OF EXECUTION. — In an action upon a note its execution may be proved by admissions of the maker.[90] The fact of execution may be shown by circumstantial evidence,[91] and rebutted by like evidence.[92] When the defendant claimed a mistake in his signature, and that it was intended to be put on another note of the same date, such other note and a conversation between the parties relative thereto were competent evidence in his behalf.[93]

has by his contract admitted the execution of a note, the burden is upon him to show a want of authority on the part of the officers of the corporation to execute it. Temple St. Cable Ry. *v.* Hellman, 103 Cal. 634, 37 Pac. 530.

Counteracting Presumption.—The presumption of absolute delivery from possession may be counteracted by proof that it was based on a contingency which did not happen. Hurt *v.* Ford, (Mo.), 36 S. W. 671.

87. Evans *v.* Kister, 92 Fed. 828, 35 C. C. A. 28.

88. La Belle Sav. Bank *v.* Taylor, 69 Mo. App. 99.

89. Palmer *v.* Stephans, 1 Denio (N. Y.) 471.

90. *Colorado.* — Lothrop *v.* Union Bank, 16 Colo. 257, 27 Pac. 696.

Illinois. — Hefner *v.* Vandolah, 62 Ill. 483, 14 Am. Rep. 106; Paul *v.* Berry, 78 Ill. 158.

Iowa. — Patton *v.* Lund, 114 Iowa 201, 86 N. W. 296.

Kentucky. — Forsythe *v.* Bonta, 5 Bush 547; Fordsville Banking Co. *v.* Thompson, 23 Ky. L. Rep. 1276, 65 S. W. 6.

Massachusetts. — Williams *v.* Robbins, 16 Gray 77; Greenfield Bank *v.* Crafts, 4 Allen 447; Bartlett *v.* Tucker, 104 Mass. 336, 6 Am. Rep. 240; Wellington *v.* Jackson, 121 Mass. 157.

Minnesota. — Pottgieser *v.* Dorn, 16 Minn. 204.

Missouri. — Dow *v.* Spenny, 29 Mo. 386; Cravens *v.* Gillilan, 63 Mo. 28; Smith *v.* Witton, 60 Mo. 458.

New Jersey. — Suydam *v.* Combs, 15 N. J. Law 133.

Pennsylvania. — Bowen *v.* De Lattre, 6 Whart. 430.

Vermont. — Adams *v.* Brownson, 1 Tyler 452; Hodges *v.* Eastman, 12 Vt. 358.

Signature With Mark. — In the absence of any attesting witness to a signature with a mark, its execution may be proved by the maker's admission. Hilborn *v.* Alford, 22 Cal. 482. In the absence of the subscribing witness from the jurisdiction the execution of a note by the maker's mark may be proved by other evidence. Ballinger *v.* Davis, 29 Iowa 512. The execution of a note signed with a mark may be proved by evidence of the maker's repeated promises to pay it. Lopez *v.* Berghel, 15 La. (O. S.) 42. Where the attesting witness is dead, proof of his handwriting sufficiently proves the mark. Sanborn *v.* Cole, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208.

91. Melvin *v.* Hodges, 71 Ill. 422; Stricker *v.* Barnes, 122 Ind. 348, 23 N. E. 263; Holmes *v.* Riley, 14 Kan. 131; De Arman *v.* Taggart, 65 Mo. App. 82; German-American Bank *v.* Stickle, 59 Neb. 321, 80 N. W. 910; Stevenson *v.* Stewart, 11 Pa. St. 307; Crane *v.* Dexter, Horton & Co., 5 Wash. 479, 32 Pac. 223.

92. Hunter *v.* Harris, 24 Ill. App. 637; Dorsett *v.* Clother, 133 Ill. 195, 24 N. E. 525; Nickerson *v.* Gould, 82 Me. 512, 20 Atl. 86; Travers *v.* Snyder, 38 Ill. App. 379; Carpenter *v.* Wilmot, 24 Mo. App. 589; Wagoner *v.* Ruply, 69 Tex. 700, 7 S. W. 80.

93. Copeland *v.* Copeland, 64 S. C. 251, 42 S. E. 105.

Evidence of Fraud in Procuring Execution. — Under a defense that the execution of the note in suit was procured by fraud and circumvention, evidence is admissible to show

Parol evidence is admissible to prove that an instrument signed by one person for another was signed by the latter's direction in his presence,[94] and to show as between the parties that one who signed as a maker intended to sign as an indorser or guarantor.[95]

C. Evidence of Delivery. — Evidence of delivery is essential to give validity and effect to a bill or note,[96] and will control the

that the defendant did not to his knowledge sign the note sued upon, but signed another and different note. Lindley *v.* Hitchings, 78 Ill. App. 425.

94. Morton *v.* Murray, 176 Ill. 54, 51 N. E. 767.

95. Miller *v.* Kenigsberg, 9 Kan. App 29. 57 Pac. 246.

96. *United States.* — Wells, Fargo & Co. *v.* Vansickle, 64 Fed. 944.

Arkansas. — Mitchell *v.* Conley, 13 Ark. 414.

District of Columbia. — Drum *v.* Benton, 13 App. D. C. 245.

Illinois. — King *v.* Fleming, 72 Ill. 21, 22 Am. Rep. 131; Buehler *v.* Galt, 35 Ill. App. 225; Farmers' & Merchants' State Bank *v.* Gleason, 75 Ill. App. 251.

Indiana. — Wickhizer *v.* Bolin, 22 Ind. App. 1, 53 N. E. 238; Nicholson *v.* Coombs, 90 Ind. 515, 46 Am. Rep. 229; Stokes *v.* Anderson, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313; Purviance *v.* Jones, 120 Ind. 162, 21 N. E. 1099, 16 Am. St. Rep. 319; Palmer *v.* Poor, 121 Ind. 132, 22 N. E. 984, 6 L. R. A. 469.

Iowa. — Bell *v.* Mahin, 69 Iowa 408, 29 N. W. 331.

Maine. — Leigh *v.* Horsum, 4 Me. 28; Salley *v.* Terrill, 95 Me. 553, 50 Atl. 896, 55 L. R. A. 730.

Maryland. — Devries & Co. *v.* Shumate, 53 Md. 211.

Massachusetts. — Canfield *v.* Ives, 18 Pick. 253.

Michigan. — Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497.

Minnesota. — Stein *v.* Passmore, 25 Minn. 256.

Missouri. — Carter *v.* McClintock, 29 Mo. 464.

New York. — Russell *v.* Whipple, 2 Cow. 536; Marvin *v.* McCullum, 20 Johns. 288; Kinne *v.* Ford, 52 Barb. 194, 43 N. Y. 587.

Ohio. — Doane *v.* Dunlap, Tapp. 145; Portage Co. Branch Bank *v.* Lane, 8 Ohio St. 405.

South Carolina. — Brooks *v.* Bobo, 4 Strob. 38; Weyman *v.* Perry, 42 S. C. 415, 20 S. E. 287.

Texas. — Montgomery *v.* Montgomery, (Tex. Civ. App.), 54 S. W. 414.

Vermont. — Binney *v.* Plumley, 5 Vt. 500; Chamberlain *v.* Hopps, 8 Vt. 94.

Virginia. — Wright *v.* Smith, 81 Va. 777; Grasswitt *v.* Connally, 27 Gratt. 19.

Wisconsin. — Burbank *v.* French, 12 Wis. 376; Thomas *v.* Watkins, 16 Wis. 549; Chipman *v.* Tucker 38 Wis. 43, 20 Am. Rep. 1.

Delivery of Indorsed Note.—There must be evidence of a delivery of an indorsed note to prove the title of the indorsee.

Arkansas. — Bizzell *v.* State Bank, 8 Ark. 459; Kirkpatrick *v.* Wolfe, 17 Ark. 96.

Colorado. — Spencer *v.* Carstarphen, 15 Colo. 445, 24 Pac. 882.

Connecticut. — Clark *v.* Sigourney, 17 Conn. 511; Dann *v.* Norris, 24 Conn. 333.

Georgia. — Daniel *v.* Royce, 95 Ga. 566, 23 S. E. 493.

Illinois. — Brinkley *v.* Going, 1 Ill. 366; Richards *v.* Darst, 51 Ill. 140; Badgeley *v.* Votrain, 68 Ill. 25, 18 Am. Rep. 541.

Indiana. — Weader *v.* First Nat. Bank, 126 Ind. 111, 25 N. E. 887; Mattix *v.* Leach, 16 Ind. App. 112, 43 N. E. 969.

Louisiana. — Rasch *v.* Johns, 14 La. (O. S.) 46.

Maryland. — Kiersted *v.* Rogers, 6 Har. & J. 282.

New Jersey. — Middleton *v.* Griffith, 57 N. J. Law 442, 31 Atl. 405.

Ohio. — Clark *v.* Boyd, 2 Ohio 56.

Pennsylvania. — Dean *v.* Warnock, 98 Pa. St. 565.

Virginia. — Howe *v.* Ould, 28 Gratt. 1.

presumption of execution at the time of its date.[97] The mere mailing of a mortgage for record securing an undelivered note does not prove a delivery of the note;[98] but the delivery of the note may be shown *prima facie* by circumstances, showing a safe keeping by the maker for the payee.[99] Parol evidence is admissible to show the purpose and condition of the delivery of an instrument for the payment of money,[1] and to show that a note in the possession of the payee was not intended to be delivered,[2] but not to show that it was delivered to the payee as an escrow.[3]

2. Relation of Evidence to Pleading. — A. Admissibility Under Issues. — Under a declaration alleging that the defendant executed the note in suit, evidence is admissible that it was executed by his authorized agent.[4] A note or bill sued upon is generally, by

97. *Alabama.* — Flanagan *v.* Meyer, 41 Ala. 132; Burns *v.* Moore, 76 Ala. 339, 52 Am. Rep. 332.

California. — Collins *v.* Driscoll, 69 Cal. 550, 11 Pac. 244.

Illinois. — Baldwin *v.* Freydenhall, 10 Ill. App. 106.

Indiana. — Davis *v.* Barger, 57 Ind. 54; Conrad *v.* Kinzie, 105 Ind. 281, 4 N. E. 863.

Iowa. — Barlow *v.* Buckingham, 68 Iowa 169, 26 N. W. 58.

Maine. — Hilton *v.* Houghton, 35 Me. 143; Cumberland Bank *v.* Mayberry, 48 Me. 198.

Michigan. — Beman *v.* Wessels, 53 Mich. 549, 19 N. W. 179.

Minnesota. — Almich *v.* Downey, 45 Minn. 460, 48 N. W. 197.

Mississippi. — Dean *v.* De Lezardi, 24 Miss. 424.

Missouri. — Fritsch *v.* Heislen, 40 Mo. 555.

New Hampshire. — Marshall *v.* Russell, 44 N. H. 509.

New York. — Lansing *v.* Gaine, 2 Johns. 300, 3 Am. Dec. 422; Breck *v.* Cole, 4 Sandf. 79; Germania Bank *v.* Distler, 67 Barb. 333, 4 Hun 622; Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70.

Ohio. — Jessup *v.* Dennison, 2 Dis. 150.

Vermont. — Woodford *v.* Dorwin, 3 Vt. 82, 21 Am. Dec. 573; Lovejoy *v.* Whipple, 18 Vt. 379, 46 Am. Dec. 157; Goss *v.* Whitney, 24 Vt. 187.

98. Intent to Deliver Note. Evidence of the mere intent to deliver a note does not prove delivery. Montgomery *v.* Montgomery, (Tex. Civ. App.), 54 S. W. 414.

99. Vietor *v.* Swisky, 87 Ill. App. 583; *In re* Reeve's Estate, 111 Iowa 260, 82 N. W. 912.

Possession by Maker as Agent. Where the maker of a note is shown to have held possession thereof as agent of the payee, and after the death of the payee, handed it to her administrator, the delivery is sufficiently shown. Welch *v.* Dameron, 47 Mo. App. 221.

1. *United States.* — Burke *v.* Delaney, 153 U. S. 228.

Connecticut. — Couch *v.* Meeker, 2 Conn. 302, 7 Am. Dec. 274; McFarland *v.* Sikes, 54 Conn. 250, 7 Atl. 408.

Georgia. — Crawford *v.* Foster, 6 Ga. 202, 50 Am. Dec. 327.

Minnesota. — Westman *v.* Krumweide, 30 Minn. 313, 15 N. W. 255.

Maryland. — Rickerts *v.* Pendleton, 14 Md. 320.

New York. — Parmerter *v.* Colrick, 20 Misc. 202, 45 N. Y. Supp. 748.

Ohio. — Bovey Queen City, etc. Co. *v.* Chillicothe, etc. Works, 6 Ohio Dec. 713.

Texas. — Merchants' Nat. Bank *v.* McAnulty, (Tex. Civ. App.), 31 S. W. 1091.

2. Scaife *v.* Byrd, 39 Ark. 568.

3. Garner *v.* Fite, 93 Ala. 405, 9 So. 367.

Delivery of Bond as Escrow. Parol evidence is admissible to show that a bond was delivered by the sureties to the principal obligors as an escrow. Crawford *v.* Foster, 6 Ga. 202, 50 Am. Dec. 327.

4. Baldwin *v.* Stebbins, Minor (Ala.) 180; Phelps *v.* Riley, 3 Conn.

statute, admissible in evidence without proof of execution if its execution is not denied under oath.[5] Under a denial of execution evidence is admissible to show the character of delivery,[6] or to disprove delivery,[7] and, under such denial the note is admissible, if there is slight proof of execution.[8]

B. VARIANCE. — a. *Materiality.* — Evidence of a note under seal is not admissible under a complaint upon a promissory note,[9] nor

266; Fraser *v.* Spofford, 5 Blackf. (Ind.) 207; McMartin *v.* Adams, 16 Mo. 268; Stevin *v.* Reppy, 46 Mo. 606; C. J. L. Meyer & Sons Co. *v.* Black, 4 N. M. 352, 16 Pac. 620; Moore *v.* McClure, 8 Hun (N. Y.) 557.

5. *United States.* — Pratt *v.* Willard, 6 McLean 27, 19 Fed. Cas. No. 11,378.

Alabama.—Tuskaloosa Cotton Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635.

Arkansas. — Richardson *v.* Comstock, 21 Ark. 69.

California. — Corcoran *v.* Doll, 32 Cal. 82.

Colorado. — Litchfield *v.* Daniels, 1 Colo. 268.

Delaware. — Pusey *v.* Pyle, 4 Houst. 98.

Georgia.— Union Dray Co. *v* Reid, 26 Ga. 107; Hays *v.* Hamilton, 68 Ga. 833.

Illinois.— Bailey *v.* Val. Nat. Bank, 127 Ill. 332, 19 N. E. 605; Judd *v.* Cralle, 37 Ill. App. 149.

Indiana. — Woollen *v.* Whitacre, 73 Ind. 198; McDonald *v.* Hare, 28 Ind. App. 227, 62 N. E. 501.

Iowa. — Dickey *v.* Baker, 76 Iowa 303, 41 N. W. 24.

Kansas. — Payne *v.* First Nat. Bank, 16 Kan. 147.

Kentucky. — Black *v.* Crouch, 3 Litt. 226; Gill *v.* Johnson, 1 Met. 649.

Michigan. — Dewey *v.* Toledo A. A. & N. M. R. Co., 91 Mich. 351, 51 N. W. 1063.

Minnesota. — McCormick Harv. Mach. Co. *v.* Doucette, 61 Minn. 40, 63 N. W. 95.

Mississippi. — Thornton *v.* Allis-ton, 12 Smed. & M. 124.

Missouri. — Zervis *v.* Unnerstall, 29 Mo. App. 474; Lebaume *v.* Lebaume, 1 Mo. 487.

Ohio. — Somers *v.* Harris, 16 Ohio 262.

Pennsylvania. — Miller *v.* Weeks, 22 Pa. St. 89.

South Carolina.— Carrier *v.* Hague, 9 S. C. 454.

Tennessee. — Smith *v.* McManus, 7 Yerg. 477, 27 Am. Dec. 519.

Texas. — San Antonio & A. P. R. Co. *v.* Harrison, 72 Tex. 478, 10 S. W. 556.

Virginia. — Clason *v.* Parrish, 93 Va. 24, 24 S. E. 471.

Wisconsin. — Smith *v.* Ehnert, 47 Wis. 479, 3 N. W. 26.

6. Owings *v.* Grubbs, 6 J. J. Marsh. (Ky.) 31.

Escrow Not Provable.—In an action of debt on a note under seal, under a plea of *non est factum,* it cannot be given in evidence that the note was delivered as an escrow. Smallwood *v.* Clark, Tayl. (N. C.) 281, 3 N. C. 320.

7. Pastene *v.* Pardini, 135 Cal. 431, 67 Pac. 681; Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Salley *v.* Terrill, 95 Me. 553, 50 Atl. 896, 55 L. R. A. 730.

8. Morris *v.* Varner, 32 Ala. 499; Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43; Melvin *v.* Hodges, 71 Ill. 422; Pate *v.* First Nat. Bank, 63 Ind. 254; Rotan *v.* Stoeber, 81 Ind. 145; Suydam *v.* Combs, 15 N. J. Law 133; Holmes *v.* Cook, 50 Wis. 172, 6 N. W. 507.

9. Reed *v.* Scott, 30 Ala. 640; McCrummen *v.* Campbell, 82 Ala. 566, 2 So. 482; Benoist *v.* Inhabitants of Carondelet, 8 Mo. 250; January *v.* Goodman, 1 Dall. (U. S.) 208.

Surplusage. — The letters "L. S." added to the signature of an inland bill of exchange, and the words "Witness my hand and seal" may be rejected as surplusage, and the bill may be admitted in evidence under a declaration as upon an ordinary bill of exchange. Irwin *v.* Brown, 2 Cranch C. C. 314, 13 Fed. Cas. No. 7,080.

is evidence of an unsealed note admissible under a complaint declaring upon a sealed note.[10] Evidence of a note executed and delivered to a third person and indorsed to plaintiffs is not admissible under a complaint upon a note alleging that it was executed and delivered by defendants to plaintiffs.[11] Evidence of a note indorsed by the defendant cannot support a complaint against him as maker.[12] A variance between the description of the note sued upon and the one produced in evidence is fatal,[13] and a variance between the pleading and the evidence as to the delivery of notes is material.[14]

b. *Immateriality.* — An unsubstantial variance between the note in evidence and the declaration will be disregarded.[15]

IV. ACCEPTANCE OF BILLS.

1. Presumptions and Burden of Proof. — An acceptor of a bill of exchange is presumed to know the signature of the drawer, though not that of the indorsers,[16] but has a right to rely upon the pre-

10. Stull *v.* Wilcox, 2 Ohio St. 569; Scott *v.* Horn, 9 Pa. St. 407. The letters "L. S." appended to the signature to a note do not make it a writing under seal, and the note is admissible under a declaration upon a note. Breitling *v.* Marx, 123 Ala. 222, 26 So. 203.

11. Sweetzer *v.* Claflin, 74 Tex. 667, 12 S. W. 395.

12. Bremen Bank *v.* Umrath, 42 Mo. App. 525.

13. *United States.* — Craig *v.* Brown, Pet. C. C. 139, 6 Fed. Cas. No. 3,326; Hyer *v.* Smith, 3 Cranch C. C. 437, 12 Fed. Cas. No. 6,979.

Alabama. — May *v.* Miller, 27 Ala. 515; Clancy *v.* Hilliard, 39 Ala. 713.

Arkansas. — State Bank *v.* Hubbard, 4 Ark. 419; Jordan *v.* Ford, 7 Ark. 416; Boren *v.* State Bank, 8 Ark. 500.

California. — Cates *v.* Campbell, 3 Cal. 191; Farmer *v.* Cram, 7 Cal. 135.

Connecticut. — Rossiter *v.* Marsh, 4 Conn. 196.

Illinois. — Conolly *v.* Cottle, 1 Ill. 364; Ingraham *v.* Luther, 65 Ill. 446.

Indiana. — Lawton *v.* Swihart, 10 Ind. 562; McKinney *v.* Harter, 6 Blackf. 320.

Iowa. — Hall *v.* Bennet, 2 Greene 466.

Louisiana. — Flogny *v.* Adams, 11 Mart. (O. S.) 547.

Maine. — Atkins *v.* Brown, 59 Me. 90.

Mississippi. — Leach *v.* Blow, 8 Smed. & M. 221.

Missouri. — Faulkner *v.* Faulkner, 73 Mo. 327; King *v.* Clark, 7 Mo. 269.

New York. — Bissel *v.* Drake, 19 Johns. 66.

Oregon. — Thompson *v.* Rathbun, 18 Or. 202, 22 Pac. 837.

South Carolina. — Cherry *v.* Ferguson, 2 McMull. 15; Harden *v.* Harden, 1 Strob. Law 56.

14. Stokes *v.* Polley, 30 App. Div. 550, 52 N. Y. Supp. 406.

15. *United States.* — Conant *v.* Wills, 1 McLean 427, 6 Fed. Cas. No. 3,087.

Alabama. — Dew *v.* Garner, 7 Port. 503; Leigh *v.* Lightfoot, 11 Ala. 935; Coster *v.* Thomason, 19 Ala. 717.

California. — Corcoran *v.* Doll, 32 Cal. 82.

Connecticut. — Walbridge *v.* Arnold, 21 Conn. 424; Hoyt *v.* Seeley, 18 Conn. 353.

Illinois. — Pickering *v.* Pulsifer, 9 Ill. 79; Hunter *v.* Bryden, 21 Ill. 591.

Indiana. — Glenn *v.* Porter, 72 Ind. 525.

Maine. — Blackstone Nat. Bank *v.* Lane, 80 Me. 165, 13 Atl. 683.

Maryland. — Rich *v.* Boyce, 39 Md. 314.

Missouri. — Dent *v.* Miles, 4 Mo. 419; Henshaw *v.* Liberty M. & F. Ins. Co., 9 Mo. 336.

New York. — Claflin *v.* Griffin, 8 Bosw. 689.

16. *United States.* — U. S. Bank

sumptive ownership of the apparent holder.[17] The acceptance of a bill raises a presumption, in the absence of evidence to the contrary, that the acceptor has funds of the drawer in his hands to meet it,[18] which presumption may be overcome by evidence of the relations of the parties, and the general scope of their dealings.[19] The burden of proof is on the holder of the bill to prove the hap-

v. Bank of Georgia, 10 Wheat. 333; U. S. *v.* U. S. Bank, 4 Dall. 235, note.

Illinois. — First Nat. Bank *v.* Ricker, 71 Ill. 439.

Louisiana. — Robbins *v.* Lambeth, 2 Rob. 304; McCall *v.* Corning, 3 La. Ann. 409, 48 Am. Dec. 454; McKleroy *v.* Southern Bank, 14 La. Ann. 458, 74 Am. Dec. 438; Howard *v.* Mississippi Val. Bank, 28 La. Ann. 727, 26 Am. Rep. 105.

Maryland. — Williams *v.* Drexel, 14 Md. 566.

New York. — Goddard *v.* Merchants' Bank, 2 Sandf. 247; Coggill *v.* Am. Ex. Bank, 1 N. Y. 113, 49 Am. Dec. 310; Bank of Commerce *v.* Union Bank, 3 N. Y. 230; Nat. Park Bank *v.* Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310; Holt *v.* Ross, 54 N. Y. 472, 13 Am. Rep. 615; White *v.* Continental Nat. Bank, 64 N. Y. 316, 21 Am. Rep. 612.

17. White *v.* Continental Nat. Bank, 64 N. Y. 316, 21 Am. Rep. 612.

18. *United States.* — Raborg *v.* Peyton, 2 Wheat. 385; Benjamin *v.* Tillman, 2 McLean 213, 3 Fed. Cas. No. 1,304; Kemble *v.* Lull, 3 McLean 272, 14 Fed. Cas. No. 7,683.

Arkansas. — Byrd *v.* Bertrand, 7 Ark. 321.

Illinois. — Gillilan *v.* Myers, 31 Ill. 525.

Kentucky. — Turner *v.* Browder, 5 Bush 216.

Louisiana. — Eastin *v.* Osborn, 26 La. Ann. 153; First Nat. Bank *v.* Moss, 41 La. Ann. 227, 6 So. 25.

Maine. — Kendall *v.* Galvin, 15 Me. 131, 32 Am. Dec. 141.

Missouri. — Adams *v.* Darby, 28 Mo. 162, 75 Am. Dec. 115.

Nebraska. — Trego *v.* Lowrey, 8 Neb. 238.

New York. — Alvord *v.* Baker, 9 Wend. 323; Healy *v.* Gilman, 1 Bosw. 235.

North Carolina. — State Bank *v.* Clark, 1 Hawks 36; Jordan *v.* Tarkington, 4 Dev. Law 357.

Ohio. — Ives *v.* Strickland, 4 Wkly. L. B. 852.

Pennsylvania. — Coursin *v.* Ledlie, 31 Pa. St. 506.

Tennessee. — Bradley *v.* McLellan, 3 Yerg. 301.

Presumption of Payment From Funds. — After the bill has been accepted and paid, it will be presumed that it was paid out of the drawer's funds in the hands of the drawee. Parks *v.* Nichols, 20 Ill. App. 143.

Presumption in Support of Action. The presumption that the acceptor had funds of the drawer is sufficient, if not overcome by proof, to support an action by the drawer, in possession of the bill after protest for nonpayment, to recover from the acceptor on a count for money had and received. Pilkington *v.* Woods, 10 Ind. 432; Byrne *v.* Schwing, 6 B. Mon. (Ky.) 199; Thurman *v.* Van Brunt, 19 Barb. (N. Y.) 409.

19. Parks *v.* Nichols, 20 Ill. App. 143; Trego *v.* Lowrey, 8 Neb. 238.

Shifting of Presumption. — When the proof shows that the acceptance was made without funds, the presumption shifts to the other side, there being an implied promise of the drawer to put the drawee in funds. But the presumption again may be overcome by proof that the acceptance was made upon an agreement that the bill was both drawn and accepted for the accommodation of the payees. Thurman *v.* Van Brunt, 19 Barb. (N. Y.) 409.

Presumption Not Overcome. — A direction in the bill as to the reimbursement of the drawee does not negative the ordinary presumption of funds in the hands of the acceptor belonging to the drawer. Coursin *v.* Ledlie, 31 Pa. St. 506.

pening of a condition attached to the acceptance,[20] but the burden is on the acceptor to show clearly the existence of the condition.[21]

2. Evidence. — A. In General. — Evidence of an agreement to pay what might become due to the drawer does not prove an acceptance of the draft.[22] Evidence of a statement by the drawee that he has accepted the draft, but will not be able to pay until certain goods are sold, does not prove a conditional acceptance, but is evidence that the draft has been previously accepted and is due.[23] A general acceptance of any order drawn for the proceeds of goods is merely evidence that the proceeds of goods received after its date are received to the use of the payee.[24] A valid agreement to accept a bill is evidence of an acceptance.[25]

20. *Arkansas.* — Henry *v.* Hazen, 5 Ark. 401.
Georgia. — Marshall *v.* Clary, Ga. 511.
Maine. — Head *v.* Sleeper, 20 Me. 314.
Massachusetts. — Jackman *v.* Bowker, 4 Metc. 235.
Mississippi. — Van Vacter *v.* Flack, 1 Smed. & M. 393, 40 Am. Dec. 100.
Nebraska. — Stabler *v.* Gund, 35 Neb. 648, 53 N. W. 570.
New Jersey. — Rice *v.* Porter, 16 N. J. Law 440.
New York. — Atkinson *v.* Manks, 1 Cow. 691; Kellogg *v.* Lawrence, Hill & D. Supp. 332.
Pennsylvania. — Mason *v.* Graff, 35 Pa. St. 448.
South Carolina. — Walker *v.* Lide, 1 Rich. Law 249, 44 Am. Dec. 252.
21. Coffman *v.* Campbell, 87 Ill. 98.
22. Williams *v.* Gallyon, 107 Ala. 439, 18 So. 162.
23. Wells *v.* Brigham, 6 Cush. (Mass.) 6, 52 Am. Dec. 750.
24. Atkinson *v.* Manks, 1 Cow. (N. Y.) 691.
25. *United States.* — Wildes *v.* Savage, 1 Story 22, 29 Fed. Cas. No. 17,653; Cassel *v.* Dows, 1 Blatchf. 335, 5 Fed. Cas. No. 2,502; Garretson *v.* North Atchison Bank, 39 Fed. 163, 7 L. R. A. 428; Coollidge *v.* Payson, 2 Wheat. 66; Townsley *v.* Sumrall, 2 Pet. 170; Boyce *v.* Edwards, 4 Pet. 111.
Alabama. — Kennedy *v.* Geddes, 8 Port. 263, 33 Am. Dec. 289; Smith *v.* Ledyard, 49 Ala. 279; Whilden *v.* Merchants' & Planters' Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1.
California. — Naglee *v.* Lyman, 14 Cal. 450; Wakefield *v.* Greenhood, 29 Cal. 597; James *v.* E. G. Lyons Co., 134 Cal. 189, 66 Pac. 210.
Illinois. — Coffman *v.* Campbell, 87 Ill. 98; Second Nat. Bank *v.* Diefendorf, 90 Ill. 396; Hall *v.* First Nat. Bank, 133 Ill. 234, 24 N. E. 546.
Indiana. — Beach *v.* State Bank, 2 Ind. 488.
Kansas. — Light *v.* Powers, 13 Kan. 96.
Kentucky. — Vance *v.* Ward, 2 Dana 95.
Louisiana. — Von Phul *v.* Sloan, 2 Rob. 148, 38 Am. Dec. 207; Johnson *v.* Blakemore, 28 La. Ann. 140.
Maine. — Gates *v.* Parker, 43 Me. 544.
Maryland. — First Nat. Bank *v.* Clark, 61 Md. 400, 48 Am. Rep. 114; Brown *v.* Ambler, 66 Md. 391, 7 Atl. 903.
Massachusetts. — Storer *v.* Logan, 9 Mass. 55; Mayhen *v.* Prince, 11 Mass. 54.
Michigan. — Bissell *v.* Lewis, 4 Mich. 450.
Minnesota. — Woodard *v.* Griffiths-Marshall G. C. Co., 43 Minn. 260, 45 N. W. 433; Union Bank *v.* Shea, 57 Minn. 180, 58 N. W. 985.
Missouri. — Adoue *v.* Fox, 30 Mo. App. 98.
Nebraska. — Burke *v.* Utah Nat. Bank, 47 Neb. 247, 66 N. W. 295.
New Jersey. — Williams *v.* Winans, 14 N. J. Law 339.
New York. — Goodrich *v.* Gordon, 15 Johns. 6; Ontario Bank *v.* Worthington, 12 Wend. 593; Bank of Michigan *v.* Ely, 17 Wend. 508; Merchants Bank *v.* Griswold, 72 N. Y. 472, 48 Am. Rep. 159; Ruiz *v.*

B. Parol Evidence. — a. *Admissibility.* — Parol evidence is admissible in the absence of a statutory provision requiring a written acceptance to prove a verbal acceptance of a bill, order, or draft.[26] Parol evidence is admissible to prove a waiver of acceptance,[27] and the circumstances attending such waiver,[28] and to prove that an acceptance by an agent as such, was intended to bind the principal,[29]

Renauld, 100 N. Y. 256, 3 N. E. 182.

North Carolina — Nimocks *v.* Woody, 97 N. C. 1, 2 S. E. 249.

Pennsylvania. — Allentown Nat. Bank *v.* Kiner, 4 W. N. C. 401; Bell *v.* Morse, 5 Whart. 189.

South Carolina. — Strohecker *v.* Cohen, 1 Spear 349.

Virginia. — Hooe *v.* Oxley, 1 Wash. 19, 1 Am. Dec. 425.

Washington. — Kelley *v.* Greenough, 9 Wash. 659, 38 Pac. 158.

Evidence of Action on Promise. The possession of the written promise by the holder with an indorsement made by the drawer, that the bill was drawn under the promise, is *prima facie* evidence that the bill was taken on the faith of the promise. Nisbett *v.* Galbraith, 3 La. Ann. 690.

26. *United States.* — Townsley *v.* Sumrall, 2 Pet. 170; Hall *v.* Cordell, 142 U. S. 116, 12 Sup. Ct. 154, 34 Fed. 866; Scudder *v.* Union Nat. Bank, 91 U. S. 406.

Colorado. — Durkee *v.* Conklin, 13 Colo. App. 313, 57 Pac. 486.

Connecticut. — Dougal *v.* Cowles, 5 Day 511; Jarvis *v.* Wilson, 46 Conn. 90, 33 Am. Rep. 18.

Delaware. — Barcroft *v.* Denny, 5 Houst. 9.

Illinois. — Mason *v.* Dousay, 35 Ill. 424, 85 Am. Dec. 368; St. Louis Nat. Stock Yards *v.* O'Reilly, 85 Ill. 546; Heitschmidt *v.* McAlpine, 59 Ill. App. 231.

Indiana. — Spurgeon *v.* Swain, 13 Ind. App. 188, 41 N. E. 397; Miller *v.* Neihans, 51 Ind. 401.

Iowa. — Walton *v.* Mandeville, (Iowa), 5 N. W. 776, 41 Am. Rep. 123.

Kansas. — Light *v.* Powers, 13 Kan. 96.

Louisiana. — Crowell *v.* Van Bibber, 18 La. Ann. 637.

Massachusetts. — Pierce *v.* Kittredge, 115 Mass. 374.

Mississippi. — McCutchen *v.* Rice, 56 Miss. 455.

New Hampshire. — Edson *v.* Fuller, 22 N. H. 183; Barnett *v.* Smith, 30 N. H. 256, 64 Am. Dec. 290.

New Jersey. — Williams *v.* Winans, 14 N. J. Law 339; McPherson *v.* Walton, 42 N. J. Eq. 282, 11 Atl. 21.

New York. — Leonard *v.* Mason, 1 Wend. 522.

North Carolina.—Short *v.* Blount, 99 N. C. 49, 5 S. E. 190.

Pennsylvania. — Dull *v.* Bricker, 76 Pa. St. 255.

South Carolina. — Walker *v.* Lide, 1 Rich. Law 249, 44 Am. Dec. 252.

Texas. — Lemon *v.* Box, 20 Tex. 329; White *v.* Dienger, (Tex. Civ. App.), 25 S. W. 666.

Vermont. — Fisher *v.* Beckwith, 19 Vt. 31, 46 Am. Dec. 174; *In re* Goddard's Estate, 66 Vt. 415, 29 Atl. 634.

Clear Showing Required. — The words from which a verbal acceptance is to be inferred must be shown not to be equivocal. Walker *v.* Lide, 1 Rich. Law (S. C.) 249, 44 Am. Dec. 252; McEwen *v.* Scott, 49 Vt. 376.

Admission of Oral Acceptance. In an action on an order, where there was evidence that defendant admitted that he orally accepted the order, an instruction which requires other evidence to establish the fact of acceptance is erroneous. Crumb *v.* Phettiplace, 53 Ill. App. 337. See Bruner *v.* Nisbett, 31 Ill. App. 517.

27. Wintermute *v.* Post, 24 N. J. Law 420.

28. McLendon *v.* Wilson, 57 Ga. 438; Wintermute *v.* Post, 24 N. J. Law 420.

29. May *v.* Hewitt, 32 Ala. 161; Farmers' & Mechanics' Bank *v.* Troy City Bank, 1 Doug. (Mich.) 457; Hardy *v.* Pilcher, 57 Miss. 18, 34 Am. Rep. 432; Schmittler *v.*

and that an acceptance was for the debt or liability of the drawer[30] or was subject to oral conditions agreed upon.[31] Parol evidence is admissible to explain an acceptance which is ambiguous on its face,[32] and to explain the relations of the parties to the bill.[33]

b. *Inadmissibility.* — Parol evidence is inadmissible to prove, as against the payee, that the acceptance was for the accommodation of the drawer,[34] or to vary the terms or legal effect of the written acceptance.[35]

V. CONSIDERATION.

1. Presumptions and Burden of Proof. — A negotiable instrument is presumed to be based on a valid and sufficient consideration in the absence of evidence to the contrary,[36] and the recital of value re-

Simon, 114 N. Y. 176, 21 N. E. 162, 11 Am. St. Rep. 621.

30. Canadian Bank of Commerce *v.* Coumbe, 47 Mich. 358, 11 N. W. 196; Child *v.* Eureka Powder Works, 44 N. H. 354; Parker *v.* Lewis, 39 Tex. 394.

Proof by Accommodation Acceptor. An accommodation acceptor suing the drawer must prove both the acceptance and the payment by him. Nichols *v.* Morgan, 9 La. Ann. 534.

31. Bohn Mfg. Co. *v.* Harrison, 13 Mont. 293, 34 Pac. 313; Penniman *v.* Alexander, 111 N. C. 427, 16 S. E. 408; Leary *v.* Meredith, 5 W. N. C. (Pa.) 37.

32. Gallagher *v.* Black, 44 Me. 99; Laflin & Rand Powder Co. *v.* Sinsheimer, 48 Md. 411, 30 Am. Rep. 472.

33. Walton *v.* Williams, 44 Ala. 347; Lacy *v.* Loftin, 26 Ind. 324; Lewis *v.* Williams, 4 Bush (Ky.) 678.

34. *United States.* — Jewett *v.* Hone, 1 Woods 530, 13 Fed. Cas. No. 7,311.

Alabama. — Dunbar *v.* Smith, 66 Ala. 490.

Colorado. — Law *v.* Brinker, 6 Colo. 555.

Illinois. — Diversy *v.* Moor, 22 Ill. 331, 74 Am. Dec. 157; Diversy *v.* Loeb, 22 Ill. 394; Nowak *v.* Excelsior Stone Co., 78 Ill. 307.

Indiana. — Lambert *v.* Sanford, 2 Blackf. 137, 18 Am. Dec. 149; Beach *v.* State Bank, 2 Ind. 488.

Louisiana. — McNabb *v.* Tally, 27 La. Ann. 640.

Maryland. — Laflin & Rand Powder Co. *v.* Sinsheimer, 48 Md. 411, 30 Am. Rep. 472.

Mississippi. — Winn *v.* Wilkins, 35 Miss. 186; Meggett *v.* Baum, 57 Miss. 22.

New Jersey. — Meyer *v.* Beardsley, 30 N. J. Law 236.

New York. — Grant *v.* Ellicott, 7 Wend. 227; Iselin *v.* Chemical Nat. Bank, 16 Misc. 437, 40 N. Y. Supp. 388.

Pennsylvania. — Bockoven *v.* National Mechanics' & Traders' Bank, 11 W. N. C. 570.

South Carolina. — Israel *v.* Ayer, 2 S. C. 344.

Vermont. — Arnold *v.* Sprague, 34 Vt. 402.

35. *Alabama.* — Cowles *v.* Townsend, 31 Ala. 133.

Illinois. — Haines *v.* Nance, 52 Ill. App. 406.

Louisiana. — Kaufman *v.* Barringer, 20 La. Ann. 419.

Maine. — Sylvester *v.* Staples, 44 Me. 496.

Maryland. — Hunting *v.* Emmart, 55 Md. 265.

Mississippi. — Heaverin *v.* Donnell, 7 Smed. & M. 244, 45 Am. Dec. 302.

New Jersey. — Meyer *v.* Beardsley, 30 N. J. Law 236.

Ohio. — Robinson *v.* Kanawha Val. Bank, 44 Ohio St. 441, 8 N. E. 583, 58 Am. Dec. 829.

Pennsylvania. — Mason *v.* Graff, 35 Pa. St. 448.

Vermont. — Arnold *v.* Sprague, 34 Vt. 402.

Wisconsin. — Foster *v.* Clifford, 44 Wis. 569, 28 Am. Rep. 603.

36. *United States.* — Halsted *v.*

Lyon, 2 McLean 226, 11 Fed. Cas. No. 5,968; Packwood *v.* Clark, 2 Sawy. 546, 18 Fed. Cas. No. 10,656; Lipsmeier *v.* Vehslage, 29 Fed. 175.

Alabama. — Thompson *v.* Hall, 16 Ala. 204; Bird *v.* Wooley, 23 Ala. 717; Martin *v.* Foster, 83 Ala. 213, 3 So. 422.

Arkansas. — Cheney *v.* Higginbotham, 10 Ark. 273; Ware *v.* Kelly, 22 Ark. 441.

California. — Fuller *v.* Hutchings, 10 Cal. 523, 70 Am. Dec. 74; Armstrong *v.* Davis, 41 Cal. 494.

Colorado. — Cowan *v.* Hallack, 9 Colo. 572, 13 Pac. 700; Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391.

Connecticut. — Camp *v.* Tompkins, 9 Conn. 545; Bristol *v.* Warner, 19 Conn. 7.

Delaware. — Kennedy *v.* Murdick, 5 Harr. 263.

District of Columbia. — Johnson *v.* Wright, 2 App. D. C. 216.

Florida. — Lines *v.* Smith, 4 Fla. 47.

Georgia. — Brewer *v.* Brewer, 7 Ga. 584; Feagan *v.* Cureton, 19 Ga. 404; Rowland *v.* Harris, 55 Ga. 141.

Illinois. — Nickerson *v.* Sheldon, 33 Ill. 372, 85 Am. Dec. 280; Safford *v.* Graves, 56 Ill. App. 499; Board *v.* O'Donovan, 82 Ill. App. 163.

Indiana. — Du Pont *v.* Beck, 81 Ind. 271; Keesling *v.* Watson, 91 Ind. 578; Louisville E. & St. L. R. Co. *v.* Caldwell, 98 Ind. 245.

Iowa. — Thompson *v.* Maugh, 3 Greene. 342; McCormick Harv. Mac. Co. *v.* Jacobson, 77 Iowa 582, 42 N. W. 499.

Kansas. — Sollenberger *v.* Stephens, 46 Kan. 386, 26 Pac. 690.

Kentucky. — Henderson & N. R. Co. *v.* Moss, 2 Dana (63 Ky.) 242; Brann *v.* Brann, 19 Ky. L. Rep. 1814, 44 S. W. 424.

Louisiana. — Byrne *v.* Grayson, 15 La. Ann. 457; Mahier *v.* Keys, 28 La. Ann. 246.

Maine. — Eddy *v.* Bond, 19 Me. 461, 36 Am. Dec. 767; Small *v.* Clewley, 62 Me. 155, 16 Am. Rep. 410.

Massachusetts. — Dean *v.* Carruth, 108 Mass. 242; Perley *v.* Perley, 144 Mass. 104, 10 N. E. 726.

Michigan. — Manistee Nat. Bank *v.* Seymour, 64 Mich. 59, 31 N. W. 140; Robson *v.* Dayton, 111 Mich. 440, 69 N. W. 834.

Minnesota. — Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228; Germania Bank *v.* Michaud, 62 Minn. 459, 65 N. W. 70, 30 L. R. A. 286.

Mississippi. — Moore *v.* Mickell, Walk. 231.

Missouri. — Newcomb *v.* Jones, 37 Mo. App. 475; Eyermann *v.* Piron, 151 Mo. 107, 52 S. W. 229.

Montana. — Clarke *v.* Marlow, 20 Mont. 249, 50 Pac. 713.

Nebraska. — Search *v.* Miller, 9 Neb. 26, 1 N. W. 975.

New Hampshire. — Adams *v.* Hackett, 27 N. H. 289, 59 Am. Dec. 376; Shaw *v.* Shaw, 60 N. H. 565.

New York. — Carnwright *v.* Gray, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845; Durland *v.* Durland, 153 N. Y. 67, 47 N. E. 42; White *v.* Davis, 62 Hun 622, 17 N. Y. Supp. 548; Bringman *v.* Von Glahn, (App. Div.), 75 N. Y. Supp. 845.

North Carolina. — McArthur *v.* McLeod, 6 Jones Law 475; Campbell *v.* McCormac, 90 N. C. 491.

Ohio. — Ring *v.* Foster, 6 Ohio 279; Dalrymple *v.* Wyker, 60 Ohio St. 108, 53 N. E. 713.

Oregon. — Flint *v.* Phipps, 16 Or. 437, 19 Pac. 543; Wilson *v.* Wilson, 26 Or. 315, 38 Pac. 189.

Pennsylvania. — Eckel *v.* Murphey, 15 Pa. St. 488, 53 Am. Dec. 607; Heffner *v.* Wenrich, 32 Pa. St. 423; Conmey *v.* Macfarlane, 97 Pa. St. 361.

South Carolina. — Gains *v.* Kendrick, 2 Mill Const. 339; Chappell *v.* Proctor, Harp. 40: Bank of Charleston *v.* Chambers, 11 Rich. Law 657.

South Dakota. — First Nat. Bank *v.* Spear, 12 S. D. 108, 80 N. W. 166.

Texas. — Newton *v.* Newton, 77 Tex. 508, 14 S. W. 157.

Utah. — First Nat. Bank *v.* Foote, 12 Utah 157, 42 Pac. 205.

Vermont. — Hathaway *v.* Hagan, 59 Vt. 75, 8 Atl. 678.

Virginia. — Peasley *v.* Boatwright, 2 Leigh 195; Averett *v.* Booker, 15 Gratt. 163, 76 Am. Dec. 203.

Washington. — Poncin *v.* Furth, 15 Wash. 201, 46 Pac. 241.

West Virginia. — Cheuvront *v.* Bee, 44 W. Va. 103, 28 S. E. 751.

ceived therein is *prima facie* evidence of consideration.[37] The burden is upon the maker to show a want or failure of consideration,[38]

Prevalence of Presumption. Where the evidence leaves the question as to the consideration of negotiable paper in doubt, the presumption that there was a sufficient consideration must prevail. Martin *v.* Foster, 83 Ala. 213, 3 So. 422; Cook *v.* Noble, 4 Ind. 221; Sawyer *v.* Vaughan, 25 Me. 337.

Acceptance of Bill. — An acceptance of a bill of exchange implies a consideration as much as a note or guaranty "for value received." Mechanics' Bank *v.* Livingston, 33 Barb. (N. Y.) 458.

37. United States. — Mandeville *v.* Welch, 5 Wheat. 277; Nat. Loan & Inv. Co. *v.* Rockland Co., 94 Fed. 335, 3 C. C. A. 370.

Arkansas. — Richardson *v.* Comstock, 21 Ark. 69.

Illinois. — Hill *v.* Todd, 29 Ill. 101.

Louisiana. — Friedmann *v.* Houghton, 21 La. Ann. 200.

Maine. — Bourne *v.* Ward, 51 Me. 191; Noyes *v.* Smith, (Me.), 5 Atl. 529.

Massachusetts. — Parish *v.* Stone, 14 Pick. 198, 25 Am. Dec. 378; Black River Sav. Bank *v.* Edwards, 10 Gray 387; Gamwell *v.* Moseley, 11 Gray 173.

Michigan. — Parsons *v.* Frost, 55 Mich. 230, 21 N. W. 303.

Minnesota. — Priedman *v.* Johnson, 21 Minn. 12; Frank *v.* Irgins, 27 Minn. 43, 6 N. W. 380.

New Hampshire. — Child *v.* Moore, 6 N. H. 33.

New York. — Leonard *v.* Vredenburgh, 8 Johns. 29, 5 Am. Dec. 317; Sawyer *v.* McLouth, 46 Barb. 350; Howell *v.* Wright, 41 Hun 167.

North Carolina. — Cox *v.* Slade, 2 Dev. Law 8; Stronach *v.* Bledsoe, 85 N. C. 473.

Texas. — Williams *v.* Edwards, 15 Tex. 41; Bybee *v.* Wadlington, 2 Posey Unrep. Cas. 464.

West Virginia. — Williamson *v.* Cline, 40 W. Va. 194, 20 S. E. 917.

Other Recitals. — A recital that a note was given in consideration of a patent to burn lime, is evidence that the patent has been conveyed. Ott *v.* Houghton, 30 Pa. St. 457. A note containing the words "for work he did on my plantation," expresses a sufficient consideration. Mahier *v.* Keys, 28 La. Ann. 246.

Effect of Recital of Value. — The recital of value received in a note, whether it be negotiable or not, imports a consideration. Dugan *v* Campbell, 1 Ohio 115; Leonard *v.* Sweetzer, 16 Ohio 1. Where a bill imports on its face that it is "for value received," it is *prima facie* evidence of the fact between third parties, as well as between original parties, as well as between original parties. Mandeville *v.* Welch, 5 Wheat. (U. S.) 277.

Presumption Overcome. — The presumption of a consideration for a note containing a recital "for value received" may be overthrown by the evidence of the plaintiff that the note was given for a consideration which the law does not recognize as sufficient to support the promise. Blanshan *v.* Russell, 52 N. Y. Supp. 963.

38. *United States.* — Packwood *v.* Clark, 2 Sawy. 546, 18 Fed. Cas. No. 10,656; Lipsmeier *v.* Vehslage, 29 Fed. 175.

Alabama. — Douglass *v.* Eason, 36 Ala. 687; Martin *v.* Foster, 83 Ala. 213, 3 So. 422.

Arkansas. — Dickson *v.* Burks, 11 Ark. 307; Richardson *v.* Comstock, 21 Ark. 69.

California. — Armstrong *v.* Davis, 41 Cal. 494.

Colorado. — Scott *v.* Fleetford, 13 Colo. App. 158, 57 Pac. 485; Perot *v.* Cooper, 87 Colo. 80, 28 Pac. 391.

Georgia. — Rowland *v.* Harris, 55 Ga. 141; Gallagher *v.* Kiley, 115 Ga. 420, 41 S. E. 613.

Idaho. — Yates *v.* Spofford, (Idaho), 65 Pac. 501.

Illinois. — McMicken *v.* Safford, 197 Ill. 540, 64 N. E. 540; Culver *v.* Benson, 65 Ill. App. 107; Chicago Trust & Sav. Bank *v.* Landfield, 73 Ill. App. 173.

Indiana. — Towsey *v.* Shook, 3 Blackf. 267; Beeson *v.* Howard, 44 Ind. 413.

or the illegality of the consideration.[39] But the burden of proof is on the plaintiff to show a new consideration for a signature affixed

Iowa. — McCormick Har. Mach. Co. *v.* Jacobson, 77 Iowa 582, 42 N. W. 499; Smith *v.* Griswold, 95 Iowa 684, 64 N. W. 624.

Kansas. — Stiles *v.* Steele, 37 Kan. 552, 15 Pac. 561; Bank of Topeka *v.* Nelson, 58 Kan. 815, 40 Pac. 155; Stout *v.* Judd, 10 Kan. App. 579, 63 Pac. 662.

Louisiana. — Irving *v.* Edrington, 41 La. Ann. 671, 6 So. 177; Weill *v.* Trosclair, 42 La. Ann. 171, 7 So. 232.

Maine. — Sawyer *v.* Vaughan, 25 Me. 337.

Massachusetts. — Parish *v.* Stone, 14 Pick. 198, 25 Am. Dec. 378; Jennison *v.* Stafford, 1 Cush. 168, 48 Am. Dec. 594.

Michigan. — Rood *v.* Jones, 1 Doug. 188.

Mississippi. — Fitch *v.* Stamps, 6 How. 487; Walker *v.* Meek, 12 Smed. & M. 495; Boone *v.* Boone, 58 Miss. 820; Ganning *v.* Royal, 59 Miss. 45, 42 Am. Rep. 350.

Missouri. — Hammett *v.* Barnum, 30 Mo. App. 289; La Belle Sav. Bank *v.* Taylor, 69 Mo. App. 99; Wood *v.* Flanery, 89 Mo. App. 632.

Nebraska. — Crosby *v.* Ritchey, 47 Neb. 924, 66 N. W. 1005.

New Hampshire. — Coburn *v.* Odell, 30 N. H. 540.

New Jersey. — Duncan *v.* Gilbert, 29 N. J. Law 521.

New York. — Bank of Orleans *v.* Barry, 1 Denio 116; Sawyer *v.* McLouth, 46 Barb. 350; Raubitschek *v.* Blank, 80 N. Y. 478; Howell *v.* Wright, 41 Hun 167; Bottum *v.* Scott, 11 N. Y. St. 514.

North Carolina. — McArthur *v.* McLeod, 6 Jones Law 475.

Oregon. — Flint *v.* Phipps, 16 Or. 437, 19 Pac. 543; Sayre *v.* Mohney, 35 Or. 141, 56 Pac. 526.

Pennsylvania. — Knight *v.* Pugh, 4 Watts & S. 445, 39 Am. Dec. 00; Barr *v.* Greenwalt, 62 Pa. St. 172.

South Carolina. — Pryor *v.* Coulter, 1 Bailey 517; Miller *v.* Deal, 9 Rich. Law 75; Jeter *v.* Tucker, 1 S. C. 245.

Texas. — Newton *v.* Newton, 77 Tex. 508, 14 S. W. 157; Herman *v.* Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632; Mulberger *v.* Morgan, (Tex. Civ. App.), 47 S. W. 738.

Utah. — First Nat. Bank *v.* Foote, 12 Utah 157, 42 Pac. 205.

Washington. — McKenzie *v.* Oregon Imp. Co., 5 Wash. 409, 31 Pac. 748.

Joint Note. — Proof that one of two joint makers signed the note without consideration is not sufficient to overcome the presumption of consideration arising from the note. First Nat. Bank *v.* Foote, 12 Utah 157, 42 Pac. 205.

39. *Georgia.* — Patillo *v.* Smith, 61 Ga. 265.

Illinois. — Pixley *v.* Boynton, 59 Ill. 351; Stanton *v.* Strong, 94 Ill. App. 486.

Indiana. — Pritchett *v.* Sheridan, (Ind. App.), 63 N. E. 865.

Louisiana. — Babcock *v.* Watson, 24 La. Ann. 238.

Maine. — Wing *v.* Martel, 95 Me. 535, 50 Atl. 705.

Massachusetts. — Wyman *v.* Fiske, 3 Allen 238, 80 Am. Dec. 66; Pratt *v.* Langdon, 97 Mass. 97, 93 Am. Dec. 61.

Michigan. — American Ins. Co. *v.* Cutler, 36 Mich. 261.

New Hampshire. — Gassett *v.* Godfrey, 26 N. H. 415.

New Jersey. — Allerton *v.* Grundy, 67 N. J. Law 55, 50 Atl. 352.

New York. — Cuyler *v.* Sanford, 8 Barb. 225.

Texas. — Hogue *v.* Williamson, (Tex. Civ. App.), 22 S. W. 762.

Burden Upon Concubine. — A concubine suing upon a note of a deceased person, must prove that she gave a legal consideration. Succession of Coste, 43 La. Ann. 144, 9 So. 62.

Usury. — The burden of proof of usury is upon the one who claims to have paid it.

United States. — McAlleese *v.* Goodwin, 69 Fed. 759; *In re* Kellogg, 113 Fed. 120.

Alabama. — George *v.* N. E. Mortg. S. Co., 109 Ala. 548, 20 So. 331.

after delivery,[40] and to overcome evidence tending to impeach the consideration;[41] if it appears the maker was insane when the note

Arkansas. — Sawyer *v.* Dickson, 66 Ark. 77, 48 S. W. 903.

Georgia. — Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374.

Illinois. — Dearlove *v.* Edwards, 166 Ill. 619, 46 N. E. 1081; Chicago Trust & Sav. Bank *v.* Landfield, 73 Ill. App. 173.

Indian Territory. — Smith *v.* Neeley, 2 Ind. Ter. 651, 53 S. W. 450.

Louisiana. — Byrne *v.* Grayson, 15 La. Ann. 457.

Maryland. — Rappannier *v.* Bannon, (Md.), 8 Atl. 555.

Nebraska. — Olmsted *v.* N. E. Mortg. S. Co., 11 Neb. 487, 9 N. W. 650.

New Jersey. — Conover *v.* Van Mater, 18 N. J. Eq. 481; Berdan *v.* School Dist. No. 38, 47 N. J. Eq. 8, 21 Atl. 40.

New York. — Stillman *v.* Northrup, 109 N. Y. 473, 17 N. E. 379.

Texas. — Cotton States Bldg. Co. *v.* Peightal, (Tex. Civ. App.), 67 S. W. 524.

Washington. — Clark *v.* Eltinge, 29 Wash. 215, 69 Pac. 736.

Presumption. — The presumption is against usury not appearing on the face of the note. McAlleese *v.* Goodwin, 69 Fed. 759. And it will be presumed that parties subject to different laws contracted with reference to the laws of the state which would not render the note usurious.

United States. — Hieronymus *v.* N. Y. Bldg. & Loan Assn., 101 Fed. 12; Pritchard *v.* Norton, 106 U. S. 124.

Arkansas. — Crebbin *v.* Deloney, 70 Ark. 493, 69 S. W. 312.

Iowa. — Bigelow *v.* Burnham, 90 Iowa 300, 57 N. W. 865.

Minnesota. — Ames *v.* Benjamin, 74 Minn. 335, 77 N. W. 230.

New Jersey. — Rutherford B. S. & C. Elec. Co. *v.* Franklin Trust Co., 58 N. J. Eq. 584, 43 Atl. 584.

North Dakota. — U. S. Sav. & L. Co. *v.* Shain, 8 N. D. 136, 77 N. W. 1006.

South Carolina. — Turner *v.* Interstate B. & L. Assn., 51 S. C. 33, 27 S. E. 947.

40. Parkhurst *v.* Vail, 73 Ill. 343; Edwards *v.* Trustees of Schools, 30 Ill. App. 528; Featherstone *v.* Hendrick, 59 Ill. App. 497; Clopton *v.* Hall, 51 Miss. 482.

Burden Upon Defendant. — The burden is upon the defendant to show that he signed the note after the consideration had passed to other parties, and without any new consideration. La Belle Sav. Bank *v.* Taylor, 69 Mo. App. 99.

41. *United States.* — U. S. *v.* Price, 2 Wash. C. C. 460, 27 Fed. Cas. No. 16,090.

Alabama. — Battle *v.* Weams, 44 Ala. 105.

California. — Fuller *v.* Hutchings, 10 Cal. 523, 70 Am. Dec. 746.

Florida. — Cooper *v.* Livingston, 19 Fla. 684.

Illinois. — Wurster *v.* Reitzinger, 5 Ill. App. 112.

Indiana. — New *v.* Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; State Nat. Bank *v.* Bennett, 8 Ind. App. 679, 36 N. E. 551; Kniss *v.* Holbrook, (Ind. App.), 40 N. E. 1118.

Iowa. — Rock Island Nat. Bank *v.* Nelson, 41 Iowa 563; Terry *v.* Taylor, 64 Iowa 35, 19 N. W. 841.

Louisiana. — Martin *v.* Donovan, 15 La. Ann. 41.

Maine. — Small *v.* Clewley, 62 Me. 155, 16 Am. Rep. 410.

Massachusetts. — Perley *v.* Perley, 144 Mass. 104, 10 N. E. 726; Huntington *v.* Shute, 180 Mass. 371, 62 N. E. 380.

Michigan. — Eaton *v.* Coit, 5 Mich. 505, 72 Am. Dec. 58; City Bank *v.* Dill, 84 Mich. 549, 47 N. W. 1109.

Missouri. — Bogie *v.* Nolan, 96 Mo. 85, 9 S. W. 13; Smith *v.* Mohr, 64 Mo. App. 39.

Nebraska. — Knox *v.* Williams, 24 Neb. 630, 39 N. W. 786, 8 Am. St. Rep. 281; McDonald *v.* Aufdengarten, 41 Neb. 40, 59 N. W. 762.

New Hampshire. — Garland *v.* Lane, 46 N. H. 245.

New York. — Exchange Bank *v.* Monteath, 17 Barb. 171; Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70; Douai *v.* Lutjens, 165 N. Y. 622, 59 N. E. 1121.

was made,[42] the holder must prove consideration, and he has the burden of showing a consideration for assuming the payment of the note by a third person.[43]

2. Evidence. — A. In General. — A check,[44] bill of sale,[45] receipts,[46] and other notes,[47] are admissible in evidence upon the question of consideration, and circumstantial evidence is admissible as tending to show want of consideration,[48] or usury.[49]

North Carolina. — Campbell *v.* McCormac, 90 N. C. 491.

Ohio. — Murphy *v.* Hagerman, Wright 293.

Pennsylvania. — Conmey *v.* Macfarlane, 97 Pa. St. 361; Horstman *v.* Zimmerman, (Pa. St.), 4 Atl. 171.

Vermont. — Hathaway *v.* Hagan, 59 Vt. 75, 8 Atl. 678.

Effect of Pleadings Upon Burden of Proof. — In Florida, by virtue of a statute, and in a few decisions in other states, it is held that if there is a sworn plea of want or failure of consideration, the burden is upon the plaintiff to prove other consideration than that of the note itself. Prescott *v.* Johnson, 8 Fla. 391; Reddick *v.* Nickler, 23 Fla. 335, 2 So. 698; Smith *v.* La Vesque, 25 Fla. 464, 6 So. 263; McCallum *v.* Driggs, 35 Fla. 277, 17 So. 407; Poole *v.* Vanlandingham, 1 Ill. 47; Tissott *v.* Bowles, 18 La. (O. S.) 29; Martin *v.* Donovan, 15 La. Ann. 41; Solomon *v.* Huey, 1 Posey Unrep. Cas. (Tex.) 205. Where the defendant pleads generally that there was no consideration for the note, the burden of the issue is on the plaintiff, but if he pleads specially the matters showing a want of consideration, he thereby assumes the burden of sustaining the issue. Brown *v.* Wright, 17 Ark. 9; Tissott *v.* Bowles, 18 La. (O. S.) 29. If plaintiff unnecessarily alleges a particular consideration, the burden is on him to prove it as alleged, if it is denied. James *v.* Hayden, 10 Ky. L. Rep. 534. If the note expressly states that it is for value received, it will sustain the plaintiff's burden, though a consideration is expressly denied. Carroll *v.* Peters, 1 McGloin (La.) 88. So also, if the action is upon a sealed note, notwithstanding fraud, undue influence and want of consideration are pleaded in the answer. Jeter *v.* Tucker, 1 S. C. 245. The burden is not shifted upon the plaintiff where the plea is only of a partial failure of consideration. Topper *v.* Snow, 20 Ill. 434; Eich. *v.* Sievers, 73 Ill. 194; Haas *v.* Rhodes, 36 La. Ann. 351. Under the Revised Statutes of Texas, a sworn plea of want of consideration does not throw the burden of proving consideration upon the plaintiff. Newton *v.* Newton, 77 Tex. 508, 14 S. W. 157; Hogue *v.* Williamson, (Tex. Civ. App.), 22 S. W. 762.

42. Hosler *v.* Beard, 54 Ohio St. 398, 43 N. E. 1040.

43. Cooper *v.* Forgey, 14 Ind. App. 151, 42 N. E. 651.

44. Gormley *v.* Bunyan, 138 U. S. 623, 11 Sup. Ct. 453.

Check Book. — The drawer's check book, with entries in the margin, is not admissible to show consideration. Bunting *v.* Allen, 18 N. J. Law 300. See Ortmann *v.* Merchants' Bank, 41 Mich. 482, 2 N. W. 677.

45. Ward *v.* Reynolds, 32 Ala. 384.

Contract Giving Option. — In an action upon a note given for an option to buy land, where the legality of the contract is involved, it is admissible in evidence. Hanna *v.* Ingram, 93 Ala. 482, 9 So. 621.

46. Stretch *v.* Talmadge, 65 Cal. 510, 4 Pac. 15; Hedge *v.* Gibson, 58 Iowa 656, 12 N. W. 713.

47. Weaver *v.* Lapsley, 42 Ala. 601, 94 Am. Dec. 671; Jansen *v.* Grimshaw, 125 Ill. 468, 17 N. E. 850; Snyder *v.* Wilt, 15 Pa. St. 59.

48. Litchfield *v.* Falconer, 2 Ala. 280; Smith *v.* Vincent, 15 Conn. 138; Marshall *v.* Marshall, 12 B. Mon. 459; Hedrick *v.* Bannister, 10 La. Ann. 792; Vogt *v.* Butler, 105 Mo. 479, 16 S. W. 512; Nicholls *v.* Van Valkenburgh, 15 Hun 230; Dryer *v.* Brown, 52 Hun 321, 5 N. Y. Supp. 486.

49. Guenther *v.* Amsden, 162 N. Y. 601, 57 N. E. 1111.

B. PAROL EVIDENCE. — Parol evidence is admissible to prove or explain[50] or to impeach the consideration of a negotiable instrument[51]

50. *Alabama.* — Baker *v.* Boon, 100 Ala. 622, 13 So. 481; Hendon *v.* Morris, 110 Ala. 106, 20 So. 27; Booth *v.* Dexter Steam F. E. Co., 118 Ala. 369, 24 So. 405; Folmar *v.* Siler, 132 Ala. 297, 31 So. 719.

California. — Langan *v.* Langan, 89 Cal. 186, 26 Pac. 764.

Colorado. — Hubbard *v.* Mulligan, 13 Colo. App. 116, 57 Pac. 738.

Connecticut. — Rose *v.* Phillips, 33 Conn. 570.

Georgia. — Pitts *v.* Allen, 72 Ga. 69; Sanders *v.* Houston G. & W. Co., 107 Ga. 49, 32 S. E. 610.

Illinois. — Martin *v.* Stubbings, 27 Ill. App. 121, *affirmed* 126 Ill. 387, 18 N. E. 651, 9 Am. St. Rep. 620; Post *v.* Brown, 55 Ill. App. 355.

Indiana.—Smith *v.* Boruff, 75 Ind. 412; Bragg *v.* Stanford, 82 Ind. 234; First Nat. Bank *v.* Nugen, 99 Ind. 160.

Iowa. — Pembroke *v.* Hayes, 114 Iowa 576, 87 N. W. 492.

Kentucky. — Brothers *v.* Porter, 6 B. Mon. 106.

Louisiana.— Saramia *v.* Courege, 13 La. Ann. 25; Parker *v.* Broas, 20 La. Ann. 167.

Maine. — Herrick *v.* Bean, 20 Me. 51; Haskell *v.* Tukesbury, 92 Me. 551, 43 Atl. 500; Leighton *v.* Bowen, 75 Me. 504.

Maryland. — Harris *v.* Alcock, 10 Gill & J. 226, 32 Am. Dec. 158.

Massachusetts. — Ilsley *v.* Jewett, 2 Metc. 168; Walker *v.* Sherman, 11 Metc. 170.

Michigan. — Garton *v.* Union City Nat. Bank, 34 Mich. 279; Taylor *v.* Dansby, 42 Mich. 82, 3 N. W. 267.

Mississippi. — Marsh. *v.* Lisle, 34 Miss. 173; Eckford *v.* Hogan, 44 Miss. 398; Cocke *v.* Blackbourne, 57 Miss. 689.

Nebraska. — Walker *v.* Hagerty, 30 Neb. 120, 46 N. W. 221.

New Hampshire. — Cross *v.* Rowe, 22 N. H. 76.

New York. — Smith *v.* Sergent, 67 Barb. 243; Miller *v.* McKenzie, 95 N. Y. 575, 47 Am. Rep. 85; Keuka College *v.* Ray, 167 N. Y. 96, 60 N. E. 325.

North Carolina. — Flaum *v.* Wallace, 103 N. C. 296, 9 S. E. 567.

Pennsylvania. — Packer *v.* Hook, 16 Serg. & R. 327.

Tennessee. — Fort *v.* Orndorff, 7 Heisk. 167.

Texas. — Crutchfield *v.* Donathon, 49 Tex. 691, 30 Am. Rep. 112; Martin *v.* Rotan Grocery Co., (Tex. Civ. App.), 66 S. W. 212.

Vermont.—Citizens Sav. Bank & Trust Co. *v.* Babbitt, 71 Vt. 182, 44 Atl. 71.

Washington. — Bigelow *v.* Scott, 2 Wash. Ter. 378, 8 Pac. 494.

Wisconsin. — Trustees of Seventh Day Baptist Mem. Fund *v.* Saunders, 84 Wis. 570, 54 N. W. 1094.

Consideration of Indorsement. The consideration of an indorsement or guaranty written on the back of a note may be proved by parol evidence. Palmer *v.* Tripp, 8 Cal. 95; Pettibone *v.* Roberts, 2 Root (Conn.) 258; Kirkham *v.* Boston, 67, Ill. 599; Bradshaw *v.* Combs, 102 Ill. 428; Brown *v.* Summers, 91 Ind. 151; Smythe v. Scott, 106 Ind. 245, 6 N. E. 145; Baldwin *v.* Dow, 130 Mass. 416; Curtis *v.* Brown, 2 Barb. (N. Y.) 51; Nichols *v.* Bell, 1 Jones Law (N. C.) 32.

51. *United States.* — Corcoran *v.* Hodges, 2 Cranch C. C. 452, 6 Fed. Cas. No. 3228.

Alabama. — Newton *v.* Jackson, 23 Ala. 335; Pacific Guano Co. *v.* Mullen, 66 Ala. 582; Guice *v.* Thornton, 76 Ala. 466.

California. — Daw *v.* Niles, (Cal.), 33 Pac. 1114; Billings *v.* Everett, 52 Cal. 661.

Connecticut. — Bunnel *v.* Butler, 23 Conn. 65.

Florida.—Branch *v.* Wilson, 12 Fla. 543.

Georgia. — Boynton *v.* Twitty, 53 Ga. 214; Snowden *v.* Grice, 62 Ga. 615; Powell *v.* Subers, 67 Ga. 448; Pinson *v.* Bass, 114 Ga. 575, 40 S. E. 747.

Illinois. — Kirkham *v.* Boston, 67 Ill. 599; Mann *v.* Smyser, 76 Ill. 365; Overstreet *v.* Dunlap, 56 Ill. App. 486; Miles *v.* Andrews, 153 Ill. 262, 38 N. E. 644.

Indiana. — Pierce *v.* Hight, 76 Ind. 355; Colt *v.* McConnell, 116 Ind. 249,

and to rebut such impeachment[52] or to show usury[53] and to

19 N. E. 106; Bragg *v.* Stanford, 82 Ind. 234.

Iowa. — Dicken *v.* Morgan, 54 Iowa 684, 7 N. W. 145; Ingham *v.* Dudley, 60 Iowa 16, 14 N. W. 82; Beaty *v.* Carr, 109 Iowa 183, 80 N. W. 326; Farmers' Sav. Bank *v.* Hansman, 114 Iowa 49, 86 N. W. 31.

Kansas. — Blood *v.* Northrup, 1 Kan. 35; Dodge *v.* Oatis, 27 Kan. 762.

Kentucky. — McGlasson *v.* McGlasson, 21 Ky. L. Rep. 1843, 56 S. W. 510.

Louisiana. — Heddrick *v.* Bannister, 10 La. Ann. 792; Griffin *v.* Cowan, 15 La. Ann. 487; Reeve *v.* Doughty, 19 La. Ann. 164.

Maine. — Wise *v.* Neal, 39 Me. 422; Lime Rock Bank *v.* Hewett, 50 Me. 267; Bigelow *v.* Bigelow, 93 Me. 439, 45 Atl. 513.

Maryland. — Sumwalt *v.* Ridgely, 20 Md. 107; Hamburger *v.* Miller, 48 Md. 317.

Massachusetts. — Corlies *v.* Howe, 11 Gray 125, 71 Am. Dec. 693; Slade *v.* Hood, 13 Gray 97; Clemens Elec. Mfg. Co. *v.* Walton, 173 Mass. 286, 52 N. E. 132, 53 N. E. 820.

Michigan. — Kulenkamp *v.* Groff, 71 Mich. 675, 40 N. W. 57, 15 Am. St. Rep. 283, 1 L. R. A. 504; Davis *v.* Davis, 97 Mich. 419, 56 N. W. 774; Kelley *v.* Guy, 116 Mich. 43, 74 N. W. 291.

Minnesota. — Anderson *v.* Lee, 73 Minn. 397, 76 N. W. 24; Warner *v.* Schultz, 74 Minn. 252, 77 N. W. 25; Northwestern Creamery Co. *v.* Lanning, 83 Minn. 19, 85 N. W. 823.

Mississippi. — Buckels *v.* Cunningham, 6 Smed. & M. 358; Wren *v.* Hoffman, 41 Miss. 616.

Missouri. — Harwood *v.* Brown, 23 Mo. App. 69; Vogt *v.* Butler, 105 Mo. 479, 16 S. W. 512; Grand River College *v.* Robertson, 67 Mo. App. 329.

Nevada. — Travis *v.* Epstein, 1 Nev. 116.

New Hampshire. — Aldrich *v.* Whitaker, 70 N. H. 627, 47 Atl. 591.

New Jersey. — Eaton *v.* Eaton, 35 N. J. Law 290.

New York. — Von Kamen *v.* Roes, 65 Hun 625, 20 N. Y. Supp. 548; Divine *v.* Divine, 58 Barb. 264; Harding *v.* Jenkins, 25 Misc. 398, 54 N. Y. Supp. 1090; Bird *v.* Faulkner, 23 Jones & S. 529.

North Carolina. — Flaum *v.* Wallace, 103 N. C. 296, 9 S. E. 567.

Pennsylvania. — Volkenand *v.* Drum, 154 Pa. St. 616, 26 Atl. 611, 32 W. N. C. 284, 6 Kulp 519; Danner *v.* Hess, 19 Pa. Super. Ct. 182.

South Carolina. — Blakely *v.* Hampton, 3 McCord 469; Ellis *v.* Hill, 6 Rich. Law 37.

Texas. — Gulf C. & S. F. R. Co. *v.* Pittman, 4 Tex. Civ. App. 167, 23 S. W. 318; Watson *v.* Boswell, (Tex. Civ. App.), 61 S. W. 407.

Vermont. — Ellis *v.* Watkins, 73 Vt. 371, 50 Atl. 1105.

Wisconsin. — Peterson *v.* Johnson, 22 Wis. 21, 94 Am. Dec. 581; Smith *v.* Carter, 25 Wis. 283; Ward *v.* Perrigo, 33 Wis. 143; Foster *v.* Clifford, 44 Wis. 569, 28 Am. Rep. 603.

Breach of Oral Contract. — The rule against the introduction of parol evidence to add to or change the terms of a written contract is not infringed by the admission of evidence to show the breach of an oral contract constituting the consideration of a promissory note, as constituting a failure of consideration. Campbell *v.* Gates, 17 Ind. 26; First Nat. Bank *v.* Hurford, 29 Iowa 579; Dicken *v.* Morgan, 54 Iowa 684, 7 N. W. 145; Ingham *v.* Dudley, 60 Iowa 16, 14 N. W. 82; Dodge *v.* Oatis, 27 Kan. 762; Gulf C. & S. F. R. Co. *v.* Pittman, 4 Tex. Civ. App. 167, 23 S. W. 318.

Where there is an oral contract to sell by fixed measure and quantity, parol evidence of a deficiency by measure in the quantity specified, which constituted the consideration of a note, shows a failure of consideration *pro tanto*. Braly *v.* Henry, 71 Cal. 481, 11 Pac. 385, 12 Pac. 622, 60 Am. Rep. 543; Ellis *v.* Hill, 6 Rich. Law (S. C.) 37; Carter *v.* Hamilton, Seld. Notes 257.

52. Moore *v.* Ponders, 11 Ala. 815; Seibel *v.* Vaughan, 60 Ill. 257; Cook *v.* Whitfield, 41 Miss. 541; Packer *v.* Hook, 16 Serg. & R. (Pa.) 327; Miller *v.* Fichthorn, 31 Pa. St. 252; McCormick *v.* Kampmann, (Tex. Civ. App.), 36 S. W. 130.

53. *United States.* — Scott *v.* Lloyd,

rebut it.[54] Parol evidence is not, in general, admissible to vary a consideration stated as part of the contract,[55] though it is admissible to contradict a mere recital of consideration[56] and to show a breach

9 Pet. 418; N. E. Mortg. Sec. Co. *v.* Gray, 33 Fed. 636.

Arkansas. — Roe *v.* Kiser, 62 Ark. 92, 34 S. W. 534.

Connecticut.— Inhabitants of Reading *v.* Inhabitants of Weston, 7 Conn. 409.

Illinois.—McGuire *v.* Campbell, 58 Ill. App. 188.

Kentucky. — Fenwick *v.* Ratliff, 6 T. B. Mon. 154; Edrington *v.* Harper, 3 J. J. Marsh. 353, 20 Am. Dec. 45; Bright *v.* Wagle, 3 Dana 252.

Massachusetts.—Rohan *v.* Hanson, 11 Cush. 44.

Mississippi. — Newson *v.* Thighen, 30 Miss. 414; Grayson *v.* Brooks, 64 Miss. 410, 1 So. 482.

New York. — Austin *v.* Fuller, 12 Barb. 360; Mudgett *v.* Goler, 18 Hun 302.

Ohio. — Ohio Ins. Co. *v.* Shotts, 6 Ohio Dec. 813.

Pennsylvania.—Chamberlain *v.* McClurg, 8 Watts & S. 31.

Texas.—So. Home Bldg. & Loan Assn. *v.* Winans, (Tex. Civ. App.), 60 S. W. 825; Peightal *v.* Cotton States Bldg. & Loan Assn., (Tex. Civ. App.), 61 S. W. 428.

Vermont. — Jackson *v.* Kirby, 37 Vt. 418.

Parol Evidence, When Inadmissible.—Where a note does not stipulate for usurious interest, evidence of an oral agreement contemporaneous with the note, that on part payment at maturity the balance should be extended at usurious interest, is inadmissible. Allen *v.* Turnham, 83 Ala. 323, 3 So. 854.

Degree of Evidence Required. Usury need not be established by direct evidence. It may be inferred from facts and circumstances proved. Guenther *v.* Amsden, 162 N. Y. 601, 57 N. E. 1111. And only a preponderance of evidence is necessary to establish usury. Nunn *v.* Bird, 36 Or. 515, 59 Pac. 808.

54. Wollschlager *v.* McEldowney, 96 Ill. App. 34; Hollenbeck *v.* Schutts, 1 Gray (Mass.) 431; Griffin *v.* N. J. Oil Co., 11 N. J. Eq. 49; Davis *v.* Marvine, 160 N. Y. 269, 54 N. E. 704; Campbell *v.* Shields, 6 Leigh (Va.) 517.

55. Evans *v.* Bell, 20 Ala. 509; Adams *v.* Thomas, 54 Ala. 175; Langan *v.* Langan, 89 Cal. 186, 26 Pac. 764; Dwight *v.* Kemper, 8 La. Ann. 452; Johnson *v.* Sutherland, 39 Mich. 579; Hughes *v.* Daniel, Walk. (Miss.) 488; Cocks *v.* Barker, 49 N. Y. 107; Gazaway *v.* Moore, Harp. Law (S. C.) 401; Miller *v.* Bagwell, 3 McCord (S. C.) 562; Clark *v.* Carlton, 4 Lea (Tenn.) 452; Hubbard *v.* Marshall, 50 Wis. 322, 6 N. W. 497.

Varying Legal Effect of Note. Parol evidence is not admissible to establish a consideration which varies the legal effect of a note. Waters *v.* Smith, 23 Ill. 342; Foy *v.* Blackstone, 31 Ill. 538, 83 Am. Dec. 246; Roche *v.* Roanoke Classical Seminary, 56 Ind. 198; Coapstick *v.* Bosworth, 121 Ind. 6, 22 N. E. 772; Craig *v.* Baptist Education Soc., 7 B. Mon. (Ky.) 73; Allen *v.* Furbish, 4 Gray (Mass.) 504, 64 Am. Dec. 87; Schurmeier *v.* Johnson, 10 Minn. 319; Cocke *v.* Blackbourne, 58 Miss. 537; Kern *v.* Voorhies, 3 N. J. Law 557; Stinson *v.* McKeown, 1 Hill (S. C.) 387; McDuffie *v.* Magoon, 26 Vt. 518.

56. *Alabama.* — Counts *v.* Harlan, 78 Ala. 551.

California. — Comstock *v.* Breed, 12 Cal. 286.

Colorado. — Mulligan *v.* Smith, 13 Colo. App. 231, 57 Pac. 731.

Georgia. — Burke *v.* Napier, 106 Ga. 327, 32 S. E. 134.

Illinois. — Gage *v.* Lewis, 68 Ill. 604.

Kansas. — Blood *v.* Northrup, 1 Kan. 35.

Massachusetts. — Wilkinson *v.* Scott, 17 Mass. 249.

Mississippi. — Marsh *v.* Lisle, 34 Miss. 173.

New York. — Baird *v.* Baird, 145 N. Y. 659, 40 N. E. 222, 28 L. R. A. 375.

Tennessee. — Fort *v.* Orndorff, 7 Heisk. 167.

Texas. — Taylor *v.* Merrill, 64 Tex. 494.

of contracts of consideration, constituting a failure of consideration.[57] Parol evidence is admissible to show that a note was given to evidence an advancement from a parent of the maker,[58] but not where the note was evidently intended to be absolute and is sued upon against the son by the parent.[59]

3. Variance. — Evidence of partial failure of consideration is deemed an inadmissible variance from a plea of total failure of consideration,[60] or want of consideration,[61] or greater partial

Vermont. — Sowles *v.* Sowles, 11 Vt. 146.

57. Mulligan *v.* Smith, 13 Colo. App. 231, 57 Pac. 731; Pegram *v.* Cooper, 26 La. Ann. 361.

58. West *v.* Bolton, 23 Ga. 531; Peabody *v.* Peabody, 59 Ind. 556; Buscher *v.* Knapp, 107 Ind. 340, 8 N. E. 263; Linthicum *v.* Linthicum, 2 Md. Ch. 21.

Declarations of Father. — The declarations of a deceased father that certain notes of the son were not held as debts but as advancements to him, are admissible in an action by the son's child for a distributive share of the father's estate. Bransford *v.* Crawford, 51 Ga. 20. Evidence is admissible to prove an averment that the father represented to the son when the note was executed that it was given to evidence an advancement. Harris *v.* Harris, 69 Ind. 181.

59. Action by Father. — In an action by a father against the administrator of a deceased daughter on a note given by her, parol evidence that an advancement was intended by the father is inadmissible, where no fraud or mistake is charged. Glanton *v.* Whitaker, 75 Ga. 523. In an action on a note by a father against the son as maker, which is shown to have been given for the purchase price of personal property of the father purchased by the son at public auction, parol evidence is not admissible on behalf of the son to show that at the time of the sale the father told the son that he might have the property purchased as an advancement, and that he would take the note for the price simply as a receipt to show that the advancement had been made. Mason *v.* Mason, 72 Iowa 457, 34 N. W. 208. Where there is no ambiguity in the note sued upon, the son cannot show by parol testimony that it was given for money received by way of advancement. Porter *v.* Porter, 51 Me. 376.

Note of Son-in-Law. — In an action against a son-in-law upon an absolute note executed by him, parol evidence is not admissible to show that it was given merely as evidence of an advancement or gift to the wife of the maker. Gerth *v.* Engler, 71 Iowa 616, 33 N. W. 131. Where the note of a son-in-law to his wife's mother was an absolute obligation for money borrowed, payable one year after date, in an action by her against him thereon, parol evidence of declarations made by her after the execution of the instrument that she would give the money to him was not admissible. Frey *v.* Heydt, 20 W. N. C. (Pa.) 196. See also Heydt *v.* Frey, 21 W. N. C. 265, 13 Atl. 475.

60. Swain *v.* Cawood, 3 Ill. 505; Burnap *v.* Cook, 32 Ill. 168; Belden *v.* Clinch, 23 Ill. App. 473; Day *v.* Milligan, 72 Ill. App. 324; Stokes *v.* Scott, 188 Ill. 266, 58 N. E. 990, *affirming* 89 Ill. App. 615; H. A. Pitts Sons Mfg. Co. *v.* Lewis, 30 Kan. 541, 1 Pac. 812; Whitacre *v.* Culver, 9 Minn. 295.

Plea of Total Failure Not Supported. — Where a note was given in consideration of the assignment of two sheriff's certificates of sale of real property, a plea of total failure of consideration to an action thereon is not supported by proof that only one of such certificates was assigned. Packwood *v.* Clark, 2 Sawy. 546, 18 Fed. Cas. No. 10,656.

Decisions to Contrary. — In the following decisions it is held that under a plea of total failure of consideration, defendant may prove and recover for a partial failure of consideration. Plate *v.* Vega, 31 Cal. 384; Morgan *v.* Printup Bros., 72 Ga. 66.

61. Yeomans *v.* Lane, 101 Ill. App.

failure,[62] and the consideration alleged must be proved as laid, or the variance is fatal,[63] and no departure in proof is allowable under a plea of want or failure of consideration.[64] A plea denying the validity of the consideration is not sustained by proof of want or failure of consideration.[65] A plea of usury must be strictly proved as laid.[66]

VI. MISTAKE, FRAUD AND DURESS.

1. Presumptions and Burden of Proof. — The burden of proving an alleged mistake in the provision of a note is on the party alleging the mistake.[67] To avoid a note made by a decedent on the ground of fraud or forgery, the presumption of validity must be rebutted by clear and satisfactory evidence.[68] The burden of proof is upon

228; Wentworth *v.* Dows, 117 Mass. 14.

62. Hall *v.* Marks, 56 Ill. 125.

63. Bulkey *v.* Landon, 3 Conn. 76; Barclay *v.* Ross, 32 Ill. 211; Wheat *v.* Summers, 13 Ill. App. 444; Stone *v.* White, 8 Gray (Mass.) 589; Hart *v.* Chesley, 18 N. H. 373; Colburn *v.* Pomeroy, 44 N. H. 19; Brooks *v.* Lowry, 1 Nott & McC. (S. C.) 342; Davisson *v.* Ford, 23 W. Va. 617.

64. Departures Not Allowed.—Evidence of fraud in procuring the execution of a note is not admissible under a plea of want of consideration. Hawkins *v.* Nation, 39 Ind. 50. But in Porter *v.* Gunnison, 2 Grant's Cas. (Pa.) 297, it was held that under notice to the plaintiff to prove consideration, defendant may give in evidence that the note has been stolen, or lost, or obtained by duress, or was procured and put in circulation by fraud. Under a defense of failure of consideration, the defendants are not allowed to prove that plaintiffs were not the owners of the note. Russell *v.* Gregg, 49 Kan. 89, 30 Pac. 185. Under a plea of want of consideration evidence that the note was delivered conditionally is not admissible. Norris *v.* Tiffany, 56 N. Y. St. 406, 26 N. Y. Supp. 750. A plea of no consideration and that the note was voluntary is not sustained by proof that the consideration was fraudulently represented and believed by the maker to be good, and that it proved to be of no value. Davis *v.* Young, 3 T. B. Mon. (Ky.) 381. But in Mooklar *v.* Lewis, 40 Ind. 1, it is *held* that proof that the note was given for an article that turned out to be wholly without value, will sustain a plea either of want or of failure of consideration. Evidence that the consideration was inadequate cannot sustain a plea of want of consideration. Cheney *v.* Higginbotham, 10 Ark. 273.

65. Coyle *v.* Fowler, 3 J. J. Marsh. (Ky.) 472.

66. Frank *v.* Morris, 57 Ill. 128; Griggs *v.* Howe, 2 Abb. App. Dec. (N. Y.) 291; Long Island Bank *v.* Boynton, 105 N. Y. 656, 11 N. E. 837.

67. Buck *v.* Steffey, 65 Ind. 58; Sheley *v.* Brooks, 114 Mich. 11, 72 N. W. 37; Marmion *v.* McClellan, 11 App. D. C. 467.

Mistake Available as a Defense. A showing of mistake in a note or bill may be made available as a defense without a formal reformation in equity. Hardison *v.* Davidson, 131 Cal. 635, 63 Pac. 1005; Van Dusen *v.* Parley, 40 Iowa 70; Mercer *v.* Clark, 3 Bibb (Ky.) 224; Claxon *v.* Damaree, 14 Bush (Ky.) 172; Reardon *v.* Moriarty, 30 La. Ann. 120; Wildermann *v.* Donnelly, 86 Minn. 184, 90 N. W. 366; Seeley *v.* Engell, 13 N. Y. 542.

68. *In re* Walton, 4 Kulp (Pa.) 487.

Absence of Presumption. — There is no presumption that a note given by a testator to one upon whom he had been dependent many years for advice and assistance in his business affairs, was obtained by fraud or undue influence. *In re* Flagg's Estate, 27 Misc. 401, 59 N. Y. Supp. 167.

the maker to prove a defense that the note was procured by fraud,[69] or duress,[70] or was given in consummation of a fraudulent trans-

69. *Alabama.* — Wyatt *v.* Ayres, 2 Port. 157.

Connecticut.—Reynolds *v.* Bird, 1 Root 305; Ross *v.* Webster, 63 Conn. 64, 26 Atl. 476.

Delaware. — Terry *v.* Platt, 1 Pen. 185, 40 Atl. 243.

Georgia. — Radcliffe *v.* Biles, 94 Ga. 480, 20 S. E. 359.

Illinois. — State Bank *v.* Norton, 78 Ill. App. 174; Blake *v.* State Bank, 78 Ill. App. 166, 178 Ill. 182, 52 N. E. 957.

Iowa. — Billingsly *v.* Craddock, 82 Iowa 721, 47 N. W. 893.

Kansas. — Stout *v.* Judd, 10 Kan. App. 579, 63 Pac. 662.

Michigan. — Sheley *v.* Brooks, 114 Mich. 11, 72 N. W. 37.

Montana. — Harrington *v.* Butte & B. Min. Co., (Mont.), 69 Pac. 102.

New York. — Auburn Nat. Ex. Bank *v.* Veneman, 43 Hun 241; McCammon *v.* Shantz, 26 Misc. 476, 57 N. Y. Supp. 515.

Pennsylvania. — Holme *v.* Karsper, 5 Binn. 469; Albietz *v.* Mellon, 37 Pa. St. 367; Keystone Bank *v.* Rollins, 1 W. N. C. 5.

Tennessee. — Teutonia Ins. Co. *v.* Bussell, (Tenn.), 48 S. W. 703.

False Representations. — When a note is secured by alleged false representations, the burden is upon the defendant to prove the falsity of the representation. N. Y. Ex. Co. *v.* De Wolf, 5 Bosw. (N. Y.) 593.

False representations of fact proved to be such, on the faith of which a note is indorsed, are sufficient defense to the note. Wyatt *v.* Ayers, 2 Port. (Ala.) 157.

Alabama. — Alabama Nat. Bank *v.* Halsey, 109 Ala. 196, 19 So. 522.

Connecticut. — Litchfield Bank *v.* Peck, 29 Conn. 384.

Illinois. — Sherwood *v.* Morrison First Nat. Bank, 17 Ill. App. 591.

Indiana. — Elsass *v.* Moore Hill M. & F. Inst., 77 Ind. 72; Cross *v.* Herr, 96 Ind. 96; Union Cent. L. Ins. Co. *v.* Huyck, 5 Ind. App. 474, 32 N. E. 580.

Iowa. — Bridges *v.* Yellow Springs College, 19 Iowa 572.

Kansas. — Wickham *v.* Grant, 28 Kan. 517.

Maryland. — Kagel *v.* Totten, 59 Md. 447.

Minnesota. — Cummings *v.* Thompson, 18 Minn. 246; Aultmann *v.* Olson, 34 Minn. 450, 26 N. W. 451; Schaller *v.* Borger, 47 Minn. 357, 50 N. W. 247.

Missouri.—Beall *v.* January, 62 Mo. 434; Kalamazoo Nat. Bank *v.* Clark, 52 Mo. App. 593.

Pennsylvania.—Resh *v.* First Nat. Bank of Allentown, 93 Pa. St. 397.

Vermont. — Wilbur *v.* Prior, 67 Vt 508, 32 Atl. 474.

Wisconsin. — Neilson *v.* Schuckman, 53 Wis. 638, 11 N. W. 44.

Proof of Fraud in Procuring Bonds. — To sustain a defense at law that defendant was induced to sign a bond or sealed instrument for the payment of money, by fraud, the only fraud permissible to be proved is that touching the execution of the instrument. George *v.* Tate, 102 U. S. 564.

70. Lee *v.* Ryder, 1 Kan. App. 293, 41 Pac. 221; Stout *v.* Judd, 10 Kan. App. 579, 63 Pac. 662.

Duress How Shown.—Duress may be shown to avoid a note or bill by proof of threats to produce loss of property. (Butterfield *v.* Davenport, 84 Ind. 590; French *v.* Talbot Pav. Co., 100 Mich. 443, 59 N. W. 166; Mills *v.* Young, 23 Wend. [N. Y.] 314), or threats of personal violence (Mollere *v.* Harp, 36 La. Ann. 471; Rossiter *v.* Loeber, 18 Mont. 372, 45 Pac. 560; Owens *v.* Mynatt, 7 Heisk. [Tenn.] 675; McGowen *v.* Bush, 17 Tex. 195; Magoon *v.* Reber, 76 Wis. 392, 45 N. W. 112), or threats of arrest and criminal prosecution (Morril *v.* Nightingale, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207; Lighthall *v.* Moore, 2 Colo. App. 554, 31 Pac. 511; Shenk *v.* Phelps, 6 Ill. App. 612; Bush *v.* Brown, 49, Ind. [illegible] 19 Am. Rep. 695; First Nat. Bank *v.* Bryan, 62 Iowa 42, 17 N. W. 165; Thompson *v.* Hinds, 67 Me. 177; Taylor *v.* Jaques, 106 Mass. 291; Bryant *v.* Peck, 154 Mass. 460, 28 N.

action.[71]

2. Evidence. — A. In General. — A mere preponderance of evidence is sufficient to establish the defense of fraud or duress,[72] but the defense that a note was given under a mistake as to the amount named therein can only be sustained by evidence which leaves no reasonable doubt.[73] Fraud in obtaining a negotiable instrument may be proved by circumstantial evidence,[74] or by admis-

E. 678; Hullhorst *v.* Scharner, 15 Neb. 57, 17 N. W. 259; Alexander *v.* Pierce, 10 N. H. 494; Haynes *v.* Rudd, 30 Hun [N. Y.] 237; Schoener *v.* Lissauer, 36 Hun 100, 107 N. Y. 111, 13 N. E. 741; James *v.* Roberts, 18 Ohio 548; Morrison *v.* Faulkner, 80 Tex. 128, 15 S. W. 797; Schultz *v.* Catlin, 78 Wis. 611, 47 N. W. 946), or by proof of the unlawful detention of property (Crawford *v.* Cato, 22 Ga. 594; McPherson *v.* Cox, 86 N. Y. 472; Oliphant *v.* Markham, 79 Tex. 543, 15 S. W. 569. 23 Am. St. Rep. 363), or of persons (Osborne *v.* Robbins, 36 N. Y. 365; Strong *v.* Grannis, 26 Barb. [N. Y.] 122), or by showing an abuse of civil process (Thurman *v.* Burt, 53 Ill. 129; Ganz *v.* Weisenberger, 66 Mo. App. 110; Osborne *v.* Robbins, 36 N. Y. 365.) But evidence of mere threats to commence a civil suit, or to use lawful legal process or evidence of the use thereof, is not sufficient proof of duress to avoid a note or bill. Davis *v.* Rice, 88 Ala. 388, 6 So. 751; McClair *v.* Wilson, 18 Colo. 82, 31 Pac. 502; Mascolo *v.* Montesanto, 61 Conn. 50, 23 Atl. 714; Perryman *v.* Pope, 94 Ga. 672, 21 S. E. 715; Snyder *v.* Braden, 58 Ind. 143; Barnes *v.* Stevens, 62 Ind. 226; Peckham *v.* Hendren, 76 Ind. 47; Foster *v.* Clark, 19 Pick. (Mass.) 329; Wilcox *v.* Howland, 23 Pick. (Mass.) 167; Perkins *v.* Trinka, 30 Minn. 241, 15 N. W. 115; Jones *v.* Houghton, 61 N. H. 51; Brown *v.* Tyler, 16 Vt. 22.

Duress and Want of Consideration. Where duress and want of consideration are both set up as defenses, it is not necessary to prove both, but proof of the duress only by a preponderance of testimony is sufficient to defeat a recovery by the payee. Rossiter *v.* Loeber, 18 Mont. 372, 45 Pac. 560.

71. Harbaugh *v.* Butner, 148 Pa. St. 273, 23 Atl. 983, 30 W. N. C. 128.

Fraudulent Combination. — Proof that a note was given in pursuance of a scheme to defraud the creditors or the maker, establishes the invalidity of the note as between the parties and indorsees with notice. Riedle *v.* Mulhausen, 20 Ill. App. 68; Case *v.* Gerrish, 15 Pick. (Mass.) 49; Ramsdell *v.* Edgarton, 8 Metc. (Mass.) 227; Lothrop *v.* King, 8 Cush. (Mass.) 383; Sternburg *v.* Bowman, 103 Mass. 325; Harvey *v.* Hunt, 119 Mass. 279; Fay *v.* Fay, 121 Mass. 561; Hamilton *v.* Scull, 25 Mo. 165, 69 Am. Dec. 460; Harwood *v.* Knapper, 50 Mo. 456; McCausland *v.* Ralston, 12 Nev. 195, 28 Am. Rep. 781; Winn *v.* Thomas, 55 N. H. 294; Church *v.* Muir, 33 N. J. Law 318; Nellis *v.* Clark, 4 Hill (N. Y.) 424, 20 Wend. 24; Williams *v.* Schreiber, 14 Hun (N. Y.) 38; Lawrence *v.* Clark, 36 N. Y. 128.

72. Sherwood *v.* First Nat. Bank, 17 Ill. App. 591; Gordon *v.* Parmelee, 15 Gray (Mass.) 413; Rossiter *v.* Loeber, 18 Mont. 372, 45 Pac. 560.

73. Punch *v.* Williams, 34 Wis. 268. See also Hochstein *v.* Berghauser, 123 Cal. 681, 56 Pac. 547; Hearne *v.* Marine Ins. Co., 20 Wall. (U. S.) 488. Proof of a mistake so as to increase the amount of interest should be very clear. Hathaway *v.* Brady, 23 Cal. 122.

74. Maxson *v.* Llewelyn, 122 Cal. 195, 54 Pac. 732.

Suspicion of Fraud. — It is not sufficient to raise a mere suspicion of fraud or undue influence to vitiate a note. There must be some actual proof. McClure *v.* Mansell, 4 Brewst. (Pa.) 119.

Evidence of Circumstances. — Evidence is admissible to show the circumstances under which the note was given. Hammond *v.* Goodale,

sions of the payee.[75] Evidence is admissible to show any facts or circumstances tending to sustain a defense of fraud,[76]

38 Ill. App. 365; Banks *v.* McCosker, 82 Md. 518, 34 Atl. 539; Levin *v.* Vannevar, 137 Mass. 532; Smalley *v.* Hale, 37 Mo. 102; Kirby *v.* Berguin, 15 S. D. 444, 90 N. W. 856.

75. Cawker *v.* Seamans, 92 Wis. 328, 66 N. W. 253.

Admission of Defendant. — In an action upon the last of several notes, given in the same transaction, where the defendant relies upon duress and fraud, or mistake in its execution, a written confession of the defendant under oath, showing the execution and justice of another one of such notes in an action thereon against him, is admissible in evidence for the plaintiff. Snyder *v.* Braden, 58 Ind. 143.

Statements of Plaintiff's Agent. In proof of a defense that the note sued on was procured by fraud, statements made by plaintiff's agent, satisfactorily proved to be such, are admissible against the plaintiff. Arnold *v.* Lane, 71 Conn. 61, 40 Atl. 921.

76. Evidence of Fraud. — In an action by the assignee of an overdue note against the maker, where notice has been given that proof of the consideration for the making and transfer will be required, evidence of any facts tending to show that the note was fraudulently put in circulation is admissible for the purpose of compelling the plaintiff to prove the consideration paid by him for it. Maples *v.* Browne, 48 Pa. St. 458. Proof of circumstances indicating fraud on the part of the plaintiff assignee, and a denial that he gave consideration, throw the burden of proof on him. Copley *v.* McFarland, 9 Rob. (La.) 183. Where the issue is whether or not the execution of the note was procured by fraudulent representations, it is error for the court to refuse to allow the defendant to prove the representations in question. Johnson *v.* Lawson, 29 Ill. App. 146. Under a defense that the note or bill sued upon by an indorser was procured by fraud of the payee of the note, or drawer of the bill, the defendant is entitled to give evidence of the fraud by which the note or acceptance of the bill was originally procured (New York & V. Stock State Bank *v.* Gibson, 5 Duer [N. Y.] 574; Pelly *v.* Onderdonk, 61 Hun 314, 15 N. Y. Supp. 915); and in such an action the defendant may testify to the circumstances under which he signed the note. Banks *v.* McCosker, 82 Md. 518, 34 Atl. 539. In an action by an assignee in insolvency of an insurance company upon a note given for a premium, where the defense was that the note was procured by false and fraudulent representation as to the solvency of the company, evidence is admissible to prove the insolvent condition of the company when the note was executed. Fogg. *v.* Griffin, 2 Allen (Mass.) 1.

Proof of Scienter.—Where a fraudulent partner has given a firm note for his private business, evidence for the defrauded partner is admissible to show that the fraudulent partner had previously, with knowledge of the plaintiff, been guilty of similar frauds against the partner, and that plaintiff had advised him to give up that business, and take his notes out of the market, as tending to show *scienter* on the part of the plaintiff.

Evidence of Similar Transactions. Evidence is admissible to show that the plaintiff, who had obtained the note sued upon by fraud, had obtained other notes of other persons by fraud, under similar circumstances in the same neighborhood, at about the same time. Nichols *v.* Baker, 75 Me. 334. And where all such notes were obtained under and in pursuance of a conspiracy to defraud, evidence to show such conspiracy and all acts of fraud thereunder, is admissible as against a purchaser of the note in suit, who had taken it with knowledge of the fraud. Knotwell *v.* Blanchard, 41 Conn. 614; First Nat. Bank *v.* Goodsell, 107 Mass. 149. But mere evidence of controversies had at about the time of giving the note in suit between the payee and other parties about other

duress,[77] or mistake,[78] or to overcome such defense.[79]

notes, is not admissible in action on a negotiable note by an endorsee against whom fraud is pleaded. First Nat. Bank *v.* Stanley, 46 Mo. App. 440. And evidence is inadmissible, in action upon a note the signature to which is alleged to have been obtained by fraud, to show by a third person that he had been induced by fraud to sign a similar note. Smith *v.* Adair, 61 Ga. 281.

77. **Evidence of Duress.** — On an issue whether a note was made under duress, evidence is admissible to show that the person to whom the payee made threats of imprisonment against the maker, repeated such threats to the maker in the absence of the payee, just before the making of the note. Taylor *v.* Jaques, 106 Mass. 291. Evidence is admissible on such an issue to show that the note sued upon was extorted by the payee from the maker under a threat to use his influence with the city council to prevent the maker from being paid for paving a city street. French *v.* Talbot Paving Co., 100 Mich. 443, 59 N. W. 166. In an action on a note given while under arrest in civil suit, in settlement of the suit, or a plea of duress, evidence is admissible to show that the bail fixed by the order of arrest was excessive, and the good faith of the plaintiff in instituting the suit in which the arrest was made is a material question. Behl *v.* Schuett, 104 Wis. 76, 80 N. W. 73. Evidence of circumstances without actual threats, is admissible when tending to show an apprehension caused thereby constituting duress, avoiding the note sued upon. Evans *v.* Huey, 1 Bay (S. C.) 13. Evidence is admissible to show threats of criminal prosecution against a near relative, awaking the apprehension of the party giving a note to prevent it.

Illinois. — Shenk *v.* Phelps, 6 Ill. App. 612.

Iowa.—First Nat. Bank *v* Bryan, 62 Iowa 42, 17 N. W. 165.

Kansas. — State Bank *v.* Hutchinson, 62 Kan. 9, 61 Pac. 443.

New York. — Haynes *v.* Rudd, 30 Hun 237; Schoener *v.* Lissauer, 36 Hun 100, *affirmed* 107 N. Y. 111, 13 N. E. 741; White *v.* Rasines, 66 Hun 633, 21 N. Y. Supp. 243.

Rhode Island. — Foley *v.* Greene, 14 R. I. 618, 51 Am. Rep. 419.

Tennessee. — Coffman *v.* Lookout Bank, 5 Lea 232, 40 Am. Rep. 31.

Wisconsin. — Schultz *v.* Culbertson, 46 Wis. 313, 1 N. W. 19; Schultz *v.* Catlin, 78 Wis. 611, 47 N. W. 946.

78. **Evidence of Mistake.** — Where the drawers of a bill are holders of it, evidence is admissible against them on behalf of the acceptors, to show that through mistake they accepted the bill for too large an amount, which was greater than the sum actually due to the drawer. Thomas *v.* Thomas, 7 Wis. 476. A defendant may show that the note in suit was executed by mistake for too large an amount. Claxon *v.* Damaree, 14 Bush (Ky.) 172; Seeley *v.* Engell, 13 N. Y. 542. And he may show that the note was given by mistake for a supposed balance of account, when nothing was in fact due. Mercer *v.* Clark, 3 Bibb (Ky.) 224; Reardon *v.* Moriarity, 30 La. Ann. 120. Where a defendant in an action upon a note alleged that his signature was a mistake, and was intended to be put on another note signed on the same date, the other note is competent evidence for the defendant. Copeland *v.* Copeland, 64 S. C. 251, 42 S. E. 105.

79. **Rebutting Evidence.** — In an action on a note, plaintiff need not introduce evidence in chief to resist a plea of fraud and circumvention, but may introduce such evidence in rebuttal. Butz *v.* Schwartz, 15 Ill. App. 114. In rebutting a defense that the defendant was induced to indorse the note sued upon by fraudulent representation of the plaintiff as to the responsibility of the maker, the plaintiff may testify to his opinion of the maker's responsibility when the indorsement was made. Blanchard *v.* Mann, 1 Allen (Mass.) 433. Under an answer alleging that through mental infirmity of defendant in being unable to judge the value of the property for the purchase of which the note sued upon was given,

B. Parol Evidence. — Parol evidence is admissible to show that a note, bill, or bond was procured by fraud,[80] duress,[81] or mistake,[82] especially where relief is sought in equity for alleged fraud or mistake.[83] But parol evidence is not admissible to show a fraudulent

he was overreached by the plaintiff, evidence of the reasonable value of the property is admissible as pertinent to the issue. Nichols *v.* Hardman, 62 Mo. App. 153. Under a defense that the note sued upon was procured by plaintiff's false representations as to a mortgage held by him on plaintiff's property, which he had foreclosed and issued execution upon, the plaintiff is entitled to introduce in evidence the judgment of foreclosure, and to prove all other facts showing a valid claim to the property, and good faith in procuring the notes. Schwartz *v.* Massy, 3 Willson Civ. Cas. Ct. App. (Tex.) § 470.

80. *Illinois.* — Wilson *v.* Miller, 72 Ill. 616; Hammond *v.* Goodale, 38 Ill. App. 365.

Iowa.—Richards *v.* Monroe, 85 Iowa 359, 52 N. W. 339; Delaware Co. Bank *v.* Duncombe, 48 Iowa 488.

Louisiana. — Testart *v.* Belot, 31 La. Ann. 795.

Maine. — Larrabee *v.* Fairbanks, 24 Me. 363, 41 Am. Dec. 389; Stoyell *v.* Stoyell, 82 Me. 332, 19 Atl. 860.

Massachusetts. — Case *v.* Gerrish, 15 Pick. 49; Ramsdell *v.* Edgarton, 8 Metc. 227, 4 Am. Dec. 503; Fisher *v.* Leland, 4 Cush. 456, 50 Am. Dec. 805.

Mississippi. — Simmons *v.* Cutreer, 12 Smed. & M. 584.

Missouri. — Fisk *v.* Collins, 9 Mo. 137.

New Hampshire. — Goodwin *v.* Horne, 60 N. H. 485.

New Jersey. — Armstrong *v.* Hall 1 N. J. Law 178.

New York. — New York Ex. Co. *v.* De Wolf, 5 Bosw. 593.

Pennsylvania. — McCulloch *v.* McKee, 16 Pa. St. 289.

Wisconsin. — Walker *v.* Ebert, 29 Wis. 194.

Rebuttal of Charge of Fraud. — In an action by an administrator to recover the proceeds of a note alleged to have belonged to the deceased, the assignment of which was charged to have been procured by fraud of the defendant, the defendant may rebut the charge by parol evidence that the note was a gift. Hall *v.* Knappenberger, (Mo.), 6 S. W. 381. The insertion of the words "for no consideration," in a written obligation prepared by the obligor, is sufficient evidence of fraud to let in parol evidence by the obligee that there was a consideration, and to prove the real transaction and facts of the case. Young *v.* Young, 19 Tex. 504.

81. Overstreet *v.* Dunlap, 56 Ill. App. 486; Taylor *v.* Jaques, 106 Mass. 291; Joslyn *v.* Capron, 64 Barb. (N. Y.) 598.

82. Palmer *v.* Vance, 13 Cal. 553; Hamilton *v.* Conyers, 28 Ga. 276; Byrd. *v.* Campbell Prtg. P. & Mfg. Co., 94 Ga. 41, 20 S. E. 253; Officer *v.* Howe, 32 Iowa 142; Van Dusen *v.* Parley, 40 Iowa 70; Mercer *v.* Clark, 3 Bibb (Ky.) 224; Fishback *v.* Woodward, 1 J. J. Marsh. 84, 19 Am. Dec. 55; Claxon *v.* Damaree, 14 Bush (Ky.) 172; Jackson *v.* Bowen, 7 Cow. (N. Y.) 13.

Innocent Mistake of Plaintiff. The maker in an action by the payee, cannot prove, by parol evidence, facts amounting only to an innocent mistake of plaintiff in writing the note. Bradley *v.* Anderson, 5 Vt. 152.

83. *California.* — Hathaway *v.* Brady, 23 Cal. 122; Pierson *v.* McCahill, 23 Cal. 250; Isenhoot *v.* Chamberlain, 59 Cal. 631.

Connecticut.— Montville *v.* Haughton, 7 Conn. 543.

Indiana. — Fitzmaurice *v.* Mosier, 116 Ind. 363, 16 N. E. 175, 19 N. E. 180, 9 Am. St. Rep. 854.

Kentucky. — McCurdy *v.* Breathitt, 5 T. B. Mon. 232, 17 Am. Dec. 65; Inskol *v.* Proctor, 6 T. B. Mon. 311; Burdett *v.* Simms, 3 J. J. Marsh. 190.

North Carolina. — Huson *v.* Pitman, 2 Hayw. 331.

Ohio. — McNaughten *v.* Partridge, 11 Ohio 223.

promise to surrender a note,[84] nor a collateral fraud destroying the written contract of sureties.[85]

C. VARIANCE. — Evidence of mistake is not admissible under a plea of fraud,[86] or of payment.[87] And neither fraud nor mistake in delivery is admissible under a plea of non-delivery.[88] Evidence of fraud in procuring the execution of a note is not admissible under a plea of *non est factum*,[89] or of want of consideration.[90] Under a plea of fraud in procuring the note in suit, evidence of fraud in procuring another note of which the one in suit is a renewal is not admissible.[91]

VII. PAYMENT AND DISCHARGE.

1. Presumptions and Burden of Proof. — A. PAYMENT IN GENERAL. — In an action upon a note or bill the burden of proving payment is upon the defendant.[92] The possession of a negotiable

84. Henderson *v.* Thompson, 52 Ga. 149.

85. Lanius *v.* Shuber, 77 Tex. 24, 13 S. W. 614.

86. Leighton *v.* Grant, 20 Minn. 345.

87. Lowry *v.* Shane, 34 Ind. 495.

88. Witmer Bros. Co. *v.* Weid, 108 Cal. 569, 41 Pac. 491.

89. Cline *v.* Guthrie, 42 Ind. 227; Maxwell *v.* Morehart, 66 Ind. 301; Thomas *v.* Ruddell, 66 Ind. 326; Chambers *v.* Games, 2 Greene (Iowa) 320. *Contra.* — Woolson *v.* Shirley, 6 Dana (Ky.) 308; Kingman *v.* Shawley, 61 Mo. App. 54.

90. Hawkins *v.* Nation, 39 Ind. 50. But see Porter *v.* Gunnison, 2 Grant's Cas. (Pa.) 297.

91. Clough *v.* Holden, 115 Mo. 336, 20 S. W. 695, 21 S. W. 1071, 37 Am. St. Rep. 393.

92. *United States.* — Fullerton *v.* Bank of U. S., 1 Pet. 604.

Alabama. — Sampson *v.* Fox, 109 Ala. 662, 19 So. 896; Turrentine *v.* Grigsby, 118 Ala. 380, 23 So. 666.

California. — Lisman *v.* Early, 15 Cal. 199; Griffith *v.* Lewin, 125 Cal. 618, 58 Pac. 205; Melone *v.* Ruffino, 129 Cal. 514, 62 Pac. 93.

Colorado. — Knox *v.* McFerran, 4 Colo. 348.

Dakota. — Star Wagon Co. *v.* Matthiesse, 3 Dak. 233, 14 N. W. 107.

Georgia. — Hannah *v.* Johnson, 111 Ga. 848, 36 S. E. 462.

Illinois. — Ritter *v.* Schenk, 101 Ill. 387; Duffy *v.* Leavitt, 81 Ill. App. 410; Boon *v.* Bliss, 98 Ill. App. 341.

Indiana. — Ayres *v.* Foster, 25 Ind. App. 99, 57 N. E. 725; Carver *v.* Forry, 158 Ind. 76, 62 N. E. 697.

Indian Territory. — Barton *v.* Ferguson, 1 Ind. Ter. 263, 37 S. W. 49.

Iowa. — Walker *v.* Russell, 73 Iowa 340, 35 N. W. 443.

Kansas. — Anthony *v.* Mott, 10 Kan. App. 105, 61 Pac. 509.

Louisiana. — St. Armand *v.* Alexander, 18 La. Ann. 243; Browder *v.* Hook, 24 La. Ann. 200.

Maine. — Estes *v.* Blake, 30 Me. 164; Crooker *v.* Crooker, 49 Me. 416.

Maryland. — Miller *v.* Palmer, 58 Md. 451.

Massachusetts. — Hilton *v.* Smith, 5 Gray 400.

Michigan. — Marvin *v.* Newman, 39 Mich. 114.

Minnesota. — Marshall & I. Bank *v.* Child, 76 Minn. 173, 78 N. W. 1048.

Mississippi. — Mann *v.* Manning, 12 Smed. & M. 615.

Missouri. — Scroggs *v.* Cook, 49 Mo. 305; Kemble *v.* Logan, 79 Mo. App. 253; Oil Well Supply Co. *v.* Wolfe, 127 Mo. 616, 30 S. W. 145.

Nebraska. — Mullaly *v.* Dingman, 62 Neb. 702, 87 N. W. 543.

New Hampshire. — Kendall *v.* Brownson, 47 N. H. 186.

New York. — Dean *v.* Pitts, 10 Johns. 35.

North Carolina. — Harmon *v.* Taylor, 98 N. C. 341, 4 S. E. 510.

instrument by the maker or acceptor after maturity, creates a rebuttable presumption of payment,[93] but possession thereof by the

Ohio. — Olinger *v.* McGuffey, 55 Ohio St. 661, 48 N. E. 1115.

Pennsylvania. — Bell *v.* Young, 1 Grant. Cas. 175; Pool *v.* White, 175 Pa. St. 459, 34 Atl. 801.

South Carolina. — Harrell *v.* Parrott, 50 S. C. 16, 27 S. E. 521.

Tennessee. — Ford *v.* Lawrence, (Tenn.), 51 S. W. 1023; French *v.* Stubblefield, (Tenn.), 56 S. W. 32; Waid *v.* Greer, (Tenn.), 56 S. W. 1029; Conn. Mut. L. Ins. Co. *v.* Dunscomb, 108 Tenn. 724, 69 S. W. 345.

Texas. — Guerin *v.* Patterson, 55 Tex. 124.

Vermont. — Barber *v.* Slade, 30 Vt. 191, 73 Am. Dec. 299.

Wisconsin. — Knapp *v.* Runals, 37 Wis. 135; Goff *v.* Stonghton State Bank, 84 Wis. 369, 54 N. W. 732; Studebaker Bros. Mfg. Co. *v.* Langson, 89 Wis. 200, 61 N. W. 773.

Burden Upon Plaintiff. — A pledgee of a note fraudulently transferred by the payee to secure an existing debt has the burden of proving that such debt is unpaid, and what amount is still due thereon. Wright *v.* Hardie, 88 Tex. 653, 32 S. W. 885. Where the payee of notes was given the power of attorney to collect rents and apply them on the notes, the burden is on him to show that he did not receive the full amount of the notes in rents. Mason *v.* Marshall, 39 Kan. 424, 18 Pac. 488. Where the answer alleged that defendant had sold real estate to plaintiff the price of which was to be applied on the note, and plaintiff admitted the sale and alleged that he had paid the purchase money to third person at defendant's request, the burden of proving such payment is on the plaintiff. Kelsey *v.* McLaughlin, 10 Neb. 6, 4 N. W. 361.

In an action in equity by the maker of a note, where he alleges payment as plaintiff, the burden is on him to prove it. McIvor *v.* Smith, 118 N. C. 73, 23 S. E. 971; Cook *v.* Guirkin, 119 N. C. 13, 25 S. E. 715.

In an action against the sureties upon a note, the principal being dead, where it is shown that other payments were made by the principal, besides those credited on the note, the amount of which was known only to the plaintiff, the burden is upon the plaintiff to prove the amount of such payments, and to show the exact amount still due, if anything. Hoerr *v.* Coffin, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 184.

Application of Payments. — Where other debts between the parties besides the note in suit appear to exist, the burden of proof is upon him who asserts that sums paid were intended to be applied as a credit upon the note. White *v.* White, 19 Ky. L. Rep. 1590, 44 S. W. 83. A check will not be presumed to have been applied upon a contingent obligation not absolute at the date. McVeigh *v.* Chamberlain, 96 Va. 73, 26 S. E. 395. A surety who claims that the application of payments by the creditor and principal is inequitable as to the surety, has the burden of showing that fact. Merchants' Ins. Co. *v.* Herber, 68 Minn. 420, 71 N. W. 624.

The burden of showing that payments presumed to have been applied upon a mortgage note were in fact applied upon another debt, is upon the mortgagee. Boyd *v.* Jones, 96 Ala. 305, 11 So. 405; Greer *v.* Turner, 47 Ark. 17, 14 S. W. 383; Tharp *v.* Feltz, 6 B. Mon. (Ky.) 6.

93. *United States.* — Lonsdale *v.* Brown, 3 Wash. C. C. 404, 15 Fed. Cas. No. 8492.

Alabama. — Penn *v.* Edwards, 50 63; Potts *v.* Coleman, 86 Ala. 94, 5 So. 780; Lipscomb *v.* DeLemos, 68 Ala. 592.

Arkansas. — Lane *v.* Farmer, 13 Ark. 63; Hollenberg *v.* Lane, 47 Ark. 394, 1 S. W. 687; Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556, 25 S. W. 868.

California. — Smith *v.* Harper, 5 Cal. 330; Turner *v.* Turner, 79 Cal. 565, 21 Pac. 959.

Florida. — Perez *v.* Bank of Key West, 36 Fla. 467, 18 So. 590.

Georgia. — Osborn *v.* Herron, 28 Ga. 313; Liddell *v.* Wright, 72 Ga. 899.

Illinois. — Walker *v.* Douglas, 70

Ill. 445; Fedens *v.* Schumers, 112 Ill. 263.

Iowa. — Dougherty *v.* Deeney, 41 Iowa 19.

Kentucky. — Randle *v.* City Nat. Bank, 5 Ky. L. Rep. 185; Callahan *v.* First Nat. Bank, 78 Ky. 604, 39 Am. Rep. 262; Callahan *v.* Bank of Ky., 82 Ky. 231.

Louisiana. — Benson *v.* Shipp, 5 Mart. (N. S.) 154; Wilkinson *v.* Phelps, 16 La. (O. S.) 304; Miller *v.* Reynolds, 5 Mart. (N. S.) 665; Walton *v.* Young, 26 La. Ann. 164.

Maryland. — Carroll *v.* Bowie, 7 Gill 34.

Massachusetts. — Baring *v.* Clark, 19 Pick. 220; McGee *v.* Prouty, 9 Metc. 547, 43 Am. Dec. 409; Richardson *v.* Cambridge, 2 Allen 118, 79 Am. Dec. 767.

Missouri. — Lawson *v.* Gudgel, 45 Mo. 480; McFall *v.* Dempsey, 43 Mo. App. 369; Stephenson *v.* Richards, 45 Mo. App. 544.

Nebraska. — Smith *v.* Gardner, 36 Neb. 741, 55 N. W. 245.

New Hampshire. — Drew *v.* Phelps, 18 N. H. 572; Chandler *v.* Davis, 47 N. H. 462.

New York. — Gray *v.* Gray, 2 Lans. 173; Reynolds *v.* Harrison, 25 Weekly Dig. 558.

North Carolina. — Blount *v.* Starkey, Tayl. 65; Poston *v.* Jones, 122 N. C. 536; 29 S. E. 951.

Ohio. — Larimore *v.* Wells, 29 Ohio St. 13.

Oregon. — Hedges *v.* Strong, 3 Or. 18.

Pennsylvania. — Zeigler *v.* Gray, 12 Serg. & R. 42; Bracken *v.* Miller, 4 Watts & S. 102; Union Canal Co. *v.* Loyd, 4 Watts & S. 393; Eckert *v.* Cameron, 43 Pa. St. 120.

Texas. — Close *v.* Fields, 2 Tex. 232, 9 Tex. 422, 13 Tex. 623; Hays *v.* Samuels, 55 Tex. 560; Halfin *v.* Winkleman, 83 Tex. 165, 18 S. W. 433.

Washington. — First Nat. Bank *v.* Harris, 7 Wash. 139, 34 Pac. 466.

Absence of Interest Coupon.—The absence of an interest coupon from the principal note, raises a presumption of payment of the coupon. Merrick *v.* Hurlbert, 17 Ill. App. 90.

Possession of Draft. — The possession of a draft by the drawer is *prima facie* evidence that the drawer has paid it. Skannel *v.* Taylor, 12 La. Ann. 773. But where it is in possession of the drawee, such possession is *prima facie* evidence that the drawee has paid it. Succession of Penny, 14 La. Ann. 194.

Possession by Indorser. — The possession of a note by an indorser in a suit against a prior indorser, is *prima facie* evidence that he has paid it. Mullen *v.* French, 9 Watts (Pa.) 96.

Possession by One Joint Maker. Though the possession of a note by one joint maker after maturity raises a presumption that the note has been paid, yet it does not raise a presumption, as against the co-maker, that it was wholly paid by the possessor. Heald *v.* Davis, 11 Cush. (Mass.) 318, 59 Am. Dec. 147; Bates *v.* Cain, 70 Vt. 144, 40 Atl. 36. See Chandler *v.* Davis, 47 N. H. 462.

Burden of Proof on Payee. — The burden is on the payee of a due bill to overcome the presumption of payment from its possession by the maker. Fedens *v.* Schumers, 112 Ill. 263. The burden is on the payee of a note found among the effects of a deceased maker, by his administrator, to prove that it has not been paid. Liddell *v.* Wright, 72 Ga. 899. The burden is upon the plaintiff in an action for money loaned, which was evidenced by a note surrendered to the maker on payment of interest, to show that the note had not been paid. Reynold *v.* Harrison, 25 Weekly Dig. 558.

Presumption of Payment, When Not Arising. — The presumption of payment does not arise from the possession of the maker of a note, who is a son of the payee, and who might have acquired the possession of it while residing with his father, as well without as with payment thereof. Grimes *v.* Hilliary, 150 Ill. 141, 36 N. E. 977; Erhart *v.* Dietrich, 118 Mo. 418, 24 S. W. 188. A gift of such note is not to be presumed. Grey *v.* Grey, 47 N. Y. 552. The presumption of payment cannot be allowed to overcome the presumption of innocence of a crime. Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556, 25 S. W. 868. The production of a bill by an accommodation acceptor is not presumptive evidence of payment by him, unless it is shown to have been

payee is *prima facie* evidence of non-payment.[94] A presumption of payment may arise from the lapse of time.[95] A note paid is pre-

in circulation after acceptance. Curry *v.* Kurtz, 33 Miss. 24; Close *v.* Fields, 2 Tex. 232. See Wilkinson *v.* Phelps, 16 La. (O. S.) 304. Where a note not due is indorsed and delivered to the makers, it is presumed to have been indorsed for their accommodation for the purpose of negotiation, and payment of such note is not to be presumed from such holding by the makers. Erwin *v.* Shaffer, 9 Ohio St. 43, 72 Am. Dec. 612; Morris *v.* Morton, 14 Neb. 358, 15 N. W. 725; Eckert *v.* Cameron, 13 Pa. St. 120. Possession of a note secured by mortgage, by a mortgagee who is administrator of the mortgagor, raises no presumption of non-payment. Tharp *v.* Feltz, 6 B. Mon. (Ky.) 6. A bill of exchange coming to the possession of the acceptor before maturity does not raise a presumption of payment. Witte *v.* Williams, 8 S. C. 290, 28 Am. Rep. 294. The maker's indorsement of a note before maturity, subsequent to other indorsers, is not evidence that he had paid it. Runyan *v.* Reed, 5 Clark 439.

94. *Alabama.* — Tisdale *v.* Maxwell, 58 Ala. 40.

Arkansas. — Davis *v.* Gaines, 28 Ark. 440.

California. — Turner *v.* Turner, 79 Cal. 565, 21 Pac. 959; Locke *v.* Klunker, 123 Cal. 231, 55 Pac. 993; Griffith *v.* Lewin, 125 Cal. 618, 58 Pac. 205; Pastene *v.* Pardini, 125 Cal. 432, 67 Pac. 681.

Georgia. — Haywood *v.* Louis, 65 Ga. 221.

Illinois. — Steumbaugh *v.* Hallam, 48 Ill. 305; Douglas *v.* Pfeiffer, 46 Ill. 102; Keyes *v.* Fuller, 9 Ill. App. 528; Ritter *v.* Schenk, 101 Ill. 387.

Iowa. — Jones *v.* Fennimore, 1 Greene 134.

New York. — Giesson *v.* Giesson, 1 Code Rep. (N. S.) 114.

North Carolina. — Johnson *v.* Gooch, 116 N. C. 64, 21 S. E. 39.

Wisconsin. — Somervail *v.* Gillies, 31 Wis. 152; Studebaker Bros. Mfg. Co. *v.* Langson, 89 Wis. 200, 61 N. W. 773.

Possession by One of Two Payees. Where a note payable to two persons, not partners, is found by the executors of one of them among his testator's effects, it will be presumed that the note was unpaid. Tisdale *v.* Maxwell, 58 Ala. 40.

Possession of Accepted Bill Set Off Against Note. — In a suit upon a note held by the plaintiff, a bill drawn by a third party in favor of the defendant, and accepted by the plaintiff, prior to the note, which is sought to be set off against the note, will be presumed unpaid, and the subsequent note affords no presumption of the payment of the bill. Weaver *v.* Caldwell, 9 Ark. 330.

95. Presumption From Lapse of Time. — A common law presumption of payment arises from the lapse of twenty years, without payment or attempt to collect the obligation.

United States. — Idler *v.* Borgmeyer, 65 Fed. 910, 13 C. C. A. 198.

Alabama. — Solomon *v.* Solomon, 83 Ala. 394, 3 So. 679; Semple *v.* Glenn, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894.

California. — Gage *v.* Downey, 79 Cal. 140, 21 Pac. 527, 855.

Connecticut. — Boardman *v.* De Forest, 5 Conn. 1; Daggett *v.* Tallman, 8 Conn. 168.

Delaware. — Durham *v.* Greenly, 2 Harr. 124.

Illinois. — McCormick *v.* Evans, 33 Ill. 328.

Indiana. — O'Brien *v.* Coulter, 2 Blackf. 421.

Iowa. — Forsyth *v.* Ripley, 2 Greene 181.

Kansas. — Courtney *v.* Staudenmayer, 56 Kan. 392, 43 Pac. 758, 54 Am. St. Rep. 592.

Kentucky. — Stockton *v.* Johnson, 6 B. Mon. 408.

Missouri. — Carr *v.* Dings, 54 Mo. 95; West *v.* Brison, 99 Mo. 684, 13 S. W. 95; Williams *v.* Mitchell, 112 Mo. 300, 20 S. W. 647.

New Hampshire. — Bartlett *v.* Bartlett, 9 N. H. 398.

New Jersey.—Downs *v.* Sooy, 28 N. J. Eq. 55.

New York. — Bean *v.* Tonnele, 94 N. Y. 381, 46 Am. Rep. 153.

sumed to have been paid when due until the contrary is shown.[96] A receipt or indorsement showing payment is presumptive evidence thereof.[97]

North Carolina. — Ridley *v.* Thorpe, 2 Hayw. 343.

Pennsylvania. — Ankeny *v.* Penrose, 18 Pa. St. 190; Rogers *v.* Burns, 27 Pa. St. 525; Appeal of Bentley, 99 Pa. St. 500.

South Carolina.—Kinnard *v* Baird, 20 S. C. 377.

Texas. — Foot *v.* Silliman, 77 Tex. 268, 13 S. W. 1032.

Virginia. — Wells *v.* Washington, 6 Munf. 532; King *v.* King, 90 Va. 177, 17 S. E. 894.

Statute of Limitations. — Where there is a statute of limitations applicable to the obligation, the lapse of time fixed by the statute after the cause of action accrues raises a legal presumption of payment; though nothing short of it will raise such presumption *per se*.

Georgia. — Thomas *v.* Hunnicutt, 54 Ga. 337.

Illinois. — C. Aultman & Co. *v.* Connor, 25 Ill. App. 654.

Indiana. — Swatts *v.* Bowen, 141 Ind. 322, 40 N. E. 1057.

Michigan.—Appeal of Smith, 52 Mich. 415, 18 N. W. 195.

Mississippi. — Mann *v.* Manning, 12 Smed. & M. 615.

New York. — Jackson *v.* Sackett, 7 Wend. 94; Newcombe *v.* Fox, 1 App. Div. 389, 37 N. Y. Supp. 294.

North Carolina. — Spruill *v.* Davenport, 5 Ired. Law 663.

Tennessee. — Atkinson *v.* Dance, 9 Yerg. 424, 30 Am. Dec. 422; Anderson *v.* Settle, 5 Sneed 202; Thompson *v.* Thompson, 2 Head 405.

Vermont—Grafton Bank *v.* Doe, 19 Vt. 463, 47 Am. Dec. 697: Smith *v.* Niagara F. Ins. Co., 60 Vt. 682, 15 Atl. 353, 6 Am. St. Rep. 144, 1 L. R. A. 216.

Presumption of Payment Rebuttable. — There is a recognized distinction between the statute of limition and the presumption of payment from lapse of time, the condition of the parties and their relation towards each other. In the former case the bar is absolute; in the latter it is a rule of evidence, and may be rebutted. Clendenning *v.* Thompson, 91 Va. 518, 22 S. E. 233.

But in Blue *v.* Everett, 55 N. J. Eq. 329, 36 Atl. 960, it is held that the presumption of the payment of a note secured by mortgage arising from the lapse of twenty years without demand, payment, or acknowledgment, and without any explanation of the delay, is conclusive and cannot be rebutted by evidence that the debt is not in fact paid.

Presumption Entitled to Weight. Lapse of time affords a presumption entitled to weight. Patterson *v.* Phillips, Hempst. 69, 18 Fed. Cas. No. 10,829a. As the day of payment recedes, the presumption strengthens. Peytavin *v.* Maurin, 2 La. (O. S.) 480.

96. Lane *v.* Farmer, 13 Ark. 63; Richardson *v.* Cambridge, 2 Allen (Mass.) 118, 79 Am. Dec. 767; Bailey *v.* Gould, Walk. Ch. (Mich.) 478; Johnson *v.* Carpenter, 7 Minn. 176.

97. Receipts as Presumptive Evidence. — Receipts of payment on account of a note or bill are presumptive evidence of payment.

Alabama. — Hill *v.* Erwin, 60 Ala. 341.

Arkansas. — Burton *v.* Merrick, 21 Ark. 357.

California. — Jenne *v.* Burger, 120 Cal. 444, 52 Pac. 706.

Colorado. — Salazar *v.* Taylor, 18 Col. 538, 33 Pac. 369.

Florida.—Broward *v.* Doggett, 2 Fla. 49.

Georgia. — Raignel *v.* Dessure, 20 Ga. 690; Allen *v.* Woodson, 50 Ga. 53; M'Camy *v.* Cavender, 92 Ga. 254, 18 S. E. 415.

Indiana. — Howe Mach. Co. *v.* Simler, 59 Ind. 307.

Iowa. — Williamson *v.* Reddish, 45 Iowa 550.

Maine. — Cunningham *v.* Batchelder, 32 Me. 316.

Massachusetts. — Burnham *v.* Parkhurst, 108 Mass. 341; Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2.

Nebraska. — Butts *v.* Capital Nat. Bank, 21 Neb. 586, 33 N. W. 250.

South Carolina. — Gibson *v.* Peebles, 2 McCord 418.

Vermont. — Paige *v.* Perno, 10 Vt. 491.

Effect of Receipt of Payment. — A receipt by A. B. for a certain sum in full of all accounts and notes, is not *prima facie* evidence of the payment of notes held by A. B. as trustee for a much larger sum. Bartholomew *v.* Bartholomew, 24 Ill. 200. A receipt of $1.00 in full of a certain note is *prima facie* evidence of full payment of the note. Paige *v.* Perno, 10 Vt. 491.

The language of a receipt which recites that the sum acknowledged was received "on the within note," together with the fact that a credit for the amount was indorsed on the note referred to, shows conclusively that it was intended as a partial payment. Hill *v.* Erwin, 60 Ala. 341.

Burden of Proof. — The burden of proof is on the party seeking to impeach a receipt. Raignel *v.* Dessure, 30 Ga. 690; Winchester *v.* Grosvenor, 44 Ill. 425; Levi *v.* Karrick, 13 Iowa 344; Williamson *v.* Reddish, 45 Iowa 550; Gray *v.* Lonsdale, 10 La. Ann. 749; Butts *v.* Capitol Nat. Bank, 21 Neb. 586, 33 N. W. 250; Guyette *v.* Town of Bolton, 46 Vt. 228. When the evidence is equally balanced the receipt will stand. Borden *v.* Hope, 21 La. Ann. 581.

Indorsements as Presumptive Evidence. — Indorsements of payment upon the note are presumed to have been made by the holder or with his consent, and are presumptive evidence of payment.

Alabama. — Clark *v.* Simmons, 4 Port. 14.

Florida. — Harrell *v.* Durrance, 9 Fla. 490.

Illinois. — Greenough *v.* Taylor, 17 Ill. 602; Long *v.* Kingdon, 25 Ill. 53; Shepard *v.* Calhoun, 72 Ill. 337; Giddings *v.* McCumber, 51 Ill. App. 373.

Indiana. — Henderson *v.* Reeves, 6 Blackf. 101; Brown *v.* Gooden, 16 Ind. 444.

Iowa. — Thomassen *v.* Van Wyngaarden, 65 Iowa 687, 22 N. W. 927.

Kentucky. — Graves *v.* Moore, 7 T. B. Mon. 341, 18 Am. Dec. 181.

Louisiana. — Norcross *v.* Theurer, 3 Rob. 375; Mims *v.* Morrison, 5 La. Ann. 650; Benson *v.* Mathews, 7 La. (O. S.) 356.

Massachusetts. — Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2.

Michigan. — Morris *v.* Morris, 5 Mich. 171.

Missouri. — Jobe *v.* Weaver, 77 Mo. App. 665; Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 48 Am. St. Rep. 505.

New York. — Humphrey *v.* Sweeting, 92 Hun 447, 36 N. Y. Supp. 967.

North Carolina. — Young *v.* Alford, 118 N. C. 215, 23 S. E. 973.

Ohio.—Keys *v.* Baldwin, 17 Weekly Law Bull. 113.

Tennessee. — Harding *v.* Wormley, 8 Baxt. 578.

Erasure of Credit. — A subsequent erasure of a credit indorsed upon a note will not destroy its effect as an admission of payment, unless the contrary is distinctly proved. Clark *v.* Simmons, 4 Port. (Ala.) 14; Giddings *v.* McCumber, 51 Ill. App. 373; Graves *v.* Moore, 7 T. B. Mon. (Ky.) 341, 18 Am. Dec. 181; Benson *v.* Mathews, 7 La. (O. S.) 356; Harding *v.* Wormley, 8 Baxt. (Tenn.) 578. But the erasure may be justified by clear proof that the indorsement was mistakenly or improperly made. Tubb *v.* Madding, Minor (Ala.) 129; Chamberlin *v.* White, 79 Ill. 549; Burtch *v.* Dent, 13 Ind. 542; Dodge *v.* Greeley, 31 Me. 343; Kimball *v.* Lamson, 2 Vt. 138. Also by showing that it was erased pursuant to agreement. Coggins *v.* Stockard, 64 Miss. 301, 1 So. 245. An indorsement on a note "received on the within 50" will be treated as no credit without evidence to explain it. Gilpatrick *v.* Foster, 12 Ill. 355. An indorsement of a credit on a certain date, stating the amount in figures, and stating on the line below the same amount written out and again stated in figures, will be presumed to import two credits to that amount. Mayer *v.* Schlamp, 17 Ky. L. Rep. 691, 32 S. W. 399.

Cancellation of Instrument.—Lines drawn across a note raise a rebuttable presumption that it has been satisfied. Pitcher *v.* Patrick, 1 Stew. & P. (Ala.) 478. Where a pen mark is drawn through the word "Paid," stamped on a note, the presumption is that the word was stamped by mis-

B. Payment by Negotiable Paper. — In a number of the States it is held that the taking of a negotiable instrument for a debt is presumptive evidence of payment thereof in the absence of proof to the contrary;[98] while in other states, such acceptance is presumed

take. International Bank *v.* Bowen, 80 Ill. 541. The presumption of payment arising from the maker's possession of notes marked "Settled" and "Satisfied in full," is not conclusive. Jones *v.* Bobbitt, 90 N. C. 391. It is a question of fact whether certain pencil marks upon a note indicate its cancellation. Stockton *v.* Graves, 10 Ind. 294. The cancellation of a check on a bank and its retention by the bank are evidence of its payment. Conway *v.* Case, 22 Ill. 127.

98. Negotiable Instrument of Debtor. — In the following cases it is held that the execution of a negotiable note or bill governed by the law merchant for a simple debt of the maker creates a rebuttable presumption that the previous debt has been paid or extinguished thereby.

United States. — Baker *v.* Draper, 1 Cliff. 420, 2 Fed. Cas. No. 766; Hudson *v.* Bradley, 2 Cliff. 130, 12 Fed. Cas. No. 6, 833; Palmer *v.* Elliott, 1 Cliff. 63, 18 Fed. Cas. No. 10,690; Wallace *v.* Agry, 4 Mason 336, 29 Fed. Cas. No. 17,096.

Alabama. — Graves *v.* Shulman, 59 Ala. 406.

Arkansas. — Costar *v.* Davies, 8 Ark. 213, 46 Am. Dec. 311; Greer *v.* Laws, 56 Ark. 37, 18 S. W. 1038; Carlton *v.* Buckner, 28 Ark. 66; Nicklase *v.* Griffith, 59 Ark. 641, 26 S. W. 381.

Georgia. — Mills *v.* Mercer, Dud. 158.

Illinois. — Smalley *v.* Edey, 19 Ill. 207.

Indiana. — Smith *v.* Bettger, 68 Ind. 254, 34 Am. Rep. 256; Warring *v.* Hill, 89 Ind. 497; Mason *v.* Douglas, 6 Ind. App. 558, 33 N. E. 1009; Keck *v.* State, 12 Ind. App. 119, 39 N. E. 899; Davis & R. Bldg. & Mfg. Co. *v.* Vice, 15 Ind. App. 117, 43 N. E. 889.

Maine. — Varner *v.* Inhabitants of Nobleborough, 2 Me. 121, 11 Am. Dec. 48; Ward *v.* Bourne, 56 Me. 161; Mehon *v.* Thompson, 71 Me. 492; Titcomb *v.* McAllister, 81 Me. 399, 17 Atl. 315; Bunker *v.* Barron, 79 Me. 62, 8 Atl. 253, 1 Am. St. Rep. 282.

Massachusetts. — Reed *v.* Upton, 10 Pick. 522, 20 Am. Dec. 545; Melledge *v.* Boston I. Co., 5 Cush. 158, 51 Am. Dec. 59; Parker *v.* Osgood, 4 Gray 456; Appleton *v.* Parker, 15 Gray 173; Getchell *v.* Foster, 106 Mass. 42; Parham S. Mach. Co. *v.* Brock, 113 Mass. 194; Green *v.* Russell, 132 Mass. 536.

Rhode Island. — Sweet *v.* James, 2 R. I. 270.

Vermont. — Wemet *v.* Missiquoi L. Co., 46 Vt. 458; Hadley *v.* Bordo, 62 Vt. 285, 19 Atl. 476.

Virginia. — Thornton *v.* Spotswood, 1 Wash. 142.

Wisconsin. — Mehlberg *v.* Tisher, 24 Wis. 607; Challoner *v.* Boyington, 83 Wis. 399, 53 N. W. 694.

Receipt of Payment by Note. — A receipt of payment by note is *prima facie* evidence of payment. Moore *v.* Newbury, 6 McLean 472, 17 Fed. Cas. No. 9772; Drew *v.* Hull of a New Ship, 7 Fed. Cas. No. 4078; Palmer *v.* Priest, 1 Spr. 512, 18 Fed. Cas. No. 10,694; Real Estate Bank *v.* Rawdon, 5 Ark. 558; Phelan *v.* Crosby, 2 Gill (Md.) 462; Swain *v.* Frazier, 35 N. J. Eq. 326; *Ex parte* Williams, 17 S. C. 396. But see *contra* Glenn *v.* Smith, 2 Gill & J. (Md.) 493, 20 Am. Dec. 452; Berry *v.* Griffin, 10 Md. 27, 69 Am. Dec. 123; Doebling *v.* Loos, 45 Mo. 150; Tobey *v.* Barber, 5 Johns. (N. Y.) 68, 4 Am. Dec. 326; Putnam *v.* Lewis, 8 Johns. (N. Y.) 389.

Note with Waiver of Exemption. The acceptance of the negotiable note of the debtor for a balance due with waiver of exemption, constitutes presumptive evidence of payment, and the burden of proof is upon the plaintiff to show that such note was not received in payment. Lee *v.* Green, 83 Ala. 491, 3 So. 785.

Note for Co-temporaneous Debt. Where a note is given for a debt

to be conditional upon future payment;[99] unless the proof shows a

contracted co-temporaneously with it, the burden of proof is upon the creditors to show that the note was not received as payment of the debt. Noel *v.* Murray, 13 N. Y. 167, 1 Duer 385.

Non-Negotiable Note. — The acceptance of a non-negotiable note, not governed by the law merchant, is not presumptive evidence of the payment of a previous debt. Alford *v.* Baker, 53 Ind. 279; Northwestern Mut. L. Ins. Co. *v.* Little, 56 Ind. 504; Travelers' Ins. Co. *v.* Chappelow, 83 Ind. 429. Trustees, etc. *v.* Kendrick, 12 Me. 381; Bartlett *v.* Mayo, 33 Me. 518; Greenwood *v.* Curtis, 4 Mass. 92, 6 Mass. 358, 4 Am. Dec. 145.

Note or Bill of Third Person.—The following cases hold that the acceptance of a negotiable note, or acceptance of a third person without fraud, is presumptive evidence of payment of a previous debt. Trotter *v.* Crockett, 2 Port. (Ala.) 401; Parkhurst *v.* Jackson, 36 Me. 404; Reed *v.* Upton, 10 Pick. (Mass.) 522, 20 Am. Dec. 545; Ely *v.* James, 123 Mass. 36; Torry *v.* Hadley, 27 Barb. (N. Y.) 192; Rew *v.* Barber, 3 Cow. (N. Y.) 272; Whitbeck *v.* Van Ness, 11 Johns. (N. Y.) 409, 6 Am. Dec. 383; Breed *v.* Cook, 15 Johns. (N. Y.) 241; Union Bank *v.* Smiser, 1 Sneed (Tenn.) 501; Challoner *v.* Boyington, 91 Wis. 27, 64 N. W. 422; Dunlop *v.* Silver, 1 Cranch C. C. 27, 8 Fed. Cas. No. 4169.

99. Negotiable Instrument of Debtor. — In the following cases it is *held* that the mere acceptance of the negotiable instrument of the debtor for a previous debt raises no presumption of present payment, but only of an extension of time, and of conditional payment of the previous debt, conditioned on future payment of the instrument at maturity, in the absence of evidence of an agreement to the contrary.

United States. — Risher *v.* The Frolic, 1 Woods 92, 20 Fed. Cas. No. 11,856; Weed *v.* Snow, 3 McLean 265, 29 Fed. Cas. No. 17,347; *In re* Ouimette, 1 Sawy. 47, 18 Fed. Cas. No. 10,622; Lawrence *v.* U. S., 71 Fed. 228; Lyman *v.* U. S. Bank, 12 How. 225.

Alabama. — Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505; Keel *v* Larkin, 72 Ala. 493; Lane *v.* Jones, 79 Ala. 156.

Arkansas. — Burgman *v.* McGuire, 32 Ark. 733; Pendergrass *v.* Hellman, 50 Ark. 261, 7 S. W. 132.

California. — Steinhart *v.* Nat. Bank, 94 Cal. 362, 29 Pac. 717, 28 Am. St. Rep. 132; Savings & L. Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922; Jenne *v.* Burger, 120 Cal. 444, 52 Pac. 706; Savings Bank *v.* Central Market Co., 122 Cal. 28, 54 Pac. 723.

Colorado. — Edwards *v.* Harvey, 2 Col. App. 109, 29 Pac. 1024; Tootle *v.* Cook, 4 Colo. App. 111, 35 Pac. 193.

Connecticut. — Bill *v.* Porter, 9 Conn. 23; Clark *v.* Savage, 20 Conn. 258.

Florida. — May *v.* Gamble, 14 Fla. 467.

Georgia. — Johnson *v.* Mechanics' Sav. Bank, 25 Ga. 643; Hall's S. F. C. G. Co. *v.* Black, 71 Ga. 450; Stewart Paper Mfg. Co. *v.* Rau, 92 Ga. 511, 17 S. E. 748.

Illinois. — Hoodless *v.* Reed, (Ill.) 1 N. E. 118; Medley *v.* Specker, 58 Ill. App. 157; Davis & R. Bldg. & Mfg. Co. *v.* Montrose, B. & C. Co., 59 Ill. App. 573.

Indiana. — Hilligoss *v.* Bond, 4 Blackf. 186; Coming *v.* Strong, Smith 197.

Iowa. — McLaren *v.* Hall, 26 Iowa 297.

Kansas. — McCoy *v.* Hazlett, 14 Kan. 430.

Kentucky. — Calk *v.* Orear, 2 B. Mon. 420; Proctor *v.* Mather, 3 B. Mon. 353.

Louisiana.—Pattison *v.* His Creditors, 9 La. Ann. 228.

Maryland. — Patapsco Ins. Co. *v.* Smith, 6 Harr. & J. 166, 14 Am. Dec. 268; Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303.

Michigan. — Phoenix Ins. Co. *v.* Allen, 11 Mich. 501, 83 Am. Dec. 756; State Bank of Midland *v.* Byrne, 97 Mich. 178, 56 N. W. 355, 37 Am. St. Rep. 332, 21 L. R. A. 753; Marinette

present absolute payment.[1] A check is presumed to have been

I. W. Co. *v.* Cody, 108 Mich. 381, 66 N. W. 334.

Minnesota. — Combination S. & I. Co. *v.* St. Paul City R. Co., 47 Minn. 207, 49 N. W. 744.

Mississippi.—Buckingham *v.* Walker, 48 Miss. 609.

Missouri. — McMurry *v.* Taylor, 30 Mo. 263, 77 Am. Dec. 611; Wiles *v.* Robinson, 80 Mo. 47; Bertiaux *v.* Dillon, 20 Mo. App. 603.

Nebraska. — Young *v.* Hibbs, 5 Neb. 433; Greene *v.* Raymond Bros., 9 Neb. 295, 2 N. W. 881.

New Hampshire. —Smith *v.* Smith, 27 N. H. 244; Coburn *v.* Odell, 30 N. H. 540.

New Jersey. — Swain *v.* Frazier, 35 N. J. Eq. 326; Fry *v.* Patterson, 49 N. J. Law 612, 10 Atl. 390.

New York. — Muldon *v.* Whitlock, 1 Cow. 290, 13 Am. Dec. 533; Van Ostrand *v.* Reed, 1 Wend. 424, 19 Am. Dec. 529; Winsted Bank *v.* Webb, 39 N. Y. 325, 100 Am. Dec. 435; Jagger Iron Co. *v.* Walker, 76 N. Y. 521; Graham *v.* Negus, 55 Hun 440, 8 N. Y. Supp. 679.

Ohio. — Merrick *v.* Boury, 4 Ohio St. 60.

Oregon. — Johnston *v.* Barrills, 27 Or. 251, 41 Pac. 656, 50 Am. St. Rep. 717.

Pennsylvania. — Kean *v.* Dufresne, 3 Serg. & R. 233.

Rhode Island. — Sweet *v.* James, 2 R. I. 270.

South Carolina. —Chastain *v.* Johnson, 2 Bail. 574; Bryce *v.* Bowers, 11 Rich. Eq. 41; Watson *v.* Owens, 1 Rich. Law 111; Costelo *v.* Cave, 2 Hill Law 528, 27 Am. Dec. 404.

Texas. — McGuire *v.* Bidwell, 64 Tex. 43.

Vermont. — Street *v.* Hall, 29 Vt. 165; Wait *v.* Brewster, 31 Vt. 516.

Virginia. — Morriss *v.* Harveys, 75 Va. 726; Wright *v.* Smith, 81 Va. 777.

West Virginia. — Hornbrooks *v.* Lucas, 24 W. Va. 493, 49 Am. Rep. 277.

Wisconsin. — Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709; Eastman *v.* Porter, 14 Wis. 39; Nash *v.* Meggett, 89 Wis. 486, 61 N. W. 283.

1. Agreement for Present Payment. When the proof shows an agreement, express or implied, to receive a note or bill of the debtor or of a third person as present payment of a previous debt, the note or bill in the absence of fraud, is presumed to be an absolute satisfaction and extinguishment of the debt.

United States. — Risher *v.* The Frolic, 1 Woods 92, 20 Fed. Cas. No. 11,856; Sheehy *v.* Mandeville, 6 Cranch 253.

Alabama. — Espy *v.* Comer, 80 Ala. 333; Whitley *v.* Dunham Lumb. Co., 89 Ala. 493, 7 So. 810.

Arkansas. — Costar *v.* Davis, 8 Ark. 213, 46 Am. Dec. 311; Loth *v.* Mothner, 53 Ark. 116, 13 S. W. 594.

California. — Jenne *v.* Burger, 120 Cal. 444, 52 Pac. 706.

Connecticut. — Bonnell *v.* Chamberlin, 26 Conn. 487.

Florida. — Solomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 58 Am. Rep. 667.

Georgia. — Davis *v.* Smith, 5 Ga. 274, 47 Am. Dec. 279; Moseby *v.* Floyd, 31 Ga. 564.

Illinois. — Stevens *v.* Bradley, 22 Ill. 244; Farmers' Nat. Bank *v.* Sperling, 113 Ill. 273.

Indiana. — Miller *v.* Neihaus, 51 Ind. 401; Wells *v.* Morrison, 91 Ind. 51.

Iowa. — Hardin *v.* Branner, 25 Iowa 364.

Kentucky. — Harlan *v.* Wingate, 2 J. J. Marsh. 138; Bank of Com. *v.* Ray, 7 J. J. Marsh. 272.

Maine. — Newall *v.* Hussey, 18 Me. 249, 36 Am. Dec. 717; Comstock *v* Smith, 23 Me. 202.

Maryland. — Bernard *v.* Torrance, 5 Gill & J. 383.

Massachusetts. — Wiseman *v.* Lyman, 7 Mass. 286.

Michigan. — Riverside Iron Works *v.* Hall, 64 Mich. 165, 31 N. W. 152; Kallander *v.* Neidhold, 98 Mich. 517, 57 N. W. 571.

Minnesota. — Keough *v.* McNitt, 6 Minn. 513; Goenen *v.* Schroeder, 18 Minn. 66.

Mississippi. — Slocumb *v.* Holmes, 1 How. 139.

given in payment of money due rather than for a loan,[2] but its acceptance by the debtor is in general presumptive evidence only of conditional payment.[3] The acceptance of a new note or bill in

Missouri. — Lawson *v.* Gudgel, 45 Mo. 480.

Nebraska. — Pasewalk *v.* Bollman, 29 Neb. 519, 45 N. W. 780, 26 Am. St. Rep. 399.

New Hampshire. — Moody *v.* Leavitt, 2 N. H. 171.

New York. — People *v.* Cromwell, 102 N. Y. 477, 7 N. E. 413; Hall *v.* Stevens, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802.

North Carolina. — Delafield *v.* Lewis M. C. Co., 118 N. C. 105, 24 S. E. 10.

Ohio. — Bank *v.* Green, 40 Ohio St. 431.

Pennsylvania. — Seltzer *v.* Coleman, 32 Pa. St. 493; McCord *v.* Durant, 134 Pa. St. 184, 19 Atl. 489.

Rhode Island. — Wilbur *v.* Jernegan, 11 R. I. 113.

South Carolina. — Watson *v.* Owens, 1 Rich. Law 111; Witte *v.* Weinberg, 37 S. C. 579, 17 S. E. 681.

Tennessee. — Union Bank *v.* Smiser, 1 Sneed 501; Fowler *v.* Richardson, 3 Sneed 508.

Texas. — Rawles *v.* Pirkey, 50 Tex. 311.

Vermont. — Curtis *v.* Ingham, 2 Vt. 287.

Wisconsin. — Challoner *v.* Boyington, 88 Wis. 399, 53 N. W. 694.

2. Headley *v.* Reed, 2 Cal. 322; Ashley *v.* Vischer, 24 Cal. 322.

Poucher *v.* Scott, 33 Hun 223, 98 N. Y. 422; Koehler *v.* Adler, 78 N. Y. 287; Masser *v.* Bowen, 29 Pa. St. 128, 12 Am. Dec. 169; Baugher *v.* Com., 17 Phila. 81; Beatty *v.* Lehigh Vall. R. Co., 134 Pa. St. 294, 19 Atl. 745, 26 W. N. C. 118; Yates *v.* Shepardson, 39 Wis. 173.

3. *Alabama.* — Bibb *v.* Snodgrass, 97 Ala. 459, 11 So. 880.

Arkansas. — Henry *v.* Conley, 48 Ark. 267, 3 S. W. 181.

California. — Smith *v.* Harper, 5 Cal. 330; Comptoir D'Escompte de Paris *v.* Dresbach, 78 Cal. 15, 20 Pac. 28.

Georgia. — Phillips *v.* Bullard, 58 Ga. 256; Hatcher *v.* Comer, 75 Ga. 728.

Illinois — Heartt *v.* Rhodes, 66 Ill. 351; Canadian Bank of Commerce *v.* McCrea, 106 Ill. 281; Peoria & P. U. R. Co. *v.* Buckley, 114 Ill. 337, 2 N. E. 179; Woodburn *v.* Woodburn, 115 Ill. 427, 5 N. E. 82.

Indiana. — Born *v.* First Nat. Bank, 123 Ind. 78, 24 N. E. 173, 18 Am. St. Rep. 312, 7 L. R. A. 442.

Kansas. — Kermeyer *v.* Newby, 14 Kan. 164; Mordis *v.* Kennedy, 23 Kan. 408, 33 Am. Rep. 169.

Louisiana. — Ocean Towboat Co. *v.* The Aphelia, 11 La. Ann. 28.

Maine. — Marlett *v.* Brackett, 60 Me. 524.

Massachusetts — Taylor *v.* Wilson, 11 Metc. 44, 45 Am. Dec. 180; Small *v.* Franklin Min. Co., 99 Mass. 277; Weddigen *v.* Boston Elastic Co., 100 Mass. 422; Holmes *v.* First Nat. Bank, 126 Mass. 353.

Minnesota. — Good *v.* Singleton, 39 Minn. 340, 40 N. W. 359.

Missouri. — Selby *v.* McCullough, 26 Mo. App. 66; Barton *v.* Hunter, 59 Mo. App. 610.

New Hampshire. — Barnet *v.* Smith, 30 N. H. 256, 64 Am. Dec. 290.

New York. — Jobbit *v.* Goundry, 29 Barb. 509; Lovett *v.* Cornwall, 6 Wend. 369; Kelty *v.* Second Nat. Bank, 52 Barb. 328; Tanner *v.* Bank of Fox Lake, 23 How. Prac. 399; Sweet *v.* Titus, 67 Barb. 327; Greenwich Ins. Co. *v.* Oregon Imp. Co., 76 Hun 194, 27 N. Y. Supp. 794; Flynn *v.* Woolsey, 57 Hun 590, 10 N. Y. Supp. 875; Burkhalter *v.* Second Nat. Bank, 42 N. Y. 538, 40 How. Pr. 324; Thompson *v.* Bank of British North America, 82 N. Y. 1.

Ohio. — Imbush *v.* Mechanics' & Traders' Bank, 1 Ohio Dec. 8; Hodgson *v.* Barrett, 33 Ohio St. 63, 31 Am. Rep. 527; Fleig *v.* Sleet, 43 Ohio St. 53, 1 N. E. 24, 54 Am. Rep. 800.

Pennsylvania. — McIntyre *v.* Kennedy, 29 Pa. 448; Cannonsburg Iron Co. *v.* Union Nat. Bank, (Pa.), 6

lieu of an original, is not, in general, presumed to pay or extinguish the original,[4] unless shown to have been treated as a payment.[5]

Atl. 574; Harrisburg Bank *v.* Forster, 8 Watts 304; Loux *v.* Fox, 171 Pa. St. 68, 33 Atl. 190, 37 W. N. C. 278.

Texas. — Western Brass Mfg. Co. *v.* Maverick, 4 Tex. Civ. App. 535, 23 S. W. 728.

Virginia. — Larne *v.* Cloud, 22 Gratt. 513.

To Rebut the Legal Presumption that a check taken for a pre-existing debt is to operate as payment only conditionally if cashed, the evidence must be as clear and satisfactory as is essential to establish absolute payment of an admitted debt. Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. 860.

Check Importing Full Payment. Although the language of a check imports full payment, it is only *prima facie*, and not conclusive evidence of that fact. Greer *v.* Laws, 56 Ark. 37, 18 S. W. 1038.

4. *California.* — Savings Bank *v.* Central Market Co., 122 Cal. 28, 54 Pac. 723.

Georgia. — Partridge *v.* Williams, 72 Ga. 807.

Illinois. — Adams *v.* Squires, 61 Ill. App. 513; Scott *v.* Gilkey, 153 Ill. 168, 39 N. E. 265.

Indiana. — Reeder *v.* Nay, 95 Ind. 164.

Kentucky. — Bank of Commonwealth *v.* Letcher, 26 Ky. (3 J. J. Marsh.) 105.

Louisiana. — Woods *v.* Halsey, 42 La. Ann. 245, 7 So. 451.

Massachusetts. — Woods *v.* Woods, 127 Mass. 141.

Minnesota. — Hanson *v.* Tarbox, 47 Minn. 433, 50 N. W. 474.

New Hampshire. — Jones *v.* Rider, 60 N. H. 452.

New York. — Holland Trust Co. *v.* Waddell, 75 Hun 101, 26 N. Y. Supp. 980; Bates *v.* Rosekrans, 37 N. Y. 409; Schmidt *v.* Livingston, 16 Misc. 554, 38 N. Y. Supp. 746.

Ohio. — Miller *v.* Woods, 21 Ohio St. 485, 8 Am. Rep. 71.

Pennsylvania. — Maples *v.* Hicks, 3 Pa. Law J. 244.

South Carolina. — Allston *v.* Allston, 2 Hill Law 362; Nat. Bank *v.* Gunhouse, 17 S. C. 489.

Virginia. — Moses *v.* Trice, 21 Gratt. 556, 8 Am. Rep. 609.

Washington. — Boston Nat. Bank *v.* Jose, 10 Wash. 185, 38 Pac. 1026.

West Virginia. — Merchants' Nat. Bank *v.* Good, 21 W. Va. 455; Hess *v.* Dille, 23 W. Va. 90.

Presumption Against Payment of Secured Note. — There is strong presumption against payment of a secured note, by a new note, whether the new paper be by the same maker or bears an additional name. Savings & L. Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922; Dayton Nat. Bank *v.* Merchants' Nat. Bank, 37 Ohio St. 208; Moses *v.* Trice, 21 Gratt. (Va.) 566, 8 Am. Rep. 609; Pinney *v.* Kimpton, 46 Vt. 80.

5. Proof of Payment by New Note.

Connecticut. — Woodbridge *v.* Skinner, 15 Conn. 306.

Georgia. — Gresham *v.* Morrow, 40 Ga. 487.

Illinois. — Wickenkamp *v.* Wickenkamp, 77 Ill. 92.

Iowa. — French *v.* French, 84 Iowa 655, 51 N. W. 145, 15 L. R. A. 300.

Kentucky. — Smith *v.* Young, 11 Bush 393.

Louisiana. — Gardner *v.* Levasseur, 28 La. Ann. 679.

Massachusetts. — Dewey *v.* Bell, 5 Allen 165.

Michigan. — Sage *v.* Walker, 12 Mich. 425.

Mississippi. — Bacon *v.* Ventress, 32 Miss. 158.

New Hampshire. — Ward *v.* Howe, 38 N. H. 35.

New York. — Central City Bank *v.* Dana, 32 Barb. 296; Booth *v.* Smith, 3 Wend. 66.

North Carolina. — Cable *v.* Hardin, 67 N. C. 472.

Ohio. — Bank of Cadiz *v.* Slemmons, 34 Ohio St. 142, 32 Am. Rep. 364.

Pennsylvania. — Barnett *v.* Read, 51 Pa. St. 190, 88 Am. Dec. 574.

C. Authority for Payment. — A person in actual possession of negotiable paper is presumed to have authority to receive payment,[6] but one not in possession thereof is presumed to have no such authority,[7] and the burden is on the one alleging payment to prove

South Carolina. — Compton *v.* Patterson, 28 S. C. 115, 5 S. E. 270.

Texas. — Boyd *v.* Bell, 69 Tex. 735, 2 S. W. 657, 76 Tex. 133, 13 S. W. 232.

Vermont. — Draper *v.* Hitt, 43 Vt. 439, 5 Am. Rep. 292.

New Note of Indorser. — Where an indorser takes up the indorsed note and gives his own note to the holder, it will be presumed that such new note was given in payment of the indorsed note. Stanley *v.* McElrath, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545; Bausman *v.* Credit Guarantee Co., 47 Minn. 377, 50 N. W. 496.

6. Authority of Possessor from Owner. — The possession of a negotiable instrument is *prima facie* evidence of a right to receive payment for the owner, if payment is made to the possessor in good faith.

United States. — Alexander *v.* Horner, 1 McCrary 634, 1 Fed. Cas. No. 169.

Alabama. — Bradley *v.* Graves, 46 Ala. 277.

Georgia. — Johnson *v.* Hall, 5 Ga. 384.

Illinois. — Padfield *v.* Green, 85 Ill. 529.

Indiana. — Paulman *v.* Claycomb, 75 Ind. 64.

Kansas. — Streeter *v.* Poor, 4 Kan. 412.

Louisiana. — Vinson *v.* Viver, 24 La. Ann. 336; Baker *v.* Elstner, 24 La. Ann. 464.

Massachusetts. — Bruce *v.* Bonney, 12 Gray 107, 71 Am. Dec. 739.

Michigan. — Brennan *v.* Merchants' & Manufacturers' Nat. Bank, 62 Mich. 343, 28 N. W. 881.

Missouri. — Alexander *v.* Rollins, 14 Mo. App. 109; Whelan *v.* Reilly, 61 Mo. 565.

New York. — Cothran *v.* Collins, 29 How. Pr. 113; Merritt *v.* Cole, 9 Hun 98.

North Carolina. — Edwards *v.* Parks, Winst. Eq. 39.

South Carolina. — Cone *v.* Brown, 15 Rich. Law 262.

Tennessee. — Stewart *v.* Donelly, 4 Yerg. 177; Planters' Bank *v.* Massey, 2 Heisk. 360; King *v.* Fleece, 7 Heisk. 273.

Vermont. — Ellsworth *v.* Fogg, 35 Vt. 355; Lamb *v.* Matthews, 41 Vt. 42.

Wisconsin — Greve *v.* Schweitzer, 36 Wis. 554.

Instruments Payable to Bearer. The possession of a negotiable instrument made payable to bearer in terms, or as the result of an indorsement in blank, is *prima facie* evidence of the right of the possessor to receive payment.

United States. — Long *v.* Thayer, 150 U. S. 520, 14 Sup. Ct. 189.

Georgia. — Paris *v.* Moe, 60 Ga. 90.

Illinois. — Yates *v.* Valentine, 71 Ill. 643; Loomis *v.* Downs, 26 Ill. App. 257.

Iowa. — Shelton *v.* Sherfey, 3 Greene 108; Stoddard *v.* Burton, 41 Iowa 582.

Kansas. — Chinberg *v.* Gale S. H. Mfg. Co., 38 Kan. 228, 16 Pac. 462.

Kentucky. — Barnett *v.* Ringgold, 80 Ky. 289.

Louisiana. — Hunt *v.* Stone, 19 La. Ann. 526; Davis *v.* Lusitanian P. Ben. Assn., 20 La. Ann. 24.

Minnesota. — Woodbury *v.* Larned, 5 Minn. 339.

New Hampshire. — Ames *v.* Drew, 31 N. H. 475.

New York. — Merritt *v.* Cole, 14 Hun 324.

South Carolina. — Cone *v.* Brown, 15 Rich. Law 262.

Vermont. — Lamb *v.* Matthews, 41 Vt. 42.

Wisconsin. — Greve *v.* Schweitzer, 36 Wis. 554.

7. *Alabama.* — Williams *v.* Jones, 77 Ala. 294.

Georgia. — Paris *v.* Moe, 60 Ga. 90; Holland *v.* Van Beil, 89 Ga. 223, 15 S. E. 302.

Illinois. — McClelland *v.* Bartlett,

the authorization.[8]

D. DISCHARGE. — A note or bill is presumed to be discharged by an indorsement thereof to the maker or acceptor[9] or by a payment by any one on behalf of the maker,[10] unless the circumstances raise

3 Ill. App. 481; Stiger *v.* Bent, 111 Ill. 328.

Iowa. — Draper *v.* Rice, 56 Iowa 114, 7 N. W. 524, 8 N. W. 797, 41 Am. Rep. 88.

Louisiana. — Tew *v.* Labiche, 4 La. Ann. 526.

Massachusetts. — Wheeler *v.* Guild, 20 Pick. 545, 32 Am. Dec. 231.

Missouri. — Upton *v.* Jameson, 67 Mo. 234.

Nebraska. — South Branch Lum. Co. *v.* Littlejohn, 31 Neb. 606, 48 N. W. 476.

New York. — Dunn *v.* Hornbeck, 72 N. Y. 80.

Oregon. — Swegle *v.* Wells, 7 Or. 222.

8. Hall *v.* Smith, 3 Kan. App. 685, 44 Pac. 908; South Branch Lumber Co. *v.* Littlejohn, 31 Neb. 606, 48 N. W. 476; Lay *v.* Honey, (Neb.), 89 N. W. 998.

Evidence of Authority of Non-Possessor. — Evidence that the holder consented to or directed payment to be made to a party not in possession, is proof of authority for such payment. Lazell *v.* Francis, 5 Ill. 421; Early *v.* Patterson, 4 Blackf. (Ind.) 449; Shane *v.* Palmer, 43 Kan. 481, 23 Pac. 594. The want of possession of the note is a circumstance to be considered in determining the question of authority, but is not conclusive. The fact that a bank held the note for collection would not prevent the owner from collecting it by another agent. Quinn *v.* Dresbach, 75 Cal. 159, 16 Pac. 762. The presumption that a person not in actual possession of negotiable paper has no authority to receive payment, may be rebutted by evidence showing such authority. Swegle *v.* Wells, 7 Or. 222.

9. *Alabama.*—Wallace *v.* Branch Bank, 1 Ala. 565.

Arkansas. — Beebe *v.* Real Estate Bank, 4 Ark. 546.

California. — Gordon *v.* Wansey, 21 Cal. 77.

Colorado. — Swen *v.* Newell, 19 Col. 397, 35 Pac. 734.

Illinois. — Gillett *v.* Sweat, 6 Ill. 475.

Indiana. — Mattix *v.* Leach, 16 Ind. App. 112, 43 N. E. 969.

Kentucky. — Long *v.* Bank of Cynthiana, 1 Litt. 290.

Louisiana. — Schinkel *v.* Hanewinkel, 19 La. Ann. 260.

Michigan. — Stevens *v.* Hannan, 88 Mich. 13, 49 N. W. 874, 86 Mich. 305, 48 N. W. 951, 24 Am. St. Rep. 125.

Texas.—Kneeland *v.* Miles, (Tex. Civ. App.), 24 S. W. 1113.

10. *Alabama.* — Stephens *v.* Broadnax, 5 Ala. 258; Borland *v.* Phillips, 3 Ala. 718.

California. — Moran *v.* Abbey, 63 Cal. 56; Yule *v.* Bishop, 133 Cal. 574, 65 Pac. 1094.

Georgia. — Griffin *v.* Hampton, 21 Ga. 198.

Illinois. — Gillett *v.* Sweat, 6 Ill. 475; Richert *v.* Korener, 54 Ill. 306; Cleiman *v.* Murphy, 34 Ill. App. 633.

Indiana. — Russell *v.* Drummond, 6 Ind. 216.

Iowa. — Lawson *v.* McKenzie, 44 Iowa 663; Kennedy *v.* Hensley, 94 Iowa 629, 63 N. W. 343.

Louisiana. — Walton *v.* Young, 26 La. Ann. 164.

Maine. — Williams *v.* Thurlow, 31 Me. 392; Willis *v.* Hobson, 37 Me. 403.

Massachusetts. — Merrimack Bank *v.* Parker, 7 Pick. 88; Borden *v.* Cuyler, 10 Cush. 476; American Bank *v.* Jenness, 2 Metc. 288.

New Hampshire. — Tucker *v.* Peaslee, 36 N. H. 167; Rolfe *v.* Wooster, 58 N. H. 526.

New York. — Borst *v.* Bovee, 5 Hill 219; Burr *v.* Smith, 21 Barb. 262; Geyer *v.* Brewster, 50 Hun 604, 2 N. Y. Supp. 801; Dillenbeck *v.* Dygert, 97 N. Y. 303, 46 Am. Dec. 525.

North Carolina. — Wallace *v.* Grizzard, 114 N. C. 488, 19 S. E. 760.

a presumption of purchase,[11] or by a discharge or release of the maker,[12] or by a gift of the note from the owner to the maker,[13] or by a surrender of the note to the maker or one of the makers,[14] or of a bill to the acceptor.[15]

2. Evidence. — A. In General. — Evidence of custom is admissible to show why a paid note was not given up,[16] and the custom of a bank is admissible, in connection with other proof, to show that a note was not paid thereat.[17] Books of a bank are admissible on the question of payment thereat,[18] but books of account of the defendant are not usually admissible to show payment of a note;[19] though where an executor is sued upon a note, under the

11. Patriotic Bank *v.* Wilson, 4 Cranch C. C. 253, 18 Fed. Cas. No. 10,810; Frank *v.* Brady, 8 Cal. 47; Campbell *v.* Allen, 38 Mo. App. 27.

Circumstances. — The question whether a stranger to the note who takes it, buys it or extinguishes it, depends ordinarily on the circumstances surrounding the transaction. Wilcoxon *v.* Logan, 91 N. C. 449. If an executor takes up a note of his testator, he will be presumed, in the absence of evidence to the contrary, to have taken it up with the intention of extinguishing it. Borst *v.* Bovee, 5 Hill (N. Y.) 219.

Burden of Proof. — Payment by a third person will be presumed evidence of payment on behalf of the maker, and the burden is on him to show that he took it under such circumstances that he is entitled to be treated as an assignee. Phelps *v.* Mahurin, 6 N. H. 535. When a stranger paid to the holder of a note overdue the amount due on it, and said nothing of buying the note, it will be presumed a payment and satisfaction of the note, and proof that he declined to have it cancelled is not sufficient to overcome the presumption of payment. Burr *v.* Smith, 21 Barb. (N. Y.) 262.

12. Abat *v.* Holmes, 3 La. (O. S.) 351; Citizens' Bank *v.* Dugue, 5 La. Ann. 12; Lynch *v.* Reynolds, 16 Johns. (N. Y.) 41; Farmers' Bank *v.* Blair, 44 Barb. (N. Y.) 641.

13. Linthicum *v.* Linthicum, 2 Md. Ch. 21; Hale *v.* Rice, 124 Mass. 292; Stewart *v.* Hidden, 13 Minn. 43.

14. *Georgia.* — Mickelberry *v.* Shannon, 25 Ga. 237.

Indiana. — Fellows *v.* Kress, 5 Blackf. 146; Sherman *v.* Sherman, 3 Ind. 337.

Louisiana. — Benson *v.* Shipp, 5 Mart. (N. S.) 154; De Le Homme *v.* De Kerlengand, 4 La. (O. S.) 352.

Massachusetts. — Slade *v.* Mutrie, 156 Mass. 19, 30 N. E. 168; Bryant *v.* Smith, 64 Mass. 169; Tarbell *v.* Parker, 101 Mass. 165.

New Jersey.—Vanderbeck *v.* Vanderbeck, 3 Stew. 265.

New York. — Edwards *v.* Campbell, 23 Barb. 423; Larkin *v.* Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176.

North Carolina. — Miller *v.* Tharel, 75 N. C. 148.

Vermont. — Ellsworth *v.* Fogg, 35 Vt. 355.

15. Wilson *v.* Cromwell, 1 Cranch C. C. 214, 30 Fed. Cas. No. 17,799.

16. Remy *v.* Duffee, 4 Ala. 365.

17. Hankin *v.* Squires, 5 Biss. 186, 11 Fed. Cas. No. 6025.

18. Hankin *v.* Squires, 5 Biss. 186, 11 Fed. Cas. No. 6025; Long *v.* Straus, 124 Ind. 84, 24 N. E. 664; Woods *v.* Hamilton, 39 Kan. 69, 17 Pac. 335; Parker *v.* Sanborn, 3 Gray (Mass.) 191; Metropolitan Bank *v.* Smith, 4 Rob. (N. Y.) 229; Jermain *v.* Denniston, 6 N. Y. 276.

Entry in Support of Presumption of Payment. — An old entry made in defendant's book 19 years before trial, showing payment of a note 19 years before trial, was admitted to support the presumption of payment from lapse of time. Rodman *v.* Hoop, 1 Dall. (U. S.) 85.

19. Brannin *v.* Foree, 12 B. Mon. 506; Clark *v.* Wells, 5 Gray (Mass.) 69; Inslee *v.* Prall, 25 N. J. Law 665.

Books of Plaintiff. — The defendant may show by the books of the plain-

issue of payment the circumstances may warrant the admission of the testator's account book.[20] Transactions relative to other notes between the parties are admissible upon the issue of payment of the note in suit.[21] Payment may be proved by the direct testimony of one witness,[22] by admission of the holder,[23] by receipts,[24] letters,[25] memoranda,[26] and credits of payments,[27] and evidence of payments

tiff that when he made payment to the defendant the plaintiff was indebted to the defendant in a greater sum. McCain *v.* Peart, 145 Pa. St. 516, 22 Atl. 981.

20. Peck *v.* Pierce, 63 Conn. 310, 28 Atl. 524.

21. McCamy *v.* Cavender, 92 Ga. 254, 18 S. E. 415; Mack *v.* Leedle, 78 Iowa 164, 42 N. W. 636; Smith *v.* Taylor, 39 Me. 242.

22. Mitchel *v.* Simonds, 18 La. Ann. 120.

Competency of Parties. — Any party to the note or bill is a competent witness to prove payment. State *v.* Brooks, 85 Iowa 366, 52 N. W. 240; Franklin Bank *v.* Pratt, 31 Me. 501; Appleton *v.* Donaldson, 3 Pa. St. 381; Work *v.* Kase, 34 Pa. St. 138.

23. Remy *v.* Duffee, 4 Ala. 365; Hart *v.* Freeman, 42 Ala. 567; Hatch *v.* Dennis, 10 Me. 244; Eaton *v.* Corson, 59 Me. 510; Stevens *v.* Parker, 5 Allen (Mass.) 333; Wheeler *v.* Walker, 12 Vt. 427; Miller *v.* Bingham, 29 Vt. 82.

Admission of Defendant. — The plaintiff may disprove payment by the admission of the defendant. Turrentine *v.* Grigsby, 118 Ala. 380, 23 So. 666; Amos *v.* Flournoy, 80 Ga. 771, 6 S. E. 696. The maker's acknowledgment of the debt subsequent to a receipt is sufficient to disprove the receipt. Bienvenu *v.* Segura, 19 La. (O. S.) 346.

24. *Alabama.* — Hill *v.* Erwin, 60 Ala. 341.

Arkansas. — Burton *v.* Merrick, 21 Ark. 357.

California. — Jenne *v.* Burger, 120 Cal. 444, 52 Pac. 706.

Colorado. — Salazar *v.* Taylor, 18 Col. 538, 53 Pac. 369.

Georgia. — Raignel *v.* Dessure, 30 Ga. 690; Allen *v.* Woodson, 50 Ga. 53.

Indiana. — Howe Mach. Co. *v.* Simler, 59 Ind. 307.

Iowa. — Williamson *v.* Reddish, 45 Iowa 550.

Louisiana. — Borden *v.* Hope, 21 La. Ann. 581.

Maine. — Cunningham *v.* Batchelder, 32 Me. 316.

Massachusetts.—Burnham *v.* Parkhurst, 108 Mass. 341; Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2.

Michigan. — Baird *v.* Abbey, 73 Mich. 347, 41 N. W. 272.

Nebraska. — Butts *v.* Capital Nat. Bank, 21 Neb. 586, 33 N. W. 250.

Pennsylvania. — Rodgers *v.* Kichline, 28 Pa. St. 231.

South Carolina. — Gibson *v.* Peebles, 2 McCord 418.

Texas. — Watson *v.* Miller, 82 Tex. 279, 17 S. W. 1053.

Vermont. — Paige *v.* Perno, 10 Vt. 491; Gilson *v.* Gilson, 16 Vt. 464.

25. Smith *v.* Graves, 63 Ill. 422; Coe *v.* Anderson, 92 Iowa 515, 61 N. W. 177; Usher *v.* Gaither, 2 Har. & McH. (Md.) 457.

Letter Controlled by Receipt.—A mistake in a letter will be controlled and corrected so as to correspond with a receipt, when the receipt accords with the facts proved. Paul *v.* Stevens, 14 N. Y. St. 213.

26. Comparison of Memoranda. Memoranda made by the defendant which have been compared with the memoranda of the plaintiff, as to payments made on the note in suit, are admissible for the defendant to prove payment. Meyer *v.* Reichardt, 112 Mass. 108.

27. *Alabama.* — Clark *v.* Simmons, 4 Port. 14.

Arkansas. — Davis *v.* Gaines, 28 Ark. 440.

Connecticut. — Herd *v.* Bissel, 1 Root 260.

Florida. — Harrell *v.* Durrance, 9 Fla. 490.

Illinois. — Long *v.* Kingdon, 25 Ill. 53; Shepard *v.* Calhoun, 72 Ill. 337; Giddings *v.* McCumber, 51 Ill. App. 373.

not credited.[28] Any evidence is admissible which tends to corroborate,[29] or to rebut a presumption of payment.[30] Payment may be

Indiana. — Henderson *v.* Reeves, 6 Blackf. 101; Brown *v.* Gooden, 16 Ind. 444.

Iowa. — Carson *v.* Duncan, 1 Greene 466; Thomassen *v.* Van Wyngaarden, 65 Iowa 687.

Kentucky. — Graves *v.* Moore, 7 T. B. Mon. 341, 18 Am. Dec. 181.

Louisiana. — Norcross *v.* Theuer, 3 Rob. 375; Benson *v.* Mathews, 7 La. (O. S.) 356; Mims *v.* Morrison, 5 La. Ann. 650.

Massachusetts. — Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2.

Michigan. — Morris *v.* Morris, 5 Mich. 171; Rawlings *v.* Fisher, 110 Mich. 19, 67 N. W. 977.

Missouri. — Jobe *v.* Weaver, 77 Mo. App. 665; Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505.

New York. — Humphrey *v.* Sweeting, 92 Hun 447, 36 N. Y. Supp. 967.

North Carolina. — Young *v.* Alford, 118 N. C. 215, 23 S. E. 973.

Ohio. — Keys *v.* Baldwin, 17 Weekly Law Bull. 113.

Tennessee. — Harding *v.* Wormley, 8 Baxt. 578.

28. Proof of Circumstances. — A number of payments extending over a series of years being credited on the notes in suit, and the defendant claiming other payments not credited, it is proper to permit him to supplement his testimony by proof of circumstances tending to show their probable dates and amounts. Estes *v.* Fry, 22 Mo. App. 53.

29. Presumption from Possession. The presumption from the possession of negotiable paper by the maker may be corroborated by, and may corroborate, testimony showing payment. Perez *v.* Bank of Key West, 36 Fla. 467, 18 So. 590; Steumbaugh *v.* Hallam, 48 Ill. 305; State *v.* Brooks, 85 Iowa 366, 52 N. W. 240.

30. Possession of Maker.—To rebut the presumption from possession by the maker, evidence is admissible to prove that another note of the same tenor has been substituted for it (Potts *v.* Coleman, 67 Ala. 221), that the books of the bank, where it was payable, show its non-payment, in the absence of definite evidence of payment (Bank of Milo *v.* Mertz, 96 Iowa 725, 65 N. W. 318), that a note due to a testator was not paid in the testator's life time, but was in the hands of the defendant after his death (Page *v.* Page, 15 Pick. [Mass.] 368); that the note was seen by disinterested witnesses in the payee's possession after the time of the alleged payment, the proof of which was suspicious, and that a trust deed to secure it was not delivered up (Stephenson *v.* Richards, 45 Mo. App. 544), or that the note was wrongfully or mistakenly delivered to the maker (Banks *v.* Marshall, 23 Cal. 223; Teeter *v.* Poe, 48 Ill. App. 158; Bank of Milo *v.* Mertz, 96 Iowa 725, 65 N. W. 318; Liesemer *v.* Burg, 106 Mich. 124, 63 N. W. 999; Boulware *v.* Bank of Mo., 12 Mo. 542; Dewey *v.* Bowers, 4 Ired. Law [N. C.] 538; Shurer *v.* Green, 3 Cold. [Tenn.] 419; Reynolds *v.* French, 8 Vt. 85, 30 Am. Dec. 456; Blodgett *v.* Bickford, 30 Vt. 731, 73 Am. Dec. 334; Webster *v.* Stadden, 14 Wis. 277), or that the maker made an assignment for the benefit of creditors before maturity of the note. Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556, 25 S. W. 868.

Possession of Payee. — The presumption of non-payment from possession of a note by the payee may be rebutted by evidence that the note was given to secure further advances by the payee on general account, and that the general indebtedness was reduced by credits amounting to payment (Davis *v.* Gaines, 28 Ark. 440), that notes in the payee's hands were paid in full, but were not delivered up because the payee said they were lost (Hughes *v.* Hinds, Wright [Ohio] 650), or that the pavee having two notes secured by mortgage, demanded payment only of the last note on which there was a credit for one hundred dollars, made long after maturity of the first note, the presumption of non-payment of which is thereby overcome. Coe *v.* Anderson, 92 Iowa 515, 61 N. W. 177.

Other Presumptions. — The pre-

shown by a preponderance of evidence.[31]

B. Parol Evidence. — Parol evidence is admissible to explain or contradict a receipt of payment,[32] or an indorsement of payment,[33] and to prove the fact of payment,[34] but is not admissible to show that the indorsements on the note were for one and the same sum,[35] nor to vary a receipt which embodies a contract.[36]

VIII. TRANSFER, OWNERSHIP, AND GOOD FAITH.

1. Presumption and Burden of Proof. — A. Transfer and Ownership. — The payee of a note is presumed to be the owner

sumption of payment from the delivery of money by the maker to the holder may be overcome by circumstantial evidence. Dougherty *v.* Deeney, 45 Iowa 443. The presumption that an indorsement on the note and on separate receipt were for distinct payments cancelling the note may be rebutted by proof that they represented the same payment, corroborated by possession of the uncancelled note, and by the payment of interest by the defendant subsequent to date of the receipt and indorsement. Doty *v.* Janes, 28 Wis. 319.

31. Bonnell *v.* Wilden, 67 Ill. 327.

32. *United States.* — Weed *v.* Snow, 3 McLean 265, 29 Fed. Cas. No. 17,347.

Alabama. — Gayle *v.* Randle, 1 Stew. 529.

Georgia. — Pettijohn *v.* Liebscher, 92 Ga. 149, 17 S. E. 1007.

Illinois. — Richardson *v.* Hadsall, 106 Ill. 476.

Indiana. — Charlton *v.* Tardy, 28 Ind. 452.

Iowa. — Williamson *v.* Reddish, 45 Iowa 550.

Kentucky. — Baugh *v.* Brassfield, 5 J. J. Marsh. 78.

Missouri. — Lionberger *v.* Pohlman, 13 Mo. App. 123.

New York. — Joslyn *v.* Capron, 64 Barb. 598; Smith *v.* Holland, 61 N. Y. 635; Meyer *v.* Lathrop, 73 N. Y. 315.

Pennsylvania. — Megargel *v.* Megargel, 105 Pa. St. 475.

Entries in Books. — A receipt may be explained by proof of entries in the books of the defendant. Teliaferro *v.* Ives, 51 Ill. 247.

33. Gilpatrick *v.* Foster, 12 Ill. 355; Richardson *v.* Hadsall, 106 Ill. 476; Kingman *v.* Tirrell, 11 Allen (Mass.) 97; Rawlings *v.* Fisher, 110 Mich. 19, 67 N. W. 977; Sears *v.* Wempner, 27 Minn. 351, 7 N. W. 362; Hunter *v.* Reilley, 36 Pa. St. 509; McDaniels *v.* Lapham, 21 Vt. 222.

34. *Alabama.* — Mead *v.* Brooks, 8 Ala. 840.

Arkansas. — Borden *v.* Peay, 20 Ark. 293.

California.—Treadwell *v.* Himmelmann, 50 Cal. 9; Jones *v.* Snow, 64 Cal. 456; Howard *v.* Stratton, 64 Cal. 487; Schultz *v.* Noble, 77 Cal. 81.

Georgia. — Howard *v.* Gresham, 27 Ga. 347.

Indiana. — Ketcham *v.* Hill, 42 Ind. 64; Smith *v.* Boruff, 75 Ind. 412.

Kentucky. — Buckner *v.* Curry, 1 Bibb 477.

Louisiana. — Berthoud *v.* Barbaroux, 4 Mart. (N. S.) 543; Stewart *v.* McDonald, 18 La. Ann. 194; Dull *v.* Gordon, 24 La. Ann. 478.

Maine. — Thornton *v.* Wood, 42 Me. 282.

Missouri. — Estes *v.* Fry, 22 Mo. App. 53.

New York. — Smith *v.* Schanck, 18 Barb. 344.

North Carolina. — White *v.* Beaman, 96 N. C. 122, 1 S. E. 789.

South Carolina.—Bradley *v.* Long, 2 Strob. Law 160; Hagood *v.* Swords, 2 Bailey Law 305.

Vermont. — Bradley *v.* Bentley, 8 Vt. 243.

35. Herd *v.* Bissel, 1 Root (Conn.) 260.

36. Motley *v.* Motley 45 Ala. 555; Dorming *v.* Smith, 4 Redf. (N. Y.) 310; Strong *v.* Dean, 55 Barb. 337; McGregor *v.* Bugbee, 15 Vt. 734; *In re* Golder, 2 Hask. 28, 10 Fed. Cas.

until the contrary is shown,[37] where a note or bill is payable to bearer, the burden of proof is on the maker to show that the bearer is not the owner.[38] The possession of a note by an indorsee or apparently lawful holder of a negotiable instrument is presumptive evidence of ownership,[39] and the burden of proving want of

No. 5510; *In re* Dunham, 8 Fed. Cas. No. 4146.

37. Grigsby *v.* Nance, 3 Ala. 347; Turnley *v.* Black, 44 Ala. 159; Anniston Pipe Works *v.* Mary Pratt F. Co., 94 Ala. 606, 10 So. 259; Stiger *v.* Bent, 111 Ill. 328; Sims *v.* Wilson, 47 Ind. 226; Jaeger *v.* Hartman, 13 Minn. 56; Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228.

Special Indorsement. — In the following cases it is held that where a special indorsement has been made transferring the title, the burden is with the payee to show title by retransfer in order to recover upon the instrument. Robson *v.* Earley, 1 Mart. (La.) (N. S.) 373; Hart *v.* Windle, 15 La. 265; Penn *v.* Crawford, 16 La. Ann. 255; Veitch *v.* Basye, 2 Cranch. C. C. 6, 28 Fed. Cas. No. 16,909. But it has been *held* that after a note has been indorsed by the payee, his subsequent possession of it rebuts all presumption that the note was assigned for any other purpose than for collection. Caldwell *v.* Evans, 5 Bush (Ky.) 380, 96 Am. Dec. 358. See Waring *v.* Crawford, 14 La. (O. S.) 376. In the following cases it is *held* that possession by the payee is evidence of his ownership, notwithstanding a special indorsement to a third person. Spencer *v.* Carstarphen, 15 Colo. 445, 24 Pac. 882; Lemon *v.* Temple, 7 Ind. 556; Mendenhall *v.* Banks, 16 Ind. 284; Goddard *v.* Cunningham, 6 Iowa 400; Page *v.* Lathrop, 20 Mo. 589; Todman *v.* Purdy, 5 Nev. 238; Middleton *v.* Griffith, 57 N. J. Law 442, 31 Atl. 405.

38. National Bank *v.* Texas, 20 Wall. (U. S.) 72; Gaskell *v.* Patton, 58 Iowa 163, 12 N. W. 140; Parham *v.* Murphee, 4 Mart. (La.) (N. S.) 355; Smith *v.* Prestidge, 6 Smed. & M. (Miss.) 418; Cruger *v.* Armstrong, 3 Johns. Cas. (N. Y.) 5, 2 Am. Dec. 126; Conroy *v.* Warren, 3 Johns. Cas. (N. Y.) 259, 2 Am. Dec. 156; Farmers' & Mechanics' Bank *v.* Wadsworth, 24 N. Y. 547; Potter *v.* Bartlett, 6 Vt. 248.

39. *United States.* — Hunter *v.* Kibbe, 5 McLean 279, 12 Fed Cas. No. 6907; Picquet *v.* Curtis, 1 Sumn. 478, 19 Fed. Cas. No. 11,131; Dugan *v.* U. S., 3 Wheat. 172.

Alabama. — Tisdale *v.* Maxwell, 58 Ala. 40; Lakeside Land Co. *v.* Dromgoole, 89 Ala. 505, 7 So. 444.

California. — Bank of Cal. *v.* Mott, Iron Works, 113 Cal. 409, 45 Pac. 674; McCann *v.* Lewis, 9 Cal. 246.

Colorado. — Wyman *v.* Colo. Nat. Bank, 5 Colo. 30, 40 Am. Rep. 133; Champion Empire Min. Co. *v.* Bird, 7 Colo. App. 253, 44 Pac. 761; Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391; Solomon *v.* Brodie, 10 Colo. App. 353, 50 Pac. 1045.

Connecticut. — Hoyt *v.* Seeley, 18 Conn. 353.

Delaware. — Fairthorne *v.* Garden, 1 Houst. 197.

Florida. — McCallum *v.* Driggs, 35 Fla. 277, 17 So. 407.

Georgia. — May *v.* Dorsett, 30 Ga. 116; Leitner *v.* Miller, 49 Ga. 486.

Illinois. — New Hope Delaware Bridge Co. *v.* Perry, 11 Ill. 467, 52 Am. Dec. 443; Steinfeld *v.* Taylor, 51 Ill. App. 399; Garvin *v.* Wiswell, 83 Ill. 215.

Indiana. — Conwell *v.* Pumfhrey, 9 Ind. 135, 68 Am. Dec. 611; Paulman *v.* Claycomb, 75 Ind. 64.

Iowa. — Tuttle *v.* Becker, 47 Iowa 486; Bigelow *v.* Burnham, 90 Iowa 300, 57 N. W. 865, 48 Am. St. Rep. 442.

Kansas. — State Sav. Assn. *v.* Barber, 35 Kan. 488, 11 Pac. 330; O'Keeffe *v.* First Nat. Bank, 49 Kan. 347, 30 Pac. 473, 33 Am. St. Rep. 370; Hoskinson *v.* Bagby, 46 Kan. 758, 27 Pac. 110.

Kentucky. — Crosthwait *v.* Misener, 13 Bush 543.

Louisiana. — Squier *v.* Stockton, 5 La. Ann. 120, 52 Am. Dec. 583;

New Orleans C. & B. Co. *v.* Bailey, 18 La. Ann. 676.

Maine. — Southard *v.* Wilson, 29 Me. 56; Metcalf *v.* Yeaton, 51 Me. 198.

Maryland. — Kunkel *v.* Spooner, 9 Md. 462, 62 Am. Dec. 332; Dunham *v.* Clogg, 30 Md. 284; Herrick *v.* Swomley, 56 Md. 439.

Massachusetts.—Wheeler *v.* Guild, 20 Pick. 545, 32 Am. Dec. 231; Truesdell *v.* Thompson, 53 Mass. 565; Pettee *v.* Prout, 69 Mass. 502, 63 Am. Dec. 778; Chaffee *v.* Taylor, 85 Mass. 598.

Michigan. — Hovey *v.* Sebring, 24 Mich. 232, 9 Am. Rep. 122; Wilson S. Mach. Co. *v.* Spears, 50 Mich. 534, 15 N. W. 894; Barnes *v.* Peet, 77 Mich. 391, 43 N. W. 1025.

Minnesota. — Bahnsen *v.* Gilbert, 55 Minn. 334, 56 N. W. 1117; Robinson *v.* Smith, 62 Minn. 62, 64 N. W. 90; Kells *v.* N. W. Live Stock Ins. Co., 64 Minn. 390, 67 N. W. 215, 71 N. W. 5.

Mississippi. — Netterville *v.* Stevens, 2 How. 642; Smith *v.* Prestidge, 6 Smed. & M. 418.

Missouri. — Priest *v.* Way, 87 Mo. 16; Bobb *v.* Letcher, 30 Mo. App. 43; Banister *v.* Kenton, 46 Mo. App. 462.

Montana.—Meadowcraft *v.* Walsh, 15 Mont. 544, 39 Pac. 914.

New Hampshire. — Hopkins *v.* Farwell, 32 N. H. 425; Blodgett *v.* Jackson, 40 N. H. 21; Newmarket Sav. Bank *v.* Hansom, 67 N. H. 501, 32 Atl. 744.

New York. — Bell *v.* Spotts, 50 How. Pr. 162; Ogilby *v.* Wallace, 2 Hall 553; Townsend *v.* Billinge, 1 Hilt. 353; Green *v.* Goings, 7 Barb. 652; James *v.* Chalmers, 5 Sandf. 52, 6 N. Y. 209.

North Carolina.—Jackson *v.* Love, 82 N. C. 405, 33 Am. Rep. 685; Pugh *v.* Grant, 86 N. C. 39; Triplett *v.* Foster, 115 N. C. 335, 20 S. E. 475.

Ohio. — Sterling *v.* Kious, 7 Ohio 237.

Pennsylvania. — Porter *v.* Gunnison, 2 Grant's Cas. 297; Smyth *v.* Hawthorne, 3 Rawle 355.

Rhode Island. — Atlas Bank *v.* Doyle, 9 R. I. 76, 98 Am. Dec. 368, 11 Am. Rep. 219.

Tennessee. — Brady *v.* White, 4 Baxt. 382.

Texas. — Hays *v.* Cage, 2 Tex. 501; Butler *v.* Robertson, 11 Tex. 142; Huddleston *v.* Kempner, 3 Tex. Civ. App. 252, 22 S. W. 871; Johnson *v.* Mitchell, 50 Tex. 212, 32 Am. Rep. 602; Daugherty *v.* Eastburn, 74 Tex. 68, 11 S. W. 1053.

Vermont. — Sandford *v.* Norton, 17 Vt. 285.

Wisconsin. — Woodruff *v.* King, 47 Wis. 261, 7 N. W. 452; Hungerford *v.* Perkins, 8 Wis. 267.

Possession of Non-Negotiable Note. The possession of a non-negotiable note without a written assignment is not evidence of ownership, and the burden is on the holder to prove his ownership. Dalton City Co. *v.* Johnson, 57 Ga. 398; Speers *v.* Sterrett, 29 Pa. St. 192; Merlin *v.* Manning, 2 Tex. 351; Merrill *v.* Smith, 22 Tex. 53; Ball *v.* Hill, 38 Tex. 237; Pier *v.* Bullis, 48 Wis. 429, 4 N. W. 381.

Rights of Representative. — The mere fact of possession of a note is not *prima facie* evidence of ownership as against the payee's representative. The possession must be shown to be rightful. Gano *v.* McCarthy, 79 Ky. 409. The possession of a note by the representative of the payee is *prima facie* evidence of title, and subsequent indorsements do not displace the presumption thus created. Bobb *v.* Letcher, 30 Mo. App. 43; Banister *v.* Kenton, 46 Mo. App. 462. When a note payable to two persons, not partners, is found by the executor of one of them among his testator's effects, and is produced by the executors, the presumption is that he owns the note in his representative capacity. Tisdale *v.* Maxwell, 58 Ala. 40.

Possession by the executors of the payee of a note not indorsed is evidence of ownership. Scoville *v.* Landon, 50 N. Y. 686.

Possession of Unindorsed Note. The possession of an unindorsed note by a third person is not evidence of ownership of the holder, and the burden of proof is upon him to show beneficial ownership. Cobb *v.* Bryant, 86 Ala. 316, 5 So. 586; *In re* Wagner, 4 MacArthur (D. C.) 395; Durein *v.* Moeser, 36 Kan. 441, 13 Pac. 797; Redmond *v.* Stansbury, 24 Mich. 445; Van Eman *v.* Stanchfield,

title is on the defendant.[40] An indorsement of a negotiable note by the payee or holder is presumptive evidence of transfer thereof,[41] and an indorsement purporting to transfer a note or bill

13 Minn. 75; Vastine *v.* Wilding, 45 Mo. 89, 100 Am. Dec. 347; Cavitt *v.* Tharp. 30 Mo. App. 131; Dorn *v.* Parsons, 56 Mo. 601; Ross *v.* Smith, 19 Tex. 171, 70 Am. Dec. 327.

The possession of an unindorsed note payable to a particular person, or bearer, is *prima facie* evidence of ownership in the holder. Cox *v.* Adams, 2 Ga. 158; Tam *v.* Shaw, 10 Ind. 469; Pettee *v.* Prout, 69 Mass. 502, 63 Am. Dec. 778; Jackson *v.* Love, 82 N. C. 405, 33 Am. Rep. 685; Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601; Thompson *v.* Wheeler, 2 Tex. 260.

40. Emanuel *v.* White, 34 Miss. 56, 69 Am. Dec. 385.

Collateral Security. — The burden is on the defendant to show that the note was indorsed to the plaintiff as collateral security only. Chapin *v.* Thompson, 7 Ill. App. 288.

41. *Arkansas.* — Purdy *v.* Brown, 4 Ark. 535.

California. — Brady *v.* Reynolds, 13 Cal. 32.

Connecticut. — Clark *v.* Sigourney, 17 Conn. 511.

Georgia. — Southern Bank *v.* Mechanics' Bank, 27 Ga. 252.

Illinois. — Dietrich *v.* Mitchell, 43 Ill. 40, 92 Am. Dec. 99.

Indiana. — Keller *v.* Williams, 49 Ind. 504; Williams *v.* Osbon, 75 Ind. 280.

Iowa. — Franklin *v.* Twogood, 18 Iowa 515.

Louisiana. — White *v.* Noland, 3 Mart. (N. S.) 636.

Maine. — Farrar *v.* Gilman, 19 Me. 440, 36 Am. Dec. 766.

New York. — Richards *v.* Warring, 39 Barb. 42.

North Carolina. — Davis *v.* Morgan, 64 N. C. 570.

Blank Indorsement. — A blank indorsement is presumed to rest the legal title in any holder to whom the indorsed instrument is delivered.

United States. — Wilkinson *v.* Nicklin, 2 Dall. 396, 29 Fed. Cas. No. 17,673.

Alabama. — Miller *v.* Henry, 54 Ala. 120.

Arkansas. — Owen *v.* Arrington, 17 Ark. 530.

Illinois. — Dietrich *v.* Mitchell, 43 Ill. 40, 92 Am. Dec. 99.

Indiana. — Shirk *v.* North, 138 Ind. 210, 37 N. E. 590.

Kentucky. — Gaar *v.* Louisville Banking Co., 11 Bush 180, 21 Am. Rep. 209.

Louisiana. — Scionneaux *v.* Wagnespack, 32 La. Ann. 283.

Maryland. — Canfield *v.* McIlwaine, 32 Md. 94.

Michigan. — Whitworth *v.* Detroit L. & N. R. Co., 81 Mich. 98, 45 N. W. 500.

New York. — Bedell *v.* Carll, 33 N. Y. 581.

North Carolina. — Davis *v.* Morgan, 64 N. C. 570.

Indorsement for Collection. — An indorsement for collection for the use of the indorser is not presumed to pass any beneficial ownership or title as against the indorser.

Alabama. — People's Bank *v.* Jefferson Co. Sav. Bank, 106 Ala. 524, 17 So. 728.

Arkansas. — Payne *v.* Flournoy, 29 Ark. 500.

California. — Flanagan *v.* Brown, 70 Cal. 254, 11 Pac. 706.

Georgia. — Central R. R. *v.* First Nat. Bank, 73 Ga. 383.

Illinois. — Best *v.* Nokomis Nat. Bank, 76 Ill. 608; Fleury *v.* Tufts, 25 Ill. App. 101.

Indiana. — Williams *v.* Potter, 72 Ind. 354.

Kansas. — Armour Bros. Banking Co. *v.* Riley Co. Bank, 30 Kan. 163, 1 Pac. 506.

Kentucky. — Menzier *v.* Farmers' Bank of Ky., 3 Ky. L. Rep. 822.

Louisiana. — Mittenberger *v.* McGuire, 15 La. Ann. 486.

Maryland. — Cecil Bank *v.* Farmers' Bank, 22 Md. 148.

Massachusetts. — Freemans Nat. Bank *v.* National Tube Works, 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42.

Michigan. — Lock *v.* Leonard Silk Co., 37 Mich. 479.

will be presumed to be genuine.[42] A subsequent indorser is presumed to warrant the genuineness of all prior indorsements.[43] A transfer by delivery without indorsement is presumed to vest an equitable title to the delivered instrument.[44]

Minnesota. — Third Nat. Bank *v.* Clark, 23 Minn. 263.

New York. — National Butchers' & Drovers' Bank *v.* Hubbell, 117 N. Y. 384, 22 N. E. 1031; Bank of Clarke Co. *v.* Gilman, 81 Hun 486, 30 N. Y. Supp. 1111.

North Carolina. — Drew *v.* Jacocks, 2 Murph. Law 138.

Pennsylvania. — First Nat. Bank *v.* Gregg, 79 Pa. St. 384.

Rhode Island. — Blaine *v.* Bourne, 11 R. I. 119, 23 Am. Rep. 429.

Tennessee. — Smith *v.* McManus, 7 Yerg. 477, 22 Am. Dec. 519.

Texas. — Vance *v.* Geib, 27 Tex. 272.

The indorsement for collection is presumed to pass such legal title as will enable the indorsee to sue in his own name for collection. Laflin *v.* Sherman, 28 Ill. 391; Moore *v.* Hall, 48 Mich. 143, 11 N. W. 844; Drew *v.* Jacocks, 2 Murph. Law (N. C.) 138; Roberts *v.* Parrish, 17 Or. 583, 22 Pac. 136; King *v.* Fleece, 7 Heisk. (Tenn.) 273; Orr *v.* Lacy, 4 McLean 243, 18 Fed. Cas. No. 10,589. But he has no presumed authority to assign the instrument, and the burden of proving the authority is on the assignee. Hardesty *v.* Newby, 28 Mo. 567, 75 Am. Dec. 137.

42. Blair *v.* Pollock, Litt. Sel. Cas. (Ky.) 208; Freeland *v.* Hodge, 12 La. (O. S.) 177; Succession of Porter, 5 Rob. 96; First Nat. Bank *v.* Loyhed, 28 Minn. 396, 10 N. W. 421; Tarbox *v.* Gorman, 31 Minn. 62, 16 N. W. 466; National Bank of Battle Creek *v.* Mallan, 37 Minn. 404, 34 N. W. 901.

Burden of Proof. — Where an indorsement or assignment is denied, the burden is upon the indorsee or assignee to prove the fact of indorsement or assignment.

Colorado. — Reddicker *v.* Lavinsky, 3 Colo. App. 159, 32 Pac. 349.

Indiana. — Williams *v.* Osbon, 75 Ind. 280; Baldwin *v.* Shuter, 82 Ind. 560.

Kentucky. — Chaney *v.* City Bank, 6 Ky. L. Rep. 215.

Louisiana. — Blum *v.* Sallis, 24 La. Ann. 118.

Missouri. — Mayer *v.* Old, 51 Mo. App. 214.

Nebraska. — Schroeder *v.* Neilson, 39 Neb. 335, 57 N. W. 993.

New York. — Austin *v.* Burns, 16 Barb. 643; Claffy *v.* Farrow, 44 N. Y. St. 789, 18 N. Y. Supp. 160.

North Carolina. — Smith *v.* Bryan, 11 Ired. Law 418.

43. *Alabama.* — Woodward *v.* Harbin, 1 Ala. 104.

California. — Mills *v.* Barney, 22 Cal. 240.

Illinois. — Chicago First Nat. Bank *v.* N. W. Nat. Bank, 40 Ill. App. 640.

Kansas. — Cochran *v.* Atchison, 27 Kan. 728.

Louisiana. — McColl *v.* Corning, 3 La. Ann. 409.

Maryland. — Condon *v.* Pearce, 43 Md. 83.

Massachusetts. — Prescott Bank *v.* Caverly, 7 Gray 217, 66 Am. Dec. 473.

Minnesota. — Brown *v.* Ames, 59 Minn. 476, 61 N. W. 448.

Mississippi. — Williams *v.* Tishomingo Sav. Inst., 57 Miss. 633.

New York. — Ogden *v.* Blydenburgh, 1 Hilt. 182.

Pennsylvania. — Chambers *v.* Union Nat. Bank, 78 Pa. St. 205.

Texas. — Harrison *v.* Smith, 2 Willson Civ. Cas. Ct. App. § 396.

44. *Connecticut.* — Freeman *v.* Perry, 22 Conn. 617.

Georgia. — National Bank *v.* Leonard, 91 Ga. 805, 18 S. E. 32.

Indiana. — Foreman *v.* Beckwith, 73 Ind. 515.

Kansas. — McCrumb *v.* Corby, 11 Kan. 464.

Louisiana. — Pavey *v.* Stauffer, 45 La. Ann. 353, 12 So. 512, 19 L. R. A. 716.

Maine. — Titcomb *v.* Thomas, 5 Me. 282.

Massachusetts. — Jones *v.* Witter, 13 Mass. 304.

Michigan. — Minor *v.* Bewick, 55 Mich. 491, 22 N. W. 12.

B. BONA FIDE PURCHASERS. — The transferee or holder of a negotiable instrument is presumed to have obtained it in good faith, and for value before maturity, and without knowledge of equities or defenses against the maker in the absence of proof to the contrary,[45] and the burden of proof is upon the defendant who seeks

Mississippi. — Taylor *v.* Reese, 44 Miss. 89; Eckford *v.* Hogan, 44 Miss. 398.

New Jersey — Hughes *v.* Nelson, 29 N. J. Eq. 547.

New York. — Hedges *v.* Sealey, 9 Barb. 214; Raynor *v.* Hoagland, 7 Jones & S. 11.

North Carolina. — Jenkins *v.* Wilkinson, 113 N. C. 532, 18 S. E. 696.

Ohio. — Seymour *v.* Leyman, 10 Ohio St. 283; Miles *v.* Reiniger, 39 Ohio St. 499.

South Carolina. — Brown *v.* Wilson, 45 S. C. 519, 23 S. E. 630.

45. *United States.* — Collins *v.* Gilbert, 94 U. S. 753; Cheney *v.* Stone, 29 Fed. 885; Martin *v.* Kercheval, 4 McLean 117, 16 Fed. Cas. No. 9163.

Alabama. — Lehman *v.* Tallahassee Mfg. Co., 64 Ala. 567; First Nat. Bank *v.* Sproull, 105 Ala. 275, 16 So. 879.

California. — Sperry *v.* Spaulding, 45 Cal. 544; Luning *v.* Wise, 64 Cal. 410.

Colorado. — Wyman *v.* Colorado Nat. Bank, 5 Colo. 30, 40 Am. Rep. 133; Champion Empire Min. Co. *v.* Bird, 7 Colo. App. 253, 44 Pac. 764.

Delaware. — Freeman *v.* Sutton, 3 Houst. 264.

Georgia. — Georgia Nat. Bank *v.* Henderson, 46 Ga. 487, 12 Am. Rep. 590; Hatcher *v.* Nat. Bank, 79 Ga. 542, 5 S. E. 109.

Illinois. — Hall *v.* First Nat. Bank. 133 Ill. 234, 24 N. E. 546; Bussey *v.* Hemp, 48 Ill. App. 195; Farber *v.* National Forge & Iron Co., 50 Ill. App. 503.

Indiana. — Pilkington *v.* Woods, 10 Ind. 432.

Iowa. — Lathrop *v.* Donaldson, 22 Iowa 234; Rea *v.* Owens, 37 Iowa 262.

Kansas. — Challiss *v.* Woodburn, 2 Kan. App. 652, 43 Pac. 792.

Kentucky. — Hargis *v.* Louisville Trust Co., 17 Ky. L. Rep. 218, 30 S. W. 877; Alexander *v.* Springfield Bank, 2 Metc. 534.

Louisiana. — Judson *v.* Holmes, 9 La. Ann. 20; Wheeler *v.* Maillot, 20 La. Ann. 75.

Maine. — Dennen *v.* Haskell, 45 Me. 430; Webster *v.* Calden, 56 Me. 204.

Maryland. — McDowell *v.* Goldsmith, 6 Md. 319, 59 Am. Dec. 305; Maitland *v.* Citizens' Bank, 40 Md. 540, 17 Am. Rep. 620.

Massachusetts. — McGee *v.* Prouty, 9 Metc. 547, 43 Am. Dec. 400; Estabrook *v.* Boyle, 1 Allen 412.

Michigan. — Manistee Nat. Bank *v.* Seymour, 64 Mich. 59, 31 N. W. 140; Little *v.* Mills, 98 Mich. 423, 57 N. W. 266.

Minnesota. — Cummings *v.* Thompson, 18 Minn. 246.

Mississippi. — Emanuel *v.* White, 34 Miss. 56, 69 Am. Dec. 385; Harrison *v.* Pike, 48 Miss. 46.

Missouri. — Famous Shoe & Clothing Co. *v.* Crosswhite, 124 Mo. 34, 27 S. W. 397, 26 L. R. A. 568; Ashbrook *v.* Letcher, 41 Mo. App. 369.

Montana. — Rossiter *v.* Loeber, 18 Mont. 372, 45 Pac. 560.

Nebraska. — Kelman *v.* Calhoun, 43 Neb. 157, 61 N. W. 615.

New Hampshire. — Burnham *v.* Wood, 8 N. H. 334.

New York. — First Nat. Bank *v.* Morgan, 73 N. Y. 593; James *v.* Chalmers, 6 N. Y. 209, 5 Sandf. 52; Harger *v.* Worrall, 69 N. Y. 370, 25 Am. Rep. 206; Langley *v.* Wadsworth, 99 N. Y. 61, 1 N. E. 106.

North Carolina. — Meadows *v.* Cozart, 76 N. C. 450; Treadwell *v.* Blount, 86 N. C. 33.

Oklahoma. — Morrison *v.* Farmers' & Merchants' Bank, 9 Okla. 697, 60 Pac. 273.

Oregon. — Owens *v.* Snell H. & W. Co., 29 Or. 483, 44 Pac. 827.

Pennsylvania. — Battles *v.* Laudenslager, 84 Pa. St. 446; Lamb *v.* Burke, 132 Pa. St. 413, 20 Atl. 685; Lerch Hardware Co. *v.* Columbia First Nat. Bank, (Pa.), 5 Atl. 778.

South Carolina. — Schaub *v.* Clark, 1 Strob. Law 299, 47 Am. Dec. 554.

Texas. — Whithed *v.* McAdams, 18

to impeach the good faith of the holder.[46] The indorsement is presumed to import value in the absence of proof to the contrary.[47]

Tex. 551; Johnson *v.* Josey, 34 Tex. 533; Blum *v.* Loggins, 53 Tex. 121.

Utah. — Voorhees *v.* Fisher, 9 Utah 303, 54 Pac. 64.

Vermont. — Washburn *v.* Ramsdell, 17 Vt. 299; Leland *v.* Farnham, 25 Vt. 553.

Virginia. — Wilson *v.* Lazier, 11 Gratt. 477.

West Virginia.— Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

Wisconsin. — Cook *v.* Helms, 5 Wis. 107; Mason *v.* Nooman, 7 Wis. 609; Gutwillig *v.* Stumes, 47 Wis. 428, 2 N. W. 774; Wayland University *v.* Boorman, 56 Wis. 657, 14 N. W. 819.

Non-Negotiable Note. — There is no presumption that a non-negotiable note produced at the trial was transferred before maturity or before the commencement of the action. Barrick *v.* Austin, 21 Barb. (N. Y.) 241.

Note Payable to Executor. — There is no presumption that the transferee of a note executed by a corporation by its president, to him as the executor of a decedent, was a *bona fide* holder before maturity. Erie Boot & Shoe Co. *v.* Eichenlaub, 127 Pa. St. 164, 17 Atl. 880.

46. *United States.* — Goodman *v.* Simonds, 20 How. 343; Collins *v.* Gilbert, 94 U. S. 753; Packwood *v.* Clark, 2 Sawy. 546, 18 Fed. Cas. No. 10,656.

Alabama. — First Nat. Bank *v.* Dawson, 78 Ala. 67.

California. — Hart *v.* Church, 126 Cal. 471, 58 Pac. 910.

Connecticut. — Credit Co. *v.* Howe Mach. Co., 54 Conn. 357, 8 Atl. 472.

Georgia. — Griffin *v.* Evans, 23 Ga. 438.

Idaho. — Yates *v.* Spofford, (Idaho), 65 Pac. 501.

Illinois. — Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482; Bemis *v.* Horner, 62 Ill. App. 38.

Indiana. — Rogers *v.* Worth, 4 Blackf. 186.

Iowa. — Terry *v.* Taylor, 64 Iowa 35, 19 N. W. 841.

Kansas. — Bank of Topeka *v.* Nelson, 58 Kan. 815, 49 Pac. 155.

Louisiana. — New Orleans Canal Co. *v.* Templeton, 20 La. Ann. 141, 96 Am. Dec. 385.

Maryland. — Maitland *v.* Citizens' Bank, 40 Md. 540, 17 Am. Rep. 620.

Massachusetts. — McGee *v.* Prouty, 9 Metc. 547, 43 Am. Dec. 400.

Missouri. — Clark *v.* Schneider, 17 Mo. 295; Third Nat. Bank *v.* Tinsley, 11 Mo. App. 498.

Montana. — Rossiter *v.* Loeber, 18 Mont. 372, 45 Pac. 560.

Nebraska. — Kelman *v.* Calhoun, 43 Neb. 157, 61 N. W. 615.

New Jersey. — Duncan *v.* Gilbert, 29 N. J. Law 521.

New York. — Hill *v.* Northrup, 1 Hun 612, 4 Thomp. & C. 120; Hargar *v.* Woorall, 69 N. Y. 370, 25 Am. Rep. 206.

North Carolina.—McArthur *v.* McLeod, 6 Jones Law 475.

Oklahoma. — Morrison *v.* Farmers' & Merchants' Bank, 9 Okla. 697, 60 Pac. 273.

Pennsylvania. — Battles *v.* Laudenslager, 84 Pa. St. 446; Lerch Hardware Co. *v.* First Nat. Bank, (Pa.), 5 Atl. 778.

South Carolina. — McCaskill *v.* Ballard, 8 Rich. Law 470.

Texas. — Herman *v.* Gunter, 83 Tex. 66, 18 S. W. 428, 20 Am. St. Rep. 632.

Wisconsin. — Gutwillig *v.* Stumes, 47 Wis. 428, 2 N. W. 774; Wayland University *v.* Boerman, 56 Wis. 657, 14 N. W. 819.

47. *Alabama.* — Miller *v.* McIntyre, 9 Ala. 638.

California. — McCann *v.* Lewis, 9 Cal. 246.

Delaware. — Martin *v.* Hamilton, 5 Harr. 314.

Indiana. — Grimes *v.* McAninch, 9 Ind. 278; Hall *v.* Allen, 37 Ind. 541.

Iowa. — Kelly *v.* Ford, 4 Iowa 140.

Louisiana — Miller *v.* Wisner, 22 La. Ann. 457.

Maryland. — Gwyn *v.* Lee, 1 Md. Ch. 445.

Mississippi.—Owen *v.* Little, Walk. 326; Dibrell *v.* Dandridge, 51 Miss. 55.

Missouri.— Odell *v.* Presbury, 13 Mo. 330; Clark *v.* Schneider, 17 Mo. 295.

But upon proof of fraud or illegality in the inception of the instrument, the burden of proof is upon the holder to show that he is a *bona fide* purchaser.[48] Upon proof of payment, the burden of proof

New York. — Pratt *v.* Adams, 7 Paige Ch. 615.

Oregon. — Owens *v.* Snell, H. & W. Co., 29 Or. 483, 44 Pac. 827.

Pennsylvania. — Morse *v.* Downing, 7 Leg. Int. 7.

48. Fraud or Illegality in Inception of Instrument. — Where the fact of fraud or illegality in the inception of a negotiable instrument is shown, the burden is on the holder to prove a purchase in good faith before maturity.

United States. — Smith *v.* Sac Co., 11 Wall. 139; Stewart *v.* Lansing, 104 U. S. 505; McClintick *v.* Cummins, 2 McLean 981, 15 Fed. Cas. No. 8698; Am. Ex. Nat. Bank *v.* Oregon Pottery Co., 55 Fed. 265; Louisville N. A. & C. R. Co. *v.* Ohio Val. Imp. & Const. Co., 57 Fed. 42.

Alabama. — Holland *v.* Barnes, 53 Ala. 83, 25 Am. Rep. 595; Reid *v.* Bank of Mobile, 70 Ala. 199.

Arkansas. — Bertrand *v.* Barkman, 13 Ark. 150; Tabor *v.* Merchants' Nat. Bank, 48 Ark. 454, 3 S. W. 805.

California. — Jordan *v.* Grover, 99 Cal. 194, 33 Pac. 889; Eames *v.* Crosier, 101 Cal. 260, 35 Pac. 873; Sinkler *v.* Siljan, 136 Cal. 256, 68 Pac. 1024.

Colorado. — Harrington *v.* Johnson, 7 Colo. App. 483, 44 Pac. 368.

District of Columbia. — Second Nat. Bank *v.* Hume, 4 Mackey 90; Fisher *v.* Hume, 6 Mackey 9.

Florida. — Cooper *v.* Livingston, 19 Fla. 684.

Illinois. — Hodson *v.* Eugene Glass Co., 156 Ill. 397, 40 N. E. 971; Hide & Leather Nat. Bank *v.* Alexander, 184 Ill. 416, 56 N. E. 809; Mann *v.* Merchants' L. & T. Co., 100 Ill. App. 224.

Indiana. — New *v.* Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; Schmueckle *v.* Waters, 125 Ind. 265, 25 N. E. 281; State Nat. Bank *v.* Bennett, 8 Ind. App. 670, 36 N. E. 551; Kniss *v.* Holbrook, (Ind. App.), 40 N. E. 1118.

Iowa. — U. S. Nat. Bank *v.* Crosley, 86 Iowa 633, 53 N. W. 352; Galbraith *v.* McLaughlin, 91 Iowa 399, 59 N. W. 338; Skinner *v.* Raynor, 95 Iowa 536, 64 N. W. 601.

Kentucky. — Early *v.* McCart, 2 Dana 414; Breckenridge *v.* Moore, 3 B. Mon. 629.

Louisiana. — Nicholson *v.* Patton, 13 La. (O. S.) 213; Union Bank *v.* Ryan, 21 La. Ann. 551; Giovanovich *v.* Citizens' Bank, 26 La. Ann. 15.

Maine. — Kellogg *v.* Curtis, 69 Me. 212, 31 Am. St. Rep. 273; Market Fulton Nat. Bank *v.* Sargent, 85 Me. 349, 27 Atl. 192, 35 Am. St. Rep. 376.

Maryland. — Williams *v.* Huntington, 68 Md. 590, 13 Atl. 336, 6 Am. St Rep. 477; Cover *v.* Meyers, 75 Md. 406, 23 Atl. 850; McCosker *v.* Banks, 84 Md. 292, 35 Atl. 935.

Massachusetts. — Clark *v.* Thayer, 105 Mass. 216, 7 Am. Rep. 511; Sullivan *v.* Langley, 120 Mass. 437; Conant *v.* Johnston, 165 Mass. 450, 43 N. E. 192.

Michigan. — French *v.* Talbot Pav. Co., 108 Mich. 443, 59 N. W. 166; Drovers' Nat. Bank *v.* Blue, 110 Mich. 31, 67 N. W. 1105; Stevens *v.* McLachlan, 120 Mich. 285, 79 N. W. 627.

Minnesota. — Cummings *v.* Thompson, 18 Minn. 246; Bank of Montreal *v.* Richter, 55 Minn. 362, 57 N. W. 61; First Nat. Bank *v.* Holan, 63 Minn. 525, 65 N. W. 952.

Mississippi. — Kennedy *v.* Jones, (Miss.), 29 S. W. 819.

Missouri. — Henry *v.* Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580; Ern *v.* Rubinstein, 72 Mo. App. 337; Campbell *v.* Hoff, 129 Mo. 317, 31 S. W. 603.

Montana. — Thamling *v.* Duffey, 14 Mont. 567, 37 Pac. 363, 43 Am. St. Rep. 658; Harrington *v.* Butte & B. Min. Co., (Mont.), 69 Pac. 102.

Nebraska. — Haggland *v.* Stuart, 29 Neb. 69, 45 N. W. 263; Fawcett *v.* Powell, 43 Neb. 437, 61 N. W. 586.

New Hampshire. — Clark *v.* Pease, 41 N. H. 414; Perkins *v.* Prout, 47 N. H. 387, 93 Am. Dec. 449; Garland *v.* Lane, 46 N. H. 245.

New Jersey. — Duncan *v.* Gilbert, 29 N. J. Law 521; Haines *v.* Merrill

is upon the holder to show that defendant had notice of the transfer before payment was made,[49] but the defendant has the burden of proving that the indorsement was made after maturity,[50] or that the payment was made before the transfer,[51] or was made while the note was in the hands of the assignee.[52]

2. Evidence. — A. In General. — a. *Transfer and Ownership.* An indorsee suing upon a note and producing it need not in making out a *prima facie* case give other evidence of ownership, though denied.[53] Evidence that the note sued upon by an administrator made to his intestate was seen in the intestate's possession is relevant

Trust Co., 56 N. J. Law 312, 28 Atl. 796.

New York. — Northampton Nat. Bank *v.* Kidder, 67 How. Pr. 95, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 445; Canajoharie Nat. Bank *v.* Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; Joy *v.* Diefendorf, 130 N. Y. 6, 28 N. E. 602; Douai *v.* Lutjens, 165 N. Y. 622, 59 N. E. 1121.

North Carolina.—Commercial Bank *v.* Burgwyn, 108 N. C. 62, 12 S. E. 952, 23 Am. St. Rep. 49, 110 N. C. 267, 14 S. E. 623, 17 L. R. A. 326.

North Dakota. — Knowlton *v.* Schultz, 6 N. D. 417, 71 N. W. 550.

Ohio. — White *v.* Francis, 4 Am. Law Rec. 501; McKeeson *v.* Stanberry, 3 Ohio St. 156.

Oregon. — Owens *v.* Snell H. & W. Co., 29 Or. 483, 44 Pac. 827.

Pennsylvania. — Reamer *v.* Bell, 79 Pa. St. 292; Real Estate Inv. Co. *v.* Russell, 148 Pa. St. 496, 24 Atl. 59, 30 W. N. C. 80.

Rhode Island.—Hazard *v.* Spencer, 17 R. I. 561, 23 Atl. 729.

South Dakota.—Landauer *v.* Sioux Falls Imp. Co., 10 S. D. 205, 72 N. W. 10.

Texas. — Rische *v.* Planters' Nat. Bank, 84 Tex. 413, 19 S. W. 610.

Utah. — First Nat. Bank *v.* Foote, 12 Utah 157, 42 Pac. 205.

Vermont.—Limerick Nat. Bank *v.* Adams, 70 Vt. 132, 40 Atl. 166.

Virginia. — Vathi *v.* Zane, 6 Gratt. 246; Piedmont Bank *v.* Hatcher, 94 Va. 229, 26 S. E. 505; Wilson *v.* Lazier, 11 Gratt. 477.

West Virginia. — Union Trust Co. *v.* McClellan, 40 W. Va. 405, 21 S. E. 1025.

Freedom from Laches. — The defendant in proving fraud so as to throw upon the purchaser the burden of proving value, must prove his own freedom from laches. Muhlke *v.* Hegerness, 56 Ill. App. 322; Auburn Nat. Ex. Bank *v.* Veneman, 43 Hun 241.

Illegality of Consideration. — In cases of illegality of consideration, the general rule is that plaintiff must show that he took for value without notice of illegality. Fuller *v.* Hutchings, 10 Cal. 523; Graham *v.* Larimer, 83 Cal. 173, 23 Pac. 286; Kniss *v.* Holbrook, (Ind. App.), 40 N. E. 1118; Rock Island Nat. Bank *v.* Nelson, 41 Iowa 563; Arnkem *v.* Rouse, 26 Weekly Law Bull. 221. See *contra* as to the burden being upon defendant to prove notice of the illegality. Hapgood *v.* Needham, 59 Me. 442; Swett *v.* Hooper, 62 Me. 54; Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70.

49. Hart *v.* Freeman, 42 Ala. 567.

50. White *v.* Camp, 1 Fla. 109; Mobley *v.* Ryan, 14 Ill. 51, 56 Am. Dec. 488; State Sav. Assn. *v.* Barber, 35 Kan. 488, 11 Pac. 330; New Orleans C. & B. Co. *v.* Templeton, 20 La. Ann. 141, 96 Am. Dec. 385; Webster *v.* Calden, 56 Me. 204; Watson *v.* Flanagan, 14 Tex. 354; Rhode *v.* Alley, 27 Tex. 443. But see Tams *v.* Way, 13 Pa. St. 222, and Snyder *v.* Riley, 6 Pa. St. 164.

51. Canfield *v.* Gibson, 1 Mart. (La.) (N. S.) 143; Smith *v.* Prescott, 17 Me. 277; Webster *v.* Lee, 5 Mass. 334; Wilbour *v.* Turner, 5 Pick. (Mass.) 526; Pinkerton *v.* Bailey, 8 Wend. (N. Y.) 600.

52. Nelson *v.* Dunn, 15 Ala. 501.

53. Dawson Town & Gas Co. *v.* Woodhull, 67 Fed. 451, 14 C. C. A. 464.

and admissible.[54] An entry in the payee's day book showing a transfer to a deceased testator is evidence of his title.[55] A check with which the note in suit was paid for is admissible to corroborate evidence of purchase.[56] An assignment of all assets to the payee's creditors is evidence of a transfer to defeat an action on a note by the payee where it is pleaded that plaintiff has no title.[57] Evidence is admissible to show that the plaintiff is not the real party in interest,[58] or to rebut a defense of the transfer of a note from the plaintiff to a third party.[59] The payee's declaration is admissible to prove his transfer of the note without proof of his signature.[60]

b. *Good Faith and Value.* — Evidence tending to show a willful failure of inquiry and gross negligence in making the purchase is admissible on the question of fraud in the inception of the note, and bad faith of the purchaser.[61] Evidence of the knowledge by plaintiff of similar swindling transactions constituting part of a common scheme of which the note in suit was a part, is admissible to show notice of the fraud.[62] Evidence is admissible to show conduct of the plaintiff in failing to demand payment of the note when past due, and paying large sums to the defendant without mentioning the note held by the plaintiff, which was obtained by his assignor in

54. Hunter *v.* Harris, 24 Ill. App. 637.

Evidence as to Indorsed Notes of Intestate. — Upon an issue as to the ownership of a note indorsed by the intestate, evidence that on the same day he had made similar indorsements on notes retained in possession, and had collected them after maturity, is admissible on the question of intention in indorsing the note in suit. Schmidt *v.* Packard, 132 Ind. 398, 31 N. E. 944.

55. Macomb *v.* Wilkinson, 83 Mich. 486, 47 N. W. 336.

Books as Evidence of Consideration. In an action by the indorsee of a note against the maker, entries in the plaintiff's day book showing payment for the note, and entries posted in the ledger in due course, are admissible to show consideration paid for the transfer. Rosenberger *v.* Bitting, 15 Pa. St. 278.

56. Pearson *v.* Hardin, 95 Mich. 360, 54 N. W. 904.

57. Hartshorn *v.* Green, 1 Minn. 92.

58. Sandford *v.* Sandford, 45 N. Y. 723.

59. Hatters' Bank *v.* Phillips, 38 N. Y. 128.

60. McKown *v.* Mathes, 19 La. (O. S.) 542.

Slight Evidence of title will be sufficient to prevent a non-suit if title is not denied by plea. Stumper *v.* Hayes, 25 Ga. 546.

61. Rowland *v.* Fowler, 47 Conn. 347; Matthews *v.* Poythress, 4 Ga. 287.

62. State Nat. Bank *v.* Bennett, 8 Ind. App. 679, 36 N. E. 551; Merrill *v.* Hole, 85 Iowa 66, 52 N. W. 4; Griffith *v.* Shipley, 74 Md. 591, 22 Atl. 1107, 14 L. R. A. 405; First Nat. Bank *v.* Goodsell, 107 Mass. 149.

Knowledge of Usurious Rates. Evidence is admissible on the question of notice, to show that the plaintiff, indorsee of a note, knew that the payee usually loaned money at usurious rates. Blackwell *v.* Wright, 27 Neb. 269, 43 N. W. 116, 20 Am. St. Rep. 662; McDonald *v.* Aufdengarten, 41 Neb. 40, 59 N. W. 762.

Knowledge of Fraudulent Conduct of Payee. — Evidence is admissible to prove knowledge of the purchaser of the fraudulent manner in which similar notes were procured by the payee, as tending to show his bad faith in the purchase. Bowman *v.* Metzger, 27 Or. 23, 39 Pac. 3, 44 Pac. 1090.

fraud of the defendant's rights.[63] Evidence is admissible to show a purchase at heavy discount,[64] and of an attempt to sell at heavy discount.[65] A receipt from the drawer of a bill is not admissible to show value paid as against the acceptor.[66]

B. Parol Evidence. — Parol evidence is admissible to show that the note was indorsed merely for collection,[67] or as collateral security,[68] or for some other particular purpose,[69] or was only for the purpose of passing title.[70]

63. Carpenter *v.* Greenop, 84 Mich. 49, 47 N. W. 509.

64. Jordan *v.* Grover, 99 Cal. 104, 33 Pac. 889; Schmueckle *v.* Waters, 125 Ind. 265, 25 N. E. 281; First Nat. Bank *v.* Wade, 95 Iowa 42, 63 N. W. 345.

65. Blackwell *v.* Wright, 22 Neb. 269, 43 N. W. 116, 20 Am. St. Rep. 662.

66. Platt *v.* Jerome, 2 Blatchf. 186, 19 Fed. Cas. No. 11,217.

67. *Arkansas.* — Smith *v.* Childress, 27 Ark. 328.

Connecticut. — Dale *v.* Gear, 38 Conn. 15, 9 Am. Rep. 353.

Georgia. — Carhart *v.* Wynn, 22 Ga. 24.

Indiana. — Stack *v.* Beach, 74 Ind. 571, 39 Am. Rep. 113.

Maine. — Goodwin *v.* Davenport, 47 Me. 112, 74 Am. Dec. 478.

Massachusetts.—Church *v.* Barlow, 9 Pick. 547.

Missouri. — Kuntz *v.* Temple, 48 Mo. 71.

New Jersey.—Johnson *v.* Martinus, 9 N. J. Law 144, 17 Am. Dec. 464.

Pennsylvania. — Hill *v.* Ely, 5 Serg. & R. 363, 9 Am. Dec. 376.

Vermont. — Rhodes *v.* Risley, 1 Chip. 52, 9 Am. Dec. 696.

68. Dale *v.* Gear, 38 Conn. 15, 9 Am. Rep. 353; McCathern *v.* Bell, 93 Ga. 290, 20 S. E. 315; Wood *v.* Matthews, 73 Mo. 477; Homestead Bank *v.* Wood, 48 N. Y. St. 775, 20 N. Y. Supp. 640; Hazzard *v.* Duke, 64 Ind. 220; Stack *v.* Beach, 74 Ind. 571, 39 Am. Rep. 113.

69. *Alabama.* — Avery *v.* Miller, 86 Ala. 495, 6 So. 38.

Connecticut. — Perkins *v.* Catlin, 11 Conn. 213, 29 Am. Dec. 282; Case *v.* Spaulding, 24 Conn. 578; Dale *v.* Gear, 38 Conn. 15, 9 Am. Rep. 353.

Florida. — Friend *v.* Duryee, 17 Fla. 111, 35 Am. Rep. 80.

Indiana. — Stack *v.* Beach, 74 Ind. 511, 39 Am. Rep. 113; Spencer *v.* Sloan, 108 Ind. 183, 9 N. E. 150, 58 Am. Rep. 35.

Massachusetts. — Ayer *v.* Hutchins, 4 Mass. 370, 3 Am. Dec. 232; Watkins *v.* Hill, 8 Pick. 522.

Ohio. — Morris *v.* Faurot, 21 Ohio St. 155, 8 Am. Rep. 45; Hudson *v.* Wolcott, 39 Ohio St. 618.

Vermont. — Barrows *v.* Lane, 5 Vt. 161, 26 Am. Dec. 263.

70. *Georgia.* — Galceran *v.* Noble, 66 Ga. 367.

Iowa. — Harrison *v.* McKim, 18 Iowa 485; Truman *v.* Bishop, 83 Iowa 697, 50 N. W. 278.

Kentucky. — Butler *v.* Suddeth, 6 T. B. Mon. 541.

New York. — Bruce *v.* Wright, 3 Hun 548, 5 Thomp. & C. 81.

North Carolina. — Mendenhall *v.* Davis, 72 N. C. 150.

Ohio. — Mann *v.* Lindsey, 1 Ohio Dec. 79; Hudson *v.* Wolcott, 39 Ohio St. 618; Bailey *v.* Stoneman, 41 Ohio 148.

Pennsylvania. — Girard Bank *v.* Comley, 2 Miles 405; Patterson *v.* Todd, 18 Pa. St. 426, 27 Am. Dec. 622; Breneman *v.* Furniss, 90 Pa. St. 186, 35 Am. Rep. 657.

But in the following cases it is held that parol evidence is not admissible to limit the liability of the indorser, in connection with the transfer of title.

United States. — Martin *v.* Cole, 104 U. S. 30.

Alabama. — Day *v.* Thompson, 65 Ala. 269.

Colorado. — Dunn *v.* Ghost, 5 Col. 134.

Connecticut. — Dale *v.* Gear, 38 Conn. 15, 9 Am. Rep. 353.

Indiana. — Wilson *v.* Black, 6 Blackf. 569; Campbell *v.* Robbins, 29 Ind. 271; Parker *v.* Morton, 29 Ind. 89; Lee *v.* Pile, 37 Ind. 107.

C. VARIANCE. — There is a material variance where the note produced in evidence does not correspond substantially with the averment of indorsement,[71] but the variance is not material, where the declaration does not set out the indorsements proved,[72] nor where a blank indorsement is proved under an averment of an indorsement to plaintiff,[73] nor where evidence shows collateral security under an averment of ownership,[74] nor where there is a mere variance in time of the indorsement alleged and proved,[75] or a slight variance in the name of the indorser or indorsee.[76] An averment of sale and transfer of notes is sustained by proof that they were bartered for a stock of goods.[77]

IX. PRESENTMENT, DEMAND, PROTEST AND NOTICE.

1. Presumptions and Burden of Proof. — A. GENERAL PRESUMPTIONS. — A note payable at a bank, which remains there, is presumed to have been presented there for payment when due,[78] and the cashier of the bank is presumed to have done his duty to be at the bank to receive payment during business hours of the last day for payment.[79]

Kansas. — Doolittle *v.* Ferry, 20 Kan. 230, 27 Am. Rep. 166.

Minnesota. — First Nat. Bank *v.* Nat. Marine Bank, 20 Minn. 63.

71. *United States.* — Hyer *v.* Smith, 3 Cranch C. C. 376, 12 Fed. Cas. No. 6978.

Alabama. — Strader *v.* Alexander, 9 Port. 441.

Arkansas. — Jordan *v.* Ford, 7 Ark. 416.

Indiana. — Chapman *v.* Harper, 7 Blackf. 333; Stowe *v.* Weir, 15 Ind. 341; Smelser *v.* Wayne & U. S. L. T. Co., 82 Ind. 417.

Kentucky.—Dodge *v.* Bank of Ky., 2 A. K. Marsh. 616.

Louisiana. — Taylor *v.* Normand, 12 Rob. 240.

72. Rozet *v.* Harvey, 26 Ill. App. 558.

73. Bowers *v.* Trevor, 5 Blackf. (Ind.) 24; Moore *v.* Pendleton, 16 Ind. 481; Skinner *v.* Church, 36 Iowa 91; Morris *v.* Badger, 6 Cow. (N. Y.) 449.

74. Curtis *v.* Mohr, 18 Wis. 615.

75. Penn *v.* Flack, 3 Gill & J. (Md.) 369; Canfield *v.* McIlwaine, 32 Md. 94; Little *v.* Blunt, 16 Pick. (Mass.) 359; State Trust Co. *v.* Owen Paper Co., 162 Mass. 156, 38 N. E. 438; Davis *v.* Miller, 14 Gratt. 1.

76. Speer *v.* Craig, 22 Ill. 433; Carpenter *v.* Sheldon, 22 Ind. 259; Glenn *v.* Porter, 72 Ind. 525; Farmington Sav. Bank *v.* Fall, 71 Me. 49; Henshaw *v.* Liberty M. F. & L. Ins. Co., 9 Mo. 336; Lautermilch *v.* Kneagy, 3 Serg. & R. (Pa.) 202.

77. Snyder *v.* Reno, 38 Iowa 329.

78. Dykman *v.* Northridge, 1 App. Div. 26, 36 N. Y. Supp. 962.

Presumption of Presence of Note. In the absence of evidence to the contrary, it will be presumed that the note payable at the bank was there present when payable. Folger *v.* Chase, 18 Pick. (Mass.) 63.

79. Folger *v.* Chase, 18 Pick. (Mass.) 63; Brittain *v.* Doylestown Bank, 5 Watts & S. (Pa.) 87, 39 Am. Dec. 110.

Evidence of Formal Demand not Required. — No evidence is required to prove a formal demand upon the maker of a note payable at a particular bank and held by the bank, but it is sufficient evidence of demand and refusal that no funds were provided to meet it at the close of banking hours on the last day for payment. Allen *v.* Smith, 4 Harr. 234; Gillett *v.* Averill, 5 Denio (N. Y.) 85; Ogden *v.* Dobbins, 2 Hall (N. Y.) 112; State Bank *v.* Napier, 6 Humph. Tenn. 270, 44 Am. Dec. 308; Bank of Metropolis *v.* Brent, 2 Cranch C. C. 530, 2 Fed. Cas. No. 900; Browning *v.* Andrews, 3 McLean 576, 4 Fed. Cas. No. 2040; Bank of U. S. *v.* Carneal 2 Pet. (U.

It is presumed in the absence of evidence to the contrary that the holder of a bill resided where it was dishonored and protested,[80] and that the maker of a negotiable instrument resided at the place of its date, and that the demand was there properly made.[81] An indorsed note is presumed to be indorsed in the state where dated, in the absence of evidence to the contrary.[82] A waiver of protest by an indorser is presumptive evidence of presentment and demand,[83] and the promise of an indorser to pay after knowledge of dishonor is presumptive evidence of presentment, demand and notice.[84]

S.) 543. The only presentment and demand of a note payable at a bank which is required to be proved by an indorsee, is that he had the note at the bank during the last day of payment, and found at the close of banking hours that no funds had been there provided for its payment. Shepperd *v.* Chamberlain, 8 Gray (Mass.) 225; Hallowell *v.* Curry, 41 Pa. St. 322; Scull *v.* Mason, 43 Pa. St. 99; Jenks *v.* Doylestown Bank, 4 Watts & S. 505; Rahm *v.* Philadelphia Bank, 1 Rawle (Pa.) 335; Bank of State *v.* Flagg, 1 Hill (N. Y.) 177; Bank of U. S. *v.* O'Neal, 2 Cranch C. C. 416, 2 Fed. Cas. No. 932.

80. Tyson *v.* Oliver, 43 Ala. 455. The drawer is presumed to contract conditionally that he will pay at the place where he drew the bill if the acceptor does not pay, and the drawer is notified of dishonor. Freeze *v.* Brownell, 35 N. J. Law 285, 10 Am. Rep. 239; Warner *v.* Citizens' Bank, 6 S. D. 152, 60 N. W. 746. *Ex parte* Heidelback, 2 Low. 526, 11 Fed. Cas. No. 6322.

81. Hepburn *v.* Tolendano, 10 Mart. (La.) (O. S.) 643, 13 Am. Dec. 643; White *v.* Wilkinson, 10 La. Ann. 394; Selden *v.* Washington, 17 Md. 379, 79 Am. Dec. 659; Smith *v.* Philbrick, 10 Gray (Mass.) 252, 69 Am. Dec. 315; Herrick *v.* Baldwin, 17 Minn. 209, 10 Am. Rep. 161; Plahto *v.* Patchin, 26 Mo. 389; Wittkonski *v.* Smith, 84 N. C. 671, 37 Am. Rep. 632.

Presumption Inapplicable to Known Residence. — A party who receives a note dated at a particular place, knowing when he takes it that the maker lives elsewhere, and having sufficient time before the maturity of the note to cause a proper demand to be made upon the maker, is presumed to take the risk of a proper presentment. Oxnard *v.* Varnum, 111 Pa. St. 193, 2 Atl. 224.

82. Belford *v.* Bangs, 15 Ill. App. 76.

Law Applicable. — The law of the place where a note is made payable is presumed to govern as respects presentment and demand, but the law of the place of indorsement is presumed applicable to notice given to the indorser. Snow *v.* Perkins, 2 Mich. 238; Williams *v.* Putnam, 14 N. H. 540, 40 Am. Dec. 204; Raymond *v.* Holmes, 11 Tex. 54.

Presumption. — In the absence of proof as to where the indorsement was actually made, it will be presumed to have been made at the place of residence of the indorser, for the purpose of determining what law is applicable as to demand and notice. Simpson *v.* White, 40 N. H. 540.

83. Annville Nat. Bank *v.* Kettering, 1 Del. Co. Rep. (Pa.) 538.

Waiver of Notice of Protest. — A waiver of notice of protest is not to be deemed a waiver of presentment and demand of payment. Sprague *v.* Fletcher, 8 Or. 367, 34 Am. Rep. 587; Scull *v.* Mason, 43 Pa. St. 99. A waiver of notice of demand is not presumed to dispense with the demand itself. Voorhies *v.* Atlee, 29 Iowa 49; Drinkwater *v.* Tebbetts, 17 Me. 16; Burnham *v.* Webster, 17 Me. 50; Lane *v.* Stewart, 20 Me. 98; Berkshire Bank *v.* Jones, 6 Mass. 524, 4 Am. Dec. 175; Buckley *v.* Bentley, 42 Barb. (N. Y.) 646; Backus *v.* Shipherd, 11 Wend. (N. Y.) 629; Buchanan *v.* Marshall, 22 Vt. 561.

84. *United States.*— Sherman *v.*

B. Burden of Proof. — The burden of proof is upon the holder in an action against an indorser or drawer of a bill to show presentment and demand,[85] and notice of dishonor,[86] of due dili-

Clark, 3 McLean 91, 21 Fed. Cas. No. 12,763.

Arkansas. — Hazard *v.* White, 26 Ark. 155.

California. — Matthey *v.* Gally, 4 Cal. 62, 60 Am. Dec. 595.

Connecticut. — Breed *v.* Hillhouse, 7 Conn. 523.

Illinois. — Tobey *v.* Berly, 26 Ill. 426.

Kentucky. — Ralston *v.* Bullitts, 3 Bibb 161.

Louisiana. — Gazzo *v.* Boudoin, 10 La. Ann. 157.

Maryland. — Lewis *v.* Brehme, 33 Md. 412, 3 Am. Rep. 190.

Michigan. — Newberry *v.* Trawbridge, 13 Mich. 163.

Mississippi. — Robbins *v.* Pinkard, 5 Smed. & M. 51; Moore *v.* Ayres, 5 Smed. & M. 310.

New York. — Pierson *v.* Hooker, 3 Johns. 68, 3 Am. Dec. 467; Harral *v.* Sternberger, 17 Misc. 274, 40 N. Y. Supp. 353.

Ohio. — Hudson *v.* Wolcott, 39 Ohio St. 618.

Pennsylvania. — Loose *v.* Loose, 36 Pa. St. 538; Oxnard *v.* Varnum, 111 Pa. St. 193, 2 Atl. 224, 56 Am. Rep. 255.

South Carolina. — Hall *v.* Freeman, 2 Nott & Mc. 499, 10 Am. Dec. 621.

Virginia. — Walker *v.* Laverty, 6 Munf. 487.

85. Ducros *v.* Jacobs, 10 Rob. (La.) 453; Bank of Columbia *v.* Fitzhugh, 1 Har. & G. (Md.) 239; Jones *v.* Pridham, 3 E. D. Smith (N. Y.) 155; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

86. *United States.* — U. S. *v.* Barker,, 4 Wash. C. C. 464, 24 Fed. Cas. No. 14,520.

Alabama. — Crawford *v.* Branch Bank, 7 Ala. 205.

Arkansas. — Moore *v.* Burr, 14 Ark. 230.

Connecticut. — Lockwood *v.* Crawford, 18 Conn. 361.

Florida. — Marks *v.* Boone, 24 Fla. 177, 4 So. 532.

Georgia. — Allen *v.* Georgia Nat. Bank, 60 Ga. 347; Apple *v.* Lesser, 93 Ga. 749, 21 S. E. 171.

Kentucky. — Brown *v.* Hall, 2. A. K. Marsh. 599.

Louisiana. — Pickner *v.* Roberts, 11 La. (O. S.) 14, 30 Am. Dec. 706.

New York. — Jones *v.* Pridham, 3 E. D. Smith 155.

Virginia. — Early *v.* Preston, 1 Pat. & H. 228; Friend *v.* Wilkinson, 9 Gratt. 31.

West Virginia. — Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

Evidence and Presumption as to Notice. — Proof that a bill was duly protested and that diligence was used in giving notice, raises a presumption that notice was duly received by the parties sought to be charged. Dickins *v.* Beal. 10 Pet. (U. S.) 572. Proof of a memorandum by a bank clerk that he received the notice of dishonor on a certain day, and delivered it on the same day at the residence of the indorser to his daughter, raises a presumption that he left it with the older of two daughters aged six and seven, and that she was of sufficient age and intelligence to deliver it to her father. Bank of Kentucky *v.* Duncan, 4 Bush (Ky.) 294. Where the proof shows that a bill of exchange was discounted by a bank for a firm of which its cashier was a member, and payment was refused by the drawer, notice of non-payment to the firm will be presumed from knowledge of the cashier as a member thereof. Citizens' Sav. Bank *v.* Hays, 96 Ky. 365, 29 S. W. 20. It is to be presumed that, when a letter containing a notice of dishonor is mailed to the proper address within the city, it is delivered in accordance with the direction. Jensen *v.* McCorkell, 154 Pa. St. 323, 26 Atl. 366, 35 Am. St. Rep. 843. A postmark is *prima facie* evidence that notice was mailed on the day of its date. Early *v.* Prentiss, 1 Pat. & H. 228. Proof

gence,[87] of any excuse for non-presentment or want of notice,[88] or delay,[89] or that failure or delay produced no injury,[90] or to show a waiver of presentment, protest, or notice,[91] or that a new promise was with knowledge of the facts.[92] The burden is upon the defendant to overcome the presumption of a waiver of demand and notice,[93] to show that he was ready to pay at the time and place for payment,[94] to show a discharge by want of sufficient notice

that the notice of protest was seen in the hands of the defendant seven months after the note became due does not raise the presumption that it came to his hands in due course of mail, when the notice was not directed to his place of residence, but to a place in a different state. Paterson Bank *v.* Butler, 12 N. J. Law 268. Proof that a notice of dishonor was given is presumptive evidence that it was in proper form. Burgers *v.* Vreeland, 24 N. J. Law 71, 59 Am. Dec. 408.

87. Rives *v.* Parmley, 18 Ala. 256; Moore *v.* Burr, 14 Ark. 230; Brown *v.* Hall, 2 A. K. Marsh. (Ky.) 599; Martin *v.* Grabinsky, 38 Mo. App. 359; Early *v.* Preston, 1 Pat. & H. 228; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888; Eaton *v.* McMahon, 42 Wis. 484.

88. Excuse for Non-Presentment. The burden is on the holder in the first instance to show an excuse for non-presentment, and not by way of rebuttal after defendant has shown non-presentment. Wood *v.* Gibbs, 35 Miss. 559; Martin *v.* Grabinsky, 38 Mo. App. 559; Eaton *v.* McMahon, 42 Wis. 484.

Excuse for Want of Notice. — The burden of proof is upon the holder to prove that the drawer of a bill of exchange had no funds in the drawee's hands, to excuse want of notice. Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168; Ralston *v.* Bullitts, 3 Bibb (Ky.) 261; Baxter *v.* Graves, 2 A. K. Marsh. (Ky.) 152, 12 Am. Dec. 374; Ray *v.* Bank of Ky., 3 B. Mon. (Ky.) 510, 30 Am. Dec. 479; Richie *v.* McCoy, 13 Smed & M. (Miss.) 541; Golladay *v.* Bank of the Union, 2 Head (Tenn.) 57. Also to excuse want of notice by proof that the indorser had no known place of residence or business. Denny *v.* Palmer, 5 Ired. Law (N. C.) 610.

89. U. S. *v.* Barker, 12 Wheat. U. S. 559, *affirming* U. S. *v.* Barker, 4 Wash. C. C. 464, 24 Fed. Cas. No. 14,520.

90. Stevens *v.* Park, 73 Ill. 387; Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94; Planters' Bank *v.* Merritt, 7 Heisk. (Tenn.) 177; Planters' Bank *v.* Keesee, 7 Heisk. (Tenn.) 200; Kirkpatrick *v.* Puryear, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785.

91. Wilkins *v.* Gillis, 20 La. Ann. 538, 96 Am. Dec. 425; Edwards *v.* Tandy, 36 N. H. 540.

Evidence and Presumption as to Waiver. — A waiver of protest and notice by a firm appearing in different handwriting from that of the original indorsement is presumed to have been written by another member of the firm. O'Leary *v.* Martin, 21 La. Ann. 389. Proof by an indorser that a waiver of demand and notice was made after his blank indorsement, without authority, is *prima facie* evidence of his discharge. Farmer *v.* Rand, 16 Me. 453.

92. Good *v.* Sprigg, 2 Cranch C. C. 172, 10 Fed. Cas. No. 5532; Hunt *v.* Wadleigh, 26 Me. 271, 45 Am. Dec. 108.

93. Veazie *v.* Howland, 53 Me. 38.

94. Allain *v.* Lazarus, 14 La. (O. S.) 327, 33 Am. Dec. 583; Catalogue *v.* Alva, 13 La. Ann. 98; Thiel *v.* Conrad, 21 La. Ann. 214; Ruggles *v.* Patten, 8 Mass. 480; Kendall *v.* Badger, 1 McAll. 523, 14 Fed. Cas. No. 7691.

of dishonor,[95] to prove publicity of a change of residence,[96] to prove laches of the indorsee,[97] and that the defendant has sustained damage thereby,[98] to impeach the consideration of a new promise after protest,[99] and to show laches of the holder and his ignorance of it when the promise was made.[1]

2. Evidence. — A. In General. — For the use of notarial certificates to prove presentment, non-acceptance, non-payment, notice and protest, see article "Certificates." The evidence of a notary or his clerk is admissible in addition to the certificate of protest to supplement or explain it upon the questions of presentment, demand and notice of dishonor,[2] and any competent additional evidence is admissible upon those questions.[3] Upon the questions of demand

95. Sullivan *v.* Deadmar, 23 Ark. 14; McDougald *v.* Central Bank, 3 Kelly (Ga.) 185; Burgers *v.* Vreeland, 24 N. J. Law 71, 59 Am. Dec. 408; Cook *v.* Litchfield, 5 Sandf. (N. Y.) 320.

96. Somerville *v.* Young, 3 La. Ann. 290.

97. Smith *v.* Janes, 20 Wend. 192, 32 Am. Dec. 527.

98. Planters' Bank *v.* Merritt, 7 Heisk. (Tenn.) 177; Planters' Bank *v.* Keesee, 7 Heisk. (Tenn.) 200; McClain *v.* Lowther, 35 W. Va. 297, 13 S. E. 1003.

99. Mills *v.* Rouse, 12 Ky. (2 Litt.) 203.

1. Loose *v.* Loose, 36 Pa. St. 538; Oxnard *v.* Varnum, 111 Pa. St. 193, 2 Atl. 244, 56 Am. Rep. 255.

2. *United States* — Coyle *v.* Gozzler, 2 Cranch C. C. 625, 6 Fed. Cas. No. 3312; Bank of U. S. *v.* Abbott, 3 Cranch C C. 94, 2 Fed. Cas. No. 906; Cookendorfer *v.* Preston, 4 How. 317.

Louisiana. — Manonuvrier *v.* Marvel, 15 La. Ann. 396; Butler *v.* Murison, 18 La. Ann. 363.

Maine. — Bradley *v.* Davis, 26 Me. 45; Union Bank *v.* Stone, 50 Me. 595, 79 Am. Dec. 631.

Maryland. — Sasscer *v.* Farmers' Bank, 4 Md. 409; Wetherall *v.* Claggett, 28 Md. 465.

Michigan. — Bliss *v.* Paine, 11 Mich. 92.

Mississippi. — Cook *v.* Merchants' Nat. Bank, 72 Miss. 982, 18 So. 481; Witkowski *v.* Maxwell, 69 Miss. 56, 10 So. 453.

Missouri. — Draper *v.* Clemens, 4 Mo. 52.

New York. — Seneca County Bank *v.* Neass, 5 Denio 329; Hunt *v.* Maybee, 7 N. Y. 266.

Pennsylvania. — Parry *v.* Almond, 12 Serg. & R. 284; Strauthers *v.* Randall, 41 Pa. St. 214, 80 Am. Dec. 610.

South Carolina. — Haig *v.* Newton, 1 Mill Const. 423.

Tennessee. — Worley *v.* Waldran, 3 Sneed 548; Colms *v.* Bank of Tenn., 4 Baxt. 422.

Wisconsin. — Adams *v.* Wright, 14 Wis. 408; Terbell *v.* Jones, 15 Wis. 278.

Insufficient Protest. — Where the certificate of protest is insufficient, the notary or his clerk may by his testimony prove presentment, demand and notice, independently of the certificate. Follain *v.* Dupre, 11 Rob. (La.) 454; Hunt *v.* Maybee, 7 N. Y. 266. Though the protests are excluded, the notary may by his deposition prove that notice was sent to the indorser. Bank at Decatur *v.* Hodges, 9 Ala. 631.

3. *Alabama.* — Boit *v.* Carr, 54 Ala. 112; Martin *v.* Brown, 75 Ala. 442.

Illinois. — Eddy *v.* Peterson, 22 Ill. 535.

Kentucky. — Trabue *v.* Sayre, 1 Bush 129.

Louisiana. — Follain *v.* Dupre, 11 Rob. 454; Dubuys *v.* Farmer, 22 La. Ann. 478.

Maine. — Homes *v.* Smith, 16 Me. 181.

and notice verified memoranda,[4] certified copies of entries in notary's books,[5] and other competent evidence[6] are admissible.

Maryland. — Brailsford *v.* Williams, 15 Md. 150, 74 Am. Dec. 559; Wetherall *v.* Claggett, 28 Md. 465.

Missouri. — Pratte *v.* Hanly, 1 Mo. 35; Clough *v.* Holden, 115 Mo. 336, 21 S. W. 1071, 37 Am. St. Rep. 393.

New York. — Cook *v.* Litchfield, 2 Bosw. 137; Adams *v.* Leland, 5 Bosw. 411, 30 N. Y. 309.

Tennessee. — Ross *v.* Planters' Bank, 5 Humph. 335.

Other Competent Evidence. — Notice and protest may be proved by any other competent evidence, as well as by the notarial protest. Eddy *v.* Peterson, 22 Ill. 535. Proof of demand of payment and notice of non-payment may be made by other evidence than the records of the notary. Homes *v.* Smith, 16 Me. 181. Defects in a certificate of protest may be supplied by other evidence. Saul *v.* Brand, 1 La. Ann. 95; Bradley *v.* Davis, 26 Me. 45; Nailor *v.* Bowie, 3 Md. 251; Cayuga County Bank *v.* Warden, 6 N. Y. 19.

Foreign Bills of Exchange. — No evidence can be given of the protest of a foreign bill of exchange for non-acceptance without producing the protest itself, unless it be shown that both the original and the books are lost. Chase *v.* Taylor, 4 Har. & J. (Md.) 54; Kentucky Com. Bank *v.* Barksdale, 36 Mo. 563.

4. New Haven Co. Bank *v.* Mitchell, 15 Conn. 206; Bullard *v.* Wilson, 5 Mart. (N. S.) 196; Welsh *v.* Barrett, 15 Mass. 380; Hart *v.* Wilson, 2 Wend. (N. Y.) 513; Nichols *v.* Goldsmith, 7 Wend. (N. Y.) 161; Sheldon *v.* Benham, 4 Hill (N. Y.) 129, 40 Am. Dec. 271; Cole *v.* Jessup, 9 Barb. (N. Y.) 395, 10 How. Pr. 515, 10 N. Y. 515.

5. Whittemore *v.* Leake, 14 La. (O. S.) 392; Johnson *v.* Marshall, 4 Rob. (La.) 157; Thompson *v.* Commercial Bank, 3 Cold. (Tenn.) 46; Jackson Ins. Co. *v.* Sturges, 12 Heisk. (Tenn.) 339.

6. Evidence as to Demand. — A deposition testifying to presentment and demand of a bill of exchange, a copy of which is appended to the deposition, is competent evidence thereof. Sabine *v.* Strong, 6 Metc. (Mass.) 270. Replies made on inquiry for the maker's place of abode are admissible on the question of demand and diligence in making inquiry. Central Bank *v.* Allen, 16 Me. 41; Adams *v.* Leland, 5 Bosw. (N. Y.) 411, 30 N. Y. 309.

On an issue as to whether a demand had been made upon one of two joint makers, the evidence of the other that no such demand was made is admissible. Evidence is admissible to show an agreement that a demand note was to be paid on or about a future day, as tending to prove that a demand made at that time was reasonable. Lockwood *v.* Crawford, 18 Conn. 361.

Evidence as to Notice. — Evidence of the custom and habits of the notary and of the officers of the bank at which the negotiable instrument was payable is admissible upon the question of notice of dishonor. Grinman *v.* Walker, 9 Iowa 426; Trabue *v.* Sayre, 1 Bush (Ky.) 129; Coyle *v.* Gozzler, 2 Cranch C. C. 625, 6 Fed. Cas. No. 3312; Cookendorfer *v.* Preston, 4 How. (U. S.) 317.

A local custom may be proved as to the mode of giving notice of protest. Ray *v.* Porter, 42 Ala. 327; Grinman *v.* Walker, 9 Iowa 426. Evidence is admissible to show that notice irregularly sent by mail was actually received. (Dickins *v.* Beal, 10 Pet. [U. S.] 72) to show that the notice was addressed to the post-office at which the defendant received his letters (Leigh *v.* Lightfoot, 11 Ala. 935,) to show an admission that the notice was received (Belden *v.* Lamb, 17 Conn. 441; Derickson *v.* Whitney, 6 Gray [Mass.] 248; Duncan *v.* Watson, 2 Smed. & M. [Miss.] 121; Keeler *v.* Bartine, 12 Wend. [N. Y.] 110; Gawtry *v.* Doane, 48 Barb. [N. Y.] 148;) and to show service of notice by proved entries in

B. Parol Evidence. — Parol evidence is admissible to prove demand and notice,[7] to show an agreement for demand at a particular place,[8] to prove the contents of a written notice as primary evidence, without notice to produce it,[9] and to show a waiver of demand and notice,[10] and to contradict a certificate of notice of

bank books. North Bank *v.* Abbot, 13 Pick. (Mass.) 465, 25 Am. Dec. 334; Washington Bank *v.* Prescott, 20 Pick. (Mass.) 339. The service of notice may be inferred from circumstances proved. Ross *v.* Planters' Bank, 5 Humph. (Tenn.) 335. The time of service of notice of non-acceptance of a bill of exchange may be proved by circumstantial evidence. Whiteford *v.* Burckmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640.

Evidence of Waiver. — Waiver of demand and notice may be proved by evidence of an admission of liability or a promise to pay after dishonor. Curtiss *v.* Martin, 20 Ill. 557; First Nat. Bank *v.* Carpenter, 34 Iowa 433; Harrison *v.* Bailey, 99 Mass. 620, 97 Am. Dec. 63; Hudson *v.* Wolcott, 39 Ohio St. 618; Mensel *v.* Semple, 48 Wis. 86, 4 N. W. 110. The clearest evidence is necessary to show a waiver by indorsees of notice and protest. Oswego Bank *v.* Knower, Hill & D. Supp. 122.

7. Follain *v.* Dupre, 11 Rob. (La.) 454; Dubuys *v.* Farmer, 22 La. Ann. 478; Mechanics' & Traders' Ins. Co. *v.* Coons, 36 La. Ann. 271; Hunt *v.* Malbee, 7 N. Y. 266.

8. McKee *v.* Boswell, 33 Mo. 567; Meyer *v.* Hibsher, 47 N. Y. 265.

9. Brent *v.* Bank of Metropolis, 1 Pet. (U. S.) 89.

Alabama. — John *v.* City Nat. Bank, 62 Ala. 529, 34 Am. Rep. 35.

Louisiana. — Abat *v.* Rion, 9 Mart. (O. S.) 465, 13 Am. Dec. 313.

Maine. — Central Bank *v.* Allen, 16 Me. 41; Brooks *v.* Blaney, 62 Me. 456.

Massachusetts. — Eagle Bank *v.* Chapin, 3 Pick. 180.

Missouri. — Johnston *v.* Mason, 27 Mo. 511.

New Jersey. — Burgers *v.* Vreeland, 24 N. J. Law 71, 59 Am. Dec. 408.

New York. — Paton *v.* Lent, 4 Duer 231; Johnson *v.* Haight, 13 Johns. 470; Scott *v.* Betts, Hill & D. 363.

Pennsylvania. — Smyth *v.* Hawthorn, 3 Rawle 355.

See *Contra* Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212; Faribault *v.* Ely, 2 Dev. (N. C.) 67.

10. *Arkansas.* — Andrews *v.* Sims, 33 Ark 771.

Louisiana. — Debuys *v.* Mollere, 3 Mart. (N. S.) 318; Helm *v.* Ducayet, 20 La. Ann. 417.

Maine. — Sanborn *v.* Southard, 25 Me. 409, 43 Am. Dec. 288; Keyes *v.* Winter, 54 Me. 399.

Massachusetts. — Taunton Bank *v.* Richardson, 5 Pick. 436.

Missouri. — Kaiser *v.* Nial, 9 Mo. App. 590.

New York. — Porter *v.* Kemball, 53 Barb. 467.

Ohio. — Dye *v.* Scott, 35 Ohio St. 194, 35 Am. Rep. 604.

Pennsylvania. — Barclay *v.* Weaver, 19 Pa. St. 396, 57 Am. Dec. 660.

Tennessee. — Dick *v.* Martin, 7 Humph. 263; Taylor *v.* French, 2 Lea 257, 31 Am. Rep. 609.

Original Parol Agreement of Waiver. — Parol evidence is not admissible to show an original agreement contemporaneous with the indorsement of the note in blank to waive demand and notice.

California. — Goldman *v.* Davis, 23 Cal. 256.

Indiana. — Smythe *v.* Scott, 106 Ind. 245, 6. N. E. 145.

Minnesota. — Barnard *v.* Gaslin, 23 Minn. 192; Farwell *v.* St. Paul Trust Co., 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 742.

Mississippi. — Baskerville *v.* Harris, 41 Miss. 535.

Missouri. — Rodney *v.* Wilson, 67 Mo. 123, 29 Am. Rep. 499; Beeler *v.* Frost, 70 Mo. 185.

New Hampshire. — Barry *v.* Morse, 3 N. H. 132.

New York. — De Groot *v.* Blake,

protest,[11] and to sustain it on rebuttal.[12]

C. VARIANCE. — Under a complaint alleging presentment, demand and notice of an ordinary promissory note, a certificate of protest of an instrument under seal in evidence shows a variance.[13] A certificate of protest describing a bill of exchange of a different date from that alleged is not admissible.[14] A variance between pleading and proof as to the day on which the demand was made is not material.[15] Variances between pleading and evidence upon questions of demand and protest which are not misleading, are deemed immaterial.[16]

X. OTHER EVIDENCE RELATIVE TO BILLS AND NOTES.

1. Indorsement by Third Parties.—An indorsement of a negotiable instrument by a third party bearing no date is presumed to have been made at the time of the inception of the note,[17] and is *prima facie*

Anth. N. P. 297; Bank of Albion *v.* Smith, 27 Barb. 489.

South Dakota.— Schmitz *v.* Hawkeye Gold Min. Co., 8 S. D. 544, 67 N. W. 618.

11. *Alabama.* — Curry *v.* Bank of Mobile, 8 Port. 360; Booker *v.* Lowry, 1 Ala. 399; Bank of Mobile *v.* Marston, 7 Ala. 108.

California.— Applegarth *v.* Abbott, 64 Cal. 459, 2 Pac. 43.

Louisiana. — Duralde *v.* Guidrey, 5 Mart. (N. S.) 65; Preston *v.* Daysson, 7 La. (O. S.) 7; Gale *v.* Kemper, 10 La. (O. S.) 205; Poydras *v.* Belle, 14 La. 391; Delavigne *v.* Arnet, 14 La. (O. S.) 437; Jones *v.* Mansker, 15 La. (O. S.) 51; Union Bank *v.* Cushman, 12 Rob. 237.

Maine. — Bradley *v.* Davis, 26 Me. 45.

Maryland. — Howard Bank *v.* Carson, 50 Md. 18.

Mississippi. — Wood *v.* Am. L. Ins. & Trust Co., 7 How. 609; Seltzer *v.* Fuller, 6 Smed. & M. 185.

New York. — Hunt *v.* Maybee, 7 N. Y. 266; Meise *v.* Newman, 76 Hun 341, 27 N. Y. Supp. 708; Townsend *v.* Auld, 10 Misc. 343, 31 N. Y. Supp. 29.

Pennsylvania. — Shull *v.* Croft, 1 Del. Co. Rep. 387.

Tennessee. — Caruthers *v.* Harbert, 5 Cold. 362, 98 Am. Dec. 421.

Wisconsin. — Adams *v.* Wright, 14 Wis. 408.

12. Manouvrier *v.* Marvel, 15 La. Ann. 396.

Validity of Protest. — Extrinsic evidence is admissible to show that the protest of the note was valid. Gardner *v.* Bank of Tennessee, 1 Swan (Tenn.) 420.

13. Helfer *v.* Alden, 3 Minn. 332.

14. Bank of Decatur *v.* Hodges, 9 Ala. 631. In Leigh *v.* Lightfoot, 11 Ala. 935, the effect of a variance in some one or more words was considered, and the question of identity was left to the jury.

15. Quigley *v.* Primrose, 8 Port. (Ala.) 247; Crawford *v.* Camfield, 6 Ala. 153; Smith *v.* Robinson, 11 Ala. 270; Peters *v.* Hobbs, 25 Ark. 67, 91 Am. Dec. 526; Frank *v.* Townsend, 9 Humph. (Tenn.) 724; Jackson *v.* Henderson, 3 Leigh (Va.) 196. See *contra* Hough *v.* Young, 1 Ohio 504.

Material Variance in Time.—Proof that the demand was made too late, according to local usage as to days of grace, shows a fatal variance from an averment of due demand when the bill became payable. Jackson *v.* Henderson, 3 Leigh (Va.) 196.

16. Bank of Decatur *v.* Hodges, 9 Ala. 631; Hinsdale *v.* Miles, 5 Conn. 331; Bank of Tenn. *v.* Smith, 9 B. Mon. (Ky.) 609; State Bank *v.* Vaughan, 36 Mo. 90; Smedberg *v.* Whittlesey, 3 Sandf. Ch. (N. Y.) 320; Purchase *v.* Mattison, 6 Duer (N. Y.) 587.

17. *Illinois.* — Carroll *v.* Weld, 13 Ill. 682, 56 Am. Dec. 481; Stowell *v.* Raymond, 83 Ill. 120; Greer *v.* Cable, 45 Ill. App. 405.

evidence of an original promise, or guaranty of payment.[18] Where

Indiana. — Snyder *v.* Oatman, 16 Ind. 265.

Maine. — Bradford *v.* Prescott, 85 Me. 482, 27 Atl. 461.

Massachusetts. — Way *v.* Butterworth, 108 Mass. 509.

Michigan. — Higgins *v.* Watson, 1 Mich. 428.

Missouri. — Powell *v.* Thomas, 7 Mo. 440, 38 Am. Dec. 465.

Pennsylvania. — Amsbaugh *v.* Gearhart, 11 Pa. St. 482.

Texas. — Cook *v.* Southwick, 9 Tex. 615, 60 Am. Dec. 181; Carr *v.* Rowland, 14 Tex. 275.

18. *United States.* — First Nat. Bank *v.* Lock-Stitch Fence Co., 24 Fed. 221.

Arkansas. — Killiam *v.* Ashley, 24 Ark. 511, 91 Am. Dec. 519; Nathan *v.* Sloan, 34 Ark. 524; Heise *v.* Bumpass, 40 Ark. 545.

California. — Riggs *v.* Waldo, 2 Cal. 485, 56 Am. Dec. 356; Pierce *v.* Kennedy, 5 Cal. 138; Reeves *v.* Howe, 16 Cal. 152.

Colorado. — Good *v.* Martin, 1 Colo. 165, 91 Am. Dec. 706, 2 Colo. 218; Best *v.* Hoppie, 3 Colo. 137; Kiskadden *v.* Allen, 7 Colo. 206, 3 Pac. 221; Tabor *v.* Miles, 5 Colo. App. 127, 38 Pac. 64.

Connecticut. — Bradley *v.* Phelps, 2 Root 325; Palmer *v.* Grant, 4 Conn. 389.

Delaware. — Massey *v.* Turner, 2 Houst. 79; Gilpin *v.* Marley, 4 Houst. 284.

District of Columbia. — Portsmouth Sav. Bank *v.* Wilson, 5 App. D. C. 8.

Florida. — Melton *v.* Brown, 25 Fla. 461, 6 So. 211; McCallum *v.* Driggs, 35 Fla. 277, 17 So. 407.

Georgia. — Camp *v.* Simmons, 62 Ga. 73; Eppens *v.* Forbes, 82 Ga. 748, 9 S. E. 723.

Illinois. — Kankakee Coal Co. *v.* Crane Bros. Mfg. Co., 138 Ill. 207, 27 N. E. 935; Varley *v.* Title Guarantee Co., 60 Ill. App. 565.

Indiana. — Cecil *v.* Mix, 6 Ind. 478.

Iowa. — Veach *v.* Thompson, 15 Iowa 380; Conger *v.* Babbet, 67 Iowa 13, 24 N. W. 569.

Kansas. — Sarbach *v.* Jones, 20 Kan. 497; Talley *v.* Burtis, 45 Kan. 147, 25 Pac. 603; Fullerton *v.* Hill, 48 Kan. 558, 29 Pac. 583, 18 L. R. A. 33.

Kentucky. — Arnold *v.* Bryant, 8 Bush 668.

Louisiana. — O'Leary *v.* Martin, 21 La. Ann. 389; Rogers *v.* Gibbs, 24 La. Ann. 467.

Maine. — Woodman *v.* Boothby, 66 Me. 389; Rice *v.* Cook, 71 Me. 559; First Nat. Bank *v.* Marshall, 73 Me. 79.

Maryland. — Owings *v.* Baker, 54 Md. 82, 39 Am. Rep. 353; Schroeder *v.* Turner, 68 Md. 506, 13 Atl. 331.

Massachusetts. — Gilson *v.* Stevens Mach. Co., 124 Mass. 546; Woods *v.* Woods, 127 Mass. 141; Spaulding *v.* Putnam, 128 Mass. 363.

Michigan. — J. A. Fay & Co. *v.* James Jenks & Co., 78 Mich. 312, 44 N. W. 380; Gumz *v.* Giegling, 108 Mich. 295, 66 N. W. 48.

Minnesota. — Wolford *v.* Bowen, 57 Minn. 267, 59 N. W. 195; Schultz *v.* Howard, 63 Minn. 196, 65 N. W. 363.

Mississippi. — Polkinghorne *v.* Hendricks, 61 Miss. 366.

Missouri. — Semple *v.* Turner, 65 Mo. 696; Schmidt Malting Co. *v.* Miller, 38 Mo. App. 251.

Nebraska. — Salisbury *v.* First Nat. Bank, 37 Neb. 872, 56 N. W. 727, 40 Am. St. Rep. 527.

Nevada. — Van Doren *v.* Tjader, 1 Nev. 380.

New Hampshire. — Martin *v.* Boyd, 11 N. H. 385, 35 Am. Dec. 501; Currier *v.* Fellows, 27 N. H. 366.

New York. — Luqueer *v.* Prosser, 1 Hill 256; Boyd *v.* Finnegan, 3 Daly 222.

North Carolina. — Johnson *v.* Hooker, 2 Jones Law 29; Baker *v.* Robinson, 63 N. C. 191; Hoffman *v.* Moore, 82 N. C. 313.

Ohio. — Wallace *v.* Jewell, 21 Ohio St. 163, 8 Am. Rep. 48; Castle *v.* Rickly, 44 Ohio St. 490, 9 N. E. 136, 58 Am. Rep. 839.

Pennsylvania. — Schollenberger *v.* Nehf, 28 Pa. St. 189; Heilbruner, *v.* Wayte, 51 Pa. St. 259.

the maker presents paper drawn to his own order bearing the indorsement of a third person, such indorsement is presumptive evidence of accommodation for the maker.[19] Parol evidence is admissible to show the character of the undertaking of a third party other than the payee, whose name appears upon the back of the note when delivered, and to overcome the presumption arising therefrom.[20]

Rhode Island. — Perkins *v.* Barstow, 6 R. I. 505; Carpenter *v.* McLaughlin, 12 R. I. 270, 34 Am. Rep. 638.

South Carolina. — Baker *v.* Scott, 5 Rich. Law 305; Carpenter *v.* Oaks, 10 Rich. Law 17; McCreary *v.* Bird, 12 Rich. Law 554; Johnston *v.* McDonald, 41 S. C. 81, 19 S. E. 65.

Tennessee. — Iser *v.* Cohen, 1 Baxt. 421; Harding *v.* Waters, 6 Lea 324; Bank of Jamaica *v.* Jefferson, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100.

Texas. — Horton *v.* Manning, 37 Tex. 23; Barton *v.* Am. Nat. Bank, 8 Tex. Civ. App. 223, 29 S. W. 210.

Utah. — McGee *v.* Connor, 1 Utah 92.

Vermont. — Brooks *v.* Thacher, 52 Vt. 559; National Bank *v.* Dorset Marble Co., 61 Vt. 106, 17 Atl. 42.

Virginia. — Watson *v.* Hurt, 6 Gratt. 633.

Washington. — Donohoe, Kelly B. Co. *v.* Puget Sound Sav. Bank, 13 Wash. 407, 43 Pac. 359, 942.

West Virginia. — Burton *v.* Hansford, 10 W. Va. 470, 27 Am. Rep. 571.

Presumption As to Indorsement. In some of the states, by virtue of statutes or judicial decisions, the presumed liability of a third party indorsing a note before delivery is that of an indorser who is entitled to notice in the absence of proof of an agreement to the contrary.

Alabama. — Milton *v.* De Yampert, 3 Ala. 648; Hooks *v.* Anderson, 58 Ala. 238, 29 Am. Rep. 745.

California. — Jones *v.* Goodwin, 39 Cal. 493, 2 Am. Rep. 473; Fessenden *v.* Summers, 62 Cal. 484; Fisk *v.* Miller, 63 Cal. 367.

Indiana. — Browning *v.* Merritt, 61 Ind. 425; Kealing *v.* Van Sickle, 74 Ind. 529, 39 Am. Rep. 101; Moorman *v.* Wood, 117 Ind. 144, 19 N. E. 739.

New York. — Dean *v.* Hall, 17 Wend. 214; Waterbury *v.* Sinclair, 7 Abb. Pr. 399; Haviland *v.* Haviland, 14 Hun 627.

Oregon. — Kamm *v.* Holland, 2 Or. 59; Cogswell *v.* Hayden, 5 Or. 22; Wade *v.* Creighton, 25 Or. 455, 36 Pac. 289.

Pennsylvania. — Kyner *v.* Shower, 13 Pa. St. 444; Fegenbush *v.* Lang, 28 Pa. St. 193.

Wisconsin. — Heath *v.* Van Cott, 9 Wis. 516; Davis *v.* Barron, 13 Wis. 227.

19. Hendrie *v.* Berkowitz, 37 Cal. 113, 49 Am. Dec. 251; Satterfield *v.* Compton, 6 Rob. (La.) 120; Heffron *v.* Hanaford, 40 Mich. 305; Bloom *v.* Helm, 53 Miss. 21; Stall *v.* Catskill Bank, 18 Wend. (N. Y.) 466; Erwin *v.* Shaffer, 9 Ohio St. 43, 72 Am. Dec. 613; Bowman *v.* Cecil Bank, 3 Grant's Cas. (Pa.) 33; Overton *v.* Hardin, 6 Cold. (Tenn.) 375.

20. *United States.*—Rey *v.* Simpson, 22 How. 341.

Connecticut. — Perkins *v.* Catlin, 11 Conn. 262, 29 Am. Dec. 282; Dale *v.* Gear, 38 Conn. 15, 9 Am. Rep. 353.

Georgia. — Neal *v.* Wilson, 79 Ga. 736, 5 S. E. 54.

Illinois. — Kingsland *v.* Koeppe, 35 Ill. App. 81, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649; Featherstone *v.* Hendrick, 59 Ill. App. 497.

Indiana. — Stack *v.* Beach, 74 Ind. 571, 39 Am. Rep. 113; Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727.

Kansas. — Fullerton *v.* Hill, 48 Kan. 558, 29 Pac. 583, 18 L. R. A. 33.

Kentucky. — Levi *v.* Mendell, 1 Duv. 77.

Maine. — Sturtevant *v.* Randall, 53 Me. 149.

Maryland. — Third Nat. Bank *v.* Lange, 51 Md. 138, 34 Am. Rep. 304; Owings *v.* Baker, 54 Md. 82, 39 Am. Rep. 353.

Massachusetts.—Ulen *v.* Kittredge,

2. Competency of Witnesses. — Formerly it was generally held and is still the rule in many courts that a party to a negotiable instrument, who has given it currency, is not competent as a witness, after it has been negotiated, to impeach its original validity.[21] But

7 Mass. 233; Riley *v.* Gerrish, 9 Cush. 104.

Minnesota. — Winslow *v.* Boyden, 1 Minn. 383; McComb *v.* Thompson, 2 Minn. 139, 72 Am. Dec. 84.

Mississippi. — Jennings *v.* Thomas, 13 Smed. & M. 617; Richardson *v.* Foster, 73 Miss. 12, 18 So. 573.

Missouri. — Lewis *v.* Harvey, 18 Mo. 74, 59 Am. Dec. 286; Faulkner *v.* Faulkner, 73 Mo. 327.

New Jersey. — Chaddock *v.* Vanness, 35 N. J. Law 517, 10 Am. Rep. 256.

New York. — Nelson *v.* Dubois, 13 Johns. 175; Coulter *v.* Richmond, 59 N. Y. 478; Ubelhoer *v.* Straub, 19 Alb. Law J. 400; Wyckoff *v.* Wilson, 30 N. Y. St. 384, 9 N. Y. Supp. 628.

North Carolina. — Hoffman *v.* Moore, 82 N. C. 313.

Ohio. — Bright *v.* Carpenter, 9 Ohio 139, 34 Am. Dec. 432.

Oregon. — Deering *v.* Creighton, 19 Or. 118, 24 Pac. 198, 20 Am. St. Rep. 800.

Texas. — Cook *v.* Southwick, 9 Tex. 615, 60 Am. Dec. 181; Hueske *v.* Broussard, 55 Tex. 201; Barton *v.* Am. Nat. Bank, 8 Tex. Civ. App. 223, 29 S. W. 210.

Vermont. — Strong *v.* Ricker, 16 Vt. 554; Sanford *v.* Norton, 17 Vt. 285.

West Virginia. — Burton *v.* Hansford, 10 W. Va. 470, 27 Am. Rep. 571.

Wisconsin. — Cady *v.* Shepard, 12 Wis. 639.

21. *United States.* — Bank of U. S. *v.* Dunn, 6 Pet. 51; Bank of Metropolis *v.* Jones, 8 Pet. 12; Smyth *v.* Strader, 4 How. 404; Saltmarsh *v.* Tuthill, 13 How. 229.

Alabama. — Ross *v.* Wells, 1 Stew. 139.

District of Columbia. — Eastwood *v.* Creecy, 1 MacArthur 232.

Illinois. — Walters *v.* Witherell, 43 Ill. 388.

Maine. — Clapp *v.* Hanson, 15 Me. 345; Lincoln *v.* Fitch, 42 Me. 456.

Massachusetts. — Parker *v.* Lovejoy, 3 Mass. 565; Packard *v.* Richardson, 17 Mass. 122, 9 Am. Dec. 123.

Mississippi. — Partee *v.* Silliman, 44 Miss. 272.

New Hampshire. — Houghton *v.* Page, 1 N. H. 60.

New York. — Winton *v.* Saidler, 3 Johns. Cas. 185; Coleman *v.* Wise, 2 Johns. 165; Skilding *v.* Warren, 15 Johns. 270; Mann *v.* Swann, 14 Johns. 270.

Pennsylvania. — Harrisburg Bank *v.* Forster, 8 Watts 304; Rosenberger *v.* Bitting, 15 Pa. St. 278; Harding *v.* Mott, 20 Pa. St. 469.

Wisconsin. — Dunbar *v.* Breese, 1 Pinn. 109

The rule was based on Walton *v.* Shelley, 1 J. R. 296, *overruled* in Jordaine *v.* Lashbrooke, 7 L. R. 599, and no longer authority in England. The rule stated in the text is supported as shown by a large number of cases, but few of them are recent; the tendency is away from the rule; it has been vigorously denounced by text writers; has been abolished by statute in some jurisdictions, never admitted in others, and discarded by the courts in later cases in still others. See the following cases: Bank *v.* Rhoads, 89 Pa. St. 353; Taylor *v.* Beck, 3 Rand. (Va.) 316; Orr *v.* Lacey, 2 Doug. (Mich.) 230; Ringgold *v.* Tyson, 3 Har. & J. (Md.) 172; Jackson *v.* Packer, 13 Conn. 342; Gorham *v.* Carroll, 3 Litt. (Ky.) 221; Haines *v.* Dennett, 11 N. H. 180; Freeman *v.* Britton, 2 Harr. (Del.) 191; St. John *v.* McConnell, 19 Mo. 38; Stafford *v.* Rice, 5 Cow. (N. Y) 23; Bank *v.* Hillard, 5 Cow. (N. Y.) 153; Griffin *v.* Harris, 9 Port. (Ala.) 225; Parsons *v.* Phipps, 4 Tex. 341; Pecker *v.* Sawyer, 24 Vt. 459; Guy *v.* Hull, 3 Murph. (N. C.) 150; Bank *v.* Hull, 7 Mo. 273; Knight *v.* Packard, 3 McCord (S. C.) 71.

Limits of Rule. — The rule that the original validity of negotiable paper can not be impeached by a party thereto, is confined to negotia-

payment,[22] and other facts arising subsequent to the execution of the note, though destroying the title of the holder or avoiding the note,[23] may be proved by a party to the note.

3. Bills and Notes as Evidence. — A. IDENTIFICATION. — A bill of exchange may be identified by the deposition of the deputy of a notary, and an authenticated copy of the notarial register.[24] Notes may be identified as to dates, amounts, and circumstances, upon the testimony of illiterate persons who saw like notes signed, but do not recognize them.[25] Parol evidence is admissible to identify a note offered in evidence as being the one secured by a mortgage or deed of trust, though varying from the description contained therein,[26]

ble instruments only, and to such of them as have been actually negotiated in the usual course of business before maturity. Rohrer *v.* Morningstar, 18 Ohio 579; Pleasants *v.* Pemberton, 1 Yeates (Pa.) 202; Bearing *v.* Shippen, 2 Binn. (Pa.) 154; McFerran *v.* Powers, 1 Serg. & R. (Pa.) 102; Baird *v.* Cochran, 4 Serg. & R. (Pa.) 397; Hepburn *v.* Cassel, 6 Serg. & R. (Pa.) 113; Parke *v.* Smith, 4 Watts & S. (Pa.) 287; Bradley *v.* Knox, 5 Cranch C. C. 297, 3 Fed. Cas. No. 1782. The maker is a competent witness to impeach a dishonored note. Pine *v.* Smith, 11 Gray (Mass.) 38. The payee and indorser of a negotiable note is a competent witness for the maker to prove that the note was not assigned in the due course of trade. Bailey *v.* Cooper, 5 Humph. (Tenn.) 400. The indorser may testify that the note was indorsed after maturity. Baker *v.* Arnold, 1 Caines (N. Y.) 258; Crayton *v.* Collins, 2 McCord (S. C.) 457. One who has indorsed a note "without recourse," not having given any additional security to the note by his indorsement, is competent to impeach the validity. Bradley *v.* Morris, 4 Ill. 182; Watts *v.* Smith, 24 Miss. 77. The rule does not apply to an action by an indorsee against his immediate indorser (Smith *v.* M'Glinchy, 77 Me. 153), nor to an action by an indorsee against the drawer of a bill (State Bank *v.* Seawell, 18 Ala. 616), and in such actions the original validity of the instrument may be impeached by a party thereto. Where an action is brought by a holder in the name of the payee, the payee is competent witness for the defendant. Johnson *v.* Balckman, 11 Conn. 342. Where the signature of a married woman is a nullity in law, she is competent to impeach the note. Kiefer *v.* Carnsi, 7 D. C. 156.

22. *Maine.* — Franklin *v.* Pratt, 31 Me. 501.

Maryland. — Ringgold *v.* Tyson, 3 Har. & J. 172.

Massachusetts. — Thayer *v.* Crossman, 1 Metc. 416; American Bank *v.* Jenness, 2 Metc. 288.

Mississippi. — Rauth *v.* Helm, 6 How. 127; Williams *v.* Miller, 10 Smed. & M. 139.

New Hampshire. — Bryant *v.* Ritterbush, 2 N. H. 212.

New Jersey. — Rosevelt *v.* Gardner, 3 N. J. Law 791.

New York. — White *v.* Kibling, 11 Johns. 128.

Pennsylvania. — Appelton *v.* Donaldson, 3 Pa. St. 381; Maynard *v.* Nekervis, 9 Pa. St. 81; Work *v.* Rose, 34 Pa. St. 138.

Vermont. — Taylor *v.* Finley, 48 Vt. 78.

23. Shamburgh *v.* Commagere, 10 Mart. (La.) (O. S.) 18; Buck *v.* Appleton, 14 Me. 284; Warren *v.* Merry, 3 Mass. 27; Parker *v.* Hanson, 7 Mass. 470; Hubbly *v.* Brown, 16 Johns. (N. Y.) 70; McFadder *v.* Maxwell, 17 Johns. (N. Y.) 188; Meyers *v.* Palmer, 18 Johns. (N. Y.) 167; Kirkpatrick *v.* Muirhead, 16 Pa. St. 117; Jones *v.* Matthews, 8 Lea (Tenn.) 84, 41 Am. Rep. 633.

24. Johnson *v.* Cocks, 12 Ark. 672.

25. Moore *v.* Morris, 26 Ga. 649.

26. *Alabama.* — Posey *v.* Decatur

and to show that two notes of different dates were for the purchase money of a single sale under one contract.[27]

B. Production of Instrument. — a. *Profert and Oyer.* — Profert of the instrument sued upon should be made,[28] and when oyer is asked and given, the instrument becomes part of the record.[29]

b. *Production at Hearing.* — If the possession of the instrument is within plaintiff's control, he is bound to produce it in court at the hearing.[30] Otherwise he must account for and excuse its non-production.[31]

Bank, 12 Ala. 802; Morrison *v.* Taylor, 21 Ala. 779.

Georgia. — Kiser *v.* Carrollton D. G. Co., 96 Ga. 760, 22 S. E. 303.

Maine. — Sweetser *v.* Lowell, 33 Me. 446; Williams *v.* Hilton, 35 Me. 547, 58 Am. Dec. 729; Hoey *v.* Candage, 61 Me. 257; Stowe *v.* Merrill, 77 Me. 550, 1 Atl. 684.

Massachusetts. — Goddard *v.* Sawyer, 9 Allen 78; Payson *v.* Lamson, 134 Mass. 593, 45 Am. Rep. 348; Bigelow *v.* Capen, 145 Mass. 270, 13 N. E. 896.

Michigan. — Cutler *v.* Steele, 93 Mich. 204, 53 N. W. 521.

Missouri. — Aull *v.* Lee, 61 Mo. 160; Williams *v.* Moniteau Nat. Bank, 72 Mo. 292.

New Hampshire. — Somersworth Sav. Bank *v.* Roberts, 38 N. H. 22; Cushman *v.* Luther, 53 N. H. 562; Benton *v.* Sumner, 57 N. H. 117.

New York. — Delaplaine *v.* Hitchcock, 6 Hill 14; McKinster *v.* Babcock, 26 N. Y. 378; Bambridge *v.* Richmond, 17 Hun 391.

Tennessee. — Fitzpatrick *v.* School Com'rs., 7 Humph. 224, 46 Am. Dec. 76; Stanford *v.* Andrews, 12 Heisk. 664.

Texas. — Aycock *v.* Trammell, 77 Tex. 487, 14 S. W. 147.

Wisconsin. — Paine *v.* Benton, 32 Wis. 491.

27. Reader *v.* Helm, 57 Ala. 440.

28. Beebe *v.* Real Estate Bank, 4 Ark. 124; Buckner *v.* Real Estate Bank, 4 Ark. 440; Hynson *v.* Ruddell, 11 Ark. 33; Smith *v.* Simms, 9 Ga. 418; Everly *v.* Marable, 2 Yerg. (Tenn.) 113; Anderson *v.* Allison, 2 Head (Tenn.) 122; Williams *v.* Bryan, 5 Cold. (Tenn.) 104.

29. Chapman *v.* Harper, 7 Blackf. (Ind.) 333; Edwards *v.* Weister, 2 A. K. Marsh. (Ky.) 382; Tuggle *v.* Adams, 3 A. K. Marsh. (Ky.) 429.

Duty of Plaintiff. — The plaintiff must give oyer when asked for. Mason *v.* Buckmaster, 1 Ill. 27.

Order for Inspection. — Where the defendant has denied the signature to the note, the court may require plaintiff to file it in court for defendant's inspection. Smyth *v.* Caswell, 67 Tex. 567, 4 S. W. 848.

30. *United States.* — Morgan *v.* Reintzel, 7 Cranch 273.

Alabama. — Bird *v.* Daniel, 9 Ala. 302.

Illinois. — Hodgen *v.* Latham, 30 Ill. 188; Dowden *v.* Wilson, 71 Ill. 485.

Iowa. — Brandt *v.* Foster, 5 Iowa 287.

Louisiana. — Foltier *v.* Schroder, 19 La. Ann. 17, 92 Am. Dec. 521.

Minnesota. — Armstrong *v.* Lewis, 14 Minn. 406.

Mississippi. — Pipes *v.* Norton, 47 Miss. 61.

New Jersey.—Vanauken *v.* Hornbeck, 14 N. J. Law 178, 25 Am. Dec. 509.

New York. — Van Alstyne *v.* Nat. Com. Bank, 4 Abb. Dec. 449.

North Carolina. — Morrow *v.* Allman, 65 N. C. 508; Snields *v.* Whitaker, 82 N. C. 516.

Ohio. — Burridge *v.* Geauga Bank, Wright, 688.

Texas. — Armstrong *v.* Lipscomb, 11 Tex. 649.

31. *United States.* — Palmer *v.* Blight, 2 Wash. C. C. 96, 18 Fed. Cas. No. 10,684.

Illinois. — O'Neil *v.* O'Neil, 123 Ill. 361, 14 N. E. 844.

Indiana. — Briggs *v.* McCabe, 27 Ind. 327, 89 Am. Dec. 503.

C. Use as Evidence. — a. *Admissibility in General.* — A bill or note is admissible in evidence without proof of the signature, if not properly denied,[32] and where it is denied, slight proof of the signature is sufficient to justify its admission in evidence.[33] In an action upon a renewal note, the original note is admissible in evidence.[34] When the action is upon an old note which has been renewed, the renewed note must be produced in court, if not previously delivered up.[35] Prior notes are admissible in evidence, whenever relevant to the issue.[36] Bills and notes are admissible in evidence

Maryland. — Trundle *v.* Williams, 4 Gill 313.

Missouri. — Bank of Commerce *v.* Hoeber, 8 Mo. App. 171.

Nevada. — McClusky *v.* Gerhauser, 2 Nev. 47.

New York. — Clift *v.* Moses, 112 N. Y. 426, 20 N. E. 392.

Texas. — Armstrong *v.* Lipscomb, 11 Tex. 649.

Wisconsin. — Barnham *v.* Mitchell, 34 Wis. 117.

Proof Required. — Where the note is not produced, the proof must show the existence of a note corresponding to the one set forth in the declaration. Perkins *v.* Cushman, 44 Me. 484.

32. *Arkansas.* — Richardson *v.* Comstock, 21 Ark. 69.

California. — Corcoran *v.* Doll, 32 Cal. 82.

Georgia. — Hayes *v.* Hamilton, 68 Ga. 833; Lowe Bros. Cracker Co. *v.* Ginn, 94 Ga. 408, 20 S. E. 106.

Illinois — Dwight *v.* Newell, 15 Ill. 333; Frye *v.* Menkins, 15 Ill. 339.

Indiana. — Wallace *v.* Reed, 70 Ind. 263; Potter *v.* Earnest, 51 Ind. 384; Talbott *v.* Kennedy, 76 Ind. 282.

Iowa. — Seachrist *v.* Griffeth, 6 Iowa 390; Dickey *v.* Baker (Iowa), 41 N. W. 24.

Michigan. — Freeman *v.* Ellison, 37 Mich. 459; Reyerson *v.* Tourcotte, 121 Mich. 78, 79 N. W. 933.

Missouri. — Labeaume *v.* Labeaume, 1 Mo. 487; Smith Middlings Purifier Co. *v.* Rembaugh, 21 Mo. App. 390.

Tennessee. — Barrett *v.* Hambright, 4 Sneed 586.

Texas. — Kinnard *v.* Herlock, 20 Tex. 48; Davis *v.* Marshall, 25 Tex. 372; San Antonio & A. P. R. Co. *v.* Harrison, 72 Tex. 478, 10 S. W. 556.

33. *Alabama.* — Catlin *v.* Gilders, 3 Ala. 536; Morris *v.* Varner, 32 Ala. 499.

Georgia. — Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43; Jewell *v.* Walker, 109 Ga. 241, 34 S. E. 337.

Illinois. — Melville *v.* Hodges, 71 Ill. 422.

Indiana. — Pate *v.* First Nat. Bank, 63 Ind. 254; Roatan *v.* Stoeber, 81 Ind. 145.

Louisiana. — Mandere *v.* Bonsignore, 28 La. Ann. 521.

Michigan. — Hunter *v.* Parsons, 22 Mich. 196.

New Hampshire. — Blodgett *v.* Jackson, 40 N. H. 21.

New Jersey. — Suydam *v.* Combs, 15 N. J. Law 133.

Pennsylvania. — Irvine *v.* Lumberman's Bank, 2 Watts & S. 190.

Wisconsin. — Holmes *v.* Cook, 50 Wis. 172, 6 N. W. 507.

34. Reed *v.* Bacon, 175 Mass. 407, 56 N. E. 716.

Substituted Instruments. — Where negotiable notes sued upon were executed in lieu of outstanding negotiable notes of the same maker, the action can not be maintained unless the outstanding notes are produced and surrendered. Garner *v.* Cohen, 99 Ga. 78, 24 S. E. 851; Iglehart *v.* Jernegan, 16 Ill. 513.

35. Plicque *v.* Perret, 19 La. (O. S.) 318; Rieder *v.* Theurer, 6 Rob. (La.) 375; Whitton *v.* May, 114 Mass. 179; Miller *v.* Woods, 21 Ohio St. 485, 5 Am. Rep. 71.

36. Weaver *v.* Lapsley, 42 Ala. 601, 14 Am. Dec. 671; Little *v.* Rogers, 99 Ga. 95, 24 S. E. 856; Thorp *v.* Goeway, 85 Ill. 611; Kaestner *v.* First Nat. Bank, 170 Ill. 322, 48 N. E. 998; Louden *v.* Vinton, 108 Mich. 313, 66 N. W. 222.

under the common counts in assumpsit, regardless of their inadmissibility under a special count.[37] For admissibility under Internal Revenue Laws, see "Stamp Acts."

37. *United States.* — Frazer *v.* Carpenter, 2 McLean 235, 9 Fed. Cas. No. 5069; Hopkins *v.* Orr, 124 U. S. 510, 8 Sup. Ct. 590; Gormley *v.* Bunyan, 138 U. S. 623, 11 Sup. Ct. 453.

Alabama. — Catlin *v.* Gilders, 3 Ala. 536; Hopper *v.* Eiland, 21 Ala. 714; Talladega Ins. Co. *v.* Landen, 43 Ala. 115.

Arkansas. — Henry *v.* Hazen, 5 Ark. 401; Jordan *v.* Ford, 7 Ark. 416.

Connecticut. — White *v.* Brown, 19 Conn. 577; Farmers' and Citizens' Bank *v.* Payne, 25 Conn. 444, 68 Am. Dec. 362; Vila *v.* Weston, 33 Conn. 42.

Illinois. — Boxberger *v.* Scott, 88 Ill. 477; Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 166; Johnson *v.* Glover, 19 Ill. App. 585; Thayer *v.* Peck, 93 Ill. 357.

Indiana. — Indianapolis Ins. Co. *v.* Brown, 6 Blackf. 378.

Iowa. — Knight *v.* Fox, 1 Morris 305; King *v.* Wall, 1 Morris 187.

Maryland. — Emerson *v.* C. Aultman & Co., 69 Md. 125, 14 Atl. 671; McCann *v.* Preston, 79 Md. 223, 28 Atl. 1102.

Massachusetts. — Goodwin *v.* Morse, 9 Metc. 278; Moore *v.* Moore, 9 Metc. 417; Tebbetts *v.* Pickering, 5 Cush. 83, 51 Am. Dec. 48; Wells *v.* Brigham, 6 Cush. 6, 52 Am. Dec. 750.

Michigan. — Michael *v.* Tuttle, 37 Mich. 502; Port Huron & S. W. R. Co. *v.* Potter, 55 Mich. 627, 22 N. W. 70; Conrad Seipp Brewing Co. *v.* McKittrick, 86 Mich. 191, 48 N. W. 1086.

Mississippi. — Hughes *v.* Grand Gulf Bank, 2 Smed. & M. 115; Dowell *v.* Brown, 13 Smed. & M. 43.

New Hampshire. — Tenney *v.* Sanborn, 5 N. H. 557.

New Jersey. — N. J. Mfg. & B. Co. *v.* Myer, 12 N. J. Law 141.

New Mexico. — Orr *v.* Hopkins, 3 N. M. 45, 1 Pac. 181.

New York. — McClellan *v.* Anthony, 1 Edw. Sel. Cas. 284; Bradford *v.* Martin, 3 Sandf. 647; Bradford *v.* Corey, 5 Barb. 461; Spear *v.* Myers, 6 Barb. 445; Rockefeller *v.* Robinson, 17 Wend. 206; Purdy *v.* Vermilya, 8 N. Y. 346.

North Carolina. — Jones *v.* Cannady, 4 Dev. Law 86; Smith *v.* Bryan, 11 Ired. Law 418.

Ohio. — Hart *v.* Ayres, 9 Ohio 5; Mitchell *v.* McCabe, 10 Ohio 405; Colville *v.* Gilbert, 1 Ohio Dec. 526.

Pennsylvania. — Williams *v.* Hood, 8 Leg. Int. 111.

South Carolina. — Mathews *v.* Fogg, 1 Rich. Law 369, 44 Am. Dec. 257; Haviland *v.* Simons, 4 Rich. Law 338; Barnes *v.* Gorman, 9 Rich. Law 297.

Vermont. — Brigham *v.* Hutchins, 27 Vt. 569; Hawley *v.* Hurd, 56 Vt. 617.

West Virginia.—Walker *v.* Henry, 36 W. Va. 100, 14 S. E. 440.

Wisconsin. — Dart *v.* Sherwood, 7 Wis. 446, 76 Am. Dec. 228.

BILL TO PERPETUATE TESTIMONY.—See Depositions.

BILL TO TAKE TESTIMONY DE BENE ESSE.—See Depositions.

BINDING OVER.—See Attendance of Witnesses; Surety of Peace.

BIRTH.—See Age; Pedigree.

BLACKLIST.—See Conspiracy; Master and Servant.

BLACKMAIL.—See Extortion.

BLANKS.—See Acknowledgments; Alteration of Instruments; Bills and Notes; Bonds; Deeds; Forgery.

BLIND.—See Competency.

BLOODSTAINS.

By A. B. Young.

I. EVIDENCE RESPECTING.

1. On Person, Competent.— The presence of blood stains upon the person or clothing of one accused of bloodshedding is universally held competent evidence in support of the charge laid.[1]

1. *Alabama.* — White *v.* State, 133 Ala. 122, 32 So. 139.
California. — People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295.
Georgia. — Thomas *v.* State, 67 Ga. 460; Drake *v.* State, 75 Ga. 413; Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.
Indiana. — Beavers *v.* State, 58 Ind. 530.
Maine. — State *v.* Knight, 43 Me. 11.
Massachusetts. — Com. *v.* Sturtivant, 117 Mass. 122; Com. *v.* Dorsey, 103 Mass. 412.
Mississippi. — Dillard *v.* State, 58 Miss. 368.
Missouri. — State *v.* Stair, 87 Mo. 268, 56 Am. Rep. 449.
New York. — Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636;

2. On Premises and Movable Property. — And it is also competent to show the presence of blood and blood stains upon premises and movable property with which one dying from violence, is shown to have then recently been associated.[2]

3. On Weapons and Instruments. — The same principles and rules apply as respects blood stains upon weapons and instruments employed in the commission of a crime.[3]

People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604.

Pennsylvania. — McLain *v.* Commonwealth, 99 Pa. St. 86.

Tennessee. — Green *v.* State, 97 Tenn. 50, 36 S. W. 700.

Texas. — Moffatt *v.* State, 35 Tex. Crim. App. 257, 33 S. W. 344, 53 Am. St. Rep. 714.

West Virginia. — State *v.* Henry, 51 W. Va. 283, 41 S. E. 439; State *v.* Welch, 36 W. Va. 690, 15 S. E. 419; State *v.* Baker, 33 W. Va. 319, 10 S. E. 639.

Blood Stains Always Ordinary Indicia of Homicide. — Stains of blood found upon the person or clothing of an accused have always been recognized as among the ordinary *indicia* of homicide. People *v.* Gonzalez, 35 N. Y. 49.

2. State *v.* Knight, 43 Me. 11; People *v.* Deacons, 109 N. Y. 374, 16 N. E. 676; Dinsmore *v.* State, 61 Neb. 418, 85 N. W. 445; Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636; O'Mara *v.* Com. 75 Pa. St. 424; People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604.

Evidence of Blood Stains on Property, When Competent. — The testimony of witnesses to the effect that ten hours after the difficulty which resulted in the subsequent death of the deceased they observed spots of blood upon the horse which he was riding when wounded, was held admissible. Dillard *v.* State, 58 Miss. 368.

On Floor of House. — "This piece of floor was offered as a specimen of the stains, supposed to be blood stains, found on the floor of the house. The evidence was competent as a circumstance tending to show the defendant's connection with the death of Peter Polite. The fact that the board was taken from the floor 9 or 10 months after the alleged homicide, and while the house was occupied by another, might tend to weaken the force, but could not affect the competency of the evidence." State *v.* Martin, 47 S. C. 67, 25 S. E. 113.

Evidence was held competent showing that blood was found on different timbers and boards of the barn after the discovery of the body in June, six months after the alleged murder, as it tended to corroborate the statement of a witness as to the manner in which and the course by which the body was taken from the place of killing to the hay loft. So far as the lapse of time detracted from the force of evidence it was for the consideration of the jury. Linsday *v.* People, 63 N. Y. 143.

3. Thomas *v.* State, 67 Ga. 460; McClain *v.* Com. 99 Pa. St. 86; Barbour *v.* Com. 80 Va. 287.

Blood Stains Manifest Upon Weapons, Etc. — Referring to a hammer found in a field adjoining that near which the body was found, the court said: "But the apparent blood stains and hair found on it, and the nature of the wounds, tended to show that it was the instrument with which the killing had been done, and it was proper to go to the jury to have such weight as, in their judgment, it was entitled to." State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

The deceased was killed by a stab in the breast. The State called a physician who testified that a knife, taken from the prisoner after his arrest on the day of the homicide, was examined by him with a glass and seemed stained with a reddish color on the blade. The court said: "Here was no error. In the first place, the

4. On Property Handled by Accused. — And as respects articles of property in possession of an accused directly after a crime has been committed.[4]

5. On Objects Along Route Followed by Accused. — The same rules are applicable with respect to blood and blood stains discovered upon permanent objects on the route on which the evidence may tend to show that accused proceeded from the scene of the crime near the time of its commission.[5]

II. EVIDENCE COMPETENT TO SHOW.

1. By Circumstantial Evidence. — Blood stains may be identified by evidence purely circumstantial.[6]

witness was not giving his opinion as an expert but his opinion based on what he had observed and testified to, which was proper." State *v.* Bradley, 67 Vt. 465, 32 Atl. 238.

4. State *v.* Knight, 43 Me. 11; Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636.

The Stains on Articles of Property Possessed by Accused.— There was evidence tending to show that on the night following the murder the accused removed the body from the barn in which the crime was committed in a sleigh, and sank it in a stream of water. Two days afterwards the sleigh was used in dressing slaughtered hogs. Several months after, boards were taken from the barn and chips from the sleigh and sent to expert, who testified that he had found human blood on the boards, and human blood and that of hogs on some of the chips. The court held the expert testimony admissible, its weight and effect to be determined by the jury. Linsday *v.* People, 63 N. Y. 143.

One accused of murder was accustomed to use a stick which he left, shortly after the crime was committed, at the residence of another, bearing upon it stains apparently of blood. It was held admissible in evidence. Thomas *v.* State, 67 Ga. 460.

5. Linsday *v.* People, 63 N. Y. 143; People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604; Gaines *v.* Com. 50 Pa. St. 319; Richardson *v.* State, 7 Tex. App. 486.

On Objects Along a Given Route. "It also appeared from the evidence that the prisoner, in going from his house to his father's would pass over or near the places where the alleged blood stains were found. . . . There was blood in the house, and that it was found elsewhere in the vicinity where he may have been, evinced, with the disappearance of the coat he wore, that it may have dripped from this garment or some part of his person." Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636.

May Indicate How Dead Body Was Moved. — And from the location of blood and blood stains inferences may arise that a body was moved to a different position after life became extinct. State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

6. Com. *v.* Sturtivant, 117 Mass. 122; Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636; Lindsay *v.* State, 63 N. Y. 143; O'Mara *v.* Com. 75 Pa. St. 424.

May Be Shown by Circumstantial Evidence. — "If there had been no testimony at all from any witness to the effect that the spots upon it appeared to be blood stains, but as a matter of fact, there were spots upon it which might have been made by the blood of the deceased, it was proper for the jury to examine this coat in connection with the circumstances shown by the evidence, and give the fact of the existence of such spots such weight, as in their judgment, it was entitled to under all the circumstances shown by the evi-

2. Articles Subject to Inspection of Jury. — And it is competent to submit all tangible evidence of blood stains to the inspection of the jury.[7]

3. May Be Testified to by Non-experts. — It is not necessary that persons called as witnesses to identify blood stains should possess the qualifications of scientific experts.[8]

dence." State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

7. Thomas *v.* State, 67 Ga. 460; Dillard *v.* State, 58 Miss. 368; Com. *v.* Pope, 103 Mass. 440; People *v.* Gonzalez, 35 N. Y. 49; Udderzook *v.* Com. 76 Pa. St. 340; Omara *v.* Com. 75 Pa. St. 424; State *v.* Baker, 33 W. Va. 319, 10 S. E. 639; Barbour *v.* Com. 80 Va. 287.

Clothing May Be Exhibited to Jury. — It was contended that it was error to permit clothing bearing blood stains to be exhibited to the jury, upon the ground that the accused could not be compelled to furnish evidence against himself. The court held otherwise, and that no constitutional right had been violated. Drake *v.* State, 75 Ga. 413.

"It was as competent for the jury to get this information by their own sight as it was to get it through the medium of witnesses. State *v.* Stair, 87 Mo. 268, 56 Am. Rep. 449.

In exhibiting a blood-stained cotton flannel shirt worn by the accused at the date of the homicide to the jury it was held competent for an expert to point to the fact that a larger proportion of the coloring matter of the blood appeared on the outside surface than that next the skin, as illustrative of an opinion that such was the reverse of what would have appeared had the blood flowed from the arm of the accused. State *v.* Knight, 43 Me. 11.

Evidence Obtained on Inspection When Jurors on Former Trial. — In a case where it was objected that the testimony of two jurors on a former trial was incompetent, the court said: ". . . They say that they saw the bloody print of a hand when the drawers were exhibited at the first trial to the jury, of which they were members, and that the impression of a hand was still on them at the last trial. We know of no law or reason which would prevent a person who has served upon the jury on a previous trial of the case from testifying as to articles, blood stains, etc., which were exhibited to him at that time." Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

8. *California.* — People *v.* Bell, 49 Cal. 485; People *v.* Loui Tung, 90 Cal. 377, 27 Pac. 295.

Florida. — Ganting *v* State, 40 Fla. 237, 23 So. 857.

Georgia. — Thomas *v.* State, 67 Ga. 460; Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

Massachusetts. — Com. *v.* Dorsey, 103 Mass. 412; Com. *v.* Pope, 103 Mass. 440.

Mississippi. — Dillard *v.* State, 58 Miss. 368.

Nebraska. — Dinsmore *v.* State, 61 Neb. 418, 85 N. W. 445.

New York. — People *v.* Burgess, 153 N. Y. 561, 47 N. E. 889; Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636; People *v.* Deacons, 109 N. Y. 374, 16 N. E. 676.

Pennsylvania. — McLain *v.* Com. 99 Pa. St. 86; Gaines *v.* Com. 50 Pa. St. 319.

Texas. — Richardson *v.* State, 7 Tex. App. 487.

Utah. — People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

Virginia. — Barbour *v.* State, 80 Va. 287.

West Virginia. — State *v.* Welch, 36 W. Va. 690, 15 S. E. 419; State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

May Be Proved by Non-expert Witnesses. — Science has added new sources of primary evidence, but it has not displaced those which previously existed. The testimony of the chemist who has analyzed blood, and that of the observer who has merely recognized it, belong to the same legal grade of evidence; and

4. Need Not Be Conclusively Shown to Be Human Blood. — Nor is it necessary that the evidence shall conclusively show that the stains are human blood.[9]

A. Distinctions in Case of Non-expert Witnesses. — Any witness, expert or non-expert, may testify that stains resembled blood, but whether they arose from animal or human blood must oftentimes depend entirely upon the testimony of experts.[10]

though the one may be entitled to much greater weight than the other with the jury, the exclusion of either would be illegal. People *v.* Gonzalez, 35 N. Y. 49.

"It was not necessary for Hyatt to be an expert in order to testify what the stains on the overcoat looked like." State *v.* Robinson, 117 Mo. 649, 23 S. W. 1066.

"Stains or discolored spots were found on the shovel and also on the clothing of the accused. These were subjected to chemical analysis and microscopic examination by different experts. Some succeeded in finding well defined corpuscles, indicating human blood, others failed to find them. It was contended on the part of the accused that human blood could not be distinguished from that of animals by any chemical test or scientific appliance. . . . Nevertheless he charged that if the jury was satisfied of its truth, they might lawfully convict upon proof of the existence of human blood by the testimony of unlearned observers." McLain *v.* Com. 99 Pa. St. 86.

Where Stains are Marked and Recent. — "The existence of blood in large quantities and when the stains are recent and marked, may be distinguished by most persons; and while it is more difficult to discover the character of a few drops or a smaller quantity, it does not necessarily follow that those who from experience and observation have become familiar with the appearance of blood cannot testify to its reality as a matter of fact." Greenfield *v.* People, 85 N. Y. 69, 39 Am. Rep. 636.

9. White *v.* State 133 Ala. 122, 32 So. 139; Dillard *v.* State, 58 Miss. 368; People *v.* Johnson, 140 N. Y. 350, 36 N. E. 604; McClain *v.* Com. 99 Pa. St. 86; State *v.* Martin, 47 S. C. 67, 25 S. E. 113; Green *v.* State, 97 Tenn. 50, 36 S. W. 700; Barbour *v.* Com. 80 Va. 287.

Need Not Be Conclusively Proved to be Human. — "It is not necessary to the competency of such evidence that the spots be first shown by expert testimony and chemical analysis to be blood spots. Its competency was the only thing the court had to do with it; the weight was for the jury and the court was right in permitting it to go to the jury." State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

Comparative Weight of Evidence. "The conclusions of analysis are superior only in degree, not in kind, to those of ordinary observation. . . . In addition to this, analysis was impossible when the case was tried. The stains whether of blood or other substances, had not been preserved. There was then no higher evidence even in degree in existence." Gaines *v.* Com. 50 Pa. St. 319.

Nor That Spots Were in Fact Blood Spots. — "There was no error in refusing the instruction asked by the prisoner as to the duty of the prosecution to prove by scientific analysis that the spots found upon the clothes and person of the prisoner were in fact spots of blood." People *v.* Bell, 49 Cal. 485.

10. People *v.* Deacons, 109 N. Y. 374, 16 N. E. 676; Green *v.* State, 97 Tenn. 50, 36 S. W. 700; State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

Stains and Spots May Be Testified to in Absence of Garment. — It was held competent to show by a witness who saw the clothes of defendant at the time in question, that they had spots and stains on them without producing the clothes or showing any reason for not doing so. Com. *v.* Pope, 103 Mass. 440.

B. Witness May Give Opinion as to Direction Blood Followed. — And an opinion as to the direction in which blood may have been emitted, producing certain stains is admissible, although the witness may never have made any actual experiments of that kind.[11]

5. Experts Permitted Use of Diagrams. — Scientific witnesses testifying to blood stains in cases of homicide are permitted to illustrate their statements by the aid of diagrams and similar aids.[12]

6. Unaccounted for May Incriminate. — The omission of an accused to account for stains upon his person and clothing may be considered by the jury.[13]

III. AS EVIDENCE IN CASES NOT INVOLVING BLOODSHED.

1. Rules Not Confined to Crimes Involving Bloodshed. — The foregoing principles and rules of evidence are not confined to cases involving a charge of bloodshed.[14]

"Any witness, expert or non-expert, may testify that the stains resembled blood." State *v.* Welch, 36 W. Va. 690, 15 S. E. 419.

"The question was not whether it was human blood and no objection was taken on this ground, but what the character of the substance was." Greenfield *v.* People, 85 N. Y. 69 39 Am. Rep. 636.

11. State *v.* Knight, 43 Me. 11; Dinsmore *v.* State, 61 Neb. 418, 85 N. W. 445.

Expert Need Not Have Experimented. — "Blood is a fluid which coagulates and stiffens rapidly when exposed to the air and might therefore more decidedly give indication of its direction. If such indications do appear, there would seem to be no objection that a witness acquainted with the peculiar properties of blood, as the common mind is acquainted with more familiar fluids, should testify to them without having actually seen or made experiment in regard to it." Com. *v.* Sturtivant, 117 Mass. 122.

Contra. — But opinions of experts who assume to speak merely from view of a garment or other object in presence of the jury are not admissible. Dillard *v.* State, 58 Miss. 368.

12. State *v.* Knight, 43 Me. 11.

Experts May Employ Sketches as Illustrative. — Sketches by artists, verified by personal observation, are admissible, showing the location of blood stains on the walls and doors of the premises in which the crime was committed, as serving to explain localities. People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604.

"It is a general rule without contradiction that where the photograph is shown to be a faithful representation of what it purports to reproduce, it is admissible as an appropriate aid to the jury in applying the evidence and this is equally true whether the photograph be of persons, things or places. People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

13. State *v.* Knight, 43 Me. 11; Greenfield *v.* People, 85 N. Y. 69, 39 Am. Rep. 636; Cicely *v.* State, 13 Smed. & M. (Miss.) 203.

14. People *v.* Swist, 136 Cal. 520, 69 Pac. 223.

Blood-Stained Money, Robber Bitten by Victim, Identification. A woman bit the finger of a robber who took five bills from her. Accused, when arrested, three days after, had a wounded finger and four bills in his pocket, upon one of which was a stain. This was held competent as tending to fix the identity of the accused. Com. *v.* Tolliver, 119 Mass. 312.

On Coat of Robber. — Where it is conceded upon the trial of one accused of robbery that there was blood upon the coat of the accused, a witness who saw the defendant shortly after the alleged robbery is comp

IV. EVIDENCE OF EXPERTS.

1. Tests of and Weight to Be Given To. — Testimony of witnesses speaking as experts to the question of blood stains when admitted is to be considered like any other testimony, tried by the same tests, and accorded such weight and credit as the jury may deem it entitled to, viewed in connection with all the evidence in the case.[15]

tent to testify that the blood upon the coat was fresh, without showing himself to be an expert. People *v.* Loui Tung, 90 Cal. 377, 27 Pac 295.

On Clothes of Woman Alleged to Have Been Ravished. — Evidence that stains were found on the underclothing worn by the prosecutrix at the time of an alleged rape upon her is admissible as tending to show that the crime had been committed. State *v.* Montgomery, 79 Iowa 737, 45 N. W. 292; State *v.* Peterson, 110 Iowa 647, 82 N. W. 329.

15. People *v.* Smith, 106 Cal. 73, 39 Pac. 40; State *v.* Miller, 9 Houst. (Del.) 564, 32 Atl. 137; Linsday *v.* People, 63 N. Y. 143; McClain *v.* Com. 99 Pa. St. 86; Com. *v.* Twitchell, 1 Brewster (Pa.) 561; State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

Expert Testimony as to Blood Stains. — *How Treated.* — "If the facts so offered in proof are untrue, their fallacy is to be shown by the evidence of other experts who have made application of their scientific knowledge and experience. The court is required to be learned in the law, and to apply it by instructions to the jury, but to be learned in all matters of science is not required, and such learning, if possessed by the court, cannot, with propriety, be given by it to the jury, nor can it withdraw from them the consideration of scientific fact testified by experts." State *v.* Knight, 43 Me. 11.

Distinction Between Admissibility and Weight. — Physicians testified their opinion that stains on a piece of floor taken from the room 9 or 10 months after a homicide was committed were blood. The court said that the objection, "that it was a mere opinion of said physicians, based upon crude and insufficient analysis," merely affected the sufficiency, and not the admissibility of the evidence. The physicians gave their opinion as experts, after an examination of the stains under a microscope, and after a chemical analysis. The analysis was clearly competent. State *v.* Martin, 47 S. C. 67, 25 S. E. 113.

"This expert, however, did not undertake to state that it was human blood, saying that it was impossible to distinguish between the blood of man and other mammals, as, for instance, the blood of a goat, dog, horse, or cow. He was very positive, however that the stains were produced by blood. Such evidence, while not conclusive, was competent for the consideration of the jury, and in connection with other facts and circumstances may be cogent and convincing that the stains were from the blood of Miles Mitchell." Green *v.* State, 97 Tenn. 50, 36 S. W. 700.

Weight to Be Given To. — It was insisted that the proof of blood stains on the prisoner's clothing lacked the necessary certainty, in view of the evidence that they might have come from the market in which he was in the habit of playing where the blood of animals was dripping and that the expert called by the prosecution refused to swear positively that the stains were human blood. The court said: "I doubt if any scientific ability can surely and with absolute certainty distinguish between the blood corpuscles of man and some animals, under all circumstances. And it rather strengthens confidence in the opinion which Dr. Edson did express, that he refused to turn it into a positive assertion." People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604.

Value Of to Be Determined by the Jury. — "Whether he was an expert or not, and competent to express the opinion he did as to these stains, was a matter addressed to the discretion of the court to determine. He gave it as his opinion, based on his experience in examining blood spots, that they looked like the stains of blood. The force and value of this opinion was open to be combated by other proof that the opinion was worthless, and its value was for the jury to determine in connection with all the evidence." White *v.* State, 133 Ala. 122, 32 So. 139.

BONA FIDES.—See Good Faith and Bad Faith.

BONDS.

I. INTRODUCTORY.

1. General Rules and Presumptions. —The general rules governing the admissibility of evidence to sustain or defeat an action on a specialty, apply alike to all classes of bonds—public, indemnity, penal, and monetary.

2. Federal Regulations. — A. General Provisions. — Congress, by various statutes, passed at different times,[1] has provided that transcripts of the books and records of the treasury department, and other departments of the Federal government, shall be admissible in evidence against various officers in actions on their bonds for delinquency; and these provisions apply to actions against the sureties, as well as to actions against the principal.[2]

Where the Item Charged Against the Principal did not come into his hands in the regular course of business, the charge of that item can not be sustained by such transcript.[3]

II. EVIDENCE ADMISSIBLE UNDER PLEADINGS.

1. In General. — A. Plaintiff's Pleading and Proof. — The plaintiff has the burden of showing, by proper and adequate proof, the breach alleged, in strict accordance with the declaration;[4] and where the action is upon a penal bond, must allege and prove damages.[5]

1. See U. S. Comp. Stat., (West's ed. 1901), Vol. I, § 886, *et seq.*

2. U. S. *v.* Stone, 106 U. S. 525; U. S. *v.* Gaussen, 19 Wall. (U. S.) 198; Bruce *v.* U. S., 17 How. (U. S.) 437; Chadwick *v.* U. S., 3 Fed. 750; Postmaster-General *v.* Rice, 1 Gilp. 554, 19 Fed. Cas. No. 11,312. *See* the article "Public Documents."

3. **Item Not Received in Regular Course of Business.** — A transcript of the books is not evidence of such transaction. Bruce *v.* U. S. 17 How. (U. S.) 437; U. S. *v.* Buford 3 Pet. (U. S.) 12; U. S. *v.* Jones, 8 Pet. (U. S.) 387.

4. See, generally, *post,* III.

Action on County Treasurer's Bond, the plaintiff is not required to show how much of the various funds in which there is a deficit had been received and disbursed by the treasurer before the execution of the bond; this is a matter for the defense. Board of Com'rs Harvey Co. *v.* Munger, 24 Kan. 205.

On Township Treasurer's Bond. Declaration that a township treasurer has received from the county collector a specified sum of money belonging to a district, is not supported by evidence that he had received coupons upon the district's bonds. Humiston *v.* School Trustees, 7 Ill. App. 122.

Statement Rendered, or report made, by principal *prima facie* evidence.

5. Kelly *v.* Seay, 3 Okla. 527, 41 Pac. 615. See *post,* IV.

B. Admissibility of Bond. — Where the execution and validity of the bond, which is the foundation of the action, are not put in issue by the plea of the defendant, the bond is admissible on the part of the plaintiff,[6] even though it was executed without statutory authority,[7] or has interlineations,[8] or erasures,[9] which the plaintiff does not account for.

C. Proof of Signature. — Proof that the signature of the obligor is genuine raises the presumption that he executed the bond by sealing and delivering it,[10] and the bond is admissible on behalf of the plaintiff.[11]

Proof of Handwriting of the obligor,[12] or of subscribing witnesses, they being dead,[13] is sufficient to take the cause to the jury.

D. Where Several Defendants. — *Joinder in Plea.* — Where the defendants all join in a plea of *non est factum* to an action on a joint and several obligation, and the signature of one of the defendants is proved, it is proper to permit such proof to go to the jury as against such defendant, but not as to the other defendants.[14]

6. See *post,* IV, 2.

7. Byron *v.* Kelly, 85 Ala. 569, 5 So. 346.

Executed Without Statutory Authority a bond may be good as a common law bond, but consideration must be proved.

8. Whitsett *v.* Womack, 8 Ala. 466.

9. White S. Mach. Co. *v.* Fargo, 51 Hun 636, 3 N. Y. Supp. 494.

10. Manning *v.* Norwood, 1 Ala. 429. See *post,* IV, 2 & 3.

11. Pritchett *v.* People, 6 Ill. 525; Cully *v.* People, 73 Ill. App. 501; Conner *v.* Fleshman, 4 W. Va. 693.

In Debt Against Two of the Three Obligors on a Joint and Several Bond, the bond is admissible in evidence to sustain the issue on the part of the plaintiff raised by the pleas of *non est factum.* Webber *v.* Libby, 70 Me. 412.

12. Fogg *v.* Dennis, 3 Humph. (Tenn.) 47.

13. Weight of Evidence for Jury. Where the plaintiff offered proof of the handwriting of the subscribing witness to the bond, and that the said witnesses were dead, the court held that it was not conclusive evidence to maintain the issue on the part of the plaintiff, and left it to the jury to determine the weight of such evidence. Bogle *v.* Sullivant, 1 Call (Va.) 561.

14. Kuykendall *v.* Ruckman, 2 W. Va. 332.

Where one only of several co-obligors answers and pleads *non est factum,* it is not competent for the plaintiff to prove that the defendant and another of the obligors are warm personal friends, nor that all the co-obligors of the contesting defendant are men of good character. Heileg *v.* Dumas, 65 N. C. 214.

Acts and Agreement at Time of Signing. — Under the plea of *non est factum* defendants may testify as to what was said and done at the time they signed the bond, as the fact of its execution by them could be ascertained in no better way. State *v.* Gregory, 132 Ind. 387, 31 N. E. 952.

Illiteracy of Obligor — Surrounding Circumstances. — In an action against the representatives of the obligor, on a plea of *non est factum,* evidence that he was an illiterate German; that the subscribing witnesses, at the time it was alleged to have been executed, lived sixty miles off, in another state; that they and the plaintiff were of general bad character; and that many persons of good character, who spoke both German and English, lived in the obligor's neighborhood when the bond was alleged to have been executed,—were held to be circumstances

E. Breach. — a. *Breach of Condition.* — May be shown by any evidence tending to show a failure to perform the terms of the bond, as failure to pay on an indemnity bond;[15] failure to account on an official bond,[16] and the like.

b. *During Term of Bond.* — The plaintiff has the burden of proving, by competent evidence, that the act complained of occurred during the term of the bond.[17] Evidence must show the default

admissible in evidence, from which the jury might infer that the bond was not executed. Sides *v.* Schnebly, 3 Har. & McH. (Md.) 243.

Infamy of Son's Character may be shown where it is proved that he has said that he could counterfeit the hand of the defendant, circumstances existing to render the execution of the instrument doubtful. Rowt *v.* Kile, Gilm. (Va.) 202.

An administrator defending under the plea of *non est factum* to an action on a bond alleged to have been given by his intestate to the plaintiff may prove that the bond was found in the intestate's house among his effects, that it was never delivered, and that the alleged obligee declared at the time the bond was found that she had never seen it before. Moyer *v.* Fisher, 24 Pa. St. 513.

15. Jones *v.* Childs, 8 Nev. 121 (showing legal liability, though no actual damage); Kohler *v.* Mattlage, 10 Jones & S. (N. Y.) 247 (proof of actual damage not necessary); State *v.* Blakemore, 7 Heisk (Tenn.) 638 (need not show that he has been sued); Baby *v.* Baby, 8 Up. Can. 76 (need not show he has paid the money.)

16. See *post*, IV.

17. *United States.*— Com. *v.* Baynton, 4 Dall. 282; Alvord *v.* U. S., 13 Blatchf. 279, 1 Fed. Cas. No. 269.

Alabama. — Townsend *v.* Everett, 4 Ala. 607.

Arkansas. — State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880.

Illinois. — Stern *v.* People, 96 Ill. 475; Bogardus *v.* People, 52 Ill. App. 179; Potter *v.* Board of Trustees, 11 Ill. App. 280.

Louisiana. — State v. Powell, 40 La. Ann. 241, 4 So. 447.

Missouri. — State *v.* Alsup, 91 Mo. 172, 4 S. W. 31.

New York. — Bissell *v.* Saxton, 66 N. Y. 55; Kingston Mut. L. Ins. Co. *v.* Clark, 33 Barb. 196.

Tennessee. — Bowen *v.* Evans, 1 Lea 107.

Plaintiff Must Show not merely that the principal is indebted on an official bond, but that such indebtedness arose by reason of not accounting for money actually received during the term for which the sureties stood bound, in order to recover as against the sureties. Kellum *v.* Clark, 97 N. Y. 390, *citing* Bissell *v.* Saxton, 66 N. Y. 55.

Proof that money came into hands of principal during term which he had failed to pay out at end of term, or to invest in pursuance of order during first term, sufficient to bind sureties. Vaughan *v.* Evans, 1 Hill Eq. (S. C.) 414.

Proof That Money Came Into Hands in Line of Duty before bond was executed, and that defalcations occurred after, fixes liability of sureties. See Townsend *v.* Everett, 4 Ala. 607; U. S. *v.* Dudley, 21 D. C. 337; People *v.* Shannon, 10 Ill. App. 355. *Compare* Miller *v.* Com., 8 Pa. St. 444.

Failure to Pay Over Under Order of Court, proof of, fixes liability of sureties on bond thereafter executed. People *v.* Shannon, 10 Ill. App. 355; State *v.* Moses, 18 S. C. 366.

Officer Succeeding Himself, in suit on bond of, proof that the money should have been in his hands at the beginning of the second term, but was in fact converted during the first term, relieves the sureties on the bond for the second term. Vivian *v.* Otis, 24 Wis. 518, 1 Am. Rep. 199; State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880.

Deficit at End of Each Term of several successive terms of a treas-

during the particular term covered by the bond sued on.[18] The presumption is, in the absence of proof to the contrary, that the principal had in his possession at the beginning of a subsequent term moneys collected during a former term; hence, in such a case, the burden of proof is on the defendant surety.[19]

c. *Continuing Liability* is shown on proof that principal neglects to pay over money officially in his hands, or where he is his own successor; the presumption of law being, in the latter case, that the money coming into his hands during his first term was on hand at the commencement of his second term,[20] and such presumption is not rebutted by proof that his bank account was overdrawn at the commencement of his second term, there being no other evidence of defalcation.[21]

d. *Sureties Bound.* — The burden will be on the plaintiff to show

urer, proof of, and further proof that the current collections were used to pay these deficits, fixes the liability of the bond given for the last term, for the full amount found due. Crawn *v.* Com., 84 Va. 282, 4 S. E. 721, 10 Am. St. Rep. 839.

Executing Decree for Sale of Land, during one term, proof of receipt of money and misappropriation during second term, fixes liabililty on second bond. McLain *v.* People, 85 Ill. 205; State *v.* McCormack, 50 Mo. 568.

Proof of Custom to Elect Annually, without showing the office an annual one, will not relieve sureties on bond, even though the minutes of the directors' meeting at which the principal was chosen recite that he is "chosen for the ensuing year." Amherst Bank *v.* Root, 2 Metc. (Mass.) 522.

18. Proof of Delinquency at Time of Succeeding Himself, and merely charged the deficit against himself, relieves the sureties on the bond for the second term. State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880.

Delinquency Covered by Second Term Money being shown, makes sureties on second bond liable. People *v.* Hammond, 109 Cal. 384, 42 Pac. 36; State *v.* Smith, 26 Mo. 226, 72 Am. Dec. 204.

19. Defalcation Not Shown to Have Occurred During Prior Term, presumed to have occurred at end of last term, and sureties on bond for last term liable. U. S. *v.* Dudley, 21 D. C. 227; Pape *v.* People, 19 Ill. App. 24.

Proof the Missing Money Should Have Been in the Hands of the principal at the commencement of the second term, but had in fact been converted during the first term, relieves the bondsmen for second term. Vivian *v.* Otis, 24 Wis. 518, 1 Am. Rep. 199.

20. Bruce *v.* U. S., 17 How. (U. S.) 437; Heppe *v.* Johnson, 73 Cal. 265, 14 Pac. 833; Fox Dist. Twp. *v.* McCord, 54 Iowa 346, 6 N. W. 536; U. S. *v.* Earhart, 4 Sawy. 245, 25 Fed. Cas. No. 15,018; State *v.* Cole, 13 Lea (Tenn.) 367; Hetten *v.* Lane, 43 Tex. 279.

21. State *v.* Cole, 13 Lea (Tenn.) 367; Hetten *v.* Lane, 43 Tex. 279.

Additional Bond for Term of Office is not governed by same rule, and proof that misappropriation occurred prior to execution and approval of bond will not relieve sureties thereon. Longmire *v.* Fain, 89 Tenn. 393, 18 S. W. 70; Bramley *v.* Wilds, 9 Lea (Tenn.) 674.

Proof of Default in Duties Created by Law Enacted subsequent to the execution of the bond, relieves the sureties. Davis *v.* People, 6 Ill. 409; People *v.* McHatton, 7 Ill. 638; Mayor of New York *v.* Kelly, 98 N. Y. 467 (not unless they render impossible or materially hinder or impede the proper and just performance of the duties guaranteed); Skillet *v.* Fletcher, L. R. 2 C. P. Cas. 469.

that the default of the principal is in those duties with respect to which the sureties are bound.[22]

e. *Plea of Subsequent Default.*—On plea that the default occurred after the expiration of the period covered by the bond, the burden is on the plaintiff to show that the act complained of occurred during the life of the bond.[23]

III. VARIANCE.

1. In General. — The proof of the plaintiff must agree with, or support, the allegations in his pleadings.[24]

On Plea of the General Issue, the defendant, after oyer,[25] may take advantage of any material[26] variance,[27] as when the allegation is

22. See White *v.* Fox, 22 Me. 341; Denio *v.* State, 60 Miss. 949; Monroe Co. *v.* Clark, 92 N. Y. 391; Com. *v.* Holmes, 25 Gratt. (Va.) 771; Gaussen *v.* U. S., 97 U. S. 584; U. S. *v.* Kirkpatrick, 9 Wheat. (U. S.) 720.

23. *English.* — Peppin *v.* Cooper, 2 Barn. & A. 431; Liverpool Waterworks *v.* Atkinson, 6 East 507, 2 Smith 654.

United States. — Com. *v.* Baynton, 4 Dall. 282.

California. — People *v.* Arkenhead, 5 Cal. 106.

New York. — Kingston Mut. Ins. Co. *v.* Decker, 33 Barb. 196.

Pennsylvania. — Manufacturers' & Mechanics' Sav. & Loan Co. *v.* Odd Fellows' Hall Assn., 48 Pa. St. 446; Com. *v.* West, 1 Rawle 29; Com. *v.* Reitzel, 9 Watts & S. 109.

24. McDorman *v.* Jellison, 7 Blackf. (Ind.) 304.

"**The Rule** is that the *allegata* and *probata* must agree; a party cannot declare upon one written instrument, or cause of action, and give in evidence another and different instrument of writing. If there be a substantial variance between the instrument set out in the *narr.* and that offered in evidence, such variance may be taken advantage of under the plea of *non est factum*, and will be fatal to the plaintiff's suit." Neale *v.* Fowler, 31 Md. 155; 1 Chit. Pl. 305.

Attachment Bond.—Allegation that it is "lost or in the possession of the defendant," is supported by proof of loss. Barnett *v.* Lucas, 27 Ind. App. 441, 63 N. E. 683.

Action on Township Treasurer's Bond. — Alleging he received money of the school district from the county collector which he had neglected to pay over to his successor, proof that he had received from such collector coupons upon bonds of said district does not meet the allegations in the declaration and fails to establish a case for the plaintiff. Humiston *v.* Trustees of Schools, 7 Ill. App. 122.

25. Declaration with a Profert is not sustained by proof of a lost bond. Chamberlain *v.* Sawyer, 19 Ohio 360. In those cases where the bond is lost after the declaration is filed, the plaintiff must amend.

26. Immaterial Variance is different. Thus, where the declaration is "or other delay" and the words of the obligor are "or delay" the variance is immaterial. Henry *v.* Brown, 19 Johns. (N. Y.) 49.

Error in Copy. — Where the declaration, among other things, recites that there were to be prompt payments of "the royalty provided by law, . . . to-wit, one dollar upon each and every ton, to be estimated only on the crude rock, and not upon the rock after it has been steamed and dried," and the copy served on the defendants omitted the words "and not," under statute providing that the estimate should be made "only on the crude rock," the court held that the variance was immaterial, where another statute provides that no variance between the pleading and proof shall be deemed material, unless it actually misled the adverse party. State *v.* Scheper, 33 S. C. 562, 12 S. E. 564.

27. Ehle *v.* Purdy, 6 Wend. (N. Y.) 629.

execution by principal and sureties, and the proof shows execution by the sureties alone.[28]

2. As to Date of Instrument. — In those cases where the date of an instrument, the time of its delivery, or the date on which it becomes valid or operative, affects the merits of the cause, it must be alleged, and proved as laid.[29]

Variance Between Declaration and Bond Adduced, as to the date of the instrument,[30] or the date of performance thereof,[31] and the like, is fatal. But allegations as to the precise time when a contract became obligatory need not be proved as laid.[32]

3. As to Nature of Obligation. — The evidence adduced on the trial should support the declaration in respect to the nature of the obligation, whether alleged to be joint,[33] or joint and

28. Reitz *v.* Trustees, 3 Ill. App. 448, *citing* Bean *v.* Parker, 17 Mass. 591; Lovejoy *v.* Bright, 8 Blackf. (Ind.) 206.

Variance As to Parties in Copy. Illinois Doctrine. — That the copy of an instrument filed with the pleadings varies from that offered on the trial is not material; the copy is no part of the record; the trial court has discretion to authorize the copy corrected. Stratton *v.* Henderson, 26 Ill. 68.

29. Time Being Immaterial, it is otherwise. Tompkins *v.* Corwin, 9 Cow. (N. Y.) 255.

30. Comparet *v.* State, 7 Blackf. (Ind.) 553; Gordon *v.* Browne, 3 Hen. & M. (Va.) 219; Bennett *v.* Loyd, 6 Leigh (Va.) 316; Cooke *v.* Graham, 3 Cranch (U. S.) 229.

As to Date of Execution. — Where in an action on a liquor dealer's bond the complaint alleged execution on January 19th, and the bond offered in evidence was dated December 18th, where it was shown that on the last day the principal and his sureties acknowledged the same before the clerk of the county, the court held there was no variation. Componovo *v.* State, (Tex. Civ. App.), 39 S. W. 1114.

Declaration on an Official Bond alleged the date of execution as "April 2, 1878," a bond dated "the — day of March, 1878," was held admissible, it being shown that it was not accepted until that date. Moses *v.* U. S., 166 U. S. 571, 17 Sup. Ct. 682; Howgate *v.* U. S., 3 App. D. C. 277.

31. Thus, when a declaration alleged the condition of the bond to be to deliver goods on the 20th of June, 1840, at the farm of A, and the condition of the bond, on oyer, was found to be delivery of goods on the 2nd of June, 1840, at the house of A, the court held the variance was fatal. McKay *v.* Craig, 6 Blackf. (Ind.) 168.

32. As to Date When Took Effect. — A declaration that the defendant became indebted upon a certain day by a certain bond, and the bond given in evidence, although dated on that day, took effect upon a different day, the court held there was no variance. U. S. *v.* Le Baron, 4 Wall. (U. S.) 642.

33. Declared on As Joint, where the bond offered in evidence is joint and several, there is no variance. Grant *v.* Whiteman, 5 Blackf. (Ind.) 67; Colton *v.* Stanwood, 67 Me. 25.

Where a declaration on a bond in debt against A, administrator of B, alleged to have been executed by B, together with C, D, E, and F, and showed a joint bond, but it did not show that F had sealed it, or that he was living, *held* not objectionable on the ground of variance. Legate *v.* Marr, 8 Blackf. (Ind.) 404.

Declaration Against Only One of the Obligors in a Bond Purporting on Its Face to Be Joint, but executed by the obligors at different times, it not appearing that it was executed by one or more without con-

several.[34]

4. As to Parties to Instrument. — A. As to Description of Obligors. — At common law, the obligors must be proved as alleged in the declaration;[35] but the rule is somewhat relaxed under the codes.[36] Where a bond is alleged to have been executed by certain persons, proof that it was executed by a part only of the said persons is a material variance.[37]

B. As to Description of Covenant Clause. — A declaration as to the obligatory words of the covenanting clause should be proved substantially as laid.[38]

C. As to Representative Capacity of Obligees. — Proof of

sent of the others, can not be sustained by adduction of such a bond. Lockhart *v.* Bell, 2 Hill Law (S. C.) 422.

34. Declaration As Joint and Several, and the bond produced on oyer be joint only, the variance is fatal. Sherry *v.* Foresman, 6 Blackf. (Ind.) 56; Postmaster-General *v.* Ridgway, Gilp. 135, 19 Fed. Cas. No. 11,313.

35. Variance As to Obligors. — A declaration alleging a bond or other specialty was signed by A. B. is supported by a bond signed "A. B., his mark." Semon *v.* Hill, 7 Ark. 70.

Henry M. Rector is supported by proof of a bond signed H. M. Rector. Rector *v.* Taylor, 12 Ark. 128.

James W. Y. is supported by proof of bond signed "Jas. W. Y." Robbins *v.* Governor, 6 Ala. 839.

Mathew S. Miller is supported by proof of a bond signed "M. S. Miller." Miller *v.* Bell, 12 Ark. 135.

Philip T. is supported by a bond signed "Pilip T." Taylor *v.* Rogers, Minor (Ala.) 197.

36. See Kurtz *v.* Forquer, 94 Cal. 91, 29 Pac. 413; Thalheimer *v.* Crow, 13 Colo. 397, 22 Pac. 779.

37. Declaration on Bond As Executed by Principal and Sureties is not supported by bond executed only by two sureties. Herrick *v.* Johnson, 11 Metc. (Mass.) 26; Bean *v.* Parker, 17 Mass. 591.

Bond in the Name of H. R. alone cannot be received as evidence in support of a declaration in a suit against H. R. and H. B., charging that they both acknowledged themselves to be indebted, etc., notwithstanding the name of H. B. was signed under that of H. R., and issue was not joined on the plea of *non est factum* or *nil debet,* but of payment by H. N. Bell *v.* Allen, 3 Munf. (Va.) 118.

In a Suit on an Injunction Bond, where it appeared the proceedings for injunctions were brought by H. against G., A. R., S. L. and L. C. L., while the injunction bond recited that it was a suit in which H. was complainant and G., A. R. and L. were defendants, and its condition was to save the "defendants" harmless; it further appeared that the bond was filed in the equity case of H. vs. G., A. R., S. L. and L. C. L. in the circuit court, and that there was no other case pending in said court between the same plaintiff and the same defendants, or either of them, and that the bond was prepared and the blanks filled up by H.'s solicitor in the equity case, in this action against him and N. On objection by H. and W. to admission of the injunction bond in evidence, the court held that there was no variance between the bond and the writ. Hopkins *v.* State, 53 Md. 502.

38. Declaration That Defendants Bound Themselves is supported by a bond in which they bound "themselves, their heirs, executors, and administrators, jointly and severally." Dickinson *v.* Smith, 5 Gratt. (Va.) 135.

Bound Himself to Pay, etc., the words obligatory were "I bind my heirs," etc. The court held that the bond was obligatory upon the defendant personally. Henderson *v.* Stringer, 6 Gratt. (Va.) 130.

the representative capacity of the obligee must be made substantially as alleged.[39]

D. As to Description of Obligee. — The obligees should be accurately described in the declaration,[40] and proved as laid.[41] Thus, where the declaration alleges that the bond was payable to a corporation, but the bond shows that it was payable to the corporation *and others,* the variance is fatal.[42]

E. As to Place of Execution, Residence of Obligor, Etc. The place of execution, residence of the obligor, and circumstance

39. Variance Between Allegations and Proof As to Representative Capacity of the obligee, where material, is fatal. The following have held not to be material variances: declaration on a bond in the name of

B is supported by a bond given to "B, sheriff." Brainard *v.* Smith, 2 Root (Conn.) 318.

B, Treasurer of H County, is supported by a bond payable to "B, treasurer of H county, or his successors in office." Boles *v.* McCarty, 6 Blackf. (Ind.) 427.

The Marshal of the District of Wisconsin is supported by a bond to "the marshal for the State of Wisconsin." Huff *v.* Hutchinson, 14 How. (U. S.) 586.

In Case of Administrators and Executors. — Declaration that defendants executed their bond "payable to him (plaintiff) as administrator as aforesaid, by name of P. W. P., or order," is supported by a bond payable "to P. W. P., administrator of Simon P., deceased, or order." Kingkendall *v.* Perry, 3 Cushm. (Miss.) 228.

In a case where the declaration styled the plaintiff executor of A, "who was surviving obligee with B," is supported by a bond given by "A and B, executors of C." Crotzer *v.* Russell, 9 Serg. & R. (Pa.) 78.

40. Declaration by Hudson and James is not supported by a bond executed to "Hudson and Jones" even though the plaintiff allege and offer to prove that *James,* and not *Jones,* was intended to be an obligee, and that the insertion of the wrong name was a mere mistake. Gayle *v.* Hudson, 10 Ala. 116.

Declaration as Payable to "Abs. J. Meredith, twelve months after date," is not supported by a bond payable to "bs. J. Meredith, —— months after date." Cheadle *v.* Riddle, 6 Ark. 480.

Declaration As "Firmly Bound Unto D. K. in the sum of $100, to be paid to the said D. K." is not supported by a bond that states, "We bind ourselves," without saying to whom. Kemp *v.* McGuigin, Tapp. (Ohio) 50

41. Action on Attachment Bond Payable to "C. & Co.," brought by C., the complaint alleging that the bond was made payable to plaintiff under the name of "C. & Co.," the bond is admissible in evidence, subject to proof of the identity of plaintiff with the obligee of the bond. Hundley *v.* Chadick, 109 Ala. 575, 19 So. 845.

Question of Identity one for the jury, in considering which the attachment papers are admissible for their enlightenment. Hundley *v.* Chadwick, 109 Ala. 575, 19 So. 845, *citing* Birmingham Loan & Auction Co. *v.* First Nat. Bank, 100 Ala. 249, 13 So. 945; Zeiner *v.* Mims, 96 Ala. 285, 11 So. 302.

Declaration on Bond As Payable to the Plaintiff, after naming him as "James Whitlow, Jr., alias James Whitlock," and the bond, on oyer, is shown to be payable to James Whitlow, Jr., it is not such a variance as should prevent it from being received as evidence in support of the declaration, on the plea of payment. Whitlock *v.* Ramsey, 2 Munf. (Va.) 510.

42. Phillips *v.* Singer Mfg. Co., 88 Ill. 305.

Where bond sued on was described in the declaration as payable to "the president and trustees of the town of Fort Wayne." The bond shown on oyer was payable to "the president and trustees of the Fort

of execution,[43] where set out in the declaration, should be proved as alleged.

5. As to Contract or Instrument Sued on or Offered. — A. As to Character of Covenants. — The nature of the obligation should be correctly set forth, and proved as alleged.[44] Thus, a declaration on a bond is not sustained by proof of a promissory note.[45]

B. As to Consideration. — The allegation as to the consideration of a bond or other instrument sued on or offered in evidence, whether it be as to money to be paid,[46] or penalty incurred,[47] should be proved substantially as laid. Where a judgment is set out in the declaration in an action on a bond merely to show an injury to the plaintiff, a slight variance in the description of the record of the judgment is not fatal.[48]

Wayne Corporation." The court held that the variance was fatal. Ft. Wayne *v.* Jackson, 7 Blackf. (Ind.) 36.

43. Alleging Execution in declaration at "The City of Little Rock, Arkansas," is supported by proof of a bond dated, "Little Rock, Arkansas." Rector *v.* Taylor, 12 Ark. 128.

Alleging Residence, omitted in the declaration, is supported by bond in which residence is stated to be "of the county of S." Evans *v.* Smith, 1 Wash. (Va.) 72.

Declaration Set Out the Condition, reciting that an ejectment had been commenced for defendant "upon the demise of the said defendant and his wife," and the condition of the bond adduced in evidence recited that an ejectment had been commenced "upon the demise of my wife. A., formerly B.," etc. The court held the variance was fatal. Wilhite *v.* Roberts, 4 Dana (Ky.) 172.

44. See *Ante* notes 33 and 34.

45. Davis *v.* McWhorter, 122 Ala. 570, 26 So. 119.

46. Declaration Laid the Consideration at "$550 or thereabouts," and the bond produced in evidence was for $549, the court held there was no material variance. Usry *v.* Suit, 91 N. C. 406.

Where the declaration described the bond as being for $400, with interest at 8 per cent. per annum. Under plea of release the instrument offered in evidence was, "From a bond for four hundred dollars, with eight per cent. per amount," but the after part of the deed described the bond from which payment had been released like the one declared on. The court *held* there was no fatal variance. Vandever *v.* Clark, 16 Ark. 331.

47. Debt on a Jail Bond, plea that no such execution issued as was described in the bond, which plea was traversed. A misdescription as to the damages and costs mentioned in the execution was held to be a variance, and that, if the execution offered varied from the one described in the bond and judgment, it would not support the action. Avery *v.* Lewis, 10 Vt. 332.

Action on a Cost Bond alleged the penalty of the bond, as executed, was $2500, and asked a recovery in that sum, the bond when introduced was in the penal sum of $1500 only, the court held no recovery could be had without an amendment of the declaration so as to make it correctly describe the bond, though it was shown the alteration was made by a stranger without plaintiff's knowledge. Chicago, K. & W. R. Co. *v.* Evans, 57 Kan. 286, 46 Pac. 303.

In Action on Official Bond, judgment cannot be maintained against the principal obligor and sureties, where the penalty is alleged to be for $5000, and the bond offered in evidence is for $10,000. People *v.* Kneeland, 31 Cal. 288.

48. Smith *v.* Eubanks, 9 Yerg. (Tenn.) 20.

Declaration in a Suit on an Appeal Bond averred that the defend-

C. As to Condition. — The condition of the bond must be proved as alleged.[49] Thus, a declaration for the payment of money[50] on a day certain,[51] or on demand,[52] must be substantially shown, as laid, and a declaration on a bond founded upon a previous contract between the parties, the contract, on adduction in evidence, should support the plea.[53]

ants had not paid the judgment recovered, and specified the amount of it. The judgment when produced varied in amount from that stated in the declaration. The court held that as this was a matter of description, the judgment offered could not be received in evidence. Smith *v.* Frazer, 61 Ill. 164.

49. Declaration in Debt on an Indemnifying Bond alleged that the defendants bound themselves to pay, to any person claiming title to the property, all damages, etc. The court held that the bond offered in evidence, being in a penalty and with condition, was no variance, and that the bond was admissible. Kevan *v.* Branch, 1 Gratt. (Va.) 274. See Dickinson *v.* Smith, 5 Gratt. (Va.) 135.

Where the bond sued on, when read on oyer, conditioned for the payment of the amount declared upon, had a credit indorsed thereon, this was held not to be a variance. Wiggins *v.* Fisher, 21 Ark. 521.

50. Declaration Stated Cause of Action As a Writing Obligatory for the payment of money. The defendant pleaded *non est factum*. The bond offered in evidence on the trial was an instrument by which defendant, in consideration of a subsisting indebtedness, and the agreement by plaintiffs to accept certain drafts on them by him, obligated and bound himself to ship and to consign to the plaintiffs certain crops of wheat, corn and tobacco, to be sold by the plaintiffs on commission, and the proceeds applied to his present debt, and also any future debt he might owe by reason of said acceptances. The court held that there was a fatal variance between the instrument described in the declaration and the paper offered in evidence, and that the latter was inadmissible. Neale *v.* Fowler, 31 Md. 155.

51. Declaration in Debt Alleged Condition to Be Payment of Certain money on a certain day. The condition of the bond, as shown on oyer, was for the payment of the money out of the profits of certain real estate. The court held the variance fatal. Irish *v.* Irish, 6 Blackf. (Ind.) 438.

52. Declaration Described Appeal Bond As Payable on Demand, but set forth the condition at large by showing the true character of the bond, from which it appeared that it was payable on the affirmance of the judgment; the court held that the variance was not substantial, because the defendant could not have been surprised. Walker *v.* Welch, 14 Ill. 277.

53. Action on Bond for a Breach of Its Conditions, where there was also a contract between the principal in the bond and the obligee, respecting the sale of sewing machines; the declaration showed that, by the contract, the obligee in the bond reserved the right to make sales in the territory named, while the condition of the bond showed that the other party had the exclusive right of purchasing from him the machines. The court held that there was no fatal variance, as the suit was upon the bond. Brown *v.* Rounsavell, 78 Ill. 589.

On Bond Under Contract to Build a House. — Where the bond recites a contract to build a one-story frame dwelling house, and the contract set out is in terms to build a dwelling house, and there being nothing in it indicating that the house is to be other than a one-story house, there is no substantial variance between the contract indicated, by the reference in the bond and the contract set out in the complaint as being that intended to be secured by the bond. Forst *v.* Leonard, 112 Ala. 296, 20 So. 587.

Reference to Recitals, in an ac-

6. As to Want of Seal, Mutilation, Etc. — When the declaration is on a bond, as the cause of action, adduction of an instrument without a seal is insufficient to support the declaration.[54]

IV. PRESUMPTIONS AND BURDEN OF PROOF.

1. General Rules. — A. GENERALLY. — In an action on a bond, whether in covenant,[55] or in debt,[56] the burden is on the plaintiff to make out his cause, except in cases where the action is covenant on a bond with a defeasance, and the defendant interposes a plea of *non est factum*,[57] with a special plea of performance.[58]

Where Demand on Bond Is a Stale One, the plaintiff will be required to make strict proof of the damages he is entitled to recover.[59]

Mere Acknowledgment of Debt in a deed under seal does not import a covenant to pay, where the acknowledgment is simply collateral to the purpose for which the deed was executed;[60] and in an action thereon the plaintiff must establish his cause by evidence *aliunde*.[61]

B. BURDEN OF PROOF. — a. *Generally.* — The general rule is that the burden is on the plaintiff to make out his cause. Where the suit is on a bond conditioned for the payment of a penal sum at a specified time, proof of the execution of the bond and its introduction in evidence will establish a *prima facie* case for the plaintiff for the full amount as a debt.[62]

tion on a bond, of a previous contract of sale between the parties as having been made on a particular day, the written contract of such sale bearing date prior to the day stated in the bond, the execution of the contract being admitted by the defendant, is admissible in evidence; the date of the contract is not conclusive as to the time of its delivery. Serviss *v.* Stockstill, 30 Ohio St. 418.

54. Variance Fatal, on Demurrer, even though it corresponds in every other particular. State Auditor *v.* Woodruff, 2 Ark. 73, 33 Am. Dec. 368; Deming *v.* Bullitt, 1 Blackf. (Ind.) 241.

Under Statute providing that all bonds executed without a seal, but intended to be sealed, shall be valid, the same as though actually sealed, a declaration alleging a bond under seal is supported by a bond executed with a scroll intended as a seal. Fish *v.* Brown, 17 Conn. 341.

55. Action of Covenant on a Bond with a Defeasance is unusual, but maintainable in those cases where the gravamen of the action is failure to pay money, but not where it is breach of a condition. State *v.* Woodward, 8 Mo. 353; Douglass *v.* Hennessy, 15 R. I. 272, 3 Atl. 213, 10 Atl. 583.

56. Covenant and Debt Are Concurrent Remedies on a bond conditioned to pay money, but otherwise on a bond with a defeasance for a breach of the condition. Taylor *v.* Wilson, 5 Ired. Law (N. C.) 214.

57. See *Ante* II.

58. See *Ante* II, *passim.*

59. Cottle *v.* Payne, 3 Day (Conn.) 289, 6 Fed. Cas. No. 3268.

60. Jackson *v.* Northeastern R., 47 L. J. Ch. 303, 7 Ch. D. 573; see Ives *v.* Elwes, 3 Drew 25, 3 Eq. Rep. 163, 3 W. R. 119 (acknowledgment merely collateral matter); Courtney *v.* Taylor, 7 Scott (N. R.) 749; Morgan's Patent Anchor Co. *v.* Morgan, 35 L. T. 811 (recital of payment of purchase price of patent right does not raise a covenant to pay.)

61. See *Post*, IV, 2.

62. Hoxsey *v.* Patterson, 59 Ill. 522.

b. *On Plaintiff.* — The burden of proof is on the plaintiff to establish the execution and delivery of the instrument sued on, the liability of the defendants thereunder,[63] and the damage he is entitled to recover.[64] Thus, the plaintiff is required to prove the reasonableness of the items of expenditure he seeks to recover, under a bond binding defendant to repay such reasonable sums as plaintiff shall be required to pay for certain property.[65]

2. As to Execution. — A. Burden of Proof. — a. *On Plaintiff.* **(1.) Generally.** — The plaintiff has the burden of showing the formal execution of a bond by signing,[66] sealing,[67] acknowledgment,[68] and

63. In Seeking to Subject Heirs to the payment of the bond of their ancestor, the heirs must be shown to be bound by the bond. Douglas *v.* Piper, 3 Gratt. (Va.) 354.

An Express Company Seeking to Recover on the Bond of Its Agent for his failure to forward a package received by him, must establish that the defendant received the package as its agent. Southern Exp. Co. *v.* Moeller, 85 Mo. 208.

An Officer Suing on a Bond Indemnifying him for selling under an execution at the instance of "A and B against C," must show that he sold under the execution mentioned in the bond. Dickinson *v.* Jones, 12 Ired. Law (N. C.) 45.

64. In Proceedings in Chancery on a Penal Bond, the burden is on the plaintiff to prove how much he is entitled to receive in equity and good conscience. Gowen *v.* Nowell, 2 Me. 13.

65. Oregon R. & Nav. Co. *v.* Swinburne, 26 Or. 262, 37 Pac. 1030.

66. Genuineness of Signature of Obligor Must Be Proved by the plaintiff on a plea of *non est factum.* See Manning *v.* Norwood, 1 Ala. 429.

Making Mark must be proven. Com. *v.* Campbell, 20 Ky. L. Rep. 54, 45 S. W. 89.

By Illiterate Person, showing instrument signed by a third person at his request and in his presence, is well executed. Rex *v.* Longnor, 1 Nev. & M. 576, 6 Barn. & Ad. 647, 2 L. J. M. C. 62 (need not be previously read over unless he required it.)

Authority Inferred From Course of Business. — Where the evidence shows that in the course of business of the firm the clerk was in the habit of signing the name of the firm to such bonds, and that he did thus use their names without objection, and impliedly with their assent and approbation, and that in virtue of such bonds the firm applied for, and received the benefit they secured, it may fairly be inferred that he had the requisite authority and that the signing is obligatory on the individual members of the firm. U. S. *v.* Turner, 2 Bond C. C. 379, 28 Fed. Cas. No. 16,547.

67. Frantz *v.* Smith, 5 Gill (Md.) 280. See Every *v.* Merwin, 6 Cow. (N. Y.) 360.

"Sealed With Our Seals," but only one seal, where the instrument has more than one signature, the law will intend that the signers adopt one seal. Northumberland *v.* Cobleigh, 59 N. H. 250.

Two Persons May Adopt One Seal to an instrument, and it then becomes the deed of both; and whether one 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 such defendant adopted the seal or scroll. Pickens *v.* Rymer, 90 N. C. 282, 47 Am. Rep. 521.

68. Acknowledgment and Proving Want of at time of delivery can not be set up by a person who signs, seals and delivers an instrument. "It is the sealing and delivery that give efficacy to the deed, not proof of the execution. And this principle applies alike to all bonds, whether executed by public officers or private persons, unless, indeed, there is some statute making the acknowledgment or proof

delivery[69] of the instrument sued on.[70]

(2.) Presumptions. — Proof that the signature to a bond is genuine, with the possession of the obligee,[71] raises the presumption of execution by sealing and delivery.[72]

Bond Taken Under Statute, the presumption is that it was taken by the proper officer, where the bond is not set out on oyer, and there is nothing to show to the contrary.[73]

Sealed Articles Declared on With Profert, on oyer, if when produced they are minus the seal, they are nevertheless admissible in evidence, on the presumption that the seal was torn off after the declaration was drawn, and without the plaintiff's consent.[74]

in court essential to the validity of the instrument." Supervisors of Washington Co. *v.* Dunn, 27 Gratt. (Va.) 608.

69. Delivery by the Obligor, or by his authority, as his act, must be shown. Newlin *v.* Beard, 6 W. Va. 110.

70. Com. *v.* Campbell, 20 Ky. L. Rep. 54, 45 S. W. 89; Francis *v.* Hazlerig, 1 A. K. Marsh. (Ky.) 93; Edelin *v.* Sanders, 8 Md. 118; Frantz *v.* Smith, 5 Gill (Md.) 280; Pickens *v.* Rymer, 90 N. C. 282, 47 Am. Rep. 521; Newlin *v.* Beard, 6 W. Va. 110.

Judgment Without Proof or Admission of Execution of the instrument cannot be sustained. Killian *v.* State, 15 Ind. App. 261, 43 N. E. 955.

Signature Admitted, but Forgery as to the Body of the Instrument. The burden of proof still rests on the plaintiff to prove the execution of the bond declared on. Otey *v.* Hoyt, 2 Jones Law (N. C.) 70.

Appeal Bond Naming Certain Persons as Sureties. — The presumption is that each one contemplates that the rest will join in its execution; and in suit on the bond the plaintiff has the burden of explaining the omission of any one to do so. If any surety denies its execution on oath, and testifies that his alleged signature is a forgery, and the justification of the sureties a fraud, the plaintiff is under stronger obligation to show that defendant signed and delivered the bond with full knowledge of the facts. Woodin *v.* Durfee, 46 Mich. 424.

A Statute Dispensing With the Necessity of Calling the Subscribing Witnesses to a bond to prove its execution, unless it is denied by the defendant on oath, does not dispense with the rule that the next best evidence must be produced; and when the subscribing witnesses do not attend, their handwriting must be proved as well as the signature of the obligor. Myers *v.* Taylor, 1 Brev. (S. C.) 245.

71. Blume *v.* Bowman, 2 Ired. Law (N. C.) 338.

72. Manning *v.* Norwood, 1 Ala. 429.

73. State *v.* Witherspoon, 9 Humph. (Tenn.) 394.

Laches or Wrongful Acts of Officers of the United States, the latter not responsible for same where it takes an official bond; the obligors are conclusively presumed to execute it with a full knowledge of that principle of law, and to consent to be dealt with accordingly. Hart *v.* U. S., 95 U. S. 316.

Of Municipal Officers, the municipality not responsible for. Thus, where the sureties on a town supervisor's bond signed and delivered it unconditionally to the supervisor, who offered it to the town clerk, and the latter objected to it as insufficient, but received it, upon the supervisor's promise to procure additional security, which he never did. The clerk permitted him to take the oath and enter upon the performance of the duties of the office. The court held that neither the town clerk nor the sureties could deny that the bond was a valid obligation. Ashkum *v.* Lake, 12 Ill. App. 25.

74. Every *v.* Merwin, 6 Cow. (N. Y.) 360.

b. *On Defendant.* — The burden of proof shifts to the defendant under certain conditions of the pleadings and issues. Thus, where bonds are valid on their face, the burden is on the attacking party to show their invalidity;[75] where subscribing witness identifies his signature, the burden of showing non-execution is on defendant;[76] bond executed without the signature of others named therein, the burden is on the defendants to show that they were not to be bound unless it was executed by such others;[77] and in suit on bond given to release a vessel taken on a warrant issued under statute for non-payment of demands against the vessel, the execution being admitted, the defendants have the burden of showing the bond is not valid and binding.[78]

c. *Presumptions.*— **(1.) Generally.** —Where party must have acted under the bond sued on, or under none, the presumption is that he acted under the bond.[79]

(2.) From Attestation. — In an action in assumpsit for the non-performance of a contract in a specialty, presumption of delivery arises from the attestation: "signed, sealed and executed."[80]

(3.) From Possession. — In the absence of any evidence to the contrary, the possession and production of a bond,[81] and proof of the

75. Nichols *v.* Mase, 94 N. Y. 160.

76. Green *v.* Maloney, 7 Houst. (Del.) 22, 30 Atl. 672.

77. Mullen *v.* Morris, 43 Neb. 596, 62 N. W. 74.

Declarations of Principal Debtor at Time of Delivery. — It is competent for the defendant to prove that, at the time of delivery of the bond sued on to the obligee by the principal debtor, it was stated by him that two other obligors who were in fact sureties, signed with the understanding and agreement that certain other parties would also sign. And this being established, and that the obligee took the bond with this understanding, the delivery was not such an one as the bond of the parties to be bound thereby stipulated for, and there being no such delivery there was no such bond. Stuart *v.* Livesay, 4 W. Va. 45.

See Tidball *v.* Halley, 48 Cal. 610; Hicks *v.* Goode, 12 Leigh (Va.) 479.

Whether Agreement Was That Bond Should Not Be Delivered Unless Signed by Others, properly submitted to the jury, under instructions, where the evidence is in conflict. Spencer *v.* McLean, 20 Ind. App. 626, 50 N. E. 769.

Declaration of Obligor. — Proof that one of the obligors, at the time of executing the bond, in the presence of some of the other obligors, said: "We acknowledge this instrument, but others are to sign"—this is evidence from which the jury may infer a delivery as an escrow, by all the obligors who were then present. Pawling *v.* U. S., 4 Cranch (U. S.) 219.

78. Onderdonk *v.* Voorhis, 36 N. Y. 358.

79. McLean *v.* State, 8 Heisk. (Tenn.) 22.

80. Hall *v.* Bainbridge, 12 Ad. & E. 699, 64 Eng. C. L. 698.

81. Blume *v.* Bowman, 2 Ired. Law (N. C.) 338.

Even As Against a Denial in the Answer that there has been a delivery. Blankman *v.* Vallejo, 15 Cal. 638.

Presumption Executing Sureties Consented to the delivery without the other's signature. Ward *v.* Churn, 18 Gratt. (Va.) 801, 98 Am. Dec. 749.

Possession by a Bank of Its Cashier's Bond, the bond being executed in due form, and complete in every respect, and the fact of the cashier having been allowed to enter on his duties, is sufficient to justify a presumption of the bond having been

handwriting of the obligor, are *prima facie* evidence of delivery.[82]

(4.) Delivery in Escrow. — Burden of proving delivery in escrow is on the defendant,[83] and the fact of possession by the obligee does not shift from him the burden of proving delivery.[84]

(5.) As to Acceptance and Approval. — The delivery of a bond implies the acceptance thereof,[85] and, in the absence of testimony on the part of the defendant, the signing and sealing are *prima facie* evidence of its acceptance by the obligee,[86] but it is only *prima facie* evidence thereof, as the obligor may admit them, and yet prove the

delivered, accepted, and approved with all the requisite formality. Bostwick *v.* Van Voorhiss, 91 N. Y. 353.

82. *Alabama.*—Firemen's Ins. Co. *v.* McMillan, 29 Ala. 147; Spence *v.* Rutledge, 11 Ala. 590.

Florida. — State *v.* Suwannee Co. Com'rs., 21 Fla. 1.

Maryland. — Engler *v.* People's F. Ins. Co., 46 Md. 322; Edelin *v.* Sanders, 8 Md. 118; Glen *v.* Grover, 3 Md. 212; Union Bank *v.* Ridgely, 1 Har. & G. 324; Clarke *v.* Ray, 1 Har. & J. 318.

New Jersey. — Chetwood *v.* Wood, 45 N. J. Eq. 369, 19 Atl. 622; Wood *v.* Chetwood, 44 N. J. Eq. 64. 14 Atl. 21.

New York. — Kranichfelt *v.* Slattery, 12 Misc. 96, 33 N. Y. Supp. 27.

Pennsylvania. — Grim *v.* Jackson Tp. School Directors, 51 Pa. St. 219.

West Virginia. — Newlin *v.* Beard, 6 W. Va. 110.

83. To Be Placed in Hands of Third Party. — Premature Delivery. Proof that at the time of executing a bond a surety stipulated that it should be placed in the hands of a third party to be held by him until the principal should indemnify the surety against the risk, and proof of delivery without performance of the condition, releases the surety from liability on the bond. Whitsell *v.* Mebane, 64 N. C. 345; Johnson *v.* Baker, 4 Barn. & A. 440, 6 Eng. C. L. 479, 23 Rev. Rep. 338.

Delivery to His Agent on Condition. — It has been held that proof of delivery of a bond to the obligee's agent, who was not to deliver it to the obligee except on certain conditions specified, and that the agent delivered to his principal, the obligee, without the fulfilling of the conditions, did not constitute a legal delivery, and the bond was void as an obligation. Weed S. Mach. Co. *v.* Jeudevine, 39 Mich. 590.

The True Rule. — It is to be noted that there is a marked difference between proof of the delivery of a specialty as an escrow to a third person, and proof of a delivery to the party thereto with stipulation of like condition, for in the latter case the instrument takes effect *eo instante* as the deed of the party, regardless of the form of the words accompanying the delivery. Foley *v.* Cowgill, 5 Blackf. (Ind.) 18; Hicks *v.* Goode, 12 Leigh (Va.) 479; Moss *v.* Riddle, 5 Cranch (U. S.) 351; U. S. *v.* Hammond, 4 Biss. 283, 26 Fed. Cas. No. 15,292.

Rule by Which Determined. The sealing and signature not being denied, it is incumbent on him who alleged it to be an escrow, to prove affirmatively, not that the principal promised that something further should be done, by way of inducement to his execution of the instrument, but that the performance of such further act was the condition upon which he was to become bound, or the instrument to be delivered as his act and deed. Evans *v.* Gibbs, 6 Humph. (Tenn.) 405.

84. Whitsell *v.* Mebane, 64 N. C. 345.

85. State Bank *v.* Chetwood, 8 N. J. Law 1; State *v.* Ingram, 5 Ired. Law (N. C.) 441; State *v.* McAlpin, 4 Ired. Law (N. C.) 140; McLean *v.* State, 8 Heisk. (Tenn.) 22.

86. Wilson *v.* Ireland, 4 Md. 444; Milburn *v.* State, 1 Md. 1.

In the Absence of Any Evidence to the Contrary the possession and production of a bond or other specialty, are sufficient *prima facie* evi-

non-approval and non-acceptance of the bond or other instrument.[87]

Execution by the Officer of a Corporation of a bond is sufficient evidence of its acceptance and approval.[88]

Acceptance of an Official Bond may be inferred from the circumstances, such as the possession of the bond by the obligee in whose favor it is drawn, accompanied by possession of the office and receipt of its compensation.[89]

(6.) The Consideration of a Sealed Instrument May Be Inquired Into for the purpose of ascertaining what is due thereon.[90]

B. Burden on Plaintiff, When. — It is not necessary, in order to entitle the plaintiff to recover on a bond for the payment of money, to prove consideration. Where the defendant attacks the consideration of a bond, or other specialty, in his plea, the burden of proving want or failure,[91] or illegality of the consideration,[92] is on

dence of the delivery and acceptance thereof. Engler *v.* People's F. Ins. Co., 46 Md. 322; Union Bank *v.* Ridgeley, 1 Har. & G. (Md.) 324.

87. Milburn *v.* State, 1 Md. 1.

88. Engler *v.* People's F. Ins. Co., 46 Md. 322.

89. Portland *v.* Besser, 10 Or. 242.

Delivery and Custody. —A statute, prohibiting any officer from receiving or filing a bond not approved, does not prevent the implied acceptance of such a bond although not properly approved; such provisions of the statute are for the further security of the public. McLean *v.* State, 8 Heisk. (Tenn.) 22.

A Bond for Faithful Performance of Duties of Collector of tolls was given to the canal commissioners, bearing date on the first day of June, with a certificate of the sureties' sufficiency indorsed thereon by a public officer under date of June 25th; it was *held* that the admission of the commissioners that they "presumed" the bond was not delivered to, or accepted by them, until after the certificate of approval was thus indorsed, was not sufficient to repel the legal presumption that the bond was delivered and accepted on the day of its date, when the admission was accompanied with the declaration that they had no recollection as to the time when the bond was delivered. Seymour *v.* Van Slyck, 8 Wend. (N. Y.) 403.

90. Farnum *v.* Burnett, 21 N. J. Eq. 87.

Presumption Bond Given for an antecedent debt, where it is provided it shall bear interest from a date anterior to its date. Walker *v.* Pierce, 21 Gratt. (Va.) 722.

91. Where the "Plaintiff owed a debt to C, which was attached, in consideration of payment by plaintiff to the sheriff of a sufficient amount of the debt to pay the judgment and costs in the attachment suit without suit or delay, defendants executed a bond under seal, conditioned to indemnify plaintiff from the claims of C, and from all other persons claiming or to claim the money so paid," and "from all costs, damages," etc., arising therefrom. C subsequently sued plaintiff; the latter defended and succeeded in the defense, but could not collect his costs on account of the insolvency of C. In an action upon the bond to recover the costs and expenses incurred in the defense, the court held that the seal being presumptive evidence of a consideration, the onus was upon defendants to show that there were no claims by other parties to the money valid as against the attachment, and in the absence of such proof, a defense of want of consideration was not sustained." Home Ins. Co. *v.* Watson, 59 N. Y. 390.

92. Burden of Proving Immoral Consideration is on the defendant, in an action upon a bond executed in consideration of past illicit cohabitation, it not appearing that there was

him.[93]

C. As to Performance or Breach. — a. *Generally.* — **(1.) On Official Bonds.** — In action on the official bond of a public officer, his reports made, and statements rendered, in the line of his official duty, are *prima facie* evidence of the facts therein stated against him and his sureties.[94]

Officer Required to Account and Pay Over Moneys on or Before a Particular Date. — Mere proof that he did not pay on the date required, raises a presumption that he accounted and paid over before that date.[95]

(2.) On Private Bonds. — In private bonds, conditioned for the payment of money, or the performance of other conditions, mere lapse of time may raise a presumption of performance.[96] In an action on a bank cashier's bond, conditioned that he would well and truly perform his duties as cashier, proof of an error by such cashier in the addition of a column of figures is *prima facie* evidence of loss by the bank.[97]

D. Burden of Proof. — a. *On Plaintiff.* — In those cases where a bond, other than for the payment of money, is sued upon, and the plaintiff has alleged breach, as he is bound to do, his right to recover depending upon the breach, the burden of proving it rests upon him,[98] although it may involve the proving of

any future cohabitation. Brown *v.* Kinsey, 81 N. C. 245.

93. Dickson *v.* Burks, 11 Ark. 307; Rankin *v.* Badgett, 5 Ark. 345; Beeson *v.* Howard, 44 Ind. 413; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748; Jarvis *v.* Peck, 10 Paige Ch. (N. Y.) 118; Brown *v.* Kinsey, 81 N. C. 245.

94. Hunnicutt *v.* Kirkpatrick, 39 Ark. 172; Father Matthew Y. M. T. A. & Benev. Soc. *v.* Fitzwilliams, 12 Mo. App. 445; Baker *v.* Preston, Gilm. (Va.) 235.

95. Action Upon the Official Bond of an Overseer of Highways, proof that he had not rendered to the town supervisors "on or after the third Monday of March" in the proper year, a verified account, in writing, of the character prescribed by statute does not show a breach of the bond; the presumption would be that he had rendered it before that date. Town of Sherwood Forest *v.* Benedict, 48 Wis. 541, 4 N. W. 582.

96. Ordinary *v.* Steedman, 1 Harp. (S. C.) 287, 18 Am. Dec. 652. *See* Article "Bills and Notes."

97. Bank of Washington *v.* Barrington, 2 Pen. & W. (Pa.) 27.

98. City Nat. Bank *v.* Jeffries, 73 Ala. 183; Staats *v.* Herbert, 4 Del. Ch. 508; Barrett *v.* Douglas Park Bldg. Ass'n., 75 Ill. App. 98; Smith *v.* Smith, 34 Wis. 320.

Bond of Bank Teller. — In an action on, conditioned to save the bank harmless from any damage through the teller's want of care, where the bank has proved that the teller received money for which he did not account, this is sufficient proof of breach, the burden of proof of negligence is not on it. Union Bank *v.* Forrest, 3 Cranch C. C. 218, 24 Fed. Cas. No. 14,356.

Bond to Secure Performance of Duty As Agent in a specified business, and to secure a due accounting of all money received in such business, in an action on the bond; it is incumbent on the obligee to show a breach of duty in the business designated therein, or a failure to account for money received in the course of such business. McFall *v.* Howe S. Mach. Co., 90 Ind. 148.

a negative.[99]

Bond for Payments of Money sued upon, the breaches alleged must be established by the plaintiff.[1]

In Action on Penal Bond breach must be established by the plaintiff,[2] and damages shown.[3]

b. *On Defendant.* — In an action on a bond with a defeasance, on plea of *nil debet,* with a plea of performance, the burden of proof is on the defendant.[4]

Thus, in an action on the bond of an insurance agent, conditioned to pay over all moneys, etc., the presumption is in favor of the existence, rather than the cancellation, of a policy; and the burden is on the plaintiff to show the fact, if any of the policies have lapsed, or the renewal premiums not been paid. Hercules Mut. L. Assur. Soc. *v.* Brinker, 77 N. Y. 435.

Bond Conditioned to Pay for Convicts Escaping Through Negligence of the obligor, the burden of proving negligence is on the plaintiff in an action on the bond. Lipscomb *v.* Seegers, 22 S. C. 407.

Forthcoming Bond Given on a Distress for Rent. — In an action on the bond, the plaintiff must prove the contract of rent for which the distress was sued out. Carter *v.* Grant, 32 Gratt. (Va.) 769.

In an Action on a Penal Bond to Recover Damages for Breach of Condition, where defendant pleads a general performance, to which plaintiff replies by joining issue, the burden of proof is on plaintiff, so as to require proof of the breach of condition before recovery can be had. Holliday *v.* Cooper, 1 Smed. & M. (Miss.) 633.

Rule Does Not Apply where the defendant pleads a special performance. Holliday *v.* Cooper, 1 Smed. & M. (Miss.) 633.

99. Such Clear Proof of the Negative as would be required if it were affirmative to be proved, is not necessary. Young *v.* Stephens, 9 Mich. 500.

1. Bond for the Payment of Money in Installments, for a breach of the condition by the non-payment of installments due, the plaintiff cannot recover without proof of such breach, and the mere introduction of the bond does not make a *prima facie* case, whether the suit is at law or in equity. Barrett *v.* Douglas Park Bldg. Ass'n., 75 Ill. App. 98.

2. Attachment Bond, in action on, plaintiff must show attachment was wrongful as well as vexatious. City Nat. Bank *v.* Jeffries, 73 Ala. 183.

But the Sureties on Such a Bond May Be Liable for the costs of the action, notwithstanding that the attachment has not been formally vacated, it being in effect vacated by the judgment. Lee *v.* Homer, 37 Hun (N. Y.) 634.

Forthcoming Bond, sheriff has no right of action on until he shall have been held liable for the goods to the execution creditor, and then only to the amount of his actual damage. Staats *v.* Herbert, 4 Del. Ch. 508.

3. Staats *v.* Herbert, 4 Del. Ch. 508; Webb *v.* Webb, 16 Vt. 636.

4. Philbrook *v.* Burgess, 52 Me. 271; Judges *v.* Deans, 2 Hawks (N. C.) 93; Douglas *v.* Hennessy, 15 R. I. 272, 3 Atl. 213, 10 Alt. 583; Jamison *v.* Knotts, 12 Rich. Law (S. C.) 190.

"**In Debt Upon a Bond,** given by the cashier of a bank to account for all moneys by him received, the defendant pleaded a general performance. The plaintiff replied that the cashier, at divers times, received moneys, amounting to a certain sum, for which he had not accounted. The defendant rejoined that the cashier accounted for all moneys, by him received, and concluded to the country. It was held, that, as the pleadings stood, the defendant was bound to show, in order to entitle himself to a verdict, that the cashier accounted for the sum mentioned in the

E. Burden of Proof As to Payment, Etc. — a. *On Plaintiff.* The burden of proof of breach, or payment, or performance is on the party alleging it; and when breach is claimed, evidence establishing the fact of a breach is all that is required.[5]

b. *On Defendant.* — Where the defendant pleads payment to debt on a bond, or performance in an action for breach of covenant, the burden of proving the plea is on the defendant.[6]

3. As to Indorsement and Transfer. — A. Bona Fide Holders, Presumption. — a. *Generally.* — A person presenting a negotiable bond for payment is presumed to be a *bona fide* holder;[7] and possession of uncancelled coupons detached from negotiable bonds is *prima facie* evidence of title, with all the rights of purchaser.[8]

A bond executed and assigned to the plaintiff for full value is presumed to have been assigned before maturity.[9]

B. Burden of Proof. — a. *Generally.* — A purchaser of a bond under a sealed power of attorney to transfer the bond, which recites "value received," is relieved of the burden of proving that he is a purchaser for value paid at the time thereof, it being *prima facie* a present consideration.[10]

replication." Exeter Bank *v.* Rogers, 6 N. H. 142.

Error Against Bank in Addition of a Column of Figures by the cashier is *prima facie* evidence of a loss to the bank to the amount of the error, and the burden of showing that no loss occurred is upon the sureties in an action on the cashier's bond. Bank of Washington *v.* Barrington, 2 Pen. & W. (Pa.) 27.

5. Bond and Covenant to Pay Indebtedness of a Person and save him harmless. In an action on the bond, the obligee need not prove that he himself has been compelled to make payment; proof that the indebtedness has matured, and has not been paid by the obligor, is enough. Pierce *v.* Plumb, 74 Ill. 326.

6. Clifford *v.* Smith, 4 Ind. 377.

Plea of Payment with leave, etc., pleaded in debt on a bond: It is incumbent on the defendant to make out such a case as would entitle him to relief in a court of equity. Evans *v.* Mengel, 1 Pa. St. 68.

Plaintiff Had Agreed That Certain Money, to be paid by the defendant, should be deducted from the amount of the bond; that he had paid that money was permitted to be shown, although the defendant had not given the notice of this matter of defense, which was required by the rule of the court. Bryson *v.* Ker, 4 Serg. & R. (Pa.) 308.

7. Kennicott *v.* Wayne Co., 6 Biss C. C. 138, 14 Fed. Cas. No. 7710.

Notice to Purchaser, Duty to Inquire. — Where a railroad company issued certain bonds designated as "consolidated first mortgage," by which it appeared that it was intended to substitute a portion of the bonds for first mortgage bonds already issued, and to devote the remainder to the extension and completion of the road, the court held: (1) That the word "consolidated" was sufficient to put a purchaser upon inquiry; (2) That, as the bonds referred to the mortgage, the purchaser was bound by the statement contained therein, and that it was his duty to ascertain whether the holders of the old bonds were willing to make the exchange. Caylus *v.* New York, K. & R. Co., 10 Hun (N. Y.) 295.

8. Duncan *v.* Mobile & O. R. Co., 3 Woods 567, 8 Fed. Cas. No. 4138, *affirmed* in 96 U. S. 659.

9. Parker *v.* Flora, 63 N. C. 474.

10. Appeal of Pennsylvania Co., 86 Pa. St. 102.

b. *On Plaintiff.* — Possession of a negotiable bond, or the coupons[11] thereof, raises a presumption of ownership as a *bona fide* holder;[12] but where bonds are shown to have been stolen, or illegally,[13] or fraudulently issued,[14] or issued pending *certiorari*,[15] the burden is on the party claiming under the bond to show that he is, or some one under whom he claims was, a *bona fide* holder.[16]

c. *On Defendant.* — In an action by the holder of an ordinary coupon bond, payable to bearer, the burden is on the defendant to show that the plaintiff did not purchase in good faith, in the ordinary course of trade, for a valuable consideration.[17]

4. As to Alteration and Mutilation. — The effect upon bonds and other specialties, as subjects of evidence, of alterations and mutilations is the same as upon other instruments in writing.[18]

V. ADMISSIBILITY OF EVIDENCE.

1. Generally. — A. General Rules. — The general rules governing the admissibility of evidence in the particular form of action — assumpsit, debt, or covenant, or in the nature of either — govern in an action on a bond.[19]

11. Holder of an Interest Coupon after its severance from the bond, which coupon is by mistake for a larger sum than that named in the bond, as interest, can only recover the sum named in the bond, unless he show affirmatively that he, or some prior holder of the severed coupon, whose rights he had succeeded to, acquired the same in good faith before maturity, and without notice of the true state of affairs. Goodwin *v.* City of Bath, 77 Me. 462, 1 Atl. 244.

12. See *Ante*, Note 81.

13. Bond Shown to Be Illegal. The plaintiff cannot rely on the presumption arising from title and possession thereof, but must prove that he gave value therefor in the usual course of business, in order to constitute himself a *bona fide* holder. Hancock Mut. L. Ins. Co. *v.* City of Huron, 100 Fed. 1001, 40 C. C. A. 683, *affirming* 80 Fed. 652.

14. Bonds Alleged to Have Been Fraudulently Issued, the burden of proof is on the holder to show that he holds them in good faith. State *v.* Gaines, 46 La. Ann. 431, 15 So. 174.

15. Certiorari Suspending Power of Officer to Issue Bonds, in an action on coupon, this fact being shown, the holder has the burden of proof to show that he was the purchaser of the coupons in good faith and for value. Bailey *v.* Lansing, 13 Blatchf. 424, 2 Fed. Cas. No. 738.

16. Northampton Nat. Bank *v.* Kidder, 106 N. Y. 221, 12 N. E. 557, 60 Am. Rep. 443, *affirming* 17 Jones & S. (N. Y.) 338; Dutchess Co. Mut. Ins. Co. *v.* Hachfield, 47 How. Pr. (N. Y.) 330; Town of Lansing *v.* Lytle, 38 Fed. 204.

Person Alleged to Be Purchaser of a Bond in the ordinary course of business, in good faith, and without notice of any claim of the plaintiff to such bonds, the plaintiff, seeking to recover the possession thereof, to entitle him to recover, is bound to establish: (1) That the bonds belong to him; and (2) that the circumstances under which the defendant purchased them were not such as to protect his title. Birdsall *v.* Russell, 29 N. Y. 220.

17. Rice *v.* Southern Pa. I. & R. Co., 9 Phila. (Pa.) 294; First Nat. Bank *v.* Texas, 20 Wall. (U. S.) 72; Texas *v.* White, 7 Wall. (U. S.) 700; Murray *v.* Lardner, 2 Wall. (U. S.) 110.

18. *See* article, "Alteration of Instruments."

19. Affidavit Not Competent to

B. Extrinsic Evidence. — In an action on a bond, extrinsic evidence to show what was secured thereby is admissible only in those cases where it does not clearly express the contract secured thereby.[20] It is not admissible to show an outside arrangement or understanding, or a custom to enlarge the scope of the bond or fix responsibility of sureties.[21]

C. Bond As Evidence. — In an action for the breach of the conditions of a bond, there being no issue which imposes upon the plaintiff the burden of proving its genuineness, the bond is admissible in evidence;[22] and where the bond is conditioned for the faithful performance of a certain contract, it is proper to admit the contract in evidence for the purpose of proving its provisions.[23]

D. Acts and Declarations. — Where tending to establish the breach alleged, proof of the acts and declarations of the principal

Prove Plaintiff's Cause in an action on a bond, under a statute entitling one suing on an account to prove the items by affidavit. American Surety Co. *v.* U. S., 76 Miss. 289, 24 So. 388.

20. Bond of Sewing Machine Agent, not clearly expressing the contract secured: In a suit thereon, extrinsic evidence is admissible. White S. Mach. Co. *v.* Mullins, 41 Mich. 339.

No Ambiguity on Bond Sued on, and no allegation in the answer that the surety's signature was fraudulently obtained: Evidence to show why certain words were stricken out of the printed form before execution, and what was said on that occasion, inadmissible. White S. Mach. Co. *v.* Fargo, 51 Hun 636, 3 N. Y. Supp. 494.

21. In Action on Bond to Sell Plaintiff's Beer, and promptly remit money due plaintiff, evidence that, at the time of signing the bond, the plaintiff's agent promised to inform the sureties if the principal should make default in paying for any carload of beer, is inadmissible. Dick Bros. Quincy B. Co. *v.* Finnell, 39 Mo. App. 276.

22. Decree of a Court of Equity Pronouncing the Bond Fraudulent and void, yet the bond, being uncancelled, is good at law and will support action. Davidson *v.* Sharpe, 6 Ired. Law (N. C.) 14.

Interlineation, which the plaintiff does not account for, does not warrant the rejection of the bond as evidence, if there is no issue which imposes upon the plaintiff the burden of proving its genuineness. Perhaps, if it had been offered as evidence without having been made the basis of an action, and the interlineation was such as to warrant the suspicion that it had been made after the bond was executed, or without authority, it should be accounted for. Whitsett *v.* Womack, 8 Ala. 466.

Indorsements With Several Subscribing Witnesses, on bond introduced by defendant in evidence, the witnesses not being produced, the court held that the plaintiff might read the indorsements as evidence, without producing the subscribing witnesses. Pittman *v.* Staton, 11 Gratt. (Va.) 99.

Identifying Plaintiff and Obligee. In an action on an attachment bond payable to C. & Co., where the complaint alleges that the bond was made payable to the plaintiff under that name, the bond is admissible in evidence, subject to the proof of the identity of the plaintiff with the obligee in the bond. Hundley *v.* Chadick, 109 Ala. 575, 19 So. 845.

23. Kurtz *v.* Forquer, 94 Cal. 91, 29 Pac. 413.

Bond Conditioned to Purchase and Pay Stipulated Price for Timber Lands, a paper of the same date, but not under seal, signed by the obligee, and having reference to a certificate to be furnished by him to defendant as to the quantity and quality of the timber on the land agreed to be sold,

are admissible in a suit on the bond, when done and made in the line of duty only.[24]

E. Admissions. — In an action on an official bond, or on an indemnity bond, conditioned for the honesty and accounting of the principal, admissions of the principal are admissible in evidence against him,[25] but not against the sureties on his bond,[26] particularly in an action against the latter alone.[27]

F. Books and Writings. — In an action on an official bond, or an indemnity bond, conditioned for honesty and due accounting for all moneys received by the principal in the line of his duty or employment or containing other similar conditions, books kept,[28]

is inadmissible as evidence, being merely collateral in the suit. Robinson *v.* Heard, 15 Me. 296. See Hanson *v.* Stetson, 5 Pick. (Mass.) 506; Shed *v.* Pierce, 17 Mass. 623; Dwight *v.* Pomeroy, 17 Mass. 303.

24. Walker *v.* Pierce, 21 Gratt. (Va.) 722.

Declarations of Bank Cashier Charged With Having Converted to His Own Use, at specified times, and some time before certain declarations offered in evidence were made, several sums of money belonging to the plaintiff. These facts constituting the breach of the bond relied on in an action on the bond, the court held that evidence not tending to show what the cashier said or did, or the entries he made, at the time he received and converted the money, was improperly received against the surety. Stetson *v.* City Bank, 2 Ohio St. 167.

25. Coleman *v.* Pike Co., 83 Ala. 326, 3 So. 755. *See* general discussion of this point in Article "Admission."

Compare Walker *v.* Pierce, 21 Gratt. (Va.) 722, where it is held that the admission and declaration of the principal obligor in a bond, made at the time of its delivery, are, under the practice of Virginia, admissible in evidence in a suit against the sureties on the bond, although such obligor be dead, and therefore not a party to the suit.

26. *See* the article "Principal and Surety."

"It Was Clearly Competent As an Admission Against Himself, even if it be conceded that it is not admissible against his sureties. In such case, it would be the better practice to limit the operation of the evidence when received, but, this not being done, a co-defendant's only remedy is by a charge limiting and confining its effect and operation to the defendant making the admission." Bryan *v.* Kelly, 85 Ala. 569, 5 So. 346, *citing* Lewis *v.* Lee Co., 66 Ala. 480.

Affidavit of Defaulting Bank Teller that part of the deficiency had occurred before a defendant surety executed the bond sued on is not admissible on the part of such surety. State Bank *v.* Johnson, 1 Mill Const. (S. C.) 404.

27. A Letter by Treasurer of Manufacturing Company, written, after the termination of his services, to a director of the company, purporting to contain admissions as to his own defaults, is not admissible in evidence against a surety on his bond, in an action against the latter alone. Chelmsford Co. *v.* Demarest, 7 Gray (Mass.) 1; Smith *v.* Whittingham, 6 Car. & P. 76, 25 Eng. C. L. 291.

28. *See* the article "Books of Account." 2 Encyc. of Ev.

Books of the Agent of an Insurance Company, kept by him in the regular course of his agency, are admissible in an action by the company on a joint bond of the agent and his surety, conditioned that the principal should pay over all funds coming into his hands as agent of said company. Agricultural Ins. Co. *v.* Keeler, 44 Conn. 161.

Books of Agent and Clerk of a Public Company during his lifetime are not admissible in evidence against his sureties, in a suit on the bond to recover a deficiency in the agent's

reports made in the regular course of his official duties,[29] state-

account. Furrie *v.* Jones, 8 U. C. Q. B. 192.

Certain False and Deceptive Entries alleged to have been made in the books of the bank by its clerks, with the connivance of the cashier: On proof that they were kept by the clerks, and that the entries were in their handwriting, such books are admissible in evidence for the purpose of laying a foundation for other testimony to show fraud, etc., on the part of the cashier. Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 324.

Entries in Books Kept Under Supervision of the principal are admissible as evidence for plaintiff in an action on a contract to indemnify plaintiff for any pecuniary loss sustained by it by reason of any fraudulent or dishonest acts of such principal, to which the defense was that the shortage in his accounts occurred prior to the term covered by the bond. Standard Oil Co. *v.* Fidelity & C. Co., 21 Ky. L. Rep. 399, 51 S. W. 571.

Entries by Clerk of Division Court, in books provided by law for that purpose, of moneys received for bailiff's fees, made in the usual course of his business, are evidence against his sureties in a suit on his bond. Middlefield *v.* Gould, 10 Ont. C. P. 9.

Entries on Its Books, in town's action on a collector's bond, made at a settlement with him in his presence and with his assent, are admissible in evidence. Northumberland *v.* Cobleigh, 59 N. H. 250.

Stub of Treasurer's Private Check Book, in an action on a treasurer's bond for the conversion of money by him, is not admissible against the sureties to show a conversion of such funds before the bond was executed. Barry *v.* Screwmen's Ben. Assn., 67 Tex. 250, 3 S. W. 261.

29. Official Reports Made by a County Treasurer, during the term covered by them, are a part of *res gestae*, and competent evidence, not only of the affirmative facts appearing therein, but also of such other facts and circumstances bearing upon the liability of the sureties as are legitimately inferable therefrom, and are admissible in evidence against the sureties in an action on his official bond. Tompkins Co. *v.* Bristol, 99 N. Y. 316; Bissell *v.* Saxton, 66 N. Y. 55; Middleton *v.* Melton, 10 Barn. & C. 317, 21 Eng. C. L. 84; Whitnash *v.* George, 8 Barn. & C. 556, 15 Eng. C. L. 295; Goss *v.* Watlington, 3 Bro. & B. 132, 7 Eng. C. L. 379.

Report by Township Trustee to the county commissioners is admissible evidence against the trustee and his sureties, in a suit on his official bond. Nichols *v.* State, 65 Ind. 512.

By Treasurer of Benevolent Association, after bond executed, in accordance with his official duty, and in pursuance of the laws of the corporation, showing the money was in his hands after the execution of the bond, is admissible in an action on the bond, as against the sureties; but they may show that the report was not true. Barry *v.* Screwmen's Ben. Assn., 67 Tex. 250, 3 S. W. 261, *citing* Casky *v.* Haviland, 13 Ala. 314; Rodes *v.* Com. 6 B. Mon. (Ky.) 362; Bank of Brighton *v.* Smith, 12 Allen (Mass.) 243, 90 Am. Dec. 144; Blair *v.* Perpetual Ins. Co., 10 Mo. 560; Bissell *v.* Saxton, 66 N. Y. 55; Keowne *v.* Love, 65 Tex. 152; U. S. *v.* Boyd, 5 How. (U. S.) 30.

Quarterly Reports Made Under a Bond, securing a contract with the county for hiring of convicts, in an action on the bond for breach by reason of non-payment of the quarterly installments, such quarterly reports being shown to have been received by the proper officer and acted on by the county treasurer, are admissible in evidence in favor of the sureties under a general or special plea of payment. Sloss I. & S. Co. *v.* Macon Co., 111 Ala. 554, 20 So. 400.

Death of Principal does not affect the rule. The New York Court of Appeals, speaking of the English cases above cited, in the first paragraph of this note, says that although the fact of the death of the person making the entries appears in those cases, "it is not conceived that this was a controlling circumstance, inasmuch as the principal upon which

ments,[30] and accounts[31] rendered, and the like,[32] by the principal, in the line of his duty or employment, are admissible in evidence against both the principal and his sureties, to establish the defaults and breaches of the bond alleged.[33]

2. As to Amount of Recovery. — The general rules as to proving

they were mainly determined was the obligation assumed by the sureties in the bond for a proper performance by the officer of the duty of making such entries." Tompkins Co. *v.* Bristol, 99 N. Y. 316.

Not Conclusive as against the sureties, but are open to explanation or contradiction by them, being mere admissions of their principal. Bissell *v.* Saxton, 66 N. Y. 55. See Nichols *v.* State, 65 Ind. 512; Barry *v.* Screwmen's Ben. Assn., 67 Tex. 250, 3 S. W. 261.

Returns of a Receiver of Public Lands to the Treasury Department are not conclusive evidence, in an action by the government, against the sureties upon the receiver's bond. If the sum of money stated in such returns was not actually in the hands of the receiver, the sureties are allowed to show how the fact was. U. S. *v.* Boyd, 5 How. (U. S.) 30.

A Fabricated Account of their principal can not conclude the sureties; they may always inquire into the reality and truth of the transactions. U. S. *v.* Boyd, 5 How. (U. S.) 30.

30. Bank of Brighton *v.* Smith, 12 Allen (Mass.) 243, 90 Am. Dec. 144, *citing* Lexington & W. C. R. Co. *v.* Elwell, 8 Allen (Mass.) 371; Chelmsford Co. *v.* Demarest, 7 Gray (Mass.) 1; Amherst Bank *v.* Root, 2 Metc. (Mass.) 522; Middleton *v.* Melton, 10 Barn. & C. 317, 21 Eng. C. L. 84.

Statement Made After Removal for Misconduct, but during the period covered by the bond, is admissible in a suit on a treasurer's bond and is *prima facie* evidence of the facts therein stated. Father Matthew Y. M. T. A. & Ben. Soc. *v.* Fitzwilliams, 84 Mo. 406.

31. Accounts Rendered by Agent. for goods received from the principal, are admissible in evidence in an action on the agent's bond conditioned for the performance of his contract with the principal. Weed S. Mach. Co. *v.* Kaulback, 3 Thomp. C. (N. Y.) 304.

Account of a Public Officer, settled by the auditor general, and approved by the state treasurer, and certified in due form by the auditor general, is *prima facie* sufficient evidence to warrant a recovery against a surety in a suit on the official bond. Com. *v.* Farrely, 1 Pen. & W. (Pa.) 52.

List of Uncollected Taxes, taken off of the books in his presence, are admissible in evidence in an action on a town collector's bond. Northumberland *v.* Cobleigh, 59 N. H. 250.

32. Notes Executed by an Agent to pay for goods received from the principal are admissible in evidence in an action on the agent's bond conditioned for his performance of his contract with the principal. Weed S. Mach. Co. *v.* Kaulback, 3 Thomp. & C. (N. Y.), 304.

33. Not Admissible, Stubs of treasurer's private check book. Barry *v.* Screwmen's Ben. Assn., 67 Tex. 250, 3 S. W. 261.

Unpaid Note of Cashier given for his subscription to the capital stock of the bank, and evidence of his compromise of a claim of the bank against another bank, not admissible in an action by the bank on the bond of its cashier for losses from discounts and loans made by the defendant without authority. Pryse *v.* Farmers' Bank, 17 Ky. L. Rep. 1056, 33 S. W. 532.

Draft Drawn in Individual Capacity by a Bank Cashier on the bank, who afterward accepted it for the bank, as cashier, and sold it, and it was transmitted to him by the purchaser, with request to pass it to his credit, is not admissible, in an action on the cashier's bond, the cashier having no power, *ex officio*, to accept drafts for the bank. Pendleton *v.* State Bank, 1 T. B. Mon. (Ky.) 171.

the amount of damages in case of a breach of contract,[34] are applicable in an action for the breach of a bond.[35]

3. The Bond Necessary. — The bond, or other specialty sued on, is not only admissible in evidence on the part of the plaintiff, but is an indispensable part of his proof.[36]

4. To Show Execution. —A. GENERALLY. —Execution of the bond must be proved or admitted, to sustain a judgment.[37] The proof of execution, to make it effective, must cover the signing. and sealing thereof, followed by the act or ceremony of delivery.[38]

34. *See* the article "DAMAGES."

35. Affidavit of Merits by the plaintiff is not competent evidence for the consideration of the court in assessment of damages under an appeal bond. Mestling *v.* Hughes, 89 Ill. 389. See Coursen *v.* Browning, 86 Ill. 57.

Action on Bond for Conveyance of Land. — Evidence of the value of the land is inadmissible, unless coupled with proof of the facts entitling the plaintiff to recover damages beyond the amount of the penalty. Sweem *v.* Steele, 10 Iowa, 374, 5 Iowa 352. See Hall *v.* Stewart, 36 Iowa 681.

Appeal Bond, No Inquiry As to Merits of Original Controversy, nor as to the validity of the judgment, can be had in a suit on an appeal bond, where a judgment has been affirmed by the Supreme Court on appeal. Keithsburg & E. R. Co. *v.* Henry, 90 Ill. 255.

Attachment Bond, with surety, given pursuant to statute; on nonsuit at the trial, the plaintiff immediately commenced another suit, on which the same officer attached the property then in his hands, and subsequently sold the same, and applied the proceeds on the execution recovered in the second suit. In a suit upon the bond, it was held that the obligors might show, in mitigation of damages, the application of the proceeds of the property on the execution. Earl *v.* Spooner, 3 Denio. (N. Y.) 246.

Attachment Discharged, where the affidavit for the attachment has been controverted, in suit on the bond against principal and surety such judgment will be conclusive as to the wrongful issue of the writ. But if such judgment has been rendered because of the informality of the affidavit, and not of its falsity, this is not sufficient proof that the order was wrongfully sued out. Boatwright *v.* Stewart, 37 Ark. 614.

In Case of Closing Business, probable profits of the business during the term of stoppage may be shown. Holliday Bros. *v.* Cohen, 34 Ark. 707. *See* the articles "ATTACHMENT;" "DAMAGES."

36. Omission to Introduce Bond affords defendant sufficient ground for a new trial. Bowers *v.* State, 69 Ind. 60.

Condition of a Penal Bond put in issue by the answer, where the bond is not filed, and no evidence of its contents introduced, there is no evidence to support a finding for plaintiff. State *v.* Smit, 12 Mo. App. 572.

37. Killian *v.* State, 15 Ind. App. 261, 43 N. E. 955.

As Strict Proof of Execution Is Not Required of bond more than thirty years after its date, as if it were of recent date, the law makes some allowance for the frailties of memory, and where a great length of time has elapsed since the signing of an instrument attempted to be proved, circumstances are viewed as having an important bearing upon the question. Coulson *v.* Walton, 9 Pet. (U. S.) 62.

Proof of Execution of a bond by persons styling themselves "commissioners" of a county is not proof of the fact against third persons. Carter *v.* Garrett, 13 Ala. 728.

Execution Need Not Be Proved, the defendant not having put the execution of the bond in issue, but having set up performances and limitation. State *v.* Duval, 83 Md. 123, 34 Atl. 831.

38. Moats *v.* Moats, 72 Md. 325, 19 Atl. 965.

B. Mode and Sufficiency of Proof.—The mode of proving the execution of a bond heretofore discussed, whether made by acknowledgment,[39] by subscribing witnesses,[40] or by proving the signatures of a subscribing witness,[41] or by proof of signature of obligor,[42] by witness signing obligor's name,[43] or by an obligor,[44] to be sufficient,

39. **Proof of Acknowledgment by Defendant** in court that he had subscribed his name to the bond, and delivered it to the other defendant, as a form by which to draw such bond, without proof that he ever acknowledged the same, or delivered it as his deed, is not sufficient to charge him. Asberry *v.* Calloway, 1 Wash. (Va.) 72.

40. **Subscribing Witness, Positive Proof by One Witnees** is sufficient, as against the denial of defendants who have no knowledge of the transaction, the bond having been executed by their ancestor. Carneal *v.* Day, 6 Litt. (Ky.) 492.

Subscribing witness proved his own attestation, but had no recollection of having seen the defendant sign, seal and deliver the instrument, but said that from his being the obligee's clerk at the time, and from his having been in the habit of attesting such instruments for him, he believes that the obligor signed, sealed and delivered the bond in question, *held* sufficient proof of its due execution. Miller *v.* Honey, 4 Har. & J. (Md.) 241.

Where Attesting Witness Proved That Obligor Took Her Seat at the Table, but said that he did not see her write her name; that he did not know at the time of signing as witness whether she had signed her name; that he could not say it was her handwriting; and that the instrument was not, to his knowledge, ever read to her, or by her, is insufficient to show the signing, sealing and delivery of the instrument. Edelen *v.* Gough, 5 Gill (Md.) 103.

Showing Conditional Delivery where the subscribing witness testified that, at the time of its execution of the bond by the defendant, he said: "This bond is not to be delivered till signed by all the persons named therein;" it appearing that one of the obligors had not signed it, the bond was held not receivable in evidence. State Bank *v.* Evans, 15 N. J. Law 155, 28 Am. Dec. 400.

One of Two Subscribing Witnesses denying his signature, the other, if he could be procured, should be examined; if he cannot be found, secondary evidence might be resorted to. Booker *v.* Bowles, 2 Blackf. (Ind.) 90.

41. **Subscribing Witness Being Dead,** proof of his handwriting, unaided and unopposed by other evidence, is sufficient to establish the execution thereof. Murdock *v.* Hunter, 1 Brock C. C. 135, 17 Fed. Cas. No. 9941.

42. Proof of handwriting sufficient proof. See *In re* Mair, 42 L. J. Ch. 882, 21 W. R. 749.

Handwriting Proved, Jury May Presume the sealing and delivery. Grellier *v.* Neale, 1 Peake 146, 3 Rev. Rep. 669.

Proof of Defendant's Signature, plaintiff being in possession of the instrument, is sufficient *prima facie* evidence of its due execution by delivery to go to the jury. Pannell *v.* Williams, 8 Gill & J. (Md.) 511.

Witness Proving His Own Signature to a bond, but being unable to identify the party executing it, not knowing him, proof of the obligor's handwriting is admissible and sufficient. Layton *v.* Hastings, 2 Harr. (Del.) 147.

43. **Where Witness Swore That He Had Signed Obligor's Name,** but could not state whether the obligor was present at the time, and could not state his authority for signing his name, *held* to be sufficient proof to admit the bond to be read to the jury. Hicks *v.* Chouteau, 12 Mo. 341.

44. **In Trover for a Bond,** the plaintiff may prove its execution by one of the obligors in the bond, without producing the bond, it being in the defendant's possession. Smith *v.* Robertson, 4 Har. & J. (Md.) 30.

Acknowledgment of Having Given

must be clear and connect the defendant with the obligation.[45]

Any Evidence Tending to Prove the Execution of a bond is sufficient to entitle it to be read to the jury, who are to judge of its execution.[46]

A Corporation's Bond is sufficiently established where it is signed by the secretary and president, and has the corporate seal.[47]

5. To Show Delivery. — A. PLAINTIFF'S EVIDENCE. — Proof of execution, and possession,[48] is sufficient evidence, *prima facie,* of delivery, and, in the absence of proof on the part of the defendant, would entitle the plaintiff to a verdict.[49]

Delivery by Apt Words Shown is sufficient, even though bond retained by the obligor, such retention not rendering it inoperative.[50]

a Bond and warrant of attorney in a writing signed by the plaintiff stating the terms and conditions on which they were given, is sufficient evidence of the existence of the bond and warrant, without the production of them. Day *v.* Leal, 14 Johns. (N. Y.) 404.

45. See *Ante.* II C.

46. Hicks *v.* Chouteau, 12 Mo. 341.

47. Keithsburg & E. R. Co., *v.* Henry, 90 Ill. 255.

48. Mere Proof of Possession, however, in no manner relieves the plaintiff of the burden of proving the execution of the instrument as the deed of the obligor; that is, that the instrument was duly signed and sealed by or for him; because the mere possession of the instrument had no evidential relation to the existence of the seal. Moats *v.* Moats, 72 Md. 325, 19 Atl. 965.

49. Moats *v.* Moats, 72 Md. 325; 19 Atl. 965; Edelin *v.* Sanders, 8 Md. 118.

Sufficiency of Delivery. — Bond payable to state, conditioned for the building and keeping in repair of a public bridge, evidence that the bond was signed and sealed by the obligors, and was afterwards found among the official papers of the clerk of the county court, which appointed the commissioners to let out the building of the bridge, is sufficient proof of a delivery; express acceptance by an agent of the state need not be shown. State *v.* Ingram, 5 Ired. Law (N. C.) 441.

Bond to Reconvey Land. — Being sick, and desiring to provide for her daughter in case of her death, H. made a conveyance of land to her sister N., upon the consideration that the latter should, in the event of the death of H., support the daughter; and in case of her recovery N. was to reconvey the property to H. A bond to this effect was duly executed by N., and deposited by her in a trunk which was used in common by the two, to hold valuable papers. There was no other delivery. H. supposed that the bond was valid and binding without any further act. After the recovery of H. no demand was ever made on N., who died 20 years later, and having shortly before her death conveyed the land to W. The court held that there was sufficient delivery of the bond.- Ward's Appeal, 35 Conn. 161.

50. Hall *v.* Palmer, 3 Hare 532, 13 L. J. Ch. 352; Doe dem. Garnons *v.* Knight, 5 Barn. & C. 671, 12 Eng. C. L. 351, 29 Rev. Rep. 355; Xenos *v.* Whickham, 36 L. J. C. P. 313, L. R. 2 H. L. 296.

Sufficiency of Evidence of Delivery. — Evidence that a bond, duly executed and now produced by the obligee, was handed by one of the obligors to the attesting witness, who was his clerk, and afterwards remained in the custody of the latter for some time, and, according to his recollection, remained with the obligor's papers when he left his employment; and further evidence that the bond was in the obligor's possession at the time of his decease, without any evidence of instructions given by the obligor to the clerk at the time of handing the bond to him, is insufficient in law to warrant a

6. To Show Fraud, Etc. — Strong and conclusive evidence of fraud,[51] collusion,[52] accident, or mistake, is required before a court will set aside an instrument shown to have been duly signed and sealed.[53] Thus, to support a plea of fraud, covin, and misrepresentation in the sale of a business, which was the consideration for the bond, it is not sufficient to show that the business did not produce *to the purchaser* the sum represented by the seller.[54]

7. Breach. — The books kept in course of office or employment,[55] accounts,[56] statements, settlements,[57] and the like, are not only admissible, but sufficient *prima facie* evidence to show breach.[58]

jury to find a delivery of the bond to the obligee, or to any one in his behalf. Chase *v.* Breed, 5 Gray (Mass.) 440.

51. Hart *v.* Messenger, 46 N. Y. 253.

In Action of Debt on an Indemnity Bond, conditioned to save the plaintiff harmless from all damages or suits regarding a certain sum advanced by one A to the plaintiff, through the agency of B, and which sum was also claimed to have been paid to the plaintiff by one C, and to be now due and owing to C. Plea, that the plaintiff, if damnified, was damnified by his own wrong. Replication, setting out as a breach the recovery of judgment and execution against plaintiff by C for the said sum. Rejoinder, that the judgment was recovered by the fraud and covin of the plaintiff, upon which issue was joined. It was shown that the recovery by C had been on admissions made by plaintiff after the execution of the bond. *Held,* not sufficient to support the plea; and the plaintiff having recovered a verdict, the court refused to interfere. Powell *v.* Boulton, 2 U. C. Q. B. 487.

Plea, Bond Was Procured By Fraud. — Evidence showing plaintiff was insolvent at the time the bond was dated; that the obligor had no need of borrowing money, and that plaintiff had frequently declared the obligor owed him nothing, is sufficient to carry the case to the jury on the question of fraud in the procurement of the bond. Moats *v.* Moats, 72 Md. 325, 19 Atl. 965.

52. Bond Conditioned to Pay Any Judgment Which Might Be Recovered in a Suit by Plaintiff Against a Third Person, evidence that such third person suffered a default in such action, and that at the time of the default, and subsequent thereto, he had sufficient property to satisfy the debt, and that he had subsequently sold the property without objection on the part of the plaintiff, is insufficient to prove collusion. Tracy *v.* Maloney, 105 Mass. 90.

53. Beall *v.* Greenwade, 9 Md. 185; Marshall *v.* Hill, 6 Humph. (Tenn.) 234.

54. But if it is shown that it did not produce to the seller himself, it will be enough, as in such a case it may be presumed that the representation was untrue, to the knowledge of the party making it. D'Aranda *v.* Houstoun, 6 Car. & P. 511, 25 Eng. C. L. 516.

55. Books Kept by Treasurer are conclusive evidence, against him and his sureties, of the balance in the treasury at any given time, so as to charge them with balances carried forward from year to year, as if such balances were actually on hand. Baker *v.* Preston, Gilm. (Va.) 235.

56. Account delivered by principal charging himself is evidence against surety. Lysaght *v.* Walker, 5 Bligh. (N. S.) 1.

See "PRINCIPAL AND SURETY."

57. Settlement With County Court is conclusive in an action on a county treasurer's bond. Hunnicutt *v.* Kirkpatrick, 39 Ark. 172.

58. Bond Conditioned to Deliver Muniments of Title, production of the bond is sufficient to put the defendant upon the proof of performance of the condition in an action for breach. Stewart *v.* Grimes, Dud. (Ga.) 209.

BOOK ACCOUNT.—See Accounts and Books of Account.

BOOKS.

By Horace T. Smith.

Scope Note.—This article does not include books of account, diaries, or other written memoranda, nor works published by authority of the government, such as statutes, legislative journals and reports; but is limited to the use as evidence of private printed publications.

I. GENERALLY.

Although private publications are not as a rule competent evidence,[1] the established facts of general history, some results of scientific research and observation and some other facts from undisputed sources may be proved by standard works of authority.[2]

Books of Literature generally are not competent evidence.[3]

Judicial Notice. — The court may take judicial notice that certain books or parts of books are recognized authorities;[4] or require proof that they are such before admitting them in evidence.[5]

Reason of the Admissibility. — Appropriate matter in such works is so received in evidence on account of their recognized or proved authority;[6] and from the fact that such evidence is practically the best attainable,[7] and that all men assent to its accuracy.[8]

1. Encyclopedias. — The leading Encyclopedias are works of authority,[9] and appropriate matter in them is competent evidence.[10]

1. See *post,* Books of Science, Medicine, etc.

2. **General Rule as to Admissibility.** — Western Assur. Co. *v.* Mohlman Co., 83 Fed. 811; State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168; Darby *v.* Ousley, 36 Eng. L. & Eq. 519; Tucker *v.* Donald, 60 Miss. 460, 45 Am. Rep. 416.

"The question is not whether the courts will use the helps of science in the investigation of truth. There is no controversy on that score. The authorities are agreed that the truths of the exact sciences, the established facts of history, and computations from fixed data may be proven by the works of reputable authorities. This is on the ground that all men assent to their correctness." Bixby *v.* Omaha & C. B. & B. Co., 105 Iowa 293, 75 N. W. 182, 67 Am. St. Rep. 299, 43 L. R. A. 533.

3. **Literature.** — Whiton *v.* Albany & Narragansett Ins. Co., 109 Mass. 24.

4. **Judicial Notice,** — Worden *v.* Humeston & S. R. Co., 76 Iowa 310, 41 N. W. 26; Adler *v.* State, 55 Ala. 16; State *v.* Wagner, 61 Me. 178.

See article "MORTALITY TABLES." Nix *v.* Hedden, 149 U. S. 304, 13 Sup. Ct. 881; "Zante Currants," 73 Fed. 183.

5. **Proof of Authority.** — Gorman *v.* Minn. & St. P. R. Co., 78 Iowa 509, 43 N. W. 303.

See *post* History.

In San Antonio & A. P. R. Co. *v.* Bennett, 76 Tex. 151, 13 S. W. 319, it was held that a witness might be permitted to testify to the accuracy of mortality tables prepared by the American Legion of Honor, and with such preliminary proof they were admissible.

6. **Authority.** — Bixby *v.* Omaha & C. B. R. & B. Co., 105 Iowa 293, 75 N. W. 182, 67 Am. St. Rep. 299, 43 L. R. A. 533.

7. **Best Evidence Attainable.** Shover *v.* Myrick, 4 Ind. App. 7, 30 N. E. 207.

"**The Reason Why Public History is Admitted** as evidence seems to be, that the facts necessary to be established are properly subjects of history, and because of the extreme difficulty or utter impossibility of establishing those facts by any other testimony." Morris *v.* Edwards, 1 Ohio 189, 209.

8. **Universal Assent.** — Bixby *v.* Omaha & C. B. R. & B. Co., 105 Iowa 293, 75 N. W. 182, 67 Am. St. Rep. 299, 43 L. R. A. 533; Western Assur. Co. *v.* Mohlman Co., 83 Fed. 811.

9. **Encyclopedias.** — Worden *v.* Humeston & S. R. Co., 76 Iowa 310, 41 N. W. 26; Scagel *v.* Chicago, M. & St. P. R. Co., 83 Iowa 380, 49 N. W. 990.

10. Worden *v.* Humeston & S. R. Co., 76 Iowa 310, 41 N. W. 26; Gorman *v.* Minneapolis & St. P. R. Co., 78 Iowa 509, 43 N. W. 303; Scagel *v.* Chicago, M. & St. P. R. Co., 83 Iowa 380, 49 N. W. 990.

But they are not competent evidence on the question whether certain islands were guano islands.[11]

2. Dictionaries. — It is held that dictionaries are not properly evidence,[12] and that the court should take judicial notice of their authority and use them for his own information,[13] or read from them in his charge to the jury.[14] But other courts hold that they are competent evidence.[15]

II. HISTORICAL AND STATISTICAL.

1. General Histories. — Historical Works of recognized authority are competent evidence to prove remote facts of general history.[16]

Histories Offered in Evidence. — Proof of Historical facts is required,[17] but it is held that courts may refresh their recollections

11. Whiton *v.* Albany and Narragansett Ins. Co., 109 Mass. 24, 31.

12. Dictionaries. — "Zante Currants," 73 Fed. 183; Nix *v.* Hedden, 149 U. S. 304, 13 Sup. Ct. 881.

13. Judicial Notice. — Adler *v.* State, 55 Ala. 16; Nix *v.* Hedden, 149 U. S. 304, 13 Sup. Ct. 881; "Zante Currants," 73 Fed. 183.

The Court Will Take Judicial Notice That Webster's Unabridged Dictionary is a work of standard authority. Adler *v.* State, 55 Ala. 16, 23.

14. Adler *v.* State, 55 Ala. 16.

15. Dictionaries in Evidence. Adler *v.* State, 55 Ala. 16; Cook *v.* State, 110 Ala. 40, 20 So. 360; State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

Webster's Dictionary. — "We can perceive no good reason why a work of such standard authority as Webster's Unabridged Dictionary confessedly is, should not be used before a court or jury, when ever the meaning of an English word is brought in question. That it is a work of standard authority, is so widely known; indeed, so universally acknowledged wherever the English language is spoken, that it must be classed among the facts judicially known.

. . . . . .

"What constituted malt liquor was a material inquiry in these cases. The court might properly have given the proper definition in charge to the jury. There was no error in placing before them the proper definition, as furnished in Webster's Unabridged Dictionary. The objection and exception taken in each of these cases to the reading in evidence of the definition of the term *malt liquor*, as furnished in Webster's Unabridged Dictionary, could not have wrought any injury to defendants." Adler *v.* State, 55 Ala. 16. See also Cook *v.* State, 110 Ala. 40, 20 So. 360.

16. General History. — Charlotte *v.* Chouteau, 33 Mo. 194; Com. *v.* Alburger, 1 Whart. (Pa.) 469; Gregory *v.* Baugh, 4 Rand. (Va.) 611; Woods *v.* Banks, 14 N. H. 101; Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489; Onondaga Nation *v.* Thacher, 29 Misc. 428, 61 N. Y. Supp. 1027.

"**Historical Facts of General and Public Notoriety,** may indeed be proved by reputation; and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts, which do not presuppose better evidence in existence; and where, from the nature of the transactions, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence." Morris *v.* The Lessee of Harmer's Heirs, 7 Pet. (U. S.) 554.

General Histories of Established Reputation are competent evidence upon a question as to the boundaries between counties and the jurisdiction of the court over a crime committed in a certain place. State *v.* Wagner, 61 Me. 178, 188.

17. Book in Evidence. — McKinnon *v.* Bliss, 21 N. Y. 206; Whiton

and guide their judgments by referring to general Histories of recognized authority.[18]

2. Local Histories. — Mere local histories are not competent in evidence.[19]

Record of Weather. — But the record of the weather kept in an insane asylum was held admissible for the purpose of showing the temperature on a given day.[20]

Particular Facts and Customs may not be established by historical evidence.[21]

3. Recent Events. — Historical Works can not be offered in evidence of recent events while the author is alive and may be called to give his sources of information.[22]

4. Gazetteers and Directories. — Distances between places cannot be proved by a Gazetteer.[23]

A city directory is not competent evidence to prove that a party was an officer of a corporation,[24] or to prove his place of business.[25]

v. Albany & Narragansett Ins. Co., 109 Mass. 24; Gregory *v.* Baugh, 4 Rand. (Va.) 611.

18. Courts may take judicial notice of the facts of general history, but upon a jury trial if a fact is to be proved by historical evidence the History must be introduced. Gregory *v.* Baugh, 4 Rand. (Va.) 611; McKinnon *v.* Bliss, 21 N. Y. 206.

Judicial Notice. — State *v.* Wagner, 61 Me. 178. *See* "JUDICIAL NOTICE."

19. Local Histories. — McKinnon *v.* Bliss, 21 N. Y. 206; Morris *v.* Harmer's Lessee, 7 Pet. 554; Roe *v.* Strong, 107 N. Y. 350, 14 N. E. 294.

20. Record of Weather. — De Armond *v.* Neasmith, 32 Mich. 231.

21. Local History or Customs. Strainer *v.* Burgesses of Droitwitch, 1 Salk. 281; Morris *v.* Lessee of Harmer's Heirs, 7 Pet. 554; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633; Roe *v.* Strong, 107 N. Y. 350, 14 N. E. 294; Morris *v.* Edwards, 1 Ohio 189; Evans *v.* Getting, 6 Car. & P. 586, 25 Eng. C. L. 587; Bank of Eng. *v.* Anderson, 4 Scott 83.

History of Long Island. — "The plaintiffs offered and read in evidence, under objection, an extract from Thompson's History of Long Island, with a view of establishing that Richard Floyd's possession antedated the Nicholls patent of 1666. This evidence was incompetent. Dart *v.* Laimbeer, 107 N. Y. 664, 14 N. E. 291.

Must be General History. — "History is only admissible to prove history, that is, such facts as being matters of interest to a whole people, are usually incorporated in a general history of the state or nation." McKinnon *v.* Bliss, 21 N. Y. 206.

22. Recent Events. — McKinnon *v.* Bliss, 21 N. Y. 206; Houghton *v.* Gilbart, 7 Car. & P. 701; Onondaga Nation *v.* Thacher, 29 Misc. 428, 61 N. Y. Supp. 1027.

"**The Work of a Living Author,** who is within the reach of process of the court, can hardly be deemed of this nature. He may be called as a witness. He may be examined as to the sources and accuracy of his information; and especially if the facts which he relates are of a recent date, and may be fairly presumed to be within the knowledge of many living persons, from whom he has derived his materials; there would seem to be cogent reasons to say, that his book was not, under such circumstances, the best evidence within the reach of the parties." Morris *v.* the Lessee of Harmer's Heirs, 7 Pet. 554. Whiton *v.* Albany & N. Ins. Co., 109 Mass 24.

23. Distances. — Spalding *v.* Hedges, 2 Pa. St. 240.

24. City Directory. — Tichenor *v.* Newman, 186 Ill. 264, 57 N. E. 826.

25. Langley *v.* Smith, 3 N. Y. St. 276.

5. Newspapers. — A. GENERALLY. — Newspaper items are not made competent evidence by reason of their publication.[26]

B. MARKET REPORTS in newspapers are competent evidence.[27]

Proof of Accuracy. — But it has been held, that some proof of the general accuracy of such reports should be required.[28]

6. Lodge By-laws. — Printed copies of the Constitution and By-laws of a Beneficial Order promulgated by the Supreme Lodge and used by the officers and members of the local lodges in the transaction of business are not admissible in evidence to prove the Laws of the Order.[29]

7. Bank Note Detector. — Bank Note Detectors are not admissible in evidence.[30]

26. Newspaper. —Riley *v.* St. John, 11 New Brun. 78.

Notice or an Account of the Death of a person published in a Texas newspaper is not competent evidence of such death upon a New York trial. Fosgate *v.* Herkimer Mfg. Co. & Hydraulic Co., 9 Barb. (N. Y.) 287.

In an action for personal injury against a railroad the defendant offered in evidence a newspaper account of the accident. *Held*, that the article was properly rejected. Downs *v.* N. Y. Central R. Co., 47 N. Y. 83.

27. Markets. — Terry *v.* McNiel, 58 Barb. (N. Y.) 241; Aulls *v.* Young, 98 Mich. 231, 57 N. W. 119; Peter *v.* Thickstun, 51 Mich. 589, 17 N. W. 68; Western Assur. Co. *v.* Mohlman Co., 83 Fed. 811.

"Price Current." — In Cliquot's Champagne, 3 Wall. 114, 141, it was held that a copy of a paper entitled "Price Current" and used by a wine dealer in his business, was competent evidence of market values.

Market Price. — "We also think that the court erred in excluding evidence of the state of the markets as derived from the market reports in the newspapers. . . . As a matter of fact, such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries, or individual sales or inquiries; and courts would justly be the subject of ridicule, if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character." Sisson *v.* Cleveland Etc. R. Co., 14 Mich. 489, 90 Am. Dec. 252.

28. Proof of Accuracy. — "*Mere quotations from other newspapers,* or information obtained from those who have not the means of procuring it, would be entitled to but little if any weight. The credit to be given to such testimony must be governed by extrinsic evidence, and cannot be determined by the newspaper itself without some proof or knowledge of the mode in which the list was made out. As there was no such testimony the evidence was entirely incompetent, and should not have been received." Whelan *v.* Lynch, 60 N. Y. 469, 19 Am. Rep. 202. See also Vogt *v.* Cope, 66 Cal. 31, 4 Pac. 915.

29. Lodge By-Laws. — Downie *v.* Freeholders of Passaic Co., 54 N. J. Law 223, 23 Atl. 954, *overruled* by 48 Atl. 1000; Page *v.* K. P. of America (Tenn.), 61 S. W. 1068.

Printed copies of the constitution and by-laws of a beneficial order distributed among lodges and used by such lodges and their members in the transaction of business, are not competent evidence of the laws and rules of such order. Herman *v.* Supreme Lodge K. P. of the world, 66 N. J. Law 77, 48 Atl. 1000.

This case overrules the decision to the contrary in Schubert Lodge *v.* K. P. of N. J., 56 N. J. Eq. 78, 38 Atl. 347.

30. State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

III. SCIENTIFIC WORKS.

1. Generally. — Scientific books as a rule are not admissible in evidence.[31] It has been held that an expert witness may refresh

31. Scientific Works. — England. Attorney General *v.* Cast-Plate Glass Co., 1 Anstr. 39, 3 Rev. Rep. 543; Collier *v.* Simpson, 5 Car. & P. 73, 24 Eng. C. L. 219.

United States. — Union Pac. R. Co. *v.* Yates, 79 Fed. 584, 49 U. S. App. 241.

Georgia. — Johnston *v.* Richmond, etc. R. Co., 95 Ga. 685, 22 S. E. 694.

Illinois. — Yoe *v.* People, 49 Ill. 410; North Chicago Rolling Mill Co. *v.* Monka, 107 Ill. 340; Gale *v.* Rector, 5 Ill. App. 481.

Indiana. — Carter *v.* State, 2 Ind. 617; Epps *v.* State, 102 Ind. 539, 1 N. E. 491.

Iowa. — Bixby *v.* Omaha & C. B. R. & B. Co., 105 Iowa 293, 75 N. W. 182, 67 Am. St. Rep. 299, 43 L. R. A. 533, *explaining* Bowman *v.* Woods, 1 Greene (Iowa) 441.

Maryland. — Mut. Life Ins. Co. *v.* Bratt, 55 Md. 200.

Massachusetts. — Com. *v.* Wilson, 1 Gray 337; Washburn *v.* Cuddihy, 8 Gray 430; Ashworth *v.* Kittridge, 12 Cush. 193, 59 Am. Dec. 178; Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; Com. *v.* Brown, 121 Mass. 69.

Michigan. — People *v.* Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477; People *v.* Vanderhoof, 71 Mich. 158, 39 N. W. 28; People *v.* Millard, 53 Mich. 63, 18 N. W. 562.

New Jersey. — N. J. Zinc & Iron Co. *v.* Lehigh Zinc & Iron Co., 59 N. J. Law 189, 35 Atl. 915.

New York. — Harris *v.* Panama R. Co., 3 Bosw. 7.

North Carolina. — Melvin *v.* Easley, 1 Jones L. 386, 62 Am. Dec. 171; Huffman *v.* Click, 77 N. C. 55.

Rhode Island. — State *v.* O'Brien, 7 R. I. 336.

Texas. — Fowler *v.* Lewis, 25 Tex. Sup. 380; St. Louis etc. R. Co. *v.* Jones, (Tex.), 14 S. W. 309; Boehringer *v.* Richards Medicine Co., 9 Tex. Civ. App. 284, 29 S. W. 508.

Wisconsin. — Stilling *v.* Thorp, 54 Wis. 528, 11 N. W. 906, 41 Am. Rep. 60; Boyle *v.* State, 57 Wis. 472, 15 N. W. 827, 46 Am. Rep. 41.

Compare. — Stoudenmeier *v.* Williamson, 29 Ala. 558; Merkle *v.* State, 37 Ala. 139.

"The reasons are: First, that experiment and discovery are so constantly changing theories on scientific subjects that the books of last year may contain something which this year everybody rejects as absurd; secondly, the book may be a compilation of a compilation and be thus hearsay evidence of the most extreme kind; thirdly that the authors do not write under oath, and cannot be cross-examined as to the reasons and grounds for their opinion. This latter seems to us a controlling reason against the admission of that class of testimony. Johnston *v.* Richmond & D. R. Co., 95 Ga. 685, 22 S. E. 694.

Relevant Matter from Book of Established Reputation as Authority cannot be read in evidence to a jury on the question of diseases of horses. Harris *v.* Panama R. Co., 3 Bosw. (N. Y.) 7.

In Proving Age of Horse. — On the question of identity of a horse where its age was material, it was held to be error to admit in evidence a work on veterinary science, to instruct the jury how to ascertain the age of a horse from its teeth. Brady *v.* Shirley, 14 S. D. 447, 85 N. W. 1002.

Effect of Blindness in Horses. "On an issue as to whether plaintiff was guilty of contributory negligence in driving over a bridge, with no railings or guards, a horse which was blind in one eye, text-books relating to the effect of blindness in horses are inadmissible, since the subject is not one of expert testimony, but depends on the knowledge of the disposition of the particular animal." Gould *v.* Schermer, 101 Iowa 582, 70 N. W. 697.

Reasons for Not Admitting Medical Works. — "Every medical and scientific writer bases much of his

his recollection by referring to such works.[32]

Results of Science Sometimes Evidence. — In special cases and to prove certain results of scientific research and experiment, such scientific authorities are competent evidence.[33]

2. Cross-examination. — But where an expert bases his opinion upon such books they may be used in evidence to contradict him.[34]

conclusions upon what he believes to be true in the reported facts and opinions of other men of science. Those facts may be correctly stated, or they may be assumed on small or no foundation. Those opinions may be taken carelessly at the second hand, or they may have been thoroughly weighed before adoption. No one can tell whether a medical book or opinion is reliable or not, until he has applied himself with some fitting preparation to its study and criticism. The book may be good in part, and neither court nor jury can presumptively ascertain its quality." People *v.* Millard, 53 Mich. 63, 18 N. W. 562.

Work on Insurance. — In an action against a mutual insurance company where the deceased was in default for the later premiums and his representatives seek to recover part of the face of the policy, portions of a work on insurance containing rules and modes for adjusting such cases are not admissible. Mut. Life Ins. Co. *v.* Bratt, 55 Md. 200.

In Iowa, by Force of Statute scientific and historic works are admissible in evidence, but in Burg *v.* Chicago R. I. & P. R. Co., 90 Iowa 106, 57 N. W. 680, it was held, that an extract from the American Mechanical Dictionary treating of appliances for stopping trains and distance required therefor, which does not give the size of the train, the pressure applied to the brakes, nor the character of the grade was not admissible. In the same case it was held that the statutes of the state did not make an article in the Railway Age, purporting to contain records of tests made between Westinghouse brake and Evans Driver brake competent evidence.

Hoyle. — People *v.* Gossek, 93 Cal. 641, 29 Pac. 246.

Contra. — See note 38, last citation and notes 41 and 43.

32. State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; Huffman *v.* Click, 77 N. C. 55, where it is said that his opinion must, however, be his own, not a mere statement of the doctrine of the book.

"The book called 'Modern Pocket Hoyle' was not admissible in evidence; but, as we understand it, a page of that book containing pictorial representation of faro was merely used as a diagram by which a witness illustrated his testimony. If that was clearly the only purpose for which it was used, there was probably no error committed; but no part of the book can be used as evidence in itself of what constitutes the game of faro." People *v.* Gosset, 93 Cal. 641, 29 Pac. 246.

33. Admissible Evidence. — Bixby *v.* Omaha & C. B. R. & B. Co., 105 Iowa 293, 75 N. W. 182, 67 Am. St. Rep. 299, 43 L. R. A. 533; Shover *v.* Myrick, 4 Ind. App. 7, 30 N. E. 207.

Exact Sciences and Results of Experience. — Scientific books generally are not competent but certain classes of matter in them are admitted as primary evidence to a jury. The first class relates to sciences deemed exact and includes almanacs, logarithms, astronomical and other calculations, and the second class relates to such as by long use in the practical affairs of life have come to be accepted as standard and unvarying authority in determining the action of those who use them, and includes life insurance and annuity tables and inductive tables from experimental science. Tucker *v.* Donald, 60 Miss. 460, 470, 45 Am. Rep. 416.

34. Cross Examination. — N. J. Zinc & Iron Co. *v.* Lehigh Zinc & Iron Co., 59 N. J. Law 189, 35 Atl. 915. See *infra* "Medical Works."

Cross Examination of Expert. An expert who testifies without experience and gives opinions founded upon reading and study alone may

3. Patent Infringement Cases. — Publications of recognized or proved authority are admissible in Patent infringement case to show the state of the art at the time of the invention.[35]

4. Tabulations. — Approved Mechanical Tables from accredited authority are competent evidence.[36]

Tide Tables. — Tide Tables, carefully prepared by a scientific author, may be read from his books in evidence.[37]

5. Medical Works. — A. GENERAL RULE. — Standard medical

be cross-examined upon the books he has read. State *v.* Wood, 53 N. H. 484.

Books Referred to by Witness. "Books of science are generally inadmissible as evidence to prove the opinions contained in them; but, if a witness refers to them as an authority for his own opinions, they may be received for the purpose of contradicting him." New Jersey Zinc & Iron Co. *v.* Lehigh Zinc & Iron Co., 59 N. J. Law 189, 35 Atl. 915.

Reading of Scientific Books to witnesses on cross examination to contradict them generally is improper, unless the experts base their opinions upon or testify that they are corroborated by such scientific books. Forest City Ins. Co. *v.* Morgan, 22 Ill. App. 198.

35. Infringement. — *English Encyclopedia to Show State of Art.* In a patent infringement case it was held that an English Encyclopedia was competent under U. S. Statute to show the state of the art. Seymour *v.* McCormick, 19 How. 96, 107.

Foreign Publication. — In French *v.* Carter, 137 U. S. 239, a foreign publication showing the state of art, was held competent evidence in the question of patent infringement.

Scientific Books are competent evidence to show the state of the art in a patent infringement case. State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

36. Mechanical Tables. — *To Show Results of Series of Experiments.* In Western Assur. Co. *v.* Mohlman Co., 83 Fed. 811, 821, it was held that the results of experiment upon the strength of materials derived from two thousand tests by the United States Government, were admissible; the court saying: "Under the rule contended for, that valuable information would be available for the use of a court of justice so long as the men who made the tests and prepared the tabulations were living and producible, but after their death or disappearance the information they had gathered would be lost to the court, although available for every one else in the community, and relied upon by engineers and builders whenever a new structure is in process of erection. Upon the precise point here presented the diligence of counsel has not succeeded in discovering a single authority. We feel, therefore, no hesitancy in modifying the general rule as to hold that, where the scientific work containing them is concededly recognized as a standard authority by the profession, statistics of mechanical experiments and tabulations of the results thereof may be read in evidence by an expert witness in support of his professional opinion, when such statistics and tabulations are generally relied upon by experts in the particular field of the mechanical arts with which such statistics and tabulations are concerned."

Leffel's Tables of Water Power. With proper preliminary proof of accuracy Leffel's Tables showing the value in Horse Power of Water of varying head and quantity are competent evidence when relevant. Garwood *v.* N. Y. C. & H. R. R. Co., 45 Hun (N. Y.) 128.

Machinery. — Selections from a standard, scientific, mechanical work on "Engines and Locomotives" may be admitted in evidence under Nebraska Statutes. Sioux City & P. R. Co. *v.* Finlayson, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724.

37. Tide Tables. — Green *v.* Cornwall, 1 N. Y. City Hall Rec. 11.

works proven or admitted to be such,[38] including the U. S. Dispensatory, are not competent evidence.[39] Nor do medical works come within a statute admitting as evidence "books of science" to prove "facts of general notoriety or interest."[40]

Contra. — But other courts hold that medical authorities admitted or proved to be standard works with the profession may be used

38. Medical Work. — People *v.* Wheeler, 60 Cal. 581, 44 Am. Rep. 70; North Chicago Rolling Mill *v.* Monka, 107 Ill. 340; City of Bloomington *v.* Shrock, 110 Ill. 219, 51 Am. Rep. 678; Tucker *v.* Donald, 60 Miss. 460, 45 Am. Rep. 416; Burt *v.* State, 38 Tex. App. 397, 40 S. W. 1000, 39 L. R. A. 305; Union Pac. R. Co. *v.* Yates, 79 Fed. 584, 49 U. S. App. 241; Huffman *v.* Click, 77 N. C. 55; Ashworth *v.* Kittridge, 12 Cush. (66 Mass.) 193, 59 Am. Dec. 178; Com. *v.* Wilson, 1 Gray (Mass.) 337; Gallagher *v.* Market St. R. Co., 67 Cal. 13, 6 Pac. 869, 56 Am. Rep. 713; Gale *v.* Rector, 5 Ill. App. 481; Stilling *v.* Town of Thorp, 54 Wis. 528, 11 N. W. 906, 41 Am. Rep. 60; Van Skike *v.* Potter, 53 Neb. 28, 73 N. W. 295; Com. *v.* Brown, 121 Mass. 69; Com. *v.* Sturtivant, 117 Mass. 122, 139, 19 Am. Rep. 401; Johnson *v.* Richmond & D. R. Co., 95 Ga. 685, 22 S. E. 694; Cook *v.* Coffey, 103 Ga. 384, 30 S. E. 27; State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; Fox *v.* Peninsular White Lead & Color Works, 84 Mich. 676, 48 N. W. 203; State *v.* O'Brian, 7 R. I. 336.

Too Technical for Jury. — Bixby *v.* Omaha & C. B. R. & B. Co., 105 Iowa 293, 75 N. W. 182, 67 Am. St. Rep. 299, 43 L. R. A. 533.

Not Intelligible to Non-Experts. "Scientific or expert testimony must be given by living witnesses who can be cross-examined concerning their means of knowledge and can explain in language open to general comprehension what is necessary for the jury to know. The only legal reason for allowing the evidence of opinions is found in the presumption that an ordinary juryman or other person without special knowledge could not understand the bearing of facts that need interpretation. Medical books are not addressed to common readers, but require particular knowledge to understand them." People *v.* Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477.

Medical Works Not Best Evidence. Brodhead *v* Wiltse, 35 Iowa 429.

Surgery. — In a mal-practice suit against a surgeon for alleged negligence in operating on plaintiff's knee-cap, it was held that medical works were not competent primary evidence. Van Skike *v.* Potter, 53 Neb. 28, 73 N. W. 295.

An Engraving May Be Used as a Sketch or chalk to illustrate the case, but should be disconnected from any book, and if anything is said by counsel offering it as to its being part of some work of authority it should be excluded. Ordway *v.* Haynes, 50 N. H. 159.

39. Com. *v.* Marzynski, 149 Mass. 68, 21 N. E. 228; Boehringer *v.* Richards, Medicine Co., 9 Tex. Civ. App. 284, 29 S. W. 508.

40. Conclusions Too Uncertain. "But medicine belongs to the class known as inductive sciences. The data is constantly shifting with new discoveries, and the conclusion which may be considered sound today is repudiated tomorrow. A medical work may be standard this year and obsolete next. The opinion of the same author changes in the different editions, owing to new discoveries and a better understanding of symptoms." Bixby *v.* Omaha & C. B. R. & B. Co., 105 Iowa 293, 75 N. W. 182, 67 Am. St. Rep. 299, 43 L. R. A. 533; Union Pac. R. Co. *v.* Yates, 79 Fed. 584; Gallagher *v.* Ry. Co., 67 Cal. 13, 6 Pac. 869, 56 Am. Rep. 713.

Extracts to Show Cause and Symptoms of a Disease. — "Extended extracts from medical works defining and giving the probable cause, progress, and symptoms of diabetes

in evidence,[41] but technical and obscure phrases should be explained by experts.[42] And on a question whether a certain treatment was in accordance with the teachings of a certain system or school, the books of that school are competent.[43]

Books Kept from Jury. A witness should not be permitted to read,[44] quote,[45] nor give the substance of medical authorities[46] and should not be permitted to testify as an expert who has had no experience and speaks only from books,[47] but in some courts it is held that such witness may testify as an expert.[48]

An attorney may frame his questions from Standard Medical authorities.[49]

Not Read to Witnesses. — But cannot on examination in chief read from such authorities, and inquire of the witness as to his opinion on the selections read.[50]

were received in evidence over the objection of the defendant. These were from the Practice of Medicine, by Wood & Fitz, and the Science and Practice of Medicine, by Palmer. This was error." Stewart *v.* Equitable Mut. Life Ass'n, 110 Iowa 528, 81 N. W. 782.

41. State *v.* Winter, 72 Iowa 627, 34 N. W. 475; Carter *v.* State, 2 Ind. 617; Bowman *v.* Woods, 1 Greene (Iowa) 441; State *v.* Gillick, 10 Iowa 98; Brodhead *v.* Wiltse, 35 Iowa 429; Merkle *v.* State, 37 Ala. 139; Bales *v.* State, 63 Ala. 30; Steudenmeir *v.* Williamson, 29 Ala. 558.

In Iowa. — "The defendant assigns as error the admission in evidence of an extract from a medical work on Diseases of the Throat and Nose. The extract is in these words: 'Purulent inflammation of the nasal mucous membrane in exceeding rare cases may be simply an aggravation of an ordinary catarrh. It may likewise result from injuries.' The objection urged is that the statement is too indefinite; but we cannot say that it has no bearing upon the question at issue. If it has some bearing, the indefiniteness of the statement, it appears to us, goes to its value or weight as evidence, rather than its admissibility." Quackenbush *v.* Chicago & N. W. R. Co., 73 Iowa 458, 35 N. W. 523. But see cases cited in note last preceding.

42. Explanation of Terms.—Steudenmier *v.* Williamson, 29 Ala. 558; Bales *v.* State, 63 Ala. 30.

43. Best Evidence of System Taught in Them. — While it is true that medical works are not generally admissible in evidence in an action for mal-practice, where the defense is that the case was treated in accordance with the system of medicine professed by the doctor, the medical books of that profession are the best evidence of what that system teaches and are admissible. Bowman *v.* Wood, 1 Greene (Iowa) 441. But see Collier *v.* Simpson, 4 Car. & P. 73, 24 Eng. C. L. 219.

44. Books Must Not Be Read. Boyle *v.* State, 57 Wis. 472, 15 N. W. 827, 46 Am. Rep. 41.

45. Boyle *v.* State, 57 Wis. 472, 15 N. W. 827, 46 Am. Rep. 41; People *v.* Wheeler, 60 Cal. 581, 44 Am. Rep. 70.

46. In Boyle *v.* State, 57 Wis. 472, 15 N. W. 827, 46 Am. Rep. 41, the court held that books could not be read by the witness to the jury and that the witness should not be permitted to quote from memory from medical works nor give their substance.

47. Soquet *v.* State, 72 Wis. 659, 40 N. W. 391.

48. State *v.* Wood, 53 N. H. 484.

49. State *v.* Coleman, 20 S. C. 441.

50. Not Read to Witness. — City of Bloomington *v.* Shrock, 110 Ill. 219, 51 Am. Rep. 678; State *v.* Coleman, 20 S. C. 441.

Medical books on Farriery cannot

B. Use in Cross-examination. — Medical authorities may not be used to contradict an expert generally.[51]

Contra. — Other courts hold that medical books may be read to an expert witness and questions propounded thereon to contradict him generally.[52]

be cited by counsel, but an expert may be asked on cross-examination whether he has read particular works. Darby *v.* Ousley, 36 Eng. Law. & Eq. 519.

"On the cross-examination of Dr. Wood, a witness for the defendant, he was asked if he was acquainted with a certain book. He replied that he had heard of it but had not read it. He was then asked whether it was considered good authority, and he said it was. He was then requested to read a certain paragraph during the recess of the court. When the court convened again, he was recalled and counsel reading from the book the paragraph to which his attention had been called, asked him whether there was a case reported of taking sulphate of zinc, followed by vomiting, purging, and death? As this was what the paragraph stated, the evident purpose of the question was to put the passage from the book in this indirect manner before the jury, instead of reading from it directly." This was held to be ground for reversal. Marshal *v.* Brown, 50 Mich. 148, 15 N. W. 55.

51. Cross Examination. — Knoll *v.* State, 55 Wis. 249, 12 N. W. 369, 42 Am. Rep. 704; People *v.* Millard, 53 Mich 63, 18 N. W. 563; Macfarland's Trial, 8 Abb. Pr. (N. S.) (N. Y.) 57; Forest City Ins. Co. *v.* Morgan, 22 Ill App. 198; Davis *v.* State, 38 Md. 15; Darby *v.* Ousley, 1 Hurlst. & N. 1, 2 Jur. (N. S.) 497.

Medical works are not admissible in evidence either to sustain or contradict a witness. Davis *v.* State, 38 Md. 15.

"It was distinctly held in Marshall *v.* Brown, 50 Mich. 148, 15 N. W. 55, that attempts to evade the excluding rule by examining or cross examining in such a way as to get an opportunity to get books before the jury could not be permitted."

In People *v.* Millard, 53 Mich. 63, 18 N. W. 563, it is held that the rule excluding medical books as evidence, should not be evaded by latitude in cross-examination of witnesses.

52. Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90; Thompkins *v.* West, 56 Conn. 478, 16 Atl. 237; State *v.* Winter, 72 Iowa 627, 34 N. W. 475; Darby *v.* Ousley, 36 Eng. L. & Eq. 518; Hutchinson *v.* State, 19 Neb. 262, 27 N. W. 113; Fisher *v.* Southern, P. R. Co., 89 Cal. 399, 26 Pac. 894.

Testing Knowledge of Expert. Where an expert witness testified that a person died of delirium tremens and that he had read medical works upon that subject that he might be able to diagnose the case, it was held, that his attention might be called to definition given in medical works upon that particular disease and that he might be asked whether he concurred in those definitions. The court says: "How could the knowledge of the witness of such subjects be more fully tested." Connecticut Mut. Life Ins. Co. *v.* Ellis, 89 Ill. 516.

"In the course of his re-examination this witness was asked by appellant's counsel what was said in a certain named medical authority as to the difference between necrosis and caries of the bone, with a view to determine which of these diseases was indicated by the discharges from appellee's wound; and counsel cite authority to show that, on cross-examination, such questions are proper. There is no doubt that in order to test an expert's knowledge it is proper, on cross-examination, to read statements from writers of repute who have treated of the subject concerning which the expert has testified, and ask him questions touching the views advanced by such text writers." Louisville N. A. & C. R. Co. *v.* Howell, 147 Ind. 266, 45 N. E. 584.

C. Use Where Witness Has Based Opinion On. — Where an expert testifies that his opinions are sustained by certain authorities,[53] or where he refers to and approves such authorities,[54] or says his opinions are based upon them,[55] or that they maintain certain propositions the authorities may be used to contradict and discredit him.[56]

D. Used by One Party. — **Use by Other.** — Where medical works are improperly used or introduced by one party it would excuse their use in cross-examination or rebuttal.[57] But not where first used by a witness on cross-examination by the attorney for the same party who afterwards sought to introduce them in evidence.[58]

E. Review on Appeal. — Objection to the introduction of such books must be taken at the trial [59] and must be specific,[60] or their admission will not be ground for reversal.

F. Taking to Jury Room. — Even where such books are ad-

53. People *v.* Wheeler, 60 Cal. 581, 44 Am. Rep. 70; Ripon *v.* Bittel, 30 Wis. 614.

It has been held, however, that when an expert asserts that his opinion agrees with a particular author, it is not improper to call his attention to what that particular author says, for the purpose of contradicting him, and testing his competency as an expert. Fisher *v.* The Southern Pac. R. Co., 89 Cal. 399, 26 Pac. 894.

54. Gallagher *v.* Market St. Ry. Co., 67 Cal. 13, 6 Pac. 869, 56 Am. Rep. 713; People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; Fisher *v.* Southern Pac. R. Co., 89 Cal. 399, 26 Pac. 894; Connecticut Mut. Life Ins. Co. *v.* Ellis, 89 Ill. 516.

"Medical books may be read to the jury, not for the purpose of proving the substantial facts therein stated, but to discredit the testimony of experts who refer to books as authority for or in support of their opinions." Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90.

55. City of Bloomington *v.* Shrock, 110 Ill. 219, 51 Am. Rep. 678; Connecticut Mut. Life Ins. Co. *v.* Ellis, 89 Ill. 516; Pinney *v.* Cahill, 48 Mich. 584, 12 N. W. 862; Ripon *v.* Bittel, 30 Wis. 614; Huffman *v.* Click, 77 N. C. 55; State *v.* Wood, 53 N. H. 484.

Furthermore, it does not appear that the witness predicated his opinion upon the authority of Dr. Maudsley's works. There was, therefore, no error in the ruling of the court in that matter." People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161.

56. Ripon *v.* Bittell, 30 Wis. 614; People *v.* Millard, 53 Mich. 63, 18 N. W. 562.

"In Pinney *v.* Cahill, 48 Mich. 584, 12 N. W. 862, a witness who had asserted that a certain book laid down a certain proposition was allowed to be contradicted by showing it did not."

Only Book Referred to Can be Used. — "The expert has, or may take, perhaps, advantage of his position under these authorities, and state that his opinion is derived from standard works; and if he fails to remember what particular books he has read, or what particular books he has culled his authority from, there is, under the previous decisions of this court, no way in which to contradict the assertion he makes. But it is the settled law of the state that the contents of medical books cannot be got before the jury, unless, as in the case of Pinney *v.* Cahill, *supra*, the expert is unwise enough to state that a certain book lays down a certain proposition." People *v.* Vanderhoof, 71 Mich. 158, 39 N. W. 28.

57. Kreuziger *v.* Chicago & N. W. R. Co., 73 Wis. 158, 40 N. W. 657.

58. State *v.* O'Brien, 7 R. I. 336.

59. Kreuziger *v.* Chicago & N. W. R. Co., 73 Wis. 158, 40 N. W. 657.

60. Ripon *v.* Bittel, 30 Wis. 614;

mitted in evidence they should not be taken by the jury to their room, at least when the passages introduced in evidence are not marked.[61] But where inadvertently left where the jury can and does consult them that fact is not ground for reversal in absence of a showing that the party objecting was prejudiced thereby.[62]

State *v.* Sexton, 10 S. D. 127, 72 N. W. 84.

61. "On the trial, the defendant's counsel read as evidence to the jury from a certain book, passages to show the effect of drunkenness upon the mind, after first showing by medical testimony, that the same was a scientific work. When the trial was closed, and the jury about to retire for deliberation, the defendant claimed and requested that the jury should be allowed to take the said book into the jury room with them. The portions previously read not being marked, the court refused to permit the jury to take the book, and in this refusal, we think, there was no error." State *v.* Gillick, 10 Iowa 98.

62. People *v.* Draper, 1 N. Y. Crim. 139.

BOOKS OF ACCOUNT.

By Clark Ross Mahan.

I. ADMISSIBILITY FOR PARTY BY WHOM, OR FOR WHOM, KEPT.

1. Matters as to the Enterer. — A. Entries by the Party. a. *Rule in England.* — Formerly it seems to have been the rule to allow a party's books of account as evidence for himself even although he had made the entries therein himself, as evidenced by a statute enacted in 1609 governing the use of such books as evidence.[1] According to the more recent authorities, however, no entry in a party's own books made by himself can be received as

1. Stat. 7, Jac. I, Ch. 12. And see Bourn *v.* Debest, Tothill 90, decided in 1639, and in which shopbooks were received in evidence. See also Ellis *v.* Cowne, 2 Car. & K. 719, 61 Eng. C. L. 719, wherein it was said: "The courts, it is true, are inclined to extend the effect of tradesman's books; hence books kept openly in his shop to which the shopmen have access, and in which entries are originally made, or even onto which items are copied from other books, have been admitted as evidence, although they were written by a party to the action."

evidence for himself to prove his own demand;[2] except in so far as they are expressly allowed by a more recent statute in cases of accounting as *prima facie* evidence of matters therein contained.[3]

b. *Rule in Canada.* — And in Canada the general rule of England excluding books of account kept by the party offering them is followed.[4]

c. *Rule in United States.* — **(1.) Rule at Common Law.** — (A.) GENERALLY. — The rule in the United states independently of any governing statute on the subject is to the effect that, if accompanied by the requisite preliminary proof, a party may use as evidence on his own behalf, books of account which have been kept by himself,[5]

2. Lefebure *v.* Worden, 2 Ves. 54. See also Smart *v.* Williams, Comb. 247; 3 Black. Comm. 368.

3. Lodge *v.* Pritchard, 3 De G. M. & G. 906 (15 & 16 Vict., chap. 86, § 54;) Banks *v.* Cartwright, 15 W. R. 417; Cookes *v.* Cookes, 9 Jur. (N. S.) 843, 11 W. R. 871; Newberry *v.* Benson, 2 W. R. 648.

Applications for Leave to Use Books of Account under this statute should not be made in open court, but to the judge in chambers. Hardwick *v.* Wright, 15 W. R. 953.

Statute Retroactive. — This statute has been held to be retroactive and to apply to a case in which the decree for the accounting had been passed long prior to the enactment of the statute. Ewart *v.* Williams, 7 De G. M. & G. 68, 3 W. R. 46, *affirming* 1 Jur. (N. S.) 409, 3 W. R. 348. *Compare* Lodge *v.* Pritchard, 3 De G. M. & G. 906.

Aid of Statute as Last Resort. The account should, however, be proved by all other possible competent evidence before the aid of the statute should be invoked. Ewart *v.* Williams, 7 De G. M. & G. 68, 3 W. R. 46, *affirming*, 1 Jur. (N. S.) 409, 3 W. R. 348.

4. Brooke *v.* City Bank, 1 Low. Can. Rep. 112.

5. *Alabama.* — Dismukes *v.* Tolson, 67 Ala. 386; McDonald *v.* Carnes, 90 Ala. 147, 7 So. 919; Bolling *v.* Fannin, 97 Ala. 619, 12 So. 59 (*overruling* all previous Alabama cases to the contrary.

California. — Landis *v.* Turner, 14 Cal. 573; Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811; White *v.* Whitney, 82 Cal. 163, 22 Pac. 1138.

Connecticut. — Butler *v.* Cornwall Iron Co., 22 Conn. 335. And see Calender *v.* Colegrove, 17 Conn. 1.

Maine. — Witherell *v.* Swan, 32 Me. 247; Silver *v.* Worcester, 72 Me. 322; Hooper *v.* Taylor, 39 Me. 224; Herman *v.* Drinkwater, 1 Me. 27.

Massachusetts. — Holmes *v.* Marden, 12 Pick. 169.

Mississippi. — Moody *v.* Roberts, 41 Miss. 74 (*overruling* prior Mississippi cases to the contrary.)

New Hampshire.—Remick *v.* Rumery, 69 N. H. 601, 45 Atl. 574.

New Jersey. — Inslee *v.* Prall, 23 N. J. Law 457; Wilson *v.* Wilson, 6 N. J. Law 95.

New York. — Smith *v.* Smith, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545; Vosburgh *v.* Thayer, 12 Johns. 461; Irish *v.* Horn, 84 Hun 121, 32 N. Y. Supp. 455; Conklin *v.* Stamler, 2 Hilt. 422, 17 How. Pr. 399, 8 Abb. Pr. 395; Tomlinson *v.* Borst, 30 Barb. 42; Davison *v.* Powell, 16 How. Pr. 467; Linnell *v.* Sutherland, 11 Wend. 568.

Pennsylvania.— Jones *v.* Long, 3 Watts 325; Adams *v.* Columbian S. B. Co., 3 Whart. 75; Kelly *v.* Holdship, 1 Browne 36; Seagrove *v.* Redman, 4 Dall. 153, 1 L. ed. 779.

Rhode Island. — Cargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214.

Texas. — Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565; Underwood *v.* Parrott, 2 Tex. 168; Burleson *v.* Goodman, 32 Tex. 229; Werbiskie *v.* McManus, 31 Tex. 116.

In Missouri, it was formerly the rule that a party could not prove his account by his own books of account. Hissrick *v.* McPherson, 20 Mo. 310; Jesse *v.* Davis, 34 Mo. App. 351.

although there are cases holding to the contrary.[6]

The Book of an Assignee of an Insolvent Debtor containing charges for goods sold after the assignment and charged by him on the book is competent for the assignee.[7]

A Physician's Diary containing the original charges for professional visits, accompanied by proof of his employment and their correctness, and settlements with him by debtors from them, who found them correct, is admissible for him.[8]

Delivery of Articles Charged. — The party offering his book under the rule just stated supporting it by his oath alone, must swear to a delivery of the articles charged.[9]

The Fact of Attendance by a Physician on the party charged or his family, may usually be shown by third persons without difficulty, and some attendance during the period claimed for should be shown, but the rule is not satisfied merely by proof of a single attendance two years previous to the entries in the book.[10]

But the rule stated in the text is the one followed in that state at this time. Anchor Milling Co. *v.* Walsh, 108 Mo. 277, 18 S. W. 904, 32 Am. St. Rep. 600, *reversing* 37 Mo. App. 567; Seligman *v.* Rogers, 113 Mo. 642, 21 S. W. 94.

In Arkansas, it is not certain from the authorities what the rule is. Thus in Burr *v.* Byers, 10 Ark. 398, 52 Am. Dec. 239, it was held that, even though he offer to verify them by his own oath, a merchant's book, made by himself is not admissible in his own favor. See also Jeffrey *v.* Schlasinger, Hempsh. 12, 13 Fed. Cas. No. 7,253a. *Compare* Stanley *v.* Wilkerson, 63 Ark. 556, 39 S. W. 1043.

Nor in Indiana. — Thus in Harrison *v.* Lagow, 1 Blackf. 307, a party's books were excluded because he had not proved them to be his. See also De Camp *v.* Vandagrift, 4 Blackf. 272. *Compare* Wilber *v.* Scherer, 13 Ind. App. 428, 41 N. E. 837.

6. Calder *v.* Creditors, 47 La. Ann. 1538, 18 So. 520; Owings *v.* Low, 5 Gill & J. (Md.) 134; Stallings *v.* Gottschalk, 77 Md. 429, 26 Atl. 524; Ward *v.* Leitch, 30 Md. 326; Cavelier *v.* Collins, 3 Mart. (O. S.) (La.) 188; Whittikam *v.* Swain, 9 La. Ann. 122; Smith *v.* Harrathy, 5 Mart. (N. S.) (La.) 319; Johnston *v.* Breedlove, 2 Mart. (N. S.) (La.) 508; Kendall *v.* Bean, 12 Rob. (La.) 407.

Formerly so held in Florida, (Higgs *v.* Shehee, 4 Fla. 382.) Otherwise by statute now. See *infra* note 16, and in Alabama (Godbold *v.* Blair, 27 Ala. 592; Nolley *v.* Holmes, 3 Ala. 642.) But see *supra* note 5.

In Louisiana, a merchant's books are not evidence in his favor nor can be used as such by his creditors to establish a debt claimed as being due to him, especially where no fraud or collusion between the merchant or his alleged debtor is charged or proved. Porche *v.* La Blanc, 12 La. Ann. 778.

The mere fact that a party has been allowed, without objection, to use his books in his own behalf, does not operate to permit him to use another book against a timely and proper objection. Lyons *v.* Teal, 28 La. Ann. 592.

7. Rush *v.* Hance, 3 N. J. Law 860.

8. Knight *v.* Cunnington, 6 Hun (N. Y.) 100.

9. Dwinel *v.* Pottle, 31 Me. 167; Reed *v.* Barlow, 1 Aik. (Vt.) 145.

10. Morril *v.* Whitehead, 4 E. D. Smith (N. Y.) 239.

In Mississippi a physician suing an estate to recover for services rendered to the decedent need not prove attendance upon the intestate in his lifetime. Bookout *v.* Shannon, 59 Miss. 378.

(B.) Origin of the Rule. — This rule has been said by some of the courts to have been introduced by the first settlers of our Eastern coast from Holland;[11] and was an exception to the general rule of the common law that no party was allowed to testify in his own behalf, or produce evidence that he had made himself, and grew out of the necessity of the case, as in many cases a party would be wholly unable to prove his accounts unless he could introduce his account books in evidence.[12]

(C.) Competency of Party as Witness as Affecting Rule. — It is a very general rule that the statute removing the disability of parties as witnesses in their own behalf does not operate to deprive them of the right to use their books in evidence.[13]

(D.) Account Barred by Limitations. — It is also held that the admissibility of books of account is not affected by the fact that the account may be barred by the statute of limitations.[14]

(2.) Rule Under Statutes. — (A.) Generally. — In very many of the states there are statutes expressly regulating the use of a party's books of account as evidence in his own behalf,[15] when accompanied

11. Underwood *v.* Parrott, 2 Tex. 168; Butler *v.* Cornwall Iron Co., 22 Conn. 335; Missouri P. R. Co. *v.* Johnson, (Tex.), 7 S. W. 838; Rexford *v.* Comstock, 3 N. Y. Supp. 876; Conklin *v.* Stamler, 17 How. Pr. 399; Larue *v.* Rowland, 7 Barb. (N. Y) 107.

12. Silver *v.* Worcester, 72 Me. 322; Alling *v.* Brazee, 27 Ill. App. 595; Martin *v.* Fyffe, Dudley (Ga.) 16.

13. Bushnell *v.* Simpson, 119 Cal. 658, 51 Pac. 1080; Rexford *v.* Comstock, 3 N. Y. Supp. 876; Swain *v.* Cheney, 41 N. H. 232; Taggart *v.* Fox, 11 Daly (N. Y.) 159; Stroud *v.* Tilton, 3 Keyes (N. Y.) 139; Tomlinson *v.* Borst, 30 Barb. (N. Y.) 42; Nichols *v.* Haynes, 78 Pa. St. 174.

Contra. — Romer *v.* Jaecksch, 39 Md. 585.

Compare Ryan *v.* Dunphy, 4 Mont. 356, 5 Pac. 324, 47 Am. Rep. 355.

14. McLennan *v.* Bank of California, 87 Cal. 569. 25 Pac. 760; Thorn *v.* Moore, 21 Iowa 285; Lamb *v.* Hart, 1 Brev. (S. C.) 105.

Compare Vaughn *v.* Smith, 2 Heisk. (Tenn.) 649; Neville *v.* Northcutt, 7 Cold. (Tenn.) 294; Butterweck's Estate, 4 Pa. Dist. R. 563; Marshall *v.* Bond. Tappan (Ohio) 67; James *v.* Richmond, 5 Ohio 337; Alexander *v.* Smoot, 13 Ired. Law (N. C.) 461; Sikes *v.* Marshall, 2 Esp. 705.

15. The Georgia Code provides that the books of account of any merchant, shopkeeper, physician or blacksmith, or other person doing a regular business, and keeping daily entries thereof, may be admitted as proof of accounts contained therein upon certain named conditions. Bass *v.* Gobert, 113 Ga. 262, 38 S. E. 834. See also Ganahl *v.* Shore, 24 Ga. 17; Taylor *v.* Tucker, 1 Ga. 231.

In Connecticut a statute makes books containing the daily accounts of a party's business admissible in actions of book debt (Gen. Stat. p. 471, § 1041); and since book debt and assumpsit are concurrent remedies in all cases where book debt will lie, the books are also admissible in assumpsit for goods sold. Smith *v.* Law, 47 Conn. 431. See also Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998, holding § 31 of the practice act, making the books admissible in all actions for the recovery of a book debt to be a legitimate exercise of the legislative power to give greater effect to any particular kind of evidence than it possesses at common law.

The Illinois Statute regulating the admission of books of account did not repeal the rule of the common law admitting such books. Boyer *v.* Sweet, 4 Ill. 120; Kibbe *v.* Bancroft,

by the preliminary proof required by the statutes themselves.[16]

77 Ill. 18; Stettauer *v.* Braner, 98 Ill. 72; Taliaferro *v.* Ives, 51 Ill. 247. Only the character of the evidence is changed which is necessary to the admission of such books. Brooks *v.* Funk, 85 Ill. App. 631. To same effect, see House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307; Weigle *v.* Brautigan, 74 Ill. App. 285; Hill Co. *v.* Sommer, 55 Ill. App. 345; Boyd *v.* Jennings, 46 Ill. App. 290; Schwarze *v.* Roessler, 40 Ill. App. 474; Treadway *v.* Treadway, 5 Ill App. 478.

The New Mexico Statute supersedes the common-law rule, and must be complied with before the books can be admitted. Byerts *v.* Robinson, 9 N. M. 427, 54 Pac. 932. And when the books are clearly not within the terms of the statute, it is not applicable. Price *v.* Garland, 3 N. M. 285, 6 Pac. 472.

The Vermont Statute allows the adjustment of items of account in an action of book account, (*in re* Diggins' Estate, 68 Vt. 198, 34 Atl. 696), but not of items of book accounts in an action of account. Cilley *v.* Tenny, 31 Vt. 401. But it does not deprive the party offering the book of his common law remedy. Burnham *v.* Adams, 5 Vt. 313. See also Briggs *v.* Town of Georgia, 15 Vt. 61.

Under the Alabama Code (§ 1808) the original entries in the books of a physician are declared to be "evidence for him in actions for the recovery of his medical services, that the service was rendered;" and also to prove the medicines furnished by him in his practice as such physician. But the value of the medicine, as well as of the services rendered must be proved otherwise than by the books. Richardson *v.* Dorman, 28 Ala. 679.

But there must be competent testimony other than the party's own oath to identify the entries. Halliday *v.* Butt, 40 Ala. 178, holding, however, that proof of the handwriting is *prima facie* sufficient. If however, the correctness of the entries is denied under oath by the party to be charged thereby, as provided in the statute, the books must be rejected; and the party so denying their correctness cannot be then permitted to testify which of such entries were correct and which were not. Weaver *v.* Morgan, 49 Ala. 142.

16. *Colorado.* — Lovelock *v.* Gregg, 14 Colo. 53, 23 Pac. 86.

Delaware. — Moore *v.* Morris, 1 Pen. 412, 41 Atl. 889 (Rev. Code, Del., Chap. 107, § 11). See also McDaniel *v.* Webster, 2 Houst. 305; Gosewich *v.* Zebley, 5 Harr. 124; Cameron *v.* Kinney, 3 Harr. 317.

Florida. — Hooker *v.* Johnson, 6 Fla. 730.

Georgia. — Talbotton R. Co. *v.* Gibson, 106 Ga. 229, 32 S. E. 151.

Iowa. — Shaffer *v.* McCrackin, 90 Iowa 578, 58 N. W. 910, 48 Am. St. Rep. 465.

Minnesota. — Paine *v.* Sherwood, 21 Minn. 225.

Nebraska. — Martin *v.* Scott, 12 Neb. 42, 10 N. W. 532; Atkins *v.* Seeley, 54 Neb. 688, 74 N. W. 1100.

North Carolina. — Webber *v.* Webber, 79 N. C. 572; Thomegeux *v.* Bell, 1 Mart. 38; Colbert *v.* Piercy, 3 Ired. Law 77; Kitchen *v.* Tyson, 3 Murph. Law 314.

South Carolina. — Foster *v.* Sinkler, 1 Bay 40; Thomas *v.* Dyott, 1 Nott & McC. 186; Thomson *v.* Porter, 4 Strob. Eq. 58, 53 Am. Dec. 653; Lamb *v.* Hart, 1 Brev. 105; Spence *v.* Sanders, 1 Bay 119.

Tennessee. — Clark *v.* Howard, 10 Yerg. 250; Neville *v.* Northcutt, 7 Cold. 294.

Wisconsin. — Betts *v.* Stevens, 6 Wis. 400.

A Book Containing a Register of Loans is not a book of accounts under the Iowa statute. Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311; U. S. Bank *v.* Burson, 90 Iowa 191, 57 N. W. 705. See also Labaree *v.* Klosterman, 33 Neb. 150, 49 N. W. 1102, so holding under the Nebraska statute of a collection register and loan register.

A Record of Notes is not admissible to show that at a certain date the party owned a note given by an-

(B.) Incompetency of Party as Witness. — Other statutory provisions on this question are embraced in the statutes prohibiting a party from testifying for himself when his adversary is a personal representative of a deceased person, or is otherwise incapacitated, and form an exception to such prohibition.[17]

In some jurisdictions, by the terms of the statute a party is a competent witness for himself, in an action of book account and where the matter at issue is a proper subject for book account, only,

other person. Kassing *v.* Walter, 100 Iowa 611, 65 N. W. 832, 69 N. W. 1013.

A Book of Bills Receivable, kept by a banker is not a book of accounts, as it does not contain charges by one party against the other made in the usual course of business. Martin *v.* Scott, 12 Neb. 42, 10 N. W. 532.

A Check Book containing memoranda in the stubs of the checks used is not an account book under the Ohio statute. Watts *v.* Shewell, 31 Ohio St. 331.

In Thayer *v.* Deen, 2 Hill Law (S. C.) 677, it was held that a memorandum book of a peddler, the entries in which for the memorandum part were in pencil and which he carried about with him in his pocket, was not admissible in evidence as a merchant's book of account. "From the nature of their employment," said the court, "and the manner of their doing business, although it is possible it is not to be expected that they will keep their books with the regularity and system of a stationary regular merchant. They are mere birds of passage who sweep over the country, having no other tie to it than as the means of acquiring wealth. It is known too that they are not in the habit of dealing on credit. Their itinerant mode of life renders it in general impracticable to do it with convenience. They do not, therefore, fall within that class of persons in whose pursuit or employment the necessity and convenience or the usage of the country has imposed on them the necessity of keeping books of account."

17. Alling *v.* Brazee, 27 Ill. App. 595; McAmore *v.* Wiley, 49 Ill. App. 615; Flynn *v.* Gardner, 3 Ill. App. 253; Ruggles *v.* Gatton, 50 Ill. 412; Stucky *v.* Shekler, 12 Ky. L. Rep. 985; Wilson *v.* Goodin, Wright (Ohio) 219.

In Baxter *v.* Leith, 28 Ohio St. 84, it was held that a statute permitting a party to prove his books of account as against the guardian or trustee of the child of a deceased person, or the personal representative, or the heir or devisee, of such person, did not operate to permit a surviving partner to prove his books as against his deceased partner.

The Kentucky Statute in this respect applies only where a book of accounts kept according to the usual course of business is sought to be used. Kimbrough *v.* Grady, 10 Ky. L. Rep. 241; Callihan *v.* Trimble, 10 Ky. L. Rep. 36.

A Mere Memorandum Book is not admissible under the Tennessee statute. Nance *v.* Callender, (Tenn.), 51 S. W. 1025.

The Vermont Statute is applicable whatever the form of action or proceeding whenever the book entries were constituted an instrument of evidence pertinent to the issue on trial. Woodbury *v.* Woodbury, 48 Vt. 94. See also Hunter *v.* Kittredge, 41 Vt. 359.

A Pass-book charging a person, since deceased, with various sums of money, etc., the entries of which are mostly without date and made in such a manner as to be open to suspicion is not admissible as against the estate of the decedent. Appeal of McNulty, 135 Pa. St. 210, 19 Atl. 936.

In Kells *v.* McClure, 69 Minn. 60, 71 N. W. 827, an action by an assignee in insolvency to set aside a transfer by his assignor as fraudulent, it was held that for the purpose of showing the insolvency of the assignor, the books of account duly verified,

however, to prove the handwriting of the charges and when made.[18] But not when the subject matter of the entry is not a proper matter for book account.[19]

But it is held that despite the fact that a statute incapacitating a party as a witness against a personal representative of a deceased person or an insane person, contains no such exceptive clause as just referred to, a party may still use his books of account under the common law rules.[20]

(C.) Statutes Limiting Amounts. — Sometimes these statutes regulating the admission of books of account contain a provision limiting the amount which may be proved by the books.[21]

(3.) Effect of Party Keeping Clerk. — (A.) Generally. — The authorities are not in accord as to whether or not the books of account of a party who kept a clerk at the time of the transactions entered are admissible without reference to any evidence accounting for the non-production of such clerk. One line of authorities holds that in

pertaining not only to the individual business of the assignor, but also to that of the co-partnership of which he was a member are admissible.

18. Woodbury *v.* Woodbury, 50 Vt. 152; Hunter *v.* Kittredge, 41 Vt. 359; Anchor Milling Co. *v.* Walsh, 108 Mo. 277, 18 S. W. 904, 32 Am. St. Rep. 600.

19. Jewett *v.* Winship, 42 Vt. 204.

20. *Illinois.* — Alling *v.* Brazee, 27 Ill. App. 595.

Iowa. — See also Kilbourn *v.* Anderson, 77 Iowa 501, 42 N. W. 431.

Mississippi. — Bookout *v.* Shannon, 59 Miss. 378.

Nevada. — See Jones *v.* Gammans, 11 Nev. 249.

New Hampshire. — Snell *v.* Parsons, 59 N. H. 521.

New York. — Young *v.* Luce, 50 N. Y. St. 253, 21 N. Y. Supp. 225.

North Carolina. — Leggett *v.* Glover, 71 N. C. 211.

Ohio. — Bentley *v.* Hollenbeck, Wright 168.

Pennsylvania. — Dowie's Estate, 135 Pa. St. 210, 19 Atl. 936.

Compare Elmore *v.* Jacques, 2 Hun (N. Y.) 130.

Rule Stated. — In Bookout *v.* Shannon, 59 Miss. 378, the court said: "The books are not the testimony of the party in the sense that they are inadmissible under our statute prohibiting a party from giving testimony against the estate of a deceased person. The admissibility of this character of evidence is not affected by the fact that the party making the entries is himself disqualified from giving testimony as a witness. Indeed the books are admitted only because of a lack of better or more satisfactory evidence on account of the death, or incompetency of the party who made them, or his inability to remember the facts. When the party making the entries is incompetent as a witness, the books themselves are the evidence, and his oath may be given as supplementary proof to the court on the question of their competency; but when the party is a witness, then they may be used as a means of refreshing his memory, and only become evidence themselves in those cases in which, having examined the entries for the purpose of refreshing his memory, he is still unable to remember the facts."

21. Thus in North Carolina, the amount is limited to $60.00. Bland *v.* Warren, 65 N. C. 372; Waldo *v.* Jolly, 4 Jones Law 173; McWilliams *v.* Cosby, 4 Ired. Law 110, wherein it was held that an account which, although originally exceeding $60.00 was reduced below by credits, could be proved by the book and the party's oath.

So in Tennessee the amount provable is limited to $75.00. Johnson *v.* Price, 3 Head 549; Cave *v.* Baskett,

order to use his books of account, the party must show that he kept no clerk, or account satisfactorily for the absence of such clerk.[22] And sometimes this is the rule by express statutory enactment.[23]

On the other hand, however, it has been held that the fact that the party kept a clerk who might be called to prove the transactions entered, does not affect the admissibility of his books of account.[24]

(B.) Rule Applied. — The authorities above referred to as holding that when a party keeps a clerk his books of account are not admissible, hold, however, that the rule applies only to an employee having something to do with, and a general knowledge of, his employer's business in reference to the transactions recorded, and not to a book-keeper who has but little means of personal knowledge, or slight information in relation to such matter, except such as he has derived from others.[25]

An Employee, Who Merely Delivers Goods Ordered, keeping a temporary memorandum thereof, is not a clerk within the rule.[26]

B. Entries by Book-keeper.—a. *Production of Book-keeper as Witness.* — Books of account, kept by a person other than the party

3 Humph. 340. See also Perkins *v.* Moss, 3 Heisk. 671.

22. *California.* — Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811. *Compare* Carroll *v.* Storck, 57 Cal. 366.

Illinois. — Dodson *v.* Sears, 25 Ill. 422; Ingersoll *v.* Bannister, 41 Ill. 388; Ruggles *v.* Gatton, 50 Ill. 412.

Michigan. — Jackson *v.* Evans, 8 Mich. 476.

New York. — Smith *v.* Smith, 163 N. Y. 168; 57 N. E. 300, 52 L. R. A. 545; Vosburgh *v.* Thayer, 12 Johns. 461; Linnill *v.* Sutherland, 11 Wend. 568; Irish *v.* Horn, 84 Hun 121, 32 N. Y. Supp. 455.

Texas. — Underwood *v.* Parrott, 2 Tex. 168; Townsend *v.* Coleman, 18 Tex. 418.

Corporations. — In Congdon & Aylesworth Co. *v.* Sheehan, 11 App. Div. 456, 42 N. Y. Supp. 255, it was held that as the party whose books were in question was a corporation it was not in a position to have the benefit of the rule admitting the books of a merchant who has no clerk.

23. Express Statute in Georgia. Talbotton R. Co. *v.* Gibson, 106 Ga. 229, 32 S. E. 151; Bracken *v.* Dillon, 64 Ga. 243, 37 Am. Rep. 70; Slade *v.* Nelson, 20 Ga. 365. *Compare* Dunlap *v.* Hooper, 66 Ga. 211; McDaniel *v.* Truluck, 27 Ga. 366.

24. Mitchell *v.* Belknap, 23 Me. 475. *Compare* Kent *v.* Garvin, 1 Gray (Mass.) 148.

25. McGoldrick *v.* Traphagan, 88 N. Y. 334; Smith *v.* Smith, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545; Waggeman *v.* Peters, 22 Ill. 42; Rexford *v.* Comstock, 3 N. Y. Supp. 876.

Statement of Rule. — "The obvious purpose of the rule, limiting the admission in evidence of books of account to cases where the party has no clerk is to withhold this class of evidence where the party has some third person in his employ, whose business it is to notice the sales made or services rendered, and to make entries of them in the books as they occur, and by whom he can prove the sale or services for which he seeks to recover." Atwood *v.* Barney, 80 Hun 1, 29 N. Y. Supp. 810, wherein it was held that persons sometimes employed to help for a short time, who at times made entries in the books, which, however, were made under the general supervision of the parties with their knowledge and at their suggestion and usually in their presence and were proved to be correct, were not clerks within the rule.

26. Sickles *v.* Mather, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521; Jackson *v.* Evans, 8 Mich. 476.

himself, whose duty it was to keep them and to enter therein the proper entries contemporaneously with the transactions recorded, and in the usual course of business, are admissible provided the book-keeper, if alive and accessible, is called to verify them.[27]

Knowledge of Witness. — But proof by persons who have no personal knowledge of the entries is not enough.[28]

Statutes. — In some jurisdictions there are statutes expressly providing for the admissions of books of account kept by a regular book-keeper when authenticated by him.[29]

b. *Absence of Book-keeper Accounted For.* — **(1.) Generally.** When the book-keeper, at the time of the trial is not accessible as a witness, because he is not within the jurisdiction of the court, the books, if otherwise unobjectionable may be received in evidence

27. *United States.* — Hodge *v.* Higgs, 2 Cranch C. C. 552, 12 Fed. Cas. No. 6,558.

Connecticut.—Bartholomew *v.* Farwell, 41 Conn. 107; Weeden *v.* Hawes, 10 Conn. 50.

Delaware. — Johnson *v.* Farmers' bank, 1 Harr. 117.

Illinois. — Humphreys *v.* Spear, 15 Ill. 275; House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307.

Indiana. — Pittsburgh C. & St. L. R. Co. *v.* Noel, 77 Ind. 110.

Missouri. — Smith *v.* Beattie, 57 Mo. 281; Robinson *v.* Smith, 111 Mo. 205, 20 S. W. 29, 33 Am. St. Rep. 510; Weadley *v.* Toney, 24 Mo. App. 304.

New Hampshire. — Pillsbury *v.* Locke, 33 N. H. 96, 66 Am. Dec. 711.

New York. — Burke *v.* Wolfe, 6 Jones & S. 263; Skipworth *v.* Deyell, 83 Hun 307, 31 N. Y. Supp. 918; Shipman *v.* Glynn, 31 App. Div. 425, 52 N. Y. Supp. 691; Merrill *v.* Ithaca & O. R. Co., 16 Wend. 586, 30 Am. Dec. 130.

Pennsylvania.— Dialogue *v.* Hooven, 7 Pa. St. 327; Sterritt *v.* Bull. 1 Binn. 234; Schollenberger *v.* Seldonridge, 49 Pa. St. 83; Farmers' & Merchants' Bank *v.* Boraef, 1 Rawle 152; Meighen *v.* Bank, 25 Pa. St. 288.

South Carolina. — Tunno *v.* Rogers, 1 Bay 480.

Texas. — Burnham *v.* Chandler, 15 Tex. 441; Taylor *v.* Coleman, 20 Tex. 772.

Vermont. — Burnham *v.* Adams, 5 Vt. 313.

Rule Stated. — "When the party is living, who made such an entry in the regular course of business, though he remembers and can testify nothing about the facts recorded in the entry, but simply testifies that he made the entry in the usual course of business at the time of the transaction, such entry is of itself primary evidence of the facts recorded, though the witness be living and testifies in court, if he knows that he made the entry in the regular course of business." Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

Book of Party Unable to Write. In Luce *v.* Doane, 38 Me. 478, it was held that the rule admitting a party to prove items of account by his books and suppletory oath, does not apply to a book, in which the entries were made by the party's wife by his direction, the party himself being unable to write.

Upon an issue between a bank and its depositor, as to the manner in which the accounts were kept, and for the purpose of ascertaining the several items thereof and the dates when moneys had been received and paid out by the bank, the treasurer of the bank can produce the bank ledger and testify what the account contained therein showed. Wilcox *v.* Onondaga Co. Sav. Bank, 40 Hun (N. Y.) 297.

28. Ocean Nat. Bank *v.* Carll, 55 N. Y. 440.

29. Herriott *v.* Kersey, 69 Iowa 111, 28 N. W. 468; Volker *v.* First Nat. Bank, 26 Neb. 602, 42 N. W.

upon proof of the fact of such inaccessibility of the book-keeper and of his handwriting.[30] So also where the book-keeper is a non-resident,[31] or is, for some other good reason, not accessible as a witness.[32]

732; Holand *v.* Commercial Bank, 22 Neb. 585, 36 N. W. 112.

The Illinois Statute was not intended to prohibit the use of books kept by a clerk, when such clerk is living in the state and is able to testify to their correctness. House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307.

That the Bookkeeper is Present as a Witness for the Adverse Party does not obviate the necessity of making the proper proof by him under the Ohio statutes. Bennett *v.* Shaw, 12 Ohio C. C. 574.

30. *United States.* — James *v.* Wharton, 3 McLean, 492, 13 Fed. Cas. No. 7,187; Little Rock Granite Co. *v.* Dallas Co., 66 Fed. 522, 13 C. C. A. 620.

Alabama.— Bolling *v.* Fannin, 97 Ala. 619, 12 So. 59.

Maryland. — Heiskell *v.* Rollins, 82 Md. 14, 33 Atl. 263, 51 Am. St. Rep. 455. *Compare* Brewster *v.* Doan, 2 Hill (N. Y.) 537.

North Carolina. — Sloan *v.* McDowell, 75 N. C. 29; Kennedy *v.* Fairman, 1 Hayw. 458; Whitfield *v.* Walk, 2 Hayw. 24; State Bank *v.* Clark, 1 Hawks 36.

Pennsylvania.—Garabrant *v.* Wood, 4 Pa. Super. Ct. 391; Hay *v.* Kramer, 2 Watts & S. 137.

South Carolina. — Elms *v.* Chevis, 2 McCord Law 349.

Texas. — Burnham *v.* Chandler, 15 Tex. 441, 30 Am. Dec. 130. *Compare* Merrill *v.* Ithaca O. R. Co., 16 Wend. (N. Y.) 586, wherein it was held that the mere fact that the book-keeper is absent from the state does not entitle the book to be admitted.

The Colorado Statute (Mills Anno. Stat. § 4817,) requires proof that the book-keeper is either dead, or a non-resident of the state, and if the latter, that he was disinterested at the time he made them, and that the entries were made in the usual course of trade and of his duty or employment; together with evidence of his handwriting. Charles *v.* Ballin, 4 Colo. App. 186, 35 Pac. 279; Farrington *v.* Tucker, 6 Colo. 557.

31. Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562; Reynolds *v.* Manning, 15 Md. 510.

Rule Stated. — In Cummings *v.* Fullam, 13 Vt. 434, the objection was that as the book-keeper who was alive, although out of the state was not produced, it was error to admit the books simply on proof of the handwriting of such book-keeper; but the court in holding this objection unsound said: "In the book action, the books of the parties are evidence for or against them, according to their appearance and the regularity with which they are kept, and their freeness from alteration or erasures, and their weight with the triers must depend very considerably upon their manner of being kept. Our law has given the adverse party the right to claim the production of the original books. If it appeared, as in this case, that some of the items were not in the handwriting of the plaintiffs, it was a natural inquiry, who made such charges? If the handwriting was not known, or if the entries appeared to have been made by a person who was never known to have been in the employment of the party it would detract from the weight, which the triers might otherwise give to the books. It was, then, manifestly proper to permit the plaintiffs to show who those persons were that made the charges; that they were in the plaintiff's employment, and that it was their appropriate business to deliver such property as is charged, and make the proper entries. This would serve to give character to the books, and necessarily tend to establish the plaintiff's account. So far then as the books themselves are concerned, it must have been admissible, as having a bearing upon their character."

32. Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

(2.) Book-keeper Dead. — So. also where the book-keeper is at the time of trial, dead, proof of his death, and of his handwriting will render the books admissible as evidence.[33]

(3.) Book-keeper Insane. — And, again, where the book-keeper is insane at the time of the trial, the books may be received upon proof of his handwriting.[34]

C. Entries by Party Since Become Insane — A book of original entries kept by a person who has since become insane and proved to be in his handwriting, and accompanied by the guardian's suppletory oath, should be admitted, and its rejection because not accompanied by the oath of the insane person is error.[35]

D. Entries by Party Since Deceased. — a. *Rule at Common Law.* — It is a very generally recognized rule, independent of any statutory provisions on the subject, that books of account kept by a person who has since died, are, when accompanied by proof that they were his books and of his handwriting[36] admissible on behalf

33. *England.* — Price *v.* Earl of Torrington, 1 Salk. 285, 2 Ld. Raym. 873; Pitnam *v.* Maddox, 2 Salk. 690.
United States. — Gale *v.* Norris, 2 McLean 469, 9 Fed. Cas. No. 5190.
Alabama. — Batre *v.* Simpson, 4 Ala. 305; Bank of Montgomery *v.* Plannett, 37 Ala. 222; Elliott *v.* Dycke, 78 Ala. 150, 80 Ala. 376; Bolling *v.* Fannin, 97 Ala. 619, 12 So. 59; Everly *v.* Bradford, 4 Ala. 371.
Connecticut. — Livingston *v.* Tyler, 14 Conn. 493.
Louisiana. — Hunter *v.* Smith, 6 Mart. (N. S.) 351.
Maryland. — Clarke *v.* Magruder, 2 Har. & J. 77; King *v.* Maddux, 7 Har. & J. 467; Reynolds *v.* Manning, 15 Md. 510.
New York. — Dakin *v.* Walton, 85 Hun 561, 33 N. Y. Supp. 203; Stroud *v.* Tilton, 3 Keyes 139, 4 Abb. Ct. App. Dec. 324; Merrill *v.* Ithaca O. R. Co., 16 Wend. 586, 30 Am. Dec. 130; Ocean Nat. Bank *v.* Carll, 9 Hun 239.
North Carolina. — Bland *v.* Warren, 65 N. C. 372.
Vermont. — Bacon *v.* Vaughn, 34 Vt. 73; Burnham *v.* Adams, 5 Vt. 313.
Virginia. — Lewis *v.* Norton, 1 Wash. 76.
West Virginia. — Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

34. Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 182. See also *dictum* in Bolling *v.* Fannin, 97 Ala. 619, 12 So. 59.

35. Holbrook *v.* Gay, 6 Cush. (Mass.) 215. "The case assumes," said the court, "that the party has not the exercise of his mental powers, and that to all practical purposes, these are for the time being extinguished. This as substantially disqualifies the party from giving his own suppletory oath, as actual death. The same necessity which justifies the introduction of the books of the party, and especially the various cases of modification of the rule as to such entries, and its adaptation to the circumstances and mode of keeping the accounts, alike seem to require and justify the admission of them, where the party has become incapacitated to take the oath by reason of insanity."

36. Preliminary Proof. — In Hoover *v.* Gehr, 62 Pa. St. 136, a decedent's book was admitted on proof by the personal representative that it was found at the decedent's house, that it was the decedent's book of original entries and that the entries were in his handwriting. But there must be proof that the entries were in his handwriting; it is not enough to show merely that the book came to the personal representative as the decedent's book of original entries and that the debt is not paid. See also Robinson *v.* Dibble, 17 Fla. 457.

of his estate,[37] if they would have been so admissible for him if he were living.[38] And there is authority to the effect that there need be no proof made as to the time and manner of making the entries.[39]

b. *Rule Under Statutes.* — In some jurisdictions there are statutes regulating the use of books of account as evidence in favor of the estate of the party who kept them.[40]

37. Proof That the Entries Were Made at the Time of the Matters to which they have reference will justify the admission of a decedent's book. Lunsford *v.* Butler, 102 Ala. 403, 15 So. 239.

In New Hampshire, a decedent's books of account are admitted, although accompanied only by the suppletory oath of the personal representative. Dodge *v.* Morse, 3 N. H. 232.

In Ohio evidence that the decedent kept regular books, and of some of the items, and that the clerk was not a competent witness, authorizes the court, at its discretion, to admit the book. Van Horne *v.* Brady, Wright (Ohio), 451. See also Cram *v.* Spear, 8 Ohio 494. At the time these decisions were rendered interested persons were not competent to testify.

38. Leighton *v.* Manson, 14 Me. 208; McLellan *v.* Crofton, 6 Me. 307; Odell *v.* Culbert, 9 Watts & S. (Pa.) 66, 42 Am. Dec. 317; Dodge *v.* Morse, 3 N. H. 232; Buckley *v.* Buckley, 12 Nev. 423, *affirmed* 16 Nev. 180. *Compare* Mason *v.* Wedderspoon, 43 Hun 20; Case *v.* Potter, 8 Johns. 211; Redfield *v.* Stitt, 10 N. Y. St. Rep. 365; Schwartz *v.* Allen, 7 N. Y. Supp. 5; Dusenbury *v.* Hoadley, 66 Hun 629, 20 N. Y. Supp. 911; Vaughan *v.* Strong, 52 Hun 610, 4 N. Y. Supp. 686; Hensgen *v.* Mulally, 23 Mo. App. 613.

The Entries Must Refer to Some Relevant Fact as to which the decedent would have been a competent witness at the time, and must have been made by him in the course of his business. Avery *v.* Avery, 49 Ala. 193.

39. Hoover *v.* Gehr, 62 Pa. St. 136. Compare Rouyer *v.* Miller, 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674.

Such evidence, however, if offered, is to go to the jury, who are to find therefrom and from the books themselves on the issue as to their being books of original entry. Van Swearingen *v.* Harris, 1 Watts & S. (Pa.) 356.

40. Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581, (Idaho Rev. Stat. § 2590), holding, however, that the book offered in that case did not come within the terms of the statute.

Callaway *v.* McMillian, 11 Heisk. (Tenn.) 557. (construing and applying the Tennessee statute).

In Arkansas, by express statute, books of account kept by a person who has since deceased are, if proved to be regularly and fairly kept, competent evidence on behalf of his personal representative. Matthews *v.* Sanders, 15 Ark. 255, holding that the paper in question, although properly proved, did not come within the terms of the statute.

In Connecticut a statute (Gen. Stat. § 1094) provides for the admission of such books as the written entries of a deceased person. Setchel *v.* Keigwin, 57 Conn. 473, 18 Atl. 594; Kinney *v.* U. S., 54 Fed. 313; Douglas *v.* Chapin, 26 Conn. 76. Nor is it necessary under this statute that the books expressly refer to the matter at issue. This may be shown by evidence *aliunde.* Peck *v.* Pierce, 63 Conn. 310, 28 Atl. 524.

Under the Illinois Statute, it is sufficient to show that the books were the only books kept by the decedent, and that settlements had been made with many customers who had found them correct, as against one, who, however, on examination before any controversy arose, had made no objection. Patrick *v.* Jack, 82 Ill. 81.

Under the North Carolina Statute, the suppletory oath of an administra-

c. *Partnership Books.* — The books of account of a partnership kept by a partner who is absent or dead at the time of the trial, are, if properly proved under the rules established therefor, admissible,[41] the mere fact of the partner being also the book-keeper making no difference.[42]

2. Matters as to the Book and Entries. — A. THE CONSTRUCTION OF THE BOOK. — The manner of keeping the accounts in a book of accounts, and their purpose, is the important consideration; the form and construction of the book itself, or the material used, being immaterial matters so long as the book is otherwise unobjectionable and properly proved.[43]

Scraps of Paper. — Thus several scraps of paper presented as the party's book of original entries, though very irregular, have been permitted to go to the jury, the party swearing to them as original entries.[44]

A Mutilated Piece of Paper Apparently Torn from a Book on which the name, neither of the plaintiff nor of the defendant appears, and which contains no charges against the defendant and which is unintelligible without explanation, is not admissible in evidence.[45]

tor that the entries are in the handwriting of a person who has not, after diligent inquiry, been heard of for seven years, and that he knows of no one who can testify to the handwriting is sufficient. Stevelie *v.* Greenlee, 1 Dev. Law (N. C.) 317.

41. Butler *v.* Cornwall Iron Co., 22 Conn. 335; New Haven & N. Co. *v.* Goodwin, 42 Conn. 230; Webb *v.* Michener, 32 Minn. 48, 19 N. W. 82. See also Thompson *v.* Porter, 4 Strob. Eq. (S. C.) 58, 53 Am. Dec. 653. *Compare* Romer *v.* Jaecksch, 39 Md. 585; Burr *v.* Byers, 10 Ark. 398, 52 Am. Dec. 239.

42. Alter *v.* Berghaus, 8 Watts 77. **For an Exhaustive Treatment** of the use of partnership books, *see* article "PARTNERSHIP."

43. *Delaware.* — Smith *v.* Smith, 4 Harr. 532; Hall *v.* Field, 4 Harr. 533, note; Moore *v.* Morris, 1 Pen. 412, 41 Atl. 889.

Georgia. — Taylor *v.* Tucker, 1 Ga. 231; Dunlap *v.* Hooper, 66 Ga. 211.

Maine. — Hooper *v.* Taylor, 39 Me. 224; Witherill *v.* Swan, 32 Me. 247.

Mississippi. — Bookout *v.* Shannon, 59 Miss. 378; Moody *v.* Roberts, 41 Miss. 74.

New Hampshire. — Cummings *v.* Nicholls, 13 N. H. 420, 38 Am. Rep. 501.

Tennessee. — Irwin *v.* Jordan, 7 Humph. 167.

Vermont. — Bell *v.* McLeran, 3 Vt. 185.

The fact that the books in question had formerly been used by a firm of which the party offering them was a member and after retirement of his co-partner he had continued to use them does not affect their admissibility. Dunlap *v.* Hooper, 66 Ga. 211.

44. Smith *v.* Smith, 4 Harr. (Del.) 532. See also Taylor *v.* Tucker, 1 Ga. 231; Bell *v.* McLeran, 3 Vt. 185. *Compare* Thompson *v.* McKelvey, 13 Serg. & R. (Pa.) 126, where it was held that unconnected scraps of paper containing as alleged, accounts of sales by an agent of articles on account of his principal, so irregularly kept on their face that they were unworthy the name of an account regularly kept were not admissible as a book of original entries. And see Barber *v.* Bennett, 58 Vt. 476, 4 Atl. 231, 56 Am. Rep. 565; Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581; Richardson *v.* Emery, 23 N. H. 220; Mathews *v.* Sanders, 15 Ark. 255; Jones *v.* Jones, 21 N. H. 219.

45. Hough *v.* Doyle, 4 Rawle (Pa.) 291.

Shingle. — A shingle has been received as a book of accounts.[46] So also, has a notched stick.[47]

B. The Form of the Entries. — a. *In General.* — No particular form of book-keeping is required, nor need the books be kept according to an approved form; books used for the purpose of entering business actually done, and immediately after it is done, and used continually for that purpose in the due course of business, and which itemize the account entered therein, and which bear the evidence of fairness and integrity, are all that the law requires.[48] But preciseness and definiteness in the entries is necessary.[49]

b. *Alterations, etc.* — The weight of authority is to the effect that unless satisfactorily explained, alterations[50] and mutilations[51]

46. Kendall *v.* Field, 14 Me. 30, 30 Am. Dec. 728.

47. Rowland *v.* Burton, 2 Harr. (Del.) 288.

48. Moody *v.* Roberts, 41 Miss. 74; Missouri El. Light & P. Co. *v.* Carmody, 72 Mo. App. 534; Mathes *v.* Robinson, 8 Metc. (Mass.) 269, 41 Am. Dec. 505.

In Gailey *v.* Washington, 2 Harr. (Del.) 204, the book offered was very irregular, sometimes in ledger form, sometimes in day book entries, sometimes balances, sometimes items, and frequently scratched and erased. The court in admitting the book said: "They must act with caution in rejecting books of account altogether. If it appeared from the face of the account that it was not fairly kept, it would be their duty to reject it; but as to what constitutes a regular book of original entries, it must be understood with considerable allowance. Among illiterate men, the mode of keeping accounts must frequently be defective; scores on an old mantelpiece have been treated as a good original entry; so marks on a board, or notches on a stick. The best general rule will be, unless something clearly wrong appears from the account, to admit it in evidence leaving it to the jury to consider its weight, otherwise great injustice may be done to poor and illiterate men. The book was admitted."

49. Richardson *v.* Emery, 23 N. H. 220.

"The Charges Need Not Be Such as to Be Understood by the General Public if they are intelligible to persons in the business, but, where they are not intelligible to the common understanding, it would seem to be necessary to support them by other evidence as to their meaning and character." Fulton's Estate, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133.

50. *California.* — Caldwell *v.* McDermitt, 17 Cal. 464.

Delaware. — State *v.* Collins, 1 Marv. 536, 41 Atl. 144.

Georgia. — Doster *v.* Brown, 25 Ga. 24, 71 Am. Dec. 153.

Massachusetts. — Cogswell *v.* Dolliver, 2 Mass. 217, 3 Am. Dec. 45 (*dictum*).

Mississippi. — Moody *v.* Roberts, 41 Miss. 74.

Nebraska. — Campbell *v.* Holland, 23 Neb. 587, 35 N. W. 871.

New Hampshire. — Eastman *v.* Moulton, 3 N. H. 156.

New York. — Larue *v.* Rowland, 7 Barb. 107.

Pennsylvania. — Wollenweber *v.* Ketterlinus, 17 Pa. St. 389; Kline *v.* Gundrum, 11 Pa. St. 242; Churchman *v.* Smith, 6 Whart. 146, 36 Am. Dec. 211.

Wisconsin. — Schlettler *v.* Jones, 20 Wis. 412.

In Presbyterian Church *v.* Emerson, 66 Ill. 269, where there was some proof of erasures in the book offered, it was held, in view of that fact, that it was proper to charge the jury that if they believed from the evidence offered that the plaintiff sold the goods to the defendant, they must find for the plaintiff, without regard to the manner in which the book was kept.

51. Lovelock *v.* Gregg, 14 Colo. 53,

in a book of accounts in a material part, render the book inadmissible,[52] although there is authority to the effect that such matters do not so affect its admissibility, but only go to its credit.[53]

Evidence Explaining Alteration. — Of course involved in the rule laid down in the preceding section involving the right of a party offering his books of accounts so materially altered or mutilated is the right to give evidence explanatory thereof.[54]

c. *False Entries.* — And it has been held that even false entries do not affect the admissibility of the book.[55]

d. *Abbreviations.* — The use of well-known and ordinary abbrevi-

23 Pac. 86; Campbell *v.* Holland, 22 Neb. 587, 35 N. W. 871; James *v.* Harvey, 1 N. J. Law 228; Johnson *v.* Fry, 88 Va. 695, 12 S. E. 973, 14 S. E. 183. *Compare* Lunsford *v.* Butler, 102 Ala. 403, 15 So. 239.

In Weigle *v.* Brautigam, 74 Ill. App. 285, the book had become shopworn from use, and the outside covers and some outside pages had been lost, and a few interior leaves were gone; but it was held that this did not affect the admissibility of the book but were matters going only to the credit of the book. See also Jones *v.* Dekay, 3 N. J. Law 511.

Manipulation of Books by Bookkeeper. — In Webster *v.* San Pedro Lumber Co., 101 Cal. 326, 35 Pac. 871 it was held that the fact that the party's book-keeper had manipulated the books for the purpose of defrauding such party did not affect the competency of the books in as much as there was clearly evidence of the correctness of the books so far as the accounts and rights of those dealing with the party were concerned.

52. In Harrold *v.* Smith, 107 Ga. 849, 33 S. E. 640, it was held that, irrespective of the competency of the books for which it was offered, the book in that case was properly excluded, because it was only a part of a mutilated book, not fastened together, some of the leaves being torn and many of them entirely gone.

In Bower *v.* Smith, 8 Ga. 74, on inspection of the books in question, it appeared that one item was entered by interlineation in different ink and appearance from the other items, but charged at the same date. And further, that the books contained evidence upon the face that several of the charges were unjust. But the books were nevertheless allowed to go to the jury. The court holding that the "irregularities in the books should be exceedingly gross and palpable" to justify the court's withdrawing the books from the jury.

Alteration After Production Upon Oyer. — In Downer *v.* Lothrop, 1 Root (Conn.) 273, it was held that after a party had produced his book upon oyer, he could not make any additions or alterations thereby to surprise his adversary upon trial.

Questions for Court and Jury. Whether or not books of account are in such condition, because of erasures, interlineations, and the like, as to justify their being submitted to the jury is for the trial judge to determine. Robinson *v.* Dibble, 17 Fla. 457. See also Maverick *v.* Maury, 79 Tex. 435, 15 S. W. 686, where the court in sustaining a refusal of the trial judge to withdraw from the jury the books in question, said: "It is but reasonable that mistakes should have been made in making the entries under the circumstances disclosed by the evidence, and it was proper to correct them. If made in good faith, they should have cast no suspicion upon the account; and whether made in good faith or not was a question for the jury."

53. Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Sargent *v.* Pettibone, 1 Aik. (Vt.) 355.

54. Freer *v.* Budington, 6 N. Y. St. Rep. 319. *Compare* Richardson *v.* Wingate, 1 Ohio Dec. 478.

55. Gosewich *v.* Zebley, 5 Harr. (Del.) 124; Cook *v.* Brister, 19 N. J. Law 73.

ations in use in the particular trade or profession of the party does not affect the admissibility of his books of account.[56]

e. *Cipher Entries* — And it has been held that the fact that an entry is partly in cipher does not affect the admissibility of the book, if it is otherwise unobjectionable.[57]

f. *Omissions.* — The admissibility of books of account, otherwise unobjectionable, is not affected by the fact that the weight or quantity is not stated;[58] or that the prices are not carried out.[59]

g. *Pencil Entries.* — And the mere fact that the entries have been made with a lead pencil does not affect the admissibility,[60] although it has been held to be a circumstance proper to go to the credit of the book.[61]

C. THE MAKING OF THE ENTRIES.—a. *The Time.*—(1.) **Generally.** Although freshness of the entry is essential, the law fixes no precise instant when it shall be made; but it must be made so reasonably near the time of the transaction recorded that it may appear to have been made while the memory of the transaction was recent, or the source from which the knowledge was derived remained unimpaired;[62] in short, the entry must have been made at or near the time of the transaction recorded, whether the book is sought to be used under the common law, or the statutory, rule.[63]

56. Ray *v.* Cook, 22 N. J. Law 343; Cummings *v.* Nicholls, 13 N. H. 420, 38 Am. Dec. 501; Bookout *v.* Shannon, 59 Miss. 378; *In re* Diggins Estate, 68 Vt. 198, 34 Atl. 696. *Compare* Kelley's Estate, 5 Pa. Dist. R. 263; German's Estate, 16 Phila. (Pa.) 318.

57. Monroe *v.* Snow, 131 Ill. 126, 23 N. E. 401.

58. Pratt *v.* White, 132 Mass. 477. *Compare* Foreman's Estate, 7 Pa. Dist. R. 214.

59. Remick *v.* Rumery, 69 N. H. 601, 45 Atl. 574; Jones *v.* Orten, 65 Wis. 9, 26 N. W. 172; Steele *v.* Mfg. Co., 4 Kulp (Pa.) 414. See also Leach *v.* Shepard, 5 Vt. 363. *Compare* Hagaman *v.* Case, 4 N. J. Law 370.

Where the entries furnish nothing by which the propriety of the prices charged can be tested or criticized by witnesses familiar with the subject, the books should not be received. McGarry's Estate, 9 Pa. Dist. R. 172.

60. True *v.* Bryant, 32 N. H. 241; Gibson *v.* Bailey, 13 Metc. (Mass.) 537; Hill *v.* Scott, 12 Pa. St. 168.

61. Walton's Estate, 4 Kulp (Pa.) 487.

62. Curren *v.* Crawford, 4 Serg. & R. (Pa.) 3.

Rule Stated.—"The entries should be made at or near the time of the transaction, and the oath of the party must verify that fact. No particular limit is fixed beyond which the entry cannot be made. The court must judge whether the circumstances of the case bring it within the rule. But it is clear that the entries must not be memoranda made from the memory of things which have long since passed." Cummings *v.* Nicholls, 13 N. H. 420, 38 Am. Dec. 501.

63. *Canada.* — Barton *v.* Town of Dundas, 24 U. C. Q. B. 273.

United States. — Burley *v.* German-American Bank, 111 U. S. 216, 28 L. ed. 406. *Compare* Robinson *v.* Alabama & G. Mfg. Co., 89 Fed. 218.

Alabama. — Dismukes *v.* Tolson, 67 Ala. 386; Wagar Lumb. Co. *v.* Sullivan Log Co., 120 Ala. 558, 24 So. 949; Lane *v.* May & T. Hdwe. Co., 121 Ala. 296, 25 So. 809.

Arkansas. — Atkinson *v.* Burt, 65 Ark. 316, 53 S. W. 404.

California. — Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811.

(2.) Rule Applied. — (A.) GENERALLY. — This rule in its practical application, however, is not so construed as to mean that the transaction must have been entered on the same day on which it took place; the rule is satisfied if the entry was made in the ordinary course of business;[64] although there is authority to the effect that the mere fact that an entry is made contemporaneously with the transaction which it purports to record does not of itself entitle it to admission as a piece of substantive evidence; it must also appear to have been made in the regular course of business under such circumstances as to import trustworthiness.[65]

(B.) ENTRIES CONTEMPORANEOUS WITH ORDER. — A book of purported

Colorado. — Lovelock *v.* Gregg, 14 Colo. 53, 23 Pac. 86.

Florida. — See Robinson *v.* Dibble, 17 Fla. 457.

Georgia. — Talbotton R. Co. *v.* Gibson, 106 Ga. 229, 32 S. E. 151.

Iowa. — U. S. Bank *v.* Burson, 90 Iowa 191, 57 N. W. 705; Anderson *v.* Ames & Co., 6 Iowa 486; Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311. See also Farner *v.* Turner, 1 Iowa 53.

Massachusetts — Cogswell *v.* Dolliver, 2 Mass. 217, 3 Am. Dec. 45 (*dictum*); Prince *v.* Smith, 4 Mass. 455; Davis *v.* Sanford, 9 Allen 216.

Mississippi. — Moody *v.* Roberts, 41 Miss. 74; Chicago St. L. & N. O. R. R. Co. *v.* Provine, 61 Miss. 288.

Missouri. — Nelson *v.* Nelson, 90 Mo. 460, 2 S. W. 413; Martin *v.* Nicholls, 54 Mo. App. 594; Penn *v.* Watson, 20 Mo. 13.

Nebraska. — Atkins *v.* Seeley, 54 Neb. 688, 74 N. W. 1100; Martin *v.* Scott, 12 Neb. 42, 10 N. W. 532.

New Hampshire. — Cummings *v.* Nicholls, 13 N. H. 420, 38 Am. Dec. 501; Eastman *v.* Moulton, 3 N. H. 156.

New Jersey. — Rumsey *v.* New York & N. J. Tel. Co., 49 N. J. Law 322, 8 Atl. 290. *Compare* Sayre *v.* Sayre, 3 N. J. Law 1035.

New York. — Skipworth *v.* Deyell, 83 Hun 307, 31 N. Y. Supp. 918. See also Goodwin *v.* O'Brien, 25 N. Y. St. 203, 6 N. Y. Supp. 239.

Ohio. — Bennett *v.* Shaw, 12 Ohio C. C. 574.

Pennsylvania. — Jones *v.* Long, 3 Watts 325; Barnett *v.* Steinbach, 1 W. N. C. 335; McGarry's Estate, 9 Pa. Dist. R. 172; Walter *v.* Bollman, 8 Watts 544.

Texas. — Moore *v.* Moore, (Tex. Civ. App.), 31 S. W. 532; Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565; Bupp *v.* O'Connor, 1 Tex. Civ. App. 328, 21 S. W. 619.

In Kingsland *v.* Adams, 10 Vt. 201, it was held that the fact that no charge was made on the books at the time of delivery is not a valid objection if the article was actually sold and was a proper subject of charge on book; that when the property sold is not charged at the time it may as a matter of evidence weaken the party's claim, and when a book is kept and no charge is made it affords strong evidence against the party making the claim, but cannot determine that the article sold is not a proper subject of charge.

64. Diament *v.* Colloty, 66 N. J. Law 295, 49 Atl. 445, 808; Ray *v.* Cook, 22 N. J. Law 343; Curren *v.* Crawford, 4 Serg. & R. (Pa.) 3; Fairchild *v.* Dennison, 4 Watts (Pa.) 258; Kaughley *v.* Brewer, 16 Serg. & R. (Pa.) 133, 16 Am. Dec. 544. See also Bogart *v.* Cox, 4 Ohio C. C. 289.

In Yearsley's Appeal, 48 Pa. St. 531, it was held that entries, by a servant who was employed from daylight until late at night and frequently all night, which he made on Saturday night for the services rendered during the week and generally on the same line in his book, in which he entered the credits for money received during the week, were properly received.

65. Riley *v.* Boehm, 167 Mass. 183, 45 N. E. 84.

original entries of the sale of goods, made when the goods were ordered, and before they were delivered, is not competent evidence of the sale.[66] On the other hand, an entry made at the time of the selection by the customer of the goods and when they were set aside for delivery to him is good evidence of the sale.[67]

Entries Made When the Articles Are Finished and Ready for Manual Delivery, except the packing in boxes, are not objectionable, and the fact that they were made from six to eight days before the goods were actually taken away, is immaterial.[68]

(C.) Entries Not Dated. — Again, it is held that there must be dates to the entries, although it is not necessary that the precise day of the month should be affixed to the charge in all cases.[69]

(D.) Entry Dated on Sunday. — It has been held that where the entry offered in evidence is dated on Sunday, the party offering it must show that the transaction recorded did not in fact take place on that day.[70]

(E.) Numerous Entries Made at Same Time. — But where the appearance of the entries is such as to indicate that they were all made at the same time, although they relate to separate and distinct transactions occurring on different days, the book is not admissible.[71]

66. Rhoads *v.* Gaul, 4 Rawle (Pa.) 404, 27 Am. Dec. 277; Ridgway *v.* Bell, 1 Phila. (Pa.) 117; Rheem *v.* Snodgrass, 2 Grant's Cas. (Pa.) 379.

67. Parker *v.* Donaldson, 2 Watts & S. (Pa.) 9; Koch *v.* Howell, 6 Watts & S. (Pa.) 350; Keim *v.* Rush, 5 Watts & S. (Pa.) 377. See also Benners *v.* Maloney, 3 Phila. (Pa.) 57; Moloney *v.* Benners, 3 Grant Cas. (Pa.) 233; Bolton's Appeal, 3 Grant Cas. (Pa.) 204. *Compare* Boyle *v.* Barber, 1 Phila. (Pa.) 198.

68. Wollenweber *v.* Ketterlinus, 17 Pa. St. 389.

69. See Davis *v.* Sandford, 9 Allen (Mass.) 216, where the court excluded undated entries. *Compare* Doster *v.* Brown, 25 Ga. 24, 71 Am. Dec. 153, wherein it is held not to be fatal to the book that the date is omitted.

"The Entries Must Have Been Made at the Time They Purport to Have Been Made. — This implies that there must be dates, so far, at least, that the court may see that the case comes within the rule. But it is not necessary that the precise day of the month should be affixed to the charge in all cases. To require this would exclude the books of many individuals. The book has been admitted when only the month has been specified, it appearing to be regular in other respects." Cummings *v.* Nicholls, 13 N. H. 420, 38 Am. Dec. 501.

Under the Pennsylvania Affidavit of Defense Law the copy of an account filed must be dated; otherwise it must be affirmed of the entries that they were made at or near the time they purport to have been made. Harbison *v.* Hawkins, 81 Pa. St. 142.

70. Bustin *v.* Rogers, 11 Cush. (Mass.) 346. *Compare* Stagger's Estate, 8 Pa. Super. Ct. 260.

71. Dunbar *v.* Wright, 20 Fla. 446; Eberhart *v.* Schuster, 10 Abb. N. C. (N. Y.) 374; Lynch *v.* Hugo, 1 Bay (S. C.) 33; Davis *v.* Sandford, 9 Allen (Mass.) 216; Geiger's Appeal, 24 W. N. C. (Pa.) 264; Keener *v.* Zartman, 144 Pa. St. 179, 22 Atl. 889. See also Treadway *v.* Treadway, 5 Ill. App. 478; Eastman *v.* Moulton, 3 N. H. 156.

In Moss *v.* Vroman, 5 Wis. 147, where the entries were for the most part not dated otherwise than the year, the court said that the charac-

(F.) Entries Not Itemizing Transactions. — Nor is the book admissible when the entries do not itemize the transactions recorded, but in fact embrace several transactions,— in other words when the entries are merely "lumped charges."[72]

A Lumping Charge, if a Bill of Particulars Was Also Delivered, is sufficient; but without such a bill delivered, such a charge would not be good.[73]

Footings are no part of the entries of a book of original entries and should not be allowed as evidence.[74]

The Charge in a Physician's Account Must be specific; not loose and general.[75]

Transactions Extending Over Several Days. — Although account books

ter of the charges, the want of dates, and other characteristics of the book indicated clearly that it was not a regular book account such as is contemplated by the Wisconsin statute, and would not have been properly received in evidence had a proper objection been insisted upon at the time.

72. *Delaware.* — McLaughlin *v.* Weer, 1 Marv. (Del.) 267, 40 Atl. 1122.

Georgia. — Williams *v.* Abercrombie, Dudley (Ga.) 252.

Iowa. — Karr *v.* Stivers, 34 Iowa 123.

Massachusetts. — Bustin *v.* Rogers, 11 Cush. (Mass.) 346; Earle *v.* Sawyer, 6 Cush. (Mass.) 142; Henshaw *v.* Davis, 5 Cush. (Mass.) 145.

New Jersey. — Rumsey *v.* New York & N. J. Tel. Co., 49 N. J. Law 322, 8 Atl. 290.

Pennsylvania. — Birch *v.* Gregory, 7 W. N. C. 147; Mathews *v.* Glenn, 7 W. N. C. 213; Fulton's Estate, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133; Baumgardner *v.* Burnham, 10 W. N. C. 445; Corr *v.* Sellars, 100 Pa. 169, 45 Am. Rep. 370; *In re* Miller's Estate, 188 Pa. St. 214, 41 Atl. 532; Walton's Estate, 4 Kulp 487. And see Nichols *v.* Haynes, 78 Pa. St. 174. *Compare* Millett *v.* Allen, 3 W. N. C. 374.

Rhode Island.—Cargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214.

South Carolina. — St. Phillip's Church *v.* White, 2 McMull. 306; Lance *v.* McKenzie, 2 Bail. Law 449; Lynch *v.* Petrie, 1 Nott & McC. 130. But see Newell *v.* Keith, 11 Vt. 214, wherein it was held that the fact that the charge made in gross does not render the book inadmissible, but is to be considered, and should induce suitable degree of caution in its examination and allowance.

73. "Every person should keep his books in such a manner that the person charged may see the amount of the goods charged, by which means he will be able to ascertain whether he had the goods or not. And where such an account is exhibited against him, in an action at law, he will be able to defend himself, which he could not otherwise do, unless he had previously received a bill of particulars. Therefore the evidence of the general charges ought to be received, because it is stated per bill." McClure *v.* Byrd, 2 Over. (Tenn.) 21.

74. McAmore *v.* Wiley, 49 Ill. App. 615.

75. Hughes *v.* Hampton, 3 Brev. (S. C.) 544, 2 Tread. Const. 745. See also Lance *v.* McKenzie, 2 Bail. Law (S. C.) 449. *Compare* Bassett *v.* Spofford, 11 N. H. 167, wherein it was held that a charge for "visits and medicines" is sufficiently specific although the quality and quantity of medicines are not designated, where it does not appear they vary from the usual mode adopted by physicians in making charges. This case, however, should be further distinguished from Hughes *v.* Hampton, just cited. In that case the charge was for "curing" a person of a disease, while in Bassett *v.* Spofford, the charge was for a single visit.

are not admissible to prove a single item, yet where the evidence shows that the transactions extended over several days, and that the charge was made after it was completed, the book is not objectionable.[76]

(G.) Transferred Entries. — The rule requiring the entries to be made at or about the time of the transaction recorded also requires that transferred entries be made within a reasonable time.[77] Generally it is sufficient if the transfer be made upon the day of or the day following the transaction,[78] although there are cases in which the entries were admitted, although made several days after the transaction.[79]

76. Le Franc *v.* Hewitt, 7 Cal. 186. In Ray *v.* Cook, 22 N. J. Law 343, the charges objected to embraced the services of two or three days; but it was held that such charges are neither contrary to law nor the practice that prevails with persons who keep their books at home, while their services and labor are rendered elsewhere.

77. Redlich *v.* Bauerlee, 93 Ill. 134, 38 Am. Rep. 87.

Two or Three Days Delay renders the book inadmissible unless the delay is satisfactorily explained. Groff's Estate, 14 Phila. (Pa.) 306; Grady *v.* Thigpin, 6 Fla. 668; Vicary *v.* Moore, 2 Watts (Pa.) 451, 27 Am. Dec. 323. *Contra.*— Landis *v.* Turner, 14 Cal. 573.

78. Plummer *v.* Struby-Estabrooke M. Co., 23 Colo. 190, 47 Pac. 294; Ewart *v.* Morrell, 5 Harr. (Del.) 126; Webb *v.* Michener, 32 Minn. 48, 19 N. W. 82; Ingraham *v.* Bockius, 9 Serg. & R. (Pa.) 285, 11 Am. Dec. 720; Drummond *v.* Hyams, Harp. Law (S. C.) 268, 18 Am. Dec. 649.

Rule Stated.— "Account books are not incompetent, as of course, because the entries therein were not made on the same day that the charges were incurred. In this particular, every case must be made to depend very much upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries. Upon questions of this sort, much must be left to the judgment and discretion of the judge who presides at the trial; because, having the books before him, and understanding all the circumstances of the case, he is better able to decide upon all questions involving the fairness and regularity of the entries sought to be proved." Barker *v.* Haskell, 9 Cush. (Mass.) 218.

In Morris *v.* Briggs, 3 Cush. (Mass.) 342, an action by a painter for work done and materials furnished, it appeared that when a job of work was undertaken the course was to weigh the material, and when the workmen returned to take the daily memoranda kept by them and therefrom to make the entries in the book, sometimes the same day, sometimes after an interval of two or three days, and sometimes after a greater interval; that the book contained charges of several persons bearing date on successive days, followed by charges against the defendant on an anterior date; that in making the entries for a job of work, such as painting a house, it was customary, after making one or more charges, to leave a blank to be filled up with subsequent charges against the same person, bearing a later date, then the next succeeding charge to some other individual, in which cases prices were not usually put down, but only the materials and the number of days' work; and that there were apparently a few alterations here and there in the book; but it was held that the book was properly received.

A book into which entries are transcribed from day to day, as the parties have leisure, from counter book or blotter, is not a book of original entries. Breinig *v.* Meitzler, 23 Pa. St. 156.

79. Redlich *v.* Bauerlee, 98 Ill. 134,

Evidence As to Time. — It has been held that a witness skilled in handwriting cannot give his opinion as to whether entries were all made at the same time.[80]

D. THE CHARACTER OF THE ENTRIES.—a. *In General.*—Another requisite necessary to the admissibility of a party's books of account as evidence in his own favor, both at common law and under the statutes, is that the entries must have been the first permanent record of the matters contained therein.[81]

38 Am. Rep. 87, where the entries were transferred once a month.

In Jefferus *v.* Urmy, 3 Houst. (Del.) 653, it is held that when work is done and charged for by the hour and is so entered upon a slate, 60 hours constituting a week's work, and if 60 hours work is regularly charged in a book by the week as a week's work, the book is admissible as a book of original entries. See also Filkins *v.* Baker, 6 Lans. (N. Y.) 516.

Transfer From Slate When Full. In Hall *v.* Glidden, 39 Me. 445, it was held that entries transferred from a slate on which temporary charges were customarily made from day to day as the slate became full, although from two to four weeks sometimes after they were first made, are admissible. *Compare* Forsythe *v.* Norcross, 5 Watts (Pa.) 432, 30 Am. Dec. 334, where the court in holding otherwise on this question, said: "An entry on a card or slate, is but a memorandum preparatory to permanent evidence of the transaction, which must be perfected at or near the time, and in the routine of the business. But the routine must be a reasonable one; for there is nothing in the condition of a craftsman to call for indulgence till the slate be full, or till it be convenient for him to dispose of the contents of it."

80. Phœnix F. Ins. Co. *v.* Philip, 13 Wend. (N. Y.) 81. *See* fully on this question, article "HANDWRITING."

81. *United States.* — Fendall *v.* Billy, 1 Cranch C. C. 87, 8 Fed. Cas. No. 4,725; James *v.* Wharton, 3 McLean 492, 13 Fed. Cas. No. 7,187.

Alabama. — Dismukes *v.* Tolson, 67 Ala. 386.

California. — Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811; Landis *v.* Turner, 14 Cal. 573.

Colorado. — Lovelock *v.* Gregg, 14 Colo. 53, 23 Pac. 86.

Delaware. — Moore *v.* Morris, 1 Penn. 412, 41 Atl. 889.

Florida. — Hooker *v.* Johnson, 6 Fla 730.

Georgia. — Talbotton R. Co. *v.* Gibson, 106 Ga. 229, 32 S. E. 151.

Illinois. — Ruggles *v.* Gatton, 50 Ill. 412; McDavid *v.* Ellis, 78 Ill. App. 381; Ingersoll *v.* Bannister, 41 Ill. 388.

Iowa. — Arney *v.* Meyer, 96 Iowa 395, 65 N. W. 337; Shaffer *v.* McCracken, 90 Iowa 578, 58 N. W. 910, 48 Am. St. Rep. 465; U. S. Bank *v.* Burson, 90 Iowa 191, 57 N. W. 705; Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311.

Kentucky. — Lawhorn *v.* Carter, 11 Bush 7.

Maine. — Hooper *v.* Taylor, 39 Me. 224.

Massachusetts. — Cogswell *v.* Dolliver, 2 Mass. 217, 3 Am. Dec. 45 (*dictum.*)

Mississippi. — Moody *v.* Roberts, 41 Miss. 74.

Missouri. — Owen *v.* Bray, 80 Mo. App. 526.

Nebraska. — Martin *v.* Scott, 12 Neb. 42, 10 N. W. 532.

New Hampshire. — Remick *v.* Rumery, 69 N. H. 401, 45 Atl. 574; Eastman *v.* Moulton, 3 N. H. 156.

New Jersey. — Inslee *v.* Prall, 23 N. J. Law 457; Wilson *v.* Wilson, 6 N. J. Law 95.

New York. — Vosburgh *v.* Thayer, 12 Johns. 461; Skipworth *v.* Deyell, 83 Hun 307, 31 N. Y. Supp. 918; Winne *v.* Hills, 91 Hun 89, 36 N. Y. Supp. 683.

Bank Books. — The rule requiring that books of account offered in evidence must contain the original entries of the transactions recorded applies to bank books.[82]

Immaterial Error. — Failure to prove that the books offered are the books of original entries does not render their admission error where there is abundant uncontradicted testimony aside from the books themselves to prove a sale and delivery of the goods in dispute.[83]

b. *Transferred Entries.* — **(1.) First Record Made by Party.** — This rule in its practical application, however, does not mean that the entries in question must have been the first written record of the transaction; they may be original entries within the rule, and yet have been transferred from some other records of the transaction, made, however, merely as a temporary record as an aid and for the purpose of correctly making the permanent record.[84]

Ohio. — Baxter *v.* Leith, 28 Ohio St. 84.

Pennsylvania. — Bishop *v.* Goodhart, 135 Pa. St. 374, 19 Atl. 1026; Barnet *v.* Steinbach, 1 W. N. C. 335; Fulton's Estate, 178 Pa. St. 78, 35 Atl 880, 35 L. R. A. 133; Geiger's Appeal, (Pa.) 16 Atl. 851.

Rhode Island. — Cargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214.

Texas. — Underwood *v.* Parrott, 2 Tex. 168; Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565; Bupp *v.* O'Connor, 1 Tex. Civ. App. 328, 21 S. W. 619.

Vermont. — Wyman *v.* Wilcox, 66 Vt. 26, 28 Atl. 321.

Wyoming. — Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581.

In Cloud *v.* Hartridge, 28 Ga. 272, it was held that when cotton was weighed by warehousemen, and an account of the weights furnished to the storer, the books of the warehousemen, and not of the storer, are the books of original entries, and the best evidence of the weights.

Entries Made From. — In Pallman *v.* Smith, 135 Pa. St. 188, 19 Atl. 891, upon an issue as to the number of logs cut and delivered by the plaintiff to the defendant under a contract requiring the logs to be measured according to a certain rule, but not specifying who should keep the measurements, it was held that entries on a board made by the plaintiff of the measurements as announced by the defendant's employees, were admissible to show such measurements.

If a book appear on inspection or examination of the party by the court not to be a book of original entries, the court may reject it as incompetent; but if this does not clearly appear it must be submitted to the jury for its determination. Curren *v.* Crawford, 4 Serg. & R. (Pa.) 3.

82. Wills Point Bank *v.* Bates, 72 Tex. 137, 10 S. W. 348.

83. Hopkins *v.* Stefan, 77 Wis. 45, 45 N. W. 676.

84. *California.* — Landis *v.* Turner, 14 Cal. 573.

Colorado. — Plummer *v.* Struby-Estabrooke M. Co., 23 Colo. 190, 47 Pac. 294.

Delaware. — Ewart *v.* Morrell, 5 Harr. 126; Nichols *v.* Vinson, 9 Houst. 274, 32 Atl. 225.

Illinois. — Redlich *v.* Bauerlee, 98 Ill. 134, 38 Am. Rep. 87.

Kentucky. — Groschell *v.* Knoll, 10 Ky. L. Rep. 314.

Maine. — Hall *v.* Glidden, 39 Me. 445.

Massachusetts. — Barker *v.* Haskell, 9 Cush. 218; Faxon *v.* Hollis, 13 Mass. 427; Smith *v.* Sandford, 12 Pick. 139, 22 Am. Dec. 415; Arnold *v.* Sabin, 1 Cush. 525.

Minnesota. — Webb *v.* Michener, 32 Minn. 48, 19 N. W. 82; Paine *v.* Sherwood, 21 Minn. 225.

New York. — Stroud *v.* Tilton, 3

A Book Containing Transcribed Items of an Account, taken from the book of original entries, cannot be used as evidence of the correctness of the account.[85]

A Pay-Roll Book consisting of entries made in "monthly ledgers" from time books, and copied monthly from such ledgers is not a book of original entries.[86]

Where the Memorandum Itself Furnishes no Evidence of an Intent to Charge the Party, and the party testifies that he made the memorandum the basis or ground for charging the articles therein specified in his book, the book itself is not admissible; being no better evidence than the memorandum.[87]

(2.) First Record Made by Anotner Person. — The mere fact that the first and temporary record of the transaction was not made by the party himself but by another person does not of itself change the character of the permanent record transferred therefrom by the party or his book-keeper.[88]

Keyes 139, 4 Abb. Ct. App. Dec. 324; McGoldrick *v.* Wilson, 18 Hun 443.

Oregon. — Ladd *v.* Sears, 9 Or. 244.

Pennsylvania. — Hartley *v.* Brookes, 6 Whart. 189; Patton *v.* Ryan, 4 Rawle 408; Milton *v.* Baum, 9 Cent. Rep. (Pa.) 797.

Texas. — Missouri R. R. Co. *v.* Johnson, (Tex.) 7 S. W. 838.

85. Flato *v.* Brod, 37 Tex. 734. *Compare* Cahn *v.* Salinas, 2 Tex. Civ. App. Cas. § 616.

86. Price *v.* Garland, 3 N. M. 285, 6 Pac. 472.

87. Fairchild *v.* Dennison, 4 Watts (Pa.) 258.

88. *Georgia.* — Bracken *v.* Dillon, 64 Ga. 243, 37 Am. Rep. 70; Taylor *v.* Tucker, 1 Ga. 231.

Illinois. — Chisholm *v.* Beaman Mach. Co., 160 Ill. 101, 43 N. E. 796.

Kansas. — Rice *v.* Hodge, 26 Kan. 164.

Massachusetts. — Miller *v.* Shay, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 446.

Michigan. — Jackson *v.* Evans, 8 Mich. 476.

Minnesota. — Paine *v.* Sherwood, 21 Minn. 225; Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855.

New York. — Sickles *v.* Mather, 20 Wend. 72, 32 Am. Dec. 521; Davison *v.* Powell, 16 How. Pr. 467; Taggart *v.* Fox, 11 Daly 159; Van Wil *v.* Loomis, 77 Hun 399, 28 N. Y. Supp. 803.

Oregon. — Ladd *v.* Sears, 9 Or. 244.

Pennsylvania. — Laird *v.* Campbell, 100 Pa. St. 159; Hoover *v.* Gehr, 62 Pa. St. 136.

Texas. — Cahn *v.* Salinas, 2 Willson Tex. Civ. App. Cas. § 615.

Wisconsin. — Taylor *v.* Davis, 82 Wis. 455, 52 N. W. 756.

In Barker *v.* Haskell, 9 Cush. (Mass.) 218, it was held that the objection that the first entries made on a slate were made by one of the plaintiffs and then copied on to the book in question by the other plaintiff, was without merit. See also Faxon *v.* Hollis, 13 Mass. 427; Smith *v.* Sandford, 12 Pick. (Mass.) 139, 22 Am. Dec. 415.

In Bradford *v.* Stevens, 10 Gray (Mass.) 379, it was held that entries begun by another person, but finished by the book-keeper verifying them, by adding in the quantities and prices, are original entries, although he has no independent recollection on the subject.

Entries from Receipts of a Servant of the Party to Be Charged, of the matters recited in them are not original and consequently not admissible for any purpose. Guthrie *v.* Mann, (Tex. Civ. App.), 35 S. W. 710.

Journals Consisting of Tran-

(3.) Ledger Entries. — (A.) GENERALLY. — A ledger is a book of accounts in which are collected and arranged, each under its appropriate heading, the various transactions scattered throughout the party's journal or day book, and is therefore not a book of original entries within the rule.[89]

(B.) ORIGINAL LEDGER ENTRIES. — There are instances, however, where the original entries are in a ledger form and it has been held, in such cases, that the fact the entries were so made does not affect the book as one of original entry provided, of course, it is otherwise unobjectionable.[90]

scripts from the Stubs of Check Books made several days after the giving of the checks, the check books and books having been preserved, are not admissible in evidence. Woolsey *v.* Bohn, 41 Minn. 235, 42 N. W. 1022.

89. *United States.* — Fendall *v.* Billy, 1 Cranch C. C. 87, 8 Fed. Cas. No. 4,725.

Alabama. — First Nat. Bank *v.* Chaffin, 118 Ala. 246, 24 So. 80.

Georgia. — Bracken *v.* Dillon, 64 Ga. 243, 37 Am. Rep. 70.

Illinois. — Stickle *v.* Otto, 86 Ill 161; Meeth *v.* Rankin Brick Co., 48 Ill. App. 602; McCormick *v.* Elston, 16 Ill. 204.

Indiana. — First Nat. Bank *v.* Williams, 4 Ind. App. 501, 31 N. E. 370.

Kentucky. — Estes *v.* Jackson, 21 Ky. L. Rep. 859, 53 S. W. 271.

Massachusetts. — Stetson *v.* Wolcott, 15 Gray 545.

Nevada. — Cahill *v.* Hirshman, 6 Nev. 57.

New York. — Griesheimer *v.* Tanenbaum, 124 N. Y. 650, 26 N. E. 951. See also Rothschild *v.* Porter, 76 N. Y. St. 262, 19 N. Y. Supp. 177.

Pennsylvania. — Ahl *v.* Ahl, 176 Pa. St. 466, 35 Atl. 227. And see *In re* Huston's Estate, 167 Pa. St. 217, 31 Atl. 553.

In Fitzgerald *v.* McCarty, 55 Iowa 702, 8 N. W. 646, it was held that there was no objection to the party's attorney taking the ledger and by its aid and in presence of the jury, the more readily find the items charged in the accounts in the books of original entry.

90. *Arkansas.* — Mathews *v.* Sanders, 15 Ark. 255.

California. — Sanborn *v.* Cunningham, (Cal.), 33 Pac. 894.

Massachusetts. — Gibson *v.* Bailey, 13 Metc. 537; Faxon *v.* Hollis, 13 Mass. 427.

New Hampshire. — Swain *v.* Cheney, 41 N. H. 232; Wells *v.* Hatch, 43 N. H. 246.

New Jersey. — Jones *v.* Dekay, 3 N. J. Law 956.

New Mexico. — Byerts *v.* Robinson, 9 N. M. 427, 54 Pac. 932.

New York. — Anonymous, 21 Misc. 656, 48 N. Y. Supp. 277; Lloyd *v.* Lloyd, 1 Redf. 399; Farley *v.* Gibbs, 22 N. Y. St. 94, 4 N. Y. Supp. 353.

Pennsylvania. — Hoover *v.* Gehr, 62 Pa. St. 136; Rehrer *v.* Zeigler, 3 Watts & S. 258.

Vermont. — Gifford *v.* Thomas, 66 Vt. 34, 19 Atl. 1088.

In Way *v.* Cross, 95 Iowa 258, 63 N. W. 691, the party conducted his business by entering sales on slips of paper during the day and at the close of each day's business the amounts to be charged to customers were entered upon a ledger; and it was held that because the ledger merely showed a charge of merchandise generally and the amount for which it was sold, but did not name the goods purchased, it was not a book of original entries.

In McGoldrick *v.* Traphagan, 88 N. Y. 334, it appeared that the items of work done were first entered at the time upon a slate generally by the party who superintended the work and attended in part to it himself and made the entry save when occasionally absent. These entries were correctly transferred by his bookkeeper

(C.) Ledgers As Secondary Evidence. — There is authority also to the effect that a ledger may be received as secondary evidence, provided of course the proper foundation is laid for it as such.[91] As in other cases, however, the entries must be verified by the party who made them, or good cause shown for not so doing.[92]

c. *Balance Entries.* — An entry not of particular transactions, but of what remains due as a balance after allowing set-offs and counterclaims does not come within the rule defining original entries.[93]

d. *Intent to Charge.* — The entries must purport to have been made with an intent to charge the party named therein.[94]

nearly every day to a day book and from thence to the ledger. No prices were entered until the charges were carried to the ledger upon which they were fixed by the party and entered. It was held that under the circumstances although neither the slate, day book, nor the ledger was perfect of itself as a book of original entries all of them might be taken together, the ledger equally with the day book: that without it there was no charge actually made in full showing any services rendered and the amount claimed, but that with it the charges made were complete, and the ledger contained the first original entry of them as an entirety.

In Rodman *v.* Hoops, 1 Dall. 85, 1 L. ed. 47, a book was offered in the form of a ledger containing in some cases reference to a waste book but the court ordered the book to be read, leaving it to the jury to determine on the face of it whether it was an original or a transcript and directing them in the latter case to disregard it.

In Fitzgerald *v.* McCarty, 55 Iowa 702, 8 N. W. 646, it appeared that the ledger offered contained but one entry which was claimed to be an original entry and the party kept books in which were entered his daily transactions; and it was held that the ledger could not be considered a book of original entries.

91. Stanley *v.* Wilkerson, 63 Ark. 556, 39 S. W. 1042; Caulfield *v.* Sanders, 17 Cal. 569; Vilmar *v.* Schall, 3 Jones & S. (N. Y.) 67; Rigby *v.* Logan, 45 S. C. 651, 24 S. E. 56; McCrady *v.* Jones, 36 S. C. 136, 15 S. E. 430; Pohl *v.* Bradford, (Tex. Civ. App.), 25 S. W. 984.

92. Price *v.* Garland, 3 N. M. 285, 6 Pac. 472; Kennedy *v.* Dodge, 19 Ohio C. C. 425. See also Ives *v.* Waters, 30 Hun (N. Y.) 207.

93. McClintock's Appeal, 58 Mich. 152, 24 N. W. 549; Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565.

A Balance Found Due on Settlement may be charged over in a new account in another book and the book received in evidence. Spear *v.* Peck, 15 Vt. 566.

94. Moody *v.* Roberts, 41 Miss. 74; Walter *v.* Bolman, 8 Watts (Pa.) 544; Hale *v.* Ard, 48 Pa. St. 22.

In Jamison *v.* Jamison, 113 Iowa 720, 84 N. W. 705, the character of the entries showed that the book was a mere diary kept by the party and all of the entries that related to the questions at issue in that case were simply self-serving declarations, and it was held that the book was properly excluded.

Cash Books Kept in the Ordinary Way are admissible in evidence where the proof required by statute as to books of account has been made although the entries in question are not in terms charges against a person named as for money paid to him. Woolsey *v.* Bohn, 41 Minn. 235, 42 N. W. 1022.

In Donahue *v.* Connor, 93 Pa. St. 356, a suit by a sub-contractor against the contractor to recover for moneys paid for labor, it was held that the pay roll kept by the plaintiff, some of the entries on which were made by himself and some by his assistant, did not charge the defendant with anything and was *res inter alios acta;* but that as the plaintiff had testified that it showed the amounts so paid out by him, it was evidence, not as original evidence of

An intent to charge for services rendered is sufficiently shown where the entries show the nature of the charge, the date of the labor or services, for whom performed, its duration and its kind, although the entries are not in such form as the law requires and contain no prices carried out for the services rendered; the fair presumption being in such case that when the services were rendered no price was agreed upon and therefore its reasonable value may be recovered.[95]

e. *Entries Not Original Intermingled with Original Entries.* The admissibility of a book of accounts, otherwise unobjectionable, is not affected by the fact that intermingled with the original entries are entries objectionable as not being original, but which are the exception and are not sought to be used in evidence.[96]

E. Substance of the Entries. — a. *In General.* — Again, the transactions, of which the entries purport to be a record, must have been transactions which took place within the regular course of the business of the party;[97] otherwise the books are not

the charge, but as corroborative of the plaintiff's testimony.

95. Remick *v.* Rumery, 69 N. H. 601, 45 Atl. 574. "The law looks to the substance," said the court, "rather than to the form of things. A statement in one's book that he performed labor for, or furnished goods or lent money to another, is ordinarily understood to mean, in the absence of evidence to the contrary, that he intended to charge that person with such labor, goods, or money."

96. Armstrong *v.* Landers, 1 Pen. (Del.) 449, 42 Atl. 617; Chisholm *v.* Beaman Mach. Co., 160 Ill. 101, 43 N. E. 796; Wollenweber *v.* Ketterlinus, 17 Pa. St. 389; Baumgardner *v.* Burnham, 10 W. N. C. (Pa.) 445; Barnett *v.* Steinbach, 1 W. N. C. (Pa.) 335.

Rule Stated. — In Ives *v.* Niles, 5 Watts (Pa.) 323, the court in sustaining this rule, said: "We think the objection quite too nice and refined. . . . If it be the book in which the party has been accustomed to make all his original entries for the time being, it does not destroy or change the character of the book as a book of original entries, and render it less worthy of credit, that he has occasionally made other entries in it."

97. *Canada.* — Barton *v.* Town of Dundas, 24 U. C. Q. B. 273.

Illinois. — Dickson *v.* Kewaner, El. L. & Motor Co., 53 Ill. App. 379; Sanford *v.* Miller, 19 Ill. App. 536.

Iowa. — Karr *v.* Stivers, 34 Iowa 123; Arney *v.* Meyer, 96 Iowa 395, 65 N. W. 337; Whisler *v.* Drake, 35 Iowa 103; Hart *v.* Livingston, 29 Iowa 217; Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311.

Mississippi. — Moody *v.* Roberts, 41 Miss. 74.

Montana. — Ryan *v.* Dunphy, 4 Mont. 356, 5 Pac. 324, 47 Am. Rep. 355.

Pennsylvania. — Barnet *v.* Steinbach, 1 W. N. C. (Pa.) 335.

Texas. — Kotwitz *v.* Wright, 37 Tex. 82.

In Cook *v.* Thompson, reported in a foot note of 1 Bay (S. C.) 34, a new book of entries was rejected because it had the appearance of being fabricated for the purpose.

In Thayer *v.* Deen, 2 Hill Law (S. C.) 677, the entries in the book were so obliterated as to be illegible, and exhibited altogether great irregularity and want of system, and the court in holding the book to be inadmissible said, "the order and regularity with which the merchant's books of account are usually kept and the necessity of producing the original entries at the trial, is a security against frauds from erasures and interlinea-

admissible.[98]

b. *Casual Transaction Recorded.* — Within this rule the book is not admissible where the entry is but of a casual transaction, not in the regular course of business of the party,[99] nor where there is entered but a single transaction.[1]

F. KNOWLEDGE OF THE ENTERER. — a. *In General.* — Again it

tions, which an afterthought might suggest."

98. In Bates *v.* Sabin, 64 Vt. 511, 24 Atl. 1013, it was held that a party's memorandum books, although not admissible as independent evidence, might be considered as such memorandum books in connection with the party's own testimony.

Entries made in the front leaf of a tradesman's book before the first page and not in the regular course of charges, have a suspicious appearance, and are not proper to go to the jury. Lynch *v.* Hugo, 1 Bay (S. C.) 33.

In Huddleston *v.* Grant, 5 Smed. & M. (Miss.) 508, 43 Am. Dec. 528, assumpsit by a sheriff to recover the price of land sold by him under execution, it was held that a book containing memoranda of the sale in question was inadmissible as evidence for the sheriff, although the court further held that in view of the character of the book its admission did not operate prejudicially against the defendant so as to demand reversal of the judgment.

In Cogswell *v.* Doliver, 2 Mass. 217, 3 Am. Dec. 45, the books in question were small memorandum books not kept in the form of a day or waste book, but which contained the items of the account sought to be proved, entered therein, intermingled with various charges, notes, receipts, and memoranda relating to the party's dealings with other persons alike irregular, in whatever blank spaces he happened to find without any regard to order of dates or pages; the book also containing no credits. It was held that the books were properly receivable in evidence, but their weight and credit were questions for the jury.

Under the Iowa Statute the books, or the set to which they belong, must show a continuous course of dealings with persons generally or several items of charge at different times against the party sought to be charged. Arney *v.* Meyer, 96 Iowa 395, 65 N. W. 337. See also Whistler *v.* Drake, 35 Iowa 103; Hart *v.* Livingston, 29 Iowa 217.

So Also Under the Nebraska Statute. — Van Every *v.* Fitzgerald, 21 Neb. 36, 31 N. W. 264, 59 Am. Rep. 835.

99. Shoemaker *v.* Kellogg, 11 Pa. St. 310; Stuckslager *v.* Neil, 123 Pa. St. 53, 16 Atl. 94. See also Chicago St. L. & N. O. R. R. Co. *v.* Provine, 61 Miss. 288; Moody *v.* Roberts, 41 Miss. 74; Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565; Richardson *v.* Emery, 23 N. H. 220.

1. Boyer *v.* Sweet, 4 Ill. 120; Ingersoll *v.* Bannister, 41 Ill. 388; Kibbe *v.* Bancroft, 77 Ill. 18; Metzger *v.* Burnett, 5 Kan. App. 374, 48 Pac. 599; Doty *v.* Smith, 68 Hun 199, 22 N. Y. Supp. 840; Ryan *v.* Dunphy, 4 Mont. 356, 5 Pac. 324, 47 Am. Rep. 355; Fulton's Estate, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133. *Compare* Kingsland *v.* Adams, 10 Vt. 201.

Rule Stated. — "Where there is but a single sale, although that may have included more than one article, books of account can never be received as evidence of that transaction. They are admissible where 'regular dealings between the parties' is shown, some of the items being otherwise proved." Corning *v.* Ashley, 4 Denio (N. Y.) 354.

In Richardson *v.* Emery, 23 N. H. 220, the plaintiff was engaged in buying and selling lots of wood, keeping different books for the different lots; but he did not keep one book of original entries containing daily charges so as to afford some security against interpolations, but the matters relating to each transaction were separately recorded; and it was held that under the circumstances the book offered was not admissible.

must be shown that the entries were made by a party having knowledge of the transactions recorded, or that information thereof was communicated to the party by whom the entries were made by some person engaged in the business whose duty it was to transact the particular business and make report thereof for proper entry on the books.[2]

b. *Entries Made on Information.* — Where it appears that some of the entries in the book in question may have been made not from the personal knowledge of the party, but from information derived otherwise than as stated in the preceding section, the book should

2. *Alabama.*—McDonald *v.* Carnes, 90 Ala. 147, 7 So. 919; Dismukes *v.* Tolson, 67 Ala. 386.

California. — Kerns *v.* Dean, 77 Cal. 555, 19 Pac. 817; Kerns *v.* McKean, 76 Cal. 87, 18 Pac. 122.

Indiana. — Dodge *v.* Morrow, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153.

Maryland. — Thomas *v.* Price, 30 Md. 483.

Michigan. — Swan *v.* Thurman, 112 Mich. 416, 70 N. W. 1023.

Mississippi. — Chicago St. L. & N. O. R. R. Co. *v.* Provine, 61 Miss. 289.

Missouri. — Hill *v.* Johnson, 38 Mo. App. 383.

New York. — Ocean Nat. Bank *v.* Carll, 9 Hun 239; Peck *v.* Von Keller, 15 Hun 470; Whitman *v.* Horton, 14 Jones & S. 531, *affirmed* 91 N. Y. 644; Dykman *v.* Northbridge, 80 Hun 258, 30 N. Y. Supp. 164.

Washington. — Union El. Co. *v.* Seattle Theatre Co., 18 Wash. 213, 51 Pac. 367.

Contra. — Bailey *v.* Barnelly, 23 Ga. 582; Smith *v.* Law, 47 Conn. 431; Imhoff *v.* Fleurer, 2 Phila. 35; Jones *v.* Long, 3 Watts (Pa.) 325.

In Burke *v.* Wolfe, 6 Jones & S. (N. Y.) 263, a witness called on behalf of the plaintiffs, testified, that he had been the book-keeper for the party in his lifetime, and as such, had the entire charge of the said books; that all the entries made therein were made by himself, in the discharge of his duties as such book-keeper, and in the ordinary course of the business of said party; and that they were correctly made. He also showed that the cash book contained, with a few exceptions, the entries of all the amounts with which the defendant had been charged in his pass books, and in plaintiff's bill of particulars, furnished in this action; and that the remaining debits were to be found in some of the other books. The witness further testified, that all these charges were in his handwriting; that they were made by him, in the ordinary course of his employment; that they were the original entries; and that they were correct. And finally, the witness testified, that most of the moneys thus charged were paid by him to the defendant, over the counter, either in bills or checks, as directed by the party or his partner. This testimony was held to be sufficient to admit the said books. And that the fact that the witness, on cross-examination, admitted a want of personal knowledge as to some items would not have authorized the exclusion of the books.

In Riggs *v.* Weise, 24 Wis. 545, it was held that after a witness had sworn positively that he knew the entries in the book were correct he could testify to the facts as they appeared by the entries, although independently thereof he had no present recollection of such facts; and the fact that the entries were made by the wife of the witness from memoranda furnished by him makes no difference.

In Missouri El. Light & Power Co. *v.* Carmody, 72 Mo. App. 534, it was held that a book containing the readings of meters entered by inspector's employer for that purpose and a register on which such readings were afterwards transferred and the customer's account made up showing debits and credits, were admissible in evidence, the meter book as a book of original entries and the register as

not be received as evidence to prove the account.[3] It is no objection to entries that they were transferred from temporary records thereof, provided the original entries and copying are verified by the parties making them,[4] but unless there is such proof of the

a companion book, both being necessary to show the state of the customer's account.

3. Goodwin *v.* O'Brien, 25 N. Y. St. 203, 6 N. Y. Supp. 239. See also Hancock *v.* Flynn, 28 N. Y. St. 354, 8 N. Y. Supp. 133.

In Clough *v.* Little, 3 Rich. Law (S. C.) 353, the party producing his books testified that his clerk reported to him the terms agreed upon between him and the defendant respecting the sale of the goods and upon that report the witness made the entry, that he delivered the goods to a truckman who told him that the defendant had sent for them; it was held that the evidence was insufficient and the plaintiff was non-suited.

In White *v.* Wilkinson, 12 La. Ann. 359, it was held that where a clerk on cross-examination testifying to the correctness of the books said that he made no original entries on them, saw none of the goods purchased, and only knew that he kept the ledger correctly from the entries furnished by his employer and other clerks, the proof was insufficient; that the clerks who made purchases for the party to be charged ought to be examined.

In Countryman *v.* Bunker, 101 Mich. 218, 59 N. W. 422, it was held that a book in which entries were made by the party's wife who knew nothing about the details of the business and only made such entries as she was requested by her husband to make, it not being claimed that the book contained an accurate statement of all the items of account between the parties, was not admissible.

4. *United States.* — Mississippi River Logging Co. *v.* Robson, 69 Fed. 773, 16 C. C. A. 400.

Illinois. — Chisholm *v.* Beaman Mach. Co., 160 Ill. 101, 43 N. E. 796; House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307.

Minnesota. — Paine *v.* Sherwood, 21 Minn. 225.

New Hampshire. — State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224.

New York. — Abele *v.* Falk, 28 App. Div. 191, 50 N. Y. Supp. 876; Chenango Bridge Co. *v.* Lewis, 63 Barb. 111; Payne *v.* Hodge, 7 Hun 612; Cobb *v.* Wells, 124 N. Y. 77, 26 N. E. 284.

Pennsylvania. — Kessler *v.* Conachy, 1 Rawle 435; McCoy *v.* Lightner, 2 Watts 347. See also Jackson *v.* Evans, 8 Mich. 476.

In Power *v.* Murphy, 18 App. Div. 25, 45 N. Y. Supp. 374, the bookkeeper testified that he had the tickets for the goods sold returned by the drivers and compared the tickets with the order in the order book before he made the entry in the sales book; and it was held that on this proof the book was not admissible, although the court said that had the testimony of the drivers been produced that in every case where they had returned tickets to the book-keeper, the goods represented thereby had been actually delivered to the parties named, or that the witness was personally familiar with the signature of the party to be charged and charged him only in the books for the goods for which there were return tickets signed by him on proof of the loss or destruction of the original tickets the books would have been competent evidence to prove the delivery of the goods.

A book of entries copied by a clerk every Saturday night from the delivery book of the truckman is inadmissible to prove the delivery of the articles charged, when supported only by the testimony of the clerk that the charges were so copied and were compared and corrected by the truckman and himself; the truckman should also have been called as a witness. Kent *v.* Garvin, 1 Gray (Mass.) 148.

A book of entries made from tally board memoranda by a person other than the one who made such memoranda and who knew nothing of the correctness of the data transcribed, unaccompanied by the evidence of the persons who made such memoranda

verity of the first record and of the correctness of the transferred entries, the books should not be received.[5]

G. Verity of Entries. — a. *Burden of Proof.* — To justify the admission of a party's books of account on his own behalf, it is incumbent upon him to show by proper evidence that the record of the transactions is a faithful and honest one.[6]

The Object of This Testimony is to fortify the evidence of the party's original entries, by showing a habit of fair dealing, in like transactions, with others on his part.[7]

b. *Mode of Proof.* — **(1.) Testimony of the Party.** — (A.) Generally. — Both at common law and by some of the statutes, the testimony of the party himself, or his suppletory oath as it is sometimes called, is competent to prove his books of account.[8]

as to its correctness, is not admissible in evidence. Chicago Lumb. Co. *v.* Hewitt, 64 Fed. 314, 12 C. C. A. 129.

In Ellis *v.* Cowne, 2 Car. & K. 719, 61 Eng. C. L. 719, it was held that a book kept privately by a party made up from slips of paper on which the daily transactions of his business were entered, but unaccompanied by proof that these were actually copied by him, is not admissible in evidence.

5. Irving *v.* Claggett, 56 Hun 642, 9 N. Y. Supp. 136.

6. *Alabama.* — Wagar Lumb. Co. *v.* Sullivan Logging Co., 120 Ala. 558, 24 So. 949; Kling *v.* Tunstall, 109 Ala. 608, 19 So. 907; Powell *v.* State, 84 Ala. 444, 4 So. 719.

Arkansas. — Atkinson *v.* Burt, 65 Ark 316, 53 S. W. 404.

California. — Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811.

Illinois. — Kirby *v.* Watt, 19 Ill. 393; Ruggles *v.* Gatton, 50 Ill. 412.

Mississippi. — Moody *v.* Roberts, 41 Miss. 74. *Compare* Bookout *v.* Shannon, 59 Miss. 378.

New York. — Irish *v.* Horn, 84 Hun 121, 32 N. Y. Supp. 455.

Ohio. — Bennett *v.* Shaw, 12 Ohio C. C. 574.

Texas. — Bupp *v.* O'Connor, 1 Tex. Civ. App. 328, 21 S. W. 619.

In order to entitle books of account to reception as evidence it must appear that the party keeping and producing them is usually precise and punctilious respecting the entries therein, and they are designed at least to embrace all the items of the account which are proper subjects of entry. Countryman *v.* Bunker, 101 Mich. 218, 59 N. W. 422.

In Presbyterian Church *v.* Emerson, 66 Ill. 269, it was conceded that the statute was complied with in every respect except that the witness did not state that each item of the account was true and just. When the book was exhibited, however, he did testify that the account was correct, and the court held that the objection was without merit; that the witness need not testify in the language of the statute; that a substantial compliance was sufficient and that the testimony in question was such a compliance.

Under the Iowa Statute the charge must be verified by the party or clerk who made the entries to the effect that they believed them just and true or a sufficient reason must be given why such verification was not made. Arney *v.* Meyer, 96 Iowa 395, 65 N. W. 337; Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311; Karr *v.* Stivers, 34 Iowa 123. See also U. S. Bank *v.* Burson, 90 Iowa 191, 57 N. W. 705.

7. Taylor *v.* Tucker, 1 Ga. 231.

8. Webb *v.* Pindergrass, 4 Harr. (Del.) 439; Landis *v.* Turner, 14 Cal. 573; Taylor *v.* Tucker, 1 Ga. 231; Mathes *v.* Robinson, 8 Metc. (Mass.) 269, 41 Am. Dec. 505; Black *v.* Shooler, 2 McCord Law (S. C.) 293.

An Administrator of a Deceased Person whose books of account are offered in evidence is a competent witness to prove the books of account, and the fact that he is a party and

The Assignor of the Party is a competent witness to prove book entries sought to be used on behalf of such party.[9]

A Husband is not a competent witness to prove entries of goods delivered by his wife in his absence, but entered in the books by himself.[10] But where the party's wife who kept the books for him has testified that she made the entries by his direction and in his presence he may be permitted to testify as to the time when the entries were made and that the charges contained in them are just and true.[11]

Cross-Examination. — Where a party becomes a witness to prove his books of account he may be cross-examined by the other party.[12]

(B.) Transactions With Deceased Persons. — And it is held that admitting the testimony of the party for this purpose, where the party to be charged is dead, does not make him a witness in regard to a transaction between himself and a deceased person within the rule prohibiting such testimony.[13]

interested in the event of the suit does not render him incompetent. Keener *v.* Zartman, 144 Pa. St. 179, 22 Atl. 889.

Co-partners.— In Horton *v.* Miller, 84 Ala. 537, 4 So. 370, it was held that one partner was not a competent witness to testify to the correctness of entries in the partnership books made by his co-partner unless he has knowledge or can show that he knew the entries spoke the truth. *Compare* Foster *v.* Sinkler, 1 Bay (S. C.) 40, wherein it was held that a partner could swear to the handwriting of his co-partner who made the entries in the books but who is absent from the state.

In Frye *v.* Barker, 2 Pick. (Mass.) 65, it was said that the suppletory oath of a party offering his books must be made in court.

9. Black *v.* Shooler, 2 McCord Law (S. C.) 293, so holding on the ground that as he might do so as a merchant in a case to which he was a party, it follows as a necessary consequence that he might do so in any case in which it became necessary to prove them.

10. Hurtz *v.* Neufville, 2 McMull. Law (S. C.) 138.

11. Littlefield *v.* Rice, 10 Metc. (Mass.) 287.

12. Clough *v.* Little, 3 Rich. Law (S. C.) 353, wherein the court said: "Book entries, made by merchants and shopkeepers, in the regular course of their business, are admitted in evidence from convenience and necessity, and the best security which the rule furnishes against its fraudulent abuse is that they must be supported by their oaths; and that were useless unless the defendant could cross-examine them, for that is the only means of purging their consciences."

13. *California.* — Roche *v.* Ware, 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539.

Florida. — Lewis *v.* Meginniss, 30 Fla. 419, 12 So. 19; Robinson *v.* Dibble, 17 Fla. 457.

Georgia. — Strickland *v.* Wynn, 51 Ga. 600.

Iowa. — Dysart *v.* Furrow, 90 Iowa 59, 57 N. W. 644.

Kansas. — Anthony *v.* Stinson, 4 Kan. 180.

Nevada. — Jones *v.* Gammans, 11 Nev. 249.

Ohio.— Bogart *v.* Cox, 4 Ohio C. C. 289.

Pennsylvania. — White's Estate, 11 Phila. 100.

Rhode Island. — Cargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214.

Compare. — Dismukes *v.* Tolson, 67 Ala. 386; Callihan *v.* Trimble, 10 Ky. L. Rep. 36; Davis *v.* Seaman, 64 Hun 572, 19 N. Y. Supp. 260; Mitchell *v.* Goodell, 56 Ill. App. 280.

In Martin *v.* Scott, 12 Neb. 42, 10 N. W. 532, it was held that as against a personal representative of a deceased person the plaintiff was not

(2.) Testimony of Third Persons. — (A.) GENERALLY. — It is also necsary, both under the common law rule and under some of the statutes, that there be adduced testimony of customers who had dealt with the party and had upon settlements thereby, found that he kept fair and honest accounts,[14] or as some of the courts state it, there must, in addition to the oath of the party touching the correctness of his books, be proof by others who are acquainted with the character of the party amongst his neighbors and customers for fair dealings, that his reputation as an honest man and a correct bookkeeper is untarnished.[15]

(B.) EXAMINATION OF BOOKS. — Testimony merely by customers that they had settled by bills rendered to them by the party whose

a competent witness to prove the account book, but that his wife was and that on her testimony that the book was the plaintiff's book of accounts containing the original entries thereof, and that the entries were made by her husband at or near the time of the transaction recorded, the book should go to the jury for what it was worth.

In Silver *v.* Worcester, 72 Me. 322, an assumpsit for labor performed for the defendant's testator in his life time, it was held that the plaintiff was not a competent witness to testify that all the charges in his books not crossed out were of labor done by him for the defendant's testator at the latter's request, and that the names of other persons in some of the entries were written to designate the owners of premises where work was done.

In Remick *v.* Rumery, 69 N. H. 601, 45 Atl. 574, an action on an account against the estate of a deceased person, it was held that the plaintiff was not a competent witness to explain and interpret the entries in his book.

14. Vosburgh *v.* Thayer, 12 Johns. (N. Y.) 461; Smith *v.* Smith, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545; Atwood *v.* Barney, 80 Hun 1, 29 N. Y. Supp. 810; Cobb *v.* Wells, 124 N. Y. 77, 26 N. E. 284; Dooley *v.* Moan, 57 Hun 535, 11 N. Y. Supp. 230; Wright *v.* Hicks, 61 App. Div. 489, 70 N. Y. Supp. 675.

In Shute *v.* Ogden, 3 N. J. Law 480, it was held that testimony that the books were in the handwriting of the plaintiff, and that in the waste book of the plaintiff the witness perceived an entry of a transaction performed by the plaintiff as broker for the witness which the witness had settled was sufficient.

In Clarke *v.* Smith, 46 Barb. (N. Y.) 30, it was held that after a physician has proved an employment professionally, entries in his books of the visits are admissible to show the number of visits; and that it is not necessary to prove that he keeps correct books or that others have settled by them.

Testimony merely that a merchant kept correct books and charged promptly on articles purchased at his store; that certain articles charged were suitable to the wants of the defendant's family, and that he traded with the plaintiff's and was frequently at their store, is too remote to justify the presumption that the account against the defendant is correct. Grant *v.* Cole & Co., 8 Ala. 519.

In Michigan prior to the statute in that state, proof of the correctness of the books as stated in the text was required. Jackson *v.* Evans, 8 Mich. 476. But it has been held since the statute which permits parties to testify in their own behalf it is no longer necessary to call as witnesses other persons who have settled by the books. Seventh Day Adventist Pub. Assn. *v.* Fisher, 95 Mich. 274, 54 N. W. 759; Montague *v.* Dougan, 68 Mich. 98, 35 N. W. 840.

15. Werbiskie *v.* McManus, 31 Tex. 116. See also Burleson *v.* Goodman, 32 Tex. 229. *Compare* Cahn *v.* Salinas, 2 Willson Tex. Civ. App. Cas. § 615.

books were in question, but had never seen the books themselves, is not sufficient to let in the book.[16]

(C.) Employees. — The correctness of the books is to be proved by customers and not by persons in the employ of the party.[17]

(D.) Proof by a Single Witness. — The testimony of a single witness to the correctness of the books of account in question is sufficient if the proof is in other respects unobjectionable; the fact that but a single witness is produced for this purpose merely goes to the credit of the books.[18]

(E.) Settlements Subsequent to Suit Begun. — Where to show that books were correctly kept third persons testify to settling by the entries in such books and to finding them correct, it is immaterial that such settlements were made after the suit was brought in which the evidence is used, provided such entries were made during the period embraced in the account between the litigants, or at all events *ante litem motam*.[19]

(3.) Entries by Book-keeper. — (A.) Generally. — As shown above, entries in a book of accounts kept by a book-keeper employed for that purpose must be verified by the book-keeper if alive and accessible:[20] and of course when the book-keeper is produced as a witness for that purpose the questions presented for decision are not so

16. Powell *v.* Murphy, 18 App. Div. 25, 45 N. Y. Supp. 374. See also Beatey *v.* Clark, 44 Hun 126; Walbridge *v.* Simon, 13 Misc. 634, 34 N. Y. Supp. 939; Textile Pub. Co. *v.* Smith, 31 Misc. 271, 64 N. Y. Supp. 123; Davis *v.* Seaman, 64 Hun 572, 19 N. Y. Supp. 260; Ingersoll *v.* Bannister, 41 Ill. 388; Stroud *v.* Tilton, 3 Keyes (N. Y.) 139; Bowen *v.* Smith, 8 Ga. 74.

In Cole *v.* Anderson, 8 N. J. Law 68, it was held that testimony that the witness had never seen the book until it was produced; that he did not know the handwriting in which the book was kept, that he had never seen any entries made in it; that he had never made a settlement at which it was produced; but that there were charges in it for two or three things that he had had, one of which was charged higher than what he had understood it to be was insufficient to admit the book.

17. Hauptman *v.* Catlin, 1 E. D. Smith (N. Y.) 729. See also Walbridge *v.* Simon, 13 Misc. 634, 34 N. Y. Supp. 939, wherein it was held that the testimony of an employee that he was paid every week; that he knew how much was due, that he saw his employer refer to the book but that he never did as it was not necessary for he knew how much he was entitled to was not sufficient. *Compare* McGoldrick *v.* Traphagen, 88 N. Y. 334, wherein it is held that a book-keeper who has an account with his employer is a competent witness to verify his employer's books of account under the rule stated above.

18. Beattie *v.* Qua, 15 Barb. (N. Y.) 132. *Compare* Morrill *v.* Whitehead, 4 E. D. Smith (N. Y.) 239, wherein it was held that where a book is supported only by the testimony of one witness and is impeached by the testimony of another witness to the effect that on a settlement thereby he had found it incorrect and that on such settlement the error was corrected, the book should not be deemed sufficient evidence unless there is something disclosed which discredits the testimony of the impeaching witness.

19. Foster *v.* Coleman, 1 E. D. Smith (N. Y.) 85.

20. See *supra* note 27 for the general discussion of this question.

much his competency generally,[21] but whether he is competent under the circumstances of that particular case,[22] and second, whether his testimony is sufficient to let in the book.[23]

(B.) KNOWLEDGE OF BOOK-KEEPER.— A book-keeper is not competent to speak of the correctness of an account from any knowledge of the subject which he as book-keeper derived from other clerks in the store.[24]

21. Proof that the books in question were the books of original entries of the party may be proved by the party himself or by his clerk. Dunlap *v.* Hooper, 66 Ga. 211.

22. A Distributee Who Was Book-keeper for the Testator in his lifetime is competent to prove the correctness of his testator's books of account. Van Horn *v.* Brady, Wright (Ohio) 451.

An Administrator Who Was the Intestate's Clerk is a competent witness in a suit in which he is plaintiff to prove a book to be the book of original entries of his intestate and that he himself made certain original entries therein, where it does not appear that there is any person living who can make that proof and the other clerks of the intestate are dead. Ash *v.* Patton, 3 Serg. & R. (Pa.) 300. See also Webb *v.* Pindergrass, 4 Harr. (Del.) 439, where it was held that the administratrix of the estate of her deceased husband was a competent witness to prove the book of original entries kept by her for her husband.

A Wife Who Has Kept Her Husband's Book of Accounts in which she made the entries by his direction because he could not write is not a competent witness to prove the book by her suppletory oath. Luce *v.* Doane, 38 Me. 478, *distinguishing* Littlefield *v.* Rice, 10 Metc. (Mass.) 287, in which it was held that a wife who kept her husband's accounts was a competent witness to testify that she made the entries by his direction and in his presence on the ground that in the latter case it appeared that the entries were made in his presence and by his direction.

Testimony of a book-keeper who did not sell the goods sued for, but who was in the habit of presenting accounts for previous purchases to the defendant at different times, and receiving his notes therefor, that the amount of such notes was the portion of the account sued on then due, is competent. Lee *v.* Tinges, 7 Md. 215.

23. A party's books of original entries are properly admitted as part of the *res gestae* where the book-keeper testifies that the entries were made in the regular course of business immediately after the transaction recorded, and that the books were correctly kept, and the party himself testifies that all of the work and materials charged in the book were performed for, and furnished to, the party charged. Muckle *v.* Rennie, 41 N. Y. St. 97, 16 N. Y. Supp. 208.

In Dongdon & Aylesworth Co. *v.* Sheehan, 11 App. Div. 456, 42 N. Y. Supp. 255, the book-keeper testified that he sold about 80 per cent of the goods charged and himself made the original entries, but did not testify as to the particular entries which he made; and there were also entries aggregating a large amount which he could not verify; it was held that the verification was not sufficient to admit the books.

Testimony of the bookkeeper that he had supervision of the books, and that the entries made therein were made under his instruction and direction, and that they are correct, warrants the admission of the books. Union Cent. L. Ins. Co. *v.* Smith, 119 Mich. 171, 77 N. W. 706.

24. Lee *v.* Tinges, 7 Md. 215.

Compare Ward *v.* Wheeler, 18 Tex. 249, wherein it was held that the principal book-keeper under whose supervision the books were kept was a competent witness to testify to the correctness of the books, at least to the extent of his information and knowledge, and that the fact that other clerks in the store may have

(C.) Present Recollection of Book-keeper. — The correctness of a book of accounts may be proved by testimony of the book-keeper, although he has at the time no present independent recollection of the transaction entered.[25]

(D.) Book-keeper Not Produced.— Entries by a book-keeper must be authenticated, if living, and his testimony can be procured;[26] if he is dead or out of the jurisdiction of the court or cannot be found there must be proof of that fact,[27] as well as of his handwriting,[28] before the books will be allowed.

(E.) Affidavits. — An affidavit that an account was made out by a book-keeper, since deceased, does not sufficiently establish the correctness of the account.[29]

(4.) Admission of Correctness by Party To Be Charged. — A party's books of account are admissible in evidence where it is shown that the books were shown to the debtor without objection then being made by him to the entries,[30] even although the entries be not

made occasional entries in the books of goods sold by them does not necessarily render them the only competent witnesses of the correctness of the entries; but that if it should appear on his examination as such witness that portions of the account are not sufficiently established by his testimony the other clerks might be called for that purpose.

25. Newell *v.* Houlton, 22 Minn. 19; Mathias *v.* O'Neill, 94 Mo. 520, 6 S. W. 253. See also Anchor Milling Co. *v.* Walsh, 108 Mo. 277, 18 S. W. 904, 32 Am. St. Rep. 600; Merrill *v.* Ithaca & O. R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130; Gould *v.* Conway, 59 Barb. (N. Y.) 355; Rosenstock *v.* Heggarty, 36 N. Y. St. 92, 13 N. Y. Supp. 228; Curran *v.* Witter, 68 Wis. 16, 31 N. W. 705.

In Owings *v.* Lowe, 5 Gill & J. (Md.) 134, it was held that a clerk for the plaintiff might give evidence of the delivery of goods by referring to entries in the plaintiff's books made by himself testifying to his belief of their truth at the time of making them, and proving generally the dealings of defendant with the plaintiff for such articles as those charged by the clerk; but that he could not establish such a delivery by reference to entries made by the plaintiff or other clerks of which he has no knowledge other than that arising from the course of business of the plaintiff's store.

26. Books of a corporation proved by its treasurer to have been received by him as the corporate books upon his accession to his office are not admissible; it is not sufficient to show that they were said to be or that they purported to be the books of the corporation; nor is it enough to prove that they were in the handwriting of the former treasurer. Chenango Bridge Co. *v.* Lewis, 63 Barb. (N. Y.) 111.

27. St. Louis I. M. & S. R. Co. *v.* Henderson, 57 Ark. 402, 21 S. W. 878.

28. Grant *v.* Cole & Co., 8 Ala. 519; Chenango Bridge Co. *v.* Lewis, 63 Barb. (N. Y.) 111.

The entries on the party's books can only be proved by the person making the entries or in case of the death or absconding of such person, by some one acquainted with his handwriting. Walden *v.* Citizens Sav. Bank, 19 Ky. L. Rep. 1393, 43 S. W. 488.

29. Pierson *v.* Darrington, 32 Ala. 227.

30. Gaines *v.* Gaines, 39 Ga. 68; Mather *v.* Robinson, 47 Iowa 403; Royne *v.* Taylor, 12 La. Ann. 765; Snodgrass *v.* Caldwell, 90 Ala. 319, 7 So. 834; Phillips *v.* Tupper, 2 Pa. St. 323; Lever *v.* Lever, 2 Hill Eq. (S. C.) 158; Van Horne *v.* Brady, Wright (Ohio) 451; Raub *v.* Nesbitt, 118 Mich. 248, 76 N. W. 393.

In Kugler *v.* Wiseman, 20 Ohio 361, the defendant produced a book and

original and some of the items not properly the subject of book charge.[31]

(A.) Access of Debtor to Books. — Entries in a book of accounts of payments made for another are competent evidence when accompanied by proof that such other person had constant access to the books and assented to the entries.[32]

(B.) Settlements by Books. — The fact that the parties met together and settled their accounts on the basis of the entries on the books

proved by a witness that it was his book of accounts in which was an account against the plaintiffs. The witness further testified that on one occasion during the pendency of the matters in controversy the plaintiff was in the office and had his memorandum book with him; that both parties were looking over the book of accounts in the memorandum book and that there appeared to be no difference between them, although at that time the witness was engaged about his own business in posting the books; and it was held that the admission of the books of account on the theory that the correctness thereof was admitted was error, although the court said if the defendant had sustained his account by his own oath the book would have been properly admitted.

The failure to produce the proper proof of the correctness of the books of account is not ground for excluding the books where it appears that the parties charged made the payment on the account without questioning it and accepted a settlement thereof as assigned with the remark that it was "all right," and that during the three years elapsing between that time and the institution of the suit they had never urged any objection to the correctness of the account when asked for payments thereon. House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307.

31. Darlington *v.* Taylor, 3 Grant's Cas. (Pa.) 195.

In Tanner *v.* Parshall, 3 Keyes (N. Y.) 431, an action to recover the purchase price of a horse sold by the plaintiff to the defendant, it was held that the plaintiff was properly permitted to show that on the same day he claimed to have sold the horse he entered in his book of accounts, although in the absence of the defendant, and charged against the defendant, the amount sued for, which he subsequently showed to the defendant who admitted its correctness, although the defendant denied that he so admitted its correctness.

32. Himes *v.* Barnitz, 8 Watts (Pa.) 39; Fowler *v.* Hebbard, 40 App. Div. 108, 57 N. Y. Supp. 531.

In Whitman *v.* Horton, 14 Jones & S. (N. Y.) 531, it appeared that during all the time of the pendency of the matters in controversy the defendant had his desk in the plaintiff's office; that from time to time when his account was rendered to him he was in the habit of going over the account and the books with the bookkeeper and that whatever differences arose were the subject of negotiation and settlement; and that a final account was rendered to him before he left the plaintiff's office, which seemed by all parties to have been treated as the account stated, and that he thereafter made payment on account thereof; and it was held that the introduction of the books without the technical preliminary proof as to their correctness did not constitute such error as to justify reversal.

In Cheney *v.* Cheney, 162 Mass. 591 39 N. E. 187, an action to recover for work and labor, it was held that the mere fact that the plaintiff had access to his employer's books and had been seen looking over them was not evidence of an admission by him of their correctness so as to justify their admission.

Balancing an Account in a book over which one person has supervision and control, does not of itself constitute an account settled, unless there is evidence that the balance was struck with the consent of the other

in question renders the entries admissible as *prima facie* evidence between the parties.[33] So also where there is evidence tending to show that the book was recognized by the party sought to be charged, in his settlement with other persons, as accurate.[34]

(C.) Entries Made in Presence of Parties. — Where the entry in question was made at the time of the transaction and in the presence of all the parties, including the party to be charged it is admissible as a part of the *res gestae*.[35]

3. Transactions Chargeable Upon, and Provable By, Books of Account. — A. Matters of Debit and Credit Between the Parties. — a. *In General.* — As will be noticed by reference to the cases cited in the preceding sections of this article, the transactions most usually chargeable upon, and provable by, a party's books of account are the sale and delivery of goods, wares and merchandise,[36] and

party. Spellman *v.* Muehlfeld, 48 App. Div. 265, 62 N. Y. Supp. 746.

33. Hanson *v.* Jones, 20 Mo. App. 595.

Written Agreement. — Where parties have by a previous agreement in writing agreed to accept a verified statement of the account as kept in the regular books of one of the parties as correct and final between them, a statement of the account supported by the testimony of the party keeping it that he has compared it with the books and found it correct is admissible in evidence. Tollman Co. *v.* Bowerman, 5 S. D. 197, 58 N. W. 565.

34. West *v.* Van Tuyl, 119 N. Y. 620, 23 N. E. 450.

35. Reviere *v.* Powell, 61 Ga. 30, 34 Am. Rep. 94; Oram *v.* Bishop, 12 N. J. Law 153; Monroe *v.* Snow, 131 Ill. 126, 23 N. E. 401.

In Ryan *v.* Dunphy, 4 Mont. 356, 5 Pac. 324, 47 Am. Rep. 355, an action for a bonus which the plaintiff alleged that the defendant agreed to pay over and above the purchase price of certain property for which he had executed a note, the plaintiff testified that at the time of the purchase he demanded the payment of such bonus, to which the defendant responded that he need not be in any hurry about it; that he then made an entry thereof in his book and in the presence of the defendant. The defendant testified that there was no such agreement and that consequently no such entry was authorized by him; and it was held that under the circumstances the entry was not a part of the *res gestae*.

36. In Mitchell *v.* Clark, 1 Mart. (N. C.) 13, it was held competent for plaintiff to prove an account for goods sold and delivered for the use of the defendant by sundry persons and paid for by the plaintiff.

Articles Loaned. — In Darnell *v.* Sheldon, 3 N. J. Law 523, there were several small articles charged in the plaintiff's account which were noted to have been lent at the time, and because of which the defendant contended that they were not properly chargeable on book accounts; but the court said that there being a common book account kept in a plain way by plain people it was well enough and affirmed the judgment.

Betterments Made by One Party Upon Another's Land for the latter's benefit and upon his request may be charged on a book of accounts. Minor *v.* Erving, Kirby (Conn.) 158.

In Poag *v.* Poag, 1 Hill Eq. (S. C.) 285, a suit for an accounting against the defendant under a general power of attorney given to him by the plaintiff's testator, a man of weak understanding and incapable of transacting his own business, it was held that the defendant's books were not admissible to establish an account for articles sold and delivered to the plaintiff's testator.

In Darragh *v.* Stevenson, 183 Pa. St. 397, 39 Atl. 37, an action to revive a judgment on a note against the estate of one of the deceased mak-

work and services performed and rendered;[37] and indeed there is authority to the effect that in no case are account books evidence of any transaction other than those just stated.[38] There are exceptions, however, to this rule as will be subsequently shown.[39]

b. *The Property Sold.* — **(1.) Generally.** — When it is said that amongst the transactions most usually and properly chargeable upon books of account are the sale and delivery of goods, wares and merchandise, the phrase "goods, wares and merchandise" would necessarily have reference to those sold and delivered by a merchant or shopkeeper in the usual course of trade,[40] otherwise the books are not competent evidence of the transactions recorded.[41]

Necessaries Advanced by a Guardian to his ward during the latter's minority may be charged on book of account.[42]

(2.) Quantity of Goods Delivered. — There are authorities to the

ers in which the only issue was the genuineness of the decedent's signature; it was held that the plaintiff's books showing a charge against the decedent and the other maker were not relevant, although it was said had the issue been on a plea of non-assumpsit the books would have been competent evidence to show that the makers of the note owed to the plaintiff a debt, but not to show that the decedent had executed the note in question.

37. See cases cited in preceding sections.

38. Martin *v.* Scott, 12 Neb. 42, 10 N. W. 532.

In an action for work and labor done the defendant cannot give in evidence an account book kept by him of the work and labor done by the plaintiff. Summers *v.* McKim, 12 Serg. & R. (Pa.) 405. See also McKewn *v.* Barksdale, 2 Nott. & McC. (S. C.) 17; Silver *v.* Worcester, 72 Me. 322.

39. See *infra* as to matters other than, or collateral to, debit and credit.

40. See cases cited in preceding sections.

A Miller's Books of Account are competent to prove an account for meal delivered. Exum *v.* Davis, 10 Rich. Law (S. C.) 357.

A Saw-Miller's Books are competent to prove an account for lumber sold from his saw-mill. Gordon *v.* Arnold, 1 McCord (S. C.) 517. See also Conoway *v.* Spicer, 5 Harr. (Del.) 425.

Postage. — In Sargent *v.* Pettibone, 1 Aik. (Vt.) 355, it was held that a charge for postage made by a person while postmaster is properly a subject of entry in books of account.

Lottery Tickets authorized by law may be sold and properly charged on a book account. May & Co. *v.* Brownell, 3 Vt. 463; Bailey *v.* McDowell, 1 Harr. (Del.) 346; Gregory & Co. *v.* Bailey, 4 Harr. (Del.) 256.

41. The Sale of an Execution and Judgment is not proper to be charged upon an account book. Pinkham *v.* Benton, 62 N. H. 687.

Purchase Price of Real Estate. In Hinman *v.* Stiles, Kirby (Conn.) 10, the plaintiff's book was objected to because it contained charges against the defendant for the purchase price of real estate; but it was held that the objection was without merit because it appeared that the book contained a credit entry therefor.

42. Mills *v.* St. John, 2 Root (Conn.) 188. See also Stanton *v.* Willson, 3 Day (Conn.) 37, 3 Am. Dec. 255. *Compare* Finch *v.* Finch, 22 Conn. 411, an action of book debt brought against the defendant by his former wife after they had been divorced to recover for the education and support furnished by her to their minor children, the custody and control of whom had been awarded her; and in which it was held that under the circumstances the charge was not properly the subject matter of book entries.

effect that from the large quantity of articles delivered at one time there arose a presumption that there existed better proof of the delivery, so as to exclude the party's books; it being the duty of the court to inspect the books, and if therefrom it could be concluded that the articles could not have been delivered without the assistance of other persons, the books were to be excluded.[43]

(3.) The Character of the Goods. — Books of account cannot, however, be received in evidence for the purpose of showing that the goods charged are necessaries.[44]

c. *The Work or Services Done or Rendered.* — **(1.) The Character of the Work or Services.** — (A.) MECHANICS AND TRADESMEN. — Mechanics and all kinds of tradesmen are on the same footing as shopkeepers, and their books are competent to prove their accounts.[45]

43. Leighton *v.* Manson, 14 Me. 208, where the only items were for 355 pounds beef and 360 pounds beef bearing the same date and standing together without any other charges, and it was held that the books were not admissible.

In Shilliber *v.* Bingham, 3 Dane's Abr. 321, the court permitted the sale and delivery of 78 bushels of salt in one item and 132 gallons of rum in another to be proved by the vendor's book of accounts.

In Field *v.* Sawyer, Brayt. (Vt.) 39, the charge was "to 1 hhd. of gin, 116 gals. will reduce 2 to 9 making 141 gals. at 75 cts. $105.75;" and it was held that the book was properly admissible to prove the delivery of the goods charged.

In Clark *v.* Perry, 17 Me. 175, it was held that the admission of a book of accounts to prove the delivery of 60 lime casks was not error because that number, although in the aggregate very bulky, when taken singly was easily managed by one person.

A Charge for 2088 Pounds of Wool may be made upon a book of accounts and recovered in an action thereon if sold and delivered and the object of the action is merely to recover the value of the wool. Leach *v.* Shepard, 5 Vt. 363.

Where Two Men Did Business Together in a Store, their books are admissible to prove the delivery of a cask of spirits containing 45 gallons. Mitchell *v.* Belknap, 23 Me. 475.

44. In Earle *v.* Reed, 10 Metc. (Mass.) 387, an action on a promissory note in which the defendant pleaded infancy, it was held that the plaintiff might, after proving that the note was given to balance an account standing on his books against the defendant, show from his day book and ledger the several articles of which the account was composed, although the books were not his books of original entry, but that the books were not admissible for the purpose of showing that the goods were necessaries or that they were charged at fair prices.

"Family Expense." — In Way *v.* Cross, 95 Iowa 258, 63 N. W. 691, an action to recover for goods sold to the defendants, husband and wife, on the ground that the goods sold were family expenses chargeable on the property of either of the defendants as provided by statute; it was held that the plaintiff's books were not of themselves competent evidence that the goods sold were a family expense.

Consideration for Note. — Entries by a clerk made contemporaneously with the sale of the goods and in the line of his duty as clerk are competent evidence only of the sale and delivery of the goods at the times and prices charged, but not to show that they formed the consideration of a note given by the purchaser, or that the goods were necessaries suitable to the degree and condition in life of the family of the purchaser. Davis *v.* Tarver, 65 Ala. 98.

45. Lamb *v.* Hart, 2 Bay (S. C.) 362, 1 Brev. 105; Slade *v.* Teasdale, 2 Bay (S. C.) 172, (where the party

Meals Furnished at different times by the plaintiff to persons in the employ of the defendant are properly chargeable on book account.[46]

Games of Billiards are not properly chargeable on a book account.[47]

(B.) PROFESSIONAL SERVICES. — Charges for professional services,[48]

was a carpenter); Lynch *v.* Petire, 1 Nott & McC. (S. C.) 130, (where the party was a brick layer).

Job Printing may be charged on, and proved, by a book of accounts. Anthony *v.* Stinson, 4 Kan. 180.

Advertising. — A printer's books are admissible to prove his account for advertising and the delivery of his newspaper. Thomas *v.* Dyott, 1 Nott & McC. (S. C.) 186. But the file of newspapers should be produced to show the performance of the printing alleged to have been done. Richards *v.* Howard, 2 Nott & McC. (S. C.) 474.

Hauling Done by a Teamster may be charged on his book of accounts. Dicken *v.* Winters, 169 Pa. St. 126, 32 Atl. 289.

Seine Maker. — In Story *v.* Perrin, 2 Mills Const. (S. C.) 220, the party whose books were offered in evidence was by occupation a seine maker, and the court said they could see no distinction between persons of that occupation and that of any other class of mechanics or tradesmen.

Sail Maker. — Charges for labor performed and materials furnished in making sails and rigging for a vessel are properly chargeable on book accounts. Amee *v.* Wilson, 22 Me. 116.

Under the Tennessee Statute the hire of a horse may be charged on a proof by a book of accounts. Easly *v.* Eakin, Cooke (Tenn.) 388.

Shoemaker. — In Drummond *v.* Hyams, Harp. Law (S. C.) 268, 18 Am. Dec. 649, it was said that a shoemaker's books were not evidence at common law nor were they made so by the statute although the practice of receiving them had too long prevailed to be disturbed. *Compare* Schall *v.* Eisner, 58 Ga. 190, wherein the plaintiff was a shoemaker, and it was held that his book wherein he kept in German his accounts against the defendant for boots and shoes which he made and mended, was not a book kept by a shopkeeper, storekeeper or any other person dealing with customers by whom the dealer could show that he kept correct books, but was a mere memorandum kept by the plaintiff against the defendant with which he was at liberty to refresh his memory, and with his memory so refreshed swear to the account sued on.

46. Tremain *v.* Edwards 7 Cush. (Mass.) 414. See also Jones *v.* Gammans, 11 Nev. 249.

47. Boyd *v.* Ladson, 4 McCord Law (S. C.) 76, 17 Am. Dec. 707. "The keeper of a billiard table," said the court in this case, "is not a shopkeeper, merchant, handicraftsman, or mechanic, nor can the case be brought within the description of any of those in which books of entries have been allowed. The action is not for articles of any kind sold or delivered, services rendered, or for work and labor. And if these books are to be allowed I do not see why the books of showmen, rope dancers, and gamblers of every description may not be admitted."

48. Charges of Tuition for Schooling are properly subject of charge in a party's book of original entries. Oliver *v.* Phelps, 21 N. J. Law 597, *affirming* 20 N. J. Law 180. *Cntra.*— Pelzer *v.* Cranston, 2 McCord (S. C.) 328.

Collector. — In Flynn *v.* Columbus Club, 21 R. I. 534, 45 Atl. 551, an action to recover for services rendered as collector of rents while the plaintiff was president of the defendant club, it was held that the plaintiff's book showing the collections made was properly admitted in evidence.

President of Corporation. — In Bushnell *v.* Simpson, 119 Cal. 658, 51 Pac. 1080, an action by the plaintiff to recover for services rendered by him as president of a corporation after evidence showing the amount of

as for example legal services,[49] or medical services,[50] are usually chargeable upon and provable by books of account.[51]

Plans of an Architect for the erection of a building are not matters properly chargeable on a book account.[52]

(C.) Official Services. — Fees for services rendered as Justice of

salary fixed for the president and the election of the plaintiff to that office, the plaintiff testifying that he kept a private book in which he entered the charges for services as such president, it was held that the pages of a book containing such account were admissible for him as against the objection that the books of the corporation were the proper books to be offered in evidence.

Surveyor of Lumber. — In Witherill *v.* Swan, 32 Me. 247, it was held that a book kept by a surveyor of lumber containing the names of the buyer and seller, the quantity of lumber surveyed and the time, if it be the only book kept by the surveyor from which he draws all charges for his services, is admissible with his suppletory oath in an action by him against the buyer for his services in surveying the lumber.

49. Black *v.* Reybold, 3 Harr. (Del.) 528; Snell *v.* Parsons, 59 N. H. 521; Codman *v.* Caldwell, 31 Me. 560; Charlton *v.* Lawry, 1 Mart. (N. C.) 14 (so holding under the North Carolina Book Debt Law).

In Wells *v.* Hatch, 43 N. H. 246, an action by an attorney to recover for his services and to enforce a lien upon the judgment, it was objected that the book was not competent to prove charges for counsel fees for which an attorney had no lien. The book was excluded simply because it contained no charges for which a lien could be enforced.

50. Foster *v.* Coleman, 1 E. D. Smith, (N. Y.) 85.

In Bookout *v.* Shannon, 59 Miss. 378, an action to recover for medical services rendered by the plaintiff to the defendant's intestate, it was held that as the plaintiff was prohibited from testifying as a witness to establish the correctness of the account or that it was due, his books of account were admissible as the best evidence that could be produced by him to prove that the particular services sued for were rendered.

In McBride *v.* Watts, 1 McCord (S. C.) 384, an action by the executrix of a deceased physician against the captain of a ship for medical services and medicines furnished to the ship's mate, it was held that the physician's book of original entries was competent evidence as to the medicines administered and of the person at whose instance the services were rendered, inasmuch as there was testimony that when the account was tendered to the defendant he made no objection to it.

51. In Pennsylvania to what extent books of account may be received as evidence in proof of services of a professional character is not settled. In Hale *v.* Ard, 48 Pa. St. 22, an action to recover for legal services, the defendant had, so far as appeared from the record of the original action in which the services were rendered, had no connection whatever with it, and it was held that under the circumstances the plaintiff's books were not competent. The court went on to say in discussing the extent to which books of account are evidence for an attorney that "the nature of such a service is peculiar. A book entry of it must be indefinite. There is no measure by which its value can be ascertained. Unlike physical labor it is incapable of being gauged by the time it occupies, or by comparing it with other similar services with which a jury is supposed to be acquainted. Nor is it capable of such certainty in description as is essential to an ordinary charge for work done." Again in Fulton's Estate, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133, the question came before the Supreme Court, but it was left undecided, the court ruling merely on the admissibility of the book as affected by other matters.

52. Sloan *v.* Grimshaw, 4 Houst. (Del.) 326.

the Peace are proper subjects of book charge.[53]

Services Rendered by a Sheriff in maintaining in jail a person committed on a *capias* at the suit of the defendant are not properly chargeable on a book of accounts.[54]

Services Rendered by a Notary Public in taking depositions and acknowledgments are not properly chargeable on books of account.[55]

(D.) AFFREIGHTMENT — The amount due for freight on certain commodities shipped on board the plaintiff's vessel by the defendant and transported to the place of destination may be charged on book and recovered in an action of book debt.[56]

The Books of Account of an Owner of a Ferry are competent to prove an account for ferriage.[57]

(E.) BROKERAGE. — Authority from the owner of land to sell the same cannot be shown by an entry on the alleged agent's private books of account describing the property in question, its ownership, price, etc.[58]

Nor are a ship broker's books and his suppletory oath admissible to support a charge for a commission on the sale of a vessel.[59]

(2.) The Place of Performance. — The books of a mechanic or tradesman are competent only to prove the performance and delivery of work done within the mechanic's shop, and where the work was done outside of his shop or upon the premises of the party charged such as building or repairing a house or any other fixture

53. Miller *v.* French, 1 Aik. (Vt.) 99.

54. Walker *v.* McMahan, 3 Brev. (S. C.) 251.

In Smith *v.* Johnson, 5 N. J. Law 511, an action by a constable to recover for serving state process, the fees for which had been received by the defendant as County Clerk, on proof by the sheriff that he had paid over to the defendant the fees received by him from the officers of the state prison; that he had taken some of the persons mentioned in the statement of demand to the state prison after the conviction, and on testimony of another witness of his belief that the book in which the charges were entered was the plaintiff's book of original entries, plaintiff had a verdict; but it was held on appeal that because there was no legal proof that the fees sued for had come into the defendant's hands, the motion for non-suit should have been sustained.

55. Harbison *v.* Hawkins, 81 Pa. St. 142.

56. Boardman *v.* Keeler, 2 Vt. 65.

Services Rendered for Smuggling Goods from a place in the possession of the enemy during the time of war are not properly chargeable on book account. Lockwood *v.* Knap, 1 Root (Conn.) 153.

57. Frazier *v.* Drayton, 2 Nott & McC. (S. C.) 471.

58. Boyd *v.* Jennings, 46 Ill. App. 290. "Such a book," said the court, "is not an account book, the entries in which become admissible in evidence when proven under the provisions of [the Illinois Statutes.] . . . The entry in the book is nothing but the declaration of the person claiming to be an agent, and it is fundamental that agency cannot be created by the declarations of the agent." See also Fenn *v.* Earley, 113 Pa. St. 264, 6 Atl. 58.

59. Winsor *v.* Dillaway, 4 Metc. (Mass.) 221.

there can be no necessity for the books because the work itself is apparent.[60]

(3.) By Whom Performed.— The fact that the work charged for in the party's book of account was done by the party's workmen is not one affecting the competency of the books, but merely affects their credit.[61]

d. *The Value.* — Entries in a book of accounts, when properly authenticated, are *prima facie* evidence of the value of the goods or services charged.[62]

e. *Goods Sold, Work Done Under Express Contract.* — **(1.) Generally.** — It is very generally held that a book of accounts, although duly authenticated, is not competent evidence to show the delivery of goods under a previous express contract.[63] Nor to prove work

60. St. Phillip's Church *v.* White, 2 McMull. Law (S. C.) 306, 39 Am. Dec. 125. See also Lynch *v.* Cronan, 6 Gray (Mass.) 531, an action to enforce a lien for labor performed by the plaintiff on the defendant's building, where the court in holding the plaintiff's books incompetent said, "that he had it in his power to secure other evidence of the work which he has performed, either by the testimony of the contractor or by his own fellow-workmen."

61. Mathews *v.* Robinson, 8 Metc. (Mass.) 269, 41 Am. Dec. 505; Morris *v.* Briggs, 3 Cush. (Mass.) 342; Barker *v.* Haskell, 9 Cush. (Mass.) 218.

In Mathews *v.* Sanders, 15 Ark. 255, the items in the account sued for consisted of services rendered by the party himself, the hire of slaves, the hire of a horse and carriage; and the court, although expressly disclaiming any intention of holding that the Arkansas Statute did not extend to the kind of demands charged, said that they thought they were susceptible of being established by original evidence.

Under the North Carolina Book Debt Law a party may prove by his books of account work and labor done by persons in his employ. Mitchell *v.* Clark, 1 Mart. (N. C.) 13.

In Gage *v.* McIlwain, 1 Strob. Law (S. C.) 135, on proof showing that the plaintiff's testator carried on a blacksmith's business by his slave, who had entire charge of the work; that the slave entered on his sale book, in the shop, all the work done from which the testator transferred the entries to the day-book which was offered in evidence. It was also shown that a notice was posted on the work-shop door to the effect that credit would be given to a customer for work done on condition that the customer consent to be charged according to the memorandum made by the slave; and it was held that the book was not competent evidence to prove that the defendant was a customer, but was evidence against a customer at the shop of the amount of work done for him.

62. Fry *v.* Slyfield, 3 Vt. 246; Foster *v.* Sinkler, 1 Bay (S. C.) 40.

63. Lonergan *v.* Whitehead, 10 Watts (Pa.) 249; Hall *v.* Chambersburg Woolen Co., 187 Pa. 18, 40 Atl. 986, 67 Am. St. Rep. 563, 52 L. R. A. 689; Nickle *v.* Baldwin, 4 Watts & S. (Pa.) 290; Baxter *v.* Leith, 28 Ohio St. 84; Whelpley *v.* Higley, Brayt. (Vt.) 39.

Delivery for Safe Keeping. In Kerr *v.* Love, 1 Wash. (Va.) 172, it was held that an entry on the plaintiff's books made by his clerk, whose whereabouts were unknown, together with the plaintiff's oath as to the quantity charged, though admissible in the case of a sale and delivery of goods, was not competent to charge the defendant with the articles delivered to the master of his vessel for safe-keeping.

In Collins *v.* Shaw, 124 Mich 474, 83 N. W. 146, the issue was as to whether or not goods sold by the

and labor done under a special agreement.[64]

The Reason is that by a special agreement of this kind, the transaction is taken out of the usual course of buying and selling, and the performance of the contract by one, and the breach of it by the other, are susceptible of proof by the usual kinds of evidence. No reason of necessity or convenience exists for resorting to this peculiar kind of evidence, whether it be to establish the quantity of the article furnished, or any other ingredient in the party's case.[65]

But where the party abandons his right to recover under the special contract and seeks recovery merely under the common counts for goods sold, work and labor done, etc., his books then become competent evidence for him in support thereof.[66]

plaintiffs to the defendants were bought without condition or were bought under an agreement that when delivered they were to be "merchantable and marketable," and it was held error for the court to permit the plaintiffs to prove their version of the contract by an entry in their books of account.

64. Alexander *v.* Hoffman, 5 Watts & S. (Pa.) 382; Tioga Mfg. Co. *v.* Stimson, 48 Mich 213, 12 N. W. 173; Earle *v.* Sawyer, 6 Cush. (Mass.) 142; Schnader *v.* Schnader, 26 Pa. St. 384; Skinner *v.* Conant, 2 Vt. 453, 21 Am. Dec. 554; Towle *v.* Blake, 38 Me. 95; Merrill *v.* Ithaca & O. R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130. *Compare* Cummings *v.* Nichols, 13 N. H. 420, 38 Am. Dec. 501.

In Walker *v.* Curtis, 116 Mass. 98, it was held, on an issue as to the quantity of earth excavated by the plaintiff under a contract for such work to be done for the defendant, that the plaintiff might show by his books the whole number of day's work done, not as independent evidence, but in connection with his foreman's estimates, of the amount of work one workman might do in a day, and how much should be deducted from the aggregate on account of some of the workmen not being actually occupied thereupon.

In Morgans *v.* Adel, (Cal.), 18 Pac. 247, an action for work and labor performed by the plaintiff for the defendant under an agreement by which the defendant was to furnish the materials necessary for carrying on the work and account to the plaintiff for a certain share of the sums received for the work done; it was held that the shop books of the parties were competent to show what charges were made, the work performed by the plaintiff and the amount thereof for the purpose of ascertaining his share.

In Kendall *v.* Field, 14 Me. 30, 30 Am. Dec. 728, the books were admitted only to show the amount of labor that was done under a contract otherwise proved.

In Forsee *v.* Matlock, 7 Heisk. (Tenn.) 421, it was held that in an action under the Tennessee Book Debt Law to recover for services rendered where the services are of such a character as to raise no presumption that the party rendering them was to be entitled to compensation therefor, as for example in that case, services rendered by a child to the parent after becoming of age, the fact that there was any understanding expressed or implied that the services were to be paid for cannot be established by the party's book of accounts, but must be made out by independent competent evidence.

65. Whepley *v.* Higley, Brayt. (Vt.) 39.

66. McWilliams *v.* Cosby, 4 Ired. Law (N. C.) 110. *Compare* Merrill *v.* Ithaca & O. R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130, wherein it was held that charges for work done or goods delivered under the supposed existence of a special contract but which afterwards become matter of account by operation of law in consequence of a rescission of the

(2.) Mode of Payment. — An article sold, or work done, for which the seller or workman agrees to receive payment in a specified manner may be charged on book, the fact of a special agreement respecting the mode of payment does not affect the competency of the book;[67] as for example where the goods were sold, or the work done, under an agreement whereby their value was to be credited upon an existing debt due to the purchaser or party for whom the work was done.[68]

contract cannot be proved by the party's book; there must be a right to charge when the services are rendered or the goods delivered.

Rule Stated. — In McDaniel *v.* Webster, 2 Houst. (Del.) 305, the court said: "If the work was done under a special agreement such as had been stated, the plaintiff's book of original entries with the charges and sums contained in his account, was not proper, or sufficient evidence to prove the value of his services, or work done and material furnished by him in building the mill; for in that case, the plaintiff would be confined to his special contract, and could only charge and recover in strict accordance with the terms of it. But if the work was not performed and the materials were not supplied, under any special agreement, or if there was originally a special agreement between the parties in regard to the matter, under which it was commenced and prosecuted as far as it was performed by the plaintiff, but which special contract was afterward rescinded, or abandoned by reason of the misconduct of the defendant in unreasonably interfering with, or interrupting the regular prosecution of the work, the plaintiff would then, in either case, be entitled to recover on the common counts for his work and the materials furnished, as far as he had proceeded with it, without any reference to the special agreement, the same as if none had ever been entered into by him; and in either of those events, we consider, and rule, that his book of original entries would be admissible and competent evidence to go to the jury under our statute, to prove the work done and materials furnished, and the value of them; but it would not necessarily be conclusive, or unimpeachable evidence for either purpose in our opinion."

In Dayton *v.* Dean, 23 Conn. 99, the plaintiff bound himself to labor for the defendant for a term at a specified daily wage payable at the end of the term; the defendant, however, modified the agreement by offering to pay the daily wage as earned, but the plaintiff left the service without any sufficient cause against the will of the defendant; and it was held that as the defendant had waived full performance of the labor agreed upon before any payment could be claimed, the plaintiff could properly charge on his book for the labor performed.

67. Hall *v.* Ives, 11 Conn. 469; Newton *v.* Higgins, 2 Vt. 366. See also Fay *v.* Green, 2 Aik. (Vt.) 386. Harris *v.* Baker, 1 Root (Conn.) 220.

Labor Done by the Month at a Fixed Price and payable at a future date may be charged on book if payment is not made as agreed. Fry *v.* Slyfield, 3 Vt. 246.

In Terrill *v.* Beecher, 9 Conn. 344, it was held that goods sold with the expectation of their being paid for by the services of the party charged pursuant to an agreement between them were not properly the subject of a book charge. To support a charge on book it must appear that the charge existed at the time of the delivery of the articles and arose in consequence of such delivery.

68. In Doody *v.* Pierce, 9 Allen (Mass.) 141, a suit to redeem a mortgage made by the plaintiff originally to a firm of which the defendant was a member, and which had subsequently been assigned by the firm to the defendant, and which the plaintiff claimed had been paid by services rendered to the defendant and to the firm, under agreements with them that his wages should be

(3.) Goods Delivered To Be Sold on Commission.—The book of original entries is not competent evidence of the delivery of goods to be sold on commission,[69] although the book is not offered to charge the defendant, but is offered as rebutting evidence to explain certain payments proved by the defendant.[70]

f. *Payment of Money.*—**(1.) Generally.**— In the absence of a statute expressly providing otherwise,[71] the rule is very generally

applied on the mortgage debt; it was held that the plaintiff might introduce his books of account duly authenticated to prove the labor performed by him.

In Strong *v.* McConnell, 10 Vt. 231, an action of book account for goods sold from time to time to the defendant, it appeared that during the time of the account the defendant held a note against the plaintiff on which it was the intention of the parties at the time to apply the amount of the goods sold as payment; that the note was afterwards sued upon and collected by the defendant from the plaintiff. It was held that because it was the intention of the parties at the time of the transaction that the amount of sales by the plaintiff to the defendant should be thereafter applied in payment of the note, the items were properly chargeable on book and recoverable in an action of book account.

Presumption of Payment. — In King *v.* Coulter, 2 Grant's Cas. (Pa.) 77, an action on a note which the plaintiff contested on the ground that he had paid therefor by goods sold and delivered to the plaintiff more than 15 years previous to the commencement of the action; it was held that on proof that the plaintiff had, at the time alleged, an account with the defendant for goods purchased; the amount of which when closed exceeded the amount of the note, the defendant might introduce his books of original entry showing the charges of the goods bought by the plaintiff, on the ground that the jury would have a right to presume after a lapse of 16 years, that it was the understanding and agreement of the parties that the account should be a payment of the note.

In Cooke *v.* Brister, 19 N. J. Law 73, an entry in a book account charging a party with goods sold "to pay off a note" held by the party charged, although lawful evidence of the sale and delivery of the goods was not evidence that it was for the purpose of paying the note in question.

69. French *v.* Brandon, 1 Head (Tenn.) 47.

In Michigan, a section of the statute making charge and entries in books of account evidence of money paid out expressly provides that the statute shall not apply to a person selling on commission except as to the amount charged as commission for selling, unless accompanied by the proper voucher, and in Richards *v.* Burroughs, 62 Mich. 117, 28 N. W. 755, an action to recover for goods sold and delivered to the defendant, it was held that the defendant could not corroborate his own testimony to the effect that he had received the goods to be sold on commission by an entry in his books of account to that effect under the terms of this statute.

70. Murphy *v.* Cress, 2 Whart. (Pa.) 33.

71. For cases construing and applying the Michigan statute expressly providing for books of account to prove cash items, see Ganther *v.* Jenks & Co., 76 Mich. 510, 43 N. W. 600; Lester *v.* Thompson, 91 Mich. 245, 51 N. W. 893.

In Robinson *v.* Hoyt, 39 Mich. 405, it was held that where payments alleged to have been made by a deceased mortgage debtor are denied by the creditor they are not sufficiently proved by entries in the debtor's handwriting on the last page of his day-book from which the immediately preceding leaves had been torn.

Under the Minnesota Statute, cash books kept in the ordinary way

laid down that a party cannot prove by his own books of account by an entry therein the fact that he has paid out money,[72] either by way of payment on account or in extinguishment of a debt due from himself to the party,[73] or as an entry made in the regular course of

are competent on proof being made as prescribed by statute as to books of account, although the entries in question are not in express terms charges against a person named as for money paid to him. Woolsey *v.* Bohn, 41 Minn. 235, 42 N. W. 1022.

In Wisconsin, a statute provides that account books shall not be admitted as testimony of any item of money delivered at one time exceeding $5.00 and that when the books shall be received properly authenticated they are *prima facie* evidence in proof of the charges therein contained; and in Winner *v.* Bauman, 28 Wis. 563, it was held that the admission in evidence of account books showing payment in excess of the amount allowed by statute without qualification was fatal error.

72. Shaffer *v.* McCrackin, 90 Iowa 578, 58 N. W. 910, 48 Am. St. Rep. 311.

Money paid out to one person in repayment of which another agrees to deliver to the payor property equal in value to the payment, cannot be charged on a book of accounts, since it is merely a right of action founded upon an executory agreement. Peck *v.* Jones, Kirby (Conn.) 289.

In Brown *v.* Brown, 2 Wash. (Va.) 151, an entry by the clerk or agent of an administrator in his books of account of money paid over by the administrator to the guardian was admitted in evidence against the guardian on proof of the death of the administrator and the clerk and of the clerk's handwriting.

In Brannin *v.* Voorhees, 14 N. J. Law 590, it was held that an entry charging "to cash had and received to pay" in a certain bank without saying for whom or for whose use is entirely too vague and not admissible.

In Rodman *v.* Hoops, 1 Dall. 85, the defendant offered in evidence an entry in his testator's book, of money paid in discharge of a note, although there was no proof by whom it was made or whether the person who made it was dead or alive; and the court allowed it to be read, not as evidence that the defendant had paid the note but merely that such an entry had been made 19 years previously to the payment of a note of 23 years' standing and to support the presumption of payment after such a length of time.

In Kilburn *v.* Anderson, 77 Iowa 501, 42 N. W. 431, it was held that although conceding books of account to be incompetent to prove charges for cash, it would be presumed that the trial court had rejected such items because the judgment was for a sum only sufficient to cover items properly established by the books.

73. *England.* — Reeve *v.* Whitmore, 11 Jur. (N. S.) 722, 13 W. R. 913.

United States. — Milligan *v.* The B. F. Bruce, Newb. 539, 11 Fed. Cas. No. 9,602.

Colorado. — Jones *v.* Henshall, 3 Colo. App. 448, 34 Pac. 254.

Georgia. — Harold *v.* Smith, 107 Ga. 849, 33 S. E. 640; Bracken *v.* Dillon, 64 Ga. 243, 37 Am. Rep. 70; Mercier *v.* Copeland, 73 Ga. 636. *Compare* Genahl *v.* Shore, 24 Ga. 17.

Illinois. — Boyer *v.* Sweet, 4 Ill. 120 (*dictum*); Pittsfield & F. P. R. Co. *v.* Harrison, 16 Ill. 81. *Compare* Bradley *v.* Gardner, 87 Ill. App. 404; Taliaferro *v.* Ives, 51 Ill. 247.

Kentucky. — Brannin *v.* Foree, 12 B. Mon. 506.

Massachusetts. — Maine *v.* Harper, 4 Allen 115.

New York. — Atwood *v.* Barney, 80 Hun 1, 29 N. Y. Supp. 810; Irvine *v.* Wortendyke, 2 E. D. Smith, 374. *Compare* Burke *v.* Wolfe, 6 Jones & S. (N. Y.) 263.

North Carolina. — Morgan *v.* Hubbard, 66 N. C. 394.

Pennsylvania. — Hess' Appeal, 112 Pa. St. 168, 4 Atl. 340; Ahl *v.* Ahl, 176 Pa. St. 466, 35 Atl. 227; Rogers *v.* Old, 5 Serg. & R. 404.

Vermont. — Parris *v.* Bellows, 52

business of a loan to such party,[74] or paid for his benefit,[75] or upon

Vt. 351; Lapham *v.* Kelly, 35 Vt. 195; Jewett *v.* Winship, 42 Vt. 204.

Virginia. — Wells *v.* Ayres, 84 Va. 341, 5 S. E. 21.

In Baird *v.* Fletcher, 50 Vt. 603, an action to recover against the defendant under a contract by which the plaintiff alleged that tne defendant was to turn over to the plaintiff money in his hands belonging to the plaintiff's father in consideration of the plaintiff caring for the father during his life, but which agreement the defendant denied, claiming that he had settled with and paid over to the father all moneys in his hands; it was held that he could not prove such payment by entries in his own books of account.

In McLellan *v.* Crofton, 6 Me. 307, the plaintiff for the purpose of proving an item of cash paid out by his intestate upon a note, given by the defendant to a third person, offered his intestate's books of account containing such an item and a note for a like amount signed by the defendant, having an indorsement by the payee acknowledging receipt of the amount from the plaintiff's intestate; and it was held that the book in connection with the note was competent as furnishing a degree of presumptive proof of payment, it further appearing that the plaintiff's intestate had been in the habit of advancing small sums of money for the defendant's intestate.

In Ege's Appeal, 2 Watts (Pa.) a proceeding to settle the account of an administrator who was manager of his intestate's business; it was held that the administrator was entitled to a credit shown by the entries on the cash book kept by him while manager, on proof that it was the usual one kept of accounts, and that it was the one in which they were kept in that particular business, and that the books were open to the inspection of the intestate.

74. Case *v.* Potter, 8 Johns. (N. Y.) 211; Cole *v.* Dial, 8 Tex. 347; Lyman *v.* Becktel, 55 Iowa 437, 7 N. W. 673. See also Stephens *v.* Cowan, 61 N. Y. Supp. 925. *Compare* Warden *v.* Johnson, 11 Vt. 455.

In Tucker *v.* Bradley, 33 Vt. 324, a bill to foreclose a mortgage which a subsequent mortgagee contested on the ground of payment; it was held that entries in the mortgagor's books of account made in the regular course of business and showing payment by him to the first mortgagee were competent evidence for the second mortgagee to prove his claim of payment.

In Connecticut, the rule is that money loaned may properly be charged on book account and that taking notes for the moneys so loaned does not preclude the party from charging them on his book unless there was a previous agreement between the parties that the notes should be taken in extinguishment of the book debt. Clark *v.* Savage, 20 Conn. 258.

In New Jersey, the question whether or not moneys paid out, advanced or loaned, may be properly charged in a book of accounts is one upon which the cases do not agree. In Hauser *v.* Leviness, 62 N. J. Law 518, 41 Atl. 724, it was expressly held that they could not.

See also Oberg *v.* Breen, 50 N. J. Law 145, 12 Atl. 203, 7 Am. St. Rep. 779, (where the court in so holding said that a ruling in Inslee *v.* Prall, 25 N. J. Law 457, to the effect that when there have been mutual dealings between the parties, books of account are competent evidence to prove the payment of money when such money has been paid on account of claims that might be proved by books of account was an expression entirely *obiter.*) Wilson *v.* Wilson, 6 N. J. Law 95. *Compare* Craven *v.* Shaird, 7 N. J. Law 345.

75. In Brannin *v.* Voorhees, 14 N. J. Law 590, it was held that a book containing an entry charging a party for payment on an order on a third person was not admissible. *Compare* Sargeant *v.* Pettibone, 1 Aik. (Vt.) 355, wherein it was held that money paid out for the benefit and at the request of the defendant may be charged on book account, provided the auditors are satisfied by proof that it was so paid.

In Snell *v.* Eckerson, 8 Iowa 284,

his order to be repaid by him.[76]

The Reason Why Books of Account Are Not Competent to Prove Cash Transactions is that they are usually evidenced by notes, writings or vouchers in the hands of the party paying or advancing the money. Moreover entries of cash transactions could be fabricated with much greater safety and with less chance of the fraud being discovered than entries of goods sold and delivered or of services rendered.[77]

Statutes. — And there are statutes expressly providing that cash items are not properly chargeable on a book of accounts.[78]

(2.) Payments Not Applied by Creditor. — There is authority, however, that if the book is otherwise unobjectionable a debtor's book of accounts may be received in evidence to prove payment by him to his creditors, to be applied on a debt, which was not so applied.[79]

(3.) Money Paid for Goods Bought. — The rule that an account book

an action to recover for moneys paid to a third person on account of the defendant, it was held that the plaintiffs could not prove by their books of account, the payment of the money in question without first showing some authority from the defendant other than by the charge on the books.

In Saam *v.* Saam, 4 Watts (Pa.) 432, an action of trover against an executor *de son tort* it was held that the defendant could not prove payments of debts to the value of the goods retained by entries in his books of account.

76. *United States.* — Leveringe *v.* Dayton, 4 Wash. C. C. 698, 15 Fed. Cas. No. 8288.

Connecticut.— Peck *v.* Jones, Kirby 289.

Iowa.— Lyman *v.* Bechtel, 55 Iowa 437, 7 N. W. 673.

Massachusetts. — Founce *v.* Gray, 21 Pick. 243; Prince *v.* Smith, 4 Mass. 455.

New York. — Smith *v.* Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138.

Vermont. — Gleason *v.* Kinney, 65 Vt. 560, 27 Atl. 208; Weller *v.* McCarty, 16 Vt. 98.

Wisconsin. — Marsh *v.* Case, 30 Wis. 531.

Wyoming. — Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581.

77. Smith *v.* Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138.

78. McDaniel *v.* Webster, 2 Houst. (Del.) 305. See also Redden *v.* Spruance, 4 Harr. (Del.) 217; Townsend *v.* Townsend, 5 Harr. (Del.) 125.

79. Slasson *v.* Davis, 1 Aik. (Vt.) 73; Brown *v.* Talcott, 1 Root (Conn.) 85; Prentice *v.* Phillips, 1 Root (Conn.) 103; Hurd *v.* Fleming, 1 Root (Conn.) 132.

Contra. — Bradley *v.* Goodyear, 1 Day (Conn.) 104.

In Taylor *v.* Bernard, 71 Hun 207, 24 N. Y. Supp. 525, an action to foreclose a mortgage securing a note of the defendant's to the plaintiffs; it was held that the defendant's books of account were admissible under his defense on proof that the plaintiffs had traded at the defendant's store contemporaneously during the existence of the note and that upon a certain date the account in the books appeared to have been substantially closed by its appearing therefrom that the plaintiff owed the defendant on book account the amount of the note.

In Snow *v.* Thomaston Bank, 19 Me. 269, it was held that for the purpose of proving that the proceeds of a mortgage sale of the plaintiff's property had been applied to the payments of plaintiff's notes held by the defendant, it was competent for the defendant to introduce in evidence entries showing such application on proof that the entries were made by the defendant's cashier, and that the account had been submitted to the inspection of the plaintiff and not objected to by him.

is not competent to establish a charge for money loaned, does not apply where money was not in fact loaned, but was paid out for articles purchased for the party charged, and charged as so much money loaned.[80]

(4.) Expenditures for Joint Benefit. — Expenditure for repairs on a vessel of which the plaintiff and defendant were joint owners and for their joint benefit are properly chargeable on book account.[81]

(5.) Subsisting Demand. — It has been held that money advanced by the plaintiff to the defendant, not to extinguish a subsisting demand, but to be kept alive as a subsisting claim against the defendant, and to be the subject of future adjustment between the parties, is properly chargeable on the book of accounts.[82]

(6.) Money Converted. — Cash paid out by one party to another for the purchase of goods by the latter for the former which is not so used, but is converted to his own use may be charged on the books of account of the payor.[83]

(7.) Money Received by Agent. — Moneys received from time to time by the defendant as the plaintiff's agent and in the course of his duties as such agent might properly be charged upon the plaintiff's books of account.[84]

(8.) Advancements. — Entries in a book of accounts made or caused to be made by a parent of advancements to a child are competent evidence although the child charged had no knowledge of the entries.[85]

80. Le Franc *v.* Hewitt, 7 Cal. 186.

81. Bowers *v.* Dunn, 2 Root (Conn.) 59.

82. Hickok *v.* Ridley, 15 Vt. 42. In this case the money was advanced as part payment of transportation thereafter to be performed and to be adjusted on the defendant's rendering account for such service. See also Chellis *v.* Woods, 11 Vt. 466.

83. Whiting *v.* Corwin, 5 Vt. 451.

84. Vermont Mut. F. Ins. Co. *v.* Cummings, 11 Vt. 503; Hengst's Estate, 6 Watts (Pa.) 86. See also Van Houten *v.* Post, 33 N. J. Eq. 344.

85. In Putnam *v.* Town, 34 Vt. 429, a claim for services rendered by a daughter to her father after she became of age and while a member of his family; it was held that an entry in the father's book following an account for articles delivered by him to his daughter to the effect that she had been well paid for her work was not competent evidence for the estate; although it was said that if the defense had been that the articles charged had been received by the daughter to be applied in extinguishment of her claim, the entries charging her with them would have been competent.

In Perkins *v.* Perkins, 109 Iowa 216, 80 N. W. 335, a contest over the probate of a will, the proponent offered in evidence certain account books kept by the deceased showing advancements to his children, the contestants, the books being fully identified and the entries therein being in the handwriting of the deceased; it was held that while the books were not admissible under the Iowa statute relating to books of account, yet the entries therein made were written declarations of the deceased with reference to the disposition of some of his property before executing his will and that as such they were admissible.

In New York the rule is that advancements must be proved by evidence *aliunde* which in connection with the parent's books is sufficient to prove the fact but that the entries

(9.) Agents' Books. — Again, it is held that entries in the books of an agent made by himself are not, in general, competent evidence for him of the disbursement of money on account of his principal.[86]

A Distinction Has Been Noted, however, as to book entries of an agent to retail goods, upon the principle that the transactions were properly and necessarily the subject of book entries.[87]

(10.) Account Barred by Statute. — So also it has been held that credits upon an account which has been barred by the Statute of Limitations cannot be established by entries in the creditor's books of account for the purpose of removing the bar.[88]

(11.) Party's Business Consisting of Paying Out Money. — A qualification of the rule under discussion is recognized where the party whose books are offered in evidence is engaged in such a business as to justify his charging on his books items of cash transactions and the books in question are those kept by him in the usual course of his business.[89]

in the books are not to be taken as true in the absence of such evidence. Lawrence *v.* Lindsay, 68 N. Y. 108. See also Marsh *v.* Brown, 18 Hun (N. Y.) 319.

In Missouri such entries are held to be competent evidence only when it is shown that the entries were made contemporaneously with the advancement charged. Nelson *v.* Nelson, 90 Mo., 460, 2 S. W. 413.

86. Williams *v.* Gregg, 2 Strob. Eq. 297. See also Stocking *v.* Sage, 1 Conn. 75.

"No Man of Business Pays Money without evidence of the fact, other than his own knowledge; and the accountability of the agent renders it still more necessary to him to take and preserve satisfactory vouchers of his payments." Rowland *v.* Martindale, Bail. Eq. (S. C.) 226.

87. Sinclair *v.* Price, 2 Hill's Eq. 160 n.

In Seagrove *v.* Redman, 4 Dall. 153, the plaintiff was the non-resident agent of the defendants in fitting out a privateer for them during the Revolution; and his book of original entries, some of which were made by himself and some by his clerk, was admitted to prove disbursements by him upon the principle that as it related to a mercantile transaction which took place in a foreign country, the relaxation of the strict rules of the common law was reasonable, just and necessary.

88. Libby *v.* Brown, 78 Me. 492, 7 Atl. 114; Oberg *v.* Breen, 50 N. J. L. 145, 12 Atl. 203, 7 Am. St. Rep. 779. See also State Bank *v.* Fowler, 14 Ark. 159; State Bank *v.* Barber, 12 Ark. 775; Hancock *v.* Cook, 18 Pick. (Mass.) 30. *Compare* Bradley *v.* James, 13 C. B. 822, 1 W. R. 388.

89. Orcutt *v.* Hanson, 70 Iowa 604, 31 N. W. 950, (where the party was engaged in the business of loaning money.) See also Cummins *v.* Hull, 35 Iowa 253; Fleming *v.* Yost, 137 Ind. 95, 36 N. E. 705; Lyman *v.* Bechtel, 55 Iowa 437, 7 N. W. 673; Beall *v.* Rust, 68 Ga. 774, where the party was a factor or commission merchant whose ordinary and constant business is to make cash advances to customers.

In Cargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214, the court said that "where, in the ordinary course of business between the parties, cash advances as well as payments are made the subject of book account, we see no reason for holding that such items may not as well be entered on and proved by the books as the ordinary items of account may be; that is to say, where the parties are in the habit of treating cash items, both on the debit and credit side of the account between them, as the proper subject of such account, the proof of the loan or advancement of money on the one side, or of the

(12.) Amount. — Sometimes the rule is qualified to the extent of holding that the payment of money can be entered by a party upon, and proved by, his books of account, provided the amount does not exceed a certain sum.[90]

(13.) Pass Books. — Entries for money loaned or other transactions between the parties may be made in a pass book and be given in evidence against its holder.[91]

payment on account of the same on the other may be made by the production of the books, to the same extent as may the proof of the delivery of any other article."

90. Amount Limited to 40 Shillings or $6.67. — Dunn *v.* Whitney, 10 Me. 9; Hooper *v.* Taylor, 39 Me. 224; Kelton *v.* Hill, 58 Me. 114; Cleave's Case, 3 Dane Abr. 319; Burns *v.* Fay, 14 Pick. (Mass.) 8; Henshaw *v.* Davis, 5 Cush. (Mass.) 145; Davis *v.* Sandford, 9 Allen (Mass.) 216; Turner *v.* Twing, 9 Cush. (Mass.) 512; Bassett *v.* Spofford, 11 N. H. 167; Rich *v.* Eldridge, 42 N. H. 153; Bailey *v.* Harvey, 60 N. H. 152.

Rule Stated. — In Petit *v.* Teal, 57 Ga. 145, the court said, "there would seem to be good reason for admitting books to prove very small sums of cash advanced in the regular course of business, but where the amount is of such importance that a receipt or some written evidence might be reasonably called for by the other party, books alone would be unsafe. Of course, in particular lines of business, such as banking, usage might be found to extend to all amounts alike." See also Bracken *v.* Dillon, 64 Ga. 243, 37 Am. Rep. 70.

In Ohio the rule is that money, if of any considerable amount, is not the proper subject of book account; but that if in the course of business small sums are passing between the parties, they may with propriety be charged on the book and proved in the same manner as the other items of the account. Cram *v.* Spear, 8 Ohio 494. See also Watts *v.* Shewell, 31 Ohio St. 331; Kennedy *v.* Dodge, 19 Ohio C. C. 425.

In Iowa, money loaned or paid, especially if in any considerable amount, is not ordinarily the subject of book charge. Sloane *v.* Ault, 8 Iowa 229. See also Young *v.* Jones, 8 Iowa 219.

In Veiths *v.* Hagge, 8 Iowa 163, the court said: "The statute has not made any such distinction, as that small sums of money may be proved by the party's books, but that large sums shall not be so proved. The question whether the charges are made in the ordinary course of business, as well as the credibility of the books when produced, is for the jury to determine. They might more readily admit the sufficiency of the book to prove charges of money of a small, than of a large amount. So they might more readily conclude, that the loan or payment of small sums of money by a retail trader to his customers, and charged in their accounts, was more nearly in the ordinary course of business than the loan or payment of large sums; and if they should judge that small money charges were legitimately made, in the ordinary course of business, we should not be inclined to hold that they might not so determine, and allow them accordingly."

91. Ruch *v.* Fricke, 28 Pa. St. 241. The court said: "A pass-book is not, like shop books, limited as evidence to entries of goods sold and work done. It is the book of the buyer or usually debtor party in which he allows the other party to enter their mutual transactions, and thus these entries become in a great degree the written admissions of both parties. Whatever is entered there by one party is entered with the other's consent and therefore is presumed to be right, whatever may be the subject matter of the entries, for the parties may make their pass-books evidence of every sort of transaction." See also Burk *v.* Wolfe, 6 Jones & S. (N. Y.) 263.

g. *Use and Occupation of Land.* — A charge for the use and occupancy of land cannot be made on a book of accounts.[92]

h. *Damages.* — Items which are not in their nature liquidated sums, or prices, or values, but are mere damages, capable of being rendered certain only by judicial decision or convention are not properly matters to be charged in a book of accounts.[93]

It has been held, however, that a purchaser of property for which he had paid, but which the seller had failed to deliver, might charge on his books of account, and prove by them, the money paid by him.[94]

i. *Mistakes in Settlements.* — Articles omitted by mistake in a settlement are not chargeable on book account.[95]

An item credited twice by mistake in an account settled may be charged on a book of accounts if the articles themselves were proper to be so charged or credited.[96]

j. *Interest.* — Interest on a book debt after it is due cannot be charged on book account.[97]

k. *Status as Creditor.* — A creditor applying for the administration upon the estate of a deceased person upon that ground may prove by his book of accounts that he is a creditor.[98]

B. Matters as to Party Charged. — a. *Delivery to Party*

92. Hitchcock *v.* Smith, Brayt. (Vt.) 39; also Prince *v.* Smith, 4 Mass. 455; Hilton *v.* Burley, 2 N. H. 193. *Compare* Case *v.* Berry, 3 Vt. 332, where it was held that although this is the rule generally, if there are mutual dealings and accounts and on one side charges are made of articles or services, delivered or rendered, and intended to apply in payment of rent charged on the other, the accounts between the parties may be adjusted from the books.

In Connecticut it is held that a charge for the use and occupation of real estate cannot be made on book where there never has been any actual occupancy during a portion of the period for which recovery is sought; but that where there has been actual occupancy during a portion of the period for which recovery is sought such a charge may be made. Lockwood *v.* Lockwood, 22 Conn. 425. *Compare* Beach *v.* Mills, 5 Conn. 493.

93. Swing *v.* Sparks, 7 N. J. Law 59; Wait *v.* Krewsom, 59 N. J. Law 71, 35 Atl. 742; Fry *v.* Slyfield, 3 Vt. 246.

On an issue between the purchaser of an interest in a firm and the selling member as to false representations made by the latter in respect of the amount of his interest therein, the ledger of the firm containing an entry crediting each member with the amount respectively contributed is competent evidence to show the value of the interest of the selling party as bearing upon the measure of damages which the purchaser had sustained conceding that false representations had been made. Hale *v.* Philbrick, 47 Iowa 217.

94. Johnson *v.* Patten, 4 Greene (Iowa) 63.

95. Rogers *v.* Moore, 2 Root (Conn.) 58; Remington *v.* Noble, 19 Conn. 383; Punderson *v.* Shaw, Kirby (Conn.) 150. *Contra.* — Austin *v.* Berry, 3 Vt. 58. And in Darling *v.* Hall, 5 Vt. 91, it was held that a charge on book omitted by mistake in a settlement between the parties may properly be carried over into a new account and there charged.

96. Whiting *v.* Corwin, 5 Vt. 451.

97. Broom *v.* Henman, 1 Root (Conn.) 248, 1 Am. Dec. 42; Temple *v.* Belding, 1 Root (Conn.) 314. *Compare* Phenix *v.* Prindle, Kirby (Conn.) 207.

98. Arnold *v.* Sabin, 1 Cush. (Mass.) 525.

Charged on Book. — (1.) **Generally.** — The use of books of account to prove an account for goods sold, materials furnished,[1] and work done or services rendered, has been confined to charge the original debtor or debtors to whom the goods were sold, the material furnished, or for whom the work was done,[2] and who is sought to be held liable, and of course when the entries name such person or persons as the debtor or debtors, the books if otherwise unobjectionable are competent.

(2.) Liability of Third Person. — The competency of books of account is frequently questioned where the goods are delivered to a third person, or the services rendered at the call of or for the apparent benefit of the third person, and the controversy between the litigants is not merely as to amount and quantity, but whether the defendant is chargeable, in which case it is held that the books are inadmissible unless accompanied by proof *aliunde* of the defendant's liability.[3]

1. In McMullin *v.* Gilbert, 2 Whart. (Pa.) 277, an action to enforce a mechanic's lien for labor and materials which were charged on the plaintiff's book to the defendant, specifying the building for which they were furnished; it was held that the plaintiff's books are competent.

In Noar *v.* Gill (Pa. St.), 4 Atl. 552, an action to enforce a mechanic's lien for labor performed on the defendant's building; it was held that the fact that the plaintiff's book showed only a charge against the defendant personally without specifying the building upon which the labor was done was no reason for its rejection and that it was immaterial whether or not the offer of the book was accompanied by an offer of other evidence.

In Barbier *v.* Smith, 38 Pa. St. 296, an action to enforce a mechanic's lien, it was held that the fact that the plaintiff's book charged the materials to the defendant, the owner of the building, did not affect the competency of the book where there was other evidence tending to prove that the contractor used the materials and that in a settlement between the defendant and the contractor the money was set apart to pay the plaintiff's bill.

In Wood *v.* Fithian, 24 N. J. Law 838, an action to recover for materials furnished to the defendant's ship; it was held competent for the plaintiff to introduce his books of account charging the materials to the ship "and owners" where there was satisfactory evidence that the defendant was the owner and that the materials were had for his use.

2. In Bartlett *v.* Morgan, 4 Wash. 723, 31 Pac. 22, the goods sold were not in the first instance charged on the party's ledger to the person receiving them, but afterwards the name of the defendant was written over the name of the person receiving the goods, and it was held that the books were not competent.

In Moore *v.* Copeley, 165 Pa. St. 294, 30 Atl. 829, 44 Am. St. Rep. 664, an action against a married woman to charge her separate estate for medical services rendered to herself and her children while living with her husband; it was held that the plaintiff's book charging the account against the defendant was competent *prima facie* proof of the services rendered but not of the express undertaking by the defendant to subject her separate estate to liability; that it was the duty of the plaintiff to show in addition to the entries upon his books charging defendant with his services, her promise to pay therefor.

3. Silver *v.* Worcester, 72 Me. 322; Soper *v.* Veazie, 32 Me. 122; Kerr *v.* Love, 1 Wash. (Va.) 172; Kinloch *v.* Brown, 1 Rich. Law (S. C.) 223, 2 Spear's Law 284; Ten-

(3.) Delivery to Agent. — The fact that the charges are against the agent of the party sought to be charged instead of against the party himself does not render the book inadmissible.[4]

broke *v.* Johnson, 1 N. J. Law 288; Atwood *v.* Barnett, 80 Hun 1, 29 N. Y. Supp. 810; Field *v.* Thompson, 119 Mass. 151; Brown *v.* George, 17 N. H. 128; Thomson *v.* Porter, 4 Strob. Eq. (S. C.) 58, 53 Am. Dec. 653; Kaiser *v.* Alexander, 144 Mass. 71, 12 N. E. 209. *Compare* Richmond Union Pass. R. Co. *v.* New York S. B. R. Co., 95 Va. 386, 28 S. E. 573.

Rule Stated. — In Poultney *v.* Ross, 1 Dall. 238, where the entries were charged against the defendant, although the goods were delivered to a third person, the court in holding the book inadmissible, said: "The practice in this respect, however, has been confined to charge the original debtor to whom the goods were sold; for the necessity of the case only required that the plaintiff should be allowed to prove the actual delivery; and it would be highly dangerous if the evidence were extended to establish the assumption of a third person to pay the debt."

In Presbyterian Church *v.* Allison, 10 Pa. St. 413, an action to enforce a mechanic's lien for materials furnished in the erection of a church for which the plaintiff, in his books, had charged the contractor only, it was held that the plaintiff's book was competent evidence of the items and the amount of the debt, and that the plaintiff might show by other evidence that the materials were in fact furnished upon the credit of the building.

In Winslow *v.* Dakota Lumb. Co., 32 Minn. 237, 20 N. W. 145, it was held that the fact that the goods, the prices of which were sued for were charged on the plaintiff's book of account to a third person instead of the defendant, while proper to be considered by the jury upon question to whom the credit was given, was not decisive against the admissibility of the books in evidence. See also Fiske *v.* Allen, 8 Jones & S. (N. Y.) 76; Greene *v.* Burton, 59 Vt. 423, 10 Atl. 575; Mackey *v.* Smith, 21 Or. 598, 28 Pac. 974.

In Connecticut the statute (Gen. Stat. § 1041) provides that in all actions for a book debt the entries of the parties' in their respective books shall be admissible in evidence. And the practice act, § 31 makes them admissible in all actions for the recovery of a book debt. And in Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998, an action to recover from the defendant for goods delivered to the defendant's agent, it was held that the plaintiff's books were competent to prove not only that the goods charged to the defendant were sold and delivered but that they were sold to the defendant.

4. Dicken *v.* Winters, 169 Pa. St. 126, 32 Atl. 289.

On an issue as to whether the goods sued for were sold to the defendant through his agent or to the defendant's agent to whom they were delivered, the plaintiff's books were admissible to show to whom the goods were in fact charged and to whom the credit was given. Montague *v.* Dougan, 68 Mich. 98, 35 N. W. 840.

In Smith *v.* Jessup, 5 Harr. (Del.) 121, the entries in the books in question were against the agent, and it was held that the books were admissible in evidence to prove what they purport to prove, but not to charge the defendant unless the agency for the defendant should be otherwise satisfactorily proved.

The fact that the vendor of goods charged for upon his books to an agent, instead of to the principal, although strong, is not conclusive evidence that the credit was given exclusively to the agent. Foster *v.* Persch, 68 N. Y. 400.

In an action to charge a defendant for goods alleged to have been sold on his account to his agent, the plaintiff's books charging the goods against the agent are competent to show that the agent had the goods charged. Davis *v.* Dyer, 60 N. H. 400.

(4.) Alternative Charges. — The fact that the account in question is charged on the books in the alternative form against either of two persons named therein does not affect the admissibility of the book but only goes to its credit.[5]

(5.) Joint Charges. — Entries in a party's books of account charging two persons jointly, but not as co-partners are admissible together with his suppletory oath without previous evidence of the joint contract.[6]

(6.) Charges Against Partnership. — After some evidence has been given of the existence of a partnership between the defendants, the plaintiff's book of original entries containing charges against the defendants is admissible in evidence for the plaintiff as evidence of the debt against the partnership but not as evidence of partnership.[7]

b. *Delivery to Third Person.* — **(1.) Generally.** — Books of account are not admissible to prove the delivery of goods where it appears that the goods were delivered to a person other than the one charged in the book[8] who might be produced as a

5. Burnell *v.* Dunlap, 11 Iowa 446.

6. Box *v.* Welch, Quincy (Mass.) 227. See also Bowers *v.* Still, 49 Pa. St. 65.

Where one of two joint contractors is sued on an open account, plaintiff's books of account, defendant not having objected to the non-joinder by plea in abatement, may be given in evidence, although the account therein is charged to the defendants jointly. Exum *v.* Davis, 10 Rich. Law (S. C.) 357.

7. Johnston *v.* Warden, 3 Watts (Pa.) 101. See also Williamson *v.* Fox, 38 Pa. St. 214.

In an action against defendants to charge them as co-partners for goods sold, defended on the ground that the goods were sold to one of the defendants individually, the plaintiffs' books of account charging goods against the co-partnership are competent as tending to show with whom the plaintiffs understood they were transacting business and to whom they looked for payment. Sanborn *v.* Cunningham, (Cal.), 33 Pac. 894.

8. Steel *v.* Thomas, 5 Harr. (Del.) 267. See also Gorman *v.* Montgomery, 1 Allen (Mass.) 416; Textile Pub. Co. *v.* Smith, 31 Misc. 271, 64 N. Y. Supp. 123; Townley *v.* Wooley, 1 N. J. Law 377; Deas *v.* Darby, 1 Nott & McC. (S. C.) 436; Keith *v.* Kibbe, 10 Cush. (Mass.) 35.

In Kuenster *v.* Woodhouse, 101 Wis. 216, 77 N. W. 165, an action against the defendants as bankers to recover an alleged balance on a bank account against which the defendants alleged a counter-claim for a balance due over and above all set-offs and payments, it was held that the entries in the defendant's bank journal of all moneys received and paid out on a certain date were only evidence in so far as they showed transactions with the plaintiff.

In Phillips *v.* Tapper, 2 Pa. St. 323, an action of trover for an interest in a boat which plaintiff bought, to be paid for by freights, it was held that entries in a book kept by the plaintiff in the boat of the delivery of goods to third persons although coupled with proof that during the time when the entries were made, he carried freight for no one but the defendant, were not admissible evidence for the plaintiff, no charge being made in the entries against the defendant.

In Gamber *v.* Wolaver, 1 Watts & S. (Pa.) 60, assumpsit for the price of charcoaling wood for the defendant at a fixed price per cord, it was held that the book of the defendant containing entries of the amount of wood taken up from the choppers

witness.[9] So also where it appears that the articles were delivered by a third person.[10]

But after evidence tending to show that the plaintiffs were authorized to furnish goods to a third person upon the credit of the defendant,[11] it is competent to show such delivery by their books of account in which the account is charged to the defendant.[12]

(2.) Delivery to Agent. — On an issue as to whether goods were sold by the plaintiffs to the defendants through their agent or to

and its dockage was not competent evidence for the defendant on the issue as to the quantity of wood charcoaled.

In Dunlap *v.* Hooper, 66 Ga. 211, where the entries were charged against the defendant, although for goods delivered to a third person; it was held that the books were admissible to show to whom the goods were in fact charged.

In Chastain *v.* Brown, 31 Ga. 346, an action to recover goods charged on the plaintiff's books as sold to defendant "per" various persons; it was held that the books were properly admitted in evidence because in the absence of proof to the contrary the fair presumption was that the articles were sold to the defendant and not to the third person; but delivered to them at the request or by the direction of the defendant.

9. Eastman *v.* Moulton, 3 N. H. 156; Webster *v.* Clark, 30 N. H. 245.

10. McIlvane *v.* Wilkins, 12 N. H. 474.

11. In Taylor *v.* Dickey, 2 Brev. (S. C.) 131, an action for goods which it appeared were delivered to a third person, it was held that such third person was a competent witness to prove that the goods which were charged to the defendant were received by the witness on the defendant's account and applied to the defendant's use. *Compare* Townley *v.* Wooley, 1 N. J. Law 377.

12. Woodward *v.* Remington, 81 Hun 160, 30 N. Y. Supp. 743; Buckingham *v.* Murray, 7 Houst. (Del.) 176, 30 Atl. 779.

In an action to recover for goods sold and delivered to a third person under an alleged agreement with the defendant whereby the latter agreed to be individually responsible, an entry of the order in the plaintiff's order book, headed with the defendant's name is competent to show that the plaintiff acted on the order and charged the goods to the defendant. Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 17.

In Gilbert *v.* Sage, 57 N. Y. 639, an action to recover for goods delivered to a person other than the defendant under an alleged agreement with the defendant, whom they were to be charged to and paid for by the latter, it was held proper for one of the plaintiffs and his clerks, by whom the sales and deliveries were proved, to testify as to the entries made by each in the day book, each witness swearing that he sold the goods charged and made the charge, though unable to state the details save from the entries; and that the question was not affected by the fact that goods sold on orders were not entered in items, but only the name of the person in whose favor the order was drawn and the amount.

When the order from the defendant to deliver goods to a third person is proved by evidence to which there is no objection, the delivery of the goods may be proved by the plaintiff's books, whenever a delivery to the defendant himself could be thus proved. Mitchell *v.* Belknap, 23 Me. 475.

In an action to recover for work done for a third person on the credit of the defendant, it is proper for the plaintiff to introduce in evidence his books of account charging the defendant with work done, where the person for whose benefit the work was done cannot as a witness recall the dates nor the particular items of the plaintiff's account. Ball *v.* Gates, 12 Metc. (Mass.) 491.

such agent individually, the original entries on the plaintiffs' books charging goods to the defendants are admissible for the plaintiffs.[13]

(3.) Delivery to Wife. — In an action against a husband for necessaries sold to his wife, the plaintiff's shop books together with his suppletory oath are admissible to show the sale of the goods.[14]

C. Matters Other Than, or Collateral to, Debit and Credit. — a. *In General.* — It is very generally held that books of account are not competent evidence to prove matters independent of and collateral to the issue of debit and credit between the parties,[15] as illustrated by the cases set out below.[16]

Ownership of Property. — Books of account of a plaintiff in an action against a sheriff for the unlawful seizure of the plaintiff's goods under an execution against a third person were competent evidence for the plaintiff, not under the principle on which shop books are generally admitted, but as a part of the *res gestae* tend-

13. Downer *v.* Morrison, 2 Gratt. (Va.) 250.

14. Furlong *v.* Hysom, 35 Me. 332. See also Breinig *v.* Meitzler, 23 Pa. St. 156; Dexter *v.* Booth, 2 Allen (Mass.) 559.

15. Mulhall *v.* Keenan, 18 Wall. (U. S.) 342; Palmer *v.* Goldsmith, 15 Ill. App. 544; Corner *v.* Pendleton, 8 Md. 337; Gage *v.* McIlwain, 1 Strob. Law (S. C.) 135; Moody *v.* Roberts, 71 Miss. 74; Juniata Bank *v.* Brown, 5 Serg. & R. 226.

Rule Stated. — In Woods *v.* Allen, 18 N. H. 28, the court said: "The book in which a party keeps his accounts is evidence of the state of his dealing with the parties whose accounts are there kept, for the purpose of showing the state of indebtedness between them, arising from the delivery and sale of commodities, the performance of services, payments, and the like. But for collateral objects this kind of a document is not admitted in behalf of the party who has kept it. If the question at issue were, whether the defendant owed the plaintiff for the hire of his sleigh, the book would be evidence, but it is not the proper evidence to show that the defendant went to a dancing school, while he should have been at work."

16. In Woods *v.* Dennett, 12 N. H. 510, an action upon an agreement by the defendant to pay the plaintiff for articles delivered to a third person, it was held that the plaintiff could not, for the purpose of rebutting the defendant's evidence that such third person had paid the plaintiff by labor, introduce his own books of account verified by his oath to show charges against such third person while he was in the plaintiff's employ.

In Fuller *v.* Saxton, 20 N. J. Law 61, an action to recover real estate it was held that the defendant could not introduce in evidence his books of account containing a settlement between himself and a third person since deceased, signed by both, for the purpose of proving that whilst such third person exercised various acts of ownership over the premises in dispute he acted as the defendant's agent and recognized him as the owner.

In Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323, on an issue as to the time of a professional visit of the defendant to the plaintiff of which a witness gave evidence, who also testified to professional visits to other persons made by the defendant on the same day; it was held that the defendant's book of accounts purporting to contain his daily entries made at the times indicated and showing charges against other persons mentioned as being visited by the defendant was not competent to show the time of his visits.

ing to show the nature of the plaintiff's possession of the property in controversy.[17]

Pecuniary Condition. — In an action on an attachment bond it is competent for the plaintiff to rebut the defendant's evidence as to his pecuniary embarrassment by proof of outstanding accounts due to him in the course of his business by introducing in evidence his books of account accompanied with evidence showing the correctness of the accounts as charged.[18]

Partnership. — A party cannot by his books of account prove that another whom he has charged as such therein, but with whom he had no direct dealings, is a member of a firm to whom he has sold the goods charged.[19]

Value of Insured Goods. — In an action against an insurance company for the value of a stock of goods destroyed by fire, the day-books, ledgers and other books of account of the insured kept in the usual course of his business and showing the amount and value of the goods destroyed are competent evidence when properly verified or authenticated.[20]

b. *Terms of Disputed Contract.* — Books of account are not competent to prove a special agreement by an entry therein setting forth the agreement.[21]

17. Welch *v.* Cooper, 8 Pa. St. 217. "A man's exclusive possession of personal property is his own act," said the court, "either by himself or by his agent, and is often established by a variety of circumstances. The books of the store were the best evidence of the manner in which the business was conducted. They afford daily record of the business, and were offered in evidence for the purpose of establishing that they were kept in the name of the plaintiff."

18. Lockhart *v.* Woods, 38 Ala. 631.

In Smith *v.* Vincent, 15 Conn. 1, 38 Am. Dec. 52, the issue was as to the fraudulent character of the debt on which the defendant's judgment was rendered; and it was held that the defendant could not, for the purpose of showing his financial condition, introduce in evidence his books of accounts showing only amounts claimed to be due to him but containing no entries of debt due by him.

19. Severance *v.* Lombardo, 17 Cal. 57. See also Brackett *v.* Cunningham, 44 Minn. 498, 47 N. W. 157.

20. Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855. To the same effect Ins. Co. *v.* Weide, 9 Wall. (U. S.) 677. *Ibid.* 14 Wall. (U. S.) 375; Jones *v.* Mechanics' F. Ins. Co., 36 N. J. Law 29, 13 Am. Rep. 405; Coleman *v.* Retail Lumbermen's Ins. Assn., 77 Minn. 31, 79 N. W. 588.

21. Jeffries *v.* Castleman, 68 Ala. 432; Ward *v.* Powell, 3 Harr. (Del.) 379; Lyman *v.* Bechtel, 55 Iowa 437, 7 N. W. 673; Fifth Mut. Bldg. Soc. *v.* Holt, 184 Pa. St. 572, 39 Atl. 293; Wilson *v.* Wilson, 6 N. J. Law 95; Danser *v.* Boyle, 16 N. J. Law 395; Griesheimer *v.* Tenenbaum, 124 N. Y. 650, 26 N. E. 957; Horton *v.* Wood, 66 Hun 632, 21 N. Y. Supp. 178 (terms of contract). See also Purchase *v.* Mattison, 2 Robt. (N. Y.) 71; Daum *v.* Neumeister, 2 Mo. App. 597; Phillips *v.* Tapper, 2 Pa. St. 323; Stuckslager *v.* Neel, 123 Pa. St. 53, 16 Atl. 94; Pritchard *v.* McOwen, 1 Nott & McC. (S. C.) 131 n; Hazer *v.* Streich, 92 Wis. 505, 66 N. W. 720; Stillwell *v.* Farewell, 64 Vt. 286, 24 Atl. 243 (where it was held that such an entry was admissible only as corroborative of the plaintiff's testimony and not as

The Charge of a Bond, Note or Receipt in the book of accounts is not legal evidence of them or their contents.[22]

Entry Made in Presence of Parties. — An entry in a party's books of account stating the terms of a contract between himself and the party charged is competent evidence in proof of the contract where it appears that the entry was made under the party's direction and dictation by his book-keeper and in the presence of both parties and then read to the parties by the book-keeper.[23]

Settlement. — A mere entry made by a party on his books of account of a settlement with another and charging the latter with the balance due on such settlement is not, as against the party charged legal evidence of such settlement.[24]

affording direct evidence of the terms of the contract and should be submitted to the jury under a proper charge restricting the entry as to its effect).

In an action for labor performed by the plaintiff for the defendant, the defendant cannot prove by his books of account the rate of wages which he is to pay the plaintiff. Silver *v.* Worcester, 72 Me. 322.

Defendant's books of account are not competent to prove a transfer of the individual accounts of the members of the defendant firm against the plaintiff. Bracken *v.* Dillon, 64 Ga. 243, 37 Am. Rep. 70.

22. Wilson *v.* Wilson, 6 N. J. Law 95; Henshaw *v.* Davis, 5 Cush. (Mass.) 145. See also Estes *v.* Jackson, 21 Ky. L. Rep. 859, 53 S. W. 271 (where the entry in question was an entry closing a book account as settled by note); Ferrand *v.* Gage, 3 Vt. 326.

In Rosenberger *v.* Bitting, 15 Pa. St. 278, an action by an indorsee of a negotiable note against the maker; it was held that the indorsee's day-book containing entries of an account against the indorser and crediting him with the note in suit and his ledger containing the items in the day-book posted within two or three days afterwards, and in the ordinary course of business, were competent evidence for the indorsee as a part of the *res gestae* to prove the consideration for the transfer of the note.

In Barlow *v.* Butler, 1 Vt. 146, it was held that the plaintiff might charge on his books of account for a note executed by him to the defendant at a time when a credit was given by him to the defendant for a note surrendered, the note charged being the balance due.

In Connecticut the rule is, bills of exchange, orders, bank checks, and promissory notes when assigned are properly chargeable on the assignee's book of accounts in the regular course of business. Hunt *v.* Pierpont, 27 Conn. 301, (where it was expressly held that where the assignee of a due bill had surrendered it to the maker on an agreement that he might charge it on the book, a charge thereof on book was proper.)

In Stores *v.* Stores, 1 Root (Conn.) 139, it was held that an order drawn by the plaintiff on a third person for value received in favor of the defendant and delivered to him might be charged on the plaintiff's book and the plaintiff allowed to swear to it.

23. Hazer *v.* Streich, 92 Wis. 505, 66 N. W. 720.

24. Prest *v.* Mercereau, 9 N. J. Law 268.

In Powers *v.* Hamilton 6 Blackf. (Ind.) 293, it was held that the plaintiff might show by his books of account that a note set up by the defendant as a set-off had been credited to the latter in an account between the parties on a previous settlement thereof. The court said: "This is not permitting a party to introduce his account book for the purpose of establishing the propriety of *ex parte* entries in his own favor therein made, but in order to prove a transaction in which both parties participated.

c. *Performance of Contract.* — Book entries are not admissible to prove the performance of a contract,[25] unless the making of the entry is itself the performance of the contract.[26]

d. *Contradiction of Contract.* — Again mercantile books of account are not competent evidence to contradict a special contract.[27]

e. *Negative.* — So, it is generally held that mercantile books can only be admitted as affirmative evidence, and are not competent to establish a negative proposition,[28] although this statement has been

The settlement was as much the act of the defendant as of the plaintiff, and by it the former sanctioned the debits and credits embraced in the account; and it was proper for the jury to say whether, among the credits, was the note, the payment of which the defendant is now attempting to enforce by way of set-off."

25. Phillips *v.* Tapper, 2 Pa. St. 323; Eshleman *v.* Harnish, 76 Pa. St. 97.

The performance or non-performance of an agreement for the purchase of land is not a fact within the rule supposed to arise out of necessity which permits such matters to be proved by books of account. Kerns *v.* McKean, 76 Cal. 87, 18 Pac. 122. See also McPherson *v.* Neuffer, 11 Rich. Law 267.

26. In Ross *v.* Brusie, 70 Cal. 465, 11 Pac. 760, a suit to compel a reconveyance of land which the plaintiff had conveyed to the defendant, the purchase price of which was to be credited on a debt due from the plaintiff to the defendant, it was held competent for the defendant to introduce in evidence his books of account for the purpose of showing that he had performed his part of the contract and given the plaintiff the credit in question.

In Moore *v.* Knott, 14 Or. 35, 12 Pac. 59, a suit by the plaintiff individually and as assignor of claims for services rendered to the defendants, it was shown that there had been an agreement between the parties that the accounts of the plaintiff and his assignors in the defendant's books of accounts should be transferred to the account of one of the members of the defendant firm therein, and it was held that the books were then necessarily evidence of whether the defendants had performed the agreement by transferring the accounts as promised.

On an issue as to whether goods sold were to be paid for in cash or were received in part payment of a debt due to the purchaser from a firm of which the seller was a member, it is competent for the purchaser after testifying that the goods were so received by him to introduce an entry in his ledger crediting such firm with the amount of the purchase, not for the purpose of corroborating his own testimony, but to show a fulfillment of the contract on his part; and the mere fact that the entry does in part show the terms of the agreement does not affect its competency for that purpose. Griesheimer *v.* Tanenbaum, 28 N. Y. St. 653, 8 N. Y. Supp. 582.

27. Pritchard *v.* McOwen, 1 Nott & McC. (S. C.), 131 n.

In Hynes *v.* Campbell, 6 T. B. Mon. (Ky.) 286, it was held that an entry in a vendee's books of account stating the consideration of a deed to real estate to be greater than that recited in the deed itself, was not legal evidence to control and add to the deed in an action between the parties to the deed or persons claiming under them.

28. Lawhorn *v.* Carter, 11 Bush (Ky.) 7; Winner *v.* Bauman, 28 Wis. 563; Schwarz *v.* Roessler, 40 Ill. App. 474; Kerns *v.* McKean, 76 Cal. 87, 18 Pac. 122, s. c. 77 Cal. 555; Riley *v.* Boehm, 167 Mass. 183, 45 N. E. 84; Mattocks *v.* Lyman, 18 Vt. 98, 46 Am. Dec. 138; Keim *v.* Rush, 5 Watts & S. (Pa.) 377.

In Boor *v.* Moschell, 55 Hun 604, 8 N. Y. Supp. 583, on an issue as to whether or not the makers (a firm) of a note had ever executed the note

characterized as being too broad.[29] And there is authority to the effect that the account books of a commercial house presumably kept in the usual way afford some evidence of the non-payment of a claim where no credit or evidence of a payment appears on such books.[30]

f. *Contradiction of Witnesses or Evidence.* — When witnesses refer to books in aid of their testimony and especially when they state that they only know certain matters from having seen them in the books,[31] such books are clearly competent to show the im-

in suit, or if executed whether the member of the firm executing it had authority for that purpose, the firm's books of account are not competent evidence for the purpose of showing that there is no entry therein of the note in suit.

29. In Lawrence *v.* Stiles, 16 Ill. App. 489, the court characterized the rule laid down by Lawhorn *v.* Carter, 11 Bush. (Ky.) 7, as being broader than was required by the case or sustained by the authority relied on: Morse *v.* Potter, 4 Gray (Mass.) 292, where it was held that the time book of the employer showing certain days on which the laborer worked was not competent to show that he did not work on other days for which he also claimed, and the reason given was that it was a book of credits only and not of charges.

In this case (Lawrence *v.* Stiles, 16 Ill. App. 489), the issue was whether or not the defendant had made a deposit with the plaintiff bank as shown by his pass-book, but for which there was no entry in the bank books, the bank books were received without objection but it was argued that they were not competent to prove negatively the fact of no deposit being made because there was no entry of it on the bank books; but it was held that if the books were admissible at all no objection could be seen to their use for what they were worth.

In Ford *v.* Cunningham, 87 Cal. 209, 25 Pac. 403, the issue was whether or not certain goods sold by the plaintiff were sold to the defendant or to a firm of which the defendant was a member; and it was held that the ledger of the firm duly identifying and showing the firm's account with the plaintiff during the time covered by the sale in question was competent evidence for the defendants to show that there was no item covering the sale in question in the account, on proof that the ledger showed the true state of the account between the parties, and that the items had been entered at the time of the transactions recorded.

30. Union School Furniture Co. *v.* Mason, 3 S. D. 147, 52 N. W. 671.

31. Davenport *v.* Cummings, 15 Iowa 219. To the same effect see Moyes *v.* Brumeaux, 3 Yeates (Pa.) 30; Terry *v.* McNeil, 58 Barb. (N. Y.) 241.

In Cross *v.* Willard, 46 Vt. 73, an action to recover for the sale and delivery of goods by the plaintiff to the defendant's intestate which the defendant claimed had not been sold but had been merely left on deposit, the plaintiff's salesman testified to their sale to the defendant's intestate and that the latter had directed his clerk to credit the plaintiff with the goods on his books; and it was held proper for the defendant to introduce such books, identified and proved by the clerk in connection with the clerk's testimony that no order was given him to enter such a credit for the purpose of showing that no credit was in fact given.

In Hartley *v.* Weideman, 175 Pa. St. 309, 34 Atl. 625, an action to recover property taken by the defendant under execution against his judgment debtor, under which the plaintiff claimed by purchase, the *bona fides* of the defendant's judgment was attacked on the ground that the judgment note was for more than was actually due, it was held competent for the plaintiff to introduce in evidence the judgment debt-

probability of or a mistake in their testimony. It is the same as if they had referred to any other memorandum or writing. And who kept the books is not material.[32] Nor is it necessary in such a case to introduce the preliminary proof required for their admission as books of account. When the books referred to by the witnesses are sufficiently identified they are properly admitted.[33]

g. *Corroboration of Other Testimony.* — A party's books of account may be received, not as books of original entries, but in connection with and in corroboration of his testimony.[34] And where

or's books showing the amount due to the defendant to be less than the amount of the note which the debtor had testified was the amount due.

In Doolittle *v.* Gavagan, 74 Mich. 11, 41 N. W. 846, an action to recover for goods sold which the defendant claimed had been paid; it was held that after the defendant had been permitted to introduce in evidence a draft bought by a member of the firm, since deceased, for an amount more than enough to cover the defendant's debt, it was proper to permit the plaintiffs to introduce in evidence a cash book kept by the deceased member of the plaintiff firm containing a list of names of persons from which he had made collections up to about the time of the alleged payment by the defendant and the amount collected from each and showing thereby that the defendant's name did not appear in the list.

In Darlington *v.* Taylor, 3 Grant's Cas. (Pa.) 195, an action to recover rent due the plaintiff from his tenant which the defendant had agreed to pay out of funds in his hands belonging to the tenant; it was held competent for the defendant, for the purpose of contradicting the tenant's testimony that he had funds in his hands belonging to the tenant and applicable to the payment of the rent, to introduce in evidence his books of account proved to have been submitted to the tenant without objection on his part showing that there were no funds in his hands as claimed.

In Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266, a witness for the defendant had testified to sales by the plaintiff to customers at certain prices, and it was held competent for the plaintiff to introduce in evidence his books of account for the purpose of contradicting such witness on proof by his book-keeper that the entries were original and made by him contemporaneously with the transactions recorded, and that he knew they were correct at the time.

32. In Healey *v.* Wellesley & B. St. R. Co., 176 Mass. 440, 57 N. E. 703, an action to recover for personal injuries sustained by the plaintiff, it was held competent for the purpose of contradicting the testimony of a witness for the defendant as to the absence of the plaintiff from work immediately following the accident, to introduce in evidence a time book turned in by such witness to his employer, who was also plaintiff's employer, showing the time worked by the employees under his direction during the time covering the accident in question; and that the fact that the entries were not made by the witness was immaterial, since his act in turning in the book as the record of the time worked by the men under him amounted to a representation that they had worked the time therein entered.

33. Davenport *v.* Cummings, 15 Iowa 219.

34. Charles *v.* Bishoff, (Pa. St.), 1 Atl. 572. See also La Belle Sav. Bank *v.* Taylor, 69 Mo. App. 99; Johnson *v.* Morstad, 63 Minn. 207, 65 N. W. 727; Wanheimer *v.* Stern, 45 N. Y. St. 648, 18 N. Y. Supp. 366; Elsworth Coal Co. *v.* Quadi, 28 Mo. App. 421. *Compare* People *v.* Gemung, 11 Wend. (N. Y.) 18, 25 Am. Dec. 594; Smith *v.* Martin, 66 N. Y. St. 374, 32 N. Y. Supp. 943;

entries in books of account claimed to have been made at the time of the transactions recorded are introduced in evidence only for the purpose of corroborating the testimony of the party keeping them, as to the dates of those transactions it is not necessary that the books be proved in accordance with statutes relating to account books.[35]

h. *Corroborating Impeached Witness.* — A party's books of account may be received in evidence in his behalf for the purpose of corroborating the testimony of one of his witnesses who has been impeached.[36]

Bank *v.* Whitney, 3 Allen (Mass.) 454.

In Cahill *v.* Hirshman, 6 Nev. 57, an action by the plaintiffs as stock-brokers to recover from the defendants for moneys paid for stocks alleged to have been purchased by them on the defendants' order; it was held that after the defendants had introduced a statement of accounts rendered to them by the plaintiffs from their ledger which did not include any charge for the stocks in question, although rendered after its purchase, it was competent for the plaintiffs, in support of their testimony that the statement of the account rendered was only a partial statement, to introduce in evidence their ledger containing an entry charging for the stocks in question and one other item in addition to those contained in the statement of account: not for the purpose of proving the original purchase or transaction, but merely in rebuttal of the defendants' testimony and corroboration of the plaintiffs' claim.

An entry in a real estate broker's books relating to property placed in his hands for sale and indicating the selling price made at the time when the direction for its sale was given by the seller, as a part of the interview and in the presence and sight of the seller, is admissible as a part of the *res gestae* as original evidence in corroboration of testimony of the agent that at the date mentioned the seller directed him to sell for the price indicated. Monroe *v.* Snow, 131 Ill. 126, 23 N. E. 401.

In an action of slander for falsely charging the plaintiff with being interested with another in the larceny of certain property, it was held that the plaintiff could not introduce in evidence his book of account to prove certain entries therein showing that he had entered the property in question as having been purchased by him with a view to show his good faith in receiving it. Barkly *v.* Copeland, 86 Cal. 483, 25 Pac. 1.

An entry in a book of accounts introduced for the purpose of corroborating the testimony of the party who made it is admissible only as evidence of the facts stated therein, and not as to conclusions recited. People *v.* McLaughlin, 150 N. Y. 365, 44 N. E. 1017.

35. Bean *v.* Lambert, 77 Fed. 862.

36. Welch *v.* Cooper, 8 Pa. St. 217. See also Reilly *v.* English, 9 Lea (Tenn.) 16; Missinquoi Bank *v.* Evarts, 45 Vt. 293. *Compare* People *v.* Martin, 66 N. Y. St. 374, 32 N. Y. Supp. 943.

Where a witness for one party, on being cross-examined as to a particular transaction, states that he paid a certain sum of money to the plaintiff, and the witness's credit is attacked, and the transaction impeached on the ground of fraud, it is competent for such party to show by his books of account that he had entered a credit for such money at the time alleged. Fain *v.* Edwards, 11 Ired. Law (N. C.) 305. The court said: "If, instead of entering the credit on his book, the plaintiff had given the witness a receipt for it, or a note promising to pay it, would it not have been competent for him to sustain the credit of the witness, by showing the one or the

i. *Memoranda to Refresh Memory.* — A witness may for the purpose of refreshing his memory use a book of accounts, made by himself and with his memory thus refreshed, testify to the facts entered of his own knowledge, the books themselves not being evidence.[37] But when a witness has so far forgotten the facts that he cannot recollect them even after looking at the books and he testifies that he knew them and entered them on the books at the time or soon after they transpired, which he intended to make and which he believed to be correct, the entries in his handwriting may be received as evidence of a statement of the facts therein contained.[38]

II. ADMISSIBILITY AGAINST PARTY BY WHOM, OR FOR WHOM, KEPT.

1. Entries by the Party. — A. In General. — An entry in a book of accounts is competent evidence against the party whose book it is, on proof that the entry is in his handwriting,[39] as illustrated by the cases set out below.[40]

other? We think, unquestionably it would. If so, why is not the entry in the book evidence? We can see no difference in principle in these cases and the one under consideration, except that, in the present case, the evidence of the fact was in the custody of the plaintiff; in the other in that of the witness."

37. Friendly *v.* Lee, 20 Or. 202, 25 Pac. 396; St. Paul F. & M. Ins. Co. *v.* Gotthelf, 35 Neb. 351, 53 N. W. 137; Howard *v.* McDonald, 77 N. Y. 592. And see Bonnett *v.* Glatfeldt, 120 Ill. 166, 11 N. E. 250.

38. Costello *v.* Crowell, 133 Mass. 352; Howard *v.* McDonald, 77 N. Y. 592.

"An original entry or a memorandum made by a witness at the time of a transaction is admissible in evidence, as auxiliary to his testimony, only when without its aid he is unable to distinctly recollect the fact to which it relates. The evidence is admitted only as a matter of necessity. Where the witness has a distinct recollection of the essential facts to which the entry relates, so that primary common law proof may be furnished, the necessity for secondary evidence does not arise, and it is incompetent." People *v.* McLaughlin, 150 N. Y. 365, 44 N. E. 1017 and numerous other cases cited.

See More Fully on This Question article "Refreshing Memory."

39. *Canada.* — Miller *v.* White, 16 Can. Sup. Ct. 445.

Alabama. — Lang *v.* State, 97 Ala. 41, 12 So. 183; Gray *v.* Perry Howe Co., 111 Ala. 532, 20 So. 368.

Arkansas. — Wallace *v.* Bernheim, 63 Ark. 108, 37 S. W. 712.

Iowa. — Lyons *v.* Thompson, 16 Iowa 62.

Kansas. — Beyle *v.* Reid, 31 Kan. 113. 1 Pac. 264.

Mississippi. — Broach *v.* Worthheimer-Swartz Shoe Co., (Miss.), 21 So. 300.

South Carolina.—Archer *v.* Long, 38 S. C. 272, 16 S. E. 998.

Texas. — Rogers *v.* State, 26 Tex. App. 404, 9 S. W. 762; Loomis *v.* Stuart, (Tex. Civ. App.), 24 S. W. 1078.

40. On an Issue as to the Fraudulent Character of a Transfer by a judgment debtor to his mother, the debtor's books of account showing that whatever money had been loaned to him by his mother, had prior to the time of the transfer been substantially repaid, are competent evidence not only against the debtor but also against the mother. Saugetties Bank *v.* Mack, 34 App. Div. 494, 54 N. Y. Supp. 360. *Compare* Commercial Bank *v.* Bolton, 87

B. As Admissions, or Declarations Against Interest.—Again entries in a party's books of account made by him in the regular course of his business are competent evidence against him and on behalf of the adverse party when in the nature of admissions,[41] or as declarations against his interest.[42]

2. Entries by Servant or Agent. — A. In General. — Again an entry in a party's book of accounts is competent evidence against

Hun 547, 35 N. Y. Supp. 138, wherein it was held that entries in the grantor's books made or caused to be made by him before any transfer was contemplated are competent against him as bearing upon his intent to defraud creditors other than the grantee, but are in no sense competent evidence as against the grantee. See also Marmiche *v.* Commagere, 6 Mart. (N. S.) La. 657.

On an issue as to the validity of an assignment by a merchant, the books of the assignor are competent to show what other persons were his creditors and in what amount they were such creditors. Meridian Fertilizer Factory *v.* Edwards, 77 Miss. 697, 27 So. 645.

In Com. *v.* Jacobs, 152 Mass. 276, 25 N. E. 463, a prosecution for assisting in maintaining a place kept by a club for the purpose of the illegal sale of intoxicating liquors, it was held that the prosecution might introduce a book found on the premises, of which the plaintiff had the care and which he might have seen.

41. German Nat. Bank *v.* Leonard, 40 Neb. 676, 59 N. W. 107; Plummer *v.* Struby-Estabrooke M. Co., 23 Colo. 190, 47 Pac. 294. See also Winter *v.* Newell, 49 Pa. St. 507.

In an action by judgment creditors to set aside a transfer by the debtor to the defendants as fraudulent but which the defendants claimed was in consideration of a precedent debt to them from the debtor, it is competent for the plaintiffs to show by the transferee's books of account that there was no charge of the debt in his books and by the debtor's books of account containing entries debited and credited and that there was no entry of the debt upon his books. Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99. See also White *v.* Benjamin, 150 N. Y. 258, 44 N. E. 956; Bicknell *v.* Mellett, 160 Mass. 328, 35 N. E. 1130 (where the court said that in such cases the debtor's books were competent as tending to show at least what he thought his condition was at the time of making the alleged fraudulent transfer). Cluett *v.* Rosenthal, 100 Mich. 193, 58 N. W. 1009, 43 Am. St. Rep. 446; Stockbridge *v.* Fahnestock, 87 Md. 127, 39 Atl. 95; Franklin *v.* Gumersell, 11 Mo. App. 306.

42. McCain *v.* Peart, 145 Pa. St. 516, 22 Atl. 981.

In an action by an agent to recover for services rendered to his principals under a contract which they had terminated, an entry on the defendant's books made by them on the day when they terminated the contract crediting the plaintiff with his labor up to that time is proper evidence for the plaintiff and against the defendants to show that they waived any claim of forfeiture by the plaintiff, although they had made the entry in the plaintiff's absence and without his knowledge. Bell *v.* Smith, 99 Mass. 617.

In Orrett *v.* Corser, 21 Beav. 52, a suit by the beneficiary of a trust against the representative of the trustee to recover the fund after his death; it was held that an entry in the trustee's book crediting himself with payment of the fund to a person not entitled thereto was admissible because it did not discharge the trustee but on the contrary was an admission against his interest; the fact of his having paid the fund to a wrong person not operating as a discharge of his estate.

him on proof that it is in the handwriting of his servant or agent,[43] or if the entry appears on its face to be one of a series continuing for such a length of time as to warrant the inference that the enterer was a recognized servant or agent.[44]

B. Knowledge of Enterer. — And their competency in this respect is not affected by the fact that the knowledge of the clerk or book-keeper as to the transactions entered by him was derived from other persons than the owner of the books.[45]

C. Access to Books. — So, also, entries in a party's books of account by his clerk, of transactions on account of the principal are competent evidence against the principal on proof that he had constant access to the books and assented to the entries.[46]

3. Partnership Books. — It is the general rule that entries in partnership books made in the ordinary course of business are admissible in actions between partners,[47] and they are also competent in favor of third persons in actions against the partners, as

43. Currier *v.* Boston & M. R. Co., 31 N. H. 209.

On a claim by an employee against his employer under an agreement by which the plaintiff was to receive a certain portion of the net profits of a business which the plaintiff was managing for the defendant, the defendant's books of account as kept by the plaintiff are proper evidence for either side on the issue as to whether there were in fact any net profits. Wiggins *v.* Graham, 51 Mo. 17.

In Voorhies *v.* Bovell, 20 Ill. App. 538, an action to recover for the services of the defendant's intestate as general manager of a mercantile business for the plaintiff, it was held that the books of the business kept during the time when the plaintiff was so managing it were competent to show the profits and losses of the business where there is also evidence tending strongly to show that the compensation of the defendant's intestate was to be measured by the net profits of the business managed by him.

In Cormac *v.* Western White Bronze Co., 77 Iowa 32, 41 N. W. 480, an action to recover for services alleged to be due from the plaintiff to the defendant as its secretary and manager, it was held that books of account duly authenticated as the defendants books of account were competent evidence for the plaintiff and that the fact that some of the entries were made by the plaintiff was immaterial; that he made them not for himself but for the defendant and as its agent.

44. Root *v.* Great Western R. Co., 65 Barb. (N. Y.) 619.

45. Currier *v.* Boston & M. R. Co., 31 N. H. 209.

46. Himes *v.* Barnitz, 8 Watts (Pa.) 39. See also Payne *v.* Taylor, 12 La. Ann. 765, holding that entries made by a clerk in his employer's books are *prima facie* evidence in favor of the former against the latter where it is shown that the books are annually examined by the employer, and that balance sheets were semi-annually furnished to him embracing the items in dispute.

47. Fairchild *v.* Fairchild, 64 N. Y. 471; Morris *v.* Haas, 54 Neb. 579, 74 N. W. 828; Glover *v.* Hembree, (Ala.), 8 So. 251. See also Miller *v.* White, 16 Can. Sup. Ct. 445.

In case the business of a partnership has been almost exclusively conducted by one member thereof and the books have been kept by him, the other member of the firm is entitled to introduce evidence of the incorrectness of the entries contained therein and also to show that others not entered should have been. Carpenter *v.* Camp, 39 La. Ann. 1024, 3 So. 269.

in the nature of admissions of the facts stated.[48]

Entries Upon the Books of a Firm After Its Dissolution by the retirement of one of the members made by another member without the consent or knowledge of the retiring member are not competent evidence against him.[49]

III. ADMISSIBILITY AGAINST SERVANT OR AGENT.

Entries in a party's books of account, proved to be in the handwriting of a servant or agent and against his interest, are competent evidence for his employer to charge his estate after his death.[50] And they are likewise held competent against the servant or agent as his admissions and declarations where, although not in his handwriting, they were made under his immediate care and supervision.[51]

IV. BOOKS OF THIRD PERSONS.

1. General Rule. — The general rule is that entries in the books of a third person, of transactions or accounts between such third person and others not parties to the litigation, or one of the parties litigant, are *res inter alios acta* as to the other party litigant, and inadmissible.[52]

48. Kohler *v.* Lindenmeyr, 129 N. Y. 498, 29 N. E. 957.

49. Bank of British N. America *v.* Delafield, 80 Hun 564, 30 N. Y. Supp. 600.

50. Spears *v.* Spears, 27 La. Ann. 537. See also Ganies *v.* Ganies, 39 Ga. 68.

Deceased Employee. — On a proceeding against the estate of a deceased employee to recover money claimed to have been unlawfully withheld by the deceased while in general charge of the plaintiff's business as his cashier and general book-keeper, entries in the plaintiff's books of account and in the decedent's handwriting made in the usual course of business and charging himself with money taken in an amount equal to the amount claimed by the plaintiff are proper evidence for the plaintiff. Appeal of Roberts, 126 Pa. St. 102, 17 Atl. 538.

51. San Pedro Lumber Co. *v.* Reynolds, 121 Cal. 74, 53 Pac. 410; People *v.* Leonard, 106 Cal. 302, 39 Pac. 617; Bugber *v.* Allen, 56 Conn. 167, 14 Atl. 778.

Compare Lang *v.* State, 97 Ala. 41, 12 So. 183, a prosecution of an agent for embezzling funds coming into his hands as such, wherein it is held that books of account belonging to his principal, but which are not shown to be in his handwriting, are not competent evidence against him, unless there is testimony tending to show that his attention was called to them and that he made admissions in regard to the portions offered in evidence; and that if his attention was called to parts of the books and if shown to have made admissions in relation to such parts, only the parts referred to are competent evidence against him and not the whole books.

52. *England.* — Haden *v.* Burton, 9 Car. & P. 254, 38 Eng. C. L. 107.

United States.— Chandler *v.* Pomeroy, 87 Fed. 262.

California. — Watrous *v.* Cunningham, 65 Cal. 410, 4 Pac. 408.

Connecticut. — Treat *v.* Barber, 7 Conn. 274.

Florida. — Union Bank *v.* Call, 5 Fla. 409.

Georgia. — Mercier *v.* Copelan, 73 Ga. 636.

Illinois. — Boyd *v.* Yerkes, 25 Ill. App. 527; Schwartz *v.* Southerland, 51 Ill. App. 175.

2. Entries Against Interest.—A. In General.—Where a person has peculiar means of knowing a fact and makes an entry of that fact on his books of account which is against his interest at the time, the rule that his books of account are evidence of that fact as between third persons after his death is a rule finding support in the cases cited below, either directly holding the books in question to be within the rule, or recognizing the existence of the rule and holding that the books in question do not for some reason come within the application of it.[53]

B. Application of Rule. — a. *Books Subject to Inspection by Others.* — (1.) **Generally.**—The rule admitting books of deceased third persons as containing entries against the interest of the person who made them has been frequently applied to books in which the first entry is generally of money received charging the party making

Indiana. — Harrison *v.* Lagow, 1 Blackf. 307.

Iowa. — Shafer *v.* McCracken, 90 Iowa 578, 58 N. W. 910, 48 Am. St. Rep. 465.

Mississippi. — Levy *v.* Holberg, 71 Miss. 66, 14 So. 537.

New York. — Perrine *v.* Hotchkiss, 58 Barb. 77; Isham *v.* Schafer, 60 Barb. 317; Miller *v.* Clark, 5 Lans. (N. Y.) 388; Silverman *v.* Simons, 14 Misc. 222, 35 N. Y. Supp. 668.

North Carolina. — Sloane *v.* McDowell, 75 N. C. 29.

Ohio. — Powers *v.* Hazelton & L. R. Co., 33 Ohio St. 429.

Pennsylvania.—Townsend *v.* Kerns, 2 Watts 180; Juniata Bank *v.* Brown, 5 Serg. & R. 226; Winter *v.* Neuree, 49 Pa. St. 507; Holt *v.* Pie, 120 Pa. St. 425, 14 Atl. 389.

Texas. — Martin-Brown Co. *v.* Perrill, 77 Tex. 199, 13 S. W. 975.

Wisconsin. — Minton *v.* Underwood Lumb. Co., 79 Wis. 646, 48 N. W. 857; Brickley *v.* Walker, 68 Wis. 563, 32 N. W. 773.

In McKenney *v.* Waite, 20 Me. 349, assumpsit on an account annexed for work and labor; it was held that the defendant could not in support of his set-off for payments alleged to have been made by a third person for him, introduce in evidence the books of account of such third person who has since died because there was no evidence that such third person had acted as the agent or clerk for the defendant or in his behalf.

53. *England.* — Percival *v.* Nanson, 7 Ex. 1, 21 L. J. Ex. 1; Higham *v.* Ridgway, 10 East 109, 10 Rev. Rep. 235.

California. — Sill *v.* Reese, 47 Cal. 294.

Connecticut.—Bridgewater *v.* Roxbury, 54 Conn. 213, 6 Atl. 415; Livingston *v.* Tyler, 14 Conn. 493; Dwight *v.* Brown, 9 Conn. 83.

Georgia. — Field *v.* Boynton, 33 Ga. 239.

Indiana. — Johnson *v.* Culver, 116 Ind. 278, 19 N. E. 129.

Massachusetts. — Jones *v.* Howard, 3 Allen 223.

Minnesota.—Zimmerman *v.* Bloom, 43 Minn. 163, 45 N. W. 10.

New Hampshire.— Rand *v.* Dodge, 17 N. H. 343.

New York. — Forgay *v.* Atl. Mut. Ins. Co., 2 Robt. 79; Livingston *v.* Arnoux, 56 N. Y. 507; Powers *v.* Savin, 28 Abb. N. C. 463.

North Carolina. — Peck *v.* Gilmer, 4 Dev. & B. 249.

Texas. — Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46.

Vermont. — Chase *v.* Smith, 5 Vt. 556.

In Hoare *v.* Coryton, 4 Taunt. 560, it was held that an account signed by a bankrupt charging himself with a balance brought over on the day before the bankruptcy was not competent to prove the petitioning creditors' debt without positive proof that the bankrupt had acknowledged the account before the bankruptcy by evidence *dehors* the account itself.

it, and which are subject to the inspection of others,[54] as for example the books of tax collectors,[55] stewards,[56] agents,[57] bailiffs, receivers, and the like.

(2.) Agent's Books. — Books of account kept by a duly appointed agent of transactions pertaining to the business of his principal are not within the rule excluding the books of a stranger to the action but are competent evidence against the principal,[58] especially where both parties are dead, and there is strong corroborative proof of the books,[59] and they are likewise competent evidence against a person claiming under the principal.[60]

b. *Books not Subject to Inspection by Others.* — The rule has been held to have application also in respect of books not subject to such inspection by others, but which are indeed private books, retained in the custody of their owners.[61]

54. Stead *v.* Heaton, 4 Term. R. 669; Berry *v.* Bibbington, 4 Term. R. 514; Plaxton *v.* Dare, 10 Barn. & C. 17.

55. In Goss *v.* Watlington, 3 Br. & B. 132, 7 Eng. C. L. 379, it was held that entries by a deceased collector of taxes in a public book coming into his hands from his predecessor in office and by him delivered to his successor in office are competent evidence against his surety in an action on his official bond.

56. Books of Deceased Stewards. Ely *v.* Caldecott, 7 Bing. 433, 20 Eng. C. L. 192; Doe d. Strode *v.* Seaton, 2 Ad. & E. 171, 29 Eng. C. L. 62.

57. In Lichfield *v.* Stacey, 6 Car. & P. 139, 25 Eng. C. L. 320, it was held that entries signed by a deceased agent, although not in his handwriting, but by which he charges himself with the receipt of certain sums of money was admissible in evidence.

In Jones *v.* Howard, 3 Allen (Mass.) 223, an action to recover for the use and occupation of a house, it was held that books of account of plaintiff's deceased agent charging himself with money received of the defendant for rent of the premises in question were competent evidence for the plaintiff to prove that the defendant occupied the premises not adversely to the plaintiff, but by paying rent to his agent.

58. Standard Oil Co. *v.* Triumph Ins. Co., 64 N. Y. 85; Grover *v.* Morris, 73 N. Y. 473; *In re* Bolton, 71 Hun 32, 24 N. Y. Supp. 799, *affirmed* 141 N. Y. 554, 35 N. E. 1079; Lord *v.* Hutzler, (Md.), 3 Atl. 891; Dexter *v.* Berge, 76 Minn. 216, 78 N. W. 1111; General Convention of Cong. Ministers *v.* Torkelson, 73 Minn. 401, 76 N. W. 215. See also Liscomb *v.* Agate, 67 Hun 388, 22 N. Y. Supp. 126; Chateaugay Ore & Iron Co. *v.* Blake, 144 U. S. 476.

In Crusoe *v.* Clark, 127 Cal. 341, 59 Pac. 700, an action to recover for work and labor as book-keeper and clerk; it was held that the books kept by the plaintiff were admissible upon an issue as to the value of his services as showing the character and amount of book-keeping done by him.

59. Lever *v.* Lever, 2 Hill Eq. (S. C.) 158.

60. Farmers' Bank *v.* McKee, 2 Pa. St. 318.

61. Warren *v.* Greenville, 2 Stra. 1029, 2 Burr 1071; Middletown *v.* Melton, 10 Barn. & C. 317; Higham *v.* Ridgway, 10 East 109; Roe d. Brune *v.* Rawlings, 7 East 279, 8 Rev. Rep. 632.

In Anderson *v.* Edwards, 123 Mass. 273, a hearing upon charges of fraud filed by judgment creditors against a debtor at his examination upon his application to take the poor debtor's oath; it was held that the ledger and books of original entries of a savings bank showing entries of deposits to the credit of

c. *Books of Deceased Vicars.* — Again, the rule has been extended to private books of a deceased vicar or rector or of an ecclesiastical corporation aggregate, containing charges for ecclesiastic dues received, and admitted in favor of their successors, or of parties claiming under the same interest as the maker of the entries.[62]

C. Requisites to Admissibility. — a. *Interest of Enterer.* One of the principal reasons, indeed if not the most cogent, for the admissibility of this species of evidence is the fact that the entries are against the interest of the person who made them.[63] And it is held that the entry must be one which under no circumstances could operate for the advantage or to the benefit of the person making it;[64] although there is authority to the contrary.[65]

b. *Death of Enterer.* — Again, in holding entries against interest admissible, the courts hold that proof of the death of the enterer, and of his handwriting are sufficient to authorize their reception.[66]

the debtor's wife identified by the oath of the treasurer and clerk who made the entries therein, but neither of them being able by means of the books to recall the facts entered as matters of personal memory, were properly admitted in evidence for the creditors.

In Sands *v.* Hammell, 108 Ala. 624, 18 So. 489, a suit by the administrator of a principal against the surety to account for the proceeds of a life insurance policy; it was held that the defendant might show the payment by him of the principal's debt by the books of account of the principal's creditor who kept his own books and who was deceased at the time of the trial.

In Furness *v.* Cope, 5 Bing. 114, 15 Eng. C. L. 387, assumpsit to recover money alleged to have been paid by the plaintiff's assignor in bankruptcy to the defendant under a fraudulent preference, it was held that a bank's ledger was competent evidence for the plaintiff for the purpose of showing that the bankrupt had no funds in the bank's hands.

62. Young *v.* Clare Hall, 17 Ad. & E. (N. S.) 529, 79 Eng. C. L. 529; Ward *v.* Pomfret, 5 Sim. 475.

63. Warren *v.* Greenville, 3 Stra. 1129; Middletown *v.* Melton, 10 Barn. & C. 317, and see cases cited *supra* in note 53.

In Iowa, a Statute (Iowa Code 1897, § 42,) provides that "the entries or other writings of a person deceased who was in a position to know the facts therein stated, made at or near the time of the transaction are presumptive evidence of such facts when the entry was made against the interest of the person so making it, or when made in a professional capacity or in the ordinary course of professional conduct or when made in the performance of a duty specially enjoined by law." The chief ground upon which such entries are admitted as evidence is that they were hostile to the interests of the person making them and this hostility must be made clearly to appear. Mahaska Co. *v.* Ingles, 16 Iowa 81.

64. Massey *v.* Allen, 13 Ch. Div. 558.

65. Williams *v.* Graves, 8 Car. & P. 593, 34 Eng. C. L. 541; Higham *v.* Ridgway, 10 East 109.

66. Bridgewater *v.* Roxbury, 54 Conn. 213, 6 Atl. 415.

In Austin *v.* Thomson, 45 N. H. 113, assumpsit for the use and occupation of a dwelling house, the plaintiff to show a tenancy under himself proposed to show that the defendant was a tenant of one from whom the plaintiff derived title and that the defendant continued to occupy the premises after the death of such person, for this purpose offering books of account of such original

c. *Time of Entry.* — Nor do the reasons upon which the admissibility of evidence of this character rests require that the entries be shown to have been made at the time of the transaction referred to.[67]

d. *Competency of Enterer if Alive.* — The rule admitting books as containing entries against the interest of the person making them does not require that such person would, if alive, be a competent witness to prove the facts entered.[68]

e. *Knowledge of Enterer* — Nor is it necessary that the person should have had a personal knowledge of the facts entered.[69]

f. *Fact Capable of Other Proof.* — And the admissibility of such books is not affected by the fact that the facts entered are or are not susceptible of being proved by other competent and accessible witnesses.[70]

g. *Character of Enterer.* — When the person who made the entries acted for another as his agent, steward and the like, there must be proof *aliunde* of such agency or stewardship.[71] A distinction has been noted in respect of the character of the person making the entries between a public officer and an agent of a private individual; in the case of an ordinary agent the agency of the person who made the entries must be established, while in the case of

owner containing entries charging defendant with the rent of the premises in question and crediting the defendant with the receipt of rent paid; and it was held that so far as the entry admitted the receipt of the rent paid it was indeed against the interest of the person making the entry, but that its effect was not limited to this; that it tended also to show a seizin of the land and also the defendant's tenancy, both of which were not against interest, and that consequently the books were not admissible.

In Dwight *v.* Brown, 9 Conn. 83, the court in ruling upon an objection that books of third persons containing entries against their interests were not competent evidence, because the person who made them was living, said it was an objection without merit because the enterer was an incompetent witness, and that hence it was the same as if he were dead.

67. Zimmerman *v.* Bloom, 43 Minn. 163, 45 N. W. 10; Bridgewater *v.* Roxbury, 54 Conn. 213, 6 Atl. 415. See also Patteshall *v.* Turford, 3 Barn. & A. 890. *Compare* Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145; McHose *v.* Wheeler, 45 Pa. St. 32.

Under the Iowa Statute whether or not it is absolutely necessary that they must have been made at or near the time of the transaction entered seems not to be settled. State *v.* Wooderd, 20 Iowa 534.

68. Short *v.* Lee, 2 Jac. & W. 489. And see Gleadow *v.* Atkin, 1 Cr. & M. 410.

69. Crease *v.* Barrett, 1 C. M. & R. 919.

70. Middletown *v.* Melton, 10 Barn. & C. 317.

71. Short *v.* Lee, 2 Jac. & W. 489.

In De Rutzen *v.* Farr, 4 Ad. & E. 53, 31 Eng. C. L. 20, it was held that a book of accounts of a person signing himself as clerk to a steward was not competent evidence after the decease of both to prove the receipt either by the clerk or by the steward of moneys mentioned therein in the absence of evidence other than the entries themselves to show that he was such clerk.

a public officer it may be presumed that the person acting as such has been duly appointed.[72]

D. Scope of Proof by the Entries. — It has been held that an entry against the interest of the person making it has the effect of proving the truth of the other statements contained in the same entry connected with it.[73]

3. Entries Made in Course of Business or Duty. — A. In General. Another class of entries made by deceased third persons which are received in evidence are those made in the ordinary course of official, professional or other business or duty, immediately connected with the transacting or discharging of the business or duty and contemporaneous, or nearly so, with the transactions to which they relate, and by a person having a peculiar knowledge of the facts entered, and having no interest at the time to pervert or misstate them.[74]

Entries by Persons Not Employed in Business. — This rule, however,

72. Short *v.* Lee, 2 Jac. & W. 489, where this distinction is discussed at some length.

73. Davies *v.* Humphreys, 6 Mees. & W. 153. See also Higham *v.* Ridgway, 10 East 109; Doe *v.* Robinson, 15 East 32; Stead *v.* Heaton, 4 Term. R. 669; Roe d. Brune *v.* Rawlings, 7 East 279, 8 Rev. Rep. 632; Taylor *v.* Witham, 3 Ch. Div. 605, 24 W. R. 877.

In Higham *v.* Ridgway, 10 East 109, it was held that the books of a physician containing charges for his attendance upon a woman at the time of childbirth which he thereby acknowledges to have been paid are competent evidence on a controversy between third persons to show the time of the birth of the child as noted in those entries.

In Matter of Page, 62 Barb. (N. Y.) 476, on an issue as to whether or not the testator was a minor at the time of executing the will offered for probate; it was held that an entry in an account book of the deceased physician who attended or officiated at the birth of the testator, charging in his handwriting the mother of the testator for professional services followed by an entry crediting payment of the charge was not competent evidence in the absence of proof sustaining its truth.

74. *United States.* — Nicholas *v.* Webb, 8 Wheat. 365, 5 L. ed. 628; Chaffee *v.* U. S., 18 Wall. 516.

Alabama. — Hancock *v.* Kelly, 81 Ala. 368, 2 So. 281.

California. — Banning *v.* Marleau, 121 Cal. 240, 53 Pac. 692; Butler *v.* Estrella Raisin Vineyard Co., 124 Cal. 239, 56 Pac. 1040.

Connecticut. — Bridgewater *v.* Roxbury, 54 Conn. 213, 6 Atl. 415; Ashmead *v.* Colby, 26 Conn. 287.

Delaware. — Hatfield *v.* Perry, 4 Harr. 463.

Georgia. — Wood *v.* Coosa & C. R. R. Co., 32 Ga. 273.

Illinois. — Lawrence *v.* Stiles, 16 Ill. App. 489; Chicago & N. W. R. Co. *v.* Ingersoll, 65 Ill. 399.

Indiana. — Cleland *v.* Applegate, 8 Ind. App. 499, 35 N. E. 1108; Glover *v.* Hunter, 28 Ind. 185; Flemig *v.* Yost, 137 Ind. 95, 36 N. E. 705.

Kentucky. — Poor *v.* Robinson, 13 Bush 290.

Maine. — Dow *v.* Sawyer, 29 Me. 117; Augusta *v.* Windsor, 19 Me. 317; Lord *v.* Moore, 37 Me. 208.

Massachusetts. — Swift *v.* Bennett, 10 Cush. 436; Welsh *v.* Barrett, 15 Mass. 380.

Michigan. — Ortmann *v.* Merchants' Bank of Canada, 41 Mich. 482, 2 N. W. 677; People *v.* Hurst, 41 Mich. 328, 1 N. W. 1027.

New Hampshire. — State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224; Lassone *v.* Boston & L. R. Co., 66 N. H. 345, 24 Atl. 902; Wheeler *v.* Watker, 45 N. H. 355.

New York. — Bentley *v.* Falker,

does not apply to entries by any other persons than such as were employed in the business.[75]

On an Issue as to the Bona Fides of a Transfer by Debtor, the pecuniary condition of the debtor is a relevant fact to be proved, and in making proof thereof it is proper to receive in evidence the debtor's books of account.[76]

B. Requisites to Admissibility. — a. *Time of Entry Made.* In respect of this class of entries it is essential that they were made contemporaneously with the principal fact done, forming a link in the chain of events, and are indeed a part of the *res gestae*.[77]

24 App. Div. 560, 49 N. Y. Supp. 691; Leland *v.* Cameron, 31 N. Y. 115; Fisher *v.* Mayor, etc., of New York, 67 N. Y. 73; Humphrey *v.* People, 18 Hun 393; Osborn *v.* Merwin, 50 How. Pr. 183; Jermain *v.* Worth, 5 Denio 342; Chenango Bridge Co. *v.* Lewis, 63 Barb. 111.

Pennsylvania. — Nourse *v.* McCay, 2 Rawle 70.

South Dakota. — Smith *v.* Hawley, 8 S. D. 363, 66 N. W. 943.

Vermont. — State *v.* Phair, 48 Vt. 366.

Virginia. — Courtney *v.* Com., 5 Rand. 666.

Rule Stated. — In Patteshall *v.* Turford, 3 Barn. & A. 890, this principle which up to this time had been unsettled, was after much consideration, clearly established. The principle is that entries or matters of business made by third persons employed in the business, or whose duty it was to make entries, and who made them contemporaneously with the fact or business stated therein to have been done by them, are evidence that the fact took place and that the business was done as stated. The principle does not, however, apply to any entries other than those made in the ordinary and regular course of business.

In Derby *v.* Salem, 30 Vt. 722, on an issue as to whether or not a certain person resided in the defendant town at the time of its organization, evidence had been introduced tending to show that previous to that time he had left that town and gone to the plaintiff town to live with a certain person; and it was held competent for the plaintiff to introduce in evidence such person's books in which he kept his accounts, and which were in his handwriting in connection with other corroborative evidence to show by the account therein against the person whose residence was in question, that he had removed at a time later than the organization of the defendant town.

75. Lord *v.* Moore, 37 Me. 208.

76. Smith *v.* Collins, 94 Ala. 394, 10 So. 334. See also Pollak *v.* Searcy, 84 Ala. 259, 4 So. 137.

In Kramer *v.* Wilson, 22 Mo. App. 173, on an issue between attaching creditors and the administrator of the deceased debtor as to the *bona fides* of certain transfers it was held competent for the plaintiffs to put in evidence the debtor's books of account for the purpose of showing that shortly previous to the alleged fraudulent transfers the debtor held concealed in the hands of a brother and inaccessible to creditors a sum of money represented by the difference of the footings of the two sides of the account contained in the book.

In Banning *v.* Marleau, 121 Cal. 240, 53 Pac. 692, an action to recover the possession of property which was on a ranch owned by the plaintiff and which the defendant, as an officer, had seized under an attachment as belonging to a third person; it was held competent on an issue as to the validity of a sale to the plaintiff by such third person of the property in question for the plaintiff to introduce in evidence books of account kept under the direction of such third person and delivered to the plaintiff as showing the condition of the accounts between them in the business of conducting the ranch.

77. Chaffee *v.* U. S., 18 Wall. (U.

They are not merely declarations of the party, but are indeed verbal contemporaneous acts belonging not necessarily but ordinarily and naturally to the principal event,[78] as for example entries made in the regular mode on the return of the clerk from the business in which he was employed.[79]

But where the entries are merely statements subsequently written in the book concerning a past transaction, they are not admissible.[80]

b. *Death of Enterer.* — But, although it is most usually the case that the person who made them is, at the time of the trial, deceased, it is not at all essential to their admissibility that he be in fact dead,[81] although there is authority to the contrary.[82]

c. *Interest of the Enterer.* — Nor is it essential that the person who made the entries was, or was not interested in making them.[83]

d. *Knowledge of Enterer.* — The entries must, however, have been made by persons having personal knowledge of the facts.[84]

e. *Duty to Make Entries.* — The rule admitting entries made by a third person in the usual course of professional employment, or of a clerkship or agency, as competent evidence after his death, and being a part of the *res gestae*, does not require that there should be an absolute duty on doing an act to make an entry of it, in order to make the entry admissible; it is sufficient that it is a proper case for making an entry of the act and that such is the usual practice of the individual.[85]

f. *Corroboration.* — The rule under discussion also requires that the entries must be corroborated by the testimony of the enterer, if living and accessible,[86] or by proof of his handwriting if deceased

S.) 516; Oelrichs *v.* Ford, 21 Md. 489; Still *v.* Reese, 47 Cal. 294; Wood *v.* Coosa & C. R. R. Co., 32 Ga. 273; Massey *v.* Allen, 13 Ch. Div. 558; Patteschall *v.* Turford, 3 Barn. & A. 890.

It is enough if the contemporaneous character of the entries in question appear on the face of the books. Bridgewater *v.* Roxbury, 54 Conn. 213, 6 Atl. 415, where the original entries were made daily in a regular day book in which were entered charges chronologically coming up on both sides to the charges in question.

78. Sill *v.* Reese, 47 Cal. 294; Fleming *v.* Yost, 137 Ind. 95, 36 N. E. 705.

79. Poole *v.* Dicas, 1 Bing, (N. C.) 649.

80. Scott *v.* Devlin, 89 Fed. 970.

81. Chicago & N. W. R. Co. *v.* Ingersoll, 65 Ill. 399. And see Poor *v.* Robinson, 13 Bush (Ky.) 290.

82. Philadelphia Bank *v.* Officer, 12 Serg. & R. (Pa.) 49.

83. Lassone *v.* Boston & L. R. Co., 66 N. H. 345, 24 Atl. 902; Augusta *v.* Windsor, 19 Me. 317. And cases cited *supra* in note 74.

84. Chaffee *v.* U. S., 18 Wall. (U. S.) 516; Wood *v.* Coosa, & C. R. R. Co., 32 Ga. 273; Lassone *v.* Boston & L. R. Co., 66 N. H. 345, 24 Atl. 902.

85. Arms *v.* Middleton, 23 Barb. (N. Y.) 571. See also Wood *v.* Coosa & C. R. R. Co., 32 Ga. 273.

86. Chaffee *v.* U. S., 18 Wall. (U. S.) 516; Chenango Bridge Co. *v.* Lewis, 63 Barb. (N. Y.) 111; Union Cent. L. Ins. Co. *v.* Smith, 119 Mich. 171, 77 N. W. 706; Poor *v.* Robinson, 13 Bush (Ky.) 290; Lassone *v.* Boston & L. R. Co., 66 N. H. 345, 24 Atl. 902; Cleland *v.* Applegate, 8 Ind. App. 499, 35 N. E. 1108; Gochenauer

or insane, or beyond the reach of the process or commission of the court.[87]

C. Scope of Proof. — The entries must speak to that only which it was the duty or business of such person to do and not to extraneous or foreign circumstances.[88] Nor are the entries admissible

v. Good, 3 Pen. & W. (Pa.) 274; *In re* Simpson Estate, 5 N. Y. Supp. 863.

In Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, on a controversy as to the state of a person's bank account, it was held that books of the bank were properly admitted on proof by the clerks and officers of that bank that the entries were made by the proper and authorized book-keepers to make them; that they were made in the due course of business in the discharge of their duties and were correct when made; and the book-keepers testifying that the entries made by them were original and entered by them in books kept for that purpose and that they had no recollection of the facts entered, although it appeared that certain of the book-keepers that made entries in the books were dead or non-residents of the state.

In Terry *v.* Birmingham Nat. Bank, 93 Ala. 599, 9 So. 299, 30 Am. St. Rep. 87, it was held that on an issue between a pledgor and pledgee of corporate stock, which the latter was authorized to sell at private sale through brokers on the stock exchange, the stock exchange being a private corporation, entries in its books as independent evidence against persons, must stand upon the same footing as entries made in the books of other private individuals or corporations, and that its books of account are not admissible to show that the stock was sold on the stock exchange as directed, where it appears that the secretary of the stock exchange who made the entries is alive and within the reach of process, and no showing is made to account for his absence.

In American Surety Co. *v.* Pauly, 72 Fed. 470, 18 C. C. A. 644, *affirmed* 170, U. S. 133, an action on a surety bond given by the cashier of a bank to recover loss to the bank resulting from misappropriation of the bank's funds by the president with the aid of the cashier, it was held that the president's ledger account kept by the book-keeper was competent evidence to show the state of the president's account on proof of the book-keeper who made the entries from the original memoranda supplemented by proof that such original memoranda were found to be correct or were correctly made by the person who received the deposits, or who paid out the money on the president's checks.

87. Chaffee *v.* U. S., 18 Wall. (U. S.) 516; Bridgewater *v.* Roxbury, 54 Conn. 213, 6 Atl. 415.

In State *v.* Thomas, 64 N. C. 74, a prosecution for perjury, the state offered in evidence the books of a railway company to show that certain goods, in regard to which it was alleged that perjury had been committed had been received by the defendant; it was held that the books were not admissible against the defendant merely upon proof that the clerk who made the entries was absent from the State.

In Lane *v.* Lockridge, 20 Ky. L. Rep. 1102, 48 S. W. 975, an action by a surety against the principal makers of a note, it was said that the books of the payee bank were not competent for the plaintiff in the absence of proof by the book-keeper as to the entries offered, or proof of his handwriting in case of his death or being inaccessible; but it was held that because of a failure on the part of the defendant to make a proper objection, the admission of the books was not fatal error.

88. Wood *v.* Coosa & C. R. R. Co., 32 Ga. 273.

In Osborne *v.* Merwin, 50 How. Pr. (N. Y.) 183, the rule was recognized that entries of deceased persons in their books of account have been received as evidence of what those persons did, but they were not evidence of what other persons had

as *res gestae* where they cover the whole transaction and leave nothing else to be proved in order to make it complete; in short, where the transaction entered is the very transaction itself upon which the liability of the party to be charged is based.[89]

D. Application of Rule to Particular Books. — a. *Books of Principal Obligor.* — Upon an issue between the sureties on an agent's bond and the agent's principal, books of account kept by the agent or by his direction, and in pursuance of his duty as such agent, and pertaining to the business of his principal, are competent evidence against the sureties to show the state of the agent's accounts.[90]

done. The question in this case was as to whether or not a sale of real estate under a mortgage had been properly advertised; and it was held that entries in an attorney's book charging for such an advertisement might be evidence that he had drawn an advertisement and had delivered it to the printer, but was not evidence of the fact that the printer ran the advertisement for the required time.

89. Sypher *v.* Savary, 39 Iowa 258.

90. State Bank *v.* Johnson, 1 Mill Const. (S. C.) 404, 12 Am. Dec. 645; Whitmash *v.* Genge, 8 Barn. & C. 556, 15 Eng. C. L. 295; Williamsburg City F. Ins. Co. *v.* Frothingham, 122 Mass. 391, where the bond required the agent to keep true and correct books. See also Agricultural Ins. Co. *v.* Keeler, 44 Conn. 161, a similar action where the bond although not expressly requiring the agent to keep books of account did require that he should turn over to his principal all moneys, books, papers, etc., coming into his hands which belonged to the principal. And the books in question were in fact delivered by him to his principal as and for the books of his agency.

In Union Bank of Maryland *v.* Ridgley, 1 Harr. & G. (Md.) 324, an action by a bank against the sureties on the bond of its cashier in which the issue is that certain false and deceptive entries were made on the books of the bank by its bookkeepers with the connivance of the cashier, it was held that on proof that such books were kept by the regular book-keepers and that the entries were in their handwriting and that they were either dead or beyond the reach of process, the books were competent to show what entries were in them, especially where it appears that the books were kept under the supervision and direction of the cashier.

In Bricker *v.* Stone, 47 Mo. App. 530, a suit by plaintiff against defendant on a bond given to secure the faithful accounting by the defendant to the plaintiff for moneys used in the business of a certain co-partnership entered into between them, entries on the books of account made by the defendant while in the active management of the partnership affairs, together with such other memoranda and vouchers kept by him, constitute the very best evidence, and are competent against his surety, and are not subject to the objection that they are not a part of the *res gestae.*

In American Surety Co. *v.* Pauly, 72 Fed. 470, 18 C. C. A. 644, *affirmed* 170, U. S. 133, an action by the receiver of a bank against a surety company to recover on its bond for loss resulting from the dishonesty of the bank's cashier, it was held that a book kept by the teller who died before the trial was competent evidence in connection with the course of business, upon an issue as to whether or not money had been paid in upon a certain date, to show that upon the page where such payment should have been entered they did not appear.

b. *Books of Corporation* — (1.) **Admissibility Against Officers.** — Of course where it is shown that a managing officer and director not only had access to the books of the corporation,[91] but had actual knowledge of the entries therein and permitted them to stand unchallenged, the books are competent evidence against such officer and director.[92]

And it is held also that even where such officer and director is not affirmatively shown to have had access to, or actual knowledge of the books and entries, the books are nevertheless admissible against him so far as relates to any entries regularly contained in them and relevant to issues on trial;[93] although there is authority to the effect that it is not enough to merely show that the party against whom the books are offered is a trustee or officer of the corporation and therefore chargeable with knowledge of the entries.[94]

In Victoria Mut. F. Ins. Co. *v.* Davidson, 3 Ont. 378, an action against the surety on a bond of a clerk for the plaintiff corporation to recover money coming into the hands of a clerk which he had not accounted for, the only evidence given to prove the receipt of the moneys by the clerk were certain entries, presumably in the handwriting of a clerk, in the plaintiff's books, and although the court did not expressly rule on the question, they questioned the correctness of the rule admitting the books, stating that they thought such entries should be received as against the surety only when the death of the principal is shown.

91. First Nat. Bank *v.* Tisdale, 84 N. Y. 655. See also Olney *v.* Chadsey, 7 R. I. 224.

In Hamilton Buggy Co. *v.* Iowa Buggy Co., 88 Iowa 364, 55 N. W. 496, on an issue between the plaintiff in garnishment, and intervenor's claiming of property in the garnishee's hands under a transfer from the debtor which the plaintiff claimed was fraudulent, it appeared that the debtor and the intervenor, both corporations, used the same books of account; that the intervening corporation owned the debtor corporation, doing business in its name, but it was impossible to say from the evidence when the career of one corporation ended and the other began its operations; it was held that under the circumstances the intervenor could not be held to be a stranger to the entries in the books of account, and that hence those books were admissible in evidence against them.

In Wyckoff *v.* Johnson, 2 S. D. 91, 48 N. W. 837, an action by the receiver of an insolvent bank upon a note given to it by the defendant which the latter claimed had been materially altered by the cashier of the bank, which the plaintiff conceded, but insisted was unauthorized and not binding upon the bank; it was held that the defendant was entitled to show by the books of the bank that the note had been carried on the books as a discount for the amount to which it had been altered, as evidence tending to show an adoption or ratification by the bank of such alteration; the knowledge of the cashier as to the condition of the discounts of the bank being the knowledge of the bank.

92. Bird *v.* Magowan, (N. J.), 43 Atl. 278.

93. Huntington *v.* Attrill, 118 N. Y. 365, 23 N. E. 544, *affirming* 42 Hun 459.

To same effect Taylor *v.* Mitchell, 80 Minn. 492, 83 N. W. 418.

94. In Powell *v.* Conover, 75 Hun 11, 26 N. Y. Supp. 1028, an action to recover money alleged to have been loaned by the plaintiff to the defendant, but which the defendant claims was received by him as an officer of a corporation, and that the loan was

(2.) Admissibility Against Stockholders. — As to whether or not books of account of a corporation are competent evidence against the stockholders, the cases are not entirely harmonious. Although there is authority that they are not competent evidence in such case[95] the weight of authority is that on proof that they were the books of the corporation kept in the regular course of business, and that the entries therein were made by persons authorized to make them,[96] the books are proper to be received.[97]

to the corporation and not to the defendant; it was held that the defendant could not introduce the books of account of the corporation relating to the transaction of the account, merely on showing that one of the plaintiffs was a trustee of the corporation and therefore chargeable with knowledge of entries made on its books; that he should have gone further and shown that the plaintiffs had actual knowledge, or that there were facts charging the plaintiffs with constructive knowledge of the contents of the books as well as proving that the entries were made at the time of the transaction and by whom they were made. See also Rudd *v.* Robinson, 126 N. Y. 113, 26 N. E. 1046, 22 Am. St. Rep. 816.

In Bartholomew *v.* Farwell, 41 Conn. 107, a proceeding by the receivers of an insolvent corporation to compel the defendant to convey to them certain lands which they allege were purchased by the defendant for the benefit of the corporation and paid for by it, the defendant having been the vice-president and an active director and a member of the executive committee of the corporation, it was held that the books of account of the corporation were not competent evidence against the defendant, on the theory that he had knowledge of the entries, and by not objecting to them or denying their correctness must be held to have admitted their truth, where the only basis for this theory was the official relation of the defendant to the corporation, and the fact that the books were found by the receivers in the corporation's office.

95. Hager *v.* Cleveland, 36 Md. 476.

96. In Glenn *v.* Leggett, 47 Fed. 472, an action to collect assignments on stock of a corporation of which the plaintiff was receiver levied under an order of court, it was held that on an issue as to whether the defendants were in fact holders of stock in such corporation, entries on a cash blotter of such corporation purporting to be an account of moneys received by the corporation from various persons, and amongst others from several of the defendants, were not competent evidence for the plaintiff as not authenticated by any other proof than that it was one of the books used by the company, and that the entries were in the handwriting of the treasurer, whose absence was not accounted for.

97. In Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145, an action by creditors of an insolvent bank against the defendants as stockholders in such bank; it was held that the statute (Mills' Anno. Stat., § 4817) providing for the admission of a party's books of account as evidence in his own behalf upon a showing made as required therein does not apply to an action of such a character as that action was; but that the books of account of the corporation were competent evidence against the stockholders on proof that they were books of the bank kept in the regular course of business, and that the entries therein were made by an agent authorized to make them.

In Alling *v.* Wenzell, 27 Ill. App. 511, an action by creditors to charge the defendants, as stockholders of a corporation, for its debts as provided by statute; it was held that a book of the corporation, entitled "claim ledger," so far as it was made up in the course of business, and while the company was a going concern, was competent evidence against the defendants of whatever indebtedness of

c. *Bank Books.* — When the question how much ready money a party, who is shown to keep bank account, has on hand at a particular time becomes important in a judicial inquiry, the state of the bank account at the time in question is competent evidence, and it is held that there can hardly be any more satisfactory mode of proving it than by introducing the books of the bank where the party has his account.[98]

And where two persons have been in the habit of dealing with each other by notes and checks on a bank, the books of the bank are competent evidence to show what disposition has been made of such notes and checks and how the proceeds have been applied and used.[99]

the company was shown by it; but that entries made after the company stopped business, whether under the direction, or by an employee, of the receiver or any other person, were not competent evidence of such indebtedness, although it was said as to the latter class of entries that if they were made up from other books or papers of the company, which had been made in the ordinary course of business by the company, such other books and papers might be competent evidence.

In Dows *v.* Naper, 91 Ill. 44, an action by the plaintiff to enforce an individual liability on the part of the defendant as stockholder of an insolvent bank for moneys deposited therein, it was held that the plaintiff's passbook furnished by the bank was competent evidence against the defendant to show the amount and character of the deposits entered therein. This case also held that the ledger of the bank, although not a book of original entries, was competent evidence against the defendant because it showed an admission by the bank on its own books of the amount due to the plaintiff.

In Neilson *v.* Crawford, 52 Cal. 248, it was held that in an action brought by a creditor of a corporation to recover on the stockholder's liability for his proportion of the indebtedness of the corporation, the books of the corporation were not admissible against the defendant to prove the indebtedness. *Compare* McGowan *v.* McDonald, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149, where a contrary rule is announced, and it is said that any evidence competent to establish the liability of the corporation would be competent to establish the liability of the stockholders.

In Buffington *v.* The Turnpike R. Co., 3 Pen. & W. (Pa.) 71, an action to recover from the defendant for shares of stock subscribed by him to the plaintiff corporation; it was held error for the court to refuse to permit the defendant to offer in evidence the book of the treasurer of the plaintiff showing a credit for the stock subscribed by him; and that the fact that such credit entry was contrary to a resolution of the board of managers did not affect its competency in the first instance.

98. Lehmann *v.* Rothbarth, 111 Ill. 185; Furness *v.* Cope, 5 Bing. 114, 15 Eng. C. L. 387. See also Loewenthal *v.* McCormick, 101 Ill. 143.

In Jordan *v.* Osgood, 109 Mass. 457, 12 Am. Rep. 731, it was held that on a controversy as to the defendant's insolvency at the time of the purchase of goods of the plaintiffs which the latter had replevied, that books of the bank where the defendant kept his deposits supported by the oath of the book-keeper, were admissible.

An entry made by a clerk in the book of a bank of a deposit immediately before an entry made by him of the same deposit in the depositor's pass book and supported by the oath of the clerk is competent evidence to go to the jury in connection with the pass book and the clerk's testimony. Farmers' & Mechanics' Bank *v.* Boraef, 1 Rawle (Pa.) 152.

99. Oliver *v.* Phelps, 20 N. J. Law 180.

V. PASS BOOKS.

1. Debtor and Creditor. — Pass books in the possession of the debtor containing debit and credit entries, handed to the creditor from time to time for the purpose of writing up, which is done, and the book returned, and purporting to be a full account between the parties, are competent evidence as between the parties irrespective of whether the entries are original or not.[1] And in an action against a third person to recover for the goods charged thereon, such books are proper evidence to show the amounts charged,[2] but not to show authority from the defendant to deliver the goods on his credit.[3]

Entries by Debtor. — But where the entries in such books were made by the debtor himself, the preliminary proof necessary for the admission of books of account is necessary before the book can be introduced; and the mere fact that the creditor saw the book and the entries and even made no objection to it, does not amount to an admission of its correctness.[4]

2. Bank Pass Books. — On an issue between a banker and a depositor as to the state of the depositor's account, the depositor's pass book is competent evidence for the depositor.[5] And when a de-

In an action by the indorser of a note to recover the amount which he has paid thereon for the maker, the books of the bank to which the note was paid are competent evidence for the plaintiff in connection with the plaintiff's check for that amount to prove the payment alleged. Parker *v.* Sanborn, 7 Gray (Mass.) 191.

1. Burke *v.* Wolfe, 6 Jones & S. (N. Y.) 263; Wilshusen *v.* Binns, 19 Misc. 547, 43 N. Y. Supp. 1085. See also Weigle *v.* Brautigam, 74 Ill. App. 285; Succession of McLaughlin, 14 La. Ann. 398.

In Folsom *v.* Grant, 136 Mass. 493, an action upon a promissory note given in payment of an account due from the defendant to the plaintiff, a witness for the plaintiff testified that at the time the note was executed he produced a passbook containing the account in question and showed it to the defendant, although he could not remember that the defendant examined it, and it was held that the book in connection with the witness's testimony was competent, the whole transaction being in the nature of an admission by the defendant that the goods charged on the passbook were properly charged to him.

In Nussbaum *v.* U. S. Brewing Co., 63 Ill. App. 35, it was held that a passbook of entries made by the plaintiff for goods purchased from the plaintiff by the defendant, and of moneys paid out by the plaintiff for the defendant, and also an entry acknowledging payment in full signed by the plaintiff's agent is not competent evidence for the defendant as showing a receipt in full of all the claims between the parties at a date subsequent to the transaction in question where it was not proved nor offered to be proved that the book was the only one kept showing transactions between the parties.

2. The fact that the passbook for goods to be supplied to the defendant's family, then consisting of his mother and sisters with whom he lived, was in the mother's name, is not conclusive against the plaintiff's claim that the credit was given to the defendant and the goods supplied to him upon his request to that effect. Wilshusen *v.* Binns, 19 Misc. 547, 43 N. Y. Supp. 1085.

3. Hovey *v.* Thompson, 37 Ill. 538.

4. Sexton *v.* Brown, 36 Ill. App. 281.

5. Goff *v.* Stoughton State Bank,

positor's bank pass book is written up by the bank and returned to the depositor together with the checks and vouchers, it is his duty to examine the book and vouchers and make his objection thereto within a reasonable time; otherwise his silence is to be regarded as an admission of the correctness of the book and the book becomes competent evidence against him.[6]

Identity of Owner. — A bank pass book was not competent to show that the person in whose name the book was issued was not a fictitious person.[7]

VI. ANCIENT BOOKS.

Entries in books of account more than thirty years old coming from the proper custody are admissible in evidence without proof of the handwriting of the person making them.[8]

VII. PRODUCTION OF BOOKS.

1. Books as Entire Documents. — A. In General. — Books of account to some extent partake of the nature of documentary evidence in respect of which it is a cardinal rule that part of an instrument

84 Wis. 369, 54 N. W. 732; Arnold *v.* Hart, 176 Ill. 442, 52 N. E. 936, *affirming* 75 Ill. App. 165.

In Chesapeake Bank *v.* Swain, 29 Md. 483, an action to recover money deposited by the plaintiff with the defendant bank in coin to be repaid to him by the bank in like coin; it was held that an entry in the plaintiff's pass-book showing the special character of the deposit in question was competent evidence for the plaintiff, and that it was not necessary that the plaintiff should put in evidence all the other entries in the book.

6. Devaynes *v.* Noble, 1 Mer. 580, 15 Rev. Rep. 151. See Wills Point Bank *v.* Bates, 72 Tex. 137, 10 S. W. 348.

In Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145, it was held that a pass book furnished to a depositor by his banker showing the amount of his deposit furnishes no better evidence of the amount of deposit than did the entries in the bank's balance book which were made up from deposit slips made out by the depositor showing the amount of his deposit and presented with the pass book and preserved by the bank. *Compare* Farmers' & Mechanics' Bank *v.* Boraef, 1 Rawle (Pa.) 152, to the effect that a depositor's bank pass book is the controlling evidence as between himself and the bank, and is not to be held as inferior to the books of the bank although the court held that on a controversy between the parties as to the amount of a deposit, the bank could introduce its books together with the testimony of the book-keeper who made the entries explaining the discrepency between the entry in the books and the entry in the pass book.

7. Hirsch *v.* Jones, (Tex. Civ. App.), 42 S. W. 604.

8. Wynne *v.* Tyrwhit, 4 Barn. & A. 376, 6 Eng. C. L. 452. See also Boston *v.* Weymouth, 4 Cush. (Mass.) 538.

See more fully "Ancient Documents," Vol. I.

Where an Entry in a Book of Accounts Produced Bears Date More Than 50 Years Before the Trial, proof of the death of the person making it is not necessary; under such circumstances the presumption is that he is dead in the absence of evidence to the contrary. Doe d'Ashburnham *v.* Michael, 17 Ad. & E. (N. S.) 276, 79 Eng. C. L. 276.

cannot be received while a part is withheld; and accordingly all the books containing entries relating to the account when relied upon as furnishing evidence to sustain the account should be produced.[9] This rule does not, however, apply where the books not produced contain no entries relating to the account in suit.[10] Nor is it necessary to produce the books where the party to be charged expressly admits his liability.[11]

B. After Use by Party. — A party who resorts to his own books of account cannot introduce them with the express qualification that his adversary shall be prohibited from using them to prove other relevant matters which they are equally competent to establish, and if introduced they must come in as evidence generally for both parties.[12]

C. After Use Against Party. — Again, where one party avails himself of the use in evidence of his adversary's books of account to prove matters thereby in his own favor, it is competent for such adversary to read from the same books entries therein in favor of the latter and offsetting the effect of the entries read by the party first introducing the books.[13] And in such case an inquiry as to the handwriting of the party who made the entries in the books is immaterial.[14] But merely reading items in the adverse party's books of

9. Larue *v.* Rowland. 7 Barb. (N. Y.) 107; Eastman *v.* Moulton, 3 N. H. 156; Prince *v.* Swett, 2 Mass. 569; Rogers *v.* Old, 5 Serg. & R. (Pa.) 404. See Winne *v.* Nickerson, 1 Wis. 1, where this rule was recognized but was held not to be applicable because the book not produced was not of such a character as would have authorized its introduction in evidence.

10. Tyndall *v.* McIntyre, 24 N. J. Law, 147; Bonnell *v.* Mawha, 37 N. J. Law 198.

11. Bonnell *v.* Mawha. 37 N. J. Law 198.

12. Winants *v.* Sherman, 3 Hill (N. Y.) 74; Mattocks *v.* Lyman, 18 Vt. 98, 46 Am. Dec. 138; Blanchard *v.* Commercial Bank, 75 Fed. 249, 21 C. C. A. 319; Clinton *v.* Rowland, 24 Barb. (N. Y.) 634; Pilsbury *v.* Fernald, 10 Me. 168; Pelzer *v.* Durham, 37 S. C. 354, 16 S. E. 46; Howell *v.* Moores, 127 Ill. 67, 19 N. E. 863; Banks *v.* Darden, 18 Ga. 318; Stokes *v.* Stokes, 91 Hun 605, 36 N. Y. Supp. 350.

13. *England.* — Kilbee *v.* Sneyd, 2 Mallory 186. *Compare* Reeve *v.* Whitmoer, 2 Dr. & Sm. 446.

Illinois. — Boudinot *v.* Winter, 190 Ill. 394, 60 N. E. 553.

Iowa. — Veiths *v.* Hagge, 8 Iowa 163.

Louisiana. — White *v.* Jones, 14 La. Ann. 681; Martinstein *v.* His Creditors, 8 Rob. 6.

Maryland. — Lee *v.* Tinges, 7 Md. 215; Allender *v.* Trinity Church, 3 Gill 166; King *v.* Maddux, 7 Har. & J. 467.

Michigan. — Countryman *v.* Bunker, 101 Mich. 218, 59 N. W. 422.

Missouri. — Lewin *v.* Dilley, 17 Mo. 64; Beach *v.* Curle, 15 Mo. 105; Todd *v.* Terry, 26 Mo. App. 598.

New York. — Pendleton *v.* Weed, 17 N. Y. 72; Dewey *v.* Hotchkiss, 30 N. Y. 497; Biglow *v.* Sanders, 22 Barb. 147; Smith *v.* Reed, 24 Hun 1.

Rhode Island. — Almy *v.* Allen, 22 R. I. 595, 48 Atl. 934.

Tennessee. — McClure *v.* Byrd, 2 Over. 21.

Virginia. — Jones *v.* Jones, 4 Hen. & M. 447.

14. The entries do not derive their character as evidence from that circumstance but from the fact that they were found in the books of the party against whom they were produced in

account to a witness, and cross-examining him with reference to them, is not reading the books of such items in evidence so as to authorize such adverse party to put in the books; this is merely using the books as memorandum from which to examine the witness.[15]

D. Books of Third Persons. — Where the parties use the books of account of a third person as evidence in the case all of the contents of the book, which in anyway explain or tend to enlighten the jury on the motives or purposes of the parties and their relations to each other in their dealings are properly submitted to the jury.[16]

2. Books Produced on Notice. — A. Effect of Inspection. — Inspection by the party calling for a book of accounts of his adversary makes the book competent evidence for the latter.[17]

B. Effect of Use by Party Calling. — Where one party calls for his adversary's books of account which are produced and used by the party calling for them, the books are to be taken all together and the party calling for them is bound to admit items against him and in favor of the party producing them as well as those operating in his favor unless he can show that the items to his prejudice have been improperly entered.[18]

the first instance, in the regular course of his business and were consequently to be deemed and regarded as acts and admissions. Dewey *v.* Hotchkiss, 30 N. Y. 497.

15. First Nat. Bank *v.* Mansfield, 48 Ill. 494.

16. Jackson *v.* Adams, 100 Iowa 163, 69 N. W. 427.

17. Wilkes *v.* Elliott, 5 Cranch C. C. 611, 29 Fed. Cas. No. 17,660; Coote *v.* Bank of U. S., 3 Cranch C. C. 50, 6 Fed. Cas. No. 3,203; Merrill *v.* Merrill, 67 Me. 70; Whittemore *v.* Wentworth, 76 Me 20; Roundtree *v.* Tibbs, 4 Hayw. (Tenn.) 108.

Compare Smith *v.* Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138; Harper *v.* Ely, 70 Ill. 581; Price *v.* Garland, 3 N. M. 285, 6 Pac. 472.

The Mere Production Upon Notice of Books of Account does not make them evidence for the party producing them, unless the party giving the notice inspects them so as to become acquainted with their contents. Saunders *v.* Duval, 19 Tex. 467.

18. Frink *v.* Cole, 10 Ill. 339; Waggoner *v.* Gray, 2 Hen. & M. (Va.) 603.

In Textile Pub. Co. *v.* Smith, 31 Misc. 271, 64 N. Y. Supp. 123, where the books were produced on call and certain entries in favor of the party calling for them were excluded on objection of the party producing the books, it was held that the latter could not then introduce other entries against the party calling for the books.

Statement of Rule. — "The rule that books produced on notice and used, become evidence against, as well as for, the party calling for them, seems to rest on the same grounds as that which requires the whole of an admission or confession to be taken together to show the exact meaning of the part relied on; and if so, it must be subject to the same limitations. The only thing peculiar to it is, that the books need not be actually used; for if inspected with a view to be used, they are, it is said, equally evidence for both sides; the reason is, that it would give an unconscionable advantage, to enable a party to pry into his antagonist's affairs, for the purpose of compelling him to furnish evidence against himself, without, at the same time, subjecting him to the risk of making whatever he inspects, evidence for both parties." Withers *v.* Gillespy, 7 Serg. & R. (Pa.) 10.

VIII. EXPLANATION OF BOOK ENTRIES.

1. Ambiguous Entries. — A. In General. — Parol evidence is admissible on behalf of a party whose books are offered in evidence to explain latent ambiguities therein.[19]

B. Expert Testimony. — Where the entries in a book of accounts are so ambiguous to persons who are not skilled in book-keeping as to require explanation in order to make certain and precise the meaning it is proper to have them explained by an expert in book-keeping.[20] So also when the accounts entered therein are voluminous and intricate.[21]

A book-keeper cannot be allowed to explain, as an expert, books which are not shown to have been kept according to any technical or scientific system of book-keeping.[22] Nor can an entry, although ambiguous, be made to mean that which its language does not import.[23]

C. Testimony of the Party. — The intent and meaning of entries in a party's books of account which *prima facie* contradict his assertion on the matters in controversy may be explained by testimony of the party.[24]

2. Marks. — The meaning of a mark against an entry in a book of accounts may be explained by one who has knowledge thereof;[25]

19. Burnell *v.* Dunlap, 11 Iowa 446, where the account was headed in the alternative against either of two persons.

20. Rogers *v.* State, 26 Tex. App. 404, 9 S. W. 762. See also Cummings *v.* Nichols, 13 N. H. 420, 38 Am. Dec. 501.

The Meaning of an Obscure Figure in an entry is a question upon which it is proper to permit an expert to give his opinion. Kux *v.* Cent. Mich. Sav. Bank, 93 Mich. 511, 53 N. W. 828.

Key to Hieroglyphics. — In Bookout *v.* Shannon, 59 Miss. 378, the party in explanation of entries in his books offered in evidence a key to the hieroglyphics in which the account was kept; and it was held that it was properly received.

21. Guarantee Co. of North America *v.* Mut. Bldg. & Loan Assn., 57 Ill. App. 254.

22. McKay *v.* Overton, 65 Tex. 82.

23. Strong *v.* Kamm, 13 Or. 172, 9 Pac. 331. And see note 26 *infra*.

24. Arnold *v.* Allen, 9 Daly (N. Y.) 198. See also Meeker *v.* Claghorn, 44 N. Y. 349.

In Harrison *v.* Kirke, 6 Jones & S. (N. Y.) 396, it was held that where a party is asked to point out in his books of account any entries as to certain transactions to which he has testified and answers that there are no entries in his books as to the transactions under the name given to them in his testimony, it is error to refuse to allow him in answer to a question by his own counsel to explain the manner in which the account has been kept and how the transactions in question appeared therein.

Erasure. — In Cooke *v.* Brister, 19 N. J. Law 73, an entry in account manifestly appeared to be written on an erasure, and it was held incompetent for the party producing the book, to testify that his book-keeper had by mistake in making the entry charged the goods to another person, and had then scratched it out and made the entry as it appeared on trial.

25. North Bank *v.* Abbot, 13 Pick. (Mass.) 465, 25 Am. Dec. 334; Schuchman *v.* Winterbottom, 31 N. Y. St. 184, 9 N. Y. Supp. 733; Singer Mfg. Co. *v.* Leeds, 48 Ill. App. 297

although it has been held that one who did not make it cannot explain it.[26]

IX. IMPEACHMENT OF BOOK ENTRIES.

1. General Rule. — A party against whom his adversary has introduced his books of accounts has the right to show that there are errors in [27] and omissions from, the books.[28] But in a suit against an administrator after a party has introduced in evidence his own books it has been held that it is not proper for him to contradict them.[29]

26. Purchase *v.* Mattison, 2 Robt. (N. Y.) 71.

27. In Rodenbough *v.* Rosebury, 24 N. J. Law 491, it was held that the testimony of a witness offered to prove that there was an item charged against him in the plaintiff's books which was paid for at the time of the purchase and that the charge was incorrect is proper to be received. The court held, however, that in that case the rejection of such testimony was not fatal error because a single erroneous charge could not destroy the character or impeach the credibility of the plaintiff's books.

False Entries. — On an issue between an employee and an employer for net profits claimed to be due to the former from the latter under an agreement between them whereby the employee had managed his employer's business, the employer has the right to prove as to the books of the business, which had been kept by the employee, that false and fraudulent entries had been made by the employee in the books showing that the profits had been apparently increased. Wiggins *v.* Graham, 51 Mo. 17.

Cross-Examination of Witness Producing Book. — In Teague *v.* Irwin, 134 Mass. 303, an action of deceit based upon false representations by the defendant as to the financial condition of a corporation, stock in which the plaintiff had bought from defendant; it was held that the treasurer of the corporation who produced his journal and testified that he had showed it to the plaintiff before the latter had bought the stock in question, might be cross-examined by the plaintiff as to the manner of keeping the book to show that it was not fairly kept and did not contain a correct statement of the corporation affairs.

In Read *v.* Smith, 1 Hun (N. Y.) 263, the court in holding that after admitting certain entries in plaintiff's books as evidence either against the defendant or to corroborate plaintiff's statement, the defendant should have been allowed to test the accuracy of the entries by showing if he could that they were not in fact made at the day claimed, said that one mode of doing this was to show that they were not chronological in order with other entries in the book, or had been interpolated amongst such entries or bore on their face when compared with other immediately connected entries some suspicions of unfairness or bad faith. "The defendant claimed that some of the loans had never been made, and that others had been paid, and he was entitled, in any legitimate mode, to impugn the statements of the plaintiff and the contents of his book."

28. Bugbee *v.* Allen, 56 Conn. 167, 14 Atl. 778.

In Ramsey *v.* Cortland Cattle Co., 6 Mont. 498, 13 Pac. 247, an action for a balance due for cattle sold by the plaintiff to the defendant which the defendant claimed had been paid by its agent by causing a credit to be given to the plaintiff on a debt from him to a third person with the plaintiff's consent; it was held competent for the book-keeper of such third person to testify on behalf of the plaintiff as to whether or not his books showed any such credit and the state of the account between such third person and the defendant.

29. Cummins *v.* Hull, 35 Iowa 253. In this case on the debit side of the account there were entries as fol-

2. Errors in Other Transactions. — The production of a book by a party does not give the adverse party the right, for the purpose of weakening and invalidating the force of the evidence derived from it, to show errors therein concerning transactions entered disconnected with the account in question; nor to show that in his accounts with others, whether upon the same book or upon other books, dishonest charges had been entered, nor that proper credit had been omitted.[30]

3. Character of the Party. — Evidence of general bad moral character of the party is not competent for the purpose of discrediting his books.[31] Nor is it competent to call for a witness's opinion as to the party's character with reference to his manner of keeping his books of account.[32]

4. Declarations. — Evidence that the party had said to different persons on different occasions that it would be easy to beat his adversary in a law suit because he kept no account, is competent to impeach the reliability of the account in suit.[33] But declarations by a clerk

lows: "By cash in money," "to cash in money," etc., and it was proposed by the party to show that the word "by" was used by him in the sense of "to" and that the entries were entitled as charges and not as credits, but it was held that he could not do so. The court holding that in a suit against an administrator where a party has introduced his books of account "they assume the character of written evidence, the purport of which cannot be changed by parol testimony."

30. Gardner *v.* Way, 8 Gray (Mass.) 189. To the same effect Burnham *v.* Strafford, 58 Vt. 194, 2 Atl. 126.

31. Tomlinson *v.* Borst, 30 Barb. (N. Y.) 42, where the court in so holding said: "A man's general moral character may be bad, and yet the immorality be of such a character as not to affect the honesty and integrity of his dealings; he may be profane, intemperate or licentious. If the party's moral depravity was of a nature that would discredit his books, evidence of it was most certainly admissible. It was said in Larue *v.* Rowland, 7 Barb. 111, that 'anything might be proved which would show that the books were unworthy of credit;' and in Pennington's case, that 'the character of the man who keeps the books, the fairness, or unfairness, of the books from their appearance, the time and manner of making entries, etc., were proper subjects for the due consideration of the jury.' I most fully concur in these views. Reference is there had to the business character of the party, and not to his general moral character; to his integrity in deal, honesty in his charges, and the capacity, mode and manner of book-keeping. In this case the evidence of general moral character was properly excluded, and therefore there is no reason for reversal on that ground."

In Winne *v.* Nickerson, 1 Wis. 1, it was held that where an account book was received in evidence, testimony to impeach the character of the party whose book was so received and who had made the preliminary oath required by the statute was not admissible for the purpose of impeaching the book.

32. Long *v.* Taylor, 29 Hun (N. Y.) 127.

33. Day *v.* Gregory, 60 Ill. App. 34. Such evidence, said the court, must be "understood by the jury as referring to this suit, then begun or in prospect, because no other claim or account against him was mentioned, though his own was not otherwise indicated, nor did he otherwise intimate an intention to take advantage of the fact stated."

who made the entries in the books of account in question, made long after the date of the entries, and after they were proved to have been made, are not competent for the purpose of impeaching the correctness of the entries.[34]

X. BEST AND SECONDARY EVIDENCE.

1. Books as Best Evidence. — At the time when parties to an action were not competent witnesses in their own behalf, their books of account were admitted in evidence upon a proper showing of the mode in which they had been kept and were treated as original evidence of the matters for which they were introduced;[35] but since parties have been allowed to testify concerning all the facts for which the books were formerly offered, their testimony in reference thereto, or the testimony of other competent witnesses having knowledge thereof, constitutes the primary evidence of these facts and the books of account become merely secondary or supplementary evidence.[36]

34. Ashmead *v.* Colby, 26 Conn. 287.

35. Walker *v.* Laney, 27 S. C. 150, 3 S. E. 63; Dyson *v.* Baker, 54 Miss. 24.

36. Bushnell *v.* Simpson, 119 Cal. 658, 51 Pac. 1080; Adams *v.* Columbian S. B. Co., 3 Whart. (Pa.) 75. *Compare* Kelley *v.* Holdship, 1 Brown (Pa.) 36.

"**Oral Evidence of Persons Having Personal Knowledge of the Transactions**, is the best evidence of the items unless there is something to indicate that such items accrued in pursuance of, or are the result of, a written contract between the parties. The fact that one or both of the parties have kept a book account of their transactions, does not affect the rule of evidence, and the oral testimony of eye and ear witnesses to the transactions in which the various items of an account accrued, is still primary and not secondary evidence of such items. The books themselves are secondary or supplementary evidence." Cowdery *v.* MacChesney, 124 Cal. 363, 57 Pac. 221.

The introduction of books of account in evidence is carefully guarded by the statute. They are received as proof from necessity and because the ordinary means of establishing numerous items are often wanting. Their value as evidence must depend largely upon their condition and the manner in which they are kept and the character of the evidence laying the foundation for their introduction. Oral evidence may be introduced concerning the same transaction referred to in the books of account and its value as compared with that of such books must of course depend upon circumstances. Christman *v.* Pearson, 100 Iowa 634, 69 N. W. 1055.

In McCoul *v.* Lekamp, 2 Wheat. (U. S.) 111, the party's clerk testified that the several articles of merchandise contained in the account annexed to his deposition were sold by his employer and were charged in the day book by the deponent and another person who is dead, and that the deponent delivered them; and that he had referred to the original entries in the day book; and it was held that this was sufficient.

In Keene *v.* Meade, 3 Pet. 1, 7 L. ed. 581, it appeared that the party himself had made an entry in the rough cash book of the lender of money advanced to him, and it was objected on the trial that the book itself should be produced, and parol evidence of the loan was not admissible. The court decided that parol evidence was allowable to prove the loan notwithstanding the written entry of the advance, saying that "the entry of the advance made by the defendant himself, under the circumstances stated, cannot be considered better evidence, within the sense and meaning of the rule on that sub-

Knowledge of Witness Based on Books. — A witness who kept the plaintiff's books testifying to the correctness of the account sued upon, but basing his evidence upon an examination of the books together with other documents, and admitting that he did not sell the goods, is not competent to prove their sale and delivery; the books themselves being higher evidence than his information derived from them.[37]

2. Contents of Books. — A. In General. — The rule forbidding a resort to secondary evidence to prove the contents of an instrument in writing applies to a resort to such evidence to prove the contents of the books of account,[38] unless the absence of the books is accounted

ject, than proof of the actual payment."

In Strong *v.* State, 18 Tex. App. 19, a prosecution for embezzlement of money entrusted to the defendant for the purpose of paying into the state treasury it was held that the testimony of the treasurer was the best evidence to show that he did not receive the money and that he should have been put on the stand instead of a resort being had to the circumstance that no such fact appeared on the books of the office. *Citing* Childers *v.* State, 16 Tex. App. 524.

37. Solomon *v.* Creech, 82 Ga. 445, 9 S. E. 165. See also Day *v.* Crawford, 13 Ga. 508, holding a witness incompetent to prove a merchant's account from merely having seen and examined the original entry. Crawford *v.* Stetson, 51 Ga. 120.

In order to prove a book account without introducing the books or accounting for their non-production it is necessary that the evidence shall establish the correctness of the account irrespective of knowledge acquired by witnesses from the books in as much as the books themselves when properly authenticated as correct are the primary evidence, and information derived from them is only secondary. Birmingham Lumber Co. *v.* Brinson, 94 Ga. 517, 20 S. E. 437.

On a prosecution for false pretenses in obtaining property by means of a bogus check, the cashier of the bank on which the check was drawn, under whose supervision the bank books were kept and the business was conducted is competent to testify that the defendant had no account with the bank nor any money deposited there subject to check, although his knowledge is principally gained from the bank books. State *v.* McCormick, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 347.

In Wallace *v.* Bradshaw, 6 Dana (Ky.) 383, it was held that there was no error in rejecting that part of the defendant's account of which the witness had no knowledge and which was proved in no other way than by proof that it was correctly copied from their books.

In Iowa State Bank *v.* Novak, 97 Iowa 270, 66 N. W. 186, the cashier of a bank was permitted to testify that on a certain day there was an over balance in the accounts of the bank, that on another day the accounts balanced and that on a subsequent day there was a shortage; and it was held that in the absence of any showing that the witness was testifying from the bank's books his testimony was not secondary evidence, but that for all there appeared he was stating facts from his own knowledge entirely independent of the books; but that if it had been shown that he was testifying from his knowledge of the books, the books themselves would have been the best evidence.

38. *United States.*— Thorp *v.* Orr, 2 Cranch C. C. 335, 23 Fed. Cas. No. 14,008.

Alabama. — Roden *v.* Brown, 103 Ala. 324, 15 So. 598.

Florida. — *Compare* Higgs *v.* Sheehee, 4 Fla. 432.

Georgia. — Phillips *v.* Trowbridge Furniture Co., 86 Ga. 699, 13 S. E. 19. *Compare* Creamer *v.* Shannon, 17 Ga. 65, 63 Am. Dec. 226.

for by proof of their loss or destruction,[39] or that they are otherwise inaccessible.[40]

The Voluntary Destruction by a party of his books of account must be explained before he can prove their contents by copies.[41]

B. Books of Non-Resident Party. — The mere fact that the

Illinois. — Schotte *v.* Puscheck, 79 Ill. App. 31.

Missouri. — Ritchie *v.* Kinney, 46 Mo. 298; Wilcoxson & Co. *v.* Darr, 139 Mo. 660, 41 S. W. 227; Anderson *v.* Volmer, 83 Mo. 403.

New York. — Rouss *v.* McDowell, 88 Hun 532, 34 N. Y. Supp. 76; Reddington *v.* Gilman, 1 Bosw. 235; Collins *v.* Shaffer, 78 Hun 512, 29 N. Y. Supp. 574; Clark *v.* Dearborn, 6 Duer 309.

Pennsylvania.—Keeley *v.* Ord, 1 Dall 310.

South Carolina. — Dial *v.* Valley Mut. Life Assn., 29 S. C. 560, 8 N. E. 27.

Texas. — Arnold *v.* Penn, 11 Tex. Civ. App. 325, 32 S. W. 353; Price *v.* State, (Tex. Crim. App.), 40 S. W. 596; Watson *v.* Boswell. (Tex. Civ. App.), 61 S. W. 407.

West Virginia. — Hall *v.* Lyons, 29 W. Va. 410, 1 S. E. 582.

Wisconsin. — Dohmen Co. *v.* Niagara F. Ins. Co., 96 Wis. 38, 71 N. W. 69.

Bank Books. — In People *v.* Hurst, 41 Mich. 328, 1 N. W. 1027, the court said that while bank books are not public to the same extent that books belonging in public offices are, yet the business which corporations are required to transact cannot be done unless the books are usually kept where they belong. The blotter which was the book in question in that case, and being the book of original entries, must be in constant demand and there appeared no reason why its contents might not be shown without the production of the original in ordinary cases where no question of genuineness is likely to arise requiring a personal inspection.

The Wording of the Delaware Statute is such that a book of original entries with the oath or affirmation of the party shall be admitted or shall be allowed to be given in evidence to charge the opposite party with the sum therein contained, but it makes no provision for any secondary evidence in substitution of it in the event of its destruction or loss by accident. Bunting *v.* White, 3 Houst. (Del.) 551. But where the party who must prove his claim by his books of account is a non-resident of the state he may introduce sworn copies of the entries unless notice has been given to him by the opposite party to produce his books. Craig *v.* Russel, 2 Harr. (Del.) 353. See also Cannon *v.* Kinney, 3 Harr. (Del.) 317.

Under the Tennessee Book Debt Law, when one of the parties shall have given notice to the other who seeks to establish a book debt in the manner therein authorized requiring the latter's book to be produced on the trial, no copy thereof shall be admitted as evidence. Coxe *v.* Skeen, 3 Ired. Law (N. C.) 443, holding also that the voluntary destruction of the book by him who offered a copy will not authorize the introduction of the copy.

39. Moore *v.* Voss, 1 Cranch C. C. 179, 17 Fed. Cas. No. 9,778; Batre *v.* Simpson, 4 Ala. 305; Holmes *v.* Mardin, 12 Pick. (Mass.) 169; Mills *v.* Glennon, 2 Idaho 95, 6 Pac. 116; Baldridge *v.* Penland, 68 Tex. 141, 4 S. W. 565; Tucker *v.* Bradley, 33 Vt. 324.

In Ohio it has been held that in actions founded on book account, a party, in case the original books are lost by accident, may be examined on oath to prove their loss and touching the validity of the account but that the contents of the books must be proved by other evidence. Smiley *v.* Dewey, 17 Ohio 156.

40. Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562; Elliott *v.* Dyche, 80 Ala. 376.

41. Palmer *v.* Goldsmith, 15 Ill. App. 544.

party who desires to use his books of account as evidence in his own behalf is a non-resident or that the books are out of the jurisdiction of the court does not of itself warrant the introduction of secondary evidence of their contents;[42] although there is authority to the contrary.[43]

C. Details of Computation. — The court may in its discretion permit a competent witness who has examined the books with reference to the point sought to be established to testify to the result of his examination or to present schedules verified by his testimony showing the details of the computation he has made; where the facts sought to be proved are of such a character and the books are so voluminous that the examination of each item would be very laborious.[44]

42. Lombard *v.* McLean, 4 Cranch C. C. 623, 15 Fed. Cas. No. 8,471; Gale *v.* Norris, 2 McLean 469, 9 Fed. Cas. No. 5,190; Waite *v.* High, 96 Iowa 742, 65 N. W. 397.

In Churchill *v.* Fulliam, 8 Iowa 45, it was held incompetent for a party doing business, or residing out of the state or in a foreign country to prove the contents of such books by depositions of his clerks. The court said: "The admission of these books as evidence is of such a character that it may be said to have hardly won its way to a place among the rules of law. Wherever admitted, it is based upon the idea of the presence of the books themselves on the trial; and we have never known an attempt to dispense with that presence, and substitute evidence of their contents. After certain preliminary testimony concerning them, the court is to determine on their admissibility; but in the mode of proceeding adopted in this case, the party offering them assumes this adjudication. Then, the books being admitted, they are still subject to any objections which may be made by the other side respecting their credibility, arising from the manner in which they are kept — their appearance — alterations, erasures, confusion and irregularity — and whatever might tend to diminish their credibility in the eyes of a jury. This is in the nature of a cross-examination of a witness, and this is taken away—the other party has no opportunity to object. Again, the book itself becomes the witness when admitted, and its testimony cannot come by hearsay through other witnesses, nor can its deposition be taken. Another view in which this proceeding may be presented is that it is permitting a party to give secondary evidence of the contents of a paper, or of a writing, which is in his own exclusive possession. The allowance of this practice would violate every principle upon which the admission of books of entry is supported. The whole doctrine is based upon the idea of the presence of the books upon the trial. We are clearly of the opinion that the court erred in this instruction, and in admitting this testimony as a substitute for the books themselves."

43. Bell *v.* Keely, 2 Yeates (Pa.) 255; Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

44. Elmira Roofing Co. *v.* Gould, 71 Conn. 629, 42 Atl. 1002. In such case, unless there is some legal excuse for not producing the books themselves, they must be produced if required by the opposite party for examination or to enable him to cross-examine the witness.

But it is not error to reject such testimony where it is not made to appear that expert testimony is required to ascertain the facts sought to be proved. Van Sachs *v.* Kretz, 72 N. Y. 548.

In Roberts *v.* Eldred, 73 Cal. 394, 15 Pac. 16, an action for the accounting of the affairs of a partnership, the condition of which it was impossible to ascertain from the books of the firm; it was held that a set of books made up from the firm books by ex-

D. Authentication of Originals. — Where a party seeks to resort to secondary evidence of the contents of books of account, merely accounting for the absence of the books themselves is not enough; but there must be such proof as would warrant the admission of the books themselves in evidence were they produced.[45]

E. Authentication of Copy. — So also where a party seeks to

perts under a stipulation for the employment of experts to reduce the accounts to some intelligible shape, were competent in connection with the report of the referee to enable the judge to comprehend the state of the accounts.

45. *United States.* — Thorp *v.* Orr, 2 Cranch C. C. 335, 23 Fed. Cas. No. 14,008.

Alabama. — Walling *v.* Morgan Co., 126 Ala. 326, 28 So. 433.

Idaho. — Mills *v.* Glennon, 2 Idaho 95, 6 Pac. 116.

Iowa. — Pidcock *v.* Voorhies, 84 Iowa 705, 42 N. W. 646, 49 N. W. 1038.

Louisiana. — Byrne *v.* Grayson, 15 La. Ann. 457.

Missouri. — Collins Bros. Drug Co. *v.* Graddy, 57 Mo. App. 41.

New Hampshire. — Jones *v.* Jones, 21 N. H. 219.

New York. — Rouss *v.* McDowell, 88 Hun 532, 34 N. Y. Supp. 776; McCormick *v.* Mulvihill, 1 Hill 131.

Pennsylvania. — Budden *v.* Petriken, 5 Watts. 286; Gochenauer *v.* Good, 3 Pen. & W. 274; Vance *v.* Feariss, 1 Yeates 321; Vance *v.* Fairis, 2 Dall. 217.

Texas. — Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565.

Vermont. — Tucker *v.* Bradley, 33 Vt. 324.

An account taken from the books of a merchant kept by a clerk who is dead is not competent unless the books were the original books of entry and kept by a clerk who could have proved, if living, the delivery of the goods; and his handwriting must also be proved. But where such an account is offered, a letter from the debtor acknowledging in general terms a balance due will not be admitted to verify an account which would otherwise be inadmissible. It must be applied to the account itself and not merely to general transactions between the parties. Owen *v.* Adams, 1 Brock. 72, 18 Fed. Cas. No. 10,633.

The Pennsylvania Affidavit of Defence Statute requires that in all actions for the recovery of book debts, the plaintiff in order to be entitled to a judgment for want of an affidavit of defence, must file in the office of the prothonotary within a designated time a copy of the book entries on which the action is based; and it is held that the words "book entries" mean the entries in the original book of the plaintiff which under the ordinary rules of evidence would be competent in support of the plaintiff's claim. Wall *v.* Dovey, 60 Pa. St. 212. *Citing* Hamlin *v.* O'Donnell, 2 Miles 101.

And in Blackstock *v.* Leidy, 19 Pa. St. 335; a rule of court required "a copy taken from the plaintiff's book of original entry" to be filed and it was held that an affidavit accompanying a copy filed stating it to be "an accurate transcript from the books of plaintiff" would have been insufficient had there been a proper objection made; but as there was no affidavit filed by the defendent as required, that the defendant had no such dealing with the plaintiff as stated in the account filed or that they believed that the production of the plaintiff's book of original entries on the trial was necessary; it was held that the affidavit and the copy were sufficient. See also Mattern *v.* McDivitt, 113 Pa. St. 402, 6 Atl. 83.

A statute making copies of the books of any corporation certified to as required therein *prima facie* evidence of the facts so certified is not intended to make such books or copies thereof evidence when the books themselves were not competent evidence before the statute but was simply intended to make certified copies evidence, when by the law as it stood before, the originals would

prove the contents of his books of account by copies of the entries therein, the copies offered must be proved to be correct copies.[46]

F. Consequences of Non-Production on Notice. — A failure, after legal notice, to produce books of account which may furnish legal evidence authorizes the introduction of secondary evidence of their contents.[47]

Failure to produce a book of accounts does not justify the presumption that the book if produced would prove the facts asserted to be entered therein unless there has been a notice to the party to produce it.[48]

When secondary evidence of the contents of books of account is rendered necessary by the non-production of the books after proper notice for that purpose the party so refusing to produce cannot contradict such secondary evidence.[49]

have been competent evidence. Pittsfield & F. P. R. Co. *v.* Harrison, 16 Ill. 81.

46. Moore *v.* Voss, 1 Cranch C. C. 179, 17 Fed. Cas. No. 9,778. Bristol *v.* Warner, 19 Conn. 7, and see cases cited in previous notes of this section where, although the question is not expressly ruled upon, the rule is certainly recognized.

Where it is stipulated that the transcript from the books of account in question may be used in the same manner as the books themselves could be if produced, the transcripts are properly allowed to go to the jury. Jordan *v.* Osgood, 109 Mass. 457, 12 Am. Rep. 731.

47. Smith *v.* Collins, 94 Ala. 394, 10 So. 334.

48. Watkins *v.* Pintard, 1 N. J. Law 379.

49. McGuiness *v.* School Dist. No. 10, 39 Minn. 499, 41 N. W. 103; Bogart *v.* Brown, 5 Pick. (Mass.) 18; Platt *v.* Platt, 58 N. Y. 646.

BOTTOMRY.—See Admiralty.

BOUNDARIES.

By Horace T. Smith.

I. CREATION OF BOUNDARIES.

1. Chain of Title. — A. PATENT. — On the issue as to what line is the true boundary, the patent from the government, creating the boundary by separating the granted lands from those retained by the state is admissible,[1] and the government survey is competent to explain or correct the patent.[2]

1. Patent. — People *v.* San Francisco, 75 Cal. 388, 17 Pac. 522; Lessee of McCoy *v.* Gallowav 3 Ohio 282, 17 Am. Dec. 591.

Where the description in a patent is so certain as to leave no room for construction it must be strictly followed and a United States patent issued upon confirmation of a Mexican grant is conclusive evidence of the land confirmed. Taylor *v.* McConigle, 120 Cal. 123, 52 Pac. 159. Unlike a deed, a patent cannot create an estoppel against the grantee and its recitals are only *prima facie* evidence, and parol evidence is permissible to dispute the calls of a patent. Wallace *v.* Maxwell, 1 J. J. Marsh. (Ky.) 447.

2. Survey. — Brown *v.* Huger, 4 Fed. Cas. No. 2013; French *v.* Bankhead, 11 Gratt. (Va.) 136; Irvin *v.* Bevil, 80 Tex. 332, 16 S. W. 21; Brown *v.* Clements, 3 How. (U. S.) 650.

To show that a patent was founded upon a survey, a copy of a survey and plat made for the patentee at the proper time describing the lands patented is admissible. Clements *v.* Kyles, 13 Gratt. (Va.) 468.

The patent being founded on the survey and warrant of acceptance only conveys title to the land actually embraced in the surveys. If the patent erroneously calls for an older survey as an adjoiner, the survey and not the patent will govern, as to the land embraced in the title. Ormsby *v.* Ihmsen, 34 Pa. St. 462.

The survey is a matter of record of equal dignity with the patent itself, is referred to by the patent, and is the only source from which the boundaries contained in the patent were obtained, and the survey is competent to correct the patent. Steeles Heirs *v.* Taylor, 3 A. K. Marsh. (Ky.) 225, 13 Am. Dec. 151.

Petition and warrant for new sur-

a. *Location and Warrant.* — The entry, location, and warrant are competent to contradict the description of both the patent [3] and survey.[4] And extrinsic evidence is competent to explain an uncertain grant.[5]

B. Treaty. — A treaty transferring lands or adjusting boundaries where relevant is admissible.[6]

C. Statute. — A statute fixing or recognizing a public grant, is competent and material evidence to define its boundary lines.[7]

D. Will. — A will by which lands are subdivided is admissible,[8] and parol evidence is competent to explain uncertain boundaries thus created.[9]

E. Decree. — A decree establishing boundary lines is competent evidence as to the location of such lines.[10]

vey and report of such survey with map is not competent where there is no showing as to grant for excess of new survey. Dew on the several demises of Osborn *v.* Coward, 2 Murphy (N. C.) 77.

3. Location and Warrant. — On a question of boundary, to aid in the construction of a patent, the original entry survey and plat are competent evidence. Brown *v.* Huger, 4 Fed. Cas. No. 2,013.

4. Smith *v.* Buchanan, 2 Over. (Tenn.) 305.

5. Extrinsic Evidence. — Where a grant from the commonwealth by its terms leaves it uncertain what lands were meant or the extent of the lands intended, extrinsic evidence, including that of later contiguous grants is admissible. Owen *v.* Bartholomew, 9 Pick. (Mass.) 520.

In construing a Mexican grant the attendant and surrounding circumstances, at the time it was made, are competent evidence for the purpose of placing the court in the same situation and giving the same advantages for construction as the parties themselves had. Cavazos *v.* Trevino, 6 Wall. (U. S.) 773.

6. Treaty. — Harris *v.* Doe, 4 Blackf. (Ind.) 369.

7. Statute. — Mobile *v.* Eslava, 9 Port. (Ala.) 577, 33 Am. Dec. 325; Grimes *v.* Corporation of Bastrop, 26 Tex. 310.

Public statutes and grants, forming part of the title papers are competent to be read to the jury. Mobile Transp. Co. *v.* City of Mobile, 128 Ala. 335, 30 So. 645.

8. Will. — Jackson *v.* Perrine, 35 N. J. Law 137.

9. Parol. — Den *v.* Cubberly, 12 N. J. Law 308.

Where the owner of two tracts of land, purchased at different times from different parties makes a new division line between them, and they are thereafter farmed by different tenants up to the new line, and the tracts, named after the former owners, and mentioned by the owner with reference to the new line, and by such names devised to different devisees, these facts may be shown to explain the will. Harper *v.* Anderson, 130 N. C. 538, 41 S. E. 1021.

Where the construction of will does not disclose which of two similar monuments was intended, parol evidence is competent to effect that purpose, and the declarations of the testator to the scrivener in this regard are admissible. Jackson *v.* Perrine, 35 N. J. Law 137.

10. Decree. — Smith *v.* Shackleford, 9 Dana (Ky.) 452, 465; Jones *v.* Pashby, 48 Mich. 634, 12 N. W. 884; McAlpine *v.* Reichenecker, 27 Kan. 257.

Where a committee appointed by the court under the General Statutes of Conn. (p. 355, § 1,) report their determination, and marking of the lost line, and their report is approved by a decree of court, evidence that the restored line is not the true boundary line is admissible, and parol evidence of the committee as to what line was restored is competent, but the identity of the lost and restored lines cannot be disputed

F. Deed. — The deed by which a tract was divided is admissible to locate the division boundary line.[11] And parol or extrinsic evidence is not generally competent to vary or explain the description except in an action for reformation,[12] but where there is a latent ambiguity,[13] or an uncertainty arises in applying the description to the ground,[14] parol evidence is competent.

a. *Patent Ambiguity.* — A patent ambiguity generally cannot be explained by parol evidence,[15] but where the description is by farm

and evidence for such purpose is not admissible. Mosman *v.* Sanford, 52 Conn. 23.

A decree under which one holds lands is evidence to show extent of possession, for or against a stranger to the action. Smith *v.* Shackleford, 9 Dana (Ky.) 452.

The record of an adjudication of the boundary line between two townships, is not admissible in an action between private owners. Lawrence *v.* Haynes, 5 N. H. 33, 20 Am. Dec. 554.

11. Deed. — Busse *v.* Town of Central Covington, 19 Ky. L. Rep. 157, 38 S. W. 865; Miller *v.* Pryse, 20 Ky. L. Rep. 1544, 49 S. W. 776.

The description in the first deed from the common grantor determines the boundary line. Barrett *v.* Murphy, 140 Mass. 133, 2 N. E. 833.

12. *Alabama.* — Guilmartin *v.* Wood, 76 Ala. 204.

Massachusetts. — Owen *v.* Bartholomew, 9 Pick. 520; Waterman *v.* Johnson, 13 Pick. 261; Bond *v.* Fay, 12 Allen 86.

Minnesota. — Beardsley *v.* Crane, 52 Minn. 537, 54 N. W. 740.

Nebraska. — Rohlman *v.* Lohmeyer, 60 Neb. 364, 83 N. W. 201; Gillespie *v.* Sawyer, 15 Neb. 536, 19 N. W. 449.

New Jersey. — Jackson *v.* Perrine, 35 N. J. Law 137.

New York. — Dew *v.* Swift, 46 N. Y. 204; Lawrence *v.* Palmer, 71 N. Y. 607.

Where an ancestor buys land and the deed, by mistake in the calls, covers only part of the land but he occupies it all and perfects his title by adverse possession, when his land is sold at judicial sale by the defective description, the heir inherits the part of the land not included in such description, and the purchaser at such judicial sale cannot change the calls of the deeds by parol, except in a suit in equity to correct a mistake. Donehoo *v.* Johnson, 120 Ala. 438, 24 So. 888.

13. Latent Ambiguity. — *See* "Ambiguity," Vol. I, p. 844. — Purkiss *v.* Benson, 28 Mich. 538; Donehoo *v.* Johnson, 120 Ala. 438, 24 So. Hoar *v.* Goulding, 116 Mass. 132; Chester Emery Co. *v.* Lucas, 112 Mass. 424; Nulling *v.* Crankfield, 1 McCord (S. C.) 258.

Where the description in a deed would convey land nearly in the shape of an hourglass, there is no patent ambiguity, but if in the application of the description to the ground a latent ambiguity arises, parol evidence is competent to support and explain the deed. Talkin *v.* Anderson, (Tex.), 19 S. W. 350.

Where there is an ambiguity in a deed between adjoiners and courses and distances, the written contract now merged in the deed may be used to explain the ambiguity. Koch *v.* Dunkel, 90 Pa. St. 264.

14. Purkiss *v.* Benson, 28 Mich. 538; Beach *v.* Whittlesey, 73 Conn. 530; 48 Atl. 350; McAfferty *v.* Conover's Lessee, 7 Ohio St. 99, 70 Am. Dec. 57.

Where there is an ambiguity between the calls of a deed and the lines of a map referred to in the deed, the surrounding circumstances should be shown in evidence to aid in ascertaining the intention of the parties. Post Hill Impr. C. *v.* Brandegee, 74 Conn. 338, 50 Atl. 874.

15. But see *infra* II., 10.

Where the survey does not close, and by changing a cipher to a degree mark the calls of the description will harmonize, the deed is admissible in evidence, and the court will so correct the description, and reject the false call, without parol evidence to

name or other general terms,[16] or is indefinite, or uncertain, evidence *aliunde*,[17] is admissible; but where a general description becomes definite by a rule of legal construction, parol evidence is not competent to show a different intention.[18]

b. *Instruments Referred To.* — Monuments, surveys, and instruments mentioned in the description[19] become material evidence to

explain the mistake. Coffey *v.* Hendricks, 66 Tex. 676, 2 S. W. 47.

16. Indefinite Description.— Birchfield *v.* Bonham, 2 Spear (S. C.) 62; Lewis *v.* Roper Lumber Co., 113 N. C. 55, 18 S. E. 52; Carson *v.* Ray, 7 Jones (N. C.) 609; 78 Am. Dec. 267; Scull *v.* Pruden, 92 N. C. 168.

When land is described in a conveyance by the name of the tract or as the land where the grantor resides and without monuments courses and distance, evidence *aliunde* is admissible to establish lines and corners. Euliss *v.* McAdams, 108 N. C. 507, 13 S. E. 162.

Where a description is general, and not by definite monuments, courses, and distances, parol evidence of practical construction as shown by possession is admissible. Hill *v.* Lord, 48 Me. 83.

17. Patch *v.* Keeler, 28 Vt. 332; Haring *v.* Van Houten, 22 N. J. Law 61; Owen *v.* Bartholomew, 9 Pick. (Mass.) 520; Jackson *v.* Perrine, 35 N. J. Law 137.

Where the deed leaves the location of the boundary uncertain, the construction placed upon it by the parties by their acts with reference to the property and line may be proved by parol. Lovejoy *v.* Lovett, 124 Mass. 270.

Where a description calls for a line as a boundary, and the line is uncertain, to show the understanding of the parties, maps in common use portraying the line are admissible. Hanlon *v.* Union Pac. R. Co., 40 Neb. 52, 58 N. W. 590.

Where a description is employed which has not, by statute, usage or judicial decision, acquired a fixed legal construction, or a fluctuating or variable boundary is referred to, extrinsic evidence is competent. Waterman *v.* Johnson, 13 Pick. (Mass.) 261.

18. Waterman *v.* Johnson, 13 Pick. (Mass.) 261.

Where a deed describes the east half of a tract, the presumption is that quantity is to determine, and evidence of the existence of a fence midway between the North and South boundaries of the whole tract is not admissible. Cogan *v.* Cook, 22 Minn. 137.

A description calling for a fraction or defined quantity, of a tract along one of its lines, extends the length of the line, and one calling for a quantity of land in a corner denotes a square, and these constructions may not be altered by parol evidence of intent. Walsh's Lessee *v.* Ringer, 2 Ohio 327, 15 Am. Dec. 555.

19. *United States.*—Cragin *v.* Powell, 128 U. S. 691.

California.— Olsen *v.* Rogers, 120 Cal. 225, 52 Pac. 486.

Georgia.— McAfee *v.* Arline, 83 Ga. 645, 10 S. E. 441.

Massachusetts.— Davis *v.* Rainsford, 17 Mass. 207.

Michigan.— Hoffman *v.* City of Port Huron, 102 Mich. 417, 60 N. W. 831; Guentherodt *v.* Ross, 121 Mich. 47, 79 N. W. 920.

Minnesota. — Cannon *v.* Emmans, 44 Minn. 294, 46 N. W. 356.

Missouri.—Campbell *v.* Wood, 116 Mo. 196, 22 S. W. 796; Brewington *v.* Jenkins, 85 Mo. 57; McKinney *v.* Doane, 155 Mo. 287, 56 S. W. 304.

New Jersey.— Baldwin *v.* Shannon, 43 N. J. Law 596.

New York. — Glover *v.* Shields, 32 Barb. 374; Weeks *v.* Martin, 32 N. Y. St. 811, 10 N. Y. Supp. 656; Finelite *v.* Sinnott, 125 N. Y. 683, 25 N. E. 1089.

Wisconsin. — Fleishchfresser *v.* Schmidt, 41 Wis. 223.

A plat attached to a deed becomes a part of the deed, and when recorded with the deed is provable by the record. State *v.* Crocker, 49 S. C. 242, 27 S. E. 49.

Where a deed describes a tract and

locate boundaries, and the rule may be extended to apply where there is a chain of references,[20] but evidence as to the existence of such monuments at the time of sale is material.[21] Without such reference evidence of such monuments,[22] surveys,[23] or instruments should be excluded.[24]

excludes a part of it before conveyed, the conveyance for the part is not competent to contradict the other calls of such deed. Frost *v.* Augier, 127 Mass. 212.

It may be shown by parol evidence that an official map referred to in a deed is inaccurate and was compiled from old maps without surveys. Cleveland *v.* Choate, 77 Cal. 73, 18 Pac. 875.

Where premises are described as bounded by a certain tract, a later deed for the tract is not competent, but existing deeds may be admissible. Cutter *v.* Caruthers, 48 Cal. 178.

Where a map or plan of a tract of land with lines drawn upon it, marking the boundaries, and with the natural objects upon its surface laid down, is referred to in a deed to aid in the description, this map or plan is to be regarded as giving the true description of the land conveyed, as much as if it were expressly recited, and marked down in the deed itself. Vance *v.* Fore, 24 Cal. 436; Mayo *v.* Mazeaux, 38 Cal. 442; Serrano *v.* Rawson, 47 Cal. 52; Black *v.* Sprague, 54 Cal. 266.

A map referred to in a deed to supplement the description may be regarded as a daguerreotype of the land conveyed, and all the objects represented upon the plan are to have the same effect as if carried into the deed by verbal description. Chapman *v.* Polack, 70 Cal. 487, 11 Pac. 764; Thomas *v.* Patten, 13 Me. 329.

20. Where the owner of a tract conveys a tier of lots successively beginning with a fixed line, describing the first lot as of certain width and along such line, and each succeeding lot as of certain width and along the preceding lot, on an issue as to the boundary line of two of the lots, the deed for those lots and all preceding lots of the tier is material evidence. Devine *v.* Wyman, 131 Mass. 73.

21. Barrett *v.* Murphy, 140 Mass. 133, 2 N. E. 833.

When the corner claimed has no similitude to the reported one, courses and distances must prevail. Lessee of McCoy *v.* Galloway, 3 Ohio 282, 17 Am. Dec. 591.

Calls for non-existent monuments are calls for courses and distances only, and they then must govern. Hughlett *v.* Conner, 12 Heisk. (Tenn.) 83.

Where a deed describes by courses and distances and by monuments which had disappeared before the deed was made, the location of the monuments cannot be proved by parol to contradict the other calls of the deed. Seaman *v.* Hogeboom, 21 Barb. (N. Y.) 398.

22. Without Reference.— Whitehead *v.* Atchison, 136 Mo. 485, 37 S. W. 928; Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884; McKinney *v.* Doane, 155 Mo. 287, 56 S. W. 304.

Parol evidence of the setting stakes at the survey of a plat are not competent against a grantee whose calls are for courses and distances without reference to such stakes. Jackson *v.* Perrine, 35 N. J. Law 137.

23. A survey made at the request of a party at the time of his deed does not bind him where the deed calls for the line of an old survey, and the new survey fails to locate the old line. Wiley *v.* Lindley, (Tex. Civ. App.) 56 S. W. 1001.

An unambiguous deed not referring to a particular survey can not be modified by parol testimony that the parties understood such reference. Rowland *v.* McCown, 20 Or. 538, 26 Pac. 853.

24. Where a deed describes by reference to a recorded plat, the original plat from which the record was made is not admissible to contradict such record, except upon proper showing in an action to reform the deed. Jones *v.* Johnston, 18 How. (U. S.) 150.

Before a plan or map is admissible

Conveyances. — The first conveyance creating the boundary line, and the mesne conveyances, are competent to show such references.[25]

c. *Recitals.* — Recitals in a deed are admissible against the grantee and those holding title under him,[26] against the grantor[27] and where his remaining lands are affected by the recitals against those holding such lands under him, but both parties must be privy to the deed,[28] except when hearsay or evidence of reputation is competent.

G. PRESUMPTIONS. — There is a presumption that land descended to the heir [29] and the boundary lines are presumed to remain as fixed by the first conveyance or original title.[30]

2. Agreed Line. — A. GENERALLY. — An agreement settling a dispute of boundary may be shown to create a new line,[31] but the

to show the boundaries of a deed, it must have been referred to as part of the description, and without such reference it can not be protracted upon the earth to show the locations. Talbot *v.* Copeland, 38 Me. 333.

25. Mesne Conveyances. — Heinricks *v.* Terrell, 65 Iowa 25, 21 N. W. 171; Windus *v.* James, (Tex.), 19 S. W. 873.

Where a party has put a deed on record executed by an attorney the opposite party may introduce the record in evidence when otherwise competent without proof of authority. Hale *v.* Silloway, 1 Allen (Mass.) 21.

Where the demandant by an elder conveyance and the tenant by junior deed hold under a common grantor, the junior deed to the tenant is competent evidence for him. Chase *v.* White, 41 Me. 228.

26. Recitals. — Carver *v.* Jackson, 4 Pet. (U. S.) 1, 83; Sinclair *v.* Jackson, 8 Cow. (N .Y.) 543; Hale *v.* Silloway, 1 Allen (Mass.) 21.

The recitals in a deed are evidence as between parties, and those deriving title under them, the acceptance of the deed operating as an estoppel against the grantee, and those claiming under him. Demeyer *v.* Legg, 18 Barb. (N. Y.) 14.

The dedication of a street may be shown by the contents or recitals of deeds, made by the privies of those disputing the dedication. Doe *v.* Jones, 11 Ala. 63.

27. Stumpf *v.* Osterhage, 94 Ill. 115.

28. "Technically speaking a recital in a deed operates as an estoppel and binds parties and privies; privies in blood, privies in estate, and privies in law, but it does not bind mere strangers or those who claim by paramount or anterior title." Carver *v.* Jackson, 4 Pet. (U. S.) 1, 83.

The recitals of a recorded deed are evidence against those claiming under the parties by conveyances made after the recitals, but are not evidence against others. Stumpf *v.* Osterhage, 94 Ill. 115.

29. Descent Presumed.— Morris *v.* Callanan, 105 Mass. 129.

30. Boundaries Changed. — Den *ex* Dem. Van Blarcom *v.* Kip, 26 N. J. Law 351.

The presumption is that the grantor intended to convey the lands embraced within the boundaries of the government survey as the corners were actually established, and not as they ought to have been established, or were shown by surveyor's notes and maps. Greer *v.* Squire, 9 Wash. St. 359, 37 Pac. 545.

31. Generally.— *Kentucky.*— Smith *v.* Prewit, 2 A. K. Marsh. 155.

Michigan.— Jones *v.* Pashby, 67 Mich. 459, 35 N. W. 152; Smith *v.* Hamilton, 20 Mich. 433, 4 Am. Rep. 398; Joyce *v.* Williams, 26 Mich. 332; Stewart *v.* Carleton, 31 Mich. 270; Dupont *v.* Starring, 42 Mich. 492; 4 N. W. 190; Burns *v.* Martin, 45 Mich. 22, 7 N. W. 219; Diehl *v.* Zanger, 39 Mich. 601.

New Hampshire.— Gray *v.* Berry, 9 N. H. 473.

burden of proof is on the party relying upon such agreement.[32]

B. PAROL EVIDENCE. — When a party has had possession up to such line the agreement may be proved by parol evidence,[33] as may also a practical location of the line.[34]

New York.— Wood *v.* Lafayette, 46 N. Y. 484.

Texas.—Smith *v.* Russell, 37 Tex. 247.

Where the parties by indentures establish their boundary line, and afterward the line so established comes in question, evidence as to their former title line is not admissible without proof that the agreed indenture line and monuments cannot be ascertained. Proprietors of Liverpool Wharf *v.* Prescott, 4 Allen (Mass.) 22.

An official survey, establishing an old government line and monuments will not preclude a party from showing adverse possession, or an agreed line or practical location. Miller *v.* White, 28 Ind. App. 371, 62 N. E. 1021.

Where the range line was the disputed boundary, and the parties agreed upon their boundary, and a sale was made calling for the range line, the agreed line may be shown as the line intended in the deed. Dudley *v.* Elkins, 39 N. H. 78.

An agreement to settle boundaries referring to a certain draft or map as explaining the agreement is not competent without the draft. McDermott *v.* Hoffman, 70 Pa. St. 31.

To establish an agreed location of a boundary line which is to divest one of a clear and conceded title by deed, the extent of which is free from ambiguity or doubt, the evidence establishing such location should be clear, positive, and unequivocal. There should be an express agreement made between the owners of the lands, deliberately setting the exact, precise line between them. Beardsley *v.* Crane, 52 Minn. 537, 54 N. W. 740.

Where a party depends upon an alleged agreement establishing a permanent boundary line, the fact that the latter employed a surveyor to locate this boundary may be shown to discredit his claim. Archer *v.* Helm, 70 Miss. 874, 12 So. 702.

Neither the true record line nor an accepted award long acquiesced in, will preclude proof of a later agreed line made in settlement of a new controversy. Hitchcock *v.* Libby, 70 N. H. 399, 47 Atl. 269.

32. Burden of Proof.— Archer *v.* Helm, 70 Miss. 874, 12 So. 702; Jones *v* Pashby, 67 Mich. 459, 35 N. W. 152.

33. Parol.— *California.*— Helm *v.* Wilson, 76 Cal. 476, 18 Pac. 604.

Illinois. — La Mont *v.* Dickinson, 189 Ill. 628, 60 N. E. 40.

Michigan.— Manistee Mfg. Co. *v.* Cogswell, 103 Mich. 602, 61 N. W. 884; Stewart *v.* Carleton, 31 Mich. 270.

Missouri.— Jacobs *v.* Moseley, 91 Mo. 457, 4 S. W. 135.

New Hampshire.—Sawyer *v.* Fellows, 6 N. H. 107, 25 Am. Dec. 452.

New York.— Nat. Com. Bank of Albany *v.* Gray, 71 Hun 295, 24 N. Y. Supp. 997.

Ohio.— Bobo *v.* Richmond, 25 Ohio St. 115.

Texas.— Wardlow *v.* Harmon, (Tex. Civ. App.), 45 S. W. 828.

Where there is a dispute as to the true boundary line, or the line is uncertain, and the adjoining land owners are both ignorant as to the true location, they may fix and agree upon a permanent boundary line, and take possession accordingly, when the agreement is binding upon them and those holding under them. Such agreement is not within the Statutes of Frauds and need not be in writing. Jacobs *v.* Mosely, 91 Mo. 457, 4 S. W. 135.

34. Practical Location.— Miles *v.* Barrows, 122 Mass. 579; Dupont *v.* Starring, 42 Mich. 492; 4 N. W. 190; Pickett *v.* Nelson, 71 Wis. 542, 37 N. W. 836; Welton *v.* Poynter, 96 Wis. 346, 71 N. W. 597; Makepeace *v.* Bancroft, 12 Mass. 469; Diehl *v.* Zanger, 39 Mich. 601.

A practical location for 20 years can not be changed without writings. Burns *v.* Martin, 45 Mich. 22, 7 N. W. 219.

Where streets have been opened

C. Privies in Title. — Such evidence is admissible against the parties and successors in title [35] only.[36]

D. Dispute. — The agreement or practical location must have been made in settlement of a dispute or doubt,[37] and it is sometimes held that the description must be ambiguous or uncertain to make such evidence competent.[38]

a. *Exception.* — Where an estoppel arises[39] or a practical location was made by vendor and vendee at time of sale, such evidence is admissible without proof of dispute or doubt.[40]

and long acquiesced in, under supposed conformity to the plat, they should be accepted as fixed monuments in locating blocks, lots contiguous thereto, and fronting thereon. Van Den Brooks *v.* Correon, 48 Mich. 283, 12 N. W. 206.

Where a street arises from dedication and user, its boundaries are determined by their actual location upon the ground. Jackson *v.* Perrine, 35 N. J. Law 137.

35. Orr *v.* Foote, 10 B. Mon. (Ky.) 387; Burns *v.* Martin, 45 Mich. 22, 7 N. W. 219; Orr *v.* Hadley, 36 N. H. 575; Dudley *v.* Elkins, 39 N. H. 78; Bartlett *v.* Young, 63 N. H. 265; McKinney *v.* Doane, 155 Mo. 287, 56 S. W. 304; Joyce *v.* Williams, 26 Mich. 332.

A written agreement, unacknowledged and not recorded, for a practical location of a boundary line, executed in duplicate 75 years before, one of the copies being found with the muniments of title of either party, upon proof of the signature of the grantor of the party against whom the paper is offered, is competent evidence as an ancient instrument. Nat. Com. Bank of Albany *v.* Gray, 71 Hun, 205, 24 N. Y. Supp. 997.

36. Wallace *v.* Goodall, 18 N. H. 439.

Where a disputed boundary on the east line was located by agreement, and the northeast corner was fixed, these facts are not competent evidence on an issue with another party as to the north boundary line. Anderson *v.* Jackson, 69 Tex. 346, 6 S. W. 575.

A party may not show a practical location nor agreed line unless he is privy to such settlement of the disputed boundary. Knudsen *v.* Omanson, 10 Utah 124, 37 Pac. 250.

Where the vendee under a land contract, and the adjoining land owner agree upon a boundary between them, although vendor assists in locating it, he will not be bound thereby. Pickett *v.* Nelson, 79 Wis. 9, 47 N. W. 936.

37. Dispute. — Pickett *v.* Nelson, 71 Wis. 542, 37 N. W. 836; Hitchcock *v.* Libby, 70 N. H. 399, 47 Atl. 269.

Mere acquiescence with practical location is not enough, it must also appear that the parties were acting with particular reference to determining their boundary, and for that specific purpose. Cronin *v.* Gore, 38 Mich. 381.

38. Jackson *v.* Perrine, 35 N. J. Law 137; Baldwin *v.* Brown, 16 N. Y. 359; Silvarer *v.* Hansen, 77 Cal. 579, 20 Pac. 136.

Where the line was so ambiguous as to require a court to determine the meaning of the description, a doubt exists which the parties might well settle by an agreement evidenced by parol. Jones *v.* Pashby, 67 Mich. 459, 35 N. W. 152.

The admission of evidence as to a practical location is permitted only where the description in the deeds is ambiguous, or uncertain, or where an estoppel arises. Baldwin *v.* Shannon, 43 N. J. Law 596.

39. Exceptions. — Jackson *v.* Perrine, 35 N. J. Law 137; Haring *v.* Van Houten, 22 N. J. Law 61; Pickett *v.* Nelson, 71 Wis. 542, 37 N. W. 936.

40. Location at Sale. — *Louisiana.* Lebeau *v.* Bergeron, 14 La. Ann. 489.

Maine. — Dunn *v.* Hayes, 21 Me. 76.

Massachusetts. — Makepeace *v.* Bancroft, 12 Mass. 469; Barrett *v.* Murphy, 140 Mass. 133, 2 N. E. 833; Gerrish *v.* Towne, 3 Gray 82;

E. Rebuttal. — A party may show in rebuttal that he is an innocent purchaser from one in possession,[41] that the contract or practical location was induced by the fraud of the opposite party,[42] or that a location, not fixed at the time of sale, was made by mistake and not in settlement of a dispute.[43]

F. Acts of Parties. — a. *Marked Line.* — In proof of agreement or practical location, it is competent to show against a party that, alone or with adjoining land owner, he marked the line,[44] built or maintained a fence,[45] or party wall thereon[46] or made improvements with reference to such line.[47]

G. Acts of Party Claiming Line. — a. *Taxes.* — The party claiming the agreed line may show that he paid taxes,[48] and held possession up to such line.[49] And the acquiescence of his adversary as to such line may be shown.[50] The declarations of a party are

Chester-Emery Co. *v.* Lucas, 112 Mass. 424; Hoar *v.* Goulding, 116 Mass. 132; Dunham *v.* Gannett, 124 Mass. 151.

41. Innocent Purchaser. — Stewart *v.* Carleton, 31 Mich. 270; Robinson *v.* Miller, 37 Me. 312.

An innocent purchaser without notice from one in possession under a record title will not be affected by an agreement made by his grantor to establish a disputed boundary. Edwards *v.* Smith, 71 Tex. 156, 9 S. W. 77.

42. Perry *v.* Hardy, 71 N H. 151, 51 Atl. 644.

43. Mistake.—Beardsley *v.* Crane, 52 Minn. 537, 54 N. W. 740; Wiley *v.* Lindley, (Tex. Civ. App.), 56 S. W. 1001; Hass *v.* Plautz, 56 Wis. 105, 14 N. W. 65, 43 Am. Rep. 699; Coon *v* Smith, 29 N. Y. 392; McAfferty *v.* Conover's Lessee, 7 Ohio St. 99, 70 Am. Dec. 57; Cronin *v.* Gore, 38 Mich. 381.

Where the parties, intending to establish the true line between them, fix the bounds, and occupy up to the line for more than 20 years, and then one of the parties tells a purchaser that he does not own beyond the line, and later acquiesces in improvements made with reference to the line, it was held that there was no estoppel to claim the true line because the agreement and representations were made in good faith under a mistake. Brewer *v.* Boston etc. R. R. Co., 5 Metc. (Mass.) 478, 39 Am. Dec. 694.

44. Marked Line. — Jackson *v.* Perrine, 35 N. J. Law 137.

On the issue as to a disputed boundary it is competent to show that in a controversy between prior owners, they called in a surveyor who ran a boundary line, which the parties then pronounced acceptable, and requested him to mark with proper monuments, and that he so marked the line. Hitchcock *v.* Libby, 70 N. H. 399, 47 Atl. 269.

45. Fence. — Jackson *v.* Perrine, 35 N. J. Law 137; Smith *v.* Hosmer, 7 N. H. 436, 28 Am. Dec. 354; Knight *v.* Coleman, 19 N. H. 118, 49 Am. Dec. 147; Helm *v.* Wilson, 76 Cal. 476, 18 Pac. 604.

46. Party Wall. — Nat. Com. Bank of Albany *v.* Gray, 71 Hun 295, 24 N. Y. Supp. 997.

47. Improvement. — Haring *v.* Van Houten, 22 N. J. Law 61.

48. St. Louis Public Schools *v.* Risely, 40 Mo. 356; Heywood *v.* Wild River Lumber Co., 70 N. H. 24, 47 Atl. 294; Merwin *v.* Morris, 71 Conn. 555, 42 Atl. 855.

49. Possession. — Dudley *v.* Elkins, 29 N. H. 78; Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738.

50. Acquiescence.—Haring *v.* Van Houten, 22 N. J. Law 61; Hoffman *v.* City of Port Huron, 102 Mich. 417, 60 N. W. 831; Stewart *v.* Carleton, 31 Mich. 270; Deihl *v.* Zanger, 39 Mich. 601; Reed *v.* Farr, 35 N. Y. 113; Baldwin *v.* Brown, 16 N. Y. 359; Corning *v.* Troy Iron & Nail Factory, 44 N. Y. 577; Sherman *v.* Kane, 86 N. Y. 57; Barrett *v.* Murphy, 140 Mass. 133, 2 N. E. 833; Dunham *v.* Gannett, 124 Mass. 151.

The testimony of neighbors who

admissible to disprove his acquiescence,[51] and the mere understanding of a party as to the location of the line is not evidence.[52]

3. Estoppel. — A. Evidence of an Agreed Line. — Evidence, admissible to prove an agreed line,[53] or a practical location, is competent in proof of an estoppel.[54]

B. Acts and Declarations. — It may also be shown that the party to be estopped, by his acts or declarations,[55] or his acquiescence or silence when he ought to have spoken, induced or confirmed a belief that a false line was the true one,[56] and that relying upon such belief or trusting to a supposed agreed line or practical location, the other party purchased [57] or made improvements with reference to such boundary.[58]

had resided near the lands for years that they had never heard of adverse claims is competent to prove acquiescence. Smith *v.* Forrest, 49 N. H. 230; Fellows *v.* Fellows, 37 N. H. 75.

51. Sneed *v.* Woodward, 30 Cal. 430.

Where the defendant showed long apparent acquiescence in a certain boundary line, the plaintiff should be permitted to testify that he had not brought the suit earlier for want of means. Harris *v.* City of Ansonia, 73 Conn. 359, 47 Atl. 672.

52. The understanding of party or his grantor is not evidence against the other party unless it is shown that he or his grantor knew of and acquiesced in the claim. Heywood *v.* Wild River Lumber Co., 70 N. H. 24, 47 Atl. 294.

53. Proof of an Agreed Line. Haring *v.* Van Houten, 22 N. J. Law 61.

Where there is an agreement as to the boundary line and an occupation up to it, with the making of valuable improvements on it, the party will be estopped from disputing the practical location thus made, although the bar of the statute of limitations is incomplete. Mullaney *v.* Duffy, 145 Ill. 559, 33 N. E. 750.

54. Proof Practical Location. Keer *v.* Hilt, 75 Ill. 51; Joyce *v.* Williams, 26 Mich. 332; Haring *v.* Van Houten, 22 N. J. Law 61.

Where there is no uncertainty in the description, but the grantee locates his line wrong, inducing others to purchase or improve with reference to such erroneous line, he will be estopped to dispute the boundaries thus fixed though the period of the statute of limitations has not expired. Jackson *v.* Perrine, 35 N. J. Law 137.

55. Acts and Declarations.—Penny Pot Landing etc. *v.* Philadelphia, 16 Pa. St. 79.

The practical construction placed upon a deed by the defendants in a mortgage foreclosure and sustained in a decree as to rents and profits, is evidence of estoppel in an action where they have brought in the adverse title and stand upon it. Jones *v.* Pashby, 48 Mich. 634, 12 N. W. 884. But where a judgment creditor's levy is not allowed he would not be estopped. Jones *v.* Pashby, 62 Mich. 614, 29 N. W. 374.

56. Acquiescence. — Joyce *v.* Williams, 26 Mich. 332.

Where the grantor owning a section of land, had it surveyed into quarter sections, a grantee who assisted at the survey, and later purchased a quarter section, will be estopped to claim land beyond such surveyed line against another grantee who purchased and occupied with reference to such line and the estoppel would apply to those holding under the first named grantee. Holland *v.* Thompson, 12 Tex. Civ. App. 471, 35 S. W. 19.

57. Purchase. — Holland *v.* Thompson, 12 Tex. Civ. App. 471, 35 S. W. 19; Jackson *v.* Perrine, 35 N. J. Law 137.

58. Improvements. — Gratz *v.* Beates, 45 Pa. St. 495; Haring *v.* Van Houten, 22 N. J. Law 61; Laverty *v.* Moore, 32 Barb. (N. Y.) 347; Joyce *v.* Williams, 26 Mich. 332; Manistee Mfg. Co. *v.* Cogswell,

C. Married Woman. — It would seem that a married woman disabled by coverture to contract may not be so estopped, and such evidence is not admissible against her.[59]

II. PROOF OF SURVEY.

1. Generally. — When by proof or admissions it appears that a surveyed line is the disputed boundary, the surveyor's report is the official history of the survey, and material evidence of the original location of such line.[60]

2. Official Survey. — A. Report. — When the notes of an official survey are reduced to the permanent form (as report,[61] maps,[62] or records) required by official procedure in the course of duty,[63] with preliminary proof of their identity, they become competent evidence of all those things which the surveyor ought to report,[64] and gov-

103 Mich. 602, 61 N. W. 884; Helm *v.* Wilson, 76 Cal. 476, 18 Pac. 604.

59. Married Woman. — Behler *v.* Weyburn, 59 Ind. 143; Tod *v.* P. F. & W. R. R. Co., 19 Ohio St. 514; Glidden *v.* Strupler, 52 Pa. St. 400; Dukes *v.* Sprangler, 35 Ohio St. 119.

60. Generally. — Olin *v.* Henderson, 120 Mich. 149, 79 N. W. 178; Bonewitts *v.* Wygant, 75 Ind. 41; Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57; Canavan *v.* Dugan, 10 N. M. 316, 62 Pac. 971.

The surveyor's report is substantive proof. Heffington *v.* White, 1 Bibb (Ky.) 115.

61. Report. — Doe *v.* Hildreth, 2 Ind. 274.

Where the original report of a U. S. survey is lost, field notes in the handwriting of the surveyor are competent. Dugger *v.* McKesson, 100 N. C. 1, 6 S. E. 746.

The government field notes and plat are evidence to help locate a corner, but not to show where such corner ought to be. Morrison *v.* Neff, 18 Neb. 133, 20 N. W. 254, 24 N. W. 555.

62. Maps. — Boon *v.* Hunter, 62 Tex. 582; Surget *v.* Little, 5 Smed. & M. (Miss.) 319; Doe *v.* Hildreth, 2 Ind. 274; Stroud *v.* Springfield, 28 Tex. 649; Beeman *v.* Black, 49 Mich. 598, 14 N. W. 560; Redmond *v.* Mullenax, 113 N. C. 505, 18 S. E. 708.

The official township map made by the direction of the surveyor general from notes of his deputy surveyor portraying natural and artificial objects, and showing township and section lines, and section and fractional section corners, with the relative position of such objects, lines, and corners, cannot be disputed by evidence of private surveys. Chapman *v.* Polack, 70 Cal. 487, 11 Pac. 764.

Where a party introduces land office maps, the other party may put in evidence patents and other maps showing that the office regarded the maps as incorrect. Stroud *v.* Springfield, 28 Tex. 649.

63. Records. — Boon *v.* Hunter, 62 Tex. 582; Bonewits *v.* Wygant, 75 Ind. 41; Chapman *v.* Polack, 70 Cal. 487, 11 Pac. 764; Smith *v.* Rich, 37 Mich. 549; Schlei *v.* Struck, 109 Wis. 598, 85 N. W. 430.

The statute making the records of surveys by the county surveyor evidence, raises a presumption in favor of the facts therein found; and casts a burden upon the opposing party, but other surveys by competent surveyors may be of equal force. Hess *v.* Meyer, 73 Mich. 259, 41 N. W. 422.

64. Stroud *v.* Springfield, 28 Tex. 649; Turnipseed *v.* Hawkins, 1 McCord (S. C.) 272.

The court should reject conclusions derived from examination of witness's records and other surveys, and admit only the report of his personal work on the ground. Schunior *v.* Russell, 83 Tex. 83, 18 S. W. 84.

Evidence of What? — Carland *v.* Rowland, 3 Bibb (Ky.) 125; Chap-

ernment surveys are presumed to have been made in accordance with the statutes and the rules of the department.[65]

B. Copies. — When such files or records are admissible, true copies are competent, subject to the limitations and restrictions as to Best and Secondary Evidence,[66] and these copies may generally be proved by the certificate of the official custodian of archives and records,[67] whose signature and seal *prima facie* prove themselves;[68] examined copies may be proved by testimony as to their accuracy as in other cases by testimony at the trial,[69] but affidavits are not evidence to prove a copy.[70]

3. Private Survey. — Field notes or reports of a private survey, not *ex parte*, including the diagrams or maps, when identified are competent evidence of their lines and monuments.[71]

4. Ex Parte Survey. — The notes, reports, or maps of an *ex parte* survey or[72] the unauthorized notes, maps or reports of any survey

man *v.* Polack, 70 Cal. 487, 11 Pac. 764; Bodley *v.* Herndon, 3 A. K. Marsh. (Ky.) 21; Heffington *v.* White, 1 Bibb (Ky.) 115; Smith *v.* Rich, 37 Mich. 549.

65. Chapman *v.* Polack, 70 Cal. 487, 11 Pac. 764.

66. Copies. — Surget *v.* Little, 5 Smed. & M. (Miss.) 319; Doe *v.* Hildreth, 2 Ind. 274.

67. Soulard *v.* Lane, 16 Mo. 366; Kuechler *v.* Wilson, 82 Tex. 638, 18 S. W. 317; Bonewits *v.* Wygant, 75 Ind. 41; Doe *v.* Hildreth, 2 Ind. 274; Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705.

The certificate of the commissioner of the Land Office a part of which is competent evidence should not be excluded because it also contained his opinion. Petrucio *v.* Gross, (Tex. Civ. App.), 47 S. W. 43.

68. The seal of the General Land Office is on the same footing as the seal of a court of record, and the signature of the commissioner, and such seal to copies of originals required by law to be deposited in that office, *prima facie* prove themselves. Harris *v.* Doe, 4 Blackf. (Ind.) 369.

69. Where the original field notes of a survey are competent evidence and shown to be lost, a copy of the notes, proved to be accurate by the witness who made it, is admissible. Stewart *v.* Crosby, (Tex. Civ. App.), 56 S. W. 433.

70. Affidavit. — A voluntary unofficial affidavit of a surveyor, filed in the land office does not become an archive and a properly certified copy of it, is not competent evidence. Daniels *v.* Fitzhugh, 13 Tex. Civ. App. 300, 35 S. W. 38.

An *ex parte* affidavit of the surveyor that a paper is a true copy of his field notes does not make the paper competent evidence. Grimes *v.* Corporation of Bastrop, 26 Tex. 310.

71. Private Survey. — Stewart *v.* Crosby, (Tex. Civ. App.), 56 S. W. 433; Donohue *v.* Whitney, 133 N. Y. 178, 30 N. E. 848.

A private map made by the surveyor under whose direction a survey was made, is competent evidence on the question of relocating the lines of that survey, no matter from whose custody it came. Ostrom *v.* Layer, (Tex. Civ. App.) 48 S. W. 1095.

72. Ex Parte Surveys. — Nolin *v.* Palmer, 21 Ala. 66; Surget *v.* Little, 5 Smed. & M. (Miss.) 319; Whitney *v.* Smith, 10 N. H. 43; Henry *v* Henry, 5 Pa. St. 247; Underwood *v.* Evans, 2 Bay (S. C.) 437; Jones *v.* Huggins, 1 Dev. 223 (N. C.), 17 Am. Dec. 567; Ewing's Heirs *v.* Savary, 3 Bibb (Ky.) 235; Free *v.* James, 27 Conn. 77.

The report of a survey made by order of court in case is not competent against subsequent parties or parties not then in court. Sowder *v.* McMillan's Heirs, 4 Dana (Ky.) 456.

are not admissible.[73] But such *ex parte* survey may become admissible by proof of accuracy at the trial,[74] to identify monuments of such survey, or where it is claimed that a disputed monument was made in such survey.[75] By force of statute in some states *ex parte* official surveys are rendered competent evidence.[76]

5. Plats. — A. GENERALLY. — Plats being *ex parte* maps would not be competent evidence in themselves, but upon acceptance by a municipality, or by being placed upon record they may establish and become competent evidence of streets.[77]

B. BASIS OF SALES. — And such plats or their records are admissible where sales have been made with reference to them for description.[78]

73. Unauthorized Reports.—Boston Water & Power Co. *v.* Hanlon, 132 Mass. 483; Free *v.* James, 27 Conn. 77; Woods *v.* Ege, 2 Watts (Pa.) 333.

74. Proof of Accuracy. — *Alabama.* — Bridges *v.* McClendon, 56 Ala. 327; Nolin *v.* Parmer, 21 Ala. 66; Dailey *v.* Fountain, 35 Ala. 26.

California. — Olsen *v.* Rogers, 120 Cal. 225, 52 Pac. 486.

Illinois. — Justen *v.* Schaaf, 175 Ill. 45, 51 N. E. 695.

Michigan. — Atwood *v.* Canrike, 86 Mich. 99, 48 N. W. 950.

Missouri. — Williamson *v.* Fischer, 50 Mo. 198; Mincke *v.* Skinner, 44 Mo. 92.

New York. — Donohue *v.* Whitney, 133 N. Y. 178, 30 N. E. 848.

Oregon. — Rowland *v.* McCown, 20 Or. 528, 26 Pac. 853.

Pennsylvania. — Henry *v.* Henry, 5 Pa. St. 247; Hoey *v.* Furman, 1 Pa. St. 295, 44 Am. Dec. 129.

Texas. — Bessom *v.* Richards, 24 Tex. App. 64, 58 S. W. 611.

Vermont. — Tillotson *v.* Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95.

A survey by a county surveyor without notice to the adverse party is not of itself evidence, but the surveyor may use the survey to illustrate his testimony, and after he has proved their accuracy his notes or diagram may go to the jury. Nolin *v.* Parmer, 21 Ala. 66.

The testimony and the map of a surveyor who ran the line in question while processioning lands, are competent evidence. Gunn *v.* Harris, 88 Ga. 439, 14 S. E. 593.

75. To Identify Monuments of Such Survey. — Jackson *v.* Cable, (Tex. Civ. App.), 27 S. W. 201; Lessee of McCoy *v.* Galloway, 3 Ohio 282, 17 Am. Dec. 591.

It is competent to show that marks relied upon as monuments of an old survey were marks of a later compromise survey and deeds made pursuant to such compromise are admissible. Fisher *v.* Kaufman, 170 Pa. St. 444, 33 Atl. 137.

76. Radford *v.* Johnson, 8 N. D. 182, 77 N. W. 601.

An *ex parte* survey by a county surveyor of a disputed line of a U. S. survey is not binding, but is competent. Holliday *v.* Maddox, 39 Kan. 359, 18 Pac. 299.

Under a statute providing that no survey or re-survey hereafter made by any person except the county surveyor or his deputy shall be considered as legal evidence, the contents and results of such a survey may not be proved by parol. Houx *v.* Batteen, 68 Mo. 84.

77. Pettibone *v.* Hamilton, 40 Wis. 402.

Where a plat corresponds with contemporaneous and subsequent deeds, and has been on record for 50 years, but without marks of authenticity, it is presumed to have been placed on record by the owner and it becomes competent evidence. Borough of Birmingham *v.* Anderson, 40 Pa. 506.

78. Basis of Sales. — Olsen *v.* Rogers, 120 Cal. 225, 52 Pac. 486; Schwede *v.* Hemrich, 29 Wash. 124, 69 Pac. 643.

Where a plan or plat never recorded and not referred to in the deeds describes a contemplated

C. Scaling. — And in case of uncertainty as to distances, it is held that the results of scaling the plat are competent evidence,[79] but the authorities are not uniform on this question.[80]

D. Copies. — Copies of plats are admissible as in other cases.[81]

E. Survey. — A plat is only the picture of the survey from which it was made and such survey is evidence to dispute the plat,[82] but where the parties select the plat or its record, by deed reference, for their description, evidence of the survey is not admissible,[83] unless the plat is uncertain,[84] or the deed, plat, or its certificate refers to the survey or its monuments.[85]

6. Partition. — A. Record. — The record of a partition case is competent to prove the boundaries of the parts held in severalty, and if monuments of the surveys approved in the action are lost or obliterated, parol evidence is competent in locating such lost monuments.[86]

street, and the deeds refer to such street, the plan is admissible. Barrett *v.* Murphy, 140 Mass. 133, 2 N. E. 833.

Where the owner plants a tract, laying out a street, and sells lands with reference to such plat, and a surveyor at the request of a grantee copies such plat, places additional lines upon the copy and then lithographs it, such lithograph copies in the absence of originals are competent evidence as to the boundaries of such street. Stetson *v.* Dow, 16 Gray (Mass.) 372.

A record of a plat, not entitled to record for want of signature and acknowledgment, may be evidence as a memorandum with evidence that it was referred to in deeds in the chain of title. Brewington *v.* Jenkins, 85 Mo. 57.

79. Scaling. — Where a number of lots front upon a street, not at right angles to the division lines, and the plat and survey are ambiguous as to the manner of measuring the width of the lots, the results of scaling the plat are competent evidence as to whether the measurements should be on the line of the street or at right angles to the side lines of the lots. Baldwin *v.* Shannon, 43 N. J. Law 596.

80. Toogood *v.* Hoyt, 42 Mich. 609, 4 N. W. 445.

81. Copies. — Sperry *v.* Wesco, 26 Or. 483, 38 Pac. 623.

82. Survey. — Coleman *v.* Lord, 96 Me. 192, 52 Atl. 645; Bean *v.* Bachelder, 78 Me. 184, 3 Atl. 279.

83. Where the deeds are by lot numbers and plat references, and there is no reference in either deed or plat to stakes, pins, or other surveyor's monuments at lot lines or corners, although stakes were set out by the surveyor, a purchaser who buys without notice of such stakes will not be affected by them. McKinney *v.* Doane, 155 Mo. 287, 56 S. W. 304.

84. Wiggins Ferry Co. *v.* Louisville E. & St. L. Consol. R. Co., 178 Ill. 473, 53 N. E. 411.

85. Stanwood *v.* Beck, (N. J.) 52 Atl. 353. *See* "Deeds."

The words "as surveyed by me" in a surveyor's certificate to a recorded plat include a reference to the monuments fixed by him in making the survey, and evidence of where such monuments are or were is competent where the deed refers to the plat. Turnbull *v.* Schroeder, 29 Minn. 49, 11 N. W. 147.

86. The following principles should control in the admission and construction of evidence as to disputed partition lines. 1. If the monuments or marks on the ground for corners of the several allotments can be found such marks and monuments must govern, and distances and bearing must be disregarded. 2. If the monuments or marks on the ground are lost or obliterated, parol evidence may be introduced in connection with the record to show their location. 3. If no monuments were set except theoretically on pa-

7. Other Surveys. — A. Called Surveys. — Where lines or monuments of a senior survey are called, they become by adoption a part of the new survey.[87]

B. Uncalled Surveys. — Uncalled deeds and surveys, except where extrinsic testimony is competent in special cases, are not admissible.[88]

8. Chamber Survey. — Where a patent is founded upon a chamber survey and the report of such survey, by reference or adoption is made part of the grant, such report is competent evidence to define boundaries.[89]

A. Presumption That Survey Was Made. — While there is a presumption that the survey was made as returned and is not a chamber survey,[90] and such presumption is conclusive after twenty-

per, the proper location of those monuments will be determined by prorating distances as given in the records according to the length of frontage of the several allotments. 4. If the actual computed sum of the length of the several allotments as given exceeds the length of the tract partitioned, it will be construed that the decree means, that upon the hypothesis that the entire length of the whole tract is as stated, then the length of each assignment shall be as given, but if less, the assignments of allotments must lose in proportion. McAlpine *v.* Reicheneker, 27 Kan. 257.

87. Called Surveys. — Buckner *v.* Hendrick, 8 Ky. L. Rep. 347, 1 S. W. 646; Stanus *v.* Smith, (Tex.Civ. App.) 30 S. W. 262; Cottingham *v.* Seward, Tex. Civ. App. 25 S. W. 797.

Where a grant calls for a monument of a senior grant, such monument may be located by parol without the introduction of the senior grant or its survey. Hughlett *v.* Conner, 12 Heisk. (Tenn.) 83.

88. Uncalled Surveys. — McKinney *v.* Doane, 155 Mo. 287, 56 S. W. 304; Fuller *v.* Worth, 91 Wis. 406, 64 N. W. 995.

Where the owner of a large tract of land divides two townships by a line and establishes a corner, it does not follow that such corner and the continuation of such line will determine or be the boundary of two similar adjacent townships of the same tract. Talbot *v.* Copeland, 38 Me. 333.

A junior deed is not evidence to locate senior corner. Euliss *v.* McAdams, 108 N. C. 507, 13 S. E. 162.

89. Bellas *v.* Cleaver, 40 Pa. St. 260; Smith *v.* Buchannon's Lessee, 2 Over. (Tenn.) 305; Boon *v.* Hunter, 62 Tex. 582.

The government surveyor is the agent chosen by the government and an omission to make a survey will not render his chamber survey incompetent and the plat of such a survey is admissible. Alexander *v.* Lively, 5 T. B. Mon. 159, (Ky.) 17 Am. Dec. 50.

In a chamber survey where the initial point only was marked by the surveyor, the calls will control in the same order as an actual survey. Newsom *v.* Pryor's Lessee, 7 Wheat. (U. S.) 7.

When a tract of land is represented on a plat or map divided into distinct parcels, and the outer boundaries of the whole are exhibited with precision by lines and existing monuments upon the face of the earth, and there are no monuments or established lines upon the ground to designate the interior lines, in order to fix such interior lines the plan or map is protracted upon the earth with accuracy. Talbot *v.* Copeland, 38 Me. 333.

90. Presumption That Survey Was Made. — Packer *v.* Schrader Min. & Mfg. Co., 97 Pa. St. 379; Keller *v.* Over, 136 Pa. 1, 20 Atl. 25; Salmon Creek Lumber & Min. Co. *v.* Dusenbury, 110 Pa. St. 446, 1 Atl. 635; Disney *v.* Coal Creek Min. & Mfg. Co., 11 Lea (Tenn.) 607; Burge *v.* Poindexter, (Tex.

ruction,"[92] or in favor of junior survey with marked lines, that ines were never surveyed,[93] but a surveyor cannot be compelled criminate himself by his testimony.[94]

Adoption of Old Lines. — And a survey made by the adop- of old lines is not to be regarded as a chamber survey.[95]

Presumptions. — A. Report Correct. — The surveyor's notes, rt, and maps being the official history of the survey are pre- d to be correct.[96] There is a presumption that monuments, ers and lines are where they are called,[97] and the burden of f is upon him who would locate them at a different place.[98]

Duty Performed. — The surveyor is presumed to have done luty in every respect,[99] and the burden of proof is upon the disputing that his work was rightly done.[1]

App.), 56 S. W. 81; Boon *v.* er, 62 Tex. 582; Bellas *v.* er, 40 Pa. St. 260.

Collins *v.* Barclay, 7 Pa. St. Ormsby *v.* Ihmsen, 34 Pa. St. Glass *v.* Gilbert, 58 Pa. St. Packer *v.* Schrader Min. & Co., 97 Pa. St. 379; Salmon Lumber Co. *v.* Dusenbury, Pa. St. 446, 1 Atl. 635; Bellas *v.* er, 40 Pa. St. 260.

Parol. — Glass *v.* Gilbert, 58 St. 266; Boon *v.* Hunter, 62 582.

here chamber field notes of a . survey were rejected by the eyor general, but a plat was from them which was the only at time of sales, such plat is not etent against a deed calling he section line, and not refer- to the plat. Hamil *v.* Carr, 21 St. 258.

Glass *v.* Gilbert, 58 Pa. St. 266. here a surveyor runs and s four lines enclosing a tract, seeks to enlarge the survey by asing the dimensions of the lines, and only locates one ex- on, and does not run or mark new side line, obliterate the s of the old one, nor erase the corner bearings from his notes, ew purchaser or locator who eys up to the marked side may tain it as his boundary. Bart- Heirs *v.* Hubert, 21 Tex. 8.

Smith *v.* Buchannon's Lessee, er. (Tenn.) 305.

Adoption of Elder Line. s *v.* Gilbert, 58 Pa. 266; Packer Schrader Min. & Mfg. Co., 97 Pa. St. 379; Talbot *v.* Copeland, 38 Me. 333.

96. Report Correct. — Harris *v.* Burchan, 1 Wash. C. C. 191, 11 Fed. Cas. No. 6,117; Greer *v.* Squire, 9 Wash. 359, 37 Pac. 545.

97. Monuments Where Called. Greer *v.* Squire, 9 Wash. 359, 37 Pac. 545; Cadeau *v.* Elliott, 7 Wash. 205, 34 Pac. 916.

98. Greer *v.* Squire, 9 Wash. St. 359, 37 Pac. 545; Schaeffer *v.* Perry, 62 Tex. 705; Smith *v.* Rich, 37 Mich. 549.

Where alleged monuments conflict with the field notes, the burden of proof is upon the party claiming by such monuments, to show their identity as original monuments of the survey. Robinson *v.* Laurer, 27 Or. 315, 40 Pac. 1012.

99. Duty Performed. — Smith *v.* Rich, 37 Mich. 549.

"The law presumes that every officer does his duty, and the presumption is that the surveyor who located the surveys of land in controversy actually ran his lines as described in said field notes to the point called for therein; and the burden is upon the party who now challenges the correctness of the same to establish that fact." Holland *v.* Thompson, 12 Tex. Civ. App. 471, 35 S. W. 19.

1. Where the authority under which a survey was made requires the survey to be made with certain calls, and the report of the survey shows that this was done, the burden of proof is upon the party who

C. Identified Monuments Conclusive. — When monuments can be identified there is a conclusive presumption that the lines are where they indicate.[2]

D. Weight of Calls. — When the calls of the survey cannot be reconciled their probative force is presumed to be in the following order of importance, to-wit: Natural objects, artificial marks, adjacent boundaries, courses, distances, and quantity.[3] But all calls

claims a different survey. Beach *v.* Fay, 46 Vt. 337.

2. Identified Monuments Conclusive. — *United States.* — Ulman *v.* Clark, 100 Fed. 180.

Connecticut. — Nichols *v.* Turney, 15 Conn. 101.

Iowa. — Root *v.* Cincinnati, 87 Iowa 202, 54 N. W. 206; Rollins *v.* Davidson, 84 Iowa 237, 50 N. W. 1061.

Minnesota. — Beardsley *v.* Crane, 52 Minn. 537, 54 N. W. 740.

Missouri. — Granby Mining & Smelting Co. *v.* Davis, 156 Mo. 422, 57 S. W. 126.

Nebraska. — Johnson *v.* Preston, 9 Neb. 474, 4 N. W. 83; Morrison *v.* Neff, 18 Neb. 133, 24 N. W. 555.

Pennsylvania. — Bellas *v.* Cleaver, 40 Pa. St. 260; Henry *v.* Henry, 5 Pa. St. 247.

Tennessee. — Morris *v.* Millner, 104 Tenn. 485, 58 S. W. 125.

Texas. — Schaeffer *v.* Berry, 62 Tex. 705.

Vermont. — Clary *v.* McGlynn, 46 Vt. 347.

Monuments are facts, while field notes and plats indicating courses, distances and quantities, are but descriptions, which serve to assist in ascertaining those facts. Greer *v.* Squire, 9 Wash. 359, 37 Pac. 545; Martin *v.* Carlin, 19 Wis. 454, 88 Am. Dec. 696; Granby Mining & Smelting Co. *v.* Davis, 156 Mo. 422, 57 S. W. 126; Whitehead *v.* Atchison, 136 Mo. 485, 37 S. W. 928; McKinney *v.* Doane, 155 Mo. 287, 56 S. W. 304; Hubbard *v.* Dusy, 80 Cal. 281, 22 Pac. 214.

Where one call is by course and distance, and fails to reach a natural monument along which the next line is called, the court will read into the description after the short call the words "more or less" and extend the short call to the natural monument. Park *v.* Wilkinson, 21 Utah 279, 60 Pac. 945; Echerd *v.* Johnson, 126 N. C. 409, 35 S. E. 1036; Wiley *v.* Lindley, (Tex. Civ. App.), 56 S. W. 1001.

The object of the application of calls of a survey is to discover the footsteps of the surveyor, and when they are found and identified, all classes of calls must yield to them. Morgan *v.* Mowles, (Tex. Civ. App.), 61 S. W. 155.

Evidence of discrepancies between the known monuments and field notes of other surveys in other townships of the same county made by the same surveyor is immaterial and irrelevent. Rollins *v.* Davidson, 84 Iowa 237, 50 N. W. 1061.

3. Conclusion of Calls.—*United States.* — Brown *v.* Huger, 4 Fed. Cas. No. 2,013; Ulman *v.* Clark, 100 Fed. 180; Cleveland *v.* Smith, 2 Story 278.

Connecticut. — Nichols *v.* Turney, 15 Conn. 101.

Delaware. — Dale *v.* Smith, 1 Del. Ch. 1, 12 Am. Dec. 64.

Kentucky. — Bryan *v.* Beckley, Litt. Sel. Cas. 91, 12 Am. Dec. 276.

Michigan.—Hoffman *v.* City of Port Huron, 102 Mich. 417, 60 N. W. 831.

Missouri. — Mayor of Liberty *v.* Burns, 114 Mo. 426, 19 S. W. 1107, 21 S. E. 728; Granby Mining & Smelting Co. *v.* Davis, 156 Mo. 422, 57 S. W. 126.

Nebraska. — Rohlman *v.* Lohmeyer, 60 Neb. 364, 83 N. W. 201.

New Jersey. — Jackson *v.* Perrine, 35 N. J. Law 137; Fuller *v.* Carr, 33 N. J. Law 157; Blackman *v.* Doughty, 40 N. J. Law 319; Opdyke *v.* Stephens, 28 N. J. Law 83.

New York. — Robinson *v.* Kime, 70 N. Y. 147.

North Carolina.— Echerd *v.* John-

are evidence to aid in locating the survey upon the ground,[4] and there is no inflexible rule as to their relative importance.[5]

E. Straight Line. — A called line is presumed to be a straight one.[6]

F. Survey and Plat. — A survey is presumed to be better evidence than the plat made from and referring to the survey and its monuments.[7] But the higher calls of the plat as per rules of construction may defeat this presumption.[8]

son, 126 N. C. 409, 35 S. E. 1036; Graybeal *v.* Powers, 76 N. C. 66.

Pennsylvania. — Bellas *v.* Cleaver, 40 Pa. St. 260; Koch *v.* Dunkel, 90 Pa. St. 264.

Tennessee.— Disney *v.* Coal Creek Min. & Mfg. Co., 11 Lea 607.

Texas. — Schley *v.* Blum, 85 Tex. 551, 22 S. W. 267; Booth *v.* Upshur, 26 Tex. 64; Burge *v.* Poindexter, (Tex. Civ. App.), 56 S. W. 81.

Virginia. — Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

4. All Calls Evidence. — Nichols *v.* Turney, 15 Conn. 101; Budd *v.* Brooke, 3 Gill 198 (Md.), 43 Am. Dec. 321; Schley *v.* Blum, 85 Tex. 551, 22 S. W. 267; Baldwin *v.* Brown, 16 N. Y. 359; Higinbotham *v.* Stoddard, 72 N. Y. 95; Morrison *v.* Neff, 18 Neb. 133, 20 N. W. 254, 24 N. W. 555; Johnson *v.* Preston, 9 Neb. 474, 4 N. W. 83; Buckner *v.* Hendrick, 8 Ky. L. Rep. 347, 1 S. W. 646; Hoffman *v.* City of Port Huron, 102 Mich. 417, 60 N. W. 831.

Where monuments are identified it is not error to exclude testimony offered as to quantity and distance. Fleischfresser *v.* Schmidt, 41 Wis. 223.

The beginning corner in the plot or certificate of the survey is of no higher dignity or importance than any other corner. Miles *v.* Sherwood, 84 Tex. 485, 19 S. W. 853.

Where a vendor holds two adjacent grants and sells, by metes and bounds, a certain quantity but calling for only one patented tract, the vendee will take by the other calls of his deed, to the full extent of the call even if he take part of both tracts. Wallace *v.* Maxwell. 1 J. J. Marsh. (Ky.) 447.

When it is apparent that a mistake has been made, an inferior means of location may control a higher one. Ulman *v.* Clark, 100 Fed. 180.

As between evidence of different monuments, the jury should look to the evidence identifying them and those best identified should prevail independent of field notes of the original or subsequent surveys, but other things being equal field notes would control. Hubbard *v.* Dusy. 80 Cal. 281, 22 Pac. 214.

5. Booth *v.* Upshur, 26 Tex. 64.

In relocating a lost corner, where the calls in the field notes are inconsistent there is no universal rule which requires that certain calls shall be preferred to others, but the evidence of those which under all the circumstances are most entitled to credit should be accepted. Stadin *v.* Helin, 76 Minn. 496, 79 N. W. 537, 602; Loring *v.* Norton, 8 Greenl. (Me.) 61; Jones *v.* Burgett *et al.*, 46 Tex. 284.

6. Straight Line. — Allen *v.* Kingsbury, 16 Pick. (Mass.) 235.

The burden of proof is upon the party who disputes that a straight line drawn from opposite section corner monuments of the exterior township survey is the true section line. Hamil *v.* Carr, 21 Ohio S. 258.

7. Survey and Plat. — O'Farrel *v* Harney, 51 Cal. 125; Root *v.* Cincinnati, 87 Iowa 202, 54 N. W. 206· Bradstreet *v.* Dunham, 65 Iowa 248, 21 N. W. 592; Cleveland *v.* Choate, 77 Cal. 73, 18 Pac. 875; McKinney *v.* Doane, 155 Mo. 287, 56 S. W. 304.

8. Bell *v.* Hickman, 6 Humph. (Tenn.) 398.

Where the meandered line of a grant approximately corresponds with the ocean front a plat of the survey is competent to show that the ocean was intended. Jones *v.* Martin, 35 Fed. 348.

A plat made as part of the report of a survey is competent against

G. Senior Survey. — Every presumption is given to the senior survey against a junior survey much later in time;[9] against a party who neglects to survey his grant the presumptions are all to be counted.[10]

H. Called Objects. — Called objects which ought to have been mentioned in the report are presumed to have existed at the time of the survey,[11] and a call for an object as a monument or boundary is presumed to be a call for its center or middle line.[12]

I. Meridian. — The courses of a survey are presumed to have been run by the true meridian,[13] but in the early surveys in the east and south the magnetic meridian is presumed to have been employed.[14]

10. Parol. — A. Surveyor. — The surveyor who made the survey,[15] the chain carrier who assisted him, and other non-experts, may testify as to[16] the locating of the lines upon the ground, the placing or marking of the original monuments, and the order in which lines were run,[17] the identification of such monu-

courses and distances and calls of the notes to show that a stream is the boundary. Alexander *v.* Lively, 5 T. B. Mon. (Ky.) 159, 17 Am. Dec. 50.

9. Senior Survey. — Glass *v.* Gilbert, 58 Pa. St. 266.

10. After a long lapse of time, every presumption is to be taken against a party who neglects to have his land surveyed and its boundaries accurately defined, and his grant will be reduced to narrowest limits consistent with his deeds. Jackson *v.* Schoonmaker, 7 Johns. (N. Y.) 12.

11. Called Objects. — Kuechler *v.* Wilson, 82 Tex. 638, 18 S. W. 317.

12. Boston *v.* Richardson, 13 Allen Mass. 146; Motley *v.* Sargent, 119 Mass. 231.

Presumption is that grant or deed carries to center of tree or stone pile and central line of road, stream or tidal creek, where that much of the boundary object belongs to the grantor. Freeman *v.* Bellegarde, 108 Cal. 179, 41 Pac. 289, 49 Am. St. Rep. 76.

13. True Meridian. — There is a presumption that a course has reference to the true meridian, but such presumption may be rebutted by evidence. Reed *v.* Tacoma Bldg. & Sav. Ass'n, 2 Wash. 198, 26 Pac. 252, 26 Am. St. Rep. 851.

14. Magnetic Meridian. — The courses in a deed are to be run according to the magnetic meridian, unless something appears to show that a different mode is intended in the instrument. Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

Courts will take judicial notice of the variations of the magnetic needle. Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 102 Am. Dec. 276.

15. Witnesses. — Overton's Heirs *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544; Schley *v.* Blum, 85 Tex. 551, 22 S. W. 267.

16. Non-experts.—Overton's Heirs *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 541; Deming *v.* Gainey, 95 N. C. 528; Shaver *v.* Adams, 37 Or. 282, 60 Pac. 902; Wheeler *v.* State, 114 Ala. 22, 21 So. 941; Bolton *v.* Lann, 16 Tex. 96; Weaver *v.* Robinett, 17 Mo. 459.

Non-expert who saw the survey made may testify as to what was done. Dugger *v.* McKesson, 100 N. C. 1, 6 S. E. 746.

Where a survey is described by a witness it is proper cross-examination to inquire how near the line ran to a house for the purpose of locating the line by the house as a landmark. Harris *v.* City of Ansonia, 73 Conn. 359, 47 Atl. 672.

17. Acts of Surveyor. — Euliss *v.* McAdams, 108 N. C. 507, 13 S. E. 162; Henry *v.* Henry, 5 Pa. St. 247; Wheeler *v.* State, 114 Ala. 22, 21 So. 941; Salmon Creek Lumber & Min.

ments,[18] the identification of the lands and the location of adjoining tracts,[19] but may not contradict unambiguous calls,[20] or correct a mistake in the survey,[21] or in the surveyor's notes, maps or reports.[22]

Co. *v.* Dusenbury, 110 Pa. St. 446, 1 Atl. 635; Wallace *v.* Maxwell, 1 J. J. Marsh. Ky. 447; Shaver *v.* Adams, 37 Or. 282, 60 Pac. 902; Smith *v.* Leach, 70 Tex. 493, 7 S. W. 767.

Parol evidence is competent to trace the footsteps of the surveyor, and prove that he began at a different corner than the one mentioned as the initial corner in the notes. Lumpkin *v.* Draper, (Tex.), 18 S. W. 1058.

18. Identification of Monuments. *United States.* — Ulman *v.* Clark, 100 Fed. 180.

Kentucky. — Smith *v.* Prewitt, 2 A. K. Marsh. 155.

Michigan. — Twogood *v.* Hoyt, 42 Mich. 609, 4 N. W. 445; Purkiss *v.* Benson, 28 Mich. 539.

New Mexico. — Canavan *v.* Dugan, 10 N. M. 316, 62 Pac. 971.

North Carolina. — Echerd *v.* Johnson, 126 N. C. 409, 35 S. E. 1036.

Oregon. — Shaver *v.* Adams, 37 Or. 282, 60 Pac. 902.

Tennessee. — Hughlett *v.* Conner, 12 Heisk. 83; Clay *v.* Sloan, 104 Tenn. 401, 58 S. W. 229.

Texas. — Morgan *v.* Mowles, (Tex. Civ. App.), 61 S. W. 155; Wiley *v.* Lindley, (Tex. Civ. App.), 56 S. W. 1001. Smith *v.* Russell, 37 Tex. 217.

19. Identification of Lands. — Murray *v.* Hobson, 10 Colo. 66, 13 Pac. 921; Deming *v.* Gainey, 95 N. C. 528; Murray *v.* Hobson, 10 Colo. 65, 13 Pac. 921; Graybeal *v.* Powers, 76 N. C. 66.

Where the survey was made upon, and possession taken in the S. W. quarter, but the notes and deed call for the S. E. quarter, the facts may be shown by parol. Helm *v.* Wilson, 76 Cal. 476, 18 Pac. 604.

20. Not Contradict Calls. — Booth *v.* Upshur, 26 Tex. 64; Donehoo *v.* Johnson, 120 Ala. 438, 24 So. 888; Harris *v.* Doe, 4 Blackf. (Ind.) 369.

Witness may show that a corner once existed and has been destroyed, and that it corresponded with the calls of the survey. But they cannot be allowed to substitute one corner for another nor contradict the record of the survey. They cannot change a sugar tree to an ash. Lessee of McCoy *v.* Galloway, 3 Ohio 282, 17 Am. Dec. 591.

An uncalled stake set by a surveyor cannot be located by his parol testimony to contradict called monuments, courses and distances. Steyer *v.* Curran, 48 Iowa 580.

21. Hull *v.* Fuller, 7 Vt. 100; Urquhart *v.* Burleson, 6 Tex. 502.

The power to make and correct surveys of public lands belongs to the political department of the Government for if the courts, state or federal, were permitted to interfere and overthrow the public surveys, great confusion would arise. Greer *v.* Squire, 9 Wash. 359, 37 Pac. 545; Cragin *v.* Powell, 128 U. S. 691, 9 Sup. Ct. 203; Haydel *v.* Dufresne, 17 How. (U. S.) 23; Cadeau *v.* Elliott, 7 Wash. 205, 34 Pac. 916.

Where section or fractional section corners are located on the government map, those corners as actually located on the ground, cannot be disputed by showing that the surveyor made a mistake and that a true survey places them at other points. Chapman *v.* Pollock, 70 Cal. 487, 11 Pac. 764.

A surveyor should not be permitted to testify as to his intention in making a survey. It is the intention deducible from the face of the grant, the legal meaning of the language considered in the light shed upon it by the acts of the survey which determines boundaries. Blackwell *v.* Coleman Co., 94 Tex. 216, 59 S. W. 530.

22. Mundell *v.* Perry, 2 Gill & J. (Md.) 115; Anderson *v.* Stamps, 19 Tex. 460. *Contra.* — Certain lines upon the plat of a survey by the direction of the owner cannot be explained by his evidence. State *v.* Crocker, 49 S. C. 242, 27 S. E. 49.

A witness is not permitted to testify that there is a mistake on the face of field notes, the notes should

B. Ambiguous Calls. — But where the calls are inconsistent when applied to the ground[23] or any latent ambiguity appears, parol or extrinsic evidence is competent to explain the inconsistency or ambiguity.[24]

C. Loss of Instruments or Monuments. — By loss of instruments referred to or the disappearance of monuments, extrinsic evidence may become competent.[25]

D. Practical Construction. — And the construction the parties themselves placed upon the contract is very material

speak for themselves. Coleman *v.* Smith 55 Tex. 254.

A clerical mistake cannot be explained by parol, but the jury must determine the matter from the whole report of the survey. Coleman *v.* Smith, 55 Tex. 254.

Contra. — The acts done upon the ground pursuant to authority constitute the survey, and the plat and certificate may be made out later. If the surveyor should misstate what was actually done on the ground either through fraud or mistake, it would be alike preposterous and unjust, to preclude a party from proving the truth. Wallace *v.* Maxwell, 1 J. J. Marsh. (Ky.) 447.

23. Ambiguous Calls. — Jackson *v.* Perrine, 35 N. J. Law 137; Barrett *v.* Murphy, 140 Mass. 133, 2 N. E. 833; Beach *v.* Whittlesey, 73 Conn. 530, 48 Atl. 350. *See* "Ambiguity."

Where there are two inconsistent objects called, extrinsic evidence including the testimony of the surveyor should be received to explain how the error occurred. Booth *v.* Upshur, 26 Tex. 64.

Uncalled marked trees and corners are competent to correct an obvious mistake in a course, but not to contradict distance. Graybeal *v.* Powers, 76 N. C. 66.

Where there are inconsistent calls, a map not referred to in the deed but examined by the parties before sale, is competent evidence on the location of boundaries. Beach *v.* Whittlesey, 73 Conn. 530, 48 Atl. 350.

Where instruments furnish the data for a survey, they are competent evidence to explain inconsistent calls or latent ambiguities. Silvey *v.* McCool, 86 Ga. 1, 12 S. E. 175.

24. *England.* — Beaumont *v.* Field, 1 Barn. & A. 247; Paddock *v.* Fradley, 1 C. & J. 90; Wadley *v.* Bayliss, 5 Taunt. 752.

Alabama. — Donehoo *v.* Johnson, 120 Ala. 438, 24 So. 888.

Connecticut. — Nichols *v.* Lewis, 15 Conn. 137.

Indiana. — Harris *v.* Doe, 4 Blackf. (Ind.) 369.

Massachusetts. — Storer *v.* Freeman, 6 Mass. 435, 4 Am. Dec. 155; Makepeace *v.* Bancroft, 12 Mass. 469; Owen *v.* Bartholomew, 9 Pick. 520; Waterman *v.* Johnson, 13 Pick. 261.

New Jersey. — Opdyke *v.* Stephens, 28 N. J. Law 83.

New York — Hunt *v.* Johnson, 19 N. Y. 279.

Vermont. — Patch *v.* Keeler, 28 Vt. 332.

Where the call is for the R. Survey it is competent to show the W. Survey intended was known as the R. Survey. Buford *v.* Bostick, 50 Tex. 371.

25. Loss of Instruments or Monuments. — Nixon *v.* Porter, 34 Miss, 697, 69 Am. Dec. 408. *See* "Hearsay."

Nys *v.* Biemeret, 44 Wis. 104; Watkins *v.* Holman, 16 Pet. (U. S.) 25.

Where lots are described by map number only, without courses, distances or quantity and the map is lost, the certificate of the controller, showing the quantity of land sold, (it being his duty to keep a record of the matter) is competent evidence. Edwards *v.* Smith, 71 Tex. 156, 9 S. W. 77.

Where evidence *aliunde* is admissible to explain a grant, contiguous grants and deeds may be considered. Owen *v.* Bartholomew, 9 Pick. (Mass.) 520.

evidence.[26]

11. Application of Survey to Ground. — A. RESURVEY. — To relocate a line, or monumental evidence of the application of the survey to the ground, by means of a resurvey[27] with reference to remaining and known monuments,[28] the precise footsteps of the surveyor, as shown by his reports,[29] and competent parol or extrinsic evidence, should be retraced in such resurvey.[30] And in such application to the ground the calls may be reversed or inter-

26. Practical Construction.—*Massachusetts.* — Crafts *v.* Hibbard, 4 Metc. 448; Stone *v.* Clark, 1 Metc. 378, 35 Am. Dec. 370; Frost *v.* Spaulding, 19 Pic. 445, 31 Am. Dec. 150; Clark *v.* Munyan, 22 Pick. 410, 33 Am. Dec. 752; Makepeace *v.* Bancroft, 12 Mass. 469.

Michigan. — Jones *v.* Pashby, 62 Mich. 614, 29 N. W. 374.

New Jersey. — Jackson *v.* Perrine, 35 N. J. Law 137.

Texas. — Bolton *v.* Lann, 16 Tex. 96.

Vermont. — Kinney *v.* Hooker, 65 Vt. 333, 26 Atl. 690, 36 Am. Dec. 864.

Where the language of a deed is equivocal and the location of the premises is made doubtful, either by the insufficiency of the description or the inconsistency of the parts, the construction put upon the deed by the parties themselves in locating the premises, may be shown to determine boundary lines. Jackson *v.* Perrine, 35 N. J. Law 137.

27. Resurvey. — Fuller *v.* Carr, 33 N. J. Law 157; Tuxedo Park Ass'n *v.* Sterling Iron & R. Co., 60 App. Div. 349, 70 N. Y. Supp. 95; Stadin *v.* Helin, 76 Minn. 496, 79 N. W. 537, 602; Beach *v.* Whittlesey, 73 Conn. 530, 48 Atl. 350; Granby Mining & Smelting Co. *v.* Davis, 156 Mo. 422, 57 S. W. 126; Bussye *v.* Town of Central Covington, 19 Ky. L. Rep. 157, 38 S. W. 865; Woodbury *v.* Venia, 114 Mich. 251, 72 N. W. 189; Opdyke *v.* Stephens, 28 N. J. Law 83.

Where the lost section corners are those which were placed when the Township was subdivided, they should be placed at the intersection of a North and South and East and West line surveyed between the nearest known government monument in the respective lines and lost quarter posts at equal distance from the section corners. Hess *v.* Meyer, 73 Mich. 259, 41 N. W. 422.

28. Stadin *v.* Helin, 76 Minn. 496, 79 N. W. 537, 602; Shaver *v.* Adams, 37 Or. 282, 60 Pac. 902; Trotter *v.* Town of Stayton, (Or.), 68 Pac. 3.

An ordinance of a city establishing an initial point and base line, can not affect street lines and boundaries of lots, and is not admissible evidence as to their location. Orena *v.* Santa Barbara, 91 Cal. 621, 28 Pac. 268.

The exterior lines of a township made by an independent and controlling survey, and a lost corner on such line can not be located from monuments of the interior lines away from the township line as shown by known monuments, courses, and distances. Hess *v.* Meyer, 73 Mich. 259, 41 N. W. 422.

29. Footsteps of Surveyor.—Hathaway *v.* Evans, 113 Mass. 264.

30. Euliss *v.* McAdams, 108 N. C. 507, 13 S. E. 162.

The quarter posts of U. S. Survey are set for the purpose of being found and recognized on future surveys, and the parties making such resurvey (in this case not the surveyor) may testify directly that they found them. Thoen *v.* Roche, 57 Minn. 135, 58 N. W. 686, 47 Am. St. Rep. 600.

Careful correction or allowance should be made for difference of chains, as shown by the measurements between monuments of the survey. Hess *v.* Meyer, 73 Mich. 259, 41 N. W. 422.

Where no fractional corner is set by a government survey or such corner is lost, evidence of the distance between the nearest marked corners on either side on the controlling line is admissible, but evidence of distance on the inferior cross line is not competent, the importance of the lines being determined by the statutes and

changed when the surveys will thus better fit the ground.[31]

B. Controlling Parts of Survey. — Those parts of surveys or system of surveys, that did not help to create the lost line or monument would not be material in such application,[32] except as affecting the local and material parts where the line or monument was established.[33]

C. Surveyor's Report. — The surveyor's report of an *ex parte* trial survey are not competent evidence but the facts must be shown.[34]

D. Meridians. — For the purpose of comparing or harmonizing the facts of both surveys, the variations of the magnetic needle,[35] and the difference between the true and magnetic meridians at the times, and as used in the surveys, may be shown.[36]

E. Changes in Monuments. — Evidence of changes which time has made in the topography of the lands,[37] and in the appearance, condition and location of monuments is admissible.[38]

official rules for making surveys. Chapman *v.* Polack, 70 Cal. 487, 11 Pac. 764.

31. Reversing Calls.— Stanus *v.* Smith, (Tex. Civ. App.), 30 S. W. 262; Burge *v.* Poindexter, (Tex. Civ. App.), 56 S. W. 81; Miles *v.* Sherwood, 84 Tex. 485, 19 S. W. 853; Dobson *v.* Finley, 8 Jones L. (N. C.) 499.

32. Controlling Parts of Survey. Hathaway *v.* Evans, 113 Mass. 264; Orena *v.* Santa Barbara, 91 Cal. 621, 28 Pac. 268.

A resurvey to be competent must have for its initial point a monument or point within the immediate plan or local system by which the original survey was regulated and controlled. Burns *v* Martin, 45 Mich. 22, 7 N. W. 19.

33. Stiles *v.* Estabrook, 66 Vt. 535, 29 Atl. 961.

34. Surveyor's Report. — Dunn *v.* Hayes, 21 Me. 76; See *Ex Parte* Survey, *Supra* II, 4.

In cross-examination of a surveyor all the lines he run and surveys he made in locating the disputed boundary are proper subject of inquiry. Clark *v.* Gallagher, 74 Vt. 331. 52 Atl. 539.

Where a surveyor ran a line and compared it with a certain map and found the map correct, without introducing the map he may use its data so found correct in his testimony. Wineman *v.* Grummond, 90 Mich. 280, 51 N. W. 509.

To show the application of the description to the proper ground, parol proof is always admissible, and a witness may use a map or diagram to illustrate his testimony. Nolin *v.* Parmer, 21 Ala. 66.

35. Bodley *v.* Herndon, 3 A. K. Marsh. (Ky.) 22.

36. Bodley *v.* Herndon, 3 A. K. Marsh. (Ky.) 22.

Public policy demands that the custom of surveyors, as to the use of the true or magnetic meridian, in locating town plats especially in the City of Tacoma be submitted in evidence. Reed *v.* Tacoma Bldg. & Sav. Assn., 2 Wash. 198, 26 Pac. 252, 26 Am. St. Rep. 851.

37. Changes.— Lewis *v.* Upton, 52 App. Div. 617, 65 N. Y. Supp. 263; Ulman *v.* Clark, 100 Fed. 180.

Although natural objects as monuments control courses and distances, where the natural objects by lapse of time change their position, the rule does not apply and courses and distances prevail. Smith *v.* Hutchison, 104 Tenn. 394, 58 S. W. 226.

38. Aldrich *v.* Griffith, 68 Vt. 390, 29 Atl. 376; Greif *v.* Norfolk & W. R. Co., (Va.), 30 S. E. 438; Morgan *v.* Mowles, (Tex. Civ. App.), 61 S. W. 155.

Where one of the monuments of a boundary line was a spring, it may be shown by parol that time has changed the position of the spring and the line may be established from

Artificial changes may also be shown,[39] and where monuments have disappeared parol evidence is competent to show where they were.[40]

III. HIGHWAY.

1. Middle Line Presumed. — Land bounded by a highway or public road or street is presumed to extend to the middle line of such road or street, and each conveyance is presumed to be bounded by such middle line,[41] but when the description clearly indicates an intention to make the side line of the road or street the boundary, such presumptions fail,[42] but that intention must clearly appear,[43] and the facts and circumstances as to a called

other evidence. Ballinger *v.* Stinnett, (Tenn.), 59 S. W. 1044.

Evidence of the concentric rings or number of grains in the witness mark of a tree, is competent. Aldrich *v.* Griffith, 68 Vt. 390, 29 Atl. 376.

39. Rejection of evidence that the initial monument had been moved, before the trial survey relied on, was error. Anderson *v.* Wirth, (Mich.) 91 N. W. 157.

40. Robinson *v.* Kime, 70 N. Y. 147; Wallace *v.* Maxwell, 1 J. J. Marsh. (Ky.) 47; Wheeler *v.* Benjamin, 136 Cal. 51, 68 Pac. 313.

Where a stake is the corner of four lots, to corroborate the testimony of two of the lot owners that they remember the position of the stake, it is competent to show that they located their line fence by it. Barrett *v.* Murphy, 140 Mass. 133, 2 N. E. 833.

41. Foreman *v.* Presbyterian Assn. of Baltimore, (Md.), 30 Atl. 1114; Jacksonville T. & K. W. Ry. Co. *v.* Lockwood, 33 Fla. 573, 15 So. 327; Winter *v.* Peterson, 24 N. J. Law 524; 61 Am. Dec. 678; Hollenbeck *v.* Rowley, 8 Allen (Mass.) 473; Purkiss *v.* Benson, 28 Mich. 538; Boston *v.* Richardson, 13 Allen (Mass.) 146; Low *v.* Tibbets, 72 Me. 92, 39 Am. Rep. 303; Silvey *v.* McCool, 86 Ga. 1, 12 S. E. 175; Kneeland *v.* Van Valkenburgh, 46 Wis. 434, 1 N. W. 63, 32 Am. Rep. 719; White *v.* Godfrey, 97 Mass. 472.

42. Intention.—Jackson *v.* Hathaway, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; Whites Bank *v.* Nichols, 64 N. Y. 65; Maynard *v.* Weeks, 41 Vt. 617; Iron Mountain R. Co. *v.* Bingham, 87 Tenn. 522; 11 S. W. 705; 4 L. R. A. 622; Gould *v.* Eastern R. R., 142 Mass. 85, 7 N. E. 543; Alameda Macademizing Co. *v.* Williams, 70 Cal. 534, 12 Pac. 530; Rieman *v.* Baltimore Belt R. Co., 81 Md. 68; 31 Atl. 444; The City of Chicago *v.* Rumsey, 87 Ill. 348.

Where quantity and distance were satisfied by side line of the road, and the calls were for two monuments set upon that side line, the presumption that the center line is the boundary was rebutted. Peabody Heights Co. *v.* Sadtler, 63 Md. 533, 52 Am. Rep. 519.

43. Must be Clear.— Goodeno *v.* Hutchinson, 54 N. H. 159; Low *v.* Tibbets, 72 Me. 92, 39 Am. Rep. 303; Oxton *v.* Groves, 68 Me. 371, 28 Am. Rep. 75; Salter *v.* Jonas, 39 N. J. Law 469, 23 Am. Rep. 229; Sibley *v.* Holden, 10 Pick. (Mass.) 249, 20 Am. Dec. 521; Paul *v.* Carver, 26 Pa. St. 223, 67 Am. Dec. 413; Thomas *v.* Hunt, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857; Adams *v.* Saratoga & W. R. Co., 11 Barb. (N. Y.) 414; Mott *v.* Mott, 68 N. Y. 246.

Land may no doubt be bounded by the side of a highway, but the conveyance must contain clear and distinct terms to control the strong presumption that the premises extend *ad medium filum viae*, and distance reaching only to the side of the road are not sufficient evidence to rebut such presumption. Newhall *v.* Ireson, 8 Cush. (Mass.) 595, 54 Am. Dec. 790.

The presumption that title extends *ad medium filum viae*, can only be overcome by something stated in the deed which shows distinctly an in-

street never opened might be evidence to show such intention.[44] Such lines of a highway may be proved generally as other lines, by the surveys,[45] or by the plats locating the roads or streets,[46] and where sales have been made with reference to a plat to locate the lines, the plat is competent evidence though the street or road has never been opened.[47]

2. Practical Location. — Parol evidence of such lines may be shown by their actual location upon the ground.[48] Under a general call for the street or street lines, where the street as opened and the plat differ, and the grantor owned to both lines, evidence of both located and platted lines is admissible,[49] and evidence

tention to withhold an interest in the street. Snoddy *v.* Boley, 122 Mo. 79, 24 S. W. 142, 25 S. W. 932, 24 L. R. A. 507.

44. Palmer *v.* Dougherty, 33 Me. 502, 54 Am. Dec. 636; Southerland *v.* Jackson, 30 Me. 462, 50 Am. Dec. 633; Baltimore & O. R. Co. *v.* Gould, 67 Md. 60, 8 Atl. 754.

45. Where a street is located by formal grant or conveyance its lines are determined by description or surveys. Jackson *v.* Perrine, 35 N. J. Law 137.

46. Jacob *v.* Woolfolk, 90 Ky. 426, 14 S. W. 415, 9 L. R. A. 551; Atwood *v.* Canrike, 86 Mich. 99, 48 N. W. 950.

Where a plat has no line between a street and a river for a portion of the length of the street, and the cross street is not shown as extending to the river, the river will be regarded as the street boundary although the street is considerably widened thereby. Com. *v.* Y. M. C. A., 169 Pa. St. 24, 32 Atl. 121.

The dedication of a strip of land lying along a navigable river in Alabama extends to low water mark. Webb *v.* City of Demopolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62; Doe *v.* Jones, 11 Ala. 63.

Where a street corner is the initial monument of a description, the return of the surveyor laying out such highway and parol evidence of its location are competent even if the proceedings were void. The question was not whether the road ws a legal highway, but where was it and what was it and what was the intent of the parties in referring to the corner. Haring *v.* Van Houten, 22 N. J. Law 61.

The platting of lots and streets and selling with reference thereto, is evidence of the dedication of the streets and of the boundaries of the streets so dedicated. Schneider *v.* Jacob, 9 Ky. L. Rep. 382, 5 S. W. 350.

47. Streets not Opened.—White *v.* Flannigan, 1 Md. 525, 54 Am. Dec. 668; *In re* Lewis Street, 2 Wend. (N. Y.) 472; Parker *v.* Smith, 17 Mass. 413, 9 Am. Dec. 157; Emerson *v.* Wiley, 10 Pick. (Mass.) 316.

48. Valley Pulp & Paper Co. *v.* West, 58 Wis. 599, 17 N. W. 554; Connehan *v.* Ford, 9 Wis. 216; Cahill *v.* Layton, 57 Wis. 600, 16 N. W. 1, 46 Am. Rep. 46.

Land was bounded by private road on the grantor's land, but no road was then laid out, and no reference was made to the plat of the owner then recorded. *Held*, the position of the road was one of fact to be determined from the plan, from the practical location as shown by fences and culverts erected soon after and from the conduct and declarations of the parties. Crafts *v.* Judson, 119 Mass. 521.

49. Plat and Parol.— Hoffman *v.* City of Port Huron, 102 Mich. 417, 60 N. W. 831; Crafts *v.* Judson, 119 Mass. 521.

Street as opened up and used is presumed to be the boundary called, by general reference in deed. Southern Iron Works *v.* Central of Georgia R. Co., 131 Ala. 649, 31 So. 723.

Where there was a call for a public road, and evidence tending to show that the road did not then exist was introduced, a plat of the tract defining such road is admissible. Atwood *v.* Canrike, 86 Mich. 99, 48 N. W. 950.

aliunde is received to show the intention of the parties.[50]

IV. OPINION EVIDENCE.

1. Facts. — Generally, facts and not opinions on questions of boundaries should be given in evidence,[51] but where the facts can not be clearly shown, or peculiar learning or skill is required to deduce correct conclusions from them,[52] the opinions of expert surveyors are competent as to the conclusions of fact.[53]

A. ACCURACY OF SURVEY. — The custom of surveyors about the time in question as to accuracy in delineation of streams,[54]

Where a description calls for a road as a boundary, the presumption is that reference is made to the road as it exists upon the ground and not to recorded lines of roads never opened. Atwood *v.* Canrike, 86 Mich. 99, 48 N. W. 950.

50. Aliunde.—Purkiss *v.* Benson, 28 Mich. 538; Hoffman *v.* City of Port Huron, 102 Mich. 417, 60 N. W. 831.

51. Facts.— Schultz *v.* Lindell, 30 Mo. 310; Blumenthall *v.* Roll, 24 Mo. 113; Kutchler *v.* Wilson, 82 Tex. 638, 18 S. W. 317; Reast *v.* Donald, 84 Tex. 648, 19 S. W. 795.

Where an old survey in its bearings contains no fractions of degrees, a surveyor is not permitted to explain the fact with an opinion that the fractions were disregarded in such survey. Harris *v.* City of Ansonia, 73 Conn. 359, 47 Atl. 672.

Where a highway had been laid out fifty years before in the valley of a river, it is not admissible for an expert to give his opinion as to what the present custom is in laying out such highways in respect to their proximity to river banks at bridge crossings. Harris *v.* City of Ansonia, 73 Conn. 359, 47 Atl. 672.

A surveyor should give the facts as he finds them on resurveys and his opinion that certain lines were only chamber work should be excluded, as usurping the province of the jury. Randall *v.* Gill, 77 Tex. 351, 14 S. W. 134.

The surveyor testified that he could not find a quarter post on his resurvey, and the court properly excluded his opinion upon the question whether the government surveyor established one. Burt *v.* Busch, 82 Mich. 506, 46 N. W. 790.

52. Learning Required.— Davis *v.* Mason, 4 Pick. (Mass.) 156; Knox *v.* Clark, 123 Mass. 216.

A surveyor may testify that he ran certain lines, that they corresponded with certain monuments found upon the ground, and that the monuments correspond in age with the old survey he was retracing. Hoover *v.* Gonzalus, 11 Serg. & R. (Pa.) 314.

A surveyor may give his opinion that marks on the N. E. side of tree were placed there for protection from wind and weather. Dugger *v.* McKesson, 100 N. C. 1, 6 S. E. 746.

Surveyor may testify that changing a cipher to a degree mark will make the description in a deed close and describe the claimed lands. Coffey *v.* Hendricks, 66 Tex. 676, 2 S. W. 47.

53. Conclusions of Fact. — Radford *v.* Johnson, 8 N. D. 182, 77 N. W. 601; Ormsby *v.* Ihmsen, 34 Pa. St. 462.

Where a chain carrier testifies to facts as to a certain survey he helped to make and describes the survey, a surveyor who heard his testimony and was acquainted with the tract in litigation, should be permitted to testify that the chain carrier described another survey not the one in question. Emmett *v.* Briggs, 21 N. J. Law 53.

A surveyor who in the exercise of his profession has become familiar with a certain map and many others inscribed in apparently the same handwriting found in the proper public offices, is qualified to give his opinion to who made the map. Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884.

54. Accuracy of Survey.— Dugger *v.* McKesson, 100 N. C. 1, 6 S. E. 746.

manner of marking witness trees or other monuments,[55] ignoring fractions of degrees,[56] and as to giving large measure, may be shown by expert testimony of surveyors,[57] and they may testify as to the variations of the needle.[58]

B. Resurveys. — After making resurveys surveyors have been permitted to give opinions as to the location of lines,[59] and lost monuments with reference to other objects,[60] and as to correspondence between the original and their resurvey.[61]

a. *Initial Points.* — But their opinions as to the initial point of the survey should be excluded,[62] unless based upon knowledge of the original survey establishing such point,[63] and it is held that the facts of such original surveys should be given by the expert

55. Inquiry of an expert surveyor as to the custom of ancient surveyors to use accuracy in the delineation of streams and other objects in the notes and maps is proper. Dugger *v.* McKesson, 100 N. C. 1, 6 S. E. 746.

56. Owen *v.* Bartholomew, 9 Pick. (Mass.) 520.

If a custom existed among surveyors to ignore fractions of degrees in their field notes, that fact may be proved when relevant. Harris *v.* City of Ansonia, 73 Conn. 359, 47 Atl. 672.

57. Owen *v.* Bartholomew, 9 Pick. (Mass.) 520.

58. A surveyor as an expert may testify as to variations of the needle to explain slight discrepancies in the direction of call objects. Angle *v.* Young, (Tex. Civ. App.), 25 S. W. 798.

59. Resurveys. — Bridges *v.* McClendon, 56 Ala. 327; Nolin *v.* Parmer, 21 Ala. 66; Dailey *v.* Fountain, 35 Ala. 26.

A surveyor who made the survey and plat, may give his opinion as to fences and lot lines and their relative location. Messer *v.* Reginnitter, 32 Iowa 312.

Where a surveyor made a survey and map from the deed under which a party claims, which map and deed are in evidence, after describing the making of the survey, it is competent for him to testify that the "deed did not include or describe the land sued for in this action." Donehoo *v.* Johnson, 120 Ala. 438, 24 So. 888.

60. Davis *v.* Mason, 4 Pick. (Mass.) 156; Shook *v.* Pate, 50 Ala. 91.

The opinion of a surveyor who has made the survey as to whether the corner he located was the true section corner is admissible evidence. Toomey *v.* Kay, 62 Wis. 104, 22 N. W. 286.

61. A surveyor may testify as an expert that the corners located by him in his resurvey were the same as those of the old survey. Hockmoth *v.* Des Grand Champs, 7 Mich. 520, 39 N. W. 737.

62. Initial Points. — Cronin *v.* Gore, 38 Mich. 381; Stewart *v.* Carleton, 31 Mich. 270.

The position of monuments and starting points are questions of fact to be determined by evidence, and surveyors have no more authority than other men to determine them. The law recognizes them as useful assistants in doing the mechanical work of measurement and calculation, and also allows credit to their judgment and experience, which may give it value when better means of information do not exist, but the position of a monument corner or section line is always a question of fact. Radford *v.* Johnson, 8 N. D. 182, 77 N. W. 601.

63. Busse *v* Town of Central Covington, 19 Ky. L. Rep. 157, 38 S. W. 865.

To establish an initial point and make an otherwise competent survey admissible, parol testimony of the surveyor that he had taken pains to establish the correctness of the section corner, the initial point that he had used it for many years and so often in his surveys that he was perfectly sure of its correctness, is com-

before he is permitted to give his opinion.[64]

C. Monuments. — A surveyor qualified as an expert may give his opinion as to whether certain marks or monuments were intended for witness marks or monuments,[65] as to their being ancient,[66] and as to their age as shown by appearance or concentric rings of growth;[67] but an opinion that they were made in a certain survey should be excluded.[68]

2. Personal Knowledge. — Where opinions are not derived from expert skill or learning, but from personal observation, they should be excluded.[69]

3. Legal Conclusions. — Expert testimony as to legal conclusions,[70] or construction of papers, is not admissible.[71]

V. REPUTATION.

1. Public Boundaries. — A. At Common Law. — At common law, in England and in the United States, ancient public boundaries of common interest may be shown by evidence of general reputation,[72] by evidence of tradition,[73] and by the hearsay declarations of deceased persons with knowledge;[74] but such declarations must have been made before the controversy arose.[75]

petent. Manistee Mfg. Co. *v.* Cogswell, 103 Mich. 602, 61 N. W. 884.

64. Stewart *v.* Carleton, 31 Mich. 270.

65. Monuments.—Northumberland Coal Co. *v.* Clement, 95 Pa. St. 126; Davis *v.* Mason, 4 Pick. (Mass.) 156; St. Louis Public Schools *v.* Risely, 40 Mo. 356.

66. Age of Monuments.— Knox *v.* Clark, 123 Mass. 216; Davis *v.* Mason, 4 Pick. (Mass.) 156; Barron *v.* Cobleigh, 11 N. H. 557, 35 Am. Dec. 505.

67. Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57; Kennedy *v.* Lubold, 88 Pa. St. 246.

68. A surveyor may be permitted to give his opinion that certain marks on a tree showed it to be the corner tree of a survey, but may not testify that it was the corner of the particular survey in question. Clegg *v.* Fields, 7 Jones Law (N. C.) 37, 75 Am. Dec. 450.

69. Personal Knowledge.— A surveyor should not be permitted to give his opinion that certain witness marks are the work of another surveyor, although he has often resurveyed after him, for this would be an opinion upon personal rather than expert knowledge. Barron *v.* Cobleigh, 11 N. H. 557, 35 Am. Dec. 505.

70. Legal Conclusions.— Ormsby *v.* Ihmsen, 34 Pa. St. 462.

71. Ormsby *v.* Ihmsen, 34 Pa. St. 462.

The opinion of an abstractor or examiner of titles is not admissible in evidence on the question of boundary lines. St. Louis Public Schools *v.* Risely, 40 Mo. 356.

72. Common Law Rules.— Wood *v.* Willard, 37 Vt. 377, 86 Am. Dec. 716; Hecker *v.* Sterling, 36 Pa. St. 423; St. Louis Public Schools *v.* Risely, 40 Mo. 356.

Where the question of boundary relates to a large region so extensive as to make it a matter of public notoriety, the early acts of the patentees and those claiming under them, ancient documents and especially such as have been retained as monuments of title and declarations of deceased persons, supposed to have knowledge upon the subject, if made "*ante litem motam*" are competent evidence. Hunt *v.* Johnson, 19 N. Y. 279.

73. St. Louis Public Schools *v.* Risley, 40 Mo. 356.

74. Hearsay. — Kennedy *v.* Lubold, 88 Pa. St. 246; Hunnicutt *v.* Peyton, 102 U. S. 333.

75. Wood *v.* Willard, 37 Vt. 377; 86 Am. Dec. 716; Hunt *v.* Johnson, 19 N. Y. 279.

Public Interest. — County lines,[76] street boundaries,[77] lines of an old highway,[78] the initial point of a city or village survey,[79] or corners of United States surveys are of common interest, and may be shown by reputation or hearsay, where the common law rule has not been changed.[80]

2. Private Boundaries. — A. At Common Law. — Evidence of reputation,[81] or of hearsay declarations as to private boundaries, was not admissible,[82] but an exception was made where the declarations were part of the *res gestae* of the survey,[83] and where private and public boundaries were co-incident.[84] Such evidence is still excluded in England, and some of the states.[85]

B. Common Law Rules Relaxed. — From the inability to procure better evidence on account of the remoteness of the transaction,[86] the rules permitting proof of public boundaries by

76. Public Interest. — A county line ought to be recognized as being where it is generally understood to be, and not where we would now place it if we had to apply the law for the first time. We can best ascertain where the true line was by looking to the public practice relative to it, in connection with the levying of taxes, selecting of jurors, serving of process by sheriffs and constables, elections, official surveys, etc. Hecker *v.* Sterling, 36 Pa. St. 423.

Contra. — Evidence that persons living in the disputed territory voted, were assessed and paid taxes in either county is not competent proof as to where the line actually was. Lay *v.* Neville, 25 Cal. 545.

77. Ancient reputation and possession in respect to the boundaries of streets are entitled to more respect in deciding those boundaries and the boundaries of the abutting lots, than any survey that can now be made. Ralston *v.* Miller, 3 Rand. (Va.) 44, 15 Am. Dec. 704.

78. Highways.—Wooster *v.* Butler, 13 Conn. 309.

79. Initial Points of City Surveys. The initial points in the survey of a city are of general and public interest, and at common law could be proved by reputation, and such proof is admissible under the California Code. Muller *v.* S. P. B. R. Co., 83 Cal. 240, 23 Pac. 265.

80. Corners U. S. Survey. — Boardman *v.* Lessee of Reed, 6 Pet. (U. S.) 328; Holbrook *v.* Debo, 99 Ill. 372; Thoen *v.* Roche, 57 Minn. 135, 58 N. W. 686, 47 Am. St. Rep. 600.

Where the initial point of a survey establishing a private boundary is a corner of a U. S. survey, its location may be proved by common or general reputation. Mullaney *v.* Duffy, 145 Ill. 559, 33 N. E. 750.

81. Reputation. — Clement *v.* Packer, 125 U. S. 309; Burt *v.* Ten Eyck, 24 N. J. Law 756.

82. Hearsay. — Hunnicut *v.* Peyton, 102 U. S. 333; Runk *v.* Ten Eyck, 24 N. J. Law 756.

83. Res Gestae. — Stroud *v.* Springfield, 28 Tex. 649; Hunnicut *v.* Peyton, 102 U. S. 333.

84. Coincident With Public Boundaries. — Traditionary evidence not admissible unless boundary coincident with a boundary of public nature. Chapman *v.* Twichell, 37 Me. 59, 58 Am. Dec. 473.

85. Common Law Followed. Clement *v.* Packer, 125 U. S. 309; Ellicott *v.* Pearl, 10 Pet. (U. S.) 412; Wood *v.* Willard, 37 Vt. 377, 86 Am. Dec. 716; Schaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154; Hunnicutt *v.* Peyton, 102 U. S. 333; Sample *v.* Robb, 16 Pa. St. 305; Hall *v.* Mayo, 97 Mass. 416.

86. Reason for Admitting Reputation. — Kennedy *v.* Lubold, 88 Pa. St. 246; Clement *v.* Packer, 125 U. S. 309; Boardman *v.* Lessee of Reed, 6 Pet. (U. S.) 328; Stroud *v.* Springfield, 28 Tex. 649; Gibson *v.* Poor, 21 N. H. 440, 53 Am. Dec. 216; Powers *v.* Sibley, 41 Vt. 288;

evidence of reputation have been extended in most of the states to apply to old private boundaries, monuments and corners.[87]

a. *Not to Lines.* — But it has been held that such proof applies only to initial points, monuments and corners and not to the lines themselves.[88]

b. *Less Remote Cases.* — Evidence of reputation has been held competent in less remote cases where description were ambiguous or uncertain, or the better evidence had disappeared.[89].

c. *General Reputation.* — When evidence of general reputation is competent,[90] the things which go to make up or illustrate that

Wood *v.* Willard, 37 Vt. 377, 86 Am. Dec. 716.

Declarations of deceased persons with actual knowledge made upon the ground, pointing out the monuments or boundaries, may be received in evidence when from lapse of time there is no reasonable probability that testimony can be obtained from those with such knowledge. Turner Falls Lumber Co. *v.* Burns, 71 Vt. 354, 45 Atl. 896.

87. Reputation Admitted. — *United States.* — Fraser *v.* Hunter, 9 Fed. Cas. No. 5063; Clement *v.* Packer, 125 U. S. 309.

Alabama. — Doe *v.* Mayor etc. of Mobile, 8 Ala. 279.

Connecticut. — Wooster *v.* Butler, 13 Conn. 309; Higley *v.* Bidwell, 9 Conn. 447; Kinney *v.* Farnsworth, 17 Conn. 355.

Kansas. — Stetson *v.* Freeman, 35 Kan. 523, 11 Pac. 431.

Kentucky. — Smith *v.* Prewit, 2 A. K. Marsh 155; Smith *v.* Shackelford, 9 Dana 452.

Michigan — Baker *v.* McArthur, 54 Mich. 139.

North Carolina. — Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154.

New York. — Hunt *v.* Johnson, 19 N. Y. 279.

Ohio. — Lessee of McCoy *v.* Galloway, 3 Ohio 282, 17 Am. Dec. 597.

Pennsylvania. — Caufman *v.* Presbyterian Congregation of Cedar Springs, 6 Binn. 59; Kramer *v.* Goodlander, 98 Pa. St. 353; Kennedy *v.* Lubold, 88 Pa. St. 246.

Texas. — Stroud *v.* Springfield, 28 Tex. 649.

Virginia. — Overton's Heirs *v.* Davison, 1 Gratt. (Va.) 211, 42 Am. Dec. 544.

The initial points of a survey or other monuments of boundary may be proved either by direct evidence or by reputation and hearsay evidence. Nixon *v.* Porter, 34 Miss. 697, 69 Am. Dec. 408.

Where a willow tree then gone was proved by reputation to have been an old corner of an early survey, the courses and distances of a later survey starting at such willow corner may be used with the monuments of such later survey to relocate the old willow corner. Stewart *v.* Crosby, (Tex. Civ. App.), 56 S. W. 433.

88. Not to Lines. — In a boundary case, evidence that a certain spring was commonly reputed to be located in the lands of a party is not admissible. Fraser *v.* Hunter, 9 Fed. Cas. No. 5,063.

The location of monuments and the initial points of a survey may be established by reputation, but such evidence is not competent upon the location of lines between such monuments. Lay *v.* Neville, 25 Cal. 545.

89. Less Remote Cases. — Hollenbeck *v.* Rowley, 8 Allen (Mass.) 473.

Where there was a discrepancy between patent and survey, county maps were admitted as well as reputation. Irvin *v.* Bevil, 80 Tex. 332, 16 S. W. 21.

The description of a patent and the field notes of an adjoining survey made by the same surveyor about the same time are admissible in the location of a doubtful corner. Adair *v.* White, (Cal.), 34 Pac. 338.

90. General Reputation — Hunnicut *v.* Peyton, 102 U. S. 333; Clark *v.* Gallagher, 74 Vt. 331, 52 Atl. 539; Nys *v.* Biemeret, 44 Wis. 104; Stroud *v.* Springfield, 28 Tex. 649; Smith *v.*

reputation may be shown separately, as improvements made by strangers with reference to the line;[91] or old published maps, made by a now deceased surveyor;[92] but if the author is living and his testimony can be obtained, the accuracy of the map should be shown by such testimony before it can be received in evidence.[93]

d. *Recognition by Surveyors.* — Evidence of general recognition of a line or monument by surveyors is admissible,[94] and reputation may be shown by hearsay declarations of persons with knowledge,[95]

Nowells, 2 Litt. (Ky.) 159; Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154; Smith *v.* Russell *et al.*, 37 Tex. 247.

Common reputation is admissible to prove an old corner, and its location may be shown by witnesses who have no knowledge of the original surveys establishing the corner. Stewart *v.* Crosby, (Tex. Civ. App.), 56 S. W. 433.

Boundaries may be proved by evidence of common reputation, but the weight of such evidence is not sufficient to contradict unambiguous calls of a survey. McCoy *v.* Galloway, 3 Ohio 282, 17 Am. Dec. 591.

91. Improvements by Strangers. Schlei *v.* Struck, 109 Wis. 598, 85 N. W. 430; Baker *v.* McArthur, 54 Mich. 139; City of Racine *v.* Emerson, 85 Wis. 80, 55 N. W. 177, 39 Am. St. Rep. 819.

The witness testified that he had lived on both lots, that the boundaries between them were pointed out to him, that he assisted in surveys of extensions of the disputed line, and was familiar with the marked trees of the boundary for many years, and testified as to the location of the line. *Held,* proper cross examination to show adverse possession and improvements on the extended line at variance with his location. Clark *v.* Gallagher, 74 Vt. 331, 52 Atl. 539.

The erection of ancient building on parallel lines at times when lost monuments must have been known is competent evidence in the relocation of lost corners and lines. Shaver *v.* Adams, 37 Or. 282, 60 Pac. 902.

The building of fences and setting out of rows of trees and the making of public and private improvements with reference to certain claimed corner marks is competent traditional evidence that they are the true marks. Arneson *v.* Spawn, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783.

92. Old Published Maps. — Rust *v.* Boston Mill Co., 6 Pick. (Mass.) 158.

The dedication of a street may be proved by public maps or documents of ancient date showing its existence. Doe *v.* Jones, 11 Ala. 63.

The book of possession of the town of Boston, though not certainly authorized by any law or ordinance is competent evidence from its recognized authority. City of Boston *v.* Richardson, 13 Allen (Mass.) 146.

Ancient maps made by state authority are *prima facie* evidence of the true town lines and where private boundaries are coincident, are evidence of them. Adams *v.* Stanyan, 24 N. H. 405.

93. Living Author. — Maps with their explanations contained in private publications of a living author are not competent evidence, without preliminary proof of their accuracy. Morris *v.* Harmer's Heirs, 7 Pet. (U. S.) 554.

94. Reputation Among Surveyors. Where the location of a line has been recognized as a proper one, by surveyors and others whose business interests led them to look for the line these facts are material and may be proved by oral evidence. Kramer *v.* Goodlander, 98 Pa. St. 353.

95. Persons with Knowledge. *United States.* — Boardman *v.* Lessee of Reed, 6 Pet. 328; Clement *v.* Packer, 125 U. S. 309; Hunnicut *v.* Peyton, 102 U. S. 333.

Kentucky. — Whalen *v.* Nesbit, 95 Ky. 464, 26 S. W. 188.

New Hampshire. — Wendell *v.* Abbott, 45 N. H. 349; Wallace *v.* Goodall, 18 N. H. 439; Smith *v.* Forrest, 49 N. H. 230; Smith *v.* Pow-

but the declarations of others, strangers to the title, are generally rejected.[96]

e. *Declarant Dead.* — It is generally held that the declarant must be dead,[97] but in establishing general reputation an exception to the rule is made by many courts.[98]

f. *Of Owner.* — The declarations of a deceased owner made while holding title,[99] or after sale are admissible where proof of reputation is proper.[1] His self-serving declarations, made while no motive existed for false statement are generally received.[2]

ers, 15 N. H. 546; Adams *v.* Stanyan, 24 N. H. 405; Gibson *v.* Poor, 21 N. H. 440, 53 Am. Dec. 216; Great Falls Co. *v.* Worster, 15 N. H. 412; Adams *v.* Blodgett, 47 N. H. 219, 90 Am. Dec. 569.

North Carolina — Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240.

Pennsylvania. — McCausland *v.* Fleming, 63 Pa. St. 36.

Texas. — Welder *v.* Carroll, 29 Tex. 317; Tucker *v.* Smith, 68 Tex. 473, 3 S. W. 671; Smith *v.* Russell, 37 Tex. 247; Evans *v.* Hurt, 34 Tex. 111.

Vermont. — Turner Falls Lumber Co. *v.* Burns, 71 Vt. 354, 45 Atl. 896.

Virginia. — Overton's Heirs *v.* Davisson, 1 Gratt. 211, 42 Am. Dec. 544; Harriman *v.* Brown, 8 Leigh 697; Clements *v.* Kyles, 13 Gratt. 468.

Wisconsin. — Nys *v.* Bremeret, 44 Wis. 104.

96. Rejected for Want of Knowledge. — Hurt *v.* Evans, 49 Tex. 311; Tucker *v.* Smith, 68 Tex. 473, 3 S. W. 671; Curtis *v.* Aaronson, 49 N. J. Law 68, 7 Atl. 886, 60 Am. Rep. 584; Bartlett *v.* Emerson, 7 Gray (Mass.) 174; Hunnicut *v.* Peyton, 102 U. S. 333; Long *v.* Colton, 116 Mass. 414.

97. Declarant Dead. — Overton's Heirs *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544; Long *v.* Colton, 116 Mass. 414; Bartlett *v.* Emerson, 7 Gray (Mass.) 174; Smith *v.* Nowells, 2 Litt. (Ky.) 159; Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240.

Before hearsay evidence on the question of boundary can be admitted it must be proved that the party quoted is dead, otherwise his testimony should be given. Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154.

98. Conn *v.* Penn, 1 Pet. C. C. 496; Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154; Harris *v.* Powell, 2 Hayw. (N. C.) 349; Hartzog *v.* Hubbard, 2 Dev. & B. (N. C.) 241.

99. Of Owner. — Hamilton *v.* Menor, 2 Serg. & R. (Pa.) 70; Hunnicut *v.* Peyton, 102 U. S. 333; Evans *v.* Hurt, 34 Tex. 111; Curtis *v.* Aaronson, 49 N. J. Law 68, 7 Atl. 886, 60 Am. Rep. 584; Daggett *v.* Shaw, 5 Metc. (Mass.) 223; Hurt *v.* Evans, 49 Tex. 311; Partridge *v.* Russell, 50 Hun 601, 2 N. Y. Supp. 529; Halstead *v.* Mullen, 93 N. C. 252.

A map found among the papers of a deceased grantor, which he had declared to be a correct map of the premises in question, is competent evidence. Nichols *v.* Turney, 15 Conn. 101.

Declarations of former owner of adjoining lands as to the location of the joint corner are admissible. Mills *v.* Buchanan, 14 Pa. St. 59; Stumpf *v.* Osterhage, 94 Ill. 115.

1. Fisher *v.* Kaufman, 170 Pa. St. 444, 33 Atl. 137; Tyrone Min. & Mfg. Co. *v.* Cross, 128 Pa. St. 636, 18 Atl. 519.

Proof of former ownership alone does not make the declarations of such owner competent evidence. Martyn *v.* Curtis, 68 Vt. 397, 35 Atl. 333.

An owner is presumed to know his own boundaries and his declarations made after sale and when he has no interest in the boundary, are admissible after his death. Hurt *v.* Evans, 49 Tex. 311.

2. Curtis *v.* Aaronson, 49 N. J. Law 68, 7 Atl. 886, 60 Am. Rep. 584; Bartlett *v.* Emerson, 7 Gray (Mass.) 174; Long *v.* Colton, 116 Mass. 414; Smith *v.* Forrest, 49 N.

g. *Of Surveyor.* — The declarations of the deceased surveyor who ran the disputed line, verbally made, or expressed in his reports, or maps of later survey, are admissible,[3] but the declarations of a surveyor cannot be used to contradict his own report.[4]

h. *Of Assistant.* — The declarations of the deceased chain carrier who assisted at the survey,[5] or of a deceased commissioner in partition are admissible.[6]

i. *Of Surveyor Who Resurveyed.* — The declarations of a surveyor who retraced the line,[7] re-marked and relocated the monu-

H. 230; Smith *v.* Powers, 15 N. H. 546; Turner Falls Lumber Co. *v.* Burns, 71 Vt. 354, 45 Atl. 896; Partridge *v.* Russell, 50 Hun 601, 2 N. Y. Supp. 529.

Declarations of a person interested at the time he made them are not evidence. Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240.

3. Surveyor Who Made the Survey. — *United States.*—Clements *v.* Packer, 125 U. S. 309, 8 Sup. Ct. 907.

Kentucky. — Whalen *v.* Nesbit, 95 Ky. 464, 26 S. W. 188.

Pennsylvania. — Caufman *v.* Presbyterian Congregation of Cedar Springs, 6 Binn. 59; Borough of Birmingham *v.* Anderson, 40 Pa. St. 506.

South Carolina. — Blythe *v.* Sutherland, 3 McCord 258.

Texas. — George *v.* Thomas, 16 Tex. 74, 67 Am. Dec. 612.

Virginia. — Overton's Heirs *v.* Davisson, 1 Gratt. 211, 42 Am. Dec. 544; Clements *v.* Kyle, 13 Gratt. 468; Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

West Virginia. — McMullen *v.* Lewis, 5 W. Va. 144.

Where the survey calls for the line of another survey as a boundary other surveys made about that time by the same surveyor now deceased are his declarations and competent evidence. Cottingham *v.* Seward, (Tex. Civ. App.), 25 S. W. 797.

Where a surveyor now deceased surveyed the tract in question, and shortly after made another survey of an adjoining tract, which latter survey was canceled, and the canceled survey calls for lines and monuments of the tract in question, the notes of the canceled survey are admissible in evidence as declarations of the deceased surveyor. Stanus *v.* Smith, (Tex. Civ. App.), 30 S. W. 262.

Where two surveys are made by the same surveyor, the calls of the junior one for a line of the other are admissible as declarations to establish the older line by reputation. Bellas *v.* Cleaver, 40 Pa. St. 260.

After the death of a surveyor, his plat and the "*proces verbal*" are competent evidence. Lebeau *v.* Bergeron, 14 La. Ann. 489.

A plat showing the boundaries in question made by a now deceased surveyor, based upon a survey made by him, is the declaration of the surveyor and is admissible. State *v.* Crocker, 49 S. C. 242, 27 S. E. 49.

Maps of contemporaneous surveys are competent to identify streams mentioned in old surveys. Kain *v.* Young, 41 W. Va. 618, 24 S. E. 554.

4. Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

5. Chain Surveyor. — Spear *v.* Coate, 3 McCord (S. C.) 227, 15 Am. Dec. 627; Smith *v.* Russell, 37 Tex. 247; Hunnicut *v.* Peyton, 102 U. S. 333; Overton's Heirs *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544.

Contra — Ellicott *v.* Pearl, 10 Pet. (U. S.) 412.

6. Commissioner in Partition. The declarations of a deceased commissioner in partition as to the location upon the ground of a line made by him as such commissioner are admissible. Coleman *v.* Smith, 55 Tex. 254.

7. Of Surveyor Who Resurveyed. Donohue *v.* Whitney, 39 N. Y. St. 706, 15 N. Y. Supp. 622.

The declarations of a deceased

ments,[8] or used them in connection with his later survey are admissible hearsay,[9] and such declarations may be verbal,[10] or expressed in the reports of such surveys[11] of the same[12] or adjoining lands made *ex parte* or *inter alios*.[13]

surveyor who ran the lines, found original witness marks, blocked the trees, counted the growths, and pronounced a hickory a monument of an old survey, are very strong evidence. Kennedy *v.* Lubold, 88 Pa. St. 246.

The declarations of a surveyor now deceased, made while retracing line in question, in making the survey of an adjoining lot, are admissible. Adams *v.* Blodgett, 47 N. H. 219, 90 Am. Dec. 569.

Contra. — Certificates of highway surveyors are not admissible on the question of boundaries. Corlis *v.* Little, 13 N. J. Law 229.

The declarations of a deceased surveyor who examined a line formerly surveyed by another are competent, their weight depending on the extent of such examination. Kramer *v.* Goodlander, 98 Pa. St. 366.

Contra — The declarations of a deceased surveyor who made the original survey are admissible hearsay, but the rule is not extended to the declarations of a surveyor who subdivided the tract by a later survey. Angle *v.* Young, (Tex. Civ. App.), 25 S. W. 798.

8. Donohue *v.* Whitney, 39 N. Y. St. 706, 15 N. Y. Supp. 622; Kennedy *v.* Lubold, 88 Pa. St. 246.

Where the selectmen of adjoining townships were required by law to perambulate their boundary line and re-mark boundaries at certain periods. *Held*, their acts of relocation are evidence of the true location even between private owners of such boundary. Lawrence *v.* Haynes, 5 N. H. 33, 20 Am. Dec. 554; Nichols *v.* Parker, 14 East 331, note.

9. Stewart *v.* Crosby, (Tex. Civ. App.), 56 S. W. 433; Tyrone Min. & Mfg. Co. *v.* Cross, 128 Pa. St. 636, 18 Atl. 519; Fisher *v.* Kaufman, 170 Pa. St. 444, 33 Atl. 137; Mitchell *v.* Mitchell, 8 Gill (Md.) 98.

Contra. — Russell *v.* Hunnicut, 70 Tex. 657, 9 S. W. 500.

The monuments of the senior survey have disappeared, but the calls of a junior survey made the Northern boundary of the former, Southern boundary of the latter, and there was a discrepancy of five per cent in distance. *Held*, the presumption must prevail that the surveyor of the second tract saw the monuments of the survey, and that the two tracts are contiguous. Freeman *v.* Mahoney, 57 Tex. 621.

Field notes of a junior survey calling for adjoinder with the survey in question are admissible as a recognition of the elder line. Moore *v.* Stewart, (Tex.), 7 S. W. 771.

Contra. — In Clements *v.* Kyles, 13 Gratt. (Va.) 468, the court makes a distinction between the declarations of the original surveyor who ran the lines as expressed in his subsequent surveys, and similar declarations of another surveyor, admitting the former, but excluding the latter for the reason that the duty of the surveyor would not require him to make the necessary investigation as to the old lines and monuments.

10. **Verbal.** — Donohue *v.* Whitney, 39 N. Y. St. 706, 15 N. Y. Supp. 622; Kennedy *v.* Lubold, 88 Pa. St. 246; Kramer *v.* Goodlander, 98 Pa. St. 366.

11. **Calls of Surveys.** — Stewart *v.* Crosby, (Tex. Civ. App.), 56 S. W. 433; Stanus *v.* Smith, (Tex. Civ. App.), 30 S. W. 262.

12. The field notes and plat of a resurvey some fifty years old are properly admitted in evidence, where the resurvey was made by a county surveyor and returned by him to the land office under a mistake supposing the lands had become vacant, and a call in such notes for the now disputed land as "one of the Selkirk islands" is competent evidence. Petrucio *v.* Gross, (Tex. Civ. App.), 47 S. W. 43.

13. Stewart *v.* Crosby, (Tex. Civ. App.), 56 S. W. 433; Cottingham *v.*

j. *Old Maps.* — Such reputation may also be proved by old maps or diagrams, reputed to be correct.[14]

k. *Matters Inter Alios.* — Ancient deeds, *inter alios*,[15] or decrees between strangers are competent as reputation.[16]

l. *Ante Litem Motam.* — The declarations to be admissible, must have been made before the controversy arose,[17] and to render the verbal declarations competent they must be made on the grounds while pointing out the monuments or corners.[18] But there are

Seward, (Tex. Civ. App.), 25 S. W. 797; Donohue *v.* Whitney, 39 N. Y. St. 706, 15 N. Y. Supp. 622.

Where a younger survey with known monuments calls for an elder survey, the former is evidence, in locating lines of the latter. Clement *v.* Packer, 125 U. S. 309.

14. Old Maps. — Sample *v.* Robb, 16 Pa. St. 305; McCausland *v.* Fleming, 63 Pa. St. 36.

The title to land cannot be established by unofficial diagrams, drafts or surveys, but such papers are often extremely useful in fixing and designating doubtful boundaries. Sweigart *v.* Richards, 8 Pa. St. 436.

An old map, generally well known and accepted as authority is competent evidence. Taylor *v.* McConigle, 120 Cal. 123, 52 Pac. 159.

In some cases a map might be receivable in evidence as an ancient document, but it must purport upon its face to have been executed by a competent authority and must be shown to have been found in a proper depository, or to have been made or referred to as a part of the muniments of title of a party for or against whom it is offered. Donohue *v.* Whitney, 133 N. Y. 178, 30 N. E. 848.

Ancient platting found with papers of dead surveyor, without evidence that they were made at request of parties is not competent. Boston Water Power Co. *v.* Hanlon, 132 Mass. 483.

Where title to lands in San Francisco was acquired in 1852, the official map of 1851 giving the dimensions and boundaries was held admissible, but the introduction of later official and unofficial maps was error. Payne *v.* English, 79 Cal. 549, 21 Pac. 952.

Where a document upon inspection appears to be an ancient well worn plat of a town the declarations of deceased persons with knowledge about it are competent and when it appears reasonably probable that it is such plat it is competent. Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543.

15. Inter Alios. — Hathaway *v.* Evans, 113 Mass. 264.

A relevant ancient deed more than 50 years old *inter alios* is competent evidence. Morris *v.* Callanan, 105 Mass. 129.

Recitals in deeds *inter alios* more than 30 years old are competent to prove boundary lines or other lines from which the boundaries can be located. Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95.

Recitals in recent deeds where both parties are dead are not competent evidence to affect other lands. Pettingill *v.* Porter, 8 Allen (Mass.) 1, 85 Am. Dec. 671.

16. Smith *v.* Shackeford, 9 Dana (Ky.) 452.

A decree between other parties establishing monuments or lines which would control the lines in question may be admitted as evidence of reputation. Kinney *v.* Farnsworth, 17 Conn. 355.

17. Ante Litem Motam.—Lewis *v.* Roper Lumber Co., 113 N. C. 55, 18 S. E. 52; Bethea *v.* Byrd, 95 N. E. 309, 59 Am. Rep. 240; Stroud *v.* Springfield, 28 Tex. 649; Theon *v.* Roche, 57 Minn. 135, 58 N. W. 686, 47 Am. St. Rep. 600; Muller *v.* S. R. B. R. Co., 83 Cal. 240, 23 Pac. 265; Shutte *v.* Thompson, 15 Wall. (U. S.) 151; Overton's Heirs *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544; Spear *v.* Coate, 3 McCord (S. C.) 227, 15 Am. Dec. 627.

18. Pointing Out Monuments.

holdings to the contrary.[19]

m. *Facts.* — Such declarations must be a statement of fact, and not the expression of an opinion.[20]

n. *Words or Substance.* — The witness must give the words or substance of the declaration, and not his understanding from it.[21] Reputation at the time of a transfer is also evidence of the intention of the parties.[22]

United States. — Hunnicut *v.* Peyton, 102 U. S. 333.

Alabama. — Southern Iron Works *v.* Central of Georgia Ry. Co., 131 Ala. 649, 31 So. 723.

Massachusetts. — Bartlett *v.* Emerson, 7 Gray 174; Daggett *v.* Shaw, 5 Metc, 223; Long *v.* Colton, 116 Mass 414.

New Hampshire. — Smith *v.* Forrest, 49 N. H. 230; Smith *v.* Powers, 15 N. H. 546.

New Jersey. — Curtis *v.* Aaronson 49 N. J. Law 68, 7 Atl. 886, 60 Am. Rep. 584.

New York. — Partridge *v.* Russell, 50 Hun 601, 2 N. Y. Supp. 529.

Pennsylvania. — Bender *v.* Pitzer, 27 Pa. St. 333.

South Carolina. — Blythe *v.* Sutherland, 3 McCord 258.

Vermont. — Turner Falls Lumber Co. *v.* Burns, 71 Vt. 354, 45 Atl. 896.

19. *Contra.* — Smith *v.* Forrest, 49 N. H. 230; Great Falls Co. *v.* Worster, 15 N. H. 412; Powers *v.* Sibley, 41 Vt. 288.

Declarations otherwise admissible are not incompetent, because made off the ground, and made without pointing out the line or monuments. Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543.

20. Facts. — The declarations of the deceased surveyor who ran the lines in question, to be admissible, must be statements of facts or identification of monuments of the survey, and not of his opinions or conclusions. Evans *v.* Greene, 21 Mo. 170.

21. Words or Substance.—Tucker *v.* Smith, 68 Tex. 473, 3 S. W. 671.

22. Where an old line is adopted in a conveyance, what common fame or general reputation showed the line to be at the time of its adoption, is competent evidence to show the intention of the parties, in the absence of terms in the chain of title to the contrary. Donohue *v.* Whitney, 39 N. Y. St. 706, 15 N. Y. Supp. 622.

BOYCOTT.—See Conspiracy.

BRANDS.—See Animals.

BRAWLS.—See Affray; Riot.

BREACH OF PEACE.—See Affray; Assault and Battery; Riot.

BREACH OF PROMISE.

By Horace T. Smith.

I. PRESUMPTIONS.

1. Capacity of Parties. — The parties are presumed to be of proper age, sex and health and otherwise qualified to contract to marry each other,[1] but where they have lived and cohabited together for a long time and represented themselves as husband and wife, a strong presumption of marriage arises.[2]

A. GENERALLY. — There are presumptions, that a general contract was to be performed in a reasonable time,[3] that letters in possession of the plaintiff were written to her,[4] that damages arise from the breach of the contract,[5] (but many of the usual elements of damages must be proved,)[6] and that the damages are aggravated by seduction.[7]

B. PLAINTIFF MISTRESS OF DEFENDANT. — Conduct and language with a mistress will not be presumed to refer to a future marriage when they are referable as well to a continuation or resumption of the old relation.[8]

1. Capacity of Parties. — Jones *v.* Layman, 123 Ind. 569, 24 N. E. 363. "She did not need to allege or prove that she was a woman, that she was of marriageable age, that she was unmarried, or that she was otherwise competent to enter into a contract of marriage. Her capacity to enter into such a contract will be presumed, in the absence of averment and proof to the contrary." Tucker *v.* Hyatt, 144 Ind. 635, 41 N. E. 1047; Simmons *v.* Simmons, 8 Mich. 318.

2. Married. — Durand *v.* Durand, 2 Sweeney 32 (N. Y. Super. Ct.) 315.

3. Reasonable Time. — Prescott *v.* Guyler, 32 Ill. 312; Blackburn *v.* Mann, 85 Ill. 222; Clement *v.* Skinner, 72 Vt. 159, 47 Atl. 788; Clements *v.* Moore, 11 Ala. 35; Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Cole *v.* Holliday, 4 Mo. App. 94; Nichols *v.* Weaver, 7 Kan. 373.

"A contract to marry without specification of time, is a contract to marry within a reasonable time. In determining what is reasonable time, the age of the parties, their pecuniary ability and in general the circumstances of the particular case are to be taken into account." Wagenseller *v.* Simmers, 97 Pa. St. 465.

4. Ownership of Letters. — "I think it is very clear, therefore, that the possession of the three letters by the defendant in error, under the circumstances, raised a strong presumption that they were, as claimed by her, intended for and received by her in good faith; and that it was for the plaintiff in error, to rebut this presumption, and if he was in fact, in correspondence with and addressed and sent these letters to another person by the name of Mary, it devolved on him to prove the fact." Tefft *v.* Marsh, 1 W. Va. 38.

5. Damages for Breach. — "Proof of specific elements of damage are not necessary in an action for breach of promise." Rime *v.* Rater, 108 Iowa 61, 78 N. W. 835.

6. Damages Should Be Proved. Glasscock *v.* Shell, 57 Tex. 215.

7. Seduction Aggravates Damages. "The injury resulting from seduction consists in a loss of character as well as of good name, and from the fact of seduction, without other direct evidence, dishonor, humiliation, and the loss of peace and happiness may be inferred." Haymond *v.* Saucer, 84 Ind. 3.

8. Plaintiff - Mistress. — Bleiler *v.* Koons, 132 Pa. St. 401, 19 Atl. 140.

"No promise of marriage could properly be inferred from any such state of things. Unlawful cohabitation having been carried on for a long time between these parties, the presumption would be that if they lived together again it would be in the same manner, and upon the same

C. Failure to Offer Testimony. — There is no presumption against either party from failure to produce evidence or witnesses.[9]

II. BURDEN OF PROOF.

The burden of proof is with the plaintiff to prove the promise and its acceptance, the breach, the request and matters in aggravation of damage,[10] and is upon the defendant to prove all new matter in defense or mitigation.[11]

III. CONTRACT.

1. Direct Evidence. — The direct evidence of the contract to

terms. A condition of things once having been proved to exist, is presumed to continue. We think the fact that a man has lived with a woman as his mistress raises a very strong presumption that he does not intend to marry her at all; and as in this case, where the woman has lived with the man as his mistress with her consent, and under a contract for so much wages by the month for services rendered and this has been continued for years, and there is a subsequent promise on the part of the man to live with the woman again, no presumption whatever would arise that he intended to live with her as his wife. If any inference could be indulged, it would be just the contrary." Dupont *v.* McAdow, 6 Mont. 226, 9 Pac. 925.

9. Failure to Produce Witness or Evidence. — "In 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 is 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." Law *v.* Woodruff, 48 Ill. 399.

"When in an action for breach of promise and for seduction, evidence had been given tending to show improper relations between the plaintiff and another, it was not error to refuse to instruct that the jury might consider the failure of the plaintiff to produce and examine such person in reference to the matter." Haymond *v.* Saucer, 84 Ind. 3.

10. Burden With Plaintiff. — McPhail *v.* Trovillo, 65 Ill. App. 660; Giese *v.* Schultz, 53 Wis. 462, 10 N. W. 598.

"When he therefore says in his answer that her readiness to marry him was coupled with the condition that she was not to live in the house that he had provided, and that the daughter was not to live with her, he merely denies that she was ready to fulfill her promise according to the terms of her declaration. It was not enough therefore to prove that the promise was made, and that he did not fulfill it; for her offer to fulfill the engagement may have been accompanied with conditions that would justify his refusal. Apparently one of the most important controversies in the case was whether she did impose the conditions alleged in the answer. Upon this point the evidence conflicted, and the jury were erroneously instructed in substance that the burden of proof was on the defendant." Hook *v.* George, 108 Mass. 324.

11. Burden With Defendant. Campbell *v.* Arbuckle, 51 Hun 641, 4 N. Y. Supp. 29; Kelley *v.* Heghfield, 15 Or. 277, 14 Pac. 744; Irving *v.* Greenwood, 1 Car. & P. 350.

In an action for breach of contract of marriage, aggravated by seduction, the burden of proving a release from the engagement is upon the defendant. Liese *v.* Meyer, 143 Mo. 547, 45 S. W. 282.

One who contracts to marry another, knowing that the latter has previously been unchaste, is bound

marry may be corroborated by circumstantial evidence,[12] or such contract may be proved by the acts and conduct of the parties alone.[13]

2. Implied Contract. — The existence of an express contract is not essential, but an implied contract may be established from facts and circumstances,[14] and it will be sufficient for the plaintiff to show that both parties understood they were engaged,[15] or that the plaintiff believed there was an engagement and acted upon such belief and the defendant, knowing this, continued his attentions without

thereby. If unchaste conduct subsequent to the contract, is relied upon as a defense to an action for breach of the contract, the burden of proof is upon the defendant; the fact is not to be presumed. Johnson *v.* Travis, 33 Minn. 231, 22 N. W. 624.

12. Direct and Circumstantial Evidence. — Waters *v.* Bristol, 26 Conn. 398; McCrum *v.* Hildebrand, 85 Ind. 204. (Conduct of Plaintiff;) Royal *v.* Smith, 40 Iowa 615; Olmstead *v,* Hay, 112 Iowa 349, 83 N. W. 1056; Homan *v.* Earle, 53 N. Y. 267, *affirming* 15 Abb. Pr. N. S. 402; Rutter *v.* Collins, 96 Mich. 510, 56 N. W. 93; Richmond *v.* Roberts, 98 Ill. 472; Tefft *v.* Marsh, 1 W. Va. 38; Burnham *v.* Cornwell, 55 Ky. (16 B. Mon.) 284, 63 Am. Dec. 529; Judy *v.* Sterrett, 52 Ill. App. 265; Hoitt *v.* Moulton, 21 N. H. 586.

"In an action for breach of promise of marriage, it is not necessary that there be direct and positive evidence of the marriage contract sufficient in itself to make proof of the same. The relations of the parties and the circumstances surrounding them are proper matters to be considered and given weight in determining that question." Kennedy *v.* Rodgers, 2 Kan. App. 764, 44 Pac. 47.

13. Circumstantial Evidence Alone. Rime *v.* Rater, 108 Iowa 61, 78 N. W. 835; Wightman *v.* Coates, 15 Mass. 1, 8 Am. Dec. 77; Leckey *v.* Bloser, 2 Pa. St. 401; Moritz *v.* Melhorn, 14 Pa. St. 331; Von Storch *v.* Griffin, 71 Pa. St. 240; Hubbard *v.* Bonesteal, 16 Barb. (N. Y.) 360; Espy *v.* Jones, 37 Ala. 379; Rockafellow *v.* Newcomb, 57 Ill. 186.

The contract of marriage is a sacred and peculiar one, and owing to its private and confidential nature, is not often susceptible of direct proof. Hence, in order to protect the innocent against the wiles of the faithless party, and the grave consequences which would often ensue from the inability of the injured party to produce *positive* proof, the jury is allowed to *infer* the contract of marriage from the conduct and bearing of the parties towards each other. Tefft *v.* Marsh, 1 W. Va. 38.

14. Implied Contract. —Thurston *v.* Cavenor, 8 Iowa 155; Hotchkins *v.* Hodge, 38 Barb. (N. Y.) 117; Clark *v.* Pendleton, 20 Conn. 495; Rockafellow *v.* Newcomb, 57 Ill. 186. Blackburn *v.* Mann, 85 Ill. 222; Edge *v.* Griffin, (Tex. Civ. App.), 63 S. W. 148.

"Moreover, an express and formal promise is not necessary; a promise may be inferred from the language, conduct and relations of the parties." Judy *v.* Sterrett 52 Ill. App. 265.

15. Understanding.—In this case, there had been a quarrel, after which the parties renewed their former relations. The court says: "True, no formal promise of marriage is claimed to have been made after this resumption of the former relations between the parties, nor was any necessary. The parties simply resumed their former relations and obligations at the request of the appellant." Judy *v.* Sterrett, 52 Ill. 265.

"Contracts of marriage are unlike all others. They concern the highest interest of human life, and enlist the tenderest sympathies of the human heart, and the acts and declarations done and employed by parties in negotiating them are often correspondingly delicate and emotional. As matter of law the learned judge was clearly right in holding that no for-

explanation to the contrary,[16] and his bad faith is evidence in aggravation and not in defense or mitigation.[17]

3. Acceptance. — The acceptance by the plaintiff may further be proved by her own acts and declarations before breach in the absence of the defendant,[18] but the contrary is held in many jurisdictions.[19]

4. Consideration. — The mutual promises are reciprocal considerations, but other considerations may be shown to exist.[20]

5. Conduct of Parties Before Breach. — Evidence of such sentiments as usually impel parties to become engaged is material and their development and existence may be shown by the acts and

mal language is necessary to constitute the contract of marriage. If the conduct and declarations of the parties clearly indicate that they regard themselves engaged, it is not material by what means they have arrived at that state." Homan *v.* Earle, 53 N. Y. 267.

16. Defendant Estopped.— Where the acts and declarations of the defendant were such as to induce the plaintiff to believe that there was an engagement and the latter acted upon that belief, and the former, knowing this, still continues them, he cannot deny that the engagement existed, and the obligation which he professed to incur can be enforced. Homan *v.* Earle, 53 N. Y. 267 *affirming* 15 Abb. Pr. N. S. 402.

17. Mala Fides of Defendant.—"It is not necessary that the promise be *bona fide* on both sides. The defendant in such an action is liable upon a promise made *mala fide*, as much as upon one made *bona fide*." Prescott *v.* Guyler, 32 Ill. 312.

18. Acceptance Proved by Acts and Declarations. — Oates *v.* McKinney, 48 Ind. 562, 17 Am. Rep. 768; King *v.* Kersey, 2 Ind. 402; Thurston *v.* Cavenor, 8 Iowa 155; Peppinger *v.* Low, 6 N. J. Law 384; Wilcox *v.* Green, 23 Barb. (N. Y.) 639; Moritz *v.* Melhorn, 13 Pa. St. 331; Leckey *v.* Bloser, 24 Pa. St. 401; Southard *v.* Rexford, 6 Cow. (N. Y.) 254; Wightman *v.* Coates, 15 Mass. 1, 8 Am. Dec. 17; Ellis *v.* Gugenheim, 20 Pa. St. 287; Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

"The questions as to 'what the plaintiff was doing in the way of getting ready to be married,' and 'Do you know anything about Rosa making preparations for marriage?' are not objectionable on the ground that they assume the existence of a contract." Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 492.

"In the case under consideration, the plaintiff's acts of preparation for the marriage were not objected to, and were properly admitted as evidence of her acceptance of defendant's promise to marry her. And why exclude her statements at the time, explanatory of such acts of preparation? The latter are no more likely to be deceptive than the former, but are the more reliable and satisfactory, because they are a distinct, express, and binding admission of what would only be otherwise ascertained by inference from unexplained acts." Wetmore *v.* Mell, 1 Ohio St. 26.

19. Russell *v.* Cowles, 15 Gray (Mass.) 582, 77 Am. Dec. 391; Hahn *v.* Bettingen, 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 449; Walmsley *v.* Robinson, 63 Ill. 41, 14 Am. Rep. 111; Dunlap *v.* Clark, 25 Ill. App. 573; Graham *v.* Martin, 64 Ind. 567; Standiford *v.* Gentry, 32 Mo. 477; Homan *v.* Earle, 53 N. Y. 267.

20. Other Consideration. — Finkelstein *v.* Bernett, 74 N. Y. St. 551, 38 N. Y. Supp. 961; Rockafellow *v.* Newcomb, 57 Ill. 186.

The exchange of property being a part of the consideration of the alleged promise to marry, for breach of which plaintiff sued, testimony as to the value of the property was competent. Shields *v.* Lewis, 20 Ky. Law 1601, 49 S. W. 803.

conduct of the parties before the alleged engagment,[21] and evidence of such acts and conduct afterward is admissible to show the probability of such engagement.[22]

A. During Courtship. — Evidence of the entire relations and courtship of the parties is admissible, on the issue of contract.[23] Evidence of presents made or exchanged is admissible on the

21. Before Contract. — Smith *v.* Hall, 69 Conn. 651, 38 Atl. 386; Homan *v.* Earle, 53 N. Y. 267.

"The law is well settled that a contract of marriage may be found by a jury from the familiar and affectionate intercourse which may exist between marriageable persons of opposite sex. Constant and devoted attention to each other; fondness for each other's society; endearing epithets; caresses; rides and walks with each other; presents; familiar talk upon the subject of intermarriage; plans for enjoyment or of future life after marriage; exchanges of presents; and an innumerable variety of acts and conduct towards each other,— evince an attachment and regard from which a jury are at liberty to presume a contract of marriage." Button *v.* Hibbard, 64 N. Y. St. 80, 31 N. Y. Supp. 483.

22. After Contract. — Testimony that after the marriage contract the defendant induced the plaintiff to change her church relations, and transfer her membership to the church of which he is a member, is admissible. MacElree *v.* Wolfersberger, 59 Kan. 105, 52 Pac. 69.

"In an action for breach of promise of marriage, evidence of such conduct and behavior as are customary between persons under contract of marriage, is admissible to prove the existence of such contract." Wagenseller *v.* Simmers, 97 Pa. St. 465.

Where the offer was admitted, and the issue was upon the acceptance, conduct of the parties before the offer should not be considered by the jury but conduct afterward is admissible. Rutter *v.* Collins, 96 Mich. 510, 56 N. W. 93.

23. During Courtship. — Yale *v.* Curtiss, 54 N. Y. St. 538, 24 N. Y. Supp. 981, and 151 N. Y. 598, 45 N. E. 1125; Roe *v.* Doe, 11 N. Y. Supp. 236.

"The testimony of the existence and breaking off of a previous intimacy was rightfully admitted. The whole relation of the parties was admissible, including the whole course of the courtship." Ray *v.* Smith, 9 Gray (Mass.) 141.

"When testifying in his own behalf the appellant was asked by his counsel: 'Did you at any time since you have known Miss Sterrett, promise to marry her?' The court, upon the objection of the appellee, refused to permit appellant to answer this question.

"This is assigned for error. We think the ruling of the court in this respect wrong." Judy *v.* Sterrett, 52 Ill. App. 265.

"In an action for a breach of promise of marriage, the plaintiff introduced evidence of the manner in which the acquaintance between her and the defendant, commenced. To repel such evidence, the defendant offered to show that he supposed his visits to the plaintiff were first made, in consequence of her invitation to him, communicated through a mutual friend. *Held,* that such evidence was admissible.

"*Held,* also, that if the defendant acted upon the belief that the plaintiff had made such request, his misapprehension of the fact, was immaterial." Daily *v.* McDonald, 23 Conn. 570.

"As affecting and bearing upon the question of engagement, it was proper to prove that plaintiff, during the time she claims the engagement existed, received the attention of other young men. Such evidence would be entitled to consideration in determining whether or not an engagement was established by the evidence, and such proof defendant was permitted to introduce." Royal *v.* Smith, 40 Iowa 615.

question of contract.[24]

B. Defendant's Flight. — Evidence of the defendant's flight is not admissible in proof of contract.[25] And evidence that judgments were confessed by the defendant on the eve of trial should be excluded.[26]

C. Parol Evidence of Correspondence. — The plaintiff may prove by parol that letters passed between the parties.[27] And may use the letters of the defendant against him,[28] or may use part of such letters.[29]

D. Plaintiff's Letters. — She may use her own letters received by him before the breach, and her letters are evidence against her.[30]

E. Replies. — When letters are introduced the replies may be offered in rebuttal,[31] and a marked excerpt may be read in evidence with the letter enclosing it.[32]

24. Presents. — Walker *v.* Johnson, 6 Ind. App. 600, 33 N. E. 267; Button *v.* Hibbard, 64 N. Y. St. 80, 31 N. Y. Supp. 483.

25. Flight. — Wise *v.* Schloesser, 111 Iowa 16, 82 N. W. 439.

26. Cognovit Judgments. — Coryell *v.* Colbaugh, 1 N. J. Law 90.

"We do not see upon what principle the judgments confessed by the defendant in favor of his father and brother, were evidence in this suit. The argument is, that he confessed to the marriage promise alleged, because on the eve of the trial of the plaintiff's action he gave his father and brother judgments for what he owed them. It is compared to the flight of a man charged with crime, which is always some evidence of his guilt. The inference is too remote and inconsequential. If the money were justly due to the father and brother, the judgments were well confessed— if it were not, the time for proving the judgments fraudulent will come when they interfere with the plaintiff's right to seek satisfaction out of his estate for whatever may be finally adjudged her dues. But that issue could not be tried on this record." Leckey *v.* Bloser, 24 Pa. St. 401.

27. Parol Evidence of Correspondence. — "We think the plaintiff had a right to prove by parol the fact that letters had passed between the parties. After having proved the exoption to introduce them or not in evidence, or to prove their contents or not if they were lost. If the conistence of the letters, it was at her tents of the letters were not introduced in evidence, the fact of their existence would pass for what it was worth; but its force as tending to prove a marriage contract would be diminished, if not destroyed by the contents of the letters being withheld." Conaway *v.* Shelton, 3 Ind. 334.

28. Defendant's Letters. — Tefft *v.* Marsh 1 W. Va. 38; Richmond *v.* Roberts, 98 Ill. 472; Hoitt *v.* Moulton, 21 N. H. 586; Schroeder *v.* Michel, 98 Mo. 43; Judy *v.* Sterrett, 52 Ill. App. 265. Prescott *v.* Guyler, 32 Ill. 312.

"In an action for breach of promise to marry, letters from defendant to plaintiff, containing references to defendant's business, and the amount of money he was making, and explaining his relations with another woman, were admissible." Geiger *v.* Payne, 102 Iowa, 581, 69 N. W. 554.

29. Stone *v.* Sanborn, 104 Mass. 319, 6 Am. Rep. 338.

30. Plaintiff's Letters. — Vanderpool *v.* Richardson, 52 Mich. 336, 17 N. W. 936.

31. Replies. — "Where plaintiff in a breach of promise suit has put her letters to defendant in evidence, defendant may put in evidence the replies." Vanderpool *v.* Richardson, 52 Mich. 336, 17 N. W. 936.

32. Richmond *v.* Roberts, 98 Ill. 472.

F. Secondary Evidence of Letters. Secondary evidence is allowed at the discretion of the court even when the party offering it destroyed the letters but without fraud.[33]

G. Declarations. — Declarations of the sentiments and intentions of the defendant are evidence against him.[34] And declarations of plaintiff, after breach, of her then feeling and intentions toward defendant are admissible,[35] but it has been held, that only such declarations as refer to sentiments prior to the breach can be received.[36]

H. Opinions. — Surmises and opinions of witnesses are not evidence of the existence of the contract,[37] but it has been held that a resolution of congratulations of a fraternity was admissible.[38]

33. Secondary Evidence of Letters. Shields *v.* Lewis, 20 Ky. L. Rep. 1601, 49 S. W. 803.

Plaintiff introduced a letter from defendant, stating that in answer to her note inquiring why he did not come up, he would say that, as she had never answered his proposal, he thought it was no use, though he thought more of her, etc. *Held*, that, defendant having admitted that all letters received from plaintiff had been destroyed, plaintiff was entitled to introduce a copy of a letter that she immediately sent in reply, which she had written first, but kept, because it did not look well enough to send, stating that she thought he knew his proposal was accepted, and that she would not have him think otherwise for the world. Rutter *v.* Collins, 96 Mich. 510, 56 N. W. 93.

A plaintiff, who had received from the defendant letters, which, if existing, would be admissible in evidence, may prove their contents by secondary evidence, where the destruction of them is shown to have arisen from misapprehension and was without any fraudulent purpose: notwithstanding their destruction was the plaintiff's own voluntary act.

To repel the inference of fraud, a witness, who was present and advised the destruction of the letters, may be allowed to state his declarations, being admissible as a part of the *res gestae*, and as explanatory of the motive which influenced the party to destroy them.

The destruction of the letters was a question for the determination of the court; and, from the evidence, the court was also to determine that their destruction was not the result of a dishonest purpose. Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547.

34. Declarations of Defendant. Ray *v.* Smith, 9 Gray (Mass.) 141; Tamke *v.* Vangsnes, 72 Minn. 236, 75 N. W. 217.

"In an action for breach of promise to marry, defendant's statement to a third person that he was between two fires, and did not know whether to marry plaintiff or another woman, was admissible to show that he had a marriage with plaintiff under consideration." Geiger *v.* Payne, 102 Iowa 581, 69 N. W. 554.

"Evidence of defendant's expressed intention to marry plaintiff is admissible, as tending to corroborate testimony that he carried that intention into effect by making the contract." Lohner *v.* Coldwell, 15 Tex. Civ. App. 444, 39 S. W. 591.

35. Declaration of Plaintiff After Breach. — Hook *v.* George, 100 Mass. 331. See *post* "Mitigation of Damages."

36. Sentiments Before Breach. Miller *v.* Rosier, 31 Mich. 475. See *post* "Mitigation."

37. Opinions. — Leckey *v.* Bloser, 24 Pa. St. 401; McCormick *v.* Robb, 24 Pa. St. 44; Brown *v.* Odill, 104 Tenn. 250, 56 S. W. 840.

"Surmises and conclusions of witnesses based on what they have observed of mutual behavior, are not admissible to prove a promise of marriage; the facts observed should be shown." Vanderpool *v.* Richardson, 52 Mich. 336, 17 N. W. 936.

38. Resolution of Fraternity.—"In

IV. BREACH OF CONTRACT.

1. Refusal. — The breach may be shown by a refusal,[39] by wilful and persistent neglect and the abandonment of all attentions,[40] or by marriage of the defendant.[41]

2. Disability. — Where the defendant has a disability which he concealed it is no defense, but may be shown to prove breach,[42] but a postponement for a reasonable time for proper cause or by consent does not amount to a breach.[43] And evidence of ill-health will excuse postponement or delay.[44]

3. Request. — The plaintiff may show a request to have been made by herself or some friend[45] and such request may be inferred

proof of an executory promise of marriage, plaintiff introduced a copy of a resolution of a fraternity of which the parties were active members, purporting to extend to them the congratulations of the lodge upon the supposed marriage, adopted on information which proved to be false. *Held*, that it was admissible to show that a closer intimacy than the ordinary relations of friendship obtained between the parties, within the knowledge of their co-members." Osmun *v.* Winters, 25 Or. 260, 35 Pac. 250.

39. Refusal. — Zatlin *v.* Davenport, 71 Ill. App. 292; Holloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208; Kennedy *v.* Rodgers, 2 Kan. App. 764, 44 Pac. 47.

Defendant having declared that he would not carry out a contract to marry, suit can be brought on it, though the time within which it was to have been performed has not expired. Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

40. Jones *v.* Layman, 123 Ind. 569, 24 N. E. 363; Prescott *v.* Guyler, 32 Ill. 312; Wagenseller *v.* Simmers, 97 Pa. St. 465.

41. Marriage. — A contract of marriage to be consummated on the death of the divorced wife of the party thereto, is broken by the marriage of such a party to another woman, although the divorced wife is still living, and he might be able to marry the plaintiff at her death. Brown *v.* Odill, 104 Tenn. 250, 56 S. W. 840.

"The denial of the defendant that he ever promised to marry the plaintiff was, in itself, a very strong evidence of a refusal. Wagenseller *v.* Simmers, 97 Pa. St. 465.

42. Disability.— Kelley *v.* Riley, 106 Mass. 339, 8 Am. Rep. 336; Coover *v.* Davenport, 1 Heisk. (48 Tenn.) 368, 2 Am. Rep. 706; Pollock *v.* Sullivan, 53 Vt. 507, 38 Am. Rep. 702; Paddock *v.* Robinson, 63 Ill. 99, 14 Am. Rep. 112.

"Of course, if the defendant entered into the contract knowing of such an impediment to its consummation, it would be an aggravation of the plaintiff's damages, and she would be entitled to refuse to marry him, and to treat his condition as a breach of the contract." Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. 79, 81 Am. St. Rep. 302, 51 L. R. A. 854.

43. Postponement. — Stone *v.* Appel, 12 Ill. App. 582; Walters *v.* Stockberger, 20 Ind. App. 277, 50 N. E. 763.

"It cannot then be permitted to either party to a contract of this description to say, the omission to marry upon a particular day is a breach of the engagement. It necessarily continues in force until the one or the other of the parties, by conduct, or by words, evinces that he or she is unwilling to proceed to the ordinary result. When this takes place, and not until then, does any right of action accrue to either party." Kelly *v.* Renfro, 9 Ala. (N. S.) 325, 44 Am. Dec. 441.

44. Ill Health. — Campbell *v.* Arbuckle, 51 Hun 641, 4 N. Y. Supp. 29.

45. Request. — Fible *v.* Caplinger, 13 B. Mon. (Ky.) 464; Kniffen *v.* McConnell, 30 N. Y. 285.

"Nor need such request be made

from slight evidence.[46]

4. Request Excused. — When the defendant has refused to marry the plaintiff, or [47] has wholly abandoned her [48] or married another, such request need not be proved.[49]

V. DEFENSES.

1. Infancy of Defendant. — The defendant may prove in defense his own infancy at the time the contract was made,[50] and may do this even in those states where infants of his age are permitted by law to marry.[51] Though he seduce the plaintiff by means of his

by the plaintiff herself. It may be made by her father or other friend, whose authority to do so may be inferred from the relations existing between the parties. In this case an interview took place between the father of the plaintiff, and in her presence, and the defendant, in which her father told the defendant if he did not want Catherine (the plaintiff), he should not have Julia. Defendant said but little. He said he liked Julia better than Catherine. From this the jury might well infer an offer and refusal. Any female of the least sensibility would certainly consider this a sufficient refusal to marry her, to prevent her from renewing the offer, never so indirectly. In any civilized country she should have considered her offer to marry rejected, and herself discarded. Then we may well suppose that hate would begin to take the place of love. We think the evidence sustained the declaration and warranted the verdict." Prescott *v.* Guyler, 32 Ill. 312.

46. Request Inferred.— "Positive proof of a request and refusal is never required, in order to warrant a recovery under a count on a promise to marry on request. They may be inferred from circumstances, and especially from evidence showing a substantial refusal by the defendant." Prescott *v.* Guyler, 32 Ill. 312.

47. Request Excused. — McCormick *v.* Robb, 24 Pa. St. 44.

"If the defendant did refuse to marry plaintiff, then no request on her part was necessary. Coil *v.* Wallace, 24 N. J. Law 291; Kelly *v.* Brennan, 18 R. I. 41, 25 Atl. 346; Olson *v.* Solverson, 71 Wis. 663, 38 N. W. 329; Kurtz *v.* Frank, 76 Ind. 594." Rime *v.* Rater, 108 Iowa 61, 78 N. W. 835; Greenup *v.* Stoker, 8 Ill. 202; Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581; Burke *v.* Shaver, 92 Va. 345, 23 S. E. 749.

48. Coil *v* Wallace, 24 N. J. Law 291; Kelley *v* Brennan, 18 R. I. 41, 25 Atl. 346; Olsen *v* Solverson, 71 Wis. 663, 38 N. W. 329.

"A refusal to fulfill a promise of marriage may be inferred from a wilful and persistent neglect of the person with whom the contract has been entered into, or from any other conduct calculated publicly to indicate an abandonment of all intimate relations with her.

"Where the defendant's conduct is such as has just been described, it is not incumbent upon the plaintiff to tender performance of her part of the contract before bringing suit." Wagenseller *v.* Simmers, 97 Pa. St. 465.

49. Clements *v.* Moore, 11 Ala. 35; King *v.* Kersey, 2 Ind. 402; Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581; Lahey *v.* Knott, 8 Or. 198.

"Even if a woman, to perfect her suit for breach of promise, must ever demand fulfillment of his promise, it is not necessary where he notified her of his intention to, and did, marry another." Folz *v.* Wagner, 24 Ind. App. 694, 57 N. E. 564.

50. Infancy of Defendant.— Warwick *v.* Cooper, 5 Sneed (37 Tenn.) 659; Wells *v.* Hardy, 21 Tex. Civ. App. 454, 51 S. W. 502; Frost *v.* Vought, 37 Mich. 65; Hamilton *v.* Lomax, 26 Barb. (N. Y.) 615; Rush *v.* Wick, 31 Ohio St. 521, 27 Am. Rep. 523; McConkey *v.* Barnes, 42 Ill. App. 511; Evans *v.* Terry, 1 Brev. (S. C.) 80.

51. Marriageable Age.— Warwick *v.* Cooper, 5 Sneed, 37 Tenn. 659; Frost *v.* Vought, 37 Mich. 65.

promise, he may prove his infancy in defense.[52]

2. Infant Plaintiff. — The infancy of plaintiff can not be shown by the defendant in defense or mitigation.[53]

3. Married Plaintiff. — The defendant may prove in defense that the plaintiff was married at the time he had made the promise,[54] but the plaintiff in rebuttal may show a divorce.[55]

4. Defendant Married. — The defendant may show that he was then married and that the fact was known to the plaintiff,[56] but the

"Counsel for plaintiff urge that our statute settles the point otherwise, in that it provides that 'male persons over the age of seventeen years and females over the age of fourteen years may contract and be joined in marriage.'

"This means merely that an executed contract of marriage between persons of the age named shall be valid. It does not mean that an executory contract shall impose liability. To contract and be joined in marriage is one thing; to contract to marry is another. The one is executed and binding on all persons over the ages specified; the other is executory and may be avoided by an infant whether of the specified age or not." McConkey *v.* Barnes, 42 Ill. App. 511.

52. Plaintiff Seduced by Infant. Leichtweiss *v.* Treskow, 21 Hun (N. Y.) 487.

53. Infant Plaintiff. — Warwick *v.* Cooper, 5 Sneed, (37 Tenn.) 659; Frost *v.* Vought, 37 Mich. 65; Beelman *v.* Roush, 26 Pa. St. 509; Willard *v.* Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496.

An infant plaintiff, in an action for the breach of a promise to marry, need not allege the consent of parent or guardian to marriage, as such assent affects only the solemnization. Cannon *v.* Alsbury, 1 A. K. Marsh. (8 Ky.) 76, 10 Am. Dec. 709.

54. Married Plaintiff. — A person having a husband or wife living and undivorced, is incapable of entering into a valid marriage contract, and no right of action can arise for its breach. Drennan *v.* Douglas, 102 Ill. 341, 40 Am. Rep. 595.

55. Divorce. — Eve *v.* Rogers, 12 Ind. App. 623, 40 N. E. 25.

"In an action for breach of marriage promise, by a woman who was married when she first became acquainted with defendant, and procured a divorce so that she might marry defendant, he cannot attack the decree of divorce, and claim that it was void because obtained by fraud and false testimony given by her." Smith *v.* Hall, 69 Conn. 651, 38 Atl. 386.

56. Defendant Married. — Noice *v.* Brown, 38 N. J. Law 228, 20 Am. Rep. 388.

"On the trial the court, against the objection of defendant, permitted the plaintiff to prove promises of marriage made at a time when both parties were married and known to be so by each other. We cannot understand how an action can be maintained on such a promise. It cannot be performed except upon the death or the divorce of the husband of the one party, and the wife of the other; and to hold that it is valid because it may be performed in such a contingency, would be to introduce into social life a dangerous and immoral principle. Only in the most corrupt condition of society could such agreements be tolerated as lawful. They are, in themselves, a violation of marital duty, and the persons who make them are morally unfaithful to the marriage tie. A contract so deeply at war with the best interests of social life, and which can neither be proposed on the one side nor listened to on the other without a consciousness of moral wrong — a contract, too, incapable of performance except upon a contingency so remote as not to be expected, and which it is a sin to anticipate for such a purpose — such a contract should certainly not be recognized as valid in a court of justice." Paddock *v.* Robinson, 63 Ill. 99, 14 Am. Rep. 112.

plaintiff may show in rebuttal her want of such knowledge.[57]

5. Partial Divorce. — Where there is a partial divorce the defendant may show that one of the parties was not free to marry in the jurisdiction where the contract was made.[58]

6. Impotency. — The impotency of either party may be shown in defense,[59] and where the plaintiff was malformed and required a surgical operation to make natural copulation possible but promised to have herself cured, her failure so to do can be shown in defense.[60]

7. Prohibited Degrees. — That the parties were related within degrees prohibited when the contract was made, may be shown in defense.[61]

8. Disqualifying Disease. — If the defendant had a disqualifying venereal disease, which he believed cured at the time of the contract, its reappearance without fault on his part may be shown in defense, to excuse delay or justify breach.[62] If the plaintiff has a disqualify-

57. Want of Knowledge. — Davis *v.* Pryor, (Ind. Ter.), 58 S. W. 660; Blattmacher *v.* Saal, 29 Barb. (N. Y.) 22; Coover *v.* Davenport, 1 Heisk. (48 Tenn.) 368, 2 Am. Rep. 706; Pollock *v.* Sullivan, 53 Vt. 507, 38 Am. Rep. 702; Kelley *v.* Riley, 106 Mass. 339, 8 Am. Rep. 336.

"But where it appears, as it did in this case, that the plaintiff was not aware of the defendant's marriage, the rule had no application. Where the defendant is under a disability known to him, but unknown to plaintiff, the right of the plaintiff to maintain an action is clear." Kerns *v.* Hagenbuchle, 42 N. Y. St. 210, 17 N. Y. Supp. 367.

58. Partial Divorce. — Haviland *v.* Halstead, 34 N. Y. 643; Van Storch *v.* Griffin, 71 Pa. St. 240.

59. Impotency. — Gring *v.* Lerch, 112 Pa. St. 244, 3 Atl. 841, 56 Am. Rep. 314.

"At the time of the contract the plaintiff was thirty-nine, and the defendant seventy-nine years of age. It appeared from the proofs at the trial that the defendant was sexually impotent, owing to a surgical operation, and that such infirmity was known to the plaintiff. The question is whether an actionable promise could exist in view of such a state of facts. This inquiry, I think, should receive a negative response." Gulick *v.* Gulick, 41 N. J. Law 13.

60. Defects Must Be Cured.—Gring *v.* Lerch, 112 Pa. St. 244, 3 Atl. 841, 56 Am. Rep. 317.

61. Prohibited Degrees. — Reed *v.* Reed, 49 Ohio St. 654, 32 N. E. 750.

Where a contract is made in one state, to be performed in another, the capacity of the parties to make the contract is, as a general rule, to be determined by the law of the place where it is entered into. Campbell *v.* Crampton, 2 Fed. 417, 8 Abb. N. C. 363.

Kinship of the parties is no defense to an action for breach of promise of marriage when it is not within the degrees within which marriage is made unlawful by statute. Albrets *v.* Albrets, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

62. Diseases of Defendant.—Shackleford *v.* Hamilton, 93 Ky. 80, 19 S. W. 5, 40 Am. St. Rep. 166, 15 L. R. A. 531; Gardner *v.* Arnett, 21 Ky. Law 1, 50 S. W. 840.

"If the disease is of a temporary character,—such as was the case here, — and could be easily cured, the defendant is entitled to postpone the marriage until he is cured; and, if the disease is of a permanent character,—such as was the fact in the North Carolina, Kentucky, and Virginia cases cited,—the defendant is not only entitled to refuse to carry out the contract, but it is his duty to do so." Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. 79, 81 Am. St. Rep. 302, 51 L. R. A. 854.

ing venereal disease, not contracted from the defendant, that fact may be shown in defense.[63]

9. Duress. — The defendant may show in defense, that he was under duress at the time the contract was made.[64] And may prove duress to avoid an admission,[65] but the plaintiff may prove other promises not made under duress.[66]

10. Fraud. — Evidence of fraudulent misrepresentation or concealment as to her own character or history is admissible in defense.[67]

11. Release. — A release may be shown in defense,[68] but the con-

63. Disease of Plaintiff. — If facts exist which in law constitute a defense to an action, the defendant therein may avail himself of them for the first time on the trial of the cause; so where the defendant was sued for a breach of promise to marry, he may for the first time on the trial, set up by way of defense, that the plaintiff was affected with a venereal disease, and his right to such defense is not affected by his failure to previously place his refusal upon such grounds. Krantzler *v.* Grant, 2 Ill. App. 236.

64. Duress. — McCrum *v.* Hildebrand, 85 Ind. 204.

65. Duress-Admission. — Not only is a direct promise void, if made under duress and an illegal arrest, but so is an admission thus made of a former promise, and the jury cannot inquire whether such admission was made because it was true, or because the party was under duress. Tilley *v.* Damon, 11 Cush. (Mass.) 247.

66. Other Promises. — "If, prior to the one which the evidence tends to show the angry father and brother obtained by threats, the appellant had, when free from restraint and fear, made other promises to the appellee, they would not be rendered nugatory by the fact that a subsequent promise was obtained by putting him under duress." McCrum *v.* Hildebrand, 85 Ind. 204.

67. Fraud. — Potts *v.* Chapin, 133 Mass. 276; Bell *v.* Eaton, 28 Ind. 468, 92 Am. Dec. 329.

"There was evidence that the plaintiff represented to the defendant before the engagement that she had been previously married, and had lived with her husband in Spokane and other places five or six years, and that, a few weeks before she left Spokane for Boston, she had obtained a divorce from him on account of his bad conduct and cruelty to her. So far as appears from the exceptions, that was all that the plaintiff told the defendant about the divorce before the engagement. But there was testimony tending to show that, at the same time that she procured a divorce from her husband, he procured one from her; and that the cross-bill filed by him in answer to her complaint, and on which his divorce was granted charged her with being a woman of violent and ungovernable temper, and of jealous, revengeful, and vicious disposition, and with having, within two weeks after their marriage commenced a systematic course of violent, abusive and cruel conduct towards him, which finally broke down his health, and compelled him to leave her. It also charged her with assaulting him with a carving knife, and with using profane epithets in regard to himself, his relatives and friends, and alleged numerous specific acts of violence and passion. We think that the divorce which her husband obtained from the plaintiff and the charges contained in the cross-bill were material facts, and that if the plaintiff knew them when she told the defendant that she had obtained a divorce from her husband for his cruelty, and willfully suppressed them, she was guilty of a fraudulent concealment and misrepresentation." Van Houten *v.* Morse, 162 Mass. 414, 38 N. E. 705, 44 Am. St. Rep. 373, 26 L. R. A. 430.

68. Release. — *Indiana.* — Shellebarger *v.* Blake, 67 Ind. 75; Tucker *v.* Hyatt, 144 Ind. 635, 41 N. E. 1047; Mabin *v.* Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. Rep. 199.

Massachusetts.— Dean *v.* Skiff, 128

sent of the plaintiff to a postponement does not show a release.[69] Evidence of release by a minor defendant of marriageable age is admissible in defense.[70]

12. Unchastity. — Evidence of unchastity of the plaintiff before breach is admissible in defense,[71] but the defendant must show that he made the promise without knowledge of her wrong,[72] and that he

Mass. 174; Grant *v.* Willey, 101 Mass. 356.

Missouri. — Kraxburger *v.* Roiter, 91 Mo. 404, 3 S. W. 872, 60 Am. Rep. 262.

New York. — Cammerer *v.* Muller, 38 N. Y. St. 583, 14 N. Y. Supp. 511.

Pennsylvania.—Dierstein *v.* Schubkagel, 131 Pa. St. 46, 18 Atl. 1059, 6 L. R. A. 481.

Wisconsin. — Snell *v.* Bray, 56 Wis. 156, 14 N. W. 14; Kellett *v.* Robie, 99 Wis. 303, 74 N. W. 781.

" If, as assumed in this instruction, the appellee was induced, by the false statements of a third person, to write a letter to the appellant, discarding him, and releasing him from his engagement and promise to marry her, which letter was received and in good faith acted upon by the appellant, he having no participation in, or knowledge of, its fraudulent procurement from the appellee, the jury should have been instructed to find for the appellant. The facts referred to certainly constituted a valid defense to the action. Mutuality of obligation is essential to every contract, and there is certainly nothing in the peculiar nature of a contract to marry which should exempt it from the operation of this general rule." Allard *v.* Smith, 59 (Ky.) 2 Metc. 297.

" Defendant had written plaintiff, merely telling her that he had proved false to her, and was in a few days going to marry another, no release from his contract is shown by her letter stating that, heartbroken, she answered that she would forgive him, but it was hard to do after his treatment, after she had waited for him six years, and, while she wished him no bad luck, if any came to him let him think back." Folz *v.* Wagner, 24 Ind. App. 694, 57 N. E. 564.

69. Postponement.—"It seems there were several promises made to marry, one in the fall of 1888, just prior to the seduction of the plaintiff, and again some time after the miscarriage. Now, because the plaintiff consented to wait two years, that did not relieve the defendant from his promise to marry, but it was a mere postponement of the wedding day, and it is not that contract that is sued upon." Nearing *v.* Van Fleet, 54 N. Y. St. 308, 24 N. Y. Supp. 531.

70. Release by Minor. — " If, at the age of eighteen, the female be an adult as to the marriage contract, it necessarily follows that she is competent to release such contract. Had the statute proceeded a step further, and declared that at the age of eighteen she might contract in relation to personal property, her power to buy, sell, receipt for, release, and do everything incident to such contracts, could not be seriously doubted. Suppose, under such statute, she accordingly sell her gold watch on credit, her power to receive the price, and receipt to or release the purchaser, is necessarily implied in the power to sell. So with the marriage contract. We can see no good reason to distinguish the one case from the other. The power to contract being conferred, the incidents properly belonging to it follow.

" We, therefore, conclude that a release of Develin, after Miss Riggsbee had attained the age of eighteen years, was a good bar to an action on a verbal promise of marriage. We thus confine it strictly to the case at bar." Develin *v.* Riggsbee, 4 Ind. 464.

71. Unchastity. — Goodall *v.* Thurman, 1 Head (Tenn.) 209; Butler *v.* Eschleman, 18 Ill. 44; Sprague *v.* Craig, 51 Ill. 288; Bell *v.* Eaton, 28 Ind. 468, 92 Am. Dec. 329; Von Storch *v.* Griffin, 77 Pa. St. 504; Von Storch *v.* Griffin, 71 Pa. St. 240.

72. No Knowledge of Her Unchastity. — Sprague *v.* Craig, 51 Ill. 288; Kelley *v.* Heghfield, 15 Or. 277, 14

promptly cancelled the contract upon the discovery and on that account.[73]

13. Reputation. — Evidence of reputation is not admissible as a defense, but bad character must be shown,[74] but the contrary has been held.[75]

14. Rebuttal. — And the plaintiff may offer in rebuttal evidence of her good reputation for chastity,[76] but such evidence is not admis-

Pac. 744; Von Storch *v.* Griffin, 77 Pa. St. 504.

It is a good defense to an action by a woman for the breach of a promise of marriage to prove that she was unchaste, and that defendant was ignorant of that fact when he made the promise. Foster *v.* Hanchett, 68 Vt. 319, 35 Atl. 316, 54 Am. St. Rep. 886.

73. Prompt Cancellation. — Foster *v.* Hanchett, 68 Vt. 319, 35 Atl. 316, 54 Am. St. Rep. 886; Denslow *v.* Van Horn, 16 Iowa 476; Capehart *v.* Carradine, 4 Strob. (S. C.) 42; Espy *v.* Jones, 37 Ala. 379; Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. 422; Palmer *v.* Andrews, 7 Wend. (N. Y.) 142; Burnett *v.* Simpkins, 24 Ill. 265.

"If a person who has promised marriage discovers that his proposed wife has been guilty previously of unchaste conduct, which has been concealed from him, he may, unquestionably, if his own conduct has been fair, break off the engagement and be legally justified." Sheahan *v.* Barry, 27 Mich. 217.

In an action by a female for a breach of promise of marriage, the fact that she had committed fornication with other men, is no defense, if, at the time of making the contract, the defendant has knowledge of the misconduct.

Nor is proof of such misconduct a defense against such a contract, made by the defendant before, but continued by him as a subsisting contract after he had knowledge of it. Snowman *v.* Wardell, 32 Me. 275.

74. Reputation. — Butler *v.* Eschleman, 18 Ill. 44. In Boies *v.* McAllister, 12 Me. 308, it was held that neither rumors nor opinions that the plaintiff had been pregnant were admissible.

"But general reputation of bad character in respect to chastity is no bar. In order to bar, the defendant must prove that the plaintiff is in fact what she is reputed to be." Foster *v.* Hanchett, 68 Vt. 319, 35 Atl. 316, 54 Am. St. Rep. 886.

"Evidence as to the reputation of a woman, acquired after the commencement of an action brought by her on a promise to marry,— held to be inadmissible for the defense." Capehart *v.* Carradine, 4 Strob. (S. C.) 42.

"In support of his answer, at the trial, the 'defendant offered to prove by James L. Yater, a competent witness, and who will testify, that the plaintiff, in 1872 or 1873, lived with one Mrs. Kelley, between Baymiller and Freeman streets, on Eighth street, in the city of Cincinnati, Ohio, and that, at the time the said plaintiff lived with the said Mrs. Kelley, the said Mrs. Kelly kept a house of assignation and prostitution. . . . "In our opinion the evidence offered was proper, and ought to have been received. It tended to prove the answer, and, in part, to establish a good defense. It was therefore, error to sustain an objection to its admission." Hunter *v.* Hatfield, 68 Ind. 416.

75. Morgan *v.* Yarborough, 5 La. Ann. 316; Markham *v.* Herrick, 82 Mo. App. 327.

76. Rebuttal. — Haymond *v.* Saucer, 84 Ind. 3; Jones *v.* Layman, 123 Ind. 569, 24 N. E. 363.

"On cross examination of appellee, counsel for appellant elicited testimony tending to show that illicit relations had existed between the parties, as the result of which she was pregnant. This testimony, so far as we have been able to discover, was not in response to anything to which she testified in chief; but, conceding that the cross-examination was proper, we are not prepared to say, under the circumstances of this case, in

sible except in rebuttal.[77]

15. Immoral Consideration. — That the promise was made in consideration of future illicit intercourse may be shown in defense.[78]

16. Statute of Frauds. — It may be shown in defense that the promise was one that could not be performed in a year and was not in writing.[79]

17. Statute of Limitations. — When the defense of the statute of limitations is raised the plaintiff may show that the contract was a continuing one.[80]

18. Intermarriage. — The defendant may prove that the parties

view of the fact that the appellant called out the testimony, as indicated, that there was error in the admission of the testimony in rebuttal in support of her general reputation for chastity, virtue, and morality." Hughes *v.* Nolte, 7 Ind. App. 526, 34 N. E. 745.

"Where defendant, in his answer and by his evidence, attacks plaintiff's reputation and character for chastity, evidence of her good character and reputation for chastity is admissible in rebuttal." Smith *v.* Hall, 69 Conn. 651, 38 Atl. 386.

77. Only in Rebuttal. — Leavitt *v.* Cutler, 37 Wis. 46.

78. Immoral Consideration.—Baldy *v.* Stratton, 11 Pa. St. 316; Judy *v.* Sterrett, 52 Ill. App. 265; Burke *v.* Shaver, 92 Va. 345, 23 S. E. 749; Boigneres *v.* Boulon, 54 Cal. 146; Eve *v.* Rogers, 12 Ind. App. 623, 40 N. E. 25; Button *v.* Hibbard, 82 Hun (N. Y.) 289; Goodhall *v.* Thurman, 1 Head (Tenn.) 209; Saxon *v.* Wood, 4 Ind. App. 242, 30 N. E. 797.

In an action for breach of promise of marriage, the plaintiff testified in effect that the defendant promised to marry her if she would surrender her person to him, and that she thereupon consented. *Held,* that the promise was void on account of the immorality of the consideration. Hanks *v.* Naglee, 54 Cal. 51, 35 Am. Rep. 67.

If any part of the consideration of a contract is illegal, or against sound morals, or public policy, the whole is void; but the case of an executrix who, upon receiving a promise of marriage, compromises a suit which she had instituted in her fiduciary character, is not within the principle. Donallen *v.* Lennox, 6 Dana (36 Ky.) 89.

79. Statute of Frauds. — Nichols *v.* Weaver, 7 Kan. 373; Ullman *v.* Meyer, 10 Fed. 241; Derby *v.* Phelps, 2 N. H. 515.

"Counsel urge that the contract proved was a contract not to be performed within a year, and was, therefore, void by the statute of frauds. We do not doubt but that a contract of marriage, not to be performed within a year, is within the statute, as well as a contract on any other subject. But the evidence does not clearly show that the contract might not have been performed within a year. If it might be performed at any time within the three years, and consequently within one year, it would not be within the statute." Paris *v.* Strong, 51 Ind. 339.

Where the defendant told the plaintiff he was not able to marry her then, but promised he would marry her within four years, it not appearing that the parties understood that the promise was not to be performed within one year, such promise is not within the statute of frauds. Lawrence *v.* Cooke, 56 Me. 187, 96 Am. Dec. 443.

80. Statute of Limitations.—Where the parties, through a period of many years, treat their contract to marry as a continuing one, by recognizing its existence and promising its fulfillment, the Statute of Limitations will not begin to run until one party has broken the engagement, or until notice is given of a termination of the agreement. Blackburn *v.* Mann, 85 Ill. 222.

have intermarried at some time before trial.[81]

VI. DAMAGES.

1. Latitude of Evidence. — There should be great latitude given in the introduction of evidence on the question of damage,[82] and all the circumstances of the affair from its beginning during its continuance should be set before the jury.[83]

2. Damages Must Be Proved. — It is necessary to prove usual elements of actual damage, although some damages are presumed from the breach of the contract.[84]

3. Wealth of Defendant. — As an element of damages, the plaintiff may show the wealth of the defendant,[85] and evidence of reputa-

81. Harris *v.* Tison, 63 Ga. 629, 36 Am. Rep. 126.

82. Latitude of Evidence. — Collins *v.* Mack, 31 Ark. 684; Allen *v.* Baker, 86 N. C. 91, 41 Am. Rep. 444.

"The action for breach of promise of marriage is peculiar in its nature, and the elements going to constitute the damage differ materially from those existing in the case of a breach of any other contract. It is the duty of the jury to look beyond the contract itself for the measure of damages and give to the injured party a full compensation for all loss in not having the contract fulfilled. This has always been held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of marriage. The difficulty arising from the very nature of the case, of fixing any accurate rule by which to estimate the damage arising from these sources, has rendered it necessary to give a great latitude to the introduction of evidence, and admit the jury to full knowledge of all the circumstances attending the transaction, not only in its inception, but during the continuance of the relationship between the parties." Reed *v.* Clark, 47 Cal. 194.

83. Entire Courtship. — Reed *v.* Clark, 47 Cal. 194.

"It is not clearly error to permit a father to testify in a breach of promise suit brought by his daughter that after he had given his consent to defendant upon the latter's telling him that the lady had consented to marry him, the pair conducted themselves toward each other as though they were engaged. This is not to show the mutual promise but to show that defendant trifled with plaintiff's affections." Vanderpool *v.* Richardson, 52 Mich. 336, 17 N. W. 936.

"And induced the appellee to come and make her home at his house and perform the household duties for him and induced her to yield to his illicit embraces, and they so lived for several years, having two children born to her as a result of their illicit intercourse; that, after some lapse of time, he commenced a course of cruel and abusive treatment towards her, using violence towards her, threatening her life, and ordering her from his house. The court permitted the introduction of evidence showing all the facts in connection with their association together and their treatment of each other, and it is this evidence the appellant made a motion to strike out, and the court overruled the motion. In this ruling there was no error, it was entirely proper to admit this evidence. It was contended on behalf of appellee that the appellant at first paid his attentions to the appellee, and avowed his love and affection for her, and promised to marry her, and took her to his house, and gained her confidence and love, and induced her to yield to his illicit embraces, and then changed his conduct and treatment towards her, and it became such as to clearly indicate that he never intended to fulfill his promise of marriage." Chamness *v.* Cox, 131 Ind. 118, 30 N. E. 901.

84. Must Prove Damages. — Glasscock *v.* Shell, 57 Tex. 215.

85. Wealth of Defendant. — Collins *v.* Mack, 31 Ark. 684; Holloway

tion for wealth is admissible for this purpose.[86] And it is held that specific evidence of the defendant's pecuniary circumstances may be introduced by the plaintiff.[87]

4. Rebuttal. — The defendant in rebuttal may introduce evidence of his actual wealth,[88] but may do so only in rebuttal.[89]

5. Time. — In some jurisdictions the inquiry is as to his wealth

v. Griffith, 32 Iowa 409, 7 Am. Rep. 208; Miller *v.* Rosier, 31 Mich. 475; McPherson *v.* Ryan, 59 Mich. 33, 26 N. W. 321; Reed *v.* Clark, 47 Cal. 194; Dupont *v.* McAdow, 6 Mont. 226, 9 Pac. 925; Kniffon *v.* McConnell, 30 N. Y. 285; Lawrence *v.* Cooke, 56 Me. 187, 96 Am. Dec. 443; Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Kelley *v.* Riley, 106 Mass, 339, 8 Am. Rep. 336; Hunter *v.* Hatfield, 68 Ind. 416.

86. Reputation of Wealth. — Chellis *v.* Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; Stratton *v.* Dole, 45 Neb. 472, 63 N. W. 875.

In an action for breach of promise of marriage, evidence of the general reputation of defendant for wealth is admissible on the question of damages, as showing the condition in life plaintiff would have attained by the marriage. Humphrey *v.* Brown, 89 Fed. 640; Kennedy *v.* Rodgers, 2 Kan. App. 764, 44 Pac. 47; Geiger *v.* Payne, 102 Iowa 581, 69 N. W. 554, and 71 N. W. 571; Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581; Rime *v.* Rater, 108 Iowa 61, 78 N. W. 835; Holloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208; Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442.

87. Actual Wealth. — It seems to have been the common practice in such cases to allow specific evidence of defendant's pecuniary circumstances to be introduced. Vierling *v.* Binder, 113 Iowa 337, 85 N. W. 621. Douglass *v.* Gausman, 68 Ill. 170; Clark *v.* Hodges, 65 Vt. 273, 26 Atl. 726; Dent *v.* Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921; Reed *v.* Clark, 47 Cal. 194; Holloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208.

It is a fundamental rule that the best attainable evidence must be produced and while evidence of the reputed amount of the defendant's property may not be incompetent, because in most cases accurate knowledge of the amount is confined to the defendant and his friends yet it cannot be incompetent to permit the amount in defendant's possession to be shown by direct and precise evidence greatly superior in probative force to evidence of reputation. Crosier *v.* Craig, 47 Hun (N. Y.) 83.

88. Rebuttal. — "Where the defendant gave the jury no means of determining his pecuniary condition, the court will not disturb their verdict on the ground of excessive damages." Capehart *v.* Carradine, 4 Strob. (S. C.) 42.

"We can discover no error in permitting defendant to show his actual financial condition. Plaintiff alleged that he was worth over $10,000, and proved that he was a grocer, a member of the firm of Gill Bros. When defendant testified in his own behalf he was asked as to his financial condition; and it was objected that it was incompetent, irrelevant, and immaterial. The evidence was competent under the issue tendered by plaintiff herself." Casey *v.* Gill, 154 Mo. 181, 55 S. W. 219.

89. Rebuttal. — "The defense offered to show defendant's pecuniary condition, and this was ruled out. I have no doubt about the correctness of the decision. Plaintiff had introduced no evidence in reference to the wealth of the defendant. The evidence was not in rebuttal on any issue tendered on the other side; and it would be a strange proceeding to permit him to show his pecuniary circumstances, to decrease the damages occasioned by his own wrong. Under that view it would be only necessary for a man to show that he was very poor to escape with comparative impunity." Wilbur *v.* Johnson, 58 Mo. 600.

at the time of the breach,[90] while other courts receive testimony as to his wealth at the time of trial.[91]

6. Representations. — Representations made by defendant to plaintiff concerning his wealth are admissible.[92]

7. Earning Capacity. — The plaintiff may show the earning capacity of the defendant,[93] but not the wealth of his relatives,[94] but the social position of the defendant may be shown.[95]

8. Expense of Preparation. — The plaintiff may show the expenses she incurred in preparation for the marriage,[96] and the loss of occupation by reason of such engagement or preparation.[97]

9. Plaintiff's Poverty. — The plaintiff may show her own want of means,[98] and the length of the engagement,[99] her mental suffer-

90. Time of Breach. — Dent *v.* Pickins, 34 W. Va. 240, 12 S. W. 698, 26 Am. St. Rep. 921; Hunter *v.* Hatfield, 68 Ind. 416.

91. Time of Trial. — Vierling *v.* Binder, 113 Iowa 337, 85 N. W. 621; Douglass *v.* Gausman, 68 Ill. 170.

92. Representation. — Representations made by defendant to plaintiff as to his wealth may be admissible in evidence as explaining the situation and acts and conduct of the parties toward each other. Humphrey *v.* Brown, 89 Fed. 640.

93. Earning Capacity.—"Evidence of the wages of an engineer on a certain railroad is admissible, in action for breach of promise to marry, to show defendant's ability to earn money, and the condition in life which plaintiff might reasonably have received by a consummation of the contract, defendant at one time having been such an engineer." Rime *v.* Rater, 108 Iowa 61, 78 N. W. 835.

94. Wealth of Relatives. — Aldis *v.* Stewart, 4 Misc. 389, 24 N. Y. Supp. 329.

"Nevertheless, the plaintiff was allowed to testify as to alleged declarations of defendant to the effect that he was the only heir of his uncle who would leave a large estate to him. This evidence was clearly immaterial, and we cannot say that it did not materially increase the amount of the verdict rendered." Totten *v.* Read, 16 Daly 282, 10 N. Y. Supp. 318.

"We think the court correctly held that evidence of defendant's pecuniary circumstances might be put in by the plaintiff, but this evidence only went to show the father's circumstances, which were wholly immaterial to the case on trial." Miller *v.* Rosier, 31 Mich. 475.

95. Social Position. — Johnson *v.* Travis, 33 Minn. 231, 22 N. W. 624; Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Fidler *v.* McKinley, 21 Ill. 308; Goodhall *v.* Thurman, 1 Head 21 Tenn. 209; Dent *v.* Pickins, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921.

96. Expense of Preparation.—Dunlap *v.* Clark, 25 Ill. App. 573; Smith *v.* Sherman, 4 Cush. (Mass.) 408; Yale *v.* Curtis, 151 N. Y. 598, 45 N. E. 1125.

97. Loss of Occupation. — In Chellis *v.* Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784, the plaintiff gave up her position as teacher and the day was set. *Held,* that the jury might award exemplary damages.

98. Plaintiff's Poverty.—"In a suit brought by a woman for a breach of promise, the plaintiff may show that she has no property of her own." Vanderpool *v.* Richardson, 52 Mich. 336, 17 N. W. 936.

99. Length of Engagement.—Coolidge *v.* Neat, 129 Mass. 146; Olmstead *v.* Hoy, 112 Iowa 349, 83 N. W. 1056; Vanderpool *v.* Richardson, 52 Mich. 336, 17 N. W. 936.

"The court was also right, in our opinion, in refusing to rule, as requested by the defendant, that 'the length of time of engagement had subsisted was not an element of damage for a breach of the engagement.' It was clearly a circumstance proper to be taken into consideration. It might be very material in its effect

ing,[1] and resulting ill health as elements of damage.[2]

10. Plaintiff May Testify As to Mental Suffering. — The plaintiff may testify to her mental suffering,[3] and others as to her acts of grief, changed mental condition, and how she was affected by his rejection.[4] Acts and circumstances tending to humiliate the plaintiff or wound her pride may be shown to enhance damges.[5]

11. Opinions. — Opinions of witnesses have been received in evidence upon the question of damage.[6]

VII. AGGRAVATION OF DAMAGES.

1. Generally. — For the purpose of estimating damages, the jury has a right to consider the entire course of conduct of the parties toward each other, up to and including the trial.[7] The plaintiff may

on the plaintiff's condition and prospects, and might under some circumstances be a decided aggravation of her injury." Grant *v.* Willey 101 Mass. 356.

1. Mental Suffering. — Reed *v.* Clark, 47 Cal. 194; King *v.* Kersey, 2 Ind. 402; Bird *v.* Thompson, 96 Mo. 424, 9 S. W. 788; Liese *v.* Meyer, 143 Mo. 547, 45 S. W. 282.

2. Ill Health. — Bedell *v.* Powell, 13 Barb. (N. Y.) 183; Yale *v.* Curtiss, 151 N. Y. 598, 45 N. E. 1125.

"Testimony is admissible, to show plaintiff's grief, that on learning that defendant was going to marry another she became ill, and cried much on that day and during all the next day and night." Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581.

3. Plaintiff's Testimony. — Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 492.

"Plaintiff's testimony as to her mental suffering is admissible in an action for breach of promise." Rime *v.* Rater, 108 Iowa 61, 78 N. W. 835.

4. Other Witnesses. — Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 492; Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581; Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Hughes *v.* Nolte, 7 Ind. App. 526, 34 N. E. 745.

"In an action for breach of promise of marriage it was proper to show plaintiff's condition after she heard of defendant's marriage with another woman." For this purpose it is held proper to ask the plaintiff the following question: "When you heard that he was married, how did it affect you?" And to ask another witness, "you may state to the jury how it affected her, or how it seemed to affect her." Robinson *v.* Carver, 88 Iowa 381, 55 N. W. 492.

In Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547, the court held that a witness might testify to the mental difference he observed in the plaintiff after the defendant had ceased to visit her.

5. Humiliation. — Reed *v.* Clark, 47 Cal. 194; Dunlap *v.* Clark, 25 Ill. App. 573.

"After *prima facie* evidence of the contract is received, evidence that plaintiff told others of the contract is admissible, not as proof of the agreement to marry, but to show humiliation and damage to plaintiff." Liebrandt *v.* Sorg, 133 Cal. 571, 65 Pac. 1098.

6. Opinions. — In Sprague *v.* Craig, 51 Ill. 288, it was held proper to inquire whether the plaintiff from her conduct was or was not sincerely attached to the defendant.

"In action for breach of promise of marriage, witnesses for the plaintiff, her neighbors and the intimate friends of her family, were permitted to testify as to what, in their opinion, was the amount of damage she had sustained by reason of the breach. *Held*, that such evidence was admissible." Jones *v.* Fuller, 19 S. C. 66, 45 Am. Rep. 761.

7. Entire Relations of Parties. "There is no fixed rule of damages,

show harsh, cruel or vindictive conduct or statements on the part of the defendant at the time of the desertion or afterward,[8] but it is held in some courts that what occurred after breach cannot be shown.[9]

A. SLANDER. — Slanderous matter is excluded in some courts [10] and admitted in others.[11] While attempts to defame the plaintiff by pleadings or evidence at the trial may be considered in aggravation of damages,[12] yet in other courts affidavits charging unchastity against the plaintiff are not admissible in evidence,[13] and good faith may be shown to mitigate,[14] or justify an unsuccessful defense attacking plaintiff's character.[15]

B. FRAUD. — And evidence of any fraudulent conduct on the defendant's part in making the contract or breaking it, is admissible in aggravation of damages.[16]

and the jury may, in the exercise of a sound discretion, allow punitory damages; that is, such an amount over and above all actual damages as in their opinion is proper, by way of punishing the defendant, and such as may tend to deter others from being guilty of the like breaches of a legal and social duty. And for the purpose of enabling them to reach a proper conclusion as to the amount of damages, they have a right to consider the entire course of conduct of the parties towards each other, up to and including the time of trial. There can be no doubt, if the defendant's desertion of the plaintiff was without cause, or his conduct at the time towards her, or afterwards, was harsh, cruel, or malicious, or if at any time, even upon the trial, he makes a wrongful attempt to blacken her name or reputation, the jury have a right to consider it, and may, if they think proper, add something to the amount of damages on account of such new or additional wrong." Kelley *v.* Highfield, 15 Or. 277, 14 Pac. 744.

8. Cruel Treatment. — Osman *v.* Winters, 25 Or. 260, 35 Pac. 250; Kelley *v.* Highfield, 15 Or. 277, 14 Pac. 744; Chesley *v.* Chesley, 10 N. H. 327.

It was held in Baldy *v.* Stratton, 11 Pa. St. 316, that the circumstances attending the breach, before, at the time, and after, may be given in evidence in aggravation of damages.

9. After Breach. — Dent *v.* Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921; Greenup *v.* Stoker, 8 Ill. 202; Greenleaf *v.* McColley, 14 N. H. 303.

10. Slander. — Dunlap *v.* Clark, 25 Ill. App. 573; Greenup *v.* Stoker, 8 Ill. 202.

11. Chesley *v.* Chesley, 10 N. H. 327.

12. Wanton Defense. — "If the defendant, in an action for a breach of promise to marry, attempts, in bad faith, to blacken and defame the plaintiff's character, it may be considered in aggravation of damages." Blackburn *v.* Mann, 85 Ill. 222; Fleetford *v.* Barnett, 11 Colo. App. 77, 52 Pac. 293; Kniffen *v.* Mc Connell, 30 N. Y. 285; Reed *v.* Clark, 47 Cal. 194; Denslow *v.* Van Horn, 16 Iowa 476; Liese *v.* Meyer, 143 Mo. 547, 45 S. W. 282; Thorn *v.* Knapp, 42 N. Y. 474, 6 Am. Rep. 561; Kelley *v.* Highfield, 15 Or. 277, 14 Pac. 744.

13. Pleading Not Evidence.—Leavitt *v.* Cutler, 37 Wis. 46.

14. Mitigation. — Kelley *v.* Highfield, 15 Or. 277, 14 Pac. 744; Osman *v.* Winters, 25 Or. 260, 35 Pac. 250; Fidler *v.* McKinley, 21 Ill. 308.

15. Justification. — Reed *v.* Clark, 47 Cal. 194; Blackburn *v.* Mann, 85 Ill. 222; White *v.* Thomas, 12 Ohio St. 312; Denslaw *v.* Van Horn, 16 Iowa 476; Powers *v.* Wheatley, 45 Cal. 113.

16. Fraud. — Hughes *v.* Nolte, 7 Ind. App. 526, 34 N. E. 745; Par-

C. SEDUCTION. — Seduction accomplished after and by means of the promise may be shown to aggravate damages,[17] but the contrary has been held.[18] The plaintiff may not show the costs and expenses of supporting their bastard child,[19] her loss of time and expenses at childbirth,[20] nor loss of bodily health from such seduction and pregnancy,[21] but evidence of such loss of health has been received.[22]

ker *v.* Forehand, 99 Ga. 743, 28 S. E. 400.

Evidence that the defendant was afflicted at the time of contract or afterward viciously acquired a venereal disease may be proved in aggravation of damages. Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. 79, 81 Am. St. Rep. 302, 51 L. R. A. 854.

Evidence that the defendant was engaged, at the time of the contract, to another may be shown in aggravation. Tamke *v.* Vangsnes, 72 Minn. 236, 75 N. W. 217.

If a man forms a marriage engagement merely as a cloak to accomplish the woman's seduction, this may be considered in aggravation of damages for the subsequent unjustifiable breach of the contract by him, although the seduction be not accomplished. Kaufman *v.* Fye, 199 Tenn. 145, 42 S. W. 25.

Exemplary damages may be awarded against a man who, with improper motives, and without intending to perform his obligation, contracts to marry a woman, and then, without justification, violates the contract. Johnson *v.* Travis, 33 Minn. 231, 22 N. W. 624.

17. Seduction. — McKinsey *v.* Squires, 32 W. Va. 41, 9 S. E. 55; Williams *v.* Hollingsworth, 6 Baxt. (65 Tenn.) 12; Conn *v.* Wilson, 2 Over. (2 Tenn.) 233, 5 Am. Dec. 663; Wilbur *v.* Johnson, 58 Mo. 600; Liese *v.* Meyer, 143 Mo. 547, 45 S. W. 282; Sauer *v.* Schulenberg, 33 Md. 288, 3 Am. Rep. 174; Musselman *v.* Barker, 26 Neb. 737, 42 N. W. 759; Wells *v.* Padgett, 8 Barb. (N. Y.) 323; Matthews *v.* Cribbett, 11 Ohio St. 330; Tubbs *v.* Van Kleek, 12 Ill. 446; Fidler *v.* McKinley, 21 Ill. 308; Goodhall *v.* Thurman, 1 Head (38 Tenn.) 209; Dent *v.* Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921.

"It is very clear that, if seduction can ever be allowed to aggravate the damages, where the action is for breach of promise of marriage, it is only in those cases where the seduction follows the promise, and is effected by means of it. We can conceive of no principle upon which a seduction before the promise of marriage, and which, therefore, could not have been a consequence of such promise, should be permitted to swell the damages in an action on the contract." Espy *v.* Jones, 37 Ala. 379.

"Where plaintiff became engaged to marry defendant in 1894, and her seduction did not take place until February, 1895, and she testified that she consented to the seduction on the promise of defendant that, if anything happened to her prejudice, he would marry her at once, the marriage contract was not void as made in consideration of illicit intercourse, since the illicit intercourse was not the consideration for his previous promise to marry plaintiff, but such previous contract was made the basis for obtaining the intercourse." Spellings *v.* Parks, 104 Tenn. 351, 58 S. W. 126.

18. Weaver *v.* Bachert, 2 Pa. St. 80, 44 Am. Dec. 159; Baldy *v.* Stratton, 11 Pa. St. 316, 401; Burks *v.* Shain, 2 Bibb (Ky.) 341, 5 Am. Dec. 616; Tyler *v.* Salley, 82 Me. 128, 19 Atl. 107; Perkins *v.* Hersey, 1 R. I. 493.

19. Bastard Child. — Wilds *v.* Bogan, 57 Ind. 453.

20. Expense of Childbirth.—Giese *v.* Schultz, 53 Wis. 462, 10 N. W. 598.

21. Bodily Health. — Tyler *v.* Salley, 82 Me. 128, 19 Atl. 107. In Geise *v.* Schultz, 65 Wis. 488, 27 N. W. 353, it was held error to permit the plaintiff to testify that pregnancy and miscarriage followed her seduction unless for the purpose of showing publicity.

22. Loss of Health from Seduction.

D. RAPE. — Evidence that the defendant had sexual intercourse with the plaintiff by force is inadmissible.[23]

VIII. MITIGATION OF DAMAGES.

1. Unchastity. — Evidence of unchastity of the plaintiff with others is admissible in mitigation of damages,[24] but it has been held by some courts that, if the defendant knew of her want of virtue at the time of the contract, such unchastity cannot be shown in mitigation.[25]

2. Bad Conduct After Breach. — Improper, or illicit conduct after breach may be shown in mitigation.[26] Evidence of illicit intercourse or lewd conduct between the parties before engagement is not admissible in mitigation.[27] Drunkenness of plaintiff may be shown in mitigation.[28]

3. Temper. — He may further show in mitigation that the plaintiff has a violent and abusive temper,[29] or that her behavior is coarse

Schmidt *v.* Durham, 46 Minn. 227, 49 N. W. 126.

23. Rape. — Geise *v.* Schultz, 65 Wis. 488, 27 N. W. 353.

24. Unchastity. — Butler *v.* Eschleman, 18 Ill. 44; Denslow *v.* Van Horn, 16 Iowa 476; Kelley *v.* Highfield, 15 Or. 277, 14 Pac. 744; Doubet *v.* Kirkman, 15 Ill. App. 622; Keegan *v.* Sage, 31 Abb. N. C. (N. Y.) 54; Williams *v.* Hollingsworth, 6 Baxt. (65 Tenn.) 12; Haymond *v.* Saucer, 84 Ind. 3, 14; Clement *v.* Brown, 57 Minn. 314, 59 N. W. 198. The evidence of a want of virtue on the part of defendant in error in this case, was therefore admissible in mitigation of damages, although the plaintiff in error may have been informed of the fact at the time he entered into the contract, and it should not have been excluded from the jury. Burnett *v.* Simpkins, 24 Ill. 264.

In an action of this nature, the bad character of the plaintiff as a lewd woman, may be shown in mitigation of damages. The injury to the character of a virtuous and good woman would be greater than to that of one who is depraved and abandoned, and the breach of such a promise will not occasion the same anguish of mind or produce the same injury to the reputation of a prostitute as to a pure woman. Krantzler *v.* Grant, 2 Ill. App. 236.

Where the defendant seduced the plaintiff after promise of marriage, her former incontinence may be shown in mitigation. Sheahan *v.* Barry, 27 Mich. 217.

25. Contract With Knowledge. Butler *v.* Eschleman, 18 Ill. 44; Sheahan *v.* Barry, 27 Mich. 217; Baddeley *v.* Mortlock, 1 Holt 151, 3 Eng. C. L. 67.

26. Improper Conduct After Breach. — Willard *v.* Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; Keegan *v.* Sage, 31 Abb. N. C. (N. Y.) 54.

"The defendant may show in mitigation of damages, where such is the fact, that the plaintiff is living in a state of adultery with another man." Dupont *v.* McAdow, 6 Mont. 226, 9 Pac. 925.

27. Boynton *v.* Kellogg, 3 Mass. 189; Bennett *v.* Simpkins, 24 Ill. 265.

"Accordingly, if the plaintiff committed fornication with the defendant, before the making of the promise, that fact cannot be set up in mitigation of the damages; for that would be to permit a man to take advantage of his own fault." Espy *v.* Jones, 37 Ala. 379.

28. Button *v.* McColley, 38 Barb. (N. Y.) 413.

29. Temper. — Alberts *v.* Albretz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584; Schmidt *v.* Durnham, 46 Minn. 227, 49 N. W. 126.

Threats to take the life of a human being, even if not intended to be executed, evince grossness of man-

and immodest.[30]

4. Ill Health. — Plaintiff's ill health may be shown in mitigation,[31] as well as her declarations on the subject,[32] and the ill health of defendant may also be shown in mitigation.[33]

5. Consanguinity. — Evidence of consanguinity not within the prohibited degrees is not admissible in mitigation,[34] but the contrary has been held.[35]

6. Insanity. — If there is insanity in plaintiff's family of which the defendant was ignorant at the time of the contract he may show that fact in mitigation,[36] but the rule is to the contrary where the defendant had such knowledge.[37]

ners; and if uttered under the influence of excited and angry passions, may well be regarded as the fruit of feelings of a highly malicious character. But neither can be considered a bar to a suit like the present, as an imperative rule of law, even if the defendant on that account should immediately upon being informed thereof, refuse to fulfill his promise.

The instruction, that the use of the language, as represented in the testimony by the plaintiff, was proper for the consideration of the jury, in determining the rights of the parties, with the other evidence in the case, in reference to the question of damages, was not erroneous. Berry *v.* Bakeman, 44 Me. 164.

30. Immodest Behavior. — Leckey *v.* Bloser, 24 Pa. St. 401; Baddeley *v.* Mortlock, 1 Holt. 151, 3 Eng. C. L. 67; Stratton *v.* Dole, 45 Neb. 472, 63 N. W. 875.

The lewd and immodest conduct of plaintiff with another man, is a matter of mitigation of damages only. Alberts *v.* Albretz, 78 Wis. 72, 74 N. W. 95, 10 L. R. A. 584.

31. Walker *v.* Johnson, 6 Ind. App. 600, 33 N. E. 267; Goddard *v.* Westcott, 82 Mich. 180, 46 N. W. 242.

"Although evidence of the disease might properly have been admitted under the general denial, in mitigation of damages, there was no harm, in view of plaintiff's admissions, and in view also of the defendant's intimate knowledge as testified by him, in excluding further evidence that plaintiff had had more convulsions than she had admitted." Reinhard, C. J., and Ross, J., *dissenting.* Walker *v.* Johnson, 6 Ind. App. 600, 33 N. E. 267.

32. Declarations. — Goddard *v.* Westcott, 82 Mich. 180, 46 N. W. 242.

33. Ill Health of Defendant. Sprague *v.* Craig, 51 Ill. 288; Allen *v.* Baker, 86 N. C. 91, 41 Am. Rep. 444; Mabin *v.* Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. Rep. 199; Hall *v.* Wright, 96 Eng. C. L. 746; Sanders *v.* Coleman, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581.

34. Consanguinity. — Alberts *v.* Albretz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

35. It was undoubtedly competent to show the cousinship of the parties themselves, for all facts bearing upon their intimacy were material, and this would have some weight in explaining it. Simmons *v.* Simmons, 8 Mich. 318.

36. Insanity. — Lohner *v.* Caldwell, 15 Tex. Civ. App. 444, 39 S. W. 591.

37. "Had it been alleged and proven by appellant that the engagement had been entered into by him in ignorance of the fact that insanity has existed in the family of the appellee, and that he had broken off the engagement and refused to consummate the marriage because of such insanity, the evidence might have been admissible in mitigation of damages; but there was no allegation to that effect, and there was no offer, in connection with the proof desired, to show that appellant had, in ignorance of the taint of insanity in the family of appellee, entered into the marriage contract, and broke it off when he ascertained the fact. If

7. Other Suitors. — Where no fraud or undue familiarity is shown evidence as to other suitors is not admissible in mitigation.[38] Neither can bad character of relatives be shown in mitigation.[39]

8. Offer After Breach to Marry. — Evidence of offer to marry the plaintiff after breach has been admitted in some courts [40] but rejected in others.[41]

9. Want of Regard. — A want of proper regard by the plaintiff for the defendant may be shown in mitigation,[42] but her declarations

appellant knew of the family infirmity at the time he entered into the contract, and, if it was true, the circumstances indicate that he knew it, he cannot mitigate the damages for his breach of promise on that ground." Lohner *v.* Caldwell, 15 Tex. Civ. App. 444, 63 S. W. 148.

38. Other Suitors. — McCarty *v.* Coffin, 157 Mass. 478, 32 N. E. 694; Alberts *v.* Albretz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

In an action for breach of promise aggravated by seduction, it was held that evidence of an engagement to another man at the time of the defendant's alleged promise, could not be shown in defense or mitigation. Roper *v.* Clay, 18 Mo. 385, 59 Am. Rep. 314.

"In an action for breach of marriage promise, evidence as to previous engagements of plaintiff was not admissible on the question as to the measure of damages, it appearing that they were too remote, and not breached by reason of any fault on her part." Edge *v.* Griffin, (Tex. Civ. App.), 63 S. W. 148.

"The court properly excluded evidence that plaintiff had kept company with another man a short time before she began going with defendant, when there was no evidence that the intercourse between them was other than that which exists in case of friendship between persons of the opposite sex who do not contemplate marriage." Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 495.

39. Character of Relatives.—Sherman *v.* Rawson, 102 Mass. 395.

"In an action for breach of marriage promise, in which seduction was proven in aggravation of damages, evidence that the mother of the plaintiff was a prostitute and the mother of illegitimate children was not admissible, since the reputation of a particular member of plaintiff's family can not be shown in mitigation of damages." Spellings *v.* Parks, 104 Tenn. 351, 58 S. W. 126.

"Evidence to throw discredit on the character of plaintiff's mother, and thereby to show the social degradation of plaintiff, is not admissible in an action for breach of contract of marriage, plaintiff having no connection with the misconduct, and defendant not having been induced to make the promise by misrepresentation or wilful suppression of the facts." Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

40. Offer to Marry. —"But if the facts before the jury, in the present case, would have warranted the jury in pronouncing, that the lady considered the engagement as terminated, after the note sent to her father was communicated to her, and this was made known to the defendant, we think, notwithstanding that the subsequent offers, after the suit was commenced, to marry her, were proper evidence in mitigation of damages." Kelly *v.* Renfro, 9 Ala. (N. S.) 325, 44 Am. Dec. 441.

41. Holloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208; Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442.

42. Want of Regard. — Hook *v.* George, 100 Mass. 331; Prescott *v.* Guyler, 32 Ill. 312.

"A woman engaged to a man she does not like can seldom suffer much damage from a breach of the engagement, and if she proposes to refuse to accompany the husband to his home when marriage shall have taken place, her complaint, if he withdraws his offer, cannot be entitled to very serious consideration. And feelings and purposes of this nature may as well be shown by admissions made after a breach of the engagement as

and acts after breach as far as they relate to her sentiments at that time have been excluded by some courts.[43]

10. Knew Defendant Was Married. — That the plaintiff continued the engagement after she knew the defendant was married, may be shown in mitigation.[44]

11. Mitigation of Punitive Damages. — The plaintiff may prove any facts tending to show that his motives were not bad nor his conduct cruel, to lessen the humiliation and mitigate punitive damages or rebut evidence for such damages.[45]

12. Unhappy Marriage. — The defendant may not show that the marriage would probably have been an unhappy one because of the absence of mutual affection.[46]

before. The material question would not be as to the time they were made, but what they tended to prove." Miller *v.* Rosier, 31 Mich. 475.

"It was error to exclude evidence of declarations by plaintiff, made after the breach, that she had never cared for defendant, and only wanted his money." Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 492.

43. After Breach. — Prescott *v.* Guyler, 32 Ill. 312; Schmidt *v.* Durnham, 46 Minn. 227, 49 N. W. 126; Edwards *v.* Edwards, 93 Iowa 127, 61 N. W. 413; Miller *v.* Hayes, 34 Iowa 496, 11 Am. Rep. 154; Greenleaf *v.* McCooley, 14 N. H. 303.

In Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442, the court held that it was improper to inquire whether the plaintiff would now marry the defendant.

44. "They ought to have been told that if, after she learned he was a married man, she freely and understandingly, and uninfluenced by fraudulent misrepresentations, consented to the continuance of the contract, or took steps to secure its consummation, they might look to such facts in mitigation of damages, but that such proof would not defeat her right of action. In charging that such proof would exclude her from court, and defeat her right to recover, there was clear error." Coover *v.* Davenport, 1 Heisk. 48 (Tenn.) 368, 2 Am. Rep. 706.

45. Punitive Damages. — Thorn *v.* Knapp, 42 N. Y. 474, 1 Am. Rep. 561.

"It would seem to follow, that, when the refusal, as proved by the plaintiff, is accompanied with remarks and declarations doing ample justice to the plaintiff, and taking from the act the sting and injury, so far as kind feelings and good motives can take from a wrong act its sting and lessen its capacity to injure, such declarations should be submitted to the jury in mitigation of damages. The judge erred, I think, in instructing the jury that, so far as such declarations had been proved, they were not at liberty to consider them, to lessen their verdict. But the defendant offered to prove that the declarations were true, to-wit, that his mother was strenuously opposed to the marriage with the plaintiff, and that he yielded to this parental opposition. This was excluded; and in this, I think, the learned justice also erred. It certainly was no bar to the action, and did not tend to reduce the damages below that amount which would compensate her most fully for all the loss sustained by her in reputation, anticipated future settlement in life, and mental and bodily suffering; but it did tend to mitigate the damages, so far as they might be aggravated or punitive." Johnson *v.* Jenkins, 24 N. Y. 252.

46. Unhappy Marriage. — Piper *v.* Kingsbury, 48 Vt. 480.

BRIBERY.

By Clarence Thompson.

I. DEFINITION.

Bribery is the receiving or offering of anything of value or any undue reward by or to any person whomsoever whose ordinary business or profession relates to the administration of public justice, or to any witness, juror or voter at a public election, in order to influence his behavior in the office, and to incline him to act contrary to his duty and the known rules of honesty and integrity.[1]

II. PROSECUTION.

1. Degree of Proof Required. — As in other criminal cases, proof of facts must be made beyond a reasonable doubt,[2] but it is held that where disbarment proceedings are instituted against an attorney based on a charge of bribery, it is not necessary to prove the fact of the bribery beyond reasonable doubt as in criminal cases.[3] It is also held that in a civil action where the validity of a contract entered into by the city council in behalf of the city is contested on the ground of bribery, a preponderance of the evidence is sufficient.[4]

Evidence in bribery cases is necessarily meager and limited because such transactions are usually entered into secretly with no one present except the parties to them.[5] Circumstantial evidence is therefore admissible and sometimes sufficient.[6]

1. State *v.* Smith, 72 Vt. 366, 48 Atl. 647; State *v.* Womack, 4 Wash. 19, 29 Pac. 939; Dishon *v.* Smith, 10 Iowa 212; State *v.* Miles, 89 Me. 142, 36 Atl. 70; State *v.* Ellis, 33 N. J. L. 102, 97 Am. Dec. 707, and note; Walsh *v.* People, 65 Ill. 58, 16 Am. Rep. 569; Rex *v.* Vaughan, 4 Burr. 2494.

Treating. — However reprehensible it may be for a member of the legislature to keep open house for the entertainment of members where they may partake of light refreshments, wine, beer, liquor and cigars, it falls short of establishing a case of bribery. Randall *v.* Evening News Ass'n., 97 Mich. 136, 56 N. W. 361, 7 L. R. A. 309; Cook *v.* Broder, H. E. C. (Can.) 205; Cameron *v.* Maclennan, H. E. C. (Can.) 584.

2. State *v.* Meysenburg, (Mo.), 71 S. W. 229; Ruffin *v.* State, 36 Tex. Crim. App. 565, 38 S. W. 169; People *v.* Kerr, 6 N. Y. Crim. 406, 6 N. Y. Supp. 674.

3. *In re* Wellcome, 23 Mont. 450, 59 Pac. 445.

4. Devlin *v.* City of New York, 4 Misc. 106, 23 N. Y. Supp. 888.

5. Thompson *v.* State, 16 Ind. App. 84, 44 N. E. 763.

6. People *v.* Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; People *v.* Kerr, 6 N. Y. Crim. 406, 6 N. Y. Supp. 674.

Sufficiency. — A witness was introduced for the plaintiff who testified that a certain elector who was of the same political party with the defendant had received from the defendant twenty dollars ($20.00) "for services to the ticket," and that that elector was opposed to the election of the defendant to the office of sheriff, and had organized a local club hostile to him and in favor of his opponent; that he worked for the rival candidate in a half-hearted way until the day of the election, when he was quiet. The statement of the defendant also showed that four other named electors of a different political party from that of the defendant received from him money and whisky to be used by two of them "as best they could and thought proper," and by the other two "as they liked." There was further proof of the statement on the same line; held to be sufficient evidence to be submitted to the jury. Epps *v.* Smith, 121 N. C. 157, 28 S. E. 359.

All the circumstances of the proceeding alleged to have been influenced by bribery are admissible as links in the chain of circumstantial evidence.[7]

Where the evidence as to bribery consists of offers or proposals to bribe, the evidence should be stronger and more exact than that required to prove a bribe actually given or accepted.[8]

2. Proof of Elements of Offense. — The state must prove all the elements of offense: First, that a corrupt offer or solicitation to bribe was made, or an agreement to give, receive and accept a bribe; Second, that such proposal or agreement was made to, by or with an officer or a person at the time acting in an official capacity.[9]

A. Offer or Solicitation. — Though proof of a corrupt intent alone is not sufficient to justify a prosecution for bribery, when that intent is manifested by overt acts, such as a promise to confer upon the officer a reward as a premium to incline him to act contrary to his duty, proof of that fact is sufficient.[10] An actual tender of money is not necessary to be proved, but a mere expression of ability to produce the bribe is sufficient.[11] Whether the officer sug-

7. People *v.* Kerr, 6 N. Y. Crim. 406, 6 N. Y. Supp. 674.

The Proceedings Before the City Council in accepting the reports of the committee, both majority and minority, and the bid of H. R. & Co., were competent for the purpose of showing that the matter upon which the bribery was alleged to have been solicited, to wit: the construction of a reservoir and boulevard, was pending before the city council, and in what way it came to be pending. This proceeding showed that the matter pending before the council was not merely whether a reservoir and boulevard should be constructed, but also and mainly whether the work should be let by contract or done by the city itself by day labor, and that H. R. & Co. was a bidder, and the lowest bidder for the contract. State *v.* Durnam, 73 Minn. 150, 75 N. W. 1127.

Votes of Board. — In a prosecution against a defendant for giving a bribe to members of a board of aldermen, the votes of the board on the matter involved are admissible to show some arrangement, agreement, or understanding previously made between themselves. People *v.* Kerr, 6 N. Y. Crim. 406, 6 N. Y. Supp. 674.

Bribery of Witness. — In prosecution of a defendant for attempting to bribe a witness, a certain amount of evidence in relation to the circumstances of the crime is necessary and admissible to show the materiality of the testimony sought to be procured, but it is not admissible to go so deeply into these circumstances that it amounts to a trial of the original case. People *v.* Fong Chung, 78 Cal. 169, 20 Pac. 396.

Where an indictment charges a bailiff's officer with accepting bribes for the purpose of allowing the continuance of certain gambling dens, and alleges a receipt of a certain amount at a certain time, testimony of the receipt of various amounts at subsequent times is admissible for the purpose of corroborating the testimony of the prosecuting witness and showing the purpose, understanding and intent with which the money was received as alleged in the indictment, and for the purpose of showing a system under which these several transactions were had. Guthrie *v.* State, 16 Neb. 667, 21 N. W. 455.

8. Hunter *v.* Lauder, H. E. C. (Can.) 52; Rennick *v.* Cameron, H. E. C. (Can.) 70.

9. *In re* Yee Gee, 83 Fed. 145; State *v.* Graham, 96 Mo. 120, 8 S. W. 911; State *v.* Meysenburg, (Mo.), 71 S. W. 229.

10. People *v.* Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700.

11. O'Brien *v.* State, 6 Tex. App. 665.

gested bribery to the defendant,[12] whether he was even aware that the money was delivered as a bribe,[13] or whether he acquiesced in it,[14] is immaterial.

a. *The Purpose Sought Through Bribery and Its Performance.* It must be proved that the bribe is accepted and received with the understanding that certain action will be taken,[15] but it is immaterial whether such action ever is taken or not,[16] or whether the action sought to be influenced is one within the scope of the officer's duty or not,[17] or whether or not the action is the same that he had already determined to take,[18] or whether or not it is one that he could perform at all.[19] But it has been held that where the defendant is accused of attempting to bribe a member of the council to vote for the appointment of a person to a certain office, it is competent for the defendant to prove that in fact no such office existed.[20] It has been held also that under the Federal statute, it is not necessary to prove that a voter was bribed for some particular purpose. It is sufficient if it be shown that his freedom of voting was in any way interfered with.[21]

12. Rath *v.* State, 35 Tex. Crim. App. 142, 33 S. W. 229.

13. Proof that money was delivered by a defendant to the magistrate is sufficient to establish the commission of the crime, even though the magistrate received it in ignorance of what it was, and afterward retained it solely for the purpose of public justice. Com. *v.* Murray, 135 Mass. 530.

14. Com. *v.* Murray, 135 Mass. 530; People *v.* Squires, 99 Cal. 327, 33 Pac. 1092.

15. Sufficiency. — Where a proceeding alleged to be influenced by a bribe is stated in the indictment as one "thereafter to be brought before commissioner's court," if the proof shows that it was to be acted upon during the commissioner's term of office, it is sufficiently responsive to the allegation in the indictment. Ruffin *v.* State, 36 Tex. Crim. App. 565, 38 S. W. 169.

Responsiveness to Allegation. Prosecution must prove the defendant to have received the bribe for the purpose of influencing his vote and action in the particular matter alleged in the indictment. Ruffin *v.* State, 36 Tex. Crim. App. 565, 38 S. W. 169.

It must be proved that the party receiving the reward, benefit or advantage was influenced or intended to be influenced thereby not merely to vote at an election, but to vote for the particular candidate or ticket of candidates for office named, or upon a particular side of a named question submitted to qualified voters. Com. *v.* Steele, 97 Ky. 27, 29 S. W. 855.

16. Proof of the fact of the transfer of $5.00 and the agreement not to vote is sufficient. It is immaterial whether the agreement was carried out or not. Thompson *v.* State, 16 Ind. App. 84, 44 N. E. 763; State *v.* Miles, 89 Me. 142, 36 Atl. 170; Ruffin *v.* State, 36 Tex. Crim. App. 565, 38 S. W. 169; State *v.* Williams, 136 Mo. 293, 38 S. W. 75; State *v.* Meysenburg, (Mo.), 71 S. W. 229.

17. Rath *v.* State, 35 Tex. Crim. App. 142, 33 S. W. 229.

18. In the prosecution of a person for attempting to bribe a juror to hang the jury, it is immaterial that the juror had already formed his intention to do so. State *v.* Williams, 136 Mo. 293, 38 S. W. 75.

19. It is immaterial whether an officer actually has it in his power to carry out a corrupt agreement. People *v.* Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700. But see State *v.* Graham, 96 Mo. 120, 8 S. W. 911.

20. Com. *v.* Reese, 16 Ky. L. Rep. 493, 29 S. W. 352.

21. Sufficiency. — In a prosecution under a Federal act against bribery at

B. AGREEMENT. — Where in order to constitute bribery the act of at least two persons is essential — that of him who gives and him who receives — it must be proved that the minds of the two concurred.[22] Proof of circumstances showing an understanding between the persons is sufficient. It is not necessary that the agreement should be explicit as to details nor reduced to writing.[23] Where an indictment alleges an express agreement, such express agreement must be proved as laid.[24]

Where a defendant is accused of offering to accept a bribe from a certain person, evidence of similar offers to accept from other persons where no connection is shown between the various offenses, is not admissible.[25]

a. *Confessions.* —Extrajudicial confessions alone, uncorroborated by other evidence as to the main facts, are inadequate to establish a *corpus delicti*.[26] But where a confession is substantiated by proof of circumstances which, although they may have an innocent construction, are nevertheless calculated to suggest the commission of the crime, for the explanation of which the confession furnished the key, it should be allowed to go to the jury.[27]

b. *Admissions.* — In a prosecution against a member of a school board for bribery, admissions by him to the effect that he had drawn warrants for certain amounts at certain times, which admissions are endorsed on the back of a letter of inquiry addressed to him, when taken in connection with the other established facts of the case, are admissible.[28]

In a proceeding to contest an election, evidence of admission of

election, it is not necessary to show that a congressman was voted for on a particular ballot. It is sufficient if a vote for a congressman might have been cast upon such ballot. United States *v.* McBosley, 29 Fed. 897.

22. Certainty As to Admissions. In a prosecution against a voter for selling his vote, testimony of a witness as to what he thinks occurred in a conversation between the defendant and the party to whom the offer to sell a vote was made, is inadmissible. Such testimony should be positive and direct. Hensley *v.* Com., 10 Ky. L. Rep. 175, 9 S. W. 129; Newman *v.* People, 23 Colo. 300, 47 Pac. 278.

23. A paper shown to have come from the hands of the defendant, and to have been transmitted by his authority to the juror, making a proposition of the bribe, is admissible, although signed with the name differing in one letter from that of the defendant. Identity of the defendant with the author of the paper is a matter of inference for the jury. Caruthers *v.* State, 74 Ala. 406; Newman *v.* People, 23 Colo. 300, 47 Pac. 278.

It is not necessary for the State to prove an absolute agreement between the bribe-giver and the bribe-taker. People *v.* Kerr, 6 N. Y. Crim. 406, 6 N. Y. Supp. 674.

24. State *v.* Meysenburg, (Mo), 71 S. W. 229.

25. People *v.* Hurley, 126 Cal. 351, 58 Pac. 814.

Bribery of Juror. — Where an indictment against a person accuses him of having attempted to bribe a jury in a particular suit, the proof must be restricted to that particular suit and not to any others. White *v.* State, 103 Ala. 72, 16 So. 63.

26. Brady *v.* State, 32 Tex. Crim. App. 264, 22 S. W. 924.

27. People *v.* Jaehne, 103 N. Y. 182, 8 N. E. 374.

28. Glover *v.* State, 109 Ind. 391, 10 N. E. 282.

bribery made by an agent after his agency has expired is inadmissible.[29]

c. *Res Inter Alios Acta.* — In a prosecution against an officer for offering to accept a bribe, evidence of tender of bribes to other members of the same board is not admissible.[30]

d. *Res Gestae.* — Communications between an agent and his principal, made in the course of his employment, and narrating the circumstances of the offer, are admissible as part of the *res gestae*.[31]

C. CIRCUMSTANCES. — a. *Receipt and Acceptance.* — The state must prove the bribe to have been given to the defendant to influence his own action.[32]

(1.) **Financial Dealings.** — Proof of the financial dealings of the alleged bribe-giver or bribe-taker at or near the time of the alleged offense is admissible.[33]

b. *Value.* — The state must prove that something of value was tendered or given as a bribe.[34] Proof of the offer of something

29. Scott *v.* Cox, H. E. C. (Can.) 274.

30. People *v.* Hurley, 126 Cal. 351, 58 Pac. 814.

Conversations between the bribe-giver and other parties in the absence of the defendant, are mere hearsay, and inadmissible. State *v.* Meysenburg, (Mo.), 71 S. W. 229.

31. In a prosecution against a member of a council for offering to accept a bribe from a member of a firm of contractors, where the indictment alleges the offer to have been made to one Richards, a member of the firm, evidence of a conversation between the defendant and one Halverson, another member of the firm, on the day previous to the alleged offense, is admissible at least for the purpose of explaining and illustrating the act in question. City *v.* Durnam, 73 Minn. 150, 75 N. W. 1127.

Where the prosecuting witness in the trial of a defendant accused of offering to receive a bribe is the agent of a manufacturing company to whom the offer was made, letters written by him to his principal narrating the fact of the offer and asking their advice on the proposition, are admissible as part of the *res gestae*. State *v.* Desforges, 48 La. Ann. 73, 18 So. 912.

32. Ruffin *v.* State, 36 Tex. Crim. App. 565, 38 S. W. 169.

33. Testimony to the effect that the party alleged to have given the bribe drew a large sum of money from the bank a few days prior to the alleged offense, in the absence of other testimony tending to connect that act with the offense is inadmissible. People *v.* Bissert, 71 App. Div. 118, 75 N. Y. Supp. 630.

Paying off Mortgage. — Evidence that the alleged receiver of a large bribe, shortly after the date of the alleged occurrence, paid off a heavy mortgage with bills of large denominations, is admissible. People *v.* Kerr, 6 N. Y. Crim. 406, 6 N. Y. Supp. 674.

Failure to Account. — In a prosecution for offering a bribe in behalf of a street railway company, evidence of the financial dealings of the company, such as its failure to account for large sums of money, etc., is admissible. People *v.* Kerr, 6 N. Y. Crim. 406, 6 N. Y. Supp. 674.

Dealings Covering Long Period. Proof of the financial condition of the accused at various times covering a long period is immaterial and inadmissible in a prosecution for bribery. People *v.* Stephenson, 91 Hun 613, 36 N. Y. Supp. 595.

34. Watson *v.* State, 39 Ohio St. 123; People *v.* Kerr, 6 N. Y. Crim. 406, 6 N. Y. Supp. 674.

Immaterial Variance. — Where in an indictment a draft alleged to have been given as a bribe is described as for two hundred and ninety dollars and no hundredths, and is dated May, 1870, while the draft offered in evidence is for two hundred and

which may have a value on the performance of certain conditions, and a promise at the same time to perform these conditions, is sufficient proof of the offer of a thing of value.[35]

Evidence that the only means by which the alleged reward could be made valuable to the alleged bribe-taker would be illegal and not within the scope of his official power is immaterial.[36]

D. Corrupt Intent. — The proof must show that the money was given or received corruptly; the intent must be proved.[37] Where the bribery is shown to have been committed by an agent of defendant, it must be shown to have been done with the knowledge and consent of the principal.[38]

ninety-eight dollars, and was dated May 14th, 1870, the substantial agreement is sufficient, as the character or amount of the thing received or agreed to be received, provided it appears to be of some value, is not material. Diggs *v.* State, 49 Ala. 311.

A Promise by an Agent of the respondent when canvassing a voter that "he would see him another time and things would be made right," is not an offer of bribery. McRae *v.* Smith, H. E. C. (Can.) 252.

If the bribe offered will have a value at the time of its delivery, it is immaterial whether or not it is of any value at the time of the promise. Watson *v.* State, 39 Ohio St. 123.

Where the Notes delivered to a defendant accused of accepting bribes are proved to be forgeries and were admittedly given for an illegal consideration, the court will not say as a matter of law that the notes are of no value in view of the fact that their negotiability may protect their value in the hands of an innocent third party. Com. *v.* Donovan, 170 Mass. 228, 49 N. E. 104.

The words "gift, gratuity of a thing of value" defined, and a promise to perform an act or action held to be within the meaning of the word "thing." Caruthers *v.* State, 74 Ala. 406.

Material Variance. —Where an indictment alleges that a bribe received is "the sum of nine thousand ($9000) dollars, legal money of the United States," proof that such amount was not paid in money, but by check, is not sufficient evidence to support the charge. State *v.* Meysenburg, (Mo.), 71 S. W. 229.

35. Watson *v.* State, 39 Ohio St. 123.

36. State *v.* McDonald, 106 Ind. 233, 6 N. E. 607.

37. State *v.* Pritchard, 107 N. C. 921, 12 S. E. 50; People *v.* Kerr, 6 N. Y. Crim. 406, 6 N. Y. Supp. 674.

Presumption in Absence of Explanation. — By the Canadian law, where the transfer of money is shown on the eve of an election, in the absence of explanations, the defendant must be presumed to have intended that it should be expended in bribery. In the absence of denial on the part of the defendant, the presumption of guilt arising from the circumstances becomes conclusive. Regina *v.* Stewart, 16 Ont. (Can.) 583.

Responsiveness. — In order to convict a defendant of bribery, it is necessary to show that he participated in the act with the intention charged in the indictment. People *v.* Kerr, 6 N. Y. Crim. 406, 6 N. Y. Supp. 674; White *v.* State, 103 Ala. 72, 16 So. 63.

Jest. — A statement that an offer to bribe was made in jest should be received with great suspicion. A briber may make an offer, which he intends should be taken seriously, and then, if not accepted, he may assert that it was made in jest. Cameron *v.* McDougall, H. E. C. (Can.) 376.

38. Where there is evidence that the attorney for a party on trial for murder attempted to bribe a material witness to leave the State, the court will not presume such action on the

The question whether or not the promise or payment was made in good faith for a lawful purpose is material,[39] and is one of fact for the jury.[40]

Under the North Carolina statute, where the giving of money to electors, in order to be elected, gives a ground of action for a forfeiture, it is not necessary to prove the intention with which the action was done, except that the purpose must be to procure the election of the defendant.[41]

Where the charge is receiving money for an agreement to omit to perform a duty, performance of which is required by statute, evi-

part of the attorney to have been authorized by his client or to be within the scope of his employment. Testimony of this character is not admissible in any case until there has been proof of some connection or of some authority conferred by defendant. Otherwise the testimony as to such defendant is purely hearsay. Luttrell *v.* State, 40 Tex. Crim. App. 651, 51 S. W. 930; *citing* Favors *v.* State, 20 Tex. App. 155; Barbee *v.* State, 23 Tex. App. 199, 4 S. W. 584; Nalley *v.* State, 28 Tex. App. 387, 13 S. W. 670.

In an action against an officer alleged to have made use of bribery to secure his election, proof of the fact of bribery is not sufficient to set aside the election, unless it be shown to have been done with the knowledge and consent of the candidate. *In re* Brockville Election, 32 U. C. Q. B. (Can.) 132.

Under the consolidated Municipal act 55 Vict. Ch. 42, a candidate cannot be convicted of bribery on account of the acts of an alleged agent unless it is shown that the candidate had knowledge of the alleged bribery and intended to commit same. Regina *v.* Dewar, 26 Ont. (Can.) 512.

Presumption of Intent from Reckless Expenditure. — A candidate who on the eve of a hotly contested election places a considerable sum of money in the hands of an agent capable of keeping part of it for himself and of spending the rest improperly or corruptly, who asks for no account of it, gives no directions as to it, and exercises no control over it, must be held personally responsible if it is improperly expended. He has let loose a dangerous element, and must be held answerable for the consequences. Regina *v.* Stewart, 16 Ont. (Can.) 583.

39. The respondent owed a debt which had been due for some time. He was sued for it about the time of the election, and was informed that his opponents were using the non-payment of it against him in the election. The respondent stated that he would not pay it until after the election, as it might affect his election. *Held,* that the promise to pay the debt was not made to procure votes, but to silence the hostile criticism, and was not therefore bribery. Gibbs *v.* Wheeler, H. E. C. (Can.) 785.

40. Johnson *v.* Com., 90 Ky. 53, 12 Ky. L. Rep. 20, 13 S. W. 520.

In an action against a Chinaman for attempting to bribe an officer and offering him $200.00 to procure the release of a Chinawoman from the custody of the officer under warrant of arrest, evidence that it is the practice of the Chinese of San Francisco to buy and sell women of their country is incompetent and inadmissible. People *v.* Ah Fook, 62 Cal. 493.

Where the proof tends to show that the defendant sold worthless stock to a party for a large consideration, knowing such stock to be worthless, and intending merely to cover the fact that the consideration was a bribe, evidence as to the real value of the stock is admissible. State *v.* Meysenburg, (Mo.), 71 S. W. 229.

41. Epps *v.* Smith, 121 N. C. 157, 28 S. E. 359.

dence by the defendant of his ignorance of the duty is material, as tending to sustain his claim that he never made an agreement not to perform a duty required by the statute, but evidence of the defendant's conduct is admissible as tending to show his knowledge of the statute.[42]

E. Official Capacity. — It is, ordinarily, for the state to prove that one of the parties to the bribery is an officer, and such matter is a question of fact,[43] but whether such officer is one who comes within the statute, is a question of law for the court.[44] It is not necessary, in order to show that a certain person is a certain officer, to introduce the record of his election and qualification.[45] Where the defendant is accused of attempting to bribe a witness, an indictment with the name of the witness endorsed on its back, as a witness, is admissible to prove the latter's status as such.[46] The complaint, answer and minutes of the court are also admissible in evidence to prove the allegations of the indictment.[47] and where the charge is attempting to bribe a jury, the docket and entries thereof, kept by the clerk of the court, showing the time and the occasion, and other facts relative to the trial during which the offense was alleged to have occurred, are admissible.[48]

3. Variance. — A variance as to the time when the offense was committed is immaterial provided it is shown that both the day named and the day on which the offense was proved to have been committed were within the statute of limitation and prior to the finding of the indictment,[49] but where the indictment alleges the offer of a bribe to a certain party, the state must prove the offer

42. Newman *v.* People, 23 Colo. 300, 47 Pac. 278.

43. In a prosecution for offering a bribe to a deputy sheriff, where the indictment alleges a certain person to be sheriff, and the deputy in question to have been appointed to assist the sheriff, these facts must be proved by the prosecution as alleged. O'Brien *v.* State, 6 Tex. App. 665.

44. People *v.* Jaehne, 103 N. Y. 182, 8 N. E. 374; Diggs *v.* State, 49 Ala. 311; Messer *v.* State, 37 Tex. Crim. App. 635, 40 S. W. 488; *In re* Yee Gee, 83 Fed. 145.

Whether or not a person is an officer to come within the statute, is apparently a question for the court, but where one acts as such officer and receives emoluments of the office, he is responsible for his omission to perform the duties thereof, and in a bribery question, whether he really is an officer or not may be immaterial. State *v.* Wynne, 118 N. C. 1206, 24 S. E. 216.

In Indiana the court will take notice that a person is the trustee of the school township if he is township trustee, and acts as such in contracting for school apparatus. State *v.* McDonald, 106 Ind. 233, 6 N. E. 607.

45. Rath *v.* State, 35 Tex. Crim. App. 142, 33 S. W. 229.

46. Chrisman *v.* State, 18 Neb. 107, 24 N. W. 434.

47. People *v.* Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

48. White *v.* State, 103 Ala. 72, 16 So. 63.

49. Immaterial Variance. — Time. The proof need not show that the offense was committed on the day named in the indictment. It is sufficient if both the day named and the day on which the offense was proved to have been committed are within the statute of limitation and prior to

to that certain party, and not to another.[50]

III. DEFENSES.

1. Inducement. — In a prosecution against a defendant for accepting a bribe, proof that he was induced to do so by another is immaterial.[51] It is also immaterial whether the money offered by a bribe-giver belonged to him or to some other person.[52]

2. Character and Reputation. — Evidence of good character and excellent reputation is admissible in prosecution for bribery, but is no defense for the crime where the proof establishes it as a fact.[53] Though the reputation of a defendant may be admissible, it is not allowable for a witness to testify that he had learned, since the arrest of defendant, that his reputation before his arrest was bad.[54] The rules governing the admission of proof of bad character by evidence of former convictions are the same in bribery cases as in others.[55]

3. Drunkenness. — If drunkenness is set up as a defense to the charge of bribery, the character and extent of the drunkenness, the conduct of the defendant and any other facts tending to show that he did not know what he was doing should be shown, and the question whether he knew what he was doing or not should be left to the jury.[56]

4. Legality of Acts Sought to Be Influenced. —In an action against a defendant for attempting to bribe an officer to release him from custody, it must be shown that the custody was legal,[57] but where the prisoner is in the custody of an officer under charge of such character that it is the officer's duty under any circumstances to hold him, evidence as to the manner in which the mittimus was drawn up, for the purpose of establishing its informality, is inadmissible.[58]

the finding of the indictment. People *v.* Squires, 99 Cal. 327, 33 Pac. 1092.

50. Responsiveness. — Where an indictment alleges the offer of a bribe to a certain deputy sheriff, the State must prove the offer to that certain party and not to any other. O'Brien *v.* State, 6 Tex. App. 665.

51. People *v.* Liphardt, 105 Mich. 80, 62 N. W. 1022.

52. People *v.* Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

53. *In re* Wellcome, 23 Mont. 450, 59 Pac. 445; Walsh *v.* People, 65 Ill. 58, 16 Am. Rep. 569; People *v.* Kerr, 6 N. Y. Crim. 406, 6 N. Y. Supp. 674.

54. People *v.* Fong Ching, 78 Cal. 169, 20 Pac. 396.

55. People *v.* Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851.

56. White *v.* State, 103 Ala. 72, 16 So. 63.

Opinion. —Where an alleged bribe-giver sets up his drunkenness as a defense, the opinion of the person whom he is alleged to have approached as to whether he displayed his ordinary and average intelligence, or not, is admissible and competent as being the best evidence obtainable. White *v.* State, 103 Ala. 72, 16 So. 63.

57. Moore *v.* State, (Tex. Crim. App.), 69 S. W. 521, *overruling* Moseley *v.* State, 25 Tex. App. 515, 8 S. W. 652, and distinguishing Florez *v.* State, 11 Tex. App. 102.

58. Florez *v.* State, 11 Tex. App. 102.

IV. WITNESSES.

1. Privilege of Witness. — In the absence of a statute exempting a witness from prosecution, he has the same privilege and immunity from answering questions, of an incriminating nature, in a bribery case which he has in other cases; but by statute in some states, a witness in a bribery case is exempt from prosecution for the offense concerning which he testifies,[59] and where such statutes exist it has been held that a witness other than the defendant himself, no matter in what degree implicated in the offense, may not avail himself of the plea of self-incrimination as an excuse for not answering questions under any circumstances, because if he is implicated in the offense he is protected by the terms of the statute, and if he is innocent his answer cannot tend to criminate or convict him of that offense;[60] such a statute must be strictly construed; and where it gives immunity to the bribe-giver and none to the bribe-taker, the latter must not be compelled to testify.[61]

2. Number of Witnesses. — Where an assertion on one side is met by a contradiction on the other the uncorroborated assertion is not sufficient to sustain the charge of bribery;[62] but where the defendant is accused of attempting to bribe a considerable number of persons, and each one is able to testify only as to the offer to himself individually, and is directly contradicted by the alleged bribe-giver, though the facts to which the witnesses testified are not in corroboration of each other, the fact that the alleged bribe-giver is contradicted by so many witnesses throws a strong suspicion upon his story, and, when in addition to that, the story told by the witnesses in support of the charge is highly reasonable and probable in itself, the evidence is sufficient to justify a conviction.[63] In the state of Kentucky either the bribe-giver, or the bribe-taker, may be convicted on the testimony of the other.[64]

59. People *v.* Lewis, 14 Misc. 264, 35 N. Y. Supp. 664; People *v.* Kerr, 6 N. Y. Crim. 406, 6 N. Y. Supp. 674.

60. Bradley *v.* Clark, 133 Cal. 196, 65 Pac. 395.

61. People *v.* Lewis, 14 Misc. 264, 35 N. Y. Supp. 664.

62. Cook *v.* Broder, H. E. C. (Can.) 205; Scott *v.* Cox, H. E. C. (Can.) 274.

Where Three Voters swore to three separate offers of bribery made to each of them separately by an agent of the respondent, which such agent swore were never made by him, held that the evidence was not sufficient to justify the setting aside of the election. Rennick *v.* Cameron, H. E. C. (Can.) 70.

63. White *v.* Murray, H. E. C. (Can.) 710.

64. Kentucky Rule. — Prior to 1886, sec. 19, art. 12, Ch. 33, Gen. Stat. of Kentucky, read as follows: "But the jury shall never convict any one under the provisions of this chapter upon the testimony of a single witness, unless sustained by strong corroborating circumstances." The legislature by an act approved May 7, 1886, repealed this provision. The offense of bribing persons to vote is always committed in secret. The briber and the bribed intend that the transaction shall be a secret between themselves. They seek such places to negotiate as preclude the possibility of detection. This they can easily

3. Proof of Character in Anticipation of Attack. — Ordinarily a party cannot bolster up his witness until he has been attacked, but when it is anticipated that his testimony will be attacked, on the ground that he is an accomplice with the accused, it is competent for him to prove his conduct and conversation with other persons, at the time of the alleged offense, for the purpose of showing himself to have acted in good faith.[65]

4. Animus, Reputation and Credibility. — A defendant may prove a deep feeling of hostility on the part of the witness toward the defendant and a determination to have him convicted if false swearing could do it.[66] A defendant may also prove that the persons bringing the charges bear indifferent reputations, and where the testimony as to the offer of bribes is contradictory, such evidence has considerable weight.[67]

do. If others were on the alert to detect them, their best efforts would prove a failure in ninety-nine cases out of a hundred; also, it would be almost impossible to convict the parties on circumstantial evidence alone. Therefore the legislature, seeing that the offense would be rarely, if ever, committed in the presence of third parties, and the impossibility of obtaining evidence in nearly every instance from that source, and the almost impossibility of convicting the offenders by circumstantial evidence alone, repealed the section *supra* so as to allow a conviction to be had upon the testimony of a single witness. And for the reasons above indicated we conclude that the legislature intended that either the bribed or briber might be convicted on the testimony of the other. Cheek *v.* Com., 87 Ky. 42, 7 S. W. 403.

65. People *v.* Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; People *v.* Squires, 99 Cal. 327, 33 Pac. 1092.

Declarations. — Where the prosecuting witness in the prosecution of a councilman for soliciting a bribe in collusion with several newspapermen actually offered and delivered the bribe to the accused, his declarations made several days prior to the act tending to show that he was offering the bribe only for the purpose of securing evidence against the accused, is admissible. The court said: "For the admission of this testimony the trial judge assigned as a reason that fabrications, improper motives and prevarication had been imputed to the witness Sherman, and, on the ground that Sherman was an apparent accomplice, he permitted the testimony to be received to confirm the statements of the witness Sherman, which had been assailed; those statements being prior to similar statements made by the witness, and made at an unsuspicious time. "Where the opposing case is that the witness testified under corrupt motives, or where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, it is but proper that such evidence should be rebutted." Whart. Cr. Ev., § 492. The case of State *v.* Cady, 46 La. Ann. 1346, 16 So. 195, sustains this doctrine. In this case the general character of the witness was not attacked for truth and veracity, but particular facts were charged as false and fabricated. Hence it was competent to show that, at a time unsuspicious, he made similar statements as to the facts contradicted. But we think, under the facts of this case, the evidence was material and important, and had direct bearing upon the issues presented, and which were in fact a part of the transaction, to understand which it was essential that those facts should have been narrated. State *v.* Dudoussat, 47 La. Ann. 977, 17 So. 685.

66. Walsh *v.* People, 65 Ill. 58, 16 Am. Rep. 569.

67. Buchner *v.* Currie, H. E. C. (Can.) 187.

5. Accomplices. — Though two persons must necessarily co-operate in bribery, the attempt may be made by one and not acceded to by the other. In such case the latter is not an accomplice with the former.[68] The mere fact that a witness is a paid "spotter," or has acted as a detective or decoy, personally entering into the criminal plan in order to detect or expose it, is not sufficient to render him unworthy of belief as a matter of law, when his evidence is uncontradicted, and no attempt is made to impeach the witness, except by showing the motives which prompted him to do what he did towards securing the conviction of the defendant.[69] Where a detective officer pretends to be an accomplice in order to ferret out crime, his subsequent disclosures of other facts to his superior officer are admissible, for the purpose of showing that he was not actually an accomplice.[70] Where the offense of bribery is complete, the bribe-giver is an accomplice with the bribe-taker, and vice versa,[71] and the court must instruct the jury as to the great caution with which testimony of an accomplice should be received.[72]

A. Corroboration. — Testimony in corroboration of an accomplice should tend to show the material facts necessary to establish the commission of a crime, and the identity of the person committing it, and should tend to prove the guilt of the accused by connecting him with the crime charged.[73] Where the defendant is one of a number accused of accepting bribes, proof of the *corpus delicti* may connect him with the crime sufficiently to corroborate the testimony of the accomplices.[74]

6. Conspirators. — In order to make the declarations of alleged co-conspirators admissible in a prosecution for bribery, the fact of the conspiracy, and some connection between the parties thereto,

68. State *v.* Sargent, 71 Minn. 28, 73 N. W. 626.

69. *In re* Wellcome, 23 Mont. 450, 59 Pac. 445; State *v.* Barber, 2 Kan. App. 679, 43 Pac. 800.

70. Regina *v.* Dewar, 26 Ont. (Can.) 512.

71. People *v.* Bissert, 71 App. Div. 118, 75 N. Y. Supp. 630; O'Brien *v.* State, 6 Tex. App. 665.

Cross-Examination. — Where the main witness for the people is the person who offered the bribe, he should be subject to the most thorough and searching cross-examination. People *v.* Liphardt, 105 Mich. 80, 62 N. W. 1022.

72. State *v.* Meysenburg, (Mo.), 71 S. W. 229.

73. People *v.* Bissert, 71 App. Div. 118, 75 N. Y. Supp. 630; People *v.* Kerr, 6 N. Y. Crim. 406, 6 N. Y. Supp. 674; People *v.* Winant, 24 Misc. 361, 53 N. Y. Supp. 695.

The Acts and Proceedings of a Board of aldermen in which the defendant participated subsequent to the time of the alleged bribery are admissible to throw light upon the prior conduct of the defendant and to confirm the evidence of the accomplices and to show that the defendant's vote was in fulfillment of the corrupt agreement charged. People *v.* O'Neil, 109 N. Y. 251, 16 N. E. 68.

Contract.—In a prosecution against a contractor for attempting to bribe the county board to order the construction of a "courthouse," the contract is admissible by way of corroboration. Rath *v.* State, 35 Tex. Crim. App. 142, 33 S. W. 229.

74. People *v.* O'Neil, 109 N. Y. 251, 16 N. E. 68.

must be shown,[75] and even then, though they may be admissible as against each other, they are not admissible against a defendant in a bribery suit when he is charged with a separate and distinct crime.[76]

V. BRIBERY OF WITNESS GROUND FOR NEW TRIAL.

In order to justify the setting aside of a verdict in favor of a party, on the ground that attempts were made to influence the witnesses, it must be shown that the persons making the attempts were in some way interested in the suit, and there must be some evidence that the act complained of had probably exerted some influence in obtaining the verdict,[77] and slight evidence is not sufficient.[78] Affidavits of jurors as to what takes place in the jury room are not admissible for the purpose of impeaching their verdict on the ground of bribery.[79]

75. People *v.* Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851.

76. State *v.* Gardiner, (Minn.), 92 N. W. 529.

77. Clay *v.* Council of Montgomery, 102 Ala. 297, 14 So. 646.

78. An affidavit made by a stranger to the trial to the effect that one of the witnesses said that he, the witness, had made $15.09 out of the trial, and could have gotten another fellow into making something out of it, but thought he had better not try it, is not sufficient ground for a new trial. State *v.* Taylor, 5 Ind. App. 29, 31 N. E. 543.

Evidence of one Fulton that one Mooney told him that one O'Leary, a witness for defendant, was paid for testifying as he did, when it does not appear how Mooney knew this fact, if it was a fact, and when it does appear from Fulton's own affidavit that when Mooney told this he was intoxicated, is not sufficient showing to justify a new trial. Bryson *v.* Chicago, B. & Q. R. Co., 89 Iowa 677, 57 N. W. 430.

79. State *v.* Durnam, 73 Minn. 150, 75 N. W. 1127.

BRIDGES.—See Highways.

BROKERS.—See Principal and Agent.

BUGGERY.—See Sodomy.

BURDEN OF PROOF.

By Edgar W. Camp.

SCOPE NOTE.

"Burden of Proof" is a subject constantly presenting itself in the law of evidence, and is discussed in many articles throughout these volumes in its special relations to the subject matter of such articles. The present article is an attempt to state the rules applicable to Burden of Proof generally, and with no intention or attempt to cite the cases that deal with the topic from the standpoint of some particular defense, such as Insanity or other particular matter of proof.

I. THE USES OF THE PHRASE.

1. Used in Two Senses. — The phrase "burden of proof" is used in two senses,[1] and confusion has resulted.[2] In fact, it is often

1. "The term 'burden of proof' is used in different senses. Sometimes it is used to signify the burden of making or meeting a *prima facie* case, and sometimes the burden of producing a preponderance of evidence. These burdens are often on the same party. But this is not necessarily or always the case. And it is by no means safe to infer that because a party has the burden of meeting a *prima facie* case, therefore he must have a preponderance of evidence. It may be sufficient for him to produce just enough evidence to counterbalance the evidence adduced against him. . . . The two burdens are distinct things. One may shift back and forth with the ebb and flow of the testimony. The other remains with the party upon whom it is cast by the pleadings—that is to say, with the party who has the affirmative of the issue." Scott *v.* Wood, 81 Cal. 398, 32 Pac. 871.

In Bell *v.* Skillicorn, 6 N. M. 399, 28 Pac. 768, the opinion quotes from Thompson on Trials as follows: "Those who have some definite conception of its meaning are unfortunately divided in opinion upon the two following propositions: The first is that so long as the evidence is directed to a single issue, or, more properly, to a single proposition of fact, the burden of proof never shifts, no matter how little evidence is adduced by the party sustaining the burden or how much is adduced by the opposing party. The other is that although the evidence may be directed to the same issue or proposition of fact, yet when the party who in the beginning sustains the burden in respect of such issue or proposition of fact introduces such evidence as, if believed, makes out what is frequently called a *prima facie* case—that is, shows that the proposition which he affirms is true—the burden of proof shifts upon the other party to rebut, or to avoid, the so-called *prima facie* case thus made." The opinion adds that the court believes the first proposition to be true and the latter one not inconsistent with it, and approves the views of Chief Justice Shaw, in Powers *v.* Russell, 13 Pick. 76.

Mr. Baron Parke, in Barry *v.* Butlin, 2 Moore P. C. 480, said: "The strict meaning of the term '*onus probandi*' is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him." But this statement is applicable to either of the two senses in which the phrase is used. See illustration of use of term in each sense in Meikel *v.* State Sav. Inst., 36 Ind. 355; Tedens *v.* Schumers, 112 Ill. 263; Ross *v.* Gould, 5 Me. 204; Campbell *v.* McCormac, 90 N. C. 491. "There is an indiscriminated use of the phrase, perhaps more common than either of the others." Thayer, Prelim. Treat., p. 335; Pease *v.* Cole, 53 Conn. 53, 55 Am. Rep. 53.

2. "There is confusion, some-

difficult or impossible to say in which sense, or in what sense, the term is used.[3]

2. Proposal to Discard the Term.—It has been suggested that some other phrase be substituted for burden of proof in one of its meanings.[4]

times, in treating of the burden of proof, arising out of unexact definitions." Farmers' Loan and Trust Co. *v.* Siefke, 144 N. Y. 354, 39 N. E. 358. See the two opinions in Abrath *v.* Northeastern R. Co., 11 Q. B. D. 440, in one of which it is denied that the burden of proof shifts and in the other it is said that the burden continually shifts.

"Properly it (burden of proof) is applied only to a party affirming some fact essential to the support of his case. Thus used, it never shifts from side to side during the trial. Loosely used, it is confounded with the *weight of evidence*—a very different thing, which often shifts from one side to the other as facts and presumptions appear and are overcome. And in this indiscriminate use of the term 'burden of proof' much of the apparent conflict in the cases has its origin." Pease *v.* Cole, 53 Conn. 53, 55 Am. Rep. 53.

"A great deal of discussion has been indulged in as to the meaning of the terms 'burden of proof' and 'preponderance of testimony'. It would seem that there ought not be any misunderstanding or confusion in the use of these terms. The weight or preponderance of testimony is that which turns the scales, which before its introduction were balanced. It might be defined as the excess over the amount of testimony necessary to balance the scales, and when we say the burden of proof is on a party we mean simply that he must furnish that excess before he is entitled to a verdict." McKenzie *v.* Oregon Imp. Co., 5 Wash. 409, 31 Pac. 748. See Prof. Thayer's note in Cases on Evidence, p. 44 *et seq,* and also his Preliminary Treatise on Evidence, ch. IX.

3. "Many judges seem to use the term (burden of proof) as a sort of jargon, without any definite conception of its real meaning." Bell *v.* Skillicorn, 6 N. M. 399, 28 Pac. 768, quoting from Thompson on Trials. In Tarbox *v.* Steamboat Co., 50 Me. 339, the court speaks of the distinction between the burden of proof, which "does not shift from the party upon whom it was originally thrown," and the "weight of evidence," which may be on one side or the other. Yet the court proceeds at once to use the term "burden of proof" instead of "weight of evidence," and then declares that there is no shifting of the burden as used in that sense. So it may be that the argument of Lord Blackburn in Dublin W. & W. R. Co. *v.* Slattery, 3 App. Cas. 1155, involves a conclusion as to the effect of the burden of proof used in one sense supported by a case (Ryder *v.* Wombwell) using the term in the other sense. In State *v.* Thornton, 10 S. D. 349, 73 N. W. 196, Justice Fuller, dissenting, said: "Every student of the law fully understands the exact import of the phrase 'burden of proof,' and every juror knows that a defendant in a criminal case upon whom it is imposed must make out his defense by the production of preponderating testimony." But the majority of the court held that the trial judge (presumably a student of the law) had used the term in another very different sense, and that every one of the twelve jurors had doubtless taken it in that other sense.

4. "It is said that the expression 'burden of proof' is capable of improvement. I do not doubt that it may be improved, but whoever attempts to improve it before a jury will be trying a dangerous experiment. It is a form of expression which has been used over and over again; it is a form of expression which is known to the class of persons from whom jurors are drawn, and which, explained as Cave, J., did explain it, is well understood by them; and although a more accurate expression might be found, there would be by extreme accuracy danger of puzzling inaccurate minds. In my opinion it is better to continue to use

3. Attempts to Limit to One Meaning. — And in Massachusetts it is attempted to confine the term to one meaning.[5] Judges in some other states seem inclined to follow Massachusetts in this.[6] But even in Massachusetts there are cases where the term seems to be used in a second sense.[7] It is useless to attempt to state the rules on this subject without recognizing the two meanings of the term; and this article is arranged on the theory that the two should be treated separately.

II. THE FIRST MEANING.

1. Nature of the Burden. — A. General Definition. — In the first sense, when it is said that the burden of proof is on "A," that means he will lose unless he shall at the close of the trial or other inquiry have brought down his end of the scale, by placing thereon a weight of evidence sufficient, first, to destroy the equilibrium, and second, to overbalance any weight of evidence placed on the other end.[8]

this expression." Abrath *v.* Northeastern R. Co., 11 Q. B. D. 440.

5. Sperry *v.* Wilcox, 1 Metc. (Mass.) 267; Central Bridge Corp. *v.* Butler, 2 Gray (Mass.) 130.

Powers *v.* Russell, 13 Pick. (Mass.) 69, is referred to as first establishing what is sometimes called the "Massachusetts rule" on burden of proof, holding that the burden does not shift, and consequently limiting the phrase to one meaning. But in that case Chief Justice Shaw spoke of the shifting of the burden where the party not having the burden, instead of limiting his proof to a denial of the adversary's case, introduced a new proposition avoiding the effect of the case made. But the Chief Justice, for illustration, supposed a state of facts, which, perhaps, does not involve a new proposition at all.

In McKenzie *v.* Oregon Imp. Co., 5 Wash. 409, 31 Pac. 748, the court in a lengthy opinion criticises what it denominates the Massachusetts rule concerning burden of proof enunciated in Powers *v.* Russell, 13 Pick. (Mass.) 69, and says that the distinctions suggested in that case tend to confuse rather than to enlighten, and that no good reason can be given for their observation. That in Massachusetts where the principle announced in Powers *v.* Russell, 13 Pick. (Mass.) 69, is most strictly adhered to, a confusion has arisen and conflicting decisions have been made by attempting to maintain these separate distinctions. Possibly the criticism is meant to be limited to the rule in Massachusetts that the plaintiff in a suit on a promissory note has the burden of proving consideration.

6. In a recent case in Maine, Buswell *v.* Fuller, 89 Me. 600, 36 Atl. 1059, the phrase "burden of evidence" is substituted for the second meaning (as given in this article) of the term "burden of proof." So the phrase "weight of evidence" is used in Pease *v.* Cole, 53 Conn. 53, 55 Am. Rep. 53. See also Tarbox *v.* Steamboat Co., 50 Me. 330; Marshall Livery Co. *v.* McKelvy, 55 Mo. App. 240.

"Where there is testimony on both sides of a case, the decision is to be given by the weight of evidence, and not by the legal doctrine about burden of proof." Andrews *v.* Landers, 16 N. S. (Russ. & G., vol. IV.) 236.

7. Com. *v.* York, 9 Metc. (Mass.) 93, opinion of Justice Wilde; Davis *v.* Jenney, 1 Metc. (Mass.) 221, as to which see the remarks of Justice Endicott in Simpson *v.* Davis, 119 Mass. 269, 20 Am. Rep. 324.

8. *California.* —Scott *v.* Wood, 81 Cal. 398, 32 Pac. 871.

Connecticut. — Pease *v.* Cole, 53 Conn. 53, 55 Am. Rep. 53.

a. *Applied to Issues Joined.*—In this sense the burden is sometimes called the "burden of the issue" or "record."[9] Where one is said to have the burden of proof upon an issue it means upon the entire proposition affirmed and denied.[10] The burden of proof as to each issue must be treated as a separate thing.[11] But it is the burden of proving the proposition as a whole—that is, the party having the burden of proving the proposition does not have the burden of disproving any particular facts attempted to be shown furnishing inferences against such proposition, unless of course the inference would be conclusive.[12]

Kansas.—Piper *v.* Matkins, 8 Kan. App. 215, 55 Pac. 487.

Maine.—Ross *v.* Gould, 5 Me. 204.

New Hampshire.—Eastman *v.* Gould, 63 N. H. 89.

New York.—Farmers' Loan & Trust Co. *v.* Siefke, 144 N. Y. 354. 39 N. E. 358.

Texas.—Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356.

Washington.—McKenzie *v.* Oregon Imp. Co., 5 Wash. 409, 31 Pac. 748.

9. Meikel *v.* State Sav. Inst., 36 Ind. 355.

10. Gay *v.* Bates, 99 Mass. 263; Wilder *v.* Cowles, 100 Mass. 487; Simpson *v.* Davis, 119 Mass. 269, 20 Am. Rep. 324; Burnham *v.* Noyes, 125 Mass. 85; Berringer *v.* Lake S. I. Co., 41 Mich. 305, 2 N. W. 18; White *v.* Campbell, 25 Mich. 463.

In Burton *v.* Blin, 23 Vt. 151, the court said it is not common to separate the same proposition into its elements in order to shift the burden of proof.

Abrath *v.* Northeastern R. Co., 11 Q. B. D. 440, was an action for malicious prosecution. Brett, M. R., said that it was necessary for the plaintiff to show want of probable cause, and it became a necessary part of the question whether there was an absence of reasonable cause to determine whether reasonable care was taken by the defendants to inform themselves of the true state of the facts; that the question of reasonable care is not merely a piece of evidence to prove some fact, but a question which is itself to be decided by evidence. The burden of proving that minor proposition, as well as the whole proposition, lay upon the plaintiff because the proof of want of reasonable care is a necessary part of the larger question, namely, that there was a want of reasonable and probable cause to institute the prosecution. But see Pratt *v.* Beaupre, 13 Minn. 177.

11. Shearman *v.* Hart. 14 Abb. Pr. (N. Y.) 358; Powers *v.* Russell, 13 Pick. (Mass.) 69; Simpson *v.* Davis, 119 Mass. 269, 20 Am. Rep. 324; Wilder *v.* Cowles, 100 Mass. 487; Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142; Crowninshield *v.* Crowninshield, 2 Gray (Mass.) 524.

12. An action was brought to recover on the implied warranty of the genuineness of an indorsement on a note. The defendant did not question the fact that the indorsement was forged, but alleged that in selling the note he had acted only as agent for one Lane, and that that fact was made known to the plaintiff. Evidence tending to establish the defendant's position was introduced. The trial court charged: (Plaintiff) "is bound to show to your satisfaction that at the time of the transaction he was ignorant that the defendant was dealing for Lane." The supreme court said: "The burden upon the plaintiff is co-extensive only with the legal proposition upon which his case rests. It applies to every fact which is essential or necessarily involved in that proposition. It does not apply to facts relied upon in defense to establish an independent proposition, however inconsistent it may be with that upon which the plaintiff's case depends. It is for the defendant to furnish proof of such facts; and when he has done so the burden is upon the plaintiff not to disprove those particular facts, nor the proposition which they tend to

b. *Applied to Other Matters.* — But the rule applies not only to facts put in issue by pleadings, but to matters arising incidentally in the progress of a cause and requiring proof. Thus one has the burden of proving the facts entitling him to use a certain kind of evidence,[13] or to prove some other fact.[14]

B. The Burden Does Not Shift. — This burden is in its nature fixed and never shifts,[15] for after all the evidence is in, the one

establish, but to maintain the proposition upon which his own case rests, notwithstanding such controlling testimony, and upon the whole evidence in the case. The distinction may be narrow, but it is real and may often be decisive. To apply it to this case, the burden upon the plaintiff is to prove a contract with the defendant; not to disprove a contract with Lane, nor to disprove any of the facts from which the contract with Lane might be inferred." Wilder *v.* Cowles, 100 Mass. 487.

13. *See* the article "Best and Secondary Evidence."

14. Preliminary Proof to Admit a Dying Declaration. — Peak *v.* State, 50 N. J. Law 179, 12 Atl. 701; People *v.* Taylor, 59 Cal. 640; Reg. *v.* Jenkins, L. R. 1 C. C. 187.

15. *England.* — Hingeston *v.* Kelly. 18 L. J. Ex. 360.

Connecticut. — Pease *v.* Cole, 53 Conn. 53, 55 Am. Rep. 53.

Illinois. — Hopps *v.* People, 31 Ill. 385, 83 Am. Dec. 231.

Kansas. —Piper *v.* Matkins, 8 Kan. App. 215, 55 Pac. 487.

Maine. — Buswell *v.* Fuller, 89 Me. 600, 36 Atl. 1059; Jones *v.* Ins. Co., 90 Me. 40, 37 Atl. 326; Tarbox *v.* Steamboat Co., 50 Me. 320; State *v.* Flye, 26 Me. 312.

Massachusetts. — Willitt *v.* Rich, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684; Blanchard *v.* Young, 11 Cush. 341; Central B. Corp. *v.* Butler, 2 Gray (Mass.) 130; Brown *v.* King, 5 Metc. 173; Nichols *v.* Munsel, 115 Mass. 567; Burnham *v.* Noyes, 125 Mass. 85; Powers *v.* Russell, 13 Pick. 69; Crowninshield *v.* Crowninshield, 2 Gray 524.

Missouri. — Long *v.* Long, 44 Mo. App. 141; Marshall Livery Co. *v.* McKelvy, 55 Mo. App. 240.

New Hampshire. — Benton *v.* Burbank, 54 N. H. 583; Eastman *v.* Gould, 63 N. H. 89.

New York. — Jones *v.* Union R. Co., 18 App. Div. 267, 46 N. Y. Supp. 321; Wiley *v.* Boudy, 23 Misc. 658, 52 N. Y. Supp. 68; Claflin *v.* Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Heinemann *v.* Heard, 62 N. Y. 448; Blunt *v.* Barrett, 124 N. Y. 117, 26 N. E. 318; Farmers' L. & T. Co. *v.* Siefke, 144 N. Y. 354, 39 N. E. 358; Whitlatch *v.* Fidelity & C. Co., 149 N. Y. 45, 43 N. E. 405.

Texas. — Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356.

The court was asked to instruct the jury that if the plaintiff established that he was insane, at some time before the making of the note, then the burden of proof was cast upon the defendant to show that the plaintiff was sane at the time of the execution of the note, and it was held that the court properly refused so to instruct; that the burden of proving insanity at a time stated cannot shift from the party who has alleged it. The proof of former insanity may be enough, but when all the evidence pro and con has been heard, including the prior insanity, which is only an item of evidence on the point, the decision must be against him who alleged the insanity, unless the preponderance of all the evidence is with him.

It may be doubtful whether it is accurate to say that the burden of a particular affirmative issue ever shifts in the course of a trial. The necessity for offering further evidence in respect to it may change from one side to another, but this is quite a different thing from a change of the burden of the issue itself. Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142.

The law doubtless is that the burden of proof is upon the party having the affirmative of the issue. This burden of proof never shifts; the burden is never upon the defendant to prove the contrary. It is true

having the burden will lose unless the evidence bears more heavily in his favor.[16] There are some cases that speak of the shifting of

that as the case progresses the burden of going forward with the evidence may shift to the defendant, but after the evidence is all concluded, the burden of proof still rests upon the plaintiff as to all matters upon which he founds his claim, and an instruction that says that it is first the duty of the plaintiff to make it clear to your minds that he is right, and then it devolves upon the defendant to show that he is not right, is erroneous, as it indicated that there was a duty upon the defendant to adduce a preponderance of evidence, whereas he should win if the evidence is equally balanced. Piper *v.* Matkins, 8 Kan. App. 215, 55 Pac. 487.

16. The plaintiff may give *prima facie* evidence, which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favor. The defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts. The jury have to consider upon the evidence given upon both sides, whether they are satisfied in favor of the plaintiff with respect to the question which he calls upon them to answer. If the jury after considering the evidence are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff; if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

The instruction of the court amounted to this: "If after consideration you remain in doubt how the questions which I have put to you ought to be answered, I tell you that the burden of proof lies upon the plaintiff, and if either the plaintiff's evidence or the defendant's evidence added to the plaintiff's has really left you in doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him." Opinion of Brett, M. R., in Abrath *v.* Northeastern R. Co., 11 Q. B. D. 440.

"During the progress of a trial it often happens that a party gives evidence tending to establish his allegation, sufficient, it may be, to establish it *prima facie,* and it is sometimes said the burden of proof is then shifted. All that is meant by this is, that there is a necessity of evidence to answer the *prima facie* case, or it will prevail, but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial." Heinemann *v.* Heard, 62 N. Y. 448.

"It is very common to say that the burden is upon the defendant to establish forgery or alteration of a note sued on, or other matters proper under general denial. All that this can properly mean is that, when the plaintiff has established a *prima facie* case, the defendant is bound to controvert it by evidence; otherwise, he will be cast in judgment. When such evidence is given, and the case, upon the whole evidence — that for and that against the fact asserted by the plaintiff — is submitted to court or jury, then the question of the burden of proof as to any fact, in its proper sense, arises, and rests upon the party upon whom it was at the outset, and is not shifted by the course of the trial; and the jury may be properly instructed that all material issues tendered by the plaintiff must be established by him by a preponderance of evidence." Farmers' L. & T. Co. *v.* Siefke, 144 N. Y. 354, 39 N. E. 358. See also Whitlach *v.* Fidelity & C. Co., 149 N. Y. 45, 43 N. E. 405.

"Strictly and legally speaking we understand that, so long as the evidence is directed to the same proposition of fact, the burden of proof is never shifted from the party who has it in the first instance." Long *v.* Long, 44 Mo. App. 141; Marshall Livery Co. *v.* McKelvy, 55 Mo. App. 240. "It is true that the onus of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether

the burden of proof, using the term apparently in the sense above indicated.[17] But it is always possible that the phrase is used in such cases in its second meaning as hereinafter stated. And the later cases show that the fixed and unchangeable nature of the initial burden is now generally recognized.[18]

C. Sufficiency of Evidence to Overcome. — a. *Civil Cases.* **(1) Generally.** — In civil cases the party on whom is the burden of proof need, generally, only produce a preponderance of evidence.[19]

the person who is bound to prove the affirmative of the issue . . . has discharged himself of that burden." Lord Halsbury in Wakelin *v.* London & S. W. R. Co., 12 App. Cas. 41. But Lord Watson, in the same case, seems to speak of a shifting of the burden of proof in a different sense, contrary to the statement in the text.

17. Meikel *v.* State Sav. Inst., 36 Ind. 355; De La Chaise *v.* Maginnis, 44 La. Ann. 1043, 11 So. 715; Kelley *v.* Owens, (Cal.), 30 Pac. 596; McKenzie *v.* Oregon Imp. Co., 5 Wash. 409, 31 Pac. 748; Cook *v.* Cook, 53 Barb. (N. Y.) 180; Campbell *v.* McCormac, 90 N. C. 491.

In Tarbox *v.* Steamboat Co., 50 Me. 339, it was held that in an action on the case against a carrier for negligence in transporting goods, it being shown that they were in bad order when delivered, and there being evidence that the carrier received them in good order, the burden shifted to and remained upon the carrier to show that the goods were in bad order when received.

Onus Cast on Carrier to Disprove Negligence. — Mr. Justice Gordon approved an instruction to the effect that where a passenger is injured by any accident arising from a collision or defect in machinery, he is required in the first place to prove no more than the fact of the accident and the extent of the injuries; that a *prima facie* case is thus made out, and the onus is cast upon the carrier to disprove negligence; that the *prima facie* presumption of negligence might be overthrown by proof to the satisfaction of the jury that the injury complained of resulted from unavoidable accident or from something against which no human prudence or foresight could provide, and he quotes from the case of Laing *v.* Colder, 8 Barr 479, that the mere happening of an injurious accident raises a presumption of negligence and throws upon the carrier the onus of showing it did not exist. And also quotes from the case of Delaware L. & W. R. Co. *v.* Napheys, 9 Norris 135, where Mr. Justice Sterrett said that a *prima facie* case of negligence being made out, the onus is cast upon the carrier to disprove negligence. Philadelphia & R. R. Co. *v.* Anderson, 94 Pa. St. 351, 39 Am. Rep. 787.

18. See cases cited in the notes 15 and 16.

It sometimes occurs in the progress of a trial that a party holding the affirmative of the issue, and consequently bound to prove it, introduces evidence which uncontradicted proves the fact alleged by him. It has in such cases frequently been said that the burden of proof was changed to the other side, but it was never intended thereby that the party bound to prove the facts was relieved from this, and that the other party to entitle him to a verdict was required to satisfy the jury that the fact was not as alleged by his adversary. In such cases the party holding the affirmative is still bound to satisfy the jury affirmatively of the truth of the fact alleged by him, or he is not entitled to a verdict. Lamb *v.* Camden & A. R. & T. Co., 46 N. Y. 271, 7 Am. Rep. 327.

19. *Alabama.* — State *v.* Marler, 2 Ala. 43, 36 Am. Dec. 398 (obiter).

Illinois. — Watt *v.* Kirby, 15 Ill. 200; Kihlholz *v.* Wolf, 103 Ill. 362; Union Nat. Bank *v.* Baldenwick, 45 Ill. 375; Broughton *v.* Smart, 59 Ill. 440.

Kentucky. — Aetna Ins. Co. *v.* Johnson, 11 Bush 587, 21 Am. Rep. 223.

Maine. — Thayer *v.* Boyle, 30 Me.

(A.) Error to Require More. — It has repeatedly been held error to require more than a preponderance.[20]

(B.) Need Not Be Satisfactory. — The proof need not be to the satisfaction of the jury,[21] except as it may be said that a mere preponderance of evidence is satisfactory proof.[22]

(C.) Same When Circumstantial. — Even when the evidence is circumstantial a preponderance suffices.[23]

(D.) To Sustain Negative. — It is held that the *quantum* of evi-

475; Gile *v.* Sawtelle, 94 Me. 46, 46 Atl. 786.

Massachusetts. — Schmidt *v.* New York U. M. F. Ins. Co., 1 Gray 529.

Michigan. — Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668.

Ohio. — Strader *v.* Mullane, 17 Ohio St. 624.

Texas. — Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356.

Vermont. — Bradish *v.* Bliss, 35 Vt. 326.

Wisconsin. — Washington U. Ins. Co. *v.* Wilson, 7 Wis. 169.

20. Satisfactory Proof Not Required. — "Juries are required in civil cases to decide facts upon the weight or preponderance of the evidence, and this, too, where the proof does not show the fact in question to the satisfaction of the jury. In such cases the jury may find any given fact in a given way, upon their judgment as to the weight or preponderance of the evidence, though they may have reasonable doubts as to the real truth. The law in such cases does not demand that every material allegation be established to the satisfaction of the jury, and it was error to tell the jury so in the instruction." The instruction referred to proof that plaintiff was not guilty of contributory negligence. Stratton *v.* Central C. H. R. Co., 95 Ill. 25.

Clear Preponderance Not to Be Required. — On an issue of payment the trial court instructed the jury that a "clear preponderance" of the evidence was required to justify a finding of payment. The appellate court said: "In a civil case the party upon whom the burden of proving the affirmative of an issue is cast, is only required to establish it by a preponderance of the evidence; it is sufficient if the weight of evidence inclines to his side. The requirement of a "clear preponderance implies, and would be likely to be understood by the jury as requiring, something more satisfactory, convincing and decisive than a mere inclining of the scales." Harnish *v.* Hicks, 71 Ill. App. 551.

An instruction that one "was bound to prove to the satisfaction of the jury by a clear preponderance" is error. "The law only requires that a preponderance of evidence shall be in favor of the plaintiff." Mitchell *v.* Hindman, 150 Ill. 538, 37 N. E. 916.

21. Stratton *v.* Central C. H. R. Co., 95 Ill. 25; Harnish *v.* Hicks, 71 Ill. App. 551.

22. Preponderance Supposed to Convince. — "Under the code, the preponderance of evidence is considered sufficient to produce mental conviction in civil cases. . . . It is enough if the evidence satisfies the jury of the truth of the existence of the facts testified to by the weight or preponderance of it." Clark *v.* Cassidy, 62 Ga. 407.

Balance of Proof Often Sufficient. "Doubtless in all cases the affirmative must be satisfactorily made out by proof, except where the affirmative is presumed as matter of law; a satisfaction which is the result of a careful, conscientious examination of evidence. . . . (In civil cases) the balance of proof is sufficient often for a verdict, and not unfrequently is all that can be obtained by the party." *Dictum* in Munson *v.* Atwood, 30 Conn. 102.

See Rippey *v.* Miller, 1 Jones Law (N. C.) 479, 62 Am. Dec. 177; Neal *v.* Fesperman, 1 Jones Law (N. C.) 446.

23. Rippey *v.* Miller, 1 Jones Law (N. C.) 479, 62 Am. Dec. 177. *See* the article "Circumstantial Evidence."

dence required to sustain a negative is sometimes less than to establish an affirmative.[24]

(E.) Facts Within Opponent's Knowledge. — Less proof may be required where the facts are peculiarly within the adversary's knowledge.[25]

(F.) To Meet Denial On Information. — And it has been held that where a denial, or an assertion which is in effect a denial, is stated to be a matter of opinion or belief, the proof in support of the proposition denied may be less stringent and conclusive than where the denial is made upon knowledge.[26]

(G.) Less Than Preponderance Insufficient. — Yet apparently it is never sufficient to supply less than a preponderance of evidence; so that if the evidence of the parties, taking into consideration all applicable presumptions, is of equal weight, the one having the burden loses.[27]

24. Thayer *v.* Viles, 23 Vt. 494; U. S. *v.* South C. C. & T. Co., 18 Fed. 273; Phelps *v.* Hughes, 1 La. Ann. 320; King *v.* Atkins, 33 La. Ann. 1057; Information *v.* Oliver, 21 S. C. 318, 53 Am. Rep. 681.

"**The Averment of Neglect of Official Duty,** though negative, ought, it would seem, to be supported by some proof on the part of the plaintiff, since a breach of duty is not to be presumed; but from the nature of the case, very slight evidence will be sufficient to devolve on the defendant the burden of proving that his duty has been performed." Dobbs *v.* The Justices, 17 Ga. 624.

Negativing Existence of Accretion. The defendant pleaded title in himself, in establishing which it became necessary for him to prove that no batture existed. The court held that as this involved proof of a negative, demonstrative evidence was not required. De La Chaise *v.* Maginnis, 44 La. Ann. 1043, 11 So. 715.

That Process Was Not Valuable. Kelley *v.* Owens, (Cal.), 30 Pac. 596, was an action to rescind an agreement for the sale of land, on the ground that it had been induced by fraud, the fraud consisting in misrepresentations concerning an alleged process for making steel. The complaint averred that it had been represented that the process was a new method for the cheap manufacture at great profit of a superior quality of fine steel and merchantable iron. The court said the burden was on the plaintiff to prove his negative allegation, to-wit, that the process was not as represented, that being the foundation of his action, but that the degree of proof of a negative allegation is seldom measured by that required on an affirmative allegation. In some cases a negative may be positively and conclusively proved, and in such cases the general rule laid down in § 1869, Code of Civ. Pro., must be complied with.

25. Dederich *v.* McAllister, 49 How. Pr. (N. Y.) 351.

26. Givens *v.* Tidmore, 8 Ala. 745.

27. Piper *v.* Matkins, 8 Kan. App. 215, 55 Pac. 487; Broughton *v.* Samart, 59 Ill. 440; Raines *v.* Totman, 64 How. Pr. (N. Y.) 493; Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356.

"But he must produce that. The jury should not be given to understand that he has some duty less than the ordinary burden of proving by the greater weight of evidence." Gile *v.* Sawtelle, 94 Me. 46, 46 Atl. 786.

Intrinsic Probability Alone Not Enough. — "As such a (depreciated) currency is frequently loaned, and but seldom sold on credit, and as loans of it may be easily disguised in the exterior semblance of formal sales, and laws against usury thus easily evaded, courts should incline to consider all advances of commonwealth notes on credit, as loans; and should require only slight circumstances to defeat the plan of sale. But some

(H.) Facts Impossible of Proof. — And if a fact is incapable of proof the one having the burden loses.[28] And this may prevent one who is certainly entitled to a share in a fund from gaining it, he being unable to show to which of two equal shares he is entitled, or under which of two claims he is entitled to the same share.[29]

(2.) Cases Denying Rule of Preponderance. — (A.) Generally. — The rule that a mere preponderance suffices in civil cases has been denied.[30] And in many cases more has been required to over-

extraneous fact or circumstance should be shown before a chancellor should convict a party of usury; when he may sell, a court cannot presume that he loaned, merely because a loan is intrinsically more probable than a sale." Breeding *v.* Stoneman, 6 J. J. Marsh. (Ky.) 376.

Testimony of Parties Opposed, no Corroboration.—The burden of proof was upon the plaintiff, who testified positively to the facts making out his case. The defendant positively denied the existence of the facts. The court held that the testimony being in equilibrium, the plaintiff must fail. There was no corroboration on either side. Hanson *v.* Stephenson, 32 Iowa 129.

Only One Witness on Each Side and of Equal Credibility. — In an action to enforce a vendor's lien, defendant pleaded misrepresentation. It was held that the burden of proof was upon him, and that as only two witnesses were examined, and their testimony was diametrically opposed, and there was nothing to show that one of the witnesses was more correct than the other, nothing authorized the court to give credence to the one rather than the other; it was therefore held that the charge of misrepresentation was not proved. Joseph *v.* Seward, 91 Ala. 597, 8 So. 682.

Where one party who has the burden of proof swears unqualifiedly and explicitly in support of his contention, and the other party as unqualifiedly and explicitly swears to a contrary state of facts, and there is no evidence in the case corroborating the party who has the burden of proof, he fails to make his case. Campbell Prtg. P. & Mfg. Co. *v.* Yorkston, 11 Misc. 340, 32 N. Y. Supp. 263.

28. Newell *v.* Nichols, 75 N. Y. 78, 31 Am. Rep. 424; Wing *v.* Angrave, 8 H. L. 183.

29. Wing *v.* Angrave, 8 H. L. 183. But as to the point that one who is clearly entitled to recover on one of two grounds, will lose if he cannot establish one of them, Lord Cranworth's *dictum* in this case is to the contrary.

Survivorship in the Same Shipwreck. — Under the laws of New York there is no presumption as to survivorship. It was insisted, however, upon the part of the claimant, that it made no difference to his rights which of the two persons survived the other, as the claimant would inherit the same in either case. The court held that a party cannot successfully claim that he is entitled to one thing or the other, and as they are alike he will take either, but that he held the affirmative and must establish his title to some specific share, or interest, which cannot be done by an alternative claim, and quoted Lord Chelmsford in Wing *v.* Angrave, 8 H. L. 183, as follows: "If different persons had been entitled under the two wills, each must ever establish his claim solely by the will in his favor independently of the other, and no difference can be made in the rules of evidence because the applicant accidently happened to be the ultimate legatee in each will." Newell *v.* Nichols, 75 N. Y. 78, 31 Am. Rep. 424.

30. See remarks of Justice Hitchcock in Lexington F. L. & M. Ins. Co. *v.* Paver, 16 Ohio 324, and of Justice Wilde in Com. *v.* York, 9 Metc. (Mass.) 93.

No General Rule That Preponderance Suffices. — In Mays *v.* Williams, 27 Ala. 267, it is said that a charge that in civil cases the jury must find according to the "preponderance of

come the burden of proof.[31]

(B.) Fraud and Mistake. — When fraud[32] or mistake is to be proved some cases hold that more than mere preponderance is

the testimony" lays down the rule too broadly. That facts necessary to be established must be *proved*. That it cannot be said what degree or quantity of evidence amounts to proof, for it depends on the effect it has on the mind; but it would be unjust to charge a defendant with a heavy debt, when the preponderance of evidence merely inclined the mind of the jury to the side of the plaintiff; or to mulct a man in heavy damages when the evidence, although it preponderated against him, left the minds of the jury in a state of great doubt and uncertainty whether he was the person who committed the act complained of. Much depends upon the nature of the fact to be established; the amount of evidence varies as the fact is more or less improbable in itself that no matter what the preponderance of testimony, if it failed to produce a rational belief in the minds of the jury as to the existence of the fact, it cannot be said to be proved. Evidence may be admissible, but sufficient to produce only the lowest degree of belief, and the fact might not be regarded as established, although no evidence to the contrary is adduced. There can be no definite standard as to the quantity of testimony. In the absence of presumptions, it is for the jury to determine the amount required. The court cannot lay down an arbitrary rule forcing them to determine the existence of facts against their convictions.

Proof to Suffice Must Generate Belief. — "It cannot be said there is proof when the evidence fails to generate a rational belief of the existence of a disputed fact." Lehman *v.* McQueen, 65 Ala. 570; Brandon *v.* Cabiness, 10 Ala. 155.

"When upon a party the law casts the burden and duty of proving a particular fact, if he fails to give evidence of it, the non-existence of the fact is assumed. Or if the evidence in reference to the fact is equally balanced, or if it does not generate a rational belief of the existence of the fact, leaving the mind in a state of doubt and uncertainty, the party affirming its existence must fail for want of proof." McWilliams *v.* Phillips, 71 Ala. 80.

31. Showing Deed to Be Mortgage. — It is the rule that the burden to show that a deed absolute on its face is a mortgage can be lifted only by proof "clear and convincing," to overcome the presumption of law that the paper is what it purports to be. Bentley *v.* O'Bryan, 111 Ill. 53. The evidence must be "entirely satisfactory, if not conclusive." Eames *v.* Hardin, 111 Ill. 634.

One Claiming Real Estate by Payment of Taxes under color of title must establish the facts by proof "clear and convincing." Hurlbut *v.* Bradford, 109 Ill. 397.

Certificate of Acknowledgment of a deed can be overcome only by "clear, convincing and satisfactory proof." Warrick *v.* Hull, 102 Ill. 280.

Showing Title in Third Person. — The plaintiff had shown *prima facie* a good title to recover. The defendant set up no title in himself, and sought to maintain his position as a mere intruder by setting up a title in third persons with whom he had no privity. In such a case it is incumbent upon the party setting up the defense to establish the existence of such outstanding title beyond controversy. It is not sufficient for him to show that there may possibly be such a title. If he leaves it in doubt that is enough for the plaintiff. Greenleaf *v.* Birth, 6 Pet. (U. S.) 302.

Overcoming Recital of Consideration. — Where a contract recites a consideration the effect of the recital can be overcome only by a "clear preponderance" of evidence. McFarlane *v.* Williams, 107 Ill. 33.

32. Pratt *v.* Pratt, 96 Ill. 184; Greenwood *v.* Lowe, 7 La. Ann. 197. *Contra.* — Strader *v.* Mullane, 17 Ohio St. 624.

required.[33]

(C.) Gross Negligence. — Full proof has been required to establish gross negligence.[34]

(D.) Explanation of Such Rulings. — Perhaps the cases requiring more than a preponderance are to be explained on the theory that a presumption against the existence of certain facts is added to the ordinary burden of proving a fact.[35] And so it is said that more than a preponderance is required to disprove a legal right once admitted or established, or to rebut a presumption of law.[36]

"Where a fraudulent or criminal act is pleaded in a civil action, it may be established by a mere preponderance of evidence." Coit *v.* Churchill, 16 Iowa 147, 16 N. W. 147. See also Bissell *v.* Wert, 35 Ind. 54.

Establishing One's Own Fraud. In Payne *v.* Solomon, 19 Fed. Cas. No. 10,856, Solomon sought to establish his own fraud, and it was held that for this only a preponderance of evidence was requisite.

Must Fraud Be Proved Beyond Reasonable Doubt. — In Young *v.* Edwards, 72 Pa. St. 257, there was an issue of fraud and misrepresentation; the court had said to the jury that the evidence of false representation must be clear and explicit; must lead to a satisfactory and certain conclusion. The Supreme Court said that if by "certain conclusion" the court meant a conclusion in regard to which there must be no doubt resting on the minds of the jury, it needs no argument or authority to show that the instructions are erroneous. In civil cases the jury determine facts according to the weight of evidence, and not by its sufficiency to produce conviction of the absolute certainty of the conclusion arrived at. In most cases of conflicting evidence such a degree or amount of proof would not be attainable. It would amount to a denial of justice. If the evidence is sufficient to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest, it is all that the law requires; however such conviction may come short of absolute certainty; there is nothing peculiar in the determination of a question of fraud that makes it an exception to the general rule; where there is evidence of fraud its existence must be determined like any other fact. If the evidence satisfies an unprejudiced mind beyond reasonable doubt, it is sufficient.

This opinion seems to lay down contradictory rules in saying that fraud is to be determined like any other fact and then apparently holding that it must be proved beyond a reasonable doubt.

33. "**Clear Testimony**" required to prove mistake in account stated. First Nat. Bank *v.* Haight, 55 Ill. 191. In some cases, as in proving mistake, the burden of proof is not met by a mere preponderance of the evidence, but there must be clear and convincing proof. Pollock *v.* Warwick, 104 N. C. 638, 10 S. E. 699. But see Knisely *v.* Sampson, 100 Ill. 573.

34. Butman *v.* Hobbs, 35 Me. 227.

35. Presumption of Sanity. "When unsoundness of mind is alleged as a ground for setting aside a deed, the fact must be established with reasonable certainty. If there is only a balance of evidence, or a mere doubt of the sanity of the maker of the deed, the presumption in favor of sanity must turn the scale in favor of its validity. To destroy the binding effect of the deed, the evidence must decidedly preponderate." Myatt *v.* Walker, 44 Ill. 485.

36. Thayer *v.* Boyle, 30 Me. 475; Pennell *v.* Cummings, 75 Me. 163.

But this may be only another way of saying that in determining on which side evidence preponderates, the presumptions or the facts giving rise to the presumptions, are to be considered; see remark to that effect in Knowles *v.* Scribner, 57 Me. 495.

(3.) Proving Crime in Civil Cases. — (A.) CASES REQUIRING PROOF BEYOND DOUBT. — When in a civil case it becomes necessary to prove the commission of a crime some courts hold that it must be proved beyond a reasonable doubt,[37] or to the satisfaction of the jury, so

37. *Indiana.* — Bissell *v.* Wert, 35 Ind. 54; Byrket *v.* Monohon, 7 Blackf. 83, 41 Am. Dec. 212; Wonderly *v.* Noakes, 8 Blackf. 589; Gants *v.* Vinard, 1 Ind. 476; Tucker *v.* Call, 45 Ind. 31; Tull *v.* David, 27 Ind. 377; Swails *v.* Butcher, 2 Ind. 84.

Iowa. — Forshee *v.* Abrams, 2 Iowa 571; Fountain *v.* West, 23 Iowa 9, 92 Am. Dec. 405; Ellis *v.* Lindley, 38 Iowa 461; Barton *v.* Thompson, 46 Iowa 30, 26 Am. Rep. 131, but see Welsh *v.* Jugenheimer, 56 Iowa 11, 8 N. W. 673, 41 Am. Rep. 77, overruling this case.

Maine. — Thayer *v.* Boyle, 30 Me. 475; Butman *v.* Hobbs, 35 Me. 227. But see Knowles *v.* Scribner, 57 Me. 495, limiting Thayer *v.* Boyle, 30 Me. 475, and Ellis *v.* Buzzell, 60 Me. 209, 11 Am. Rep. 204, stating the contrary rule.

New York. — Clark *v.* Dibble, 16 Wend. 601.

In Washington U. Ins. Co. *v.* Wilson, 7 Wis. 169, it was held that in such cases, as in others, a preponderance of evidence sufficed. This was questioned in Pryce *v.* Security Ins. Co., 29 Wis. 270, and the rule of the text announced in Freeman *v.* Freeman, 31 Wis. 235, in an action for divorce on ground of adultery, where the evidence was circumstantial. But in Blaeser *v.* Milwaukee M. & M. Ins. Co., 37 Wis., 31, the ruling in Washington Ins. Co. *v.* Wilson was approved and the rule in Freeman *v.* Freeman limited to divorce cases.

Adultery in Suit for Divorce must be proved beyond a reasonable doubt. Berckmans *v.* Berckmans, 17 N. J. Eq. 453. *See* the article "DIVORCE."

Jury Must Be Satisfied. — "In all cases, whether civil or criminal, the jury must be satisfied, must be convinced that the fact is as they find it to be. And how can they be satisfied and convinced, so long as doubts exist in their minds as to the truth of such fact. Under such circumstances, I should not dare to direct a jury that they were bound to find the truth of such fact; but should unquestionably say to them that the doubt must operate in favor of him who held the negative of the issue to be passed upon." Lexington F. L. & M. Ins. Co. *v.* Paver, 16 Ohio 324. The rule in this case is approved in a *dictum* in Strader *v.* Mullane, 17 Ohio St. 624.

Greater Precision May Be Necessary Than in Criminal Case. Lanter *v.* McEwen, 8 Blackf. (Ind.) 495, was a case of slander and plea of justification. The court said: "There seems to be little, if any, difference between the evidence required in proof of a specific charge alleged in the course of a civil proceeding, and the evidence which would be essential to support an indictment for the same charge. It is said indeed that greater precision may be necessary in the former case than in the latter, as variances as to particulars which would not be fatal upon an indictment, might be so upon the issue taken on a plea of justification in slander."

Reason for the Rule in Slander and Libel. — Polston *v.* See, 54 Mo. 291, was an action for slander and a plea of justification. The jury were instructed that if they had a reasonable doubt of the plaintiff's guilt under the plea of justification they must find the issues for him. The majority opinion of the supreme court said that the question had not been directly passed upon in that court, but that the legal profession of the state had acted on the assumption that it was the settled law; that it had the support of the English authorities, and probably of the majority of the American courts. The reason of the rule is that a verdict on the question of guilt or innocence has at least the same moral force as a verdict in a criminal trial for the same offense. There seems to be no other civil case where a verdict has the same moral force, and the court differentiates

that the fact is not left in doubt.[38] Such is the rule in England.[39] This burden has been most commonly put upon defendants pleading justification in actions for slander or libel, where the alleged slander or libel charges a crime.[40] And less generally in cases where fire insurance companies defend against a claim for loss on the ground that the plaintiff willfully set the fire.[41] Some of the cases ruling against the need of proof beyond a reasonable doubt, in the latter class of cases, do so on the ground that the defense does not necessarily involve a charge of crime.[42] And it has been held that to bring any case within the rule there must be a specific charge of crime.[43] The rule has been extended to actions to recover a statutory penalty.[44]

(B.) Cases Requiring Only Preponderance. — But the cases are by

cases of trespass on the ground that in such cases the intent to steal need not be proved, whereas under the plea of justification the criminal intent is part of the case. Judge Sherwood dissented.

38. Sperry *v.* Wilcox, 1 Metc. (Mass.) 267.

39. Defense of Arson in Action on Policy. — Where an insurance company, defendant in an action on its policy, sets up that the fire was willfully set by plaintiff, it has the burden of establishing such defense beyond a reasonable doubt. Thurtell *v.* Beaumont, 1 Bing. 339, 8 Eng. C. L. 337.

Plea of Justification in Libel for Charging Forgery. — Chief Justice Tindal said: "We cannot consider the plea in any other way, or on any other kind of evidence, than if we were trying the plaintiff for the offence alleged in it. . . . If the defendants have proved to your satisfaction that the plaintiff was guilty of uttering the forged acceptance," etc. Chalmers *v.* Shackell, 6 Car. & P. 475. To same effect Wilmett *v.* Harmer, 8 Car. & P. 695. But see Cooper *v.* Slade, 6 H. of L. Cas. 746; Magee *v.* Mark, 11 Ir. C. L. (N. S.) 449.

40. Justification in Libel an Exception. — In Kane *v.* Hibernia Ins. Co., 39 N. J. Law 697, 23 Am. Rep. 239, it was said by Justice Depue that the issue of justification, in an action for libel charging crime, was an exception to the rule requiring only a preponderance of evidence in civil cases; but several of the judges declined to concur in this statement, which was *obiter*.

See article "Libel and Slander."

41. *See* the article "Insurance."

42. Kane *v.* Hibernia Ins. Co., 39 N. J. Law 697, 23 Am. Rep. 239; Rothschild *v.* American Cent. Ins. Co., 62 Mo. 356.

43. Aetna Ins. Co. *v.* Johnson, 11 Bush (Ky.) 587, 21 Am. Rep. 223; Knowles *v.* Scribner, 57 Me. 495; Schmidt *v.* New York U. M. F. Ins. Co., 1 Gray (Mass.) 529.

"**A Crime That Is Charged by Implication** will not bring the crime within the exceptions of the general rule (that requires only preponderance of evidence). Nor will it be sufficient that the facts charged involve the party in the moral turpitude of a crime." Bissell *v.* Wert, 35 Ind. 54.

44. Brooks *v.* Clayes, 10 Vt. 37; Riker *v.* Hooper, 35 Vt. 457, 82 Am. Dec. 646.

Penalty for Charging Usury. White *v.* Comstock, 6 Vt. 405, was an action to recover a penalty for charging usury. The court said that the action was penal; that it gives a right of action to a common informer, and the borrower is a competent witness; that there might be some doubt as to the rule of evidence, but that full proof is required in criminal actions and actions of a criminal nature. Generally where it is necessary to establish the fact that a person has violated a public statute, has been guilty of an offense, has incurred a penalty, or done an illegal act, it is necessary to encounter and

no means uniform; in a majority of the States of the Union only a preponderance is required.[45]

(C.) Intermediate Rule. — A rule has been suggested that seems to lie between mere preponderance and the exclusion of reasonable doubt.[46]

overcome the presumption in favor of innocence. The plaintiff recovered in an action for a penalty by virtue of a positive law enacted from principles of policy, and he must recover by proving the defendant to have acted illegally and to have violated a public statute. There is no hardship in requiring in such cases full proof.

Contra. — Opinion of Mr. Justice Willes in Cooper *v.* Slade, 6 H. L. 746, and Munson *v.* Atwood, 30 Conn. 102.

45. *Alabama.* — Ware *v.* Jones, 61 Ala. 288.

Iowa. — Coit *v.* Churchill, 61 Iowa 147, 16 N. W. 147; Welch *v.* Jugenheimer, 56 Iowa 11, 8 N. W. 673, 41 Am. Rep. 77, *overruling* Barton *v.* Thompson, 46 Iowa 30, 26 Am. Rep. 131.

Kentucky. — Aetna Ins. Co. *v.* Johnson, 11 Bush 587, 21 Am. Rep. 223.

Louisiana. — Hoffman *v.* Western M. & F. Ins. Co., 1 La. Ann. 216.

Maine. — Ellis *v.* Buzzell, 60 Me. 209, 11 Am. Rep. 204.

Missouri. — Rothschild *v.* American Ins. Co., 62 Mo. 356; Marshall *v.* Thames F. Ins. Co., 43 Mo. 586.

New Jersey. — Kane *v.* Hibernia Ins. Co., 39 N. J. Law 697, 23 Am. Rep. 239.

Vermont. — Bradish *v.* Bliss, 35 Vt. 326.

Wisconsin. — Washington U. Ins. Co. *v.* Wilson, 7 Wis. 169; Blaeser *v.* Milwaukee M. & M. Ins. Co., 37 Wis. 31.

Preponderance Enough to Support Justification in slander case for perjury. Folsom *v.* Brawn, 25 N. H. 114; Matthews *v.* Huntley, 9 N. H. 146; Kincade *v.* Bradshaw, 3 Hawks (N. C.) 63.

Criticism of English Rule. — In Kane *v.* Hibernia Ins. Co., 39 N. J. Law 697, 23 Am. Rep. 239, it is said that the ruling in Thurtell *v.* Beaumont, 1 Bing. 339, requiring more than a preponderance of evidence in civil cases where one party charges the other with a crime, was made without much consideration and has not been followed in England except in slander and libel cases. And that in the United States the rule requiring more than a preponderance of evidence has received but slender support. The court criticized and virtually overruled the earlier cases in New Jersey. Conover *v.* Van Mater, 18 N. J. Eq. 481, and Taylor *v.* Morris, 22 N. J. Eq. 606.

One Rule in All Civil Actions. "There is no rule of evidence which requires a greater preponderance of proof to authorize a verdict in one civil action than in another, by reason of the peculiar questions involved. . . . No doubt a jury will always feel disposed to scrutinize an infamous charge more closely than a trifling one, and will not convict without being well satisfied, but there is no rule of law which adopts any sliding scale of belief in civil controversies." Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668, an action for damages for assault and battery.

"How common it is to say to a jury that if there be a reasonable doubt of the person's guilt he is entitled to the benefit of the doubt. But who ever heard of such a suggestion to a jury in a civil case?" Munson *v.* Atwood, 30 Conn. 102. That was a suit for treble damages for feloniously taking cattle.

Defense of Arson in Action on Policy. — In Huchberger *v.* Merchants' F. Ins. Co., 4 Biss. 265, 12 Fed. Cas. No. 6822, Mr. Justice Davis of the Supreme Court of the United States charged the jury that the defendant must establish by preponderance of evidence a defense that the plaintiff purposely destroyed the insured property; that as the "finding necessarily stamps the plaintiffs as dishonest men, you should not be swift to come to such a conclusion."

46. **Evidence Must Clearly Satisfy**

(D.) Crime of Third Party. — Where the pleading imputes crime to one not a party, as to an employee of a party, only a preponderance of evidence is required of the pleader.[47]

b. *In Criminal Cases.* — (1.) **Where Burden is on State.** — (A.) General Rule. — In criminal actions the state must establish its case beyond a reasonable doubt.[48]

the Jury. — Scott *v.* Home Ins Co., 1 Dill. 105, 21 Fed. Cas. No. 12,533, was an action on a policy of fire insurance, the defense being that the plaintiffs burned their own property. Judge Dillon, in charging the jury, after stating that the ordinary rule in civil suits was that the jury should determine in accordance with the preponderance of evidence, said: "The court instructs you that it is not necessary that the degree of proof should be the same as if the plaintiffs were on trial under an indictment for willfully burning the property to defraud the insurance company. On the contrary, as between the rule in criminal and the rule in civil cases as above defined, it is the rule in civil cases that is to be your guide in this case. But the charge is a grave one. The act charged is one which men in general will not commit, but of which men are sometimes guilty. In view of which the court instructs that in order to justify you in finding that the plaintiffs themselves burned or caused the property to be burned, the legal evidence taken altogether must be such as clearly satisfies you of the truth of the proposition. It need not be such as to exclude all doubt, but it should be such as to satisfy your minds and judgment that they did or caused or procured the act in question to be done. On this point the decided cases are conflicting, but the foregoing seems to the court to express the sound and true rule of law on the subject."

This charge seems to be approved by the Court of Errors and Appeals in 39 N. J. Law 697. But see Ware *v.* Jones, 61 Ala. 288, where it is said that to instruct that such a defense "ought to be clearly proved" would probably be misleading unless explained.

"**The Jury Must Be Satisfied As Reasonable Men** of the truth of the allegations made by the defendants before they can find in their favor. If the jury as reasonable men were fully satisfied of the truth of these allegations that would be sufficient." Schmidt *v.* New York U. M. F. Ins. Co. 1 Gray (Mass.) 529.

Proof Must Overcome Presumption of Innocence. — In Bradish *v.* Bliss, 35 Vt. 326, the court said the law recognized no intermediate rule between that of ordinary civil cases and criminal cases; but approved a charge that where the plaintiff sought to recover damages for an act that was also a crime, he must "not only overcome the evidence of the defendant, by a fair balance in his favor, but also overcome this legal presumption (of innocence) in favor of defendant. . . . The fact must be found only when clearly established by proof."

In Missouri such instructions as to defense of incendiarism in cases against insurance companies are not permitted, the rule of preponderance of evidence, as in other civil cases, being rigidly adhered to. Rothschild *v.* American C. Ins. Co., 62 Mo. 356.

47. This is rather assumed than declared to be the law in McQueen *v.* Great Western R. Co., L. R. 10 Q. B. 569, opinion of Justice Mellor. See also Vaughton *v.* London & N. W. R. Co., 9 L. R. Ex. 93.

48. *Alabama.* — Washington *v.* State, 58 Ala. 355.

California — People *v.* Levine, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631.

Colorado. —Kent *v.* People, 8 Colo. 563, 9 Pac. 852.

Connecticut. — Munson *v.* Atwood, 30 Conn. 102.

Delaware.—State *v.* Faney, (Del.), 54 Atl. 690.

Illinois. — Alexander *v.* People, 96 Ill. 96; Hopps *v.* People, 31 Ill. 385, 83 Am. Dec. 231.

Massachusetts. — Com. *v.* McKie, 1 Gray 61, 61 Am. Dec. 410.

New York. — People *v.* McCann, 16 N. Y. 58, 69 Am. Dec. 642.

(B.) EXCEPTIONS. — But as to certain facts only a preponderance of evidence is, apparently, required in some jurisdictions.[49] For instance, that the crime was committed within the county, or other jurisdictional limit.[50]

(2.) Where Burden is on Defendant. — In those jurisdictions where it is held that the burden of proof in a prosecution for crime is, as to certain facts, cast upon the defendant, three rules are stated, each supported by respectable authority.[51]

(A.) TO CREATE REASONABLE DOUBT. — Some courts hold that the defendant need do no more than create reasonable doubt as to such facts.[52]

North Carolina.—Kincade *v.* Bradshaw, 3 Hawks 63.

The citation of cases to this point could be continued indefinitely.

Effect of the Phrase in Charge. "While it is impracticable to frame a satisfactory definition of the expression "reasonable doubt," yet the effect of a charge, in this language, is a matter of almost every day's observation." Kane *v.* Hibernia Ins. Co., 39 N. J. Law 697, 23 Am. Rep. 239.

For the equivalents of the phrase "beyond a reasonable doubt" and a statement of the attempts to define it, *see* the article "WEIGHT AND SUFFICIENCY OF EVIDENCE."

49. As to Grade of Offense. — In Com. *v.* York, 9 Metc. (Mass.) 93, it was held that the evidence for the state must preponderate to warrant a conviction for murder where there is evidence tending to reduce the offense to manslaughter.

50. Wilson *v.* State, 62 Ark. 497, 36 S. W. 842, 54 Am. St. Rep. 303; Lyon *v.* State, (Tex. Civ. App.), 34 S. W. 947; State *v.* Burns, 48 Mo. 438; Richardson *v.* Com., 80 Va. 124; Warrace *v.* State, 27 Fla. 362, 8 So. 748. But other courts require proof of venue beyond a reasonable doubt. People *v.* Manning, 48 Cal. 335; People *v.* Gleason, 1 Nev. 173; Gosha *v.* State, 56 Ga. 36; Wimbish *v.* State, 70 Ga. 718. *See* the article "VENUE."

51. *See* the articles "INSANITY," "ALIBI," "DRUNKENNESS," "SELF-DEFENSE."

52. Alexander *v.* People, 96 Ill. 96; People *v.* Fong Ah Sing, 64 Cal. 253, 28 Pac. 233; Howard *v.* State, 50 Ind. 190; Walters *v.* State, 39 Ohio St. 215; Com. *v.* Choate, 105 Mass. 451; Watson *v.* Com., 95 Pa. St. 418; State *v.* Thiele, (Iowa), 94 N. W. 256, citing a number of earlier cases in same state; State *v.* Thornton, 10 S. D. 349, 73 N. W. 196.

Mitigating Circumstances.—§ 1105 P. C. of Cal. provides: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation or that justified or excuse it devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter or that the defendant was justified or excusable." Justice Works, giving the majority opinion, says that the section did not mean that the defendant must prove such circumstances by preponderance of the evidence, but that he was bound under that section only to produce such evidence as would create in the minds of the jury a reasonable doubt of his guilt of the offense charged. The rule that the defendant shall not be convicted unless the evidence proves his guilt beyond a reasonable doubt applies to every material part of the case, whether to the act of killing or the reason for or manner of its commission. The jury should have been instructed that the burden of proving circumstances of mitigation, etc., devolved upon the defendant, and that if upon the whole case they entertain a reasonable doubt as to his guilt, he should be acquitted. People *v.* Bushton, 80 Cal. 160, 22 Pac. 127, 549. This does not apply to the defense of insanity. See next note.

(B.) To Have Preponderance — Others rule that the accused must as to such facts produce a preponderance of evidence.[53]

(C.) To Exclude Reasonable Doubt. — And the burden has been imposed on the defendant of producing evidence that will exclude all reasonable doubt.[54]

2. On Whom the Burden Rests. — A. General Theory. — The general rule as to the burden of proof, in the sense now under consideration, is that one that makes a claim which is denied has the burden of establishing the claim.[55] And in fixing the burden of

53. State *v.* Smith, 53 Mo. 267; State *v.* Lawrence, 57 Me. 574.

Proving Adultery As a Defense. In State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125, the defendant, prosecuted for failure to support his wife, attempted to show in defense that she was an adulteress. The trial court instructed that to secure an acquittal this defense must be established beyond a reasonable doubt. The supreme court held this to be error, and perhaps that is all that the case actually decides, but the opinion states that the defense could not avail the accused unless "proved," and that it could not be proved unless supported by "a preponderance of evidence;" at the same time it is said that the state must prove every fact of the case against the prisoner beyond a reasonable doubt. That the defense established "by a preponderance of evidence" becomes a fact in the case of which the jury must take notice in making up their verdict and dispose of it according to the rule that the burden is upon the state to prove every fact of the case against the prisoner beyond a reasonable doubt. But if the prisoner must establish his defense by a *preponderance of evidence*, it is difficult to see how he receives any benefit as to that defense from the rule as to reasonable doubt. The opinion also says: "But whether a greater or less weight of evidence be required, wherever the defense is so proved that a reasonable doubt is caused as to any part of the case, the defendant is entitled to the benefit of that doubt, and should be acquitted."

In California Insanity Must Be Established by a Preponderance of evidence; it is not enough for defendant to raise a reasonable doubt as to his sanity. People *v.* Travers, 88 Cal. 233, 26 Pac. 88.

In Iowa it is held that a jury should be instructed that the burden of proof is on defendant to establish an alibi by preponderance of evidence, and also that defendant must be acquitted if there is reasonable doubt of his guilt. The inconsistency of these instructions is pointed out by Adams, C. J., in State *v.* Hamilton, 57 Iowa 596, 11 N. W. 5. *Compare* State *v.* McCracken, 66 Iowa 569, 24 N. W. 43.

As to matters on which it is generally agreed that defendant has the burden of proof, *see* the articles "Former Acquittal," "Former Conviction," "Former Jeopardy," "Pardon."

54. State *v.* Spencer, 21 N. J. Law 196, charge to jury by Chief Justice Hornblower; State *v.* Brinyea, 5 Ala. 241; People *v.* Myers, 20 Cal. 518. But see People *v.* Travers, 88 Cal. 233, 26 Pac. 88; State *v.* Huting, 21 Mo. 464. But see State *v.* Smith, 53 Mo. 267; Boswell *v.* State, 63 Ala. 307, 35 Am. Rep. 20. But see Maxwell *v.* State, 89 Ala. 150, 7 So. 824.

Reasonable doubt as to sanity is not ground for acquittal; to acquit for insanity jury must be satisfied of fact of the insanity. Ortwein *v.* Com., 76 Pa. St. 414, 18 Am. Rep. 420.

See the articles "Alibi" and "Insanity" for full treatment of this matter.

55. *England.* — Dickson *v.* Evans, 6 T. R. 57.

Alabama. — Edmonds *v.* Edmonds, 1 Ala. 401; Lehman *v.* McQueen, 65 Ala. 570; Land Mortg. I. & A. Co. *v.* Preston, 119 Ala. 290, 24 So. 707.

proof a pleading or evidence that amounts to a denial has the effect of one, although cast in the form of an assertion.[56]

a. *Tests Under This.* — One common test to determine on which party lies the burden is to ask which would be entitled to a verdict

Georgia. — Clark *v.* Cassidy, 62 Ga. 407.

Illinois. — Watt *v.* Kirby, 15 Ill. 200.

Indiana. — Morgan *v.* Wattles, 69 Ind. 260; Lafayette & I. R. Co. *v.* Ehman, 30 Ind. 83; City of Lafayette *v.* Wortman, 107 Ind. 404, 8 N. E. 277.

Kentucky. — Higdon *v.* Higdon, 6 J. J. Marsh. 48.

Maine. — Ross *v.* Gould, 5 Me. 204; Pennell *v.* Cummings, 75 Me. 163.

Massachusetts. — Loring *v.* Steineman, 1 Metc. 204.

Michigan. — Walker *v.* Detroit Transit Co., 47 Mich. 338, 11 N. W. 187.

Nebraska. — McEvoy *v.* Swayze, 34 Neb. 315, 51 N. W. 824.

Nevada. — Gillson *v.* Price, 18 Nev. 109, 1 Pac. 459.

New York. — Farmers' L. & T. Co. *v.* Siefke, 144 N. Y. 354, 39 N. E. 358; Doyle *v.* Unglish, 143 N. Y. 556, 38 N. E. 711; Heinemann *v.* Heard, 62 N. Y. 448; Smith *v.* New York C. R. R. Co., 43 Barb. 225; Connolly *v.* Clark, 20 Misc. 415, 45 N. Y. Supp. 1042.

Pennsylvania. — Pusey *v.* Wright, 31 Pa. St. 387.

Texas. — Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356.

"**Actori Incumbit Onus Probandi.**" It is the duty of "him who avers, not to raise doubts, but to establish facts." Knox *v.* Haslett, 12 Mart. (O. S.) (La.) 255.

"It is an invariable rule that a party who seeks a recovery in a court of justice must sustain his cause of action or ground of defense by legal evidence, and that in no case is the plaintiff or defendant required to disprove the allegations of his opponent. Williams *v.* Calmes, 1 How. (Miss.) 121.

In a suit to enjoin collection of a tax to pay bonds, the burden is on the plaintiff to prove illegal issue of the bonds, while in *mandamus* proceedings to compel issue of bonds, the burden is on petitioner to prove legality of the issue. Lemont *v.* Singer & T. Stone Co., 98 Ill. 94.

"**The Fundamental Rule As to Burden of Proof** is that whenever the existence of any fact is necessary in order that a party may make out his case or establish a defense, the burden is on such party to show the existence of such fact. Willitt *v.* Rich, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684.

56. *England.* — Mills *v.* Barber, 1 Mees. & W. 425; Ashby *v.* Bates, 15 Mees. & W. 589.

Canada. — O'Neill *v.* Leight, 3 U. C. Q. B. 70.

Illinois. — Union Nat. Bank *v.* Baldenwick, 45 Ill. 375.

Iowa. — Homire *v.* Rodgers, 74 Iowa 395, 37 N. W. 972.

Massachusetts. — Gay *v.* Bates, 99 Mass. 263; Burnham *v.* Noyes, 125 Mass. 85.

Michigan. — Berringer *v.* Lake S. I. Co., 41 Mich. 305, 2 N. W. 18.

Mississippi. — Fox *v.* Hilliard, 35 Miss. 160.

New Hampshire. — Eastman *v.* Gould, 63 N. H. 89.

See also Breeding *v.* Stoneman, 6 J. J. Marsh. (Ky.) 377; Ross *v.* Gerrish, 8 Allen (Mass.) 147.

But see Pratt *v.* Beaupre, 13 Minn. 177.

The complaint was on promissory notes. The defendant alleged that the notes were secured by collateral held for the sole purpose of securing payments of the notes. The plaintiff replied that the collateral was held also for other purposes. The court said: "That the only issue was as to whether the bonds were held as collaterals for any other purpose than the payment of the notes; that on this issue the defendant had the affirmative." Stokes *v.* Stokes, 156 N. Y. 662, 50 N. E. 1122.

In Stanstead Election Case, 20 Can. Sup. Ct. 12, Justice Fournier, while conceding that perhaps an ob-

if no evidence were offered on either side.[57] Another test is to consider which party would fail if the allegation in question were omitted from the pleading.[58]

b. *Rules Under This.* — **(1.) Denials in Answer.** — Therefore a defendant who simply denies should never have the burden of proof.[59] If the pleading amounts to a denial the rule is the same, although the plea may be drawn in the form of an allegation.[60]

(2.) Pleas in Avoidance by Defendant. — But it will be on the defendant to establish such facts as he alleges to defeat a plaintiff's

jection by the respondent that the petitioner was not a qualified voter might put upon the petitioner the burden of proving his qualification; yet if respondent went further and said that petitioner was disqualified as a petitioner by reason of his unlawful act at the election, then respondent has the burden of proof. See opinion of same justice in Megantic Election Case, 8 Can. Sup. Ct. 169, where the court was equally divided on the question whether or not a party objecting that the petitioner was not an elector, had the burden of proof.

57. *England.* — Geach *v.* Ingall, 14 Mees. & W. 95; Belcher *v.* McIntosh, 8 Car. & P. 720, 34 Eng. C. L. 601; Leete *v.* Gresham, L. I. Co., 7 Eng. L. Eq. 578.

California. — Scott *v.* Wood, 81 Cal. 398, 32 Pac. 871.

Connecticut. — Wetherell *v.* Hollister, 73 Conn. 622, 48 Atl. 826; Pease *v.* Cole, 53 Conn. 53, 55 Am. Rep. 53.

Indiana. — Meikel *v.* State Sav. Inst., 36 Ind. 355; Kent *v.* White, 27 Ind. 390.

Iowa. — Vieths *v.* Hagge, 8 Iowa 163.

Kentucky. — Funk *v.* Procter, 22 Ky. L. Rep. 1728, 61 S. W. 286.

Mississippi. — Porter *v.* Still, 63 Miss. 357.

North Carolina. — Hudson *v.* Wetherington, 79 N. C. 3.

Washington. — McKenzie *v.* Oregon Imp. Co., 5 Wash. 409, 31 Pac. 748.

The doctrine that the burden as to a given proposition is on him against whom judgment would be given thereon, supposing no proof at all were offered, "is too familiar and well settled to admit of discussion or require the citation of authorities." Gile *v.* Sawtelle, 94 Me. 46, 46 Atl. 786.

58. Porter *v.* Still, 63 Miss. 357; McKenzie *v.* Oregon Imp. Co., 5 Wash. 409, 31 Pac. 748.

An Unfailing Test for ascertaining on which side the affirmative of an issue really lies is to consider which party would be successful if no evidence at all were given, or to examine whether if the particular allegation to be proved were struck out of the answer or the pleadings, there would or would not be a defense to the action or answer to the previous pleadings. Funk *v.* Proctor, 22 Ky. L. Rep. 1728, 61 S. W. 286.

59. Turner *v.* Wells, 64 N. J. Law 269, 45 Atl. 641; Memphis & L. R. Co. *v.* Shoecraft, 53 Ark. 96, 13 S. W. 422; Sears *v.* Daly, (Ore.), 73 Pac. 5; Sawtelle *v.* Sawtelle, 34 Me. 228; Central R. Corp. *v.* Butler, 2 Gray (Mass.) 130; Benton *v.* Burbank, 54 N. H. 583; Gann *v.* Shaw, 2 Willson Civ. Cas. Ct. App. (Tex.) § 256.

Where the material allegations of the complaint are denied, the defendant is entitled to an instruction that the burden of proof is upon the plaintiff to establish his claim by a preponderance of evidence, and refusal to give such instruction is error. Laubheimer *v.* Naill, 88 Md. 174, 40 Atl. 888.

Intervention. — Where parties are allowed to intervene and become parties defendant and file pleadings denying plaintiff's allegations, the burden is still upon the plaintiff to establish his case. Eastmore *v.* Bunkley, 113 Ga. 637, 39 S. E. 105.

60. Doe *v.* Rowlands, 9 Car. & P. 734, 38 Eng. C. L. 310; Belcher *v.*

demand;[61] (provided such facts do not in effect merely deny the plaintiff's allegations or some of them,)[62] although the very

McIntosh, 8 Car. & P. 720, 34 Eng. C. L. 601.

61. *Canada.*—Manning *v.* Thompson, 17 U. C. C. P. 606.

Alabama. — Edmonds *v.* Edmonds, 1 Ala. 401; Alabama G. S. R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28; Cook *v.* Malone, 128 Ala. 662, 29 So. 653.

Colorado. — Denver Fire Brick Co. *v.* Platt, 11 Colo. 509, 19 Pac. 536.

Florida. — Bacon *v.* Green, 36 Fla. 325, 18 So. 870.

Georgia. — Home B. & L. Assn. *v.* Van Pelt, 92 Ga. 501, 17 S. E. 771.

Illinois. — East *v.* Crow, 70 Ill. 91.

Indiana. — Peck *v.* Hunter, 7 Ind. 295; Brown *v.* Woodbury, 5 Ind. 254; Swift *v.* Ratliff, 74 Ind. 426.

Kentucky. — Jenkins *v.* Jenkins, 3 T. B. Mon. 327.

Louisiana. — Palfrey *v.* Stinson, 11 La. 77; Borel *v.* Fusillier, 2 La. 567; Gayoso de Lemos *v.* Garcia, 1 Mart. (N. S.) 324; Diggs *v.* Parish, 18 La. 6.

Maine. — Gile *v.* Sawtelle, 94 Me. 46, 46 Atl. 786; Ross *v.* Gould, 5 Me. 204; Jones *v.* Knowles, 30 Me. 492; Windle *v.* Jordan, 75 Me. 140.

Massachusetts. — Perley *v.* Perley, 144 Mass. 104, 10 N. E. 726.

Michigan. — Berringer *v.* Lake S. I. Co., 41 Mich. 305, 2 N. W. 18.

Minnesota. — Day *v.* Raguet, 14 Minn. 203.

Mississippi. — Mask *v.* Allen, (Miss.), 17 So. 82; Williams *v.* Calmes, 1 How. 121; Lamar *v.* Williams, 39 Miss. 342.

New Hampshire. — Seavy *v.* Dearborn, 19 N. H. 351; Benton *v.* Burbank, 54 N. H. 583.

New York. — Isham *v.* Post, 146 N. Y. 100, 35 N. E. 1084, 38 Am. St. Rep. 766, 23 L. R. A. 90; Costigan *v.* Mohawk & H. R. R. Co., 2 Denio 609, 43 Am. Dec. 758; Coffin *v.* President, etc., of G. R. H. Co., 136 N. Y. 655, 32 N. E. 1076; Cuyler *v.* Sanford, 8 Barb. (N. Y.) 225; Blunt *v.* Barrett, 124 N. Y. 117, 26 N. E. 318.

North Carolina. — Cook *v.* Guirkin, 119 N. C. 13, 25 S. E. 715; McQueen *v.* People's Nat. Bank, 111 N. C. 509, 16 S. E. 270.

Oregon. — Sears *v.* Daly, (Ore.), 73 Pac. 5.

Fraudulent Misrepresentations. Strong *v.* Place, 4 Rob. (N. Y.) 385; Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356.

On Plea of Usury. — Haughwout *v.* Garrison, 69 N. Y. 339.

Payment. — Shulman *v.* Brantley, 50 Ala. 81.

Settlement of Accounts. — Killen *v.* Lide, 65 Ala. 505.

Special Contract. — Richardson *v.* George, 34 Mo. 104.

Plea of Estoppel. — Neal *v.* Deming, (Ark.), 21 S. W. 1066.

Abandonment and Forfeiture. Bliley *v.* Wheeler, 5 Colo. App. 287, 38 Pac. 603.

Admission to Gain Right to Begin and Close. — The defendant, to obtain the privilege of opening and concluding, made admissions in his answer sufficient to make out a *prima facie* case in favor of plaintiffs. It then become incumbent upon him to sustain the burden of overcoming that case and of proving the truth of his own allegations. Hunter *v.* Sanders, 113 Ga. 140, 38 S. E. 406.

Failure to Deny. — Defendant who admits the cause of action stated in the complaint by failing to deny the allegations, and who undertakes to avoid it by averments, assumes the burden of proof. St. Louis Tow Co. *v.* Orphans B. Ins. Co., 52 Mo. 529.

62. Mott *v.* Baxter, 29 Colo. 418, 68 Pac. 220; Ashby *v.* Bates, 15 Mees. & W. 589; Ross *v.* Gerrish, 8 Allen (Mass.) 147; Perley *v.* Perley, 144 Mass. 104, 10 N. E. 726; Wilder *v.* Cowles, 100 Mass. 487.

Statement of Facts Negativing Complaint. — In Phipps *v.* Mahon, 141 Mass. 471, 5 N. E. 835, plaintiff proved that he had rendered services reasonably worth $200, and claimed to recover on the implied promise to pay; defendant offered evidence that the service had been rendered under an express contract for $100. The court said that defendant did not seek to avoid the contract alleged by the plaintiff, but to disprove its ex-

promise on which plaintiff sues may be conditioned that on the occurrence of those facts the defendant shall not be liable.[63]

(3.) Denials in Reply. — So a plaintiff denying the affirmative matter of the defendant's answer casts on the latter the burden as to such matter.[64]

(4.) Pleas in Avoidance in Reply. — And a plaintiff alleging in his reply, or showing in evidence, matter in avoidance has the burden as to such matter.[65]

(5.) Denial May Be Implied by Law. — The denial may be set forth in a pleading or may be implied by law.[66]

(6.) Form of Assertion Not Material. — The assertion of facts may be in form positive or negative; the form of the assertion does not affect the rule.[67] "A legal affirmative is not necessarily a grammatical affirmative, nor a legal negative a grammatical negative; on the contrary, a legal affirmative frequently assumes the shape of a

istence. While in form his evidence was affirmative, the use he sought to make of it was strictly negative. The burden was still upon the plaintiff to prove the contract alleged by him upon all the evidence in the case.

63. Gray *v.* Gardner, 17 Mass. 188; Jennison *v.* Stafford, 1 Cush. (Mass.) 168, 48 Am. Dec. 594; Thayer *v.* Connor, 5 Allen (Mass.) 25; Simpson *v.* Davis, 119 Mass. 269, 20 Am. Rep. 324; Bowser *v.* Bliss, 7 Blackf. (Ind.) 344, 43 Am. Dec. 93.

64. Champion Mach. Co. *v.* Gorder, 30 Neb. 89, 46 N. W. 253; Fox *v.* Hilliard, 35 Miss. 160; Jewett *v.* Davis, 6 N. H. 518.

Where an answer states a defense and is traversed by a reply, it is incumbent upon the defendant to sustain his defense by a preponderance of the testimony. Kentucky L. & A. Ins. Co. *v.* Thompson, 18 Ky. L. Rep. 79, 35 S. W. 550.

65. Where a Plaintiff Anticipates a Defense and alleges matters in avoidance of such defense, he assumes the burden of proof as to them. Hill *v.* Allison, 51 Tex. 390.

A plaintiff has the burden of sustaining allegations pleaded in his reply in avoidance of the facts admitted in the reply. Clapp *v.* Cunningham, 50 Iowa 307. In that case the fact admitted was the entry of a judgment, and the matter in avoidance was an appeal and subsequent dismissal of the proceedings.

66. Some codes of procedure provide for no reply to an answer, but do provide that all new matter in an answer shall be deemed denied by the plaintiff. Code Civ. Proc. Cal., § 462.

Blunt *v.* Barrett, 124 N. Y. 117, 26 N. E. 318.

Where No Issues Made. — So if parties go to trial without joining issue, as where there is no answer to the complaint, the burden of proof will be the same as if a general denial had been filed. Brower *v.* Nellis, (Ind. App.), 40 N. E. 707.

67. Stokes *v.* Stokes, 156 N. Y. 662, 50 N. E. 1122; Roberts *v.* Chittenden, 88 N. Y. 33; Megantic Election Case, 8 Can. Sup. Ct. 169; Ashby *v.* Bates, 15 Mees. & W. 589; Stewart *v.* Ashley, 34 Mich. 182; Hudson *v.* Wetherington, 79 N. C. 3; Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356.

Negative and Positive Are Relative, Not Absolute Terms. — "In an action for malicious prosecution the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable or probable cause for instituting it. In one sense that is the assertion of a negative, and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof

grammatical negative, and a legal negative that of a grammatical affirmative." [68]

B. Apparent Exceptions. — a. *Rule of Convenience.* — A rule sometimes announced is that one who pleads facts within his own peculiar knowledge, or who has custody of documents on which he relies to establish averments, has the burden of proving such facts and averments,[69] also that the burden is on the party who has to support his case by proof of a fact of which he is supposed to be cognizant and has within his power the means by which the fact can be established, and these rules so far as they conflict with the general rule are exceptions thereto, but an examination of the cases cited will show that in most of them there is no such conflict.[70]

b. *Real Issues Not Disclosed.* — To the general rule that the burden is upon him that asserts and claims other apparent exceptions exist, due to the fact that the formal pleadings or other proceedings preliminary to the introduction of evidence often conceal rather than reveal the true positions and relations of the parties, so that the one that "on the record" is claimant may prove

of the assertion still rests upon the plaintiff. The terms negative and affirmative are, after all, relative, and not absolute. Whenever a person asserts affirmatively as part of his case that a certain state of facts is present or absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively." Opinion of Bowen, L. J., in Abrath *v.* Northeastern R. Co., 11 Q. B. D. 440; Ames *v.* Snyder, 69 Ill. 376.

68. Megantic Election Case, 8 Can. Sup. Ct. 169; Higdon *v.* Higdon, 6 J. J. Marsh. (Ky.) 48.

69. Cook *v.* Guirkin, 119 N. C. 13, 25 S. E. 715; Stewart *v.* Ashley, 34 Mich. 183; Borthwick *v.* Caruthers, 1 T. R. 648.

70. Powers *v.* Foucher, 12 Mart. (O. S.) (La.) 70; Delery *v.* Mornet, 11 Mart. (O. S.) (La.) 4; Nicholls *v.* Roland, 11 Mart. (O. S.) (La.) 190; Meilleur *v.* His Creditors, 3 La. 532; Ford *v.* Simmons, 13 La. Ann. 397; Rugely *v.* Gill, 15 La. Ann. 509; Lovell *v.* Payne, 30 La. Ann. 511; Code Civ. Proc. Cal., § 1869.

Compare King *v.* Atkins, 33 La. Ann. 1057.

See Burgess *v.* Lloyd, 7 Md. 178; Thayer *v.* Connor, 5 Allen (Mass.) 25; Smith *v.* New York C. R. Co., 43 Barb. (N. Y.) 225; Borthwick *v.* Carruthers, 1 T. R. 648.

Rule Has Many Qualifications. "That in many cases the burden of proof is on the party within whose peculiar knowledge and means of information the fact lies, is admitted. But the rule is far from universal and has many qualifications upon its application." Greenleaf *v.* Birth, 6 Pet. (U. S.) 302.

Burden Not Always Where Pleadings Place It. — While the general rule is that the burden of proof is where the pleadings place it, namely, upon the party against whom judgment must go if no evidence whatever is introduced, its application is often affected by circumstances. Sometimes from the very nature of the question in dispute all, or nearly all, the evidence that could be adduced respecting it must be in the possession of, or be easily attainable by, one of the contending parties, who accordingly could at once put an end to litigation by producing that evidence; while requiring his adversary to establish his case because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to pre-

not to be so at the trial.[71] Thus to a complaint upon an account stated the defendant files a general denial; apparently the burden is on the plaintiff to prove every material fact alleged in his complaint, but if under the system of pleading in vogue the fact of payment may be shown under the general denial, then it may appear, after the plaintiff has put in his evidence and rested, that after all the defendant is the real actor or claimant, admitting the account and asserting that he has paid it.[72] Here it may be said carelessly that the burden shifts, but accurately it will be said that it is now for the first time ascertained on whose shoulders the burden rests.[73]

c. *Several Issues in Same Case.* — So, too, there may be several issues in one case as to some of which one party and as to some the other will be claimant.[74] Thus under systems permitting

vent this it has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact, which lies more peculiarly within his knowledge or of which he is supposed to be cognizant. Selma R. & D. R. Co. *v.* U. S., 139 U. S. 560.

71. Windle *v.* Jordan, 75 Me. 149; Buzzell *v.* Snell, 25 N. H. 474; Benton *v.* Burbank, 54 N. H. 583.

As when in actions of ejectment, under a plea of "not guilty," the defendant does not controvert the plaintiff's evidence but seeks to establish a state of facts that avoids the plaintiff's case. Cheesman *v.* Hart, 42 Fed. 98; Greenleaf *v.* Birth, 6 Pet. (U. S.) 302; Bagnell *v.* Broderick, 13 Pet. (U. S.) 436; Bell *v.* Skillicorn, 6 N. M. 399, 28 Pac. 768.

So also in Dublin W. & W. R. Co. *v.* Slattery, 3 App. Cas. 1155, Lord Penzance said that the plea of not guilty in an action for damages for personal injury raised the question of contributory negligence, on which of course defendant had the burden of proof; to the same effect Lord Fitzgerald's opinion in Wakelin *v.* London & S. W. R. Co., 12 App. Cas. 41.

72. Buzzell *v.* Snell, 25 N. H. 474.

73. In some cases it may be necessary as a rule of pleading for a party to negative his consent to an act or notice of a fact, and yet he may not be required to produce evidence on the point, it being sufficient for him to establish the affirmative of his pleading, to avoid which the other party must prove the fact, the non-existence of which he denied. In such case there is a shifting of the burden of proof, but it is not an exception to the proposition that the burden of proof does not change unless upon a corresponding change of the issues. The second party does not deny the *prima facie* case, but in avoidance of it, advances new matter, which he has the burden of proving, just as if he had pleaded it specially. Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142.

74. Balmford *v.* Grand Lodge, 19 Misc. 1, 42 N. Y. Supp. 881; Brigham *v.* Carlisle, 78 Ala. 243, 56 Am. Rep. 28; East *v.* Crow, 70 Ill. 91; Porter *v.* Still, 63 Miss. 357; Lexington F. L. & M. Ins. Co. *v.* Paver, 16 Ohio 324; Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356.

See criticism of Chief Justice Parker's remarks by Justice Thomas in Crowninshield *v.* Crowninshield, 2 Gray (Mass.) 524.

There Are Cases Where Both Parties Hold the Affirmative as to the issue to be tried, as where the plaintiff sues to recover money loaned, and the defendant interposes a general denial and also set off. There the plaintiff would be bound to prove his case, and the defendant be required to prove his set off or it will not be allowed. Funk *v.* Procter, 22 Ky. L. Rep. 1728, 61 S. W. 286.

Each Proves His Own Allegations. The court quotes from a note by Sharswood to Starkie's Evi. as fol-

several and even inconsistent defenses the defendant may compel the plaintiff to prove a case and also may himself assert a claim,[75] as for instance, a counterclaim.[76] Here neither party can be said to have the burden of proof generally, but each has the burden as to the issue or issues on which he holds the affirmative, in the sense of asserting and claiming a right.[77]

d. *Diverse Rulings as to Pleadings.* — Obviously the question "What is an affirmative defense?" is not one of evidence, but rather of pleading, and can not be discussed here. Yet conflicting rules as to this question may lead to apparent conflict as to burden of proof. It is not always easy to say, therefore, upon whom the burden rests, even where the pleadings clearly define the issues.[78] For instance, one claiming under a will must prove the testamentary capacity

lows: "If the defendant would show matter in avoidance after a *prima facie* case has been made out by the plaintiff, the burden shifts upon him," and the court continues as follows: "The significance of this statement depends upon the meaning to be attributed to the phrase 'matter in avoidance' and '*prima facie* case.' So long as the dispute is concerning the *prima facie* case — the facts which constitute it — the burden is on the plaintiff; but when that case is conceded, or matter in avoidance is sought to be shown, the burden shifts. But this is a shifting of the issue as well as of the burden of proof. The first issue was the truth of the plaintiff's alleged case. The new issue is the truth of the matter in avoidance.

"Generally the burden of proof in respect to the different parts of the case may be determined by a reference to the pleading, each party being bound to prove what he has affirmed, providing it is denied. But beyond the reply (the last pleading under the code), the question of the burden of proof must be determined by the nature of the evidence and its relation to the case." Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142.

75. Tennessee C. & I. R. Co. *v.* Hamilton, 100 Ala. 252, 14 So. 167, 46 Am. St. Rep. 48; Lehman *v.* McQueen, 65 Ala. 570; Brigham *v.* Carlisle, 78 Ala. 243, 56 Am. Rep. 28.

The Burden Not Affected by Allegations As to Other Issues. — In Balmford *v.* Grand Lodge, 19 Misc. 1, 42 N. Y. Supp. 881, it is held that where the allegations of the complaint are met by a general denial, and there is a separate defense in which some of those allegations are affirmed by the defendant, this does not relieve the plaintiff of the burden of proving the allegations denied by the general denial. It appeared that at the trial the defendant abandoned his separate defense.

76. Jones *v.* U. S., 39 Fed. 410; O'Neal *v.* Curry, 134 Ala. 216, 32 So. 697; Cook *v.* Malone, 128 Ala. 662, 29 So. 653; Alabama S. L. Co. *v.* Reed, 99 Ala. 19, 10 So. 238; Denver Fire Brick Co. *v.* Platt, 11 Colo. 509, 19 Pac. 536; Wetherell *v.* Hollister, 73 Conn. 622, 48 Atl. 826; East *v.* Crow, 70 Ill. 91; Broaders *v.* Toomey, 9 Allen (Mass.) 65; Champion Mach. Co. *v.* Gorder, 30 Neb. 89, 46 N. W. 253.

77. Balmford *v.* Grand Lodge, 19 Misc. 1, 42 N. Y. Supp. 881; Funk *v.* Procter, 22 Ky. L. Rep. 1728, 61 S. W. 286; Lehman *v.* McQueen, 65 Ala. 570.

78. Benton *v.* Burbank 54 N. H. 583; Omaha F. Ins. Co. *v.* Thompson, 50 Neb. 580, 70 N. W. 30.

Undoubtedly many matters which if true would show that the plaintiff never had a cause of action, or even that he never had a valid contract, must be pleaded and proved by the defendant. For instance, infancy, coverture, or probably illegalilty. Where the lines should be drawn might differ conceivably in different jurisdictions. Starratt *v.* Mullen, 148 Mass. 570, 20 N. E. 178, 2 L. R. A. 697.

of the devisor,[79] but one claiming under contract has not the burden of proving the capacity of the other party thereto.[80]

C. Rules as to Proving Negative. — a. *That Burden on Affirmant.* — It has been often said that the burden is on him that affirms.[81]

b. *That Negative Needs No Proof.* — It has been said that one

Mott *v.* Baxter, 29 Colo. 418, 68 Pac. 220, was an action on an account for services rendered under a contract, as alleged by the plaintiff. Defendant claimed that the contract was rescinded and that services were rendered under a new arrangement. It was held that under this pleading, the burden of proof remained upon the plaintiff the same as if the defendant had limited himself to a denial.

79. Barry *v.* Butlin, 2 Moore P. C. 480; Phelps *v.* Hartwell, 1 Mass. 71.

Contra. — Pettes *v.* Bingham, 10 N. H. 514; Mayor *v.* Jones, 78 N. C. 402.

In Crowninshield *v.* Crowninshield, 2 Gray (Mass.) 524, the circuit court had instructed that where it appeared that a testator was under guardianship as an insane person when he made the will, the burden of proof was on the proponent of the will to establish the testator's testamentary capacity. This was held not to be erroneous. But the appellate court went further and laid down the general rule supported by earlier cases in the same state, that the proponent of a will has always the burden of establishing testamentary capacity.

80. Myatt *v.* Walker, 44 Ill. 485. **Plea, Infancy; Reply, New Promise.** — In action on contract defendant pleaded infancy; plaintiff replied a new promise made after arriving at majority, and on this issue was joined. It was held that plaintiff having shown a new promise need not show that defendant was of age when he made it, but defendant had the burden of proving non-age at that time. Borthwick *v.* Carruthers, 1 T. R. 648.

81. *Alabama.* — Land Mort. I. & A. Co. *v.* Preston, 119 Ala. 290, 24 So. 707.

California. — Scott *v.* Wood, 81 Cal. 398, 32 Pac. 871.

Florida. — Bacon *v.* Green, 36 Fla. 325, 18 So. 870.

Illinois. — Stevenson *v.* Marony, 29 Ill. 532.

Indiana. — McClure *v.* Pursell, 6 Ind. 330; Nash *v.* Hall, 4 Ind. 444 (which notes the exception to this rule); Bowser *v.* Bliss, 7 Blackf. 344, 43 Am. Dec. 93.

Louisiana. — Hodge *v.* Morgan, 2 Mart. (N. S.) (La.) 61; Nicholls *v.* Roland, 11 Mart. (O. S.) (La.) 190; Powers *v.* Foucher, 12 Mart. (O. S.) (La.) 70.

Maryland. — Burgess *v.* Lloyd, 7 Md. 178.

Mississippi. — Mask *v.* Allen, (Miss.), 17 So. 82.

New York. — Costigan *v.* Mohawk & H. R. R. Co., 2 Denio 609, 43 Am. Dec. 758.

South Carolina. — Information *v.* Oliver, 21 S. C. 318, 53 Am. Rep. 681.

As a general rule it may be said that the burden of proof lies on the person who affirms a particular thing; *ei incumbit probatio qui dicit, non qui negat.* The Glendarroch, Prob. (1894) 226.

The General Rule Founded on Convenience and common sense is that the affirmative must be proved. He who alleges a fact to be is naturally expected to show its existence. State *v.* Morrison, 3 Dev. Law (N. C.) 299; *approved* as a general proposition in State *v.* Woodly, 2 Jones Law (N. C.) 276.

The Rule Refers to the Legal Affirmative. — But this means that the issue must be proved by the party who states the affirmative in substance; that is, the legal affirmative, not merely the affirmative in form or the grammatical affirmative. Megantic Election Case, 8 Can. Sup. Ct. 169.

who pleads a negative is not required to prove it.[82] That where

82. Stevenson *v.* Marony, 29 Ill. 532; Powers *v.* Foucher, 12 Mart. (O. S.) (La.) 70; Hicks *v.* Martin, 9 Mart. (O. S.) (La.) 47, 13 Am. Dec. 304; Borel *v.* Fusillier, 2 La. (O. S.) 567; Burgess *v.* Lloyd, 7 Md. 178; Information *v.* Oliver, 21 S. C. 318, 53 Am. Rep. 681.

The general adoption of this rule was strongly urged in Dranguet *v.* Prudhomme, 3 La. (O. S.) 71.

Plaintiff Seldom Bound to Prove Negations. — "It is not true, as a general rule, that a plaintiff is bound to prove all the allegations in his complaint; indeed, it is seldom, if ever, true in that sense. A plaintiff is seldom bound to prove negations, though frequently bound to allege them." Morgan *v.* Wattles, 69 Ind. 260.

In Carroll *v.* Malone, 28 Ala. 521, the majority opinion says that to hold that "the necessary averment of a negative in pleading imposes on the party thus pleading the necessity of proving that negative when put in issue by the adverse party," would be to establish a "monstrous proposition." And the same judge who wrote that opinion said in a later case, Haney *v.* Conoly, 57 Ala. 179: "The general rule of law is that negative averments in pleadings need not be proved."

Convenience Fixes the Burden. In an action against a railroad company for damages for stock killed, the action being brought under a statute requiring the company to fence its track, except where it is fenced by the owner of the adjacent lands, or where the company has a contract with the owner that he shall fence, the question arose whether the plaintiff must prove that no such contract was made, it being necessary that the complaint should so allege. The court said: "Whether it is necessary for the plaintiff to prove the negative averments, must depend upon their nature and character. Where it is as easy for the plaintiff to prove the negative as it is for the defendant to disprove it, then the burden of proof must rest upon him, as that the place where the animal was killed was not a town or village, or was not more than five miles from a settlement; but where the means of proving a negative are not within the power of the plaintiff, but all the proof on the subject is within the control of the defendant, who, if the negative is not true can disprove it at once, then the law presumes the truth of the negative averment from the fact that the defendant withholds or does not produce the proof which is in his hands, if it exists, that the negative is not true. In other words, the burden of proof is thrown upon the defendant to prove the affirmative against the negative averment. There are cases between these extremes where the party averring a negative is required to give some proof to establish it. Indeed, it is not easy to lay down a general rule by which it may readily be determined upon which party the burden of proof lies when a negative is averred in pleading. Each case must depend upon its peculiar characteristics, and courts must apply practical common sense in dealing with the question. Where the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but where the opposite party must from the nature of the case be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party thus in possession of the proof should be required to adduce it, or upon his failure to do so we must presume it does not exist, which of itself establishes a negative. Such is the case here. If the railroad company has a contract with the proprietor of this land that he shall fence it, it is no trouble to produce it, and thus exonerate itself from the liability to build the fence." Great Western R. Co. *v.* Bacon, 30 Ill. 347, 83 Am. Dec. 199.

Generally Proof of Negative Not Required. — "The general rule is that a party is not called upon to

the affirmative involved a negative it was not to be proved by the pleader thereof, but disproved by his adversary.[83]

c. *That Negative Not Provable.* — It was even said that a negative is not provable,[84] but this is clearly incorrect.[85]

d. *Where Negative Essential to Case.* — **(1.) Generally.** — It is now well settled that if a negative allegation is essential in assert-

prove his negative averments, although they may be necessary to his pleading. See rules of pleading set forth and approved by Field, C. J.; Baldwin, J., concurring, in Green *v.* Palmer, 15 Cal. 412, in which, among other things, it is said: 'Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged, and he must allege nothing affirmatively which he is not required to prove. Negative allegations, however, are frequently necessary, though they are not to be proved.' A negative allegation is to be proved only where it constitutes a part of the original substantive cause of action upon which the plaintiff relies, and this is an exception to the general rule — as, for instance, in an action for malicious prosecution the plaintiff must both allege and prove want of probable cause, for the latter, although in the nature of a negative averment, is a necessary ingredient in the cause of action itself. And another instance is where the cause of action consists in the failure of the defendant to do certain work in a workmanlike manner. There the very gist of the cause of action is the allegation that the work, although done, was not done in a proper manner." Melone *v.* Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127.

83. Powers *v.* Foucher, 12 Mart. (O. S.) (La.) 70; Marc *v.* Church Wardens, 8 Mart. (N. S.) (La.) 257; Gayoso de Lemos *v.* Garcia, 1 Mart. (N. S.) (La.) 324.

84. Bowser *v.* Bliss, 7 Blackf. (Ind.) 344, 43 Am. Dec. 93; Powers *v.* Foucher, 12 Mart. (O. S.) (La.) 70; Tickner *v.* Roberts, 11 La. 14, 30 Am. Dec. 706; Hodge *v.* Morgan, 2 Mart. (N. S.) (La.) 61; Marc *v.* Church Wardens, 8 Mart. (N. S.) (La.) 257; Gayoso de Lemos *v.* Garcia, 1 Mart. (N. S.) 324.

" It is seldom that the law requires a party to prove a negative, which is always difficult and often impossible." Stevenson *v.* Marony, 29 Ill. 532.

Want of Authority. — In an action by a married woman to set aside a contract because she had no authority to make it, the court held that she need not prove want of authority; that the allegation being negative the burden was cast on the opposite party; and it is said in the opinion: " That there are negative propositions capable of being proved is clear of all doubt; such as the familiar case of proving a man was not at a particular place on such a day, by showing that on that day he was at another so great a distance apart that he could not be in both. And so in other analogous cases where the negative can be established by proving an affirmative inconsistent with it. There are, however, other negative propositions which it is absolutely impossible to prove. That a thing exists or has existed, or that it has been done is susceptible of proof, though in particular cases from accidental causes that proof cannot be administered. But the non-existence or the non-performance in many cases defies all human power to establish by evidence. We can only prove that of which we obtain knowledge through our senses and they can act only on things which exist." Dranguet *v.* Prudhomme, 3 La. (O. S.) 74.

85. Higdon *v.* Higdon, 6 J. J. Marsh. (Ky.) 48. An affirmative allegation may require proof of a negative. McKenzie *v.* Oregon Imp. Co., 5 Wash. 409, 31 Pac. 748.

Perhaps the remark that a negative cannot be proved was more plausible when interested persons were not competent to testify. Yet the civil law has the maxim, *"Negantis naturali ratione nulla est probatio."*

ing a right, whether on the part of the plaintiff[86] or defendant, the one asserting the right has the burden of proving the negative[87]

86. *England.* — Abrath *v.* Northeastern R. Co., 11 Q. B. D. 440; Rex *v.* Rogers, 2 Camp. 654; Ashby *v.* Bates, 15 Mees. & W. 589.

Canada. — Megantic Election Case, 8 Can. Sup. Ct. 169.

Indiana. — Carmel N. G. & I. Co. *v.* Small, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476; New Albany *v.* Endres, 143 Ind. 192, 42 N. E. 683; Boulden *v.* McIntire, 119 Ind. 574, 21 N. E. 445, 12 Am. St. Rep. 453; Goodwin *v.* Smith, 72 Ind. 113, 37 Am. Rep. 144.

Kentucky. — Royal Ins. Co. *v.* Schwing, 87 Ky. 410, 9 S. W. 242.

Maine. — Sawtelle *v.* Sawtelle, 34 Me. 228.

Maryland. — Burgess *v.* Lloyd, 7 Md. 178.

Massachusetts. — Brown *v.* King, 5 Metc. (Mass.) 173; Wilson *v.* Melvin, 13 Gray (Mass.) 73.

Nevada. — Gillson *v.* Price, 18 Nev. 109, 1 Pac. 459.

New York. — Roberts *v.* Chittenden, 88 N. Y. 33; Stokes *v.* Stokes, 156 N. Y. 662, 50 N. E. 1122.

North Carolina. — State *v.* Woodly, 2 Jones Law (N. C.) 276.

South Carolina. — Information *v.* Oliver, 21 S. C. 318, 53 Am. Rep. 681; Connor *v.* Railroad Co., 23 S. C. 427.

Texas. — Blum Land Co. *v.* Harbin, (Tex.), 33 S. W. 153. Whenever, whether in plea or replication, or rejoinder and sur-rejoinder, the issue of fact is reached, then, whether the party claiming the judgment of the court asserts an affirmative or negative proposition, he must make good his assertion. On him lies the burden of proof. Cook *v.* Guirkin, 119 N. C. 13, 25 S. E. 715.

Right Grounded on Negative. It is true that the burden of proof is generally on the party holding the affirmative. To this rule there are exceptions. Where the plaintiff grounds his right of action on a negative allegation, the establishment of which is an essential element in his case, he is bound to prove it, though negative in its terms. The allegation of the bill in that case was that Reed did not within the time specified tender a deed for the land. Nash *v.* Hall, 4 Ind. 444.

Rule of California Code. — Money was received and deposited upon conditions that it should be drawn out only upon the consent of a person named. In a suit to recover the money it was held that the defendant had the burden of proof to show that the consent had been obtained to the withdrawal. The court says: "It is difficult, if not impossible, to lay down a general rule by which it may be determined upon which party to an action the burden of proof falls, where a negative is averred. The circumstances of each case must necessarily have much to do with applying the rule. Our code rule is as follows: 'Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded.' . . . Plaintiff's cause of action was not founded on his non-consent to the withdrawal of the money from the bank." Dirks *v.* California S. D. & T. Co., 136 Cal. 84, 68 Pac. 487.

That Note Was Purchased Without Notice. — See Sayres *v.* Linkhart, 25 Ind. 145, in which it is held that in some cases it is necessary for the pleader in his pleading to negative knowledge or notice, as that a note was taken before maturity in good faith and without notice, but the court says that the averment is a negative one, not, perhaps, in the power of the pleader to prove, and that therefore the onus of proving notice is thrown upon the other side. But this may also be explained on the theory that the holder of a note is presumed to have taken without notice, etc., and that the burden cast upon the defendant is merely that of repelling the presumption (the burden of proof in its second sense), and not that of producing a preponderance of evidence.

87. Elkin *v.* Jansen, 13 Mees. &

although he may have failed to make such allegation.[88]

(2.) Non-Compliance With Law. — (A.) GENERALLY. —Especially is this true where the allegation is of an omission by defendant of some duty imposed by law,[89] or a criminal neglect of duty,[90] or is a substantive part of a criminal charge.[91]

(B.) EXCEPTIONS. — But to this an exception is made in some cases as to matters peculiarly within the knowledge of the opponent.[92]

W. 655; Manning *v.* Thompson, 17 U. C. C. P. 606; Givens *v.* Tidmore, 8 Ala. 745.

88. "If it was necessary to allege in the petition that the fall of the building was not the cause of the fire, then the petition in the case is clearly defective. The defendant, however, if the petition was defective, cured the defect by pleading the fact that the fire resulted from the fall of the building. Still this did not place the burden on the company (the defendant), if the plaintiff was required to aver and prove the non-existence of a state of facts that would exonerate the company from liability when developed. Royal Ins. Co. *v.* Schwing, 87 Ky. 410, 9 S. W. 242.

89. Dobbs *v.* The Justices, 17 Ga. 624; Hicks *v.* Martin, 9 Mart. (O. S.) (La.) 47, 13 Am. Dec. 304; Morgan *v.* Mitchell, 3 Mart. (N. S.) (La.) 576; Baird *v.* Brown, 28 La. Ann. 842; Burgess *v.* Lloyd, 7 Md. 178; Lord Halifax, Bull. N. P. 298.

"**Where the Negative Allegation Involves a Charge of Fraud,** or breach of official duty and many other violations of trust of a kindred character, the onus is on the party making the charge; for the presumption of law is always in favor of innocence." Haney *v.* Conoly, 57 Ala. 179.

To Prove Neglect of Duty. — In Williams *v.* East India Co., 3 East 192, Lord Ellenborough says that the rule of law is that where any act is required to be done on the one part such that the party neglecting it would be guilty of a criminal neglect in duty in not having done it, the law presumes the affirmative and throws the burden of proving the contrary, that is, in such case of proving a negative, on the other side, and the chief justice quoted from Monk *v.* Butler, 1 Rol. Rep. 83, which was a suit for tithes, the defendant pleading that the plaintiff had not read the thirty-nine articles, and the court put the defendant to prove it, holding that when the law presumes the affirmative the negative is to be proved; and he quoted also from Lord Halifax's case, Bull. N. P. 298, that a person shall be presumed duly to execute his office until the contrary appears, so that the plaintiff in that case had to prove the negative.

90. Givens *v.* Tidmore, 8 Ala. 745; Cuyler *v.* Sanford, 8 Barb. (N. Y.) 225; Williams *v.* East India Co., 3 East 192, 6 Rev. Rep. 589; Potter *v.* Deyo, 19 Wend. (N. Y.) 361.

"If the law presumes the affirmative the party may still be put to the proof of the negative. Therefore if the charge consist in a criminal neglect of duty, as the law presumes the affirmative, the burden of proof of the contrary is thrown on the other side." U. S. *v.* Hayward, 2 Gall. 485, 26 Fed. Cas. No. 15,336.

91. Com. *v.* Lahy, 8 Gray (Mass.) 459; Com. *v.* Thurlow, 24 Pick. (Mass.) 374.

92. *England.* — Apothecaries Co. *v.* Bentley, 1 Car. & P. 538, Ry. & M. 159; Jelfs *v.* Ballard, 1 Bos. & P. 467 (*dictum* of Heath, J.); Rex *v.* Stone, 1 East 639; Rex *v.* Turner, 5 M. & S. 206; Rex *v.* Smith, 3 Bur. 1475; Borthwick *v.* Carruthers 1 T. R. 648 (*dictum* of Buller, J.)

United States. — U. S. *v.* Hayward, 2 Gall. 485, 26 Fed. Cas. No. 15,336.

Alabama. — Givens *v.* Tidmore, 8 Ala. 745.

Illinois. — Great Western R. Co. *v.* Bacon, 30 Ill. 347, 83 Am. Dec. 199.

Indiana. — Hayes *v.* Fitch, 47 Ind. 21.

Kentucky. — Funk *v.* Procter, 22 Ky. L. Rep. 1728, 61 S. W. 286.

Louisiana. — King *v.* Atkins, 33 La. Ann. 1057.

The most frequent illustrations of this rule in the United States have been in proceedings under laws regulating the sale of alcoholic liquors;[93] some of the cases basing their ruling on a statute and not admitting the rule except as a statutory one.[94] Others limit the rule strictly according to the reason given for it, namely, the inconvenience to the state and perhaps its inability to establish what the defendant, if it be not true, can easily disprove.[95] The existence of

New Hampshire. — Bliss *v.* Brainard, 41 N. H. 256; State *v.* Shaw, 35 N. H. 217; State *v.* Foster, 23 N. H. 348, 55 Am. Dec. 191.

New York. — Cuyler *v.* Sanford, 8 Barb. 225; Smith *v.* New York C. R. Co., 43 Barb. 225; Clapp *v.* Town of Ellington, 87 Hun 542, 34 N. Y. Supp. 283.

North Carolina. — Cook *v.* Guirkin, 119 N. C. 13, 25 S. E. 715.

South Carolina. — Connor *v.* Railroad Co., 23 S. C. 427.

Utah. — McIntyre *v.* Ajax M. Co., 20 Utah 323, 60 Pac. 552.

Defendant Prosecuted for Practicing Medicine Without a License has the burden of proving that he was licensed. People *v.* Nyce, 34 Hun (N. Y.) 298.

Prosecution of Druggist for not employing a registered pharmacist, burden on defendant to prove registration. People *v.* Nedrow, 16 Ill. App. 192.

93. Prosecution for Unlicensed Liquor Selling. — State *v.* Morrison, 3 Dev. Law (N. C.) 299 (reviewing English cases arising under game laws); Information *v.* Oliver, 21 S. C. 318, 53 Am. Rep. 681; State *v.* Geuing, 1 McCord (S. C.) 574; Noecker *v.* People, 91 Ill. 468.

Action to Recover a Penalty for unlicensed sale of liquor. Potter *v.* Deyo, 19 Wend. (N. Y.) 361; Mayor *v.* Mason, 1 Abb. Pr. (N. Y.) 344.

Convenience the Reason of the Rule. — In Harbough *v.* Monmouth, 74 Ill. 367, it is held that, on the score of convenience, the burden is on the defendant in a prosecution for illegally selling liquors, to show that he sold for medical or other excepted purposes. That was an action for a penalty and it does not appear that the information negatived the exception.

Sale to a Minor; Proving Order. In Monroe *v.* People, 113 Ill. 670, it was held that on proof by the state that liquor was sold to a minor by defendant, the latter had the burden of showing a written order such as under the statute made the sale lawful; that to hold otherwise "would impose on the prosecution the burden of proving a negative, which the law does not require." The same ruling was made in Birr *v.* People, 113 Ill. 645.

94. In an action to recover price of liquors sold, when defendant alleges that plaintiff had no license to sell, the burden is on defendant to prove want of license. Wilson *v.* Melvin, 13 Gray (Mass.) 73.

So in proceeding to abate a nuisance, consisting in keeping a house for illegal sale of liquors, the state must prove that defendant had no license. Com. *v.* Lahy, 8 Gray (Mass.) 459.

95. Where Evidence Within State's Power to Produce. — In State *v.* Woodly, 2 Jones Law (N. C.) 276, while approving the rule of the text as a general proposition, it was held that where a statute made it a felony to carry away a slave without the written consent of the owner, the absence of such consent must be proved by the state. The reason given is that the burden is on the defendant only where the evidence is presumably in his possession and the state cannot conveniently or at all prove the negative. That in the case on trial the state could call the owner to prove that no consent in writing was given.

In Com. *v.* Thurlow, 24 Pick. (Mass.) 374, the court recognized the force of the reasons for requiring the defendant to produce a license or permit, but held them inapplicable because the state had at

the exception has been denied,[96] and it is at least doubtful whether this is really an exception, or whether in such cases the phrase "burden of proof" is, or should be, used in its second sense, as hereafter explained.[97]

D. In Prosecutions for Crime. — a. *Under Plea of Not Guilty.* **(1.) On State.** — In accordance with the general rule that the demandant shall prove, and with the exceptions noted in the last section, it would seem that the state should have the burden upon the entire issue raised by the plea of not guilty, that being in effect a denial of every material statement in the indictment. And such, with a few exceptions, is the case.[98]

(2.) Does Not Shift. — And it would seem that the burden (using the term in the sense in which it has been thus far taken in this article) should not shift to the defendant as to any matters that can

hand the record of liquor licenses issued and could prove the negative.

In an action on a statute forbidding the coursing of deer on enclosed grounds *without the owner's consent* the prosecution must prove that such consent was not given. Rex *v.* Rogers, 2 Camp. 654.

96. "It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. . . . I think a proposition of that kind cannot be maintained, and that the exceptions supposed to be found among cases relating to the game laws may be explained on special grounds." Bowen, L. J., in Abrath *v.* Northeastern R. Co., 11 Q. B. D. 440.

Prosecution Under Game Laws. King *v.* Stone, 1 East 639, was a prosecution under the game laws, the question being whether it was for the prosecution to show that the defendant was not qualified to kill game, or whether that matter was so difficult of proof by the prosecution, and so easily proved by the defendant, that the prosecution would be relieved of the burden. Chief Justice Kenyon and Justice Grose held that the prosecution must prove want of qualification. Justices Lawrence and Le Blanc held the contrary on the ground of great inconvenience in negativing all the qualifications, holding that it was impossible in some cases for a prosecutor to do it. The court was therefore equally divided upon the question. Le Blanc said that in general the rule is considered to be that a party is not required to prove a negative, and it lies on the other side to prove the affirmative which he insists on.

97. Thus in Mugler *v.* Kansas, 123 U. S. 674, Mr. Justice Harlan, speaking of a statutory provision that the state need not in the first instance prove that the defendant had no license to vend liquors, said: "It does not deprive him of the presumption that he is innocent of any violation of law. If the defendant has such license or permit, he can easily produce it, and thus overthrow the *prima facie* case established by the state."

See remarks of Bowen, L. J., in Abrath *v.* Northeastern R. Co., 11 Q. B. D. 440.

98. *United States.* — German *v.* U. S., 120 Fed. 666; McKnight *v.* U. S., 115 Fed. 972.

Illinois. — Hopps *v.* People, 31 Ill. 385; 83 Am. Dec. 231; Dacey *v.* People, 116 Ill. 555, 6 N. E. 165.

Kansas. — State *v.* Crawford, 11 Kan. 34.

Maine. — State *v.* Flye, 26 Me. 312.

New York. — Brotherton *v.* People, 75 N. Y. 159; People *v.* Downs, 123 N. Y. 558, 25 N. E. 988.

Pennsylvania. — Watson *v.* Com., 95 Pa. St. 418.

"We have decided so recently as to make further citation needless that the rule that in criminal cases the de-

be shown under the general issue. Such is the general rule.[99] Presumptions, it is said, do not shift the burden.[1]

b. *Affirmative Defenses.* — **(1.) Generally.** — As to affirmative defenses the burden should be upon the defendant.[2]

(2.) Conflict of Authorities. — But upon the question, what are affirmative defenses (which is not one of evidence), the cases are in conflict. A few illustrative rulings are given below.[3] Added to this conflict there is the too frequent ambiguity in the use of the term "burden of proof," so that no more definite rules can be stated applicable to criminal actions generally. The conflicting rulings have

fendant is entitled to the benefit of a reasonable doubt applies not only to the case as made by the prosecution, but to any defense interposed." People *v.* Riordan, 117 N. Y. 71, 22 N. E. 455.

Burden Never on Accused to Prove Innocence. — In Davis *v.* U. S., 160 U. S. 469, Justice Harlan said: "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime."

99. Hopps *v.* People, 31 Ill. 385, 83 Am. Dec. 231; Dacey *v.* People, 116 Ill. 555, 6 N. E. 165; State *v.* Crawford, 11 Kan. 34; State *v.* Flye, 26 Me. 312; Watson *v.* Com., 95 Pa. St. 418.

Chief Justice Cooley's Statement. As to shifting of the burden in criminal cases where the question of insanity arises, it was said by Chief Justice Cooley: "There is no such thing in the law as a separation of the ingredients of offense, so as to leave a part to be established by the prosecution, while as to the rest the defendant takes upon himself the burden of proving a negative. The idea that the burden of proof shifts in these cases is unphilosophical, and at war with fundamental principles of criminal law." People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

1. German *v.* U. S., 120 Fed. 666; McKnight *v.* U. S., 115 Fed. 972.

2. "Whenever the matter of defense is wholly disconnected from the body of the offense charged, it is distinct affirmative matter; . . . in such cases the burden of proof does rest upon the accused." State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122.

See the articles "FORMER ACQUITTAL," "FORMER CONVICTION," "FORMER JEOPARDY," "PARDON."

3. In California by statute the burden of showing circumstances of mitigation or excuse is on defendant. People *v.* Bushton, 80 Cal. 160, 22 Pac. 127, 549.

Mitigating Circumstances. — In Alexander *v.* People, 96 Ill. 96, under a statute reading "the killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused, etc.," it was held that the jury should not be charged that defendant must "satisfactorily establish such defense." That he was indeed bound to prove the defense, but only as any other fact is proved, and that the defense, though not "satisfactorily" proved, might be supported by such proof as would produce grave doubts as to the guilt of the prisoner, and that "where there are reasonable doubts of the guilt of the accused, the rule of law is, there must be an acquittal." The defense in that case was that the homicide was an accident.

Adultery As a Defense. — In prosecution for failure to support wife the burden is on the defendant to establish defense of wife's adultery. State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125.

In State *v.* Lawrence, 57 Me. 574, the defense of insanity is said to be a plea in confession and avoidance.

most of them been made with reference to the defenses of Alibi, Drunkenness, Insanity and Self-Defense.[4]

III. SECOND MEANING OF TERM.

1. Definition. — In the second place the phrase is used to express the duty that either party may have of adducing evidence to meet evidence or presumption; or, as otherwise stated, the duty of going forward with the proofs. Whenever under the evidence, or applicable presumptions, or a combination of these, one party is entitled as matter of law to a ruling in his favor, the burden devolves upon the other party of adducing evidence.[5]

2. Shifting of Burden.—A. GENERALLY.—And this, if it occurs after some evidence has been introduced, constitutes in the true sense of the term the "shifting" of the burden of proof.[6]

B. IS WITHIN SINGLE ISSUE. — It is not a shifting to a new issue,

See also the four last preceding notes.

4. *See* the several articles "ALIBI," "DRUNKENNESS," "INSANITY," "SELF-DEFENSE," for the rulings on burden of proof applicable to each of those defenses.

5. United States *v.* South C. C. & T. Co., 18 Fed. 273; Buswell *v.* Fuller, 89 Me. 600, 36 Atl. 1059; Dublin W. & W. R. Co. *v.* Slattery, 3 App. Cas. 1155; Tedens *v.* Schumers, 112 Ill. 263.

In Claflin *v.* Meyer, 75 N. Y. 260, 31 Am. Rep. 467, the plaintiff insisted on his theory of the burden of proof and rested. The defendant after moving for a dismissal, on the opposite theory, which was denied, proceeded to put in his evidence.

Burden Shifts. — "The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on forever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests." Opinion of Bowen, L. J., in Abrath *v.* Northeastern R. Co., 11 Q. B. D. 440.

6. Pease *v.* Cole, 43 Conn. 53, 55 Am. Rep. 53; Tarbox *v.* Steamboat Co., 50 Me. 339; Heinemann *v.* Heard, 62 N. Y. 448.

Prima Facie Case Shifts the Burden. — The case of Meikel *v.* State Sav. Inst., 36 Ind. 355, involved a claim of alteration of a promissory note. The defendant in his answer had admitted the execution of the note, but alleged a subsequent alteration thereof. It was held that the affirmative of this issue was upon the defendant, because under the pleadings if neither party had offered any evidence, the plaintiff would have been entitled to recover. The court said that if the note appeared to have been altered the jury might have been instructed that the burden of explaining the alteration lay upon the plaintiff, and that this was consistent with the proposition that the

but within the same issue, to rebut some presumption or some evidence that would otherwise determine that issue.[7]

C. In Proving Negative. — Where the party having the burden is required to prove a negative, less evidence than in other cases will be required to shift the burden.[8]

D. Facts in Opponent's Knowledge. — The burden may be

burden of the issue lay upon the defendant. Whether or not the note appeared to have been altered was simply a matter of evidence, and if on the trial the note appeared to be altered, and if that called upon the plaintiff to explain, the case was made out for the defendant *prima facie*, and the burden would then be shifted onto the plaintiff. This making out a *prima facie* case by the evidence and thus casting the burden of meeting it on the other side occurs in every-day practice.

7. Meikel *v.* State Sav. Inst., 30 Ind. 355.

"It is to be observed that very often the burden of proof will be shifted within the scope of a particular issue by presumptions of law. Abrath *v.* Northeastern R. Co., 11 Q. B. D. 440.

Between Bailor and Bailee. — In "The Glendarroch," Prob. (1894) 226, it was said by Esher, M. R., that proof by the bailor of failure to deliver raised the presumption of negligence and shifted the burden to the bailee to explain: that by showing a loss from a peril of the sea the bailee did explain, and that the duty then recurred to the plaintiff of showing that such loss was caused by bailee's negligence.

To Rebut Presumption. — Caldwell *v.* New Jersey S. B. Co., 47 N. Y. 282, was an action by a passenger for damages from an explosion of a boiler. It was incumbent upon the plaintiff to establish negligence. The burden of proof and the affirmative of the issue remained upon the plaintiff throughout the trial properly speaking. But the burden or necessity was cast upon the defendant to relieve itself of the presumption of negligence raised by the plaintiff's evidence. The presumption arising from the plaintiff's proof, unless overthrown by the evidence produced by the defendant, must prevail.

No Shifting According to Massachusetts Rule. — "If there could be a shifting of the burden upon a single issue, it would be impossible to tell when the burden is to be transferred from the one party to the other." Crowninshield *v.* Crowninshield, 2 Gray (Mass.) 524. But the court is using the phrase "burden of proof" in the single and limited sense approved by Massachusetts usage; see first part of this article.

8. In an action brought to recover money paid for land, on the ground that there was a failure of title, the plaintiff showed that defendant had no title of record, and it was held that this sufficed to shift the burden of proof to the defendant because if he had any title, he alone could show it. Thayer *v.* Viles, 23 Vt. 494.

Non-Existence of Patentees. — In U. S. *v.* South C. C. & T. Co., 18 Fed. 273, it became a question whether certain persons named as patentees occupied land within the county at the time that the pretended entries were made. The United States called several witnesses, who testified that they had lived in the county a number of years and were well acquainted there, and that none of the persons named as patentees were known in the county. The courts said that the evidence produced by the complainant was sufficient to shift the burden, and make it necessary for the respondents to come forward with proofs to show that these supposed patentees were real persons. That if such were the fact, it would be easy to show it, though quite difficult to prove the negative; the amount of proof requisite to support a negative proposition and shift the burden varying according to the cir-

easily shifted to the one within whose knowledge the facts lie, and who can readily produce the evidence.[9]

E. By Presumptions. — The burden of proof is most frequently shifted by the application of presumptions.[10] One party establishes a state of facts from which the law presumes, until the contrary appears, the existence of another fact.[11] Evidently such presump-

cumstances of the case. Very slender evidence will often be sufficient to shift the burden to the party having the greatest opportunities of knowledge concerning the facts to be inquired into.

9. Harrell *v.* Mitchell, 61 Ala. 270.

10. Abrath *v.* Northeastern R. Co., 11 Q. B. D. 440; Caldwell *v.* New Jersey S. B. Co., 47 N. Y. 282; Phipps *v.* Mahon, 141 Mass. 471, 5 N. E. 835; Pease *v.* Cole, 53 Conn. 53, 55 Am. Rep. 53; Pruyn *v.* Young, 51 La. Ann. 320, 25 So. 125.

Presumption of Continuance of Insanity. — Halley *v.* Webster, 21 Me. 461.

Presumption Against Trustee in dealing with *cestui que trust.* Cumberland C. & I. Co., *v.* Parish, 42 Md. 598.

Presumption of Negligence From Fall of Building without apparent cause; Mullen *v.* St. John, 57 N. Y. 567, 18 Am. Rep. 530, or from the falling of a brick from the wall. Kearney *v.* London R. R., L. R., 6 Q. B. 759; or from the falling of a barrel from a shop window. Byrne *v.* Boadle, 2 Hurl. & Colt. 722. See also Scott *v.* London Dock Co., 3 Hurl. & Colt. 596.

Presumption That an Officer Has Done His Duty. — Hartwell *v.* Root, 19 Johns. (N. Y.) 345, 10 Am. Dec. 232.

Presumption of Negligence of a Bailee who has wholly failed to deliver or account for goods, and by the presumption in favor of a bailee, who shows loss of goods by burglary, that such burglary was not with his connivance or negligence. Claflin *v.* Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Buswell *v.* Fuller, 89 Me. 600, 36 Atl. 1059.

Of Unseaworthiness at beginning of a voyage, from fact of inability to proceed soon after voyage commenced, shifts the onus on party seeking to recover on policy of insurance. Watson *v.* Clark, 1 Dow. 336, 14 Rev. Rep. 73.

One Claiming Release by Extension of time without his consent must prove the extension, but then, it seems, the law presumes in the absence of evidence that such extension was not assented to. Hayes *v.* Fitch, 47 Ind. 21.

Whether Presumption Shifts Burden. — The burden of proof always remains upon the party who has the affirmative of the issue. From certain facts, presumptions may arise. Those presumptions are merely evidence like other proof in the case. When the case was finally submitted to the jury, weighing presumptions, proof and all the evidence, the burden of proof was on the plaintiff to establish affirmatively the negligence of the defendant. A presumption does not shift the burden of proof. Jones *v.* Union R. Co., 18 App. Div. 267, 46 N. Y. Supp. 321. Here plainly, the phrase is used in its first sense.

11. Presumption As to Alteration in a Deed. — Sharpe *v.* Orme, 61 Ala. 263.

Presumption That Party Knows Contents of Paper that he subscribes. Hartford L. & A. Ins. Co., *v.* Gray, 80 Ill. 28.

Of Payment From Payor's Possession of Due Bill. — Tedens *v.* Schumers, 112 Ill. 263; Sullivan *v.* Goldman, 19 La. Ann. 12.

Presumption From Failure to Object to Account Rendered. — Powell *v.* Powell, 10 Ala. 900.

Whenever a presumption arises that a fact exists, he who made an allegation to the contrary must prove it Thus deeds are presumed to have been delivered on the day they have date, so that he who alleges that the delivery was on a different day must prove it. On a motion to quash a

tion shifts the burden of proof, using the term in the sense of a duty to rebut a *prima facie* case.[12] But the burden cannot be said to be shifted by a presumption where the testimony relied upon to raise the presumption also shows facts that tend to rebut the presumption.[13] The effect of presumptions as evidence, or when taken into consideration with the evidence, will be stated fully in its proper place.[14]

F. By Prima Facie Case. — The fact that one side has made out a *prima facie* case has been said to shift the burden to the other, but an examination of the cases will show that generally some presumption was raised to make out the *prima facie* case.[15]

IV. IMPORTANCE OF BURDEN OF PROOF.

1. Generally. — That the question of burden of proof may be of grave importance is apparent.[16]

recognizance, for want of a judgment, proof that there is no such judgment must be made by the plaintiffs in the motion, to show negatively that there was no such judgment; for the recital in the recognizance is *prima facie* evidence of it." Higdon *v.* Higdon, 6 J. J. Marsh. (Ky.) 48.

12. Prima Facie Evidence of Right. — In every case in which there is *prima facie* evidence of any right existing in any person the *onus probandi* is always upon the person or party calling such right in question." Banbury Peerage, 1 Sim. & St. 153. The presumption in that case was of legitimacy. See Amos *v.* Livingston, 26 Kan. 106.

13. Gillespie *v.* St. Louis K. C. & N. R. Co., 6 Mo. App. 554.

In Claflin *v.* Meyer, 75 N. Y. 260, 31 Am. Rep. 467, it is held that although mere proof of demand and non-delivery raises a presumption of negligence against a bailee, which he must rebut, yet if the evidence for the bailor showed that the goods were lost from bailee's possession by theft, which *prima facie* excused the bailee, it was for the bailor to proceed to show that the theft occurred by reason of the bailee's negligence.

14. *See* article "Presumptions."

15. Union Nat. Bank *v.* Baldenwick, 45 Ill. 375; Bradford *v.* Stevens, 10 Gray (Mass.) 379; Dederich *v.* McAllister, 49 How. Pr. (N. Y.) 351.

16. People *v.* Downs, 123 N. Y. 558, 25 N. E. 988; Hingeston *v.* Kelly, 18 L. J. Ex. 360; Megantic Election Case, 8 Can. Sup. Ct. 169.

In Homicide Cases. — In the course of his opinion, Justice Finch said: "Take, for example, the prisoner's statement that the pistol exploded in a fight between him and Logan and without his conscious act. If that be true, while there was a homicide, there was no crime, for the killing would become merely an accident or misadventure. If now the burden is upon the prisoner to satisfy the jury of that fact, and unless they are so satisfied, they must deem the homicide intentional, a verdict of guilty might easily result. But if that burden is not upon the prisoner; if the jury are told that it remains with the prosecution; that if the evidence leaves in their minds a reasonable doubt whether the killing may not have been an accident or misadventure, the prisoner must have benefit of the doubt because it goes directly to the vital elements of the People's case and leaves it uncertain whether a crime has been committed at all, the verdict of the jury might be entirely different. A similar result might attend a defense of justifiable homicide, and so the question of the burden of proof and the scope and effect of a reasonable doubt became

2. Effect of Erroneous Rulings. — Therefore erroneous instructions[17] and rulings concerning it have been often deemed ground for new trial,[18] although it has been deprecated that a mistaken view as to burden of proof, resulting merely in an erroneous ruling as to the right to open and close, should be ground for new trial.[19]

Error in ruling on burden of proof, or rulings based on an erroneous theory of the burden of proof, are generally ground for reversal,[20] if proper exception is taken.[21] But if one claims a ruling and it is denied upon such erroneous theory, and he afterwards introduces evidence that supplies the defect in the opponent's case, the error is probably not ground for reversal.[22] One that at the trial assumes the burden of proof cannot on appeal insist that it was on the other side.[23]

3. Rules Apply at Law and in Equity. — The rules as to burden of proof apply equally at law and in equity.[24]

in the case at bar of very great importance. People *v.* Downs, 123 N. Y. 558, 25 N. E. 988.

"**It makes all the difference** where the onus of proof is held to be." The Glendarroch, Prob. (1894) 226.

17. People *v.* Downs, 123 N. Y. 558, 25 N. E. 988; People *v.* McCann, 16 N. Y. 58, 69 Am. Dec. 642.

Any instruction that gives the jury an impression that with respect to a certain issue the party really having the burden has only some peculiar duty other and less than the ordinary burden of proving it by the greater weight of evidence, is error. The defendant pleaded a guaranty and its breach. The trial judge said to the jury: "While I will not instruct you that the burden of proof lies upon him (defendant), I do instruct you, as he sets that up as an independent proposition, that it should fully appear to be a fact." Gile *v.* Sawtelle, 94 Me. 46, 46 Atl. 786.

18. Ashby *v.* Bates, 15 Mees. & W. 589; Claflin *v.* Meyer, 75 N. Y. 260, 31 Am. Rep. 467.

Geach *v.* Ingall, 14 Mees. & W. 95; in which case the trial judge ruled erroneously as to the right to begin, such ruling being based on a mistaken view of the burden of proof under the pleadings.

19. Megantic Election Case, 8 Can. Sup. Ct. 169; Ashby *v.* Bates, 15 Mees. & W. 589 (opinion of Baron Rolfe.)

"It is immaterial where the burden of proof belongs, as an abstract matter of law where all the evidence of the transaction has been introduced and it establishes that the note was purchased in good faith, and without notice of any facts that would have led the plaintiff to a knowledge of the consideration of the note." McCormick *v.* Holmes, 41 Kan. 265, 21 Pac. 108.

20. Claflin *v.* Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Heinemann *v.* Heard, 62 N. Y. 448; Lamb *v.* Camden & A. R. & T. Co., 46 N. Y. 271, 7 Am. Rep. 327.

21. Brotherton *v.* People, 75 N. Y. 159; Haughwout *v.* Garrison, 69 N. Y. 339.

22. Claflin *v.* Meyer, 75 N. Y. 260, 31 Am. Rep. 467.

23. Benjamin *v.* Shea, 83 Iowa 392, 49 N. W. 989.

24. There is no difference in respect to the burden of proof between proceedings at law and in equity; in both, the party maintaining the affirmative of the issue has it cast upon him to maintain the burden of proof. Pusey *v.* Wright, 31 Pa. St. 387.

BURGLARY.

By James A. Ballentine.

I. BURDEN OF PROOF.

1. In General. — The burden is, and remains throughout the trial, upon the prosecution to show the guilt of the accused beyond a reasonable doubt.[1]

1. People *v.* Winters, 93 Cal. 277, 28 Pac. 946; People *v.* Flynn, 73 Cal. 511, 15 Pac. 102; State *v.* Morris, 47 Conn. 179; State *v.* Manluff, 1 Houst. (Del.) 208; Houser *v.* State, 58 Ga. 78; Farley *v.* State, 127 Ind. 419, 26

2. Character of Burglarized Premises. — The prosecution must, in the absence of a statute enlarging the scope of burglary to other buildings, show that the building burglarized was a dwelling-house.[2]

3. Consent of Owner. — The prosecution need not prove that the premises were entered without the owner's consent,[3] but there can be no conviction if the evidence shows that the entry was instigated by or made with the knowledge and assent of the occupant.[4]

4. Intent. — The burden is not only upon the prosecution to prove the burglarious entry, but also to prove that such entry was made with the specific intent alleged.[5]

N. E. 898; Coleman *v.* State, 26 Tex. App. 252, 9 S. W. 609.

On State Throughout. — The burden is not only on the state when the trial begins, but throughout, for the presumption of innocence which makes it so at first, keeps it so to the end. Farley *v.* State, 127 Ind. 419, 26 N. E. 898.

Age As Affecting Burden. — If the defendant is between ten and fourteen, the burden of proving that he was *capax doli* is on the state. Ford *v.* State, 100 Ga. 63, 25 S. E. 845.

2. State *v.* Fisher, 1 Pen. (Del.) 303, 41 Atl. 208; Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809; Moore *v.* People, 47 Mich. 639, 11 N. W. 415.

Proof of Dwelling. — Actual residence in the house at the time of the burglary need not be shown. Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809; State *v.* Meerchouse, 34 Mo. 344, 86 Am. Dec. 109.

Contra. — State *v.* Fisher, 1 Pen. (Del.) 303, 41 Atl. 208.

Proof that an outbuilding was contiguous to and used in connection with the main building is sufficient to make it an outhouse and within the curtilage. Shotwell *v.* State, 43 Ark. 345. Whether an outbuilding forty yards from the dwelling house is within the curtilage is a question of fact for the jury. Wait *v.* State, 99 Ala. 164, 13 So. 584.

3. Buchanan *v.* State, 24 Tex. App. 195, 5 S. W. 847; Willis *v.* State, 33 Tex. Crim. App. 168, 25 S. W. 1119.

4. Allen *v.* State, 40 Ala. 334, 91 Am. Dec. 477; Roberts *v.* Territory, 8 Okla. 326, 57 Pac. 840; Turner *v.* State, 24 Tex. App. 12, 5 S. W. 511.

Failure to Fasten. — Evidence of the owner's failure to make the usual fastenings is insufficient to show his consent to the breaking and entering. State *v.* Jansen, 22 Kan. 498. But evidence that the usual fastenings were not made may be sufficient to show that the defendant was tempted by the owner's carelessness. Com. *v.* Strupney, 105 Mass. 588, 7 Am. Rep. 556.

Evidence held insufficient to show consent. People *v.* Morton, 4 Utah 407, 11 Pac. 512.

5. People *v.* Hope, 62 Cal. 291; State *v.* Carpenter, 1 Houst. (Del.) 367; State *v.* Fisher, 1 Pen. (Del.) 303, 41 Atl. 208; Davis *v.* State, 22 Fla. 633; Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809; State *v.* Carroll, 13 Mont. 246, 33 Pac. 688; State *v.* Green, 15 Mont. 424, 39 Pac. 322; State *v.* Cowell, 12 Nev. 337; Coleman *v.* State, 26 Tex. App. 252, 9 S. W. 609; Walton *v.* State, 29 Tex. App. 163, 15 S. W. 646; Mitchell *v.* State, 33 Tex. Crim. App. 575, 28 S. W. 475. Since the intent is the essence of the offense, the state must point it out and prove that it was to commit some specific felony, otherwise there would be no distinction between burglary and housebreaking in cases where the breaking is only technical. State *v.* Eaton, 3 Harr. (Del.) 544. But to constitute burglary there must be proof of an actual breaking, or its equivalent, and proof of an illegal entry such as would enable the party injured to maintain trespass *quaere clausum*; nor will proof of entrance merely for a purpose ever so felonious, suffice, if there is no actual breaking, no matter how clearly the felonious intent be

II. OWNERSHIP.

1. Ownership of Premises. — Parol evidence is admissible to establish the character of the alleged owner's possession of the premises at the time of the burglary.[6]

2. Possession. — Proof that one was in actual or constructive possession of the burglarized premises is sufficient to establish his alleged ownership.[7]

proved. State *v.* Newbegin, 25 Me. 500.

That the crime with intent to commit which the accused is charged to have broken and entered, was actually consummated, need not be shown. State *v.* Maxwell, 42 Iowa 208; State *v.* Fisher, 1 Pen. (Del.) 303, 41 Atl. 208.

6. People *v.* McGilver, 67 Cal. 55, 7 Pac. 49; Houston *v.* State, 38 Ga. 165; State *v.* Teeter, 69 Iowa 717, 27 N. W. 485; Pyland *v.* State, 33 Tex. Crim. App. 382, 26 S. W. 621.

Written Lease Proved by Parol. Parol evidence is admissible to establish the fact that the alleged owner held under a written lease. Houston *v.* State, 38 Ga. 165. One in possession may testify as to his nonconsent, the character of his ownership and his control of the premises at the time of the burglary. Pyland *v.* State, 33 Tex. Crim. App. 382, 26 S. W. 621.

7. Matthews *v.* State, 55 Ala. 65; Leslie *v.* State, 35 Fla. 171, 17 So. 555; Houston *v.* State, 38 Ga. 165; Smith *v.* People, 115 Ill. 17, 3 N. E. 733; State *v.* Lee, 95 Iowa 427, 64 N. W. 284; State *v.* Burns, 109 Iowa 436, 80 N. W. 545; State *v.* Watson, 102 Iowa 651, 72 N. W. 283; Com. *v.* Thompson, 75 Mass. 108; Com. *v.* Bowden, 80 Mass. 103; Com. *v.* Dailey, 110 Mass. 503.

Testimony of G. Wempe that his father owned the premises was sufficient to show that J. Wempe owned them as alleged. People *v.* McGilver, 67 Cal. 55, 7 Pac. 49.

Joint Ownership. — Where the names of several joint owners are alleged, they must be precisely proved as laid, though statute requires but one name to be alleged. Doan *v.* State, 26 Ind. 495.

Ownership of Husband and Wife. Evidence that the premises were the homestead of husband and wife is sufficient to show possession and ownership in the husband as alleged, as the head of the family, though she was the real owner. State *v.* Short, 54 Iowa 392, 6 N. W. 584. Evidence that the husband was the lessee of the premises held sufficient to show his ownership, though it was shown that his family, whom he had deserted, were the sole occupants. Com. *v.* Dailey, 110 Mass. 503. Proof that the house was rented by the husband and occupied by his family is insufficient, however, to support the wife's alleged ownership. Morgan *v.* State, 63 Ga. 307.

Ownership by Corporation. — When the ownership of the burglarized premises is laid in a corporation, the fact of incorporation must be shown. Johnson *v.* State, 73 Ala. 483; Edmunds *v.* State, 79 Ala. 48. But proof that the alleged corporate owner was a *de facto* corporation known by the alleged name is sufficient proof of corporate existence. State *v.* Thompson, 23 Kan. 338, 33 Am. Rep. 165; James *v.* State, 77 Miss. 370, 26 So. 929, 78 Am. St. Rep. 527. User is *prima facie* evidence of corporate existence in the case of either a foreign or a domestic corporation. Kincaid *v.* People, 139 Ill. 213, 28 N. E. 1060. Ownership of a store by a corporation will be presumed from its occupancy thereof. State *v.* Simas, 25 Nev. 432, 62 Pac. 242.

Ownership of Goods. — Where goods stolen in burglarizing a car are alleged to be the property of a railway company it is sufficient to prove that they were rightfully in the company's possession as a common carrier. State *v.* Long, 7 C. P. (Ohio) 449.

III. ENTRY.

1. Fact of Entry. — A. GENERALLY. — The gist of the offense of burglary being the breaking and entering,[8] to support conviction that element must be established beyond a reasonable doubt.[9]

8. State *v.* Hutchinson, 111 Mo. 257, 20 S. W. 34.

9. Lester *v.* State, 106 Ga. 371, 32 S. E. 335; Washington *v.* State, 21 Fla. 328; White *v.* State, 51 Ga. 285; People *v.* McCord, 76 Mich. 200, 42 N. W. 1106; State *v.* Warford, 106 Mo. 55, 16 S. W. 886, 27 Am. St. Rep. 322; McGrath *v.* State, 25 Neb. 780, 41 N. W. 780; State *v.* Cowell, 12 Nev. 337.

No breaking need be proved to sustain conviction in Nevada, proof of entry in the night time being sufficient. State *v.* Simas, 25 Nev. 432, 62 Pac. 242.

Proof of breaking is necessary, but proof of very slight force will sustain conviction. May *v.* State, 40 Fla. 426, 24 So. 498; Sims *v.* State, 136 Ind. 358, 36 N. E. 278; State *v.* Reid, 20 Iowa 413; State *v.* Herbert, 63 Kan. 516, 66 Pac. 235; State *v.* Warford, 106 Mo. 55, 16 S. W. 886, 27 Am. St. Rep. 322.

But where entry by force is charged, the force alleged must be proved. Jones *v.* State, 25 Tex. App. 226, 7 S. W. 669. But see State *v.* Huntley, 25 Or. 349, 35 Pac. 1065, holding that although the indictment charges a forcible breaking, proof is sufficient which shows that the entry was unlawful and without force.

An actual breaking may be proved by evidence of very slight force, such as lifting the latch of a door, pushing or forcing open a closed door, breaking a window, pulling an unfastened sash up or down, picking a lock, drawing back a bolt, breaking and opening an inner door after having entered an outer one, or any like means, and also by evidence of escaping from the house by any of these, or like means. State *v.* Fisher, 1 Pen. (Del.) 303, 41 Atl. 208. But proof that a front door had been bolted on the inside is insufficient to show force, where it is shown that the house had other doors through which the defendant might have entered. Jones *v.* State, 25 Tex. App. 226, 7 S. W. 669. And where the entry was through an open transom and no breaking either actual or constructive is shown, the defendant cannot be convicted. McGrath *v.* State, 25 Neb. 780, 41 N. W. 780.

Entry by Fraud. — Evidence that the defendant took off his shoes and entered through an open door, held insufficient to show an entry by fraud. Hamilton *v.* State, 11 Tex. App. 116.

Gradual Breaking. — Evidence that the defendant partially raised a window in the daytime and enough to enter the next night, was insufficient to establish a breaking. People *v.* Dupree, 98 Mich. 26, 56 N. W. 1046.

Breaking Out. — Evidence that the defendant entered through an open chimney and got out by breaking a fastening on a window from the inside, held sufficient to show a breaking into and entering. Walker *v.* State, 52 Ala. 376. But evidence that the defendant entered an open door, secreted himself until the door was locked, stole money, and broke a window to effect his escape, held insufficient to prove a breaking. Brown *v.* State, 55 Ala. 123, 28 Am. Rep. 693.

Constructive Breaking and Entering. — Where the same tool was used for breaking and for committing an ulterior crime within the building, the entering may be shown by proof that the tool was thrust into the building and was used in committing the ulterior crime without showing that the defendant entered in person. State *v.* Crawford, 8 N. D. 539, 80 N. W. 193, 73 Am. St. Rep. 772, 46 L. R. A. 312. And it is not necessary to show that the defendant actually entered, but if he and another were present, acting with a common purpose and one entered after breaking with intent to steal, it is sufficient. State *v.* Staehlin, 16 Mo. App. 559.

B. Circumstantial Evidence is admissible to show the breaking and entering.[10]

2. Time of Entry. — A. Night Time.— In the absence of express statutes punishing a breaking and entry by daylight as burglary, that the breaking and entering were done in the night time must be shown beyond a reasonable doubt,[11] but the time of the offense is sufficiently proved if it is shown to have been during the night

Assistance of Accomplice. — Evidence that the defendant procured himself to be let in by an accomplice and entered with a felonious intent, held sufficient to show a breaking and entering. Com. *v.* Lowrey, 158 Mass. 18, 32 N. E. 940.

No Breaking Shown — Evidence that the defendant entered through an open door with intent to steal, held insufficient to show a breaking. State *v.* Maxwell, 42 Iowa 208.

Attempt. — Evidence that a pane of glass was broken, but that the hole made was too small to allow entrance to be made, held insufficient to prove a breaking, but sufficient to show an attempt. Sullivan *v.* People, 27 Hun (N. Y.) 35.

10. Circumstantial Evidence. Evidence that the locks or fastenings which were secure are found broken is sufficient to show a breaking. State *v.* Groning, 33 Kan. 18, 5 Pac. 446; Com. *v.* Stephenson, 25 Mass. 354; People *v.* Curley, 99 Mich. 238, 58 N. W. 68; State *v.* Warford, 106 Mo. 55, 16 S. W. 886, 27 Am. St. Rep. 322; Foster *v.* People, 3 Hun (N. Y.) 6; People *v.* Block, 39 N. Y. St. 477, 15 N. Y. Supp. 229; State *v.* Munson, 7 Wash. 239, 34 Pac. 932.

Evidence of breaking held sufficient where it was shown that the door was habitually kept closed, money was taken from the room and the defendant had been detected in fitting a key to the lock. State *v.* Hutchinson, 111 Mo. 257, 20 S. W. 34. But testimony of the owner of the house that the morning after the burglary he found open a window usually kept closed, but did not know whether it had been closed the night before and found no signs of breaking or entering, held insufficient. Green *v.* State, 68 Ala. 539. And evidence that two planks on the side of the house had slipped down or were torn down was held insufficient to show a breaking. Prescott *v.* State (Miss.), 18 So. 683. Proof that a door was closed to exclude, though not fastened, will make mere pushing open a breaking, but not so if a door usually fastened has been left unfastened. State *v.* Newbegin, 25 Me. 500. Evidence that a window was left open an inch and that entrance was effected by lifting the sash, held insufficient to show a breaking and entering, for it must appear that the house was closed in the ordinary way, so that the defendant was not tempted by the owner's carelessness. Com. *v.* Strupney, 105 Mass. 588, 7 Am. Rep. 556. That the defendant opened an entrance door may be established by proof that he was in the house and could not otherwise have entered. People *v.* Gartland, 30 App. Div. 534, 52 N. Y. Supp. 352.

Tools Used. — Evidence that from a door's appearance it was broken open with a chisel is admissible, not as an opinion, but as evidence as to the mark made in the wood. State *v.* Ellsworth, 130 N. C. 690, 41 S. E. 548.

Custom of Owner. — Where it was shown that the outer and inner doors were latched ten minutes before the entering, evidence that they were usually kept so was admissible to show a breaking. People *v.* Bush, 3 Park. Crim. (N. Y.) 552.

11. People *v.* Flynn, 73 Cal. 511, 15 Pac. 102; Waters *v.* State, 53 Ga. 567; People *v.* Bielfus, 59 Mich. 576, 26 N. W. 771; Ashford *v.* State, 36 Neb. 38, 53 N. W. 1036; Adams *v.* State, 31 Ohio St. 462.

Whether the breaking and entering were done in the night time is a question of fact for the jury. State *v.* Leaden, 35 Conn. 515.

alleged, although a certain hour is alleged.[12]

B. Circumstantial Evidence is admissible to show that the breaking and entering were done in the night time,[13] and such evidence may be sufficient for that purpose.[14]

3. Intent of Entry. — A. Essential. — The prosecution must prove the intent alleged beyond a reasonable doubt,[15] for it is as essential to prove the intent as it is to prove the breaking and entering.[16]

B. Modes of Proof. — Since intent is a mental state, direct proof of it is not required, nor can it be so proved ordinarily, but it is generally derived and established by all the facts and circumstances attending the doing of the act complained of as disclosed by the evidence.[17]

12. Bethune *v.* State, 48 Ga. 505; State *v.* Tazewell, 30 La. Ann. 884. Proof that the burglary was committed within the time limited by statute for the prosecution of burglary held sufficient. Ferguson *v.* State, 52 Neb. 432, 72 N. W. 590, 66 Am. St. Rep. 512.

13. People *v.* Stevens, 68 Cal. 113, 8 Pac. 712; State *v.* Leaden, 35 Conn. 515; Waters *v.* State, 53 Ga. 567; People *v.* Dupree, 98 Mich. 26, 56 N. W. 1046; People *v.* Tracy, 121 Mich. 318, 80 N. W. 21; Ashford *v.* State, 36 Neb. 38, 53 N. W. 1036; State *v.* Bancroft, 10 N. H. 105.

14. People *v.* Stevens, 68 Cal. 113, 8 Pac. 712; State *v.* Leaden, 35 Conn. 515; Ashford *v.* State, 36 Neb. 38, 53 N. W. 1036; State *v.* Bancroft, 10 N. H. 105.

Between Evening and Early Morning. — Proof that the burglary must have been committed between 8 p. m. and 8 a. m., held sufficient to show that it was committed in the night time, where the sun rose at 7:25. People *v.* Stevens, 68 Cal. 113, 8 Pac. 712; between 5 p. m. and 7 p. m. in winter, Brown *v.* State, 59 Ga. 456; between 6 p. m. and before sunrise, People *v.* Getty, 49 Cal. 581; between 7 p. m. and midnight, People *v.* McCarty, 117 Cal. 65, 48 Pac. 984; between dark and time of getting up, State *v.* Bancroft, 10 N. H. 105; same, though after daylight, People *v.* Dupree, 98 Mich. 26, 56 N. W. 1046; People *v.* Tracy, 121 Mich. 318, 80 N. W. 21; or between 6 p. m. and two hours after sunrise. State *v.* Leaden, 35 Conn. 515.

Moonlight. — Evidence that it was after dark and dark save for the light of the moon is sufficient to show night time. State *v.* Morris, 47 Conn. 179; State *v.* McKnight, 111 N. C. 690, 16 S. E. 319.

15. Lowder *v.* State, 63 Ala. 143, 35 Am. Rep. 9. See *ante*, note 5.

16. State *v.* Green, 15 Mont. 424, 39 Pac. 322; State *v.* Cowell, 12 Nev. 337; Walton *v.* State, 29 Tex. App. 163, 15 S. W. 646.

Where intent alone is charged, if there is any reasonable hypothesis upon which the circumstances are consistent with the defendant's innocence, such hypothesis will control. The state must prove such criminal intent by some act or deed evidencing it. Davis *v.* State, 22 Fla. 633.

The intent alleged must be proved beyond a reasonable doubt by facts and circumstances, and cannot be left to speculation or surmise as to what would have been done had the defendant not been prevented. Mitchell *v.* State, 33 Tex. Crim. App. 575, 28 S. W. 475.

17. State *v.* Morris, 47 Conn. 179; State *v.* Manluff, 1 Houst. (Del.) 208; Davis *v.* State, 22 Fla. 633; State *v.* Maxwell, 42 Iowa, 208; People *v.* Curley, 99 Mich. 238, 58 N. W. 68; State *v.* Haynes, 71 N. C. 79; State *v.* McBryde, 97 N. C. 393, 1 S. E. 925; People *v.* Morton, 4 Utah 407, 11 Pac. 512; State *v.* Anderson, 5 Wash. 350, 31 Pac. 969.

A Jury Question. — Intent held to be a question of fact for the jury to determine from all the facts and circumstances. People *v.* Winters, 93

Cal. 277, 28 Pac. 946; People *v.* Soto, 53 Cal. 415; Woodward *v.* State, 54 Ga. 106; Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809.

Threats. — Evidence that the defendant carried a gun, threatened the prosecutor and family, and shot his dog held sufficient to show felonious intent. Maroney *v.* State, 8 Minn. 218.

Possession of Tools. — The possession of burglar's tools is admissible to show the defendant's intent in entering the house, and goes far to do so. State *v.* Franks, 64 Iowa 39, 19 N. W. 832.

Intoxication. — Proof that the defendant was intoxicated at the time of the burglary is admissible for the purpose of determining his intent in breaking and entering and whether he was capable of forming the alleged intent. People *v.* Phelan, 93 Cal. 111, 28 Pac. 855; State *v.* Maxwell, 42 Iowa 208; State *v.* Conners, 95 Iowa 485, 64 N. W. 295. *Contra*— State *v.* Hall, 31 W. Va. 505, 7 S. E. 422.

Knowledge of Valuable Contents. The defendant's conversation with the owner a month before the burglary and tending to show the defendant's knowledge that there was money in the house, was admissible to show motive. Gilmore *v.* State, 99 Ala. 154, 13 So. 536. But see State *v.* Worthen, 111 Iowa 267, 82 N. W. 910, holding that evidence as to whether the defendant knew that the house contained valuables was inadmissible on the question of intent, for intent to steal and not its execution is the essential ingredient of burglary with intent to steal.

Commission of Crime.—At common law, evidence that a felony was committed was sufficient to show that the entry was with that intent, but in Texas the specific intent alleged must be proved. Black *v.* State, 18 Tex. App. 124. But see Jones *v.* State, 11 N. H. 269; State *v.* Manluff, 1 Houst. (Del.) 208, and notes under *Intent to Commit Larceny, infra.*

Intent to Rape. — That the crime of rape was consummated need not be shown to prove the intent to commit it. State *v.* Fisher, 1 Pen. (Del.) 303, 41 Atl. 208. But evidence that after breaking and entering in the night time, the defendant touched a woman's ankle and ran on arousing her, held insufficient to show intent to rape. Mitchell *v.* State, 33 Tex. Crim. App. 575, 28 S. W. 475; Hamilton *v.* State, 11 Tex. App. 116; Turner *v.* State, 11 Tex. App. 12, 5 S. W. 511. But evidence that he placed his hands on a woman's private parts held sufficient. Harvey *v.* State, 53 Ark. 425, 14 S. W. 645, 22 Am. St Rep. 229.

Intent to Commit Larceny. — Evidence that the defendant entered the house in the night time, without any right to be there, and fled on being discovered was admissible to show his intent to steal, though nothing was stolen. State *v.* McBryde, 97 N. C. 393, 1 S. E. 925.

Intent to steal may be inferred from a breaking and entering in the night time or from an attempt to do so, where no other motive is shown. Steadman *v.* State, 81 Ga. 736, 8 S. E. 420. But see State *v.* Bell, 29 Iowa 316, and this inference is especially strong if the house entered contained money or property of great value. State *v.* Teeter, 69 Iowa 717, 27 N. W. 485; Franco *v.* State, 42 Tex. 276. Intent to steal may also be inferred from proof of actual theft in the commission of the burglary. Stokes *v.* State, 84 Ga. 258, 10 S. E. 740.

Com. *v.* McGorty, 114 Mass. 299; State *v.* Johnson, 33 Minn. 34, 21 N. W. 843; State *v.* Green, 15 Mont. 424, 39 Pac. 322; State *v.* Crawford, 8 N. D. 539, 80 N. W. 193, 73 Am. St. Rep. 772, 46 L. R. A. 312. But such is not the case where it is proved that he could not have known that the stolen goods were in the house. Black *v.* State, 18 Tex. App. 124. Nor without proof that the articles which he is charged to have entered with intent to steal were ever in the house. Rush *v.* State, 114 Ga. 113, 39 S. E. 941. Nor where the entry is shown to have been lawful. State *v.* Moore, 12 N. H. 42.

The intent to commit larceny which must be shown is an intent to deprive the owner of his property. People *v.* Bosworth, 64 Hun 72, 19 N. Y. Supp. 114; State *v.* Mills, 12 Nev. 401, 28 Am. Rep. 802.

C. Other Crimes. — The specific intent alleged may be proved by direct evidence or by indirect or circumstantial evidence,[18] and although evidence of intent to commit any other felony than the specific one charged is inadmissible,[19] proof of the commission of a felony after entry is admissible to show intent, though it proves another crime.[20]

Presumption.— The presumption is that the defendant entered with intent to do what he did, but this presumption may be rebutted. State *v.* Manluff, 1 Houst. (Del.) 208; Jones *v.* State, 18 Fla. 889; Steadman *v.* State, 81 Ga. 736, 8 S. E. 420; Stokes *v.* State, 84 Ga. 258, 10 S. E. 740; State *v.* Mecum, 95 Iowa 433, 64 N. W. 286; State *v.* Meche, 42 La. Ann. 273, 7 So. 573. And proof of entry in the night raises a strong presumption of intent to commit a public offense. State *v.* Fox, 80 Iowa, 312, 45 N. W. 874, 20 Am. St. Rep. 425; State *v.* Anderson, 5 Wash. 350, 31 Pac. 969.

Since the usual object of burglary is theft, intent to steal will be presumed from proof of breaking and entering at night, in the absence of evidence to the contrary. People *v.* Soto, 53 Cal. 415; State *v.* Worthen, 111 Iowa 267, 82 N. W. 910; Alexander *v.* State, 31 Tex. Crim. App. 359, 20 S. W. 756; Mullens *v.* State, 35 Tex. Crim. App. 149, 32 S. W. 691. This presumption is not overcome by proof that an inmate of the house believed that the defendant intended to rape her. People *v.* Soto, 53 Cal. 415; State *v.* Bell, 29 Iowa 316.

18. State *v.* Fisher, 1 Pen. (Del.) 303, 41 Atl. 208; State *v.* Maxwell, 42 Iowa 208; State *v.* McBryde, 97 N. C. 393, 1 S. E. 925; Alexander *v.* State, 31 Tex. Crim. App. 359, 20 S. W. 756.

19. Mason *v.* State, 42 Ala. 543; People *v.* Barnes, 48 Cal. 551; Com. *v.* Wilson, 2 Cush. (Mass.) 590; State *v.* Smarr, 121 N. C. 669, 28 S. E. 549.

Preparation by Another. — Evidence that another had made a key which would unlock a door of the house in question and that he intended to burglarize it, held inadmissible without evidence that he had done some overt act toward the perpetration of the burglary, or had been seen in the vicinity at the time of the burglary. State *v.* Taylor, 136 Mo. 66, 37 S. W. 907.

20. State *v.* Hale, 156 Mo. 102, 56 S. W. 881; Roberson *v.* State, 40 Fla. 509, 24 So. 474; Jones *v.* State, 18 Fla. 889; State *v.* Golden, 49 Iowa 48; State *v.* Woods, 31 La. Ann. 267; Maden *v.* Com., 4 Ky. L. Rep. 45; Com. *v.* Doherty, 64 Mass. 52.

Arson. — Evidence that the burglarized house was burned by the defendant in order to conceal evidence of the breaking was admissible, though it tended to show the commission of another crime. Roberson *v.* State, 40 Fla. 509, 24 So. 474.

Larceny. — Any evidence tending to show the defendant's guilt of theft tends to show his guilt of the burglary by means of which the theft was effected. Com. *v.* McGorty, 114 Mass. 299. But evidence of a justice that the defendant pleaded guilty to stealing the property is admissible only to establish his guilt of petty larceny. Richardson *v.* State, (Miss.), 33 So. 441. And although the discovery of the defendant's possession of goods taken in burglary and his explanation thereof are admissible, the search warrant under which the discovery was made is inadmissible if it was issued in connection with another crime of which the defendant was charged and which was in no way connected with the burglary. Roberson *v.* State, 40 Fla. 509, 24 So. 474. Similarly, evidence that the defendant owned a trunk in which goods taken in the burglary were found, was admissible to show his possession of the contents, though he had been prosecuted on another charge of burglary and larceny of the trunk. People *v.* Sears, 119 Cal. 267, 51 Pac. 325.

Contemporaneous Crimes. — Evidence that the defendant committed

IV. IDENTIFICATION OF BURGLAR.

1. Generally. — The identity of the accused as the person who committed the burglary may be sufficiently shown by circumstantial evidence,[21] if the circumstances are sufficient to thus establish it

a felony in an adjoining house, the same night, is admissible to show felonious intent in the commission of the burglary charged. Osborne *v.* People, 2 Park. Crim. (N. Y.) 583. The defendant's possession of property taken the same night from photograph galleries other than that alleged to have been burglarized, and from one in a distant town, held admissible to show motive and as *res gestae*. Kelley *v.* State, 31 Tex. Crim. App. 211, 20 S. W. 365. Evidence that shortly before the burglary the defendant held up and robbed the witness was admissible to rebut the defendant's testimony that he was too drunk at the time of the burglary to be able to form the felonious intent charged. State *v.* Harris, 100 Iowa 188, 69 N. W. 413.

Plan to Rob. — Evidence of an agreement between the defendants to rob the prosecutor's person, and that they had been watching him on the street for that purpose, was admissible to show intent. State *v.* Cowell, 12 Nev. 337.

21. State *v.* Manluff, 1 Houst. (Del.) 208; Maroney *v.* State, 8 Minn. 218; Johnson *v.* Com., 29 Gratt (Va.) 796.

Property of Defendant. — A cane identified as being seen in the defendant's possession prior to the burglary and found in the burglarized house held admissible. People *v.* Rowell, 133 Cal. 39, 65 Pac. 127.

Burglarious Tools. — When it has been shown that the burglary charged was committed, burglarious tools found in the defendant's possession are admissible, with other evidence, to connect him with the offense. People *v.* Winters, 29 Cal. 658; People *v.* McGilver, 67 Cal. 55, 7 Pac. 49; Com. *v.* Williams, 56 Mass. 582; Foster *v.* People, 3 Hun (N. Y.) 6; Johnson *v.* Com., 29 Gratt. (Va.) 796. And that such possession constitutes another crime is held not to affect their admissibility in evidence. Williams *v.* People, 196 Ill. 173, 63 N. E. 681; State *v.* Franks, 64 Iowa 39, 19 N. W. 832, though it is held otherwise if the tools are adapted to the commission of other crimes than that charged. Com. *v.* Williams, 56 Mass. 582.

What Tools Admissible. — Instruments of the sort used in safe-blowing and shown to have been in the defendant's possession six months prior to the burglary are admissible, though they were such as might have been used for lawful purposes. State *v.* Wayne, 62 Kan. 636, 64 Pac. 69. Drills and punches found in the defendant's house by officers searching under a warrant for stolen goods were admissible where it was shown that the burglarized safe was opened with similar instruments in connection with explosives. Starchman *v.* State, 62 Ark. 538, 36 S. W. 940. But tools found in the defendant's possession were inadmissible where it was shown that the breaking and entering were made without the use of such tools. People *v.* Winters, 29 Cal. 658.

Burglarious tools and implements found in the defendant's possession were admissible, though part of them were shown not to be adapted to the commission of the particular burglary. Com. *v.* Williams, 56 Mass. 582. And drills found in the defendant's possession four days after the burglary of a safe were admitted in evidence though never used, it being shown that they were adapted to safe blowing and there being evidence that he had concealed the ones he had used. Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154.

Where the defendant's counsel offered certain tools found in the defendant's possession to show that they were intended for an innocent purpose the state was properly allowed to put all the tools found in evidence, some of which might be used in burglarizing. People *v.* Wilson, 7 App.

beyond a reasonable doubt.[22]

2. Conduct of Accused. — A. In General. — Evidence of the conduct of the accused at or about the time of the commission of the offense, or of his accusation, or at the time of his arrest, is admissible against him, but not for him.[23]

Div. 326, 40 N. Y. Supp. 107. A broken tool found in the defendant's possession, exactly fitting the broken off part found in the door jamb of the house, held a strong circumstance against the defendant. White *v.* People, 179 Ill. 356, 53 N. E. 570. Evidence that burglars' tools found in the defendant's trunk were similar to tools found in an excavation which had been made under the burglarized vault held admissible. People *v.* Hope, 62 Cal. 291.

Evidence that the defendant was found in possession of tools which might be used in cracking a safe held inadmissible where such tools were shown to have been bought by him since the crime was committed. Where proof showed that the safe was blown open by the use of gunpowder, evidence that powder was found in the defendant's possession shortly after the burglary held admissible. State *v.* Haynes, 7 N. D. 70, 72 N. W. 923.

Constructive Possession of Tools. Evidence that tools used in the commission of the burglary came from the defendant's home was admissible to connect him with the offense. People *v.* Larned, 7 N. Y. 445. And evidence that a box of burglar's tools were found in an express office at a distant city soon after the burglary, that the defendant had had the box made, that his name was on it, and that he was at the express office when it was found, held admissible to connect him with it. Foster *v.* State, 3 Hun (N. Y.) 6.

Experiments Before Jury. — Experiments before the jury with tools found in the defendant's possession held proper to show that they were burglars' tools. People *v.* Hope, 62 Cal. 291.

Footprints. — Evidence that footprints found near the scene of the burglary and shortly thereafter were similar to those made by the defendant is admissible as tending to show his presence there at the time. Gilmore *v.* State, 99 Ala. 154, 13 So. 536; People *v.* Rowell, 133 Cal. 39, 65 Pac. 127.

Refusal of Defendant to Be Measured. — The defendant's refusal to allow his foot to be measured, under promise of release in case of dissimilarity of tracks, inadmissible as compelling him to give evidence against himself. Cooper *v.* State, 86 Ala. 610, 6 So. 110, 11 Am. St. Rep. 84, 4 L. R. A. 766. But see Prather *v.* Com., 85 Va. 122, 7 S. E. 178.

Conduct When Measured. — Testimony as to the defendant's appearance when the tracks of his shoes were compared held admissible. People *v.* Rowell, 133 Cal. 39, 65 Pac. 127. But the defendant's silence when his brother stated that he came home the night of the burglary with badly torn shoes held inadmissible, the tracks in question being made by ragged shoes. Brantley *v.* State, 115 Ga. 229, 41 S. E. 695.

22. Glover *v.* State, 114 Ga. 828, 40 S. E. 998. A mere preponderance of evidence is insufficient. State *v.* Morris, 47 Conn. 179.

Burglars' Tools. — The defendant's possession of burglars' tools is in itself insufficient to connect him with the burglary. Johnson *v.* Com. 29 Gratt. (Va.) 796. But a broken tool found in his possession and exactly fitting the broken off part found in the door jamb of the burglarized house is a strong circumstance against him. White *v.* People, 179 Ill. 356, 53 N. E. 570.

23. Henry *v.* State, 107 Ala. 22, 19 So. 23.

General Conduct. — Evidence that the defendant drank a good deal and walked the floor much on the day after the burglary held admissible as bearing on his conduct at the time of the offense. People *v.* Bosworth, 64 Hun 72, 19 N. Y. Supp. 114.

B. Presence Near the Premises. — Evidence that the accused was seen in the immediate neighborhood of the burglary at or about the time charged in the indictment, is admissible against him.[24]

C. Admissions. — Although the confessions of the accused while under arrest are inadmissible, unless shown to be free and voluntary, his statements as to what disposition has been made of stolen property are admissible.[25]

3. Possession of Stolen Property. — When it has been established that a burglary has been committed, the fact of possession by the accused soon after the burglary of property shown to have been taken when the burglary was committed, is admissible, with other evidence to show his guilt.[26]

On Examination of Footprints. Testimony as to the defendant's appearance when the tracks of his shoes were compared with those found near the burglarized premises held admissible. People *v.* Rowell, 133 Cal. 39, 65 Pac. 127.

24. People *v.* Flynn, 73 Cal. 511, 15 Pac. 102.

But proof that the defendant was frequently seen in that neighborhood may be sufficient to rebut such evidence. Saunders *v.* People, 38 Mich. 218. And where his presence is the sole issue, and the evidence thereon is conflicting, proof of his good moral character is entitled to great weight. People *v.* Laird, 102 Mich. 135, 60 N. W. 457. Evidence that the defendant was seen near the house on the night of the burglary, where he met another who had come from a lot where there was a cellar in which the stolen goods were found, and that the defendant had mud on his clothing similar to that in the cellar, held insufficient to convict, where the mud in the streets was shown to be the same. People *v.* Cronk, 40 App. Div. 206, 58 N. Y. Supp. 13.

25. Mallory *v.* State, 56 Ga. 545; Davis *v.* State, 105 Ga. 808, 32 S. E. 158; Frank *v.* State, 39 Miss. 705; People *v.* Ashmead, 118 Cal. 508, 50 Pac. 681; State *v.* Simas, 25 Nev. 432, 62 Pac. 242; State *v.* Drake, 82 N. C. 592.

Defendant's admission that he was near by and saw another commit the burglary was admissible not as a confession of guilt, but as a circumstance to be considered by the jury in determining his guilt. Kidd *v.* State, 101 Ga. 528, 28 S. E. 990.

If it is sufficiently proved that the money was taken by means of burglary, the defendant's admission that he had the money would tend to prove both the burglary and the larceny. State *v.* Hutchinson, 111 Mo. 257, 20 S. W. 34. But evidence that the defendant pleaded guilty of the charge of larceny is insufficient to convict him of burglary in connection with the taking. Richardson *v.* State, 80 Miss. 115, 31 So. 544.

26. Dodson *v.* State, 86 Ala. 60, 5 So. 485; People *v.* Lowery, 70 Cal. 193, 11 Pac. 605; People *v.* Neber, 125 Cal. 560, 58 Pac. 133; People *v.* Carroll, 54 Mich. 334, 20 N. W. 66; People *v.* Wilson, 7 App. Div. 326, 40 N. Y. Supp. 107; State *v.* Graves, 72 N. C. 482; Methard *v.* State, 19 Ohio St. 363; Payne *v.* State, 21 Tex. App. 184, 17 S. W. 463; Porterfield *v.* Com., 91 Va. 801, 22 S. E. 352; Prince *v.* State, 44 Va. 480.

Taking Not Alleged. — The defendant's possession of goods shortly after they were taken is admissible, though the indictment does not allege that such goods were taken. Com. *v.* McGorty, 114 Mass. 299; Stokes *v.* State, 84 Ga. 258, 10 S. E. 740.

Possession of Other Goods. — Evidence that other goods than those named in the indictment were stolen from adjoining premises and found in the defendant's possession is admissible to identify the defendant as the criminal. Osborne *v.* People, 2 Park. Crim. (N. Y.) 583; Hall's case, 3

Gratt. (Va.) 565. And evidence that articles not named in the indictment were missed after the burglary is admissible as a circumstance showing the nature and extent of the crime and as a part of the same act constituting it. Foster *v.* People, 3 Hun (N. Y.) 6.

Possession of Money. — Evidence that the defendant had money in his possession when arrested and that he had at that time given some of it to another, held admissible, though not the identical pieces of money stolen. Hicks *v.* State, 99 Ala. 169, 13 So. 375. And that after the burglary the defendant while earning nothing was spending money freely was a strong circumstance tending to show his guilt. Moye *v.* State, 66 Ga. 740; People *v.* Wilson, 7 App. Div. 326, 40 N. Y. Supp. 107.

Possession by Confederate.—Where a conspiracy has been established evidence of the possession of one is admissible against the other, though not present at the time. Munson *v.* State, 34 Tex. Crim. App. 498, 31 S. W. 387. But possession by another is inadmissible without proof that they acted together in committing the offense, and without proof that such possession was personal, exclusive, unexplained, and involving a conscious assertion of property. Jackson *v.* State, 28 Tex. App. 143, 12 S. W. 701. Evidence that some articles stolen in the burglary were found some time afterward in a room of one indicted jointly with the defendant and partly mingled with the defendant's property was admissible. Com. *v.* Parmenter, 101 Mass. 211; State *v.* Wrand, 108 Iowa 73, 78 N. W. 788.

Proof of Possession. — Evidence that shoes of the defendant were found with other wearing apparel in the house where the stolen goods were found was admissible as tending to show that the defendant resided in the house and was in possession of the goods. Roberson *v.* State, 40 Fla. 509, 24 So. 474. A miller's testimony that flour found in the defendant's possession was of the same quality as that made by him in the burglarized mill, held admissible. People *v.* Wood, 99 Mich. 620, 58 N. W. 638. The jury were properly allowed to inspect with a magnifying glass a ring found in the defendant's possession and claimed to be the stolen one, to ascertain whether the alleged inscription had been on it and had been removed from it. Short *v.* State. 63 Ind. 376. Evidence that the owner showed samples of goods stolen to parties searching for them, and that they found goods corresponding to the samples in the defendant's house held inadmissible. Crane *v.* State, 111 Ala. 45, 20 So. 590. So, testimony that the witness saw the stolen property and recognized it from the owner's description as his held inadmissible. Reed *v.* State, 66 Ark. 110, 49 S. W. 350.

Exclusiveness of Possession. —Evidence that goods were found under his clothing in a room occupied by the defendant held not inadmissible because two women occupied the room with him. People *v.* Wilson, 7 App. Div. 326, 40 N. Y. Supp. 107.

Concealment of Possession. — Evidence that on the defendant's being searched a trunk check was found in his pocket which was found to be missing soon afterward was admissible as tending to show the concealment of the check which called for a trunk containing the stolen goods. Leslie *v.* State, 35 Fla. 171, 17 So. 555. So, evidence that the defendant was seen at 2 a. m. two hours after the burglary, driving near the place where the goods were found hidden, was admissible with other evidence to show that he put them there to avert suspicion. State *v.* Struble, 71 Iowa 11, 32 N. W. 1.

Degree of Exclusiveness Necessary. When it has been shown that the goods were found in a house occupied by the defendant, it must also be shown that such occupancy and possession of the house by the defendant were exclusive and not enjoyed by others with him. Moncrief *v.* State, 99 Ga. 295, 25 S. E. 735. To warrant the inference of guilt from recent possession, it must be personal, exclusive, unexplained, and must involve a conscious assertion of property by the defendant. Jackson *v.* State, 28 Tex. App. 143, 12 S. W. 701; Field *v.* State, 24 Tex. App. 422, 6 S. W. 200. That goods were found

V. VALUE OF STOLEN GOODS.

1. The Value of Goods stolen in burglary is of no consequence, having nothing to do with the grade of the offense or the assessment of punishment, and need not be proved.[27]

VI. ATTEMPT.

Evidence which is competent on the question of guilty or not

in a room occupied by two or more persons is not conclusive evidence that they were in the possession of any one of them. Shropshire *v.* State, 69 Ga. 273. Where the fact of burglary was established proof that the stolen goods were found in a trunk on which the defendant was sitting, and which he unlocked and said was his wife's, and that he acknowledged having worn them, though claiming that they were left there by another, held sufficient to warrant conviction. Fletcher *v.* State, 93 Ga. 180, 18 S. E. 555.

Possession of Money. — The possession of money of the same kind as that taken is usually of slight weight as guilt, unless it is of a kind rarely seen in circulation, when it tends strongly to identify the money and thus to connect the defendant with the burglary. People *v.* Getty, 49 Cal. 581; State *v.* Munson, 7 Wash. 239, 34 Pac. 932. It may be inferred that the money found in the defendant's possession was the same as that stolen in so far as it corresponded therewith. Com. *v.* Chilson, 56 Mass. 15; State *v.* Mooney, (Wash.), 28 Pac. 363. The defendant's possession of the exact amount of money taken and shortly after the burglary held insufficient to connect him therewith. State *v.* Bryan, 19 Nev. 365, 11 Pac. 317. But evidence that shortly after the burglary the defendant had much ready money and spent it very freely tends strongly to show his guilt. People *v.* Wilson, 7 App. Div. 326, 40 N. Y. Supp. 107; Moye *v.* State, 66 Ga. 740.

Possession of Receptacle. — The defendant's unexplained possession of a box in which the stolen goods had been packed was evidence tending to connect him with the larceny and equal in probative force to the possession of the goods themselves. People *v.* Block, 39 N. Y. St. 477, 15 N. Y. Supp. 229.

Explanation of Possession. — If the defendant gives a reasonable account of his possession, the burden may be on the state to show its falsity, but it may be so unreasonable and unsatisfactory as to require no affirmative proof of such falsity. Com. *v.* McGorty, 114 Mass. 299. But if he gives a reasonable and credible account of how he came into possession, or such an account as will raise a reasonable doubt in the minds of the jury, it becomes the state's duty to prove that such account is untrue. Leslie *v.* State, 35 Fla. 171, 17 So. 555.

The defendant's refusal to explain his possession raises no presumption against him, for his refusal to testify cannot prejudice him. People *v.* Hart, 10 Utah 204, 37 Pac. 330.

Honesty of Possession. — The defendant need not show that his possession was an honest one. King *v.* State, 99 Ga. 686, 26 S. E. 480. Nor that it was a legal one, for a guilty acquisition may be as effectual a defense as an innocent one. Falvey *v.* State, 85 Ga. 157, 11 S. E. 607; Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154.

Contra. — The defendant must show the honesty of his possession. State *v.* Scott, 109 Mo. 226, 19 S. W. 89.

27. Tarver *v.* State, 95 Ga. 222, 21 S. E. 381; Collins *v.* State, 20 Tex. App. 197. If the value is alleged, it is sufficient to prove that the goods were of some value. McCrary *v.* State, 96 Ga. 348, 23 S. E. 409. The goods stolen must be alleged and proved to have been of some value, though the crime of burglary is made a felony irrespective of their value. Rowland *v.* State, 55 Ala. 210; Rose *v.* State, 117 Ala. 77, 23 So. 638.

guilty of the burglary charged is admissible to prove the attempt to commit it.[28]

Identification of Goods. — Though the indictment describes the stolen goods with unnecessary particularity, the descriptive allegations must be supported by proof. Starchman *v.* State, 62 Ark 538, 36 S. W. 940. And the ownership of the goods must be proved as laid, and such proof being descriptive of the identity of the offense, is necessary even when ownership is needlessly alleged. Berry *v.* State, 92 Ga. 47, 17 S. E. 1006.

28. People *v.* Lawton, 56 Barb. (N. Y.) 126.

No proof of an actual entry need be made to show an attempt, proof of an attempt to enter with intent to steal being sufficient. People *v.* Hope, 62 Cal. 291.

BURNING.—See Arson; Negligence.

BURNT RECORD ACT.—See Abstract of Title; Records.

BY-LAWS.—See Corporations.

BYSTANDERS.—See Res Gestae.

CALENDAR.—See Almanac.

CANCELLATION OF INSTRUMENTS.

By James A. Ballentine.

I. PRESUMPTIONS.

1. **Fraud.** — In general, fraud will not be presumed,[1] and although

1. Bailey *v.* Litten, 52 Ala. 282; Vandor *v.* Roach, 73 Cal. 614, 15 Pac. 354.

Gift, Father to Daughter. — There is no presumption of fraud in the case of a deed of gift executed by a father to his daughter in his last illness, in the presence of members of the family interested against the gift and raising no objection. Baxter *v.* Bailey, 8 B. Mon. (Ky.) 336.

Preparation by Grantee of a voluntary deed is a suspicious circumstance and raises a presumption of fraud. Kelley *v.* McGuire, 15 Ark. 555.

Husband and Wife. — A wife's deed to her husband made through a

inadequacy of consideration is evidence of fraud,[2] fraud will not be presumed therefrom unless such inadequacy is very gross,[3] or unless there existed a confidential or trust relation between the parties to the transaction.[4] The mental weakness of the person reposing such confidence at the time of the execution of the instrument, may add to the presumption of fraud.[5]

2. Mistake. — Where the mistake alleged as ground for cancellation is of a fact of which the party alleging it might have known by reasonable diligence, his knowledge thereof will be presumed.[6]

3. Undue Influence. — In every transaction sought to be set aside on the ground of undue influence, and between parties between whom confidential relations exist, it is presumed that he who held such influence exercised it unduly to his own advantage,[7] but such influence is not presumed from the relations of the parties alone,[8] nor from the age alone of the person alleged to have been influenced.[9]

4. Mental Disability. — Mere temporary hallucination or delusion

third party is not presumptively fraudulent. Todd *v.* Wickliffe, 18 B. Mon. (Ky.) 866.

Breach of Contract, which contract was the consideration for the execution of the instrument whose cancellation is sought, does not raise a presumption of fraudulent intent at the time of such execution. Manning *v.* Pippen, 95 Ala. 537, 11 So. 56.

2. Emonds *v.* Termehr, 60 Iowa 92, 14 N. W. 197.

3. Kelly *v.* McGuire, 15 Ark. 555; Missouri R. Ft. S. & G. R. Co. *v.* Commissioners, 12 Kan. 482; Smith *v.* Duffy, 1 How. Pr. (N. S.), (N. Y.) 343.

Opportunity Equal. — Gross inadequacy of consideration is no evidence of fraud if both parties had equal opportunity to know the value. Cooper *v.* Reilly, 90 Wis. 427, 63 N. W. 885.

4. **Fiduciary Relations.** —It is not true that inadequacy of price does not even raise a presumption of fraud as to persons whose relations are fiduciary. A trustee is not ordinarily allowed to make money out of his *cestui que trust.* If he does, the presumption is against him and he must show affirmatively that the transaction was perfectly fair. In such a case, inadequacy of consideration is one of the facts constituting the fraud. Woodroof *v.* Howes, 88 Cal. 184, 26 Pac. 111.

5. Conant *v.* Jackson, 16 Vt. 335. Where weakness of mind is not of itself a sufficient ground for equitable interference, it will nevertheless always constitute an important element in actual fraud. If a transaction be in the slightest degree tainted with deceit, the intellectual imbecility of the party may be held by a court of equity to make out a case of actual fraud which otherwise might be incapable of proof. Jones *v.* Thompson, 5 Del. Ch. 374.

6. Taylor *v.* Fleet, 4 Barb. (N. Y.) 95; Connor *v.* Stanley, 72 Cal. 556, 14 Pac. 306, 1 Am. St. Rep. 84.

7. Bayliss *v.* Williams, 6 Cold. (Tenn.) 440.

The rule is inflexible that no one who holds a confidential relation towards another shall take advantage of that relation in favor of himself, or deal with the other upon terms of his own making; that in every such transaction between persons standing in that relation the law will presume that he who held an influence over the other exercised it unduly to his own advantage. Ross *v.* Conway, 92 Cal. 632, 28 Pac. 785.

8. Bailey *v.* Litten, 52 Ala. 282; Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428.

9. The age of the grantor is not a

resulting from disease and shown to have existed prior to the execution of the instrument, is not presumed to have continued,[10] but where insanity is relied upon as ground for cancellation, and is shown to have existed, it is presumed to have continued unless the contrary is shown.[11]

II. BURDEN OF PROOF.

1. In General. — In general, the burden is upon the party seeking cancellation to establish the grounds relied upon to entitle him thereto,[12] and of proving every material fact essential to his right,[13] for he must rebut the presumption that the writing speaks the final agreement of the parties,[14] and his is the burden of proving his allegation that the instrument is invalid for reasons not apparent on its face.[15] This burden may, however, be shifted by admissions in the answer.[16]

2. Fraud. — The burden of proving alleged fraud as ground for the cancellation of an instrument is on the party alleging it,[17] when

controlling fact. Some of the greatest men of modern times have displayed the highest abilities after passing the age of three score and ten. Notable instances are found in the lives of Disraeli, Gladstone, Bismarck and Lord Mansfield, who left the bench at the age of eighty-four. Soberanes *v.* Soberanes, 97 Cal. 140, 31 Pac. 910.

10. Staples *v.* Wellington, 58 Me. 453.

11. Smith *v.* Smith, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113.

12. Oliver *v.* Oliver, 110 Ill. 119; Butler *v.* Miller, 15 B. Mon. (Ky.) 617; Kerr *v.* Freeman, 33 Miss. 292; Freeman *v.* Staats, 9 N. J. Eq. 816.

Alteration. — The burden of proving an alleged alteration made since the execution of the instrument, as ground for cancellation, is on the party alleging it. Putnam *v.* Clark, 33 N. J. Eq. 338.

Letters Patent. — The burden is always on the government of establishing invalidity in a suit against an innocent purchaser to annul a patent. Colo. Coal & Iron Co. *v.* U. S., 123 U. S. 307.

13. Thames *v.* Rembert, 63 Ala. 561.

14. Whitsett *v.* Kershow, 4 Colo. 419; Mayberry *v.* Nichol, (Tenn.), 39 S. W. 881.

15. Clements *v.* Macheboeuf, 92 U. S. 418.

Proof of Negative. — The party seeking cancellation is not relieved of the burden of proof by the negative nature of the proposition which he is bound to establish. Colo. Coal & Iron Co. *v.* U. S., 123 U. S. 307.

16. Wiard *v.* Brown, 59 Cal. 194; Shook *v.* Proctor, 27 Mich. 377; Morriss *v.* Runnells, 12 Tex. 175; German Savings & Loan Soc. *v.* De Lashmutt, 83 Fed. 33.

Failure to Testify. — Where fraud is charged and shown by the party alleging it as ground for cancellation, the failure of the other party to deny or to testify is an admission of the truth of the charges. Berger *v.* Bullock, 85 Md. 441, 37 Atl. 368.

17. Bailey *v.* Litten, 52 Ala. 282; Thames *v.* Rembert, 63 Ala. 561; Merchants' Nat. Bank *v.* Lyons, 185 Ill. 343, 56 N. E. 1083; Severance *v.* Ash, 81 Me. 278, 17 Atl. 69; Brown *v.* Foster, 112 Mo. 297, 20 S. W. 611; Freeman *v.* Staats, 9 N. J. Eq. 816; Trustees of Oberlin College *v.* Blair, 45 W. Va. 812, 32 S. E. 203.

Defense of Limitations. — The defense of limitations places the burden on the plaintiff of showing that the statute has not run since he discovered the facts constituting the fraud. Baldwin *v.* Martin, 14 Abb. Pr. (N. S.), (N. Y.) 9.

no confidential relation exists subjecting one party to the influence and control of the other;[18] and if there is nothing in the circumstances to create suspicion of wrong, the burden is not on the party benefitting by the transaction to show that it was fair,[19] but if one of the parties is under mental disability and is induced by the other to part with his property, the burden is on such other to show conclusively good faith;[20] similarly, if the party who drew up the instrument is a beneficiary thereunder, the burden is upon him to show affirmatively that the transaction was fair and honest.[21]

3. Mistake. — The burden of proving mistake as ground for cancellation is on the party alleging it,[22] and he must do so by strong and satisfactory evidence.[23]

4. Undue Influence. — The burden of proving undue influence is on the party alleging it,[24] if the transaction is an equitable one,[25] or if there was no confidential or fiduciary relation between the parties,[26] but the burden is on the one benefitting under a transaction with one aged and mentally infirm to show absence of undue influence;[27] and in such case, it matters not whether the relation is confidential or not, or that of consanguinity or otherwise,[28] or if it had been established that the grantor was mentally unsound.[29]

5. Mental Disability. — The law presumes full capacity to contract and absence thereof must be shown, by one who would set

Letters Patent. — The burden is on the government to show fraud in a suit against an innocent purchaser to annul a patent, and this burden is not shifted by suspicion of fraud on the part of the government officers. Colo. Coal & Iron Co. *v.* U. S., 123 U. S. 307.

18. Thames *v.* Rembert, 63 Ala. 561.

19. Vandor *v.* Roach, 73 Cal. 614, 15 Pac. 354.

20. Jacox *v.* Jacox, 40 Mich. 473, 29 Am. Rep. 547.

21. Kelly *v.* McGuire, 15 Ark. 555.

22. Collar *v.* Ford, 45 Iowa 334; Jackson *v.* Wood, 88 Mo. 78.

23. Weidenbusch *v.* Hartenstein, 12 W. Va. 764.

24. Taylor *v.* Crockett, 123 Mo. 300, 27 S. W. 620; Bailey *v.* Litten, 52 Ala. 282.

25. Lynch *v.* Doran, 95 Mich. 395, 54 N. W. 882.

26. Willemin *v.* Dunn, 93 Ill. 511; Cooper *v.* Reilly, 90 Wis. 427, 63 N. W. 885.

27. Soberanes *v.* Soberanes, 97 Cal. 140, 31 Pac. 910; Sands *v.* Sands, 112 Ill. 225.

Confidential Relations.—Where the gross inequality of the bargain is one which startles the mind and is followed by evidence of physical and mental infirmity on the part of the loser, and of a confidential relation between him and the gainer, the burden is on the latter to show affirmatively that all was fair, open, and well understood. Stepp *v.* Frampton, 179 Pa. St. 284, 36 Atl. 177. But when a deed is attacked on the ground of fraud in taking advantage by the grantee of confidential relations between himself and the grantor, the burden is on the grantee to show that the grantor was not influenced by them in making the deed. Starr *v.* De Lashmutt, 76 Fed. 907.

28. Jones *v.* Thompson, 5 Del. Ch. 374.

29. Hull *v.* Louth, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; German Savings & Loan Soc. *v.* De Lashmutt, 83 Fed. 33.

Intoxication. — The burden is on the party alleging it to show that imposition and fraud were used in procuring the deed during the grantor's intoxication. Conant *v.* Jackson, 16 Vt. 335.

aside the instrument,[30] to have existed at the time when the instrument was executed,[31] but if the party who executed the instrument is shown to have been generally insane prior thereto, the other party must show that it was executed during a lucid interval,[32] but where mental incapacity is shown to have been temporary and not continuous, and the transaction reasonable and natural, the burden is upon the party alleging incapacity to show its existence at the time of execution.[33]

6. Confidential Relations. — When the relations of the parties are of such character as to make it certain that the parties do not deal on terms of equality, and where, from superior knowledge derived from the confidential relation or from overmastering influence, or on account of the weakness, dependence or trust of the other, unfair advantage is rendered probable, the burden is on the stronger to show that no deception or undue influence was used, and that all was fair, open, voluntary and well understood,[34] and if a contract has been procured from one who is in a situation of distress or necessity by another who stands in a relation of confidence, the burden is on the one procuring the benefits of the transaction to show that the acts were free and voluntary.[35]

III. ADMISSIBILITY.

1. Parol Evidence. — Equity will set aside a written instrument for fraud, accident or mistake, and parol evidence is admissible to

30. Chancellor *v.* Donnell, 95 Ala. 342; 10 So. 910; Kelly *v.* McGuire, 15 Ark. 555; Howe *v.* Howe, 99 Mass. 88; Taylor *v.* Buttrick, 165 Mass. 547, 43 N. E. 507, 52 Am. St. Rep. 530; Brown *v.* Brown, 39 Mich. 792; Freeman *v.* Staats, 9 N. J. Eq. 816; Swayze *v.* Swayze, 37 N. J. Eq. 180; Conant *v.* Jackson, 16 Vt. 335.

31. Gridley *v.* Boggs, 62 Cal. 190; Titcomb *v.* Vantyle, 84 Ill. 371.

32. McNett *v.* Cooper, 13 Fed. 586; Achey *v.* Stephens, 8 Ind. 411.

33. Staples *v.* Wellington, 58 Me. 453; Trimbo *v.* Trimbo, 47 Minn. 389, 50 N. W. 350; Stewart *v.* Flint, 59 Vt. 144, 8 Atl. 801.

Intoxication.—Party alleging must clearly prove intoxication at the time of execution. Freeman *v.* Staats, 9 N. J. Eq. 816.

34. Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Sheehan *v.* Erbe, 77 App. Div. 176, 79 N. Y. Supp. 43; Stepp *v.* Frampton, 179 Pa. St. 284, 36 Atl. 177.

35. Burke *v.* Taylor, 94 Ala. 530, 10 So. 129; Kyle *v.* Perdue, 95 Ala. 579, 10 So. 103; Connor *v.* Stanley, 72 Cal. 556, 14 Pac. 306, 1 Am. St. Rep. 84; Nichols *v.* McCarthy, 53 Conn. 299, 23 Atl. 93, 55 Am. Rep. 105; Spargur *v.* Hall, 62 Iowa 498, 17 N. W. 743; Ikerd *v.* Beavers, 106 Ind. 483, 7 N. E. 326; Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428.

Man and Mistress. — Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528.

Old Widow and Trusted Friend. Waddell *v.* Lanier, 62 Ala. 347.

Principal and Agent. — Burke *v.* Taylor, 94 Ala. 530, 10 So. 129.

Sober Man and One Drunk. — Conant *v.* Jackson, 16 Vt. 335.

Spiritual Medium and Dupe.—Connor *v.* Stanley, 72 Cal. 556, 14 Pac. 306, 1 Am. St. Rep. 84.

Testator and Devisee. — Lyons *v.* Campbell, 88 Ala. 462, 7 So. 250.

Trustee and Cestui Que Trust.

contradict or vary its terms on either of such grounds,[36] but such evidence must be clear and precise.[37] Nor will the Statute of Frauds prevent the introduction of parol evidence to show that the instrument sought to be cancelled was procured by fraud,[38] and the rule that parol evidence is inadmissible to vary the terms of a written instrument has no application in a suit to set it aside on the ground of fraud.[39]

2. Circumstantial Evidence. — Since fraud is always conceived in cunning and is difficult of proof, it may be proved by circumstantial as well as by positive and direct evidence,[40] and the same is true of undue influence.[41]

IV. WEIGHT AND SUFFICIENCY.

1. In General. — Since the cancellation of an executed instrument is the most extraordinary power of a court of equity, it should

Woodroof *v.* Howes, 88 Cal. 184, 26 Pac. 111.

Husband and Wife. — The burden is on one attacking it to show that a wife's deed to her husband through a third person was fraudulent. Todd *v.* Wickliffe, 18 B. Mon. (Ky.) 866; Kennedy *v.* Ten Broeck, 11 Bush (Ky.) 241. In a suit to cancel a mortgage executed by a wife and alleged to have been made to secure his debt, the burden of proof is upon the complainant. Gafford *v.* Speaker, 125 Ala. 498, 27 So. 1003.

Sister and Brother. — Fraud will not be presumed merely because of the relationship between sister and brother. Spicer *v.* Spicer, 22 Jones & S. (N. Y.) 280.

36. Martin *v.* Berens, 67 Pa. St. 459; Taylor *v.* Fleet, 4 Barb. (N. Y.) 95; Mayberry *v.* Nichol, (Tenn.), 39 S. W. 881.

37. Rowand *v.* Finney, 96 Pa. St. 192; Mayberry *v.* Nichol, (Tenn.), 39 S. W. 881.

38. Day *v.* Lown, 51 Iowa 364, 1 N. W. 786; Kennedy *v.* Kennedy, 2 Ala. 571.

39. Thweatt *v.* McLeod, 56 Ala. 375; Grand Tower & C. G. R. Co. *v.* Walton, 150 Ill. 428, 37 N. E. 920; Wilhite *v.* Roberts, 4 Dana (Ky.) 172.

40. Thames *v.* Rembert, 63 Ala. 561; Rhodes *v.* Green, 36 Ind. 7; Waterbury *v.* Sturtevant, 18 Wend. (N. Y.) 353; Parrott *v.* Parrott, 1 Heisk. (Tenn.) 681.

Testimony of Grantor. — A husband's testimony that he executed a deed to his wife in good faith is admissible to rebut allegations of fraud. Thacher *v.* Phinney, 7 Allen (Mass.) 146.

Acts and Circumstances Prior to Execution. — Parol evidence of conversations is admissible to show fraud in procurement. Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376. Declarations of grantor while of sound mind are admissible with other evidence as to his intention, to show unsoundness of mind, undue influence and fraud. Howe *v.* Howe, 99 Mass. 88.

Acts and Circumstances Subsequent to Execution. — Offers of compromise, even if made by the grantee, are inadmissible, and a *fortiori* if made by the party seeking to set them up. Jamison *v.* Craven, 4 Del. Ch. 311. Declarations of plaintiff's intestate after the execution of the instrument held inadmissible to show misrepresentation or mistake. Stephenson *v.* Hawkins, 67 Cal. 106, 7 Pac. 198. On issue as to undue influence or unsoundness of mind at the time of execution, evidence that months afterward the grantor gave his reasons and expressed regret is admissible to show sanity. Howe *v.* Howe, 99 Mass. 88.

41. Beaubien *v.* Cicotte, 12 Mich. 459.

not be exercised except in a clear case;[42] the evidence of the grounds alleged must be clear and satisfactory, and must preponderate clearly in favor of the party asking cancellation,[43] a bare preponderance being insufficient,[44] and if such party is allowed to testify in his own behalf, the necessity of the rule requiring a high degree of proof is increased.[45]

2. Fraud. — When fraud is relied upon the proof of the fraud alleged must be clear,[46] especially if it is denied by him charged

42. Atlantic Delaine Co. *v.* James, 94 U. S. 207; Halls *v.* Thompson, 1 Smed. & M. (Miss.) 443.

The complainant must produce the clearest, most satisfactory, and indubitable proof that the defendant is without right to enforce the contract. Wilson *v.* Morris, 4 Colo. App. 242, 36 Pac. 248. *Prima facie* title to realty will not be set aside on mere suspicion; the proof must be sufficiently definite as to the grounds relied upon to enable the court to know what it is doing. Jamison *v.* Craven, 4 Del. Ch. 311. The preponderance of evidence should be clear and the evidence so convincing as to leave no reasonable doubt on the mind. Hunter *v.* Hopkins, 12 Mich. 227. The degree of proof must be stronger than that required to resist specific performance of the same contract. Hollis *v.* Hayes, 1 Md. Ch. 479; Stearns *v.* Beckham, 31 Gratt. (Va.) 379. Circumstances proper for rescission, involving control of a legal right, are more positive and definite than those required for specific performance, and although equity would refuse to decree performance whenever it would revoke, it may refuse to revoke when it would decline to execute. Campbell *v.* Patterson, 95 Pa. 447. The testimony must be of the strongest and most cogent character and the case a clear one. Walker *v.* Hough, 59 Ill. 375.

43. Dirkson *v.* Knox, 71 Iowa 728, 30 N. W. 49.

44. Maxwell Land Grant Case, 121 U. S. 325.

45. Parlin *v.* Small, 68 Me. 289.

The uncorroborated testimony of the party asking rescission held insufficient. Building Assn. *v.* Hetzel, 103 Pa. St. 507; Campbell *v.* Patterson, 95 Pa. 447.

Letters Patent. — The presumption in favor of the validity of a patent is particularly strong, and only that class of evidence which commands respect, and only that amount of it which produces conviction, is sufficient to set the patent aside. Maxwell Land Grant Case, 121 U. S. 325.

46. Bailey *v.* Litten, 52 Ala. 282; Fitzgerald *v.* Walker, 55 Ark. 148, 17 S. W. 702; Goodwin *v.* White, 59 Md. 503; Halls *v.* Thompson, 1 Smed. & M. (Miss.) 443; Freeman *v.* Staats, 9 N. J. Eq. 816; U. S. *v.* American Bell Tel. Co., 167 U. S. 224—proof must be clear, unequivocal and convincing, a bare preponderance being insufficient; Bullard *v.* His Creditors, 56 Cal. 600—mere preponderance sufficient; Tourtelotte *v.* Brown, 4 Colo. App. 377, 36 Pac. 73—clear and satisfactory in every respect; Tuck *v.* Downing, 76 Ill. 71 — strongest and most cogent; Coughlin *v.* Richmond, 77 Iowa 188, 41 N. W. 613 — clear and satisfactory; Parlin *v.* Small, 68 Me. 289 — clear, strong, satisfactory and convincing; McCall *v.* Bushnell, 41 Minn. 37, 42 N. W. 545 — clear and strong; Martin *v.* Hill, 41 Minn. 337, 43 N. W. 337 — not as great as for reformation; Jackson *v.* Wood, 88 Mo. 76 — clear and convincing; Taylor *v.* Fleet, 4 Barb. (N. Y.) 95 — strong and conclusive; Hoy *v.* Robinson, 23 Or. 47, 31 Pac. 62 — clear and satisfactory; Christmas *v.* Spink, 15 Ohio 600 — conclusive; Stine *v.* Sherk, 1 Watts & S. (Pa.) 195 — clear, precise and indubitable.

Letters Patent. — In a suit by the government to annul a patent, the government is bound to make all the proof of fraud of which the case is susceptible. Colo. Coal & Iron Co. *v.* U. S., 123 U. S. 307.

therewith,[47] and while such fraud may be sufficiently shown by circumstantial evidence,[48] mere want of consideration is insufficient to establish fraud,[49] though it is a circumstance tending to show fraud, unless adequate motive for executing the instrument is shown,[50] and even gross inadequacy is insufficient if both parties had equal opportunity to know the value,[51] but if there is evidence of imposition and weak-mindedness, the least scintilla of fraud will suffice.[52]

The falsity of false representations charged as ground for cancellation must be certainly proved.[53]

If the alleged fraud is clearly established and subsequent acts are relied upon as a defense, they must stand on the clearest evidence and must show a purpose to waive or to forgive the fraud.[54]

3. Mistake. — The mistake alleged as ground for cancellation must be distinctly proved,[55] and requires the same degree of proof as does fraud when set up for the same purpose.[56]

47. Gayle *v.* Conn, 3 J. J. Marsh. (Ky.) 538.

When so denied, the uncorroborated testimony of the party asking cancellation is insufficient. Campbell *v.* Patterson, 95 Pa. 447.

48. Parrott *v.* Parrott, 1 Heisk. (Tenn.) 681; Thames *v.* Rembert, 63 Ala. 561; Waterbury *v.* Sturtevant, 18 Wend. (N. Y.) 353.

Fraud a Question of Fact. — Fraud is a question of fact, in such cases, for the jury to decide. Rhodes *v.* Green, 36 Ind. 7.

49. Stephenson *v.* Hawkins, 67 Cal. 106, 7 Pac. 198.

50. Robins *v.* Hope, 57 Cal. 493.

51. Cooper *v.* Reilly, 90 Wis. 427, 63 N. W. 885.

52. Kelly *v.* McGuire, 15 Ark. 555; Sherrin *v.* Flinn, 155 Ind. 422, 58 N. E. 549.

53. Atlantic Delaine Co. *v.* James, 94 U. S. 207.

Mere preponderance is insufficient. Howle *v.* North Birmingham Land Co., 95 Ala. 389, 11 So. 15.

Fraudulent Intent. — That the party making the false representations knew them to be false need not be shown. Smith *v.* Bricker, 86 Iowa 285, 53 N. W. 250; Day *v.* Lown, 51 Iowa 364, 1 N. W. 785; Kennedy *v.* Roberts, 105 Iowa 521, 75, N. W. 363. For gross carelessness may amount to fraudulent intent even without intent to deceive. Alvarez *v.* Brannan, 7 Cal. 503, 68 Am. Dec. 274. Yet if there was no special confidence between the parties and no artifice was used to prevent examination of the facts, and the party to whom the representations were made had opportunity, and the alleged representations are not shown clearly to have been more than an opinion, the instrument will stand. Dickson *v.* Knox, 71 Iowa 728, 30 N. W. 49.

54. Tarkington *v.* Purvis, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607.

55. Ludington *v.* Ford, 33 Mich. 123; Maxwell Land Grant Case, 121 U. S. 325 — the proof must be clear, unequivocal and convincing, a bare preponderance being insufficient; Grymes *v.* Sanders, 93 U. S. 55 — the court must be satisfied that but for the mistake complained of, the party would not have assumed the obligation from which he seeks to be relieved; Martin *v.* Hill, 41 Minn. 337, 43 N. W. 337 — not as high a degree of proof required as for reformation; mere preponderance held sufficient; Martin *v.* Berens, 67 Pa. St. 459 — must be clear, precise and indubitable; Weidebusch *v.* Hartenstein, 12 W. Va. 760 — must be very strong; Lavassar *v.* Washburne, 50 Wis. 200, 6 N. W. 516 — clear and convincing; degree must be as high as for reformation.

56. Maxwell Land Grant Case,

4. Undue Influence. — In order to set aside an instrument for undue influence, the alleged ignorance or imposition must be shown by clear and satisfactory evidence,[57] yet, as in the case of fraud, where the person alleged to have been influenced is shown to have been mentally unsound at the time of the instrument's execution, and where there were confidential relations between the parties to the transaction, the proof of undue influence need not be as strong.[58]

5. Confidential Relations. — In cases of confidential relations whereby dominion may be exercised by one person over another, such as attorney and client, and guardian and ward, transactions wherein the superior has been benefitted will be set aside unless it is shown that the other had independent advice; that the act was the result of his own volition, and that he understood the act and its effect,[59] and it must be shown in such cases by the clearest evidence that the transaction was fair and honest throughout.[60]

6. Mental Disability. — To cancel an instrument on the ground of imbecility only, the proof thereof must be such as would justify a jury under a commission of lunacy in putting the party's property and person under the protection of the court,[61] but where the relation of the parties was confidential and fraud is shown, evidence of mere weakness of mind is sufficient to warrant cancellation,[62] and whenever transactions with old and infirm persons appear to be

121 U. S. 325; Jackson *v.* Wood, 88 Mo. 76; Martin *v.* Berens, 67 Pa. St. 459; Mayberry *v.* Nichol, (Tenn.), 39 S. W. 881.

57. Bailey *v.* Litten, 52 Ala. 282; Buchanan *v.* Gibbs, 26 Kan. 277.

Evidence Held Insufficient. — Taylor *v.* Ford, 131 Cal. 440, 63 Pac. 770; Hamilton *v.* Smith, 57 Iowa 15, 10 N. W. 276, 42 Am. Rep. 39; Kennedy *v.* Ten Broeck, 11 Bush (Ky.) 241.

58. McGuire *v.* McGuire, 11 Bush (Ky.) 142; Sherrin *v.* Flinn, 155 Ind. 422, 58 N. E. 549.

59. Starr *v.* De Lashmutt, 76 Fed. 907; Ross *v.* Conway, 92 Cal. 632, 28 Pac. 785.

60. Nichols *v.* McCarthy, 53 Conn. 299, 23 Atl. 93, 55 Am. Rep. 105; Case *v.* Case, 49 Hun 83, 1 N. Y. Supp. 714.

Attorney and Client. — Bayliss *v.* Williams, 6 Cold. (Tenn.) 440.

Guardian and Ward. — Brown *v.* Burbank, 64 Cal. 99, 27 Pac. 940.

Husband and Wife. — A conveyance from husband to wife will be set aside on much less evidence of fraud than if between strangers. Wood *v.* Harmison, 41 W. Va. 376, 23 S. E. 560.

61. Wilson *v.* Oldham, 12 B. Mon. (Ky.) 33.

Proof that at the time when the grantor delivered the instrument he was incapacitated from a rational care of his property will warrant cancellation. Crowther *v.* Rowlandson, 27 Cal. 376.

Evidence that the grantor, though not insane, was so weak mentally as to be unable to guard against imposition or to resist importunity or undue influence is sufficient. Kelly *v.* McGuire, 15 Ark. 555.

Where a man broken by years, standing alone without any to help, too enfeebled in mind and body to be watchful and penetrate the probabilities of the situation, or the designs of the others, makes a bargain with an unsuitable or insolvent man and puts all into his hands to secure necessary support and assistance, the slightest circumstance should cancel his deed. Hetrick's Appeal, 58 Pa. St. 477.

62. Wilson *v.* Oldham, 12 B. Mon. (Ky.) 33.

wholly against their interests, there must be clear proof that they understood the nature, character and effect of their acts.[63]

V. DELAY AS EVIDENCE OF ACQUIESCENCE.

Since equity will not permit a party to delay and speculate on the chances of appreciation in values and avoid only in case it may be profitable to do so, unreasonable delay on the part of the party asking cancellation after he has discovered the ground on which he relies, is evidence of acquiescence,[64] and is a waiver of the alleged ground.[65] And when the delay has been long, proof of a strong case of fraud or oppression is necessary to rebut this presumption of acquiescence.[66] Equivocal facts or acts, however, which do not clearly show a purpose, with complete knowledge of the alleged ground, to retain the benefits of the transaction, will not defeat his right,[67] but if he does and says nothing, after a full discovery, such conduct, after a reasonable time, amounts to acquiescence.[68] This presumption of acquiescence may be rebutted, however, by his satisfactory excuse for the delay.[69]

63. Jones *v.* Thompson, 5 Del. Ch. 374.

But when the party resisting cancellation has shown the sanity of the party whose mental capacity has been impeached, at the time of the instrument's execution, mere proof of general derangement will not suffice. Achey *v.* Stephens, 8 Ind. 411.

64. Howle *v.* North Birmingham Land Co., 95 Ala. 389, 11 So. 15; Bush *v.* Sherman, 80 Ill. 160; Richards *v.* Mackall, 124 U. S. 183.

65. Tarkington *v.* Purvis, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607; Howle *v.* North Birmingham Land Co., 95 Ala. 389, 11 So. 15.

This presumption of acquiescence is particularly strong when the property involved is of a fluctuating value. Grymes *v.* Sanders, 93 U. S. 55.

66. Hay *v.* Baugh, 77 Ill. 500; Richardson *v.* Medbury, 107 Mich. 176, 65 N. W. 4; Davis *v.* Fox, 59 Mo. 125; Waters *v.* Barral, 2 Bush (Ky.) 598; Weidebusch *v.* Hartenstein, 12 W. Va. 760.

67. Tarkington *v.* Purvis, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607.

68. Pierce *v.* Wilson, 34 Ala. 596; Cowan & Co. *v.* Sapp, 74 Ala. 44; Warren *v.* Walbridge, 61 Ill. 174.

69. Barfield *v.* Price, 40 Cal. 535.

"More than three years intervened between the sale and the filing of the present bill. During this time, the complainant was in the undisturbed possession of the lands, and the purchasers were inactive until within about six months, when they commenced a suit at law for the recovery of possession. In view of the fact that the payment of the judgment was made on the day of sale, and in another State, the plaintiffs accepting it, most probably, in ignorance of the intended sale of the lands, from their inaction the complainant may have inferred that they did not intend, and would not attempt, to claim under the purchase, which must have been made for them without their knowledge, and was subject to their ratification or repudiation. The delay in moving to avoid the sale is satisfactorily explained by the circumstances." Cowan & Co. *v.* Sapp, 74 Ala. 44.

CANALS.—See Admiralty; Watercourses.

CAPACITY.

By A. I. McCormick.

CROSS-REFERENCES.

Character; Competency of Witness;
Damages; Drunkenness;
Expert and Opinion Evidence; Experiments;
Insanity;
Weight of Evidence; Wills.

I. CAPACITY OF PERSONS.

1. Mental Capacity. — A. In General. — **Degree of Intelligence Possessed by Person.** — A witness who is well acquainted with a person may give his opinion as to such person's intelligence[1]

1. Keyser *v.* Chicago & G. T. R. Co., 66 Mich. 390, 33 N. W. 867.
Expert Evidence Not Essential. Laplante *v.* Warren Cotton Mills, 165 Mass. 487, 43 N. E. 294.
Child's Father may testify whether he considered his son to be of average intelligence. Hewitt *v.* Taunton St. R. Co., 167 Mass. 483, 46 N. E. 106.

and discretion;[2] but not that a child did or did not possess sufficient discretion to have seen and avoided the precise accident in suit.[3]

B. As to Language. — a. *Ability to Read.* — The ability of a person to read may be proved by requiring him to read papers in presence of jury.[4]

b. *Ability to Speak and Understand.* — A witness who had spoken to a person (since deceased) may testify that he appeared to understand English and spoke so as to be understood.[5]

C. As to Memory. — A witness, although not an expert, may testify the result of his observations as to the quality of a person's memory and the effect of an injury upon the same.[6]

D. To Transact Business. — a. *Opinion, When Admissible.* A witness intimately acquainted with a person and having observed the acts and conduct of such person, may give his opinion as to whether such person possesses the ordinary capacity for the transaction of business.[7]

In Connors *v.* Grilley, 155 Mass. 575, 30 N. E. 218, a girl 17 years old had testified as a witness. It was claimed she was feigning dullness. *Held* that, in connection with her appearance, testimony and age, evidence of her school teacher that "she was a very dull girl" was admissible, being in the discretion of the court.

Minor, Capacity to Commit Crime. To prove that a minor under 13 years of age, who is charged with crime, possesses sufficient intelligence to understand the legality of the act, the opinion of a qualified witness (non-expert) that minor had sufficient intelligence is admissible. Carr *v.* State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905.

Expert Testimony Is Also Admissible. — State *v.* Nickleson, 45 La. Ann. 1172, 14 So. 134.

Minor, Capacity to Commit Crime, Independent Evidence Directed Expressly to Capacity Not Essential. Jury may find capacity or incapacity from circumstances concerning and surrounding the acts constituting offense, without other testimony. State *v.* Toney, 15 S. C. 409.

2. **Father of Child** and another witness, qualified on subject, may testify as to boy's judgment in position of danger. St. Louis & S. W. R. Co. *v.* Shifflet, (Tex. Civ. App.), 56 S. W. 697; Lynch *v.* Smith, 104 Mass. 52, 6 Am. Rep. 188.

3. **When Inadmissible, Precise Question at Issue.** — In San Antonio & A. P. R. Co. *v.* Morgan, 24 Tex. Civ. App. 58, 58 S. W. 544, it was held that the opinion of a witness that the child "was old enough to see danger and avoid it" was inadmissible, because that was the precise question to be decided by jury, the age and intelligence of the child being in evidence. See also Lynch *v.* Smith, 104 Mass. 52, 6 Am. Rep. 188, where it was held the child's school teacher's opinion that the child was capable of exercising ordinary care in going to and from school unattended, on one of which trips he was injured, was inadmissible.

Whether a boy was proper person to put to work on a machine is not a proper question for an expert. McGuerty *v.* Hale, 161 Mass. 51, 36 N. E. 682.

4. **Ability to Read, Test.** — *Held* a proper and satisfactory test. Ort *v.* Fowler, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501.

5. **Ability to Speak and Understand a Language.** — Kuen *v.* Upmier, 98 Iowa, 393, 67 N. W. 374.

6. **Memory.** — Bridge *v.* City of Oshkosh, 71 Wis. 363, 37 N. W. 409; Staring *v.* Western Union Tel. Co., 58 Hun 606, 11 N. Y. Supp. 817.

7. Hepler *v.* Hosack, 197 Pa. St. 631, 47 Atl. 847; Hayes *v.* Candee, (Conn.), 52 Atl. 826.

As to the Effect of Injury on Person's Ability to Do Business.

b. *Opinion, When Inadmissible.* — But opinion evidence is inadmissible where such person has been examined as a witness in the presence of jury;[8] nor can any witness, however qualified, give his opinion as to the ability of a person to do a certain defined legal act.[9]

E. Showing Ability in an Employment. — a. *By Appearance and Conduct in Court.* — **Presumption.** — On the question of the ability of a person, called as a witness, to perform certain responsible work, the jury may be directed to consider his appearance and conduct as a witness, together with other evidence;[10] but it cannot be presumed that the appearance and acts or conduct of witness before the jury furnished evidence that he was incompetent to do certain work, when facts as to his appearance and conduct do not appear in the record.[11]

b. *By Opinion of Witness.* — Where the precise issue to be determined by the court or jury is whether or not a person was competent in a certain employment, the opinion of witnesses that he was or was not competent is in general inadmissible.[12]

Bridge *v.* City of Oshkosh, 71 Wis. 363, 37 N. W. 409.

Weight of Evidence Is for the Jury. — Neely *v.* Shephard, (Ind.), 60 N. E. 922.

Capacity to Transact Business, Hypothetical Question, Expert. Expert may, after hypothetical statement of facts and conduct of a person, give his opinion as to whether such person is capable of transacting ordinary business. Poole *v.* Dean, 152 Mass. 589, 26 N. E. 406.

8. Sprague *v.* Atlee, 81 Iowa 1, 46 N. W. 756. But see Connors *v.* Grilley, 155 Mass. 575, 30 N. E. 218.

9. Hayes *v.* Candee, (Conn.), 52 Atl. 826.

10. Keith *v.* New Haven & N. R. Co., 140 Mass. 175, 3 N. E. 28.

11. Peaslee *v.* Fitchburg R. Co., 152 Mass. 155, 25 N. E. 71.

12. Langston *v.* Southern Elec. R. Co., 147 Mo. 457, 48 S. W. 835, *citing* Boettger *v.* Scherpe & K. A. I. Co., 136 Mo. 531, 38 S. W. 298.

The opinion of the witness that he might in a certain time have sold a certain number of pianos is inadmissible. Kochmann *v.* Baumeister, 73 App. Div. 309, 76 N. Y. Supp. 769.

Opinion of witness "that he was careless and I did not think the man was competent for the reason that he did not have the experience," is inadmissible. Question is for the jury. Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295.

Opinion of witness familiar with the engineer and his work that he is competent is inadmissible. Hicks *v.* Southern R. Co., (S. C.), 38 S. E. 725.

"Tell the jury whether or not M was a fit man or not to handle an engine of that character" calls for a conclusion and is inadmissible. McKay *v.* Johnson, 108 Iowa 610, 79 N. W. 390.

That an engineer was skilled in his employment is not a subject for the opinion of the witness. Butler *v.* Chicago B. & Q. R. Co., 87 Iowa 206, 54 N. W. 208.

In Moore *v.* Chicago B. & Q. R. Co., 65 Iowa 505, 54 Am. Rep. 26, the opinions of expert express messengers and baggage men, who had accompanied plaintiff on one trip, were held inadmissible to prove plaintiff's capacity to perform the duties of express messenger and baggage man; facts should have been presented to jury.

Opinion of witness that one is a careful driver is inadmissible. Morris *v.* Town of East Haven, 41 Conn. 252.

Skill of Surgeon, What Evidence

c. *By One or a Series of Acts.* — The general rule is that a servant's qualifications, ability or capacity to perform the duties required of him in his employment can not be proven by evidence of any specific act, showing carelessness or incompetency,[13] but can be proven by evidence of a series of acts of such character.[14]

d. *Remoteness.* — **(1.) Carelessness.** — On the question of the

Inadmissible, Opinions, Reputation. Where the important question at issue is whether a surgeon (defendant) possessed at a certain time skill equal to the ordinary skill of the profession, following evidence is inadmissible: a. The opinion of a physician with whom defendant studied his profession, as to whether defendant possessed more than the ordinary skill of the members of the profession, because if the facts upon which the witness founded his opinion were stated to the jury, the jury could decide the question as well as he. b. The general reputation of the school at which defendant studied. c. The opinion of another physician as to the skill displayed by the defendant in the treatment of certain cases, the character of which was known to the witness only from statements made by defendant. d. Evidence that a skillful surgeon assisted the defendant at the time af the act complained of. Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323.

Contra. — On an issue as to whether a person was competent to do certain work the opinions of witnesses familiar with the person and the work were held admissible. Lewis *v.* Emery, 108 Mich. 641, 66 N. W. 569; Doster *v.* Brown, 25 Ga. 24, 71 Am. Dec. 153. Also International & G. N. R. Co. *v.* Jackson, (Tex. Civ. App.), 62 S. W. 91.

Skill or Competency of a Witness. The skill or competency of a witness, who testifies as an expert, may be proven by the opinion of another expert in same science, who knows by experience and observation the skill of witness. Laros *v.* Com., 84 Pa. St. 200, or by testimony of witness himself. Tullis *v.* Kidd, 12 Ala. 648.

13. Galveston, H. & S. A. R. Co. *v.* Davis, 92 Tex. 372, 48 S. W. 570; Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295; Spring Valley Coal Co. *v.* Patting, 86 Fed. 433.

14. Baulec *v.* New York & H. R. Co., 59 N. Y. 356, 17 Am. Rep. 325.

The Pittsburgh, Ft. W. & C. R. Co. *v.* Ruby, 38 Ind. 294, 10 Am. Rep. 111; Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295; McKinney on Fell. Servants, p. 204.

In Baulec *v.* New York & H. R. Co., 59 N. Y. 356, 17 Am. Rep. 325, which is a well considered case, and seems to lay down the correct rule, the court says: "When, as here, the general fitness and capacity of a servant are involved, the prior acts and conduct of such servant on specific occasions may be given in evidence with proof that the principal had knowledge of such acts. The cases in which evidence of other acts of misconduct or neglect of servants or employees, whose acts and omissions of duty are the subject of investigation, have been held incompetent, have been those in which it has been sought to prove a culpable neglect of duty on a particular occasion by showing similar acts of negligence on other occasions."

Contra. — The Massachusetts authorities seem to be opposed to this doctrine. They hold that incompetency of a servant in his employment cannot be shown by evidence of specific acts of negligence. Hatt *v.* Nay, 144 Mass. 186, 10 N. E. 807; Connors *v.* Morton, 160 Mass. 333, 35 N. E. 860; Kennedy *v.* Spring, 160 Mass. 203, 35 N. E. 779; Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467 (this latter case is criticised in Baulec *v.* New York & H. R. Co., 59 N. Y. 356, 17 Am. Rep. 325).

One Act Under Certain Circumstances is sufficient to prove incompetency. Evansville & T. H. R. Co. *v.* Guyton, 115 Ind. 450, 17 N. E. 101, 7 Am. St. Rep. 458; Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295.

competency of an employee to do his work, evidence of his "carelessness" is admissible and relevant.[15]

(2.) Incompetency in Similar Work. — Lack of capacity in one occupation may tend to show lack in another similar employment.[16]

(3.) Time to Which Evidence Is Directed. — Evidence as to the intelligence of a boy one year after an accident is not too remote as proof of his intelligence at the time of the accident.[17]

Evidence of skill possessed two years subsequent to certain time is too remote to prove like degree of skill at that time.[18]

2. Showing Earning Capacity. — A. In General. — **What Evidence Admissible.**— Evidence of the age, life, ability and disposition to labor, habits of living, and expenditures is admissible as proof of the earning capacity of a deceased person.[19]

B. By Opinions of Witnesses. — The ability or capacity of a person to earn money cannot, in general, be proven by the mere opinion of the party himself, nor by the opinion of a witness, however qualified, that he is or was able to earn a certain amount.[20] But opinions may be evidence of the value of the services which the person is or was able to perform.[21]

C. Actual Earnings. — **Earnings of Person in Occupations in Which He Has Been Engaged.** — Evidence as to what he was earning in the employment in which he was engaged at the time of his death or injury is admissible;[22] but the evidence is not confined to the

15. Evidence of Carelessness. Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295, *citing* Coppins *v.* New York C. & H. R. Co., 122 N. Y. 557, 25 N. E. 915, 19 Am. St. Rep. 523.

16. Incompetency of Employee in Certain Part of Work Evidence of Incompetency in Other Part of Same Work. — Where the issue is as to the incompetency of an employee in a certain part or department of his work (gripman on cable car) evidence showing a lack of judgment and discretion on his part in another department of his work (electric motorman) is admissible when person's employment was partly on cable and partly on electric cars. Morrow *v.* St. Paul City R. Co., 74 Minn. 480, 77 N. W. 303.

17. Laplante *v.* Warren Cotton Mills, 165 Mass. 487, 43 N. E. 294.

18. Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323.

19. McHugh *v.* Schlosser, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574.

20. Opinion of Party Himself Inadmissible, but his testimony that he formerly made a certain amount is admissible. Wimber *v.* Iowa C. R. Co., 114 Iowa 551, 87 N. W. 505.

Opinion of Other Witnesses.— The question, "What was the deceased's earning capacity at the time of her death?" is inadmissible as calling for a conclusion. Wilcox *v.* Wilmington City R. Co., 2 Pen., (Del.), 157, 44 Atl. 686.

Expert Testimony Inadmissible. The question of the value in money of the earning power or capacity of an injured person is not one for expert testimony. Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705.

21. Farmers of character and experience who knew the person well may testify as to the value of the services which a deceased farmer was able to perform. McLamb *v.* Wilmington & W. R. Co., 122 N. C. 862, 29 S. E. 894.

A mother may testify as to the value of the services of her son without first stating facts on which testimony is based. Birkel *v.* Chandler, 26 Wash. 241, 66 Pac. 406.

22. Earnings in Employment at Time of Injury, Testimony of

occupation in which he was engaged at said time. It is competent to show that he had at various times engaged in different pursuits, and what he made or was capable of making in each of them.[23]

D. Possible Earnings. — **Occupations in Which Person Was Never Employed.** — Evidence as to what a person would be capable of earning in vocations in which he had never been employed is inadmissible.[24] But there is an exception to this rule in the case

Party Himself. — On the question as to the earning capacity of an injured person the testimony of said person that at the time of the injury he was making a monthly salary of $50.00 in a certain employment is admissible to show actual loss of salary and also to throw light on his capacity to earn money. Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389.

Evidence of Habitual Occupation and Employment Is Admissible. Tilley *v.* Hudson River R. Co., 23 How. Pr. (N. Y.) 363.

To prove the earning capacity of a deceased railroad employee evidence of his experience in railroading is admissible and relevant. Louisville & N. R. Co. *v.* Jones, 130 Ala. 456, 30 So. 586.

23. Missouri K. & T. R. Co. *v.* St. Clair, 21 Tex. Civ. App. 345, 51 S. W. 666; Wimber *v.* Iowa C. R. Co., 114 Iowa 551, 87 N. W. 505.

Occupation at Time of Injury, Earnings in Other Occupations. In an action for personal injuries, on the question of the amount of loss of earning capacity, plaintiff may prove that he was by trade a blacksmith and what he was capable of earning as such, although at time of the accident he was merely a section hand on railroad and receiving a much less amount per day than blacksmith's wages. Chicago R. I. & T. R. Co. *v.* Long, (Tex. Civ. App.), 65 S. W. 882.

Earning Capacity of Deceased, Earnings in Other Employments. Evidence that deceased had at various times engaged in different occupations and of what he made or was capable of making in each of them is relevant and admissible, although at time of death he had ceased for a number of years to act in one of them (school teacher). His capacity to pursue it not being impaired before death "what he had earned in it would not serve as a direct basis for estimating the value of his life, but might be looked to by the jury in estimating his capacity to command continuous profitable employment should he cease to pursue the business vocation in which he was engaged at the time he was killed." Christian *v.* Columbus & R. R. Co., 90 Ga. 124, 15 S. E. 701.

24. Earning Capacity in Occupations in Which Never Employed. Atchison T. & S. F. R. Co. *v.* Chance, 57 Kan. 40, 45 Pac. 60.

On an issue as to the earning capacity of a deceased person, he having been occupied solely as a farmer since his arriving at maturity, the opinions of witnesses as to what he could have made in other vocations are inadmissible. Atlanta & W. P. R. Co. *v.* Newton, 85 Ga. 517, 11 S. E. 776.

Earning Capacity of Deceased Person, Employment at Time of Death, Higher Grades in Same Employment. — Where deceased, who was strong and of steady habits, was a fireman under civil service rules, and had risen four grades in the service at the time of death, evidence showing the advanced grades of the service above the position occupied by deceased at time of his death is admissible. Jury may consider prospects of being advanced and earning greater salary, but evidence of the amount of salaries of higher positions is inadmissible, these positions requiring other qualifications than did position deceased held. This evidence, if admissible, would tend to make probable what is only possible. Geary *v.* Metropolitan St. R. Co., 73 App. Div. 441, 77 N. Y. Supp 54.

Earning Capacity of Deceased Person, Evidence of the Salaries of Public Office Held by Deceased at Time of Death. — Evidence that at

of minors.[25]

E. Profits of Business. — Evidence of the profits of a person's business, owned and managed by him, is admissible as proof of the earning capacity of the person.[26]

F. Morality. — **Intoxication.** — Evidence of one's immoral character is inadmissible on the question of his earning capacity.[27] Testimony as to his intoxication on certain occasions is admissible.[28]

G. Effect of Injuries on Mind. — On the question of the impairment of the earning capacity of one injured, testimony as to the effect of injuries on his mind is admissible.[29]

H. Showing Samples of Work. — To show person's capacity to earn a living by certain work, specimens of such work may be exhibited to the jury.[30]

I. Earnings of Others. — **Comparison with Earnings of Average Man in Similar Employment.** — To prove one's earning capacity in a certain employment, it may be shown what another of equal ability accomplished in similar work.[31]

J. Time to Which Evidence Directed. — The amount of decrease in plaintiff's earning capacity caused by injuries may be shown by evidence of the amounts earned by him for the year preceding and the year succeeding the injury.[32] Where the question is as to the effect of the injury on the ability of a minor to earn money after he becomes of age, evidence as to the present condition of the minor with reference to his injuries and capacity to work is relevant and admissible.[33]

3. Physical Capacity or Ability. — A. In General. — a. *Pre-*

the time of his death a person killed in an accident held the office of tax collector and postmaster, and of the amount of his income therefrom, is not relevant as a basis of estimating his capacity for earning money and is inadmissible. Christian *v.* Columbus & R. R. Co., 90 Ga. 124, 15 S. E. 701.

Earning Capacity of Deceased Person, Probability of Earning Greater Salary. — Probability of a deceased person earning a greater salary had he lived must be based on existing facts and circumstances, and such facts as it is reasonably certain would have occurred had he lived. Brown *v.* Chicago R. I. & P. R. Co., 64 Iowa 652, 21 N. W. 193.

25. Minor Loss of Earning Capacity. — Jury may take into consideration his prospective loss of earnings after he shall have attained his majority, although he has never earned anything. Rosenkranz *v.* Lindell R. Co., 108 Mo. 9, 18 S. W. 890, 32 Am. St. Rep. 588; Hildenbrand *v.* Marshall, (Tex. Civ. App.), 69 S. W. 492.

26. Wallace *v.* Pennsylvania R. Co., 195 Pa. St. 127, 45 Atl. 685, *overruling* on this point Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705; Chapman *v.* Kirby, 49 Ill. 211.

27. Lord *v.* City of Mobile, 113 Ala. 360, 21 So. 366.

28. Herrick *v.* Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333.

29. Birkel *v.* Chandler, 26 Wash. 241, 66 Pac. 406.

30. Youngstown Bridge Co. *v.* Barnes, 98 Tenn. 401, 39 S. W. 714.

31. Bessimer Land & Imp. Co. *v.* Campbell, 121 Ala. 50, 25 So. 793.

32. Chicago & E. R. Co. *v.* Meech, 163 Ill. 305, 45 N. E. 290.

33. Hildenbrand *v.* Marshall, (Tex. Civ. App.), 69 S. W. 492.

sumption. — All persons are presumed to enjoy a normal condition of body and mind until the contrary is clearly proved.[34]

b. *Exhibition of Strength.* — To prove the relative strength of a person or that he possesses ordinary or more than ordinary strength, evidence of specific exhibitions of his strength is admissible.[35]

c. *Opinion of Non-Expert, Inadmissible.* — The relative strength or physical capacity of two persons can not be proven by the opinion of a non-expert witness, although he is somewhat acquainted with parties.[36]

B. To Perform Ordinary Physical Act. — a. *Testimony of Party.* — The physical ability or inability of a person to do work or perform any act may be proved by the direct testimony of the party himself.[37] He may also testify directly as to the effect of an injury on his ability to work.[38]

34. Board of Health *v.* Lederer, 52 N. J. Eq. 675, 29 Atl. 444.

35. State *v.* Knapp, 45 N. H. 148; Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216. *Contra.* — Wellar *v.* People, 30 Mich. 16.

State *v.* Knapp, 45 N. H. 148, is a leading case on the subject. That was a prosecution for alleged rape. Prosecutrix claimed to have resisted with all her power to prevent act. Defendant claimed that had she resisted he would have been unable to commit the act. On the question of the relative strengths of the parties, court held that testimony of witnesses to the effect that defendant had, in the past, had several personal encounters with others (one with one of the witnesses), and in all these that he had shown himself a strong, powerful man, was admissible.

Many statements may be found in the reports to the effect that such evidence is not admissible on this point. But a careful examination will reveal the fact that in most cases the question at issue was not the actual physical strength of the party, but the reputation of the party as to his strength.

The opinion in State *v.* Cushing, 17 Wash. 544, 50 Pac. 512, criticizes State *v.* Knapp, 45 N. H. 148, on this point. But that part of the opinion is *dictum*, the court expressly saying that the physical strength of King was an immaterial and unimportant fact in the case.

36. Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216. In a prosecution for murder where the testimony shows wound must have been caused by powerful blow, testimony of witness who knew defendant before homicide, that defendant "was a strong and powerful man," is admissible, although defendant is present in court. Thiede *v.* Utah Ter., 159 U. S. 510, 40 L. Ed. 238.

37. People *v.* Tubbs, 37 N. Y. 586; Healy *v.* Visalia & T. R. Co., 101 Cal. 585, 36 Pac. 125.

Ability to Resist Force, Testimony of Party. — Where in a prosecution for rape it is claimed that the prosecutrix was of sufficient strength to resist defendant, testimony of prosecutrix herself and of an acquaintance that she had been in feeble health for some time before the act, is admissible. State *v.* Knapp, 45 N. H. 148.

38. Effect of Injury. — That he can not do the same work since the accident that he did before. Kline *v.* Kansas City, St. J. & C. B. R. Co., 50 Iowa 656.

Effect of Injury. — That since the accident he can only use his right arm from the elbow. Winter *v.* Central Iowa R. Co., 80 Iowa 443, 45 N. W. 737; Creed *v.* Hartman, 8 Bosw. (N. Y.) 123.

Statement of witness that he has not done any work since accident because he was unable to do any is not inadmissible as a conclusion. Cass *v.* Third Ave. R. Co., 20 App. Div. 591, 47 N. Y. Supp. 356.

b. *Testimony of Non-Experts.* — The ability or inability of a certain person to do work or to perform an act may be proved by the direct testimony of a witness who knows the person and has had opportunities for observing him. The question does not call for the opinion of an expert.[39]

Party Himself May Testify Directly that before the accident he was able to do his work, and that since he has been unable to do it. Healy *v.* Visalia & T. R. Co., 101 Cal. 585, 36 Pac. 125.

Evidence of Person's Own Statements and Declarations (made long after injury) to the effect that he was not able to perform certain kinds of work because of the injury, is inadmissible when the precise issue before the triers is the ability or inability of the person to work after the injury. Winter *v.* Central Iowa R. Co., 80 Iowa 443, 45 N. W. 737.

39. Stone *v.* Moore, 83 Iowa 186, 49 N. W. 76; Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627; Sloan *v.* New York C. R. Co., 45 N. Y. 125; Barker *v.* Coleman, 35 Ala. 221; Winter *v.* Central Iowa R. Co., 74 Iowa 448, 38 N. W. 154; Chicago & A. R. Co. *v.* Arnol, 46 Ill. App. 157, *affirmed* 144 Ill. 261, 33 N. E. 204; Harris *v.* Detroit City R. Co., 76 Mich. 227, 42 N. W. 111.

Daughter of Deceased may testify that her father was in good health and able to perform hard labor. Ashley Wire Co. *v.* McFadden, 66 Ill. App. 26.

Divorced Wife may testify as to person's inability to work during time she lived with him. French *v.* Ware, 65 Vt. 338, 26 Atl. 1096.

Husband and Mother of injured woman may testify that she is unable to work since the accident. "All persons may testify as to facts within their observation as to the physical ability of another." Keller *v.* Town of Gilman, 93 Wis. 9, 66 N. W. 800.

So also with *daughter* as to ability of mother. Parker *v.* Boston & H. S. B. Co., 109 Mass. 449.

In Healy *v.* Visalia & T. R. Co., 101 Cal. 585, 36 Pac. 125, a witness who was a passenger on hand car at time of injury was permitted to answer the question, "Under the circumstances was it possible for an ordinary person sitting in the position plaintiff was sitting in, to stand the force of the jars and still retain her seat upon the car?"

In Staring *v.* Western Union Tel. Co., 58 Hun 606, 11 N. Y. Supp. 817, witnesses were not allowed to give their opinions on plaintiff's ability to labor, but were confined to facts within their knowledge.

A non-expert witness familiar with a person and having visited him often since an accident, may testify that "since that date he (plaintiff) has been unable to perform any duties which require the slightest physical exertion, and during his severe attacks he was unable to do anything, and at his best could not do anything other than jobs of a very light nature." Chattanooga R. & C. R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848, *citing* Atlanta & W. P. R. Co. *v.* Johnson, 66 Ga. 259.

Effect of Injury. — Witness may testify how much less work person could do after than before an injury, in his opinion. Atlanta & W. P. R. Co. *v.* Johnson, 66 Ga. 259.

Testimony of witness that after accident "plaintiff could not walk and had to be carried to house," is not inadmissible because other evidence showed "that there were no signs of injury visible, and because the testimony in its nature was hearsay, and self-serving actions." City of Bonham *v.* Crider, (Tex. Civ. App.), 27 S. W. 419. *Contra.*— Spears *v.* Town of Mt. Ayr, 66 Iowa 721, 24 N. W. 504, is opposed to the above rule.

Sufficiency of Officers and Crew of a Steamboat. — When the question is whether a certain number of officers and crew were sufficient to run a steamboat on a certain trip, the judgment of ordinary persons (passengers), having opportunity for observation and for forming correct opinions, founded on these observations,

c. *Testimony of Experts.* — Where the question at issue is whether a person is able or unable to perform certain work, the opinions of experts are in general admissible.[40] But if from the facts in evidence or that might be produced the desired conclusion may be reached without the aid of skill or science, opinions of experts are not admissible.[41]

C. Of Women to Bear Issue. — On the general subject of the inheritance and devolution of estates, it is never presumed that

is admissible. McCreary *v.* Turk, 29 Ala. 244.

Public Office, Capacity to Perform Duties Of. — Where it is charged that certain person is physically incapacitated from performing the duties of his office (public office) the opinion of a witness that the physical condition of person interferes with the discharge of his duties is inadmissible because it determines the very question at issue. Testimony that the officer "has trouble walking, writing and speaking, and that it is progressive," is too vague and indefinite. People *v.* Barker, 1 App. Div. 532, 37 N. Y. Supp. 555.

40. Expert Testimony. — Johnson *v.* Central Vt. R. Co., 56 Vt. 707.

Plaintiff's Physician who is familiar with her condition may give his opinion as to whether she still suffers pain, and whether she will be able to do her household duties. Holman *v.* Union St. R. Co., 114 Mich. 208, 72 N. W. 202.

Physician Examining Patient With a View of Testifying, may testify that person "was confined to his bed and could not walk without aid." Need not first disclose facts on which testimony is based. Missouri, K. & T. R. Co. *v.* Wright, 19 Tex. Civ. App. 47, 47 S. W. 56.

Whether, although person's arm is injured, he might not still use it, opinion of medical expert is admissible. Graves *v.* City of Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641.

Whether one brakeman was sufficient or able to control speed of a train by hand brakes, opinion of engineer of the train who had previously been conductor on a similar train is admissible. Union Pac. R. Co. *v.* Novak, 61 Fed. 573.

Ability to Walk After Being Shot. The distance an ordinary man can walk after being shot through the heart, in a manner known to the witness, may be proven by expert opinion of a physician or surgeon. State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315.

The Ability of a Person to Undergo a Medical Examination, with or without an anesthetic, is the subject of expert medical testimony. Missouri, K. & T. R. Co. *v.* Wright, 19 Tex. Civ. App. 47, 47 S. W. 56.

On a criminal trial where defendant claims it was physically impossible for him to commit the offense by reason of the fact he wore a wooden leg, his natural leg being amputated below the knee, the testimony of a physician that it was physically impossible for the defendant in that condition to commit the offense in the manner alleged, is admissible, although the wooden leg was not exhibited. Same might have been proven by defendant's exhibiting the wooden leg attached to the stump. State *v.* Perry, 41 W. Va. 641, 24 S. E. 634.

41. In Kline *v.* Kansas City, St. J. & C. B. R. Co., 50 Iowa 656, plaintiff's hand had been severely injured, and two fingers rendered stiff; plaintiff was in court and facts as to injured condition of hand were before jury. *Held,* that the inability of plaintiff to use his fingers as he did before the injury was a self-evident fact, and therefore the opinion of a physician as to whether plaintiff could perform certain work requiring skill of fingers (as coupling of railroad cars), was inadmissible. See also Eldredge *v.* Atlas S. S. Co., 58 Hun 96, 11 N. Y. Supp. 468.

The fact that a person who has lost a leg may, with the use of an artificial leg, stand, is a "matter of common and universal knowledge;" expert evidence thereon is inadmissible;

a woman, no matter how aged, is incapable of bearing children.[42]

D. Of Man to Beget. — The physical ability or inability of a man to beget issue is a proper subject of expert testimony.[43]

E. Sensorial Capacity. — *a. Testimony of Non-Experts.* — A witness, although not an expert, but intimately acquainted and familiar with a person, may testify directly that the person's eyesight or hearing was good or bad.[44]

b. *Expert Testimony.* — **Eyesight of Particular Person Under Particular Circumstances.** — Expert testimony of a physician concerning powers of eyesight of person under particular circumstances or as to the relative powers of sight of two specified men, is inadmissible, unless physician has made special examination of the eyes of the particular person.[45]

F. By Exhibition or Test. — The physical capacity or lack of capacity to perform an ordinary physical act may under some circumstances be proven by exhibition or test.[46] Generally it is in the discretion of court.[47]

but the ability or inability of such a person to do various kinds of work may be proven by expert testimony of one who has special knowledge of subject. New Jersey T. Co. *v.* Brabban, 57 N. J. Law 691, 32 Atl. 217.

42. List *v.* Rodney, 83 Pa. St. 483, citing 2 Blackstone Comm., 125; Coke on Littleton, 28; Jee *v.* Audley, 1 Cox 324.

In List *v.* Rodney, 83 Pa. St. 483, woman was 75 years old. *Held,* presumption was that she could bear issue.

Conclusive Presumption. — A woman 50 years of age, married and having no legitimate issue, is conclusively presumed to have the capacity to bear issue. Flora *v.* Anderson, 67 Fed. 182.

43. In a suit for bastardy, defendant, 76 years old, claimed he was physically incapable of having begotten the child; the opinion of an expert physician (defendant's family doctor), held admissible, although he has made no special examination of defendant. Johnson *v.* Castle, 63 Vt. 452, 21 Atl. 534.

44. Eyesight. — Adams *v.* People, 63 N. Y. 621.

Hearing. — Staring *v.* Western Union Tel. Co., 58 Hun 606, 11 N. Y. Supp. 817; Chicago City R. Co. *v.* Van Vleck, 143 Ill. 480, 32 N. E. 262.

45. People *v.* Marseiler, 70 Cal. 98, 11 Pac. 503.

46. Ability to Do Needlework. Exhibition to jury of crazy quilt made by person. Youngstown Bridge Co. *v.* Barnes, 98 Tenn. 401, 39 S. W. 714.

Where plaintiff claims to have been permanently disabled by an accident, it has been held proper (on cross-examination) for a physician (witness for defendant) to exhibit plaintiff to the jury and to place him in different attitudes. Citizen's St. R. Co. *v.* Willoeby, 134 Ind. 563, 33 N. E. 627.

Lack of Capacity to Feel may be demonstrated by physician thrusting pin into side of person in presence of jury, notwithstanding there was no sworn testimony as to experiment or its effect. Osborne *v.* City of Detroit, 32 Fed. 36.

47. Power of Sight; Test in Court. — Court was not obliged to require witness to go to window and look at an object on street to test his eyesight (on cross-examination). Heath *v.* State, 93 Ga. 446, 21 S. E. 77.

Ability to Walk. — Matter is in discretion of court. Hatfield *v.* St. Paul & D. R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 14.

Evidence of Test — Circumstances Must Be Exactly Similar. — In an action for damages caused by a railroad accident, it is error to admit evidence as to the placing of an object on the track, and proof of the

G. Remoteness in Time. — How far back in time to allow evidence of exhibitions of strength to go, where question is as to strength at certain time, is in discretion of court.[48]

II. CAPACITY OF THINGS.

1. Carrying Capacity. — A. Judicial Knowledge. — **Mathematical Computation.** — What is the carrying capacity of a car or ship may not be a matter of judicial knowledge or mathematical calculation.[49]

B. Testimony of Witnesses. — Where the question is as to capacity or amount of contents a thing contains or is capable of containing, and the subject matter is such that it cannot be reproduced or exactly described to the jury as it appeared to the witness at the time, and the facts are such as men in general are capable of comprehending, under such circumstances common observers, expert and non-expert, having special opportunities for observation, may testify their opinions as conclusions of fact. So it has been held that the opinions of such witnesses are competent and admissible to prove the capacity of flumes and ditches;[50]

distance at which it could be seen and distinguished, where the circumstances and surroundings are different from those existing at time of injury. The Chicago & A. R. Co. *v.* Logue, 47 Ill. App. 292; Yates *v.* The People, 32 N. Y. 509.

Examination of Person — Error of Court in Refusing to Allow. — It has been held that, under certain circumstances, court is bound to direct person to submit to physical examination by physician to determine effect of injury on ability. Schroeder *v.* Chicago, R. I. & P. R. Co., 47 Iowa 375. To ascertain effect of injury on eyesight; Atchison, T. & S. F. R. Co. *v.* Thul, 29 Kan. 333.

48. State *v.* Knapp, 45 N. H. 148. **Evidence of Health and Strength Seven Years Before** is too remote. Evans *v.* Horton, 93 Ala. 379, 9 So. 534.

49. *Held,* that court would not declare that a box car 26 feet by 8 feet by 6 1-2 feet could not hold 300 bushels of corn in the shuck. "A result so variable as this cannot become a rule, and hence cannot become a subject of judicial cognizance." South & N. Ala. R. Co. *v.* Wood, 74 Ala. 449.

Mathematical computation as to cargo of ship. Ogden *v.* Parsons, 23 How. (U. S.) 167.

50. Capacity of ditch may be proven by testimony of a miner experienced in the selling and measuring of water to miners. "The capacity of the ditch is a question of fact which does not require for its proof unusual scientific attainments or unusual skill." Frey *v.* Lowden, 70 Cal. 550, 11 Pac. 838; Osten *v.* Jerome, 93 Mich. 196, 53 N. W. 7.

Sufficiency of Evidence. — A civil engineer who has measured flume and been superintendent of flume for six years, testified as to the capacity of the flume. *Held,* sufficient to justify a finding that the flume had a certain capacity. San Luis Water Co. *v.* Estrada, 117 Cal. 168, 48 Pac. 1075.

Capacity of Ditch — Opinion — On What Facts Based. — The carrying capacity of a ditch cannot be proved by the opinion of a witness based on the dimensions of the ditch alone; the velocity of the flow must be considered. Last Chance W. D. Co. *v.* Heilborn, 86 Cal. 1, 26 Pac. 523.

sewers,[51] culverts,[52] store rooms,[53] boxes,[54] railroad cars,[55], the amount of land a certain stream can irrigate,[56] the number of feet in a certain pile of lumber,[57] capacity of an excavation,[58] the capacity of land to produce crops.[59]

C. Expert and Opinion Evidence. — a. *When Necessary.* Where the matter at issue is such that it requires special study and experience in order to form reliable judgment thereon, expert testimony is essential. Accordingly it has been held that expert

51. The insufficient capacity of a sewer may be proven by the opinions of witnesses (non-experts), who know the facts personally, after stating the facts on which opinion is based. Indianapolis *v.* Huffer, 30 Ind. 235.

52. The capacity and sufficiency of a culvert under a railroad track to carry away waters that accumulated in time of flood may be proven by the opinion of a farmer of the immediate locality (although possessing no expert knowledge or skill), he having lived for many years within a short distance of the culvert and having knowledge of the construction of the same. McPherson *v.* St. Louis, I. M. & S. R. Co., 97 Mo. 253, 10 S. W. 846. But see *contra* note 62.

53. Where the question is as to the amount of merchandise contained in a certain store, a witness familiar with the store and its contents, owning a store of same general character and of about same dimensions himself, may testify as to whether the store in question contains as much as his own store, an inventory of which had just been taken; his opinion that the store could not hold the amount of goods claimed is admissible. Howard *v.* City F. Ins. Co., 4 Denio (N. Y.) 502.

54. That a certain box commonly known as a "40-pound box" would contain if well packed about 40 pounds of fruit, may be proven by the opinions of witnesses experienced in the packing of fruit. Ah Tong *v.* Earl Fruit Co., 112 Cal. 679, 45 Pac. 7.

55. The opinion of an expert is admissible to prove the capacity of railroad cars for carrying logs, notwithstanding that expert's experience has not been on route over which logs were shipped. Conway *v.* Fitzgerald, 70 Vt. 103, 39 Atl. 634.

56. The number of acres of land that will be benefitted by the construction of a ditch may be proven by the opinion of an experienced witness. Bennett *v.* Meeham, 83 Ind. 566. *Contra.* — The question "State the fact as to whether or not from the examination you made yesterday of that creek, it appeared to have a sufficient fall to drain Mr. B's forty acres," was held not admissible because it called for the witness' opinion and not for facts within his knowledge, and was the precise issue in the case. Bohr *v.* Neuenschwander, 120 Ind. 449, 22 N. E. 416.

57. Pile of Lumber. — Expert in lumber business may testify his opinion of the number of feet in a certain pile of lumber without having measured it. Texas & Pac. R. Co. *v.* Hays, 2 Willson Civ. Cas. Ct. App., (Tex.), § 390.

58. The question as to whether a certain pile of dirt is sufficient to fill a certain excavation, may be proved by the testimony of an ordinary witness familiar therewith, there being no proof of the dimensions of the pile or excavation. Brown *v.* Town of Swanton, 69 Vt. 53, 37 Atl. 280.

59. The size of crop a given piece of land will produce may be proved by the opinion of a farmer possessing the requisite knowledge and experience. Sickles *v.* Gould, 51 How. Pr. (N. Y.) 22. The opinion of a farmer operating a farm of similar soil in same locality is admissible. Nebraska L. & L. Stock Co. *v.* Burris, 10 S. D. 430, 73 N. W. 919. A witness showing himself competent to testify may be asked to estimate the quantity of hay in a certain acreage for that season before harvest. Isaacs *v.* McLean, 106 Mich. 79, 64 N. W. 2.

testimony (as distinguished from the opinions of non-experts, however qualified,) is essential to prove capacity of ships,[60] barges,[61] culverts.[62]

b. *When Not Admissible.* — Where the subject matter to which the opinion relates is of such character that it can be clearly and exactly described to the jury and is such that, under these circumstances, the jury is capable of forming a correct conclusion as to the capacity of the thing, the opinions of witnesses are inadmissible.[63]

D. COMPARISON. — In some cases the capacity or amount of contents a thing will contain may be proven by comparison with a similar thing.[64]

2. Resisting Capacity. — A. TESTIMONY OF WITNESSES. — Where a subject matter is of such character that it cannot be clearly and exactly described to the jury, as witness knows it, or is such that the jury could not decide the question of capacity if facts were before them, the opinion of an ordinary witness having special knowledge of the subject by experience and observation

60. How Deep a Certain Vessel Can Be Safely and Prudently Laden With a Particular Cargo Is a Question for Expert Testimony. — The opinion of an experienced master who knows his particular vessel and her performances at sea is the best evidence. Weston *v.* Foster, 2 Curt. 119, 29 Fed. Cas. No. 17,452; Ogden *v.* Parsons, 23 How. (U. S.) 167.

61. The proper and competent way to prove the tonnage or capacity of a barge or floating structure, not entitled to registry, is by expert testimony. Flandreau *v.* Elsworth, 151 N. Y. 473, 45 N. E. 853.

62. The capacity or sufficiency of a culvert through a railroad embankment to carry off the waters in times of ordinary flood cannot be proven by the opinion of a witness who does not possess special knowledge and skill. Kansas City, Ft. S. & M. R. Co. *v.* Cook, 57 Ark. 387, 21 S. W. 1066; Central R. & B. Co. *v.* Kent, 84 Ga. 351, 10 S. E. 965. See note 52.

63. Sufficiency of the width of a road to allow a wagon to turn round on it with safety is not subject of opinion evidence. The facts as to the condition and description of the road should be stated to the jury. International & G. N. R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58; Fulsome *v.* Town of Concord, 46 Vt. 135. However, it has been held that a witness who knows the highway and has measured the same may testify as to whether it is wide enough to allow two wagons to pass each other. Fulsome *v.* Town of Concord, 46 Vt. 135.

The size of a hole being in evidence, it is error to ask a witness his opinion as to whether a person could put his foot in the hole. Munger *v.* City of Waterloo, 83 Iowa 559, 49 N. W. 1028.

As to the amount of blood required to saturate an ordinary handkerchief, expert evidence of physician is inadmissible. It does not require special knowledge or skill. Rio Grande W. R. Co. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76.

64. On the question as to the amount of moisture contained in a quantity of milled ore, evidence as to the amount of moisture contained in other ore taken from the same ore body and near the same place, but in an adjoining mine, is admissible. Vietti *v.* Nesbitt, 22 Nev. 390, 41 Pac. 151.

Capacity of Store Room — Comparison of Similar Store Room of Same Dimensions. — Howard *v.* City F. Ins. Co., 4 Denio (N. Y.) 502.

Contents of a Former Tree (cut down and removed) may be estimated by a witness from the size and appearance of the stump left stand-

is admissible.[65] Under like circumstances the sufficiency of a thing to bear weight or withstand force may be proven by the opinions of expert witnesses of special skill in the line of knowledge to which the inquiry relates, they being familiar with the thing itself.[66]

ing. Frantz *v.* Ireland, 66 Barb. (N. Y.) 386.

65. Sufficiency of a Dam across a stream to withstand or sustain pressure of the water against it in time of flood may be proven by the opinion of witnesses who by personal observation for a number of years have acquired a knowledge of the character of the stream and of the dam, although they possess no particular skill or knowledge of the construction of dams. "They (the witnesses) had acquired, by their personal observation, a knowledge of the character of the stream and also of the dam, and were therefore peculiarly qualified to determine whether the latter was sufficiently strong to withstand the former." Porter *v.* The Pequonnoc Mfg. Co., 17 Conn. 249 (leading case).

The Engineer of a Locomotive may testify his opinion as to the ability of the cross bar attached to his engine to withstand certain force. McDonald *v.* Michigan Cent. R. Co., 108 Mich. 7, 65 N. W. 597.

So as to the Sufficiency of a Certain Rope to sustain the weight of a derrick. Witness need not have had skill or experience in the making of ropes. Consolidated Stone Co. *v.* Williams, 26 Ind. App. 131, 57 N. E. 558.

66. Amount of Strain to Which a Piece of Timber can be subjected before breaking. Callan *v.* Bull, 113 Cal. 593, 45 Pac. 1017.

Durability of a Certain Kind of Lumber. — McConnell *v.* City of Osage, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778.

The Effect of a Knot or Cross Grain Upon the Strength of Timber may be proven by the opinion of a timber expert. Boettger *v.* Scherpe & K. A. I. Co., 124 Mo. 87, 27 S. W. 466.

Bridge, Sufficiency to Bear Load. Experienced bridge builders who had examined the bridge were allowed to give their opinions as to whether the bridge, had it been kept in good repair, would have sustained a larger load than that under which it broke down. Bonebrake *v.* Board of Com'rs. Huntington Co., 141 Ind. 62, 40 N. E. 141.

Brick Cistern Wall, Certain Thickness, Embedded in Sand. Expert may testify as to the ability or sufficiency of such a wall to resist pressure resting upon it. Sneda *v.* Libera, 65 Minn. 337, 68 N. W. 36.

Sufficiency of Walls to Sustain Building. — Experienced builder and contractor with knowledge of facts may testify his opinion. Continental Ins. Co. *v.* Pruitt, 65 Tex. 125.

The question whether a certain house or structure is sufficient or able to sustain a certain weight or withstand the strain it would be put to in being used for the purpose for which intended, may be proved by the opinion of a person skilled in the strength of materials and in the mode of building structures. Fox *v.* Buffalo Park, 21 App. Div. 321, 47 N. Y. Supp. 788; Prendible *v.* Connecticut R. Mfg. Co., 160 Mass. 131, 35 N. E. 675.

Sufficiency in strength of railroad car to hold horses. Betts *v.* Chicago, R. I. & P. R. Co., 92 Iowa 343, 60 N. W. 623.

Capacity of iron hooks to sustain given weight. Expert testimony is proper. Little *v.* Head, 69 N. H. 494, 43 Atl. 619; Claxton *v.* Lexington & B. S. R. Co., 13 Bush (Ky.) 636.

Blacksmith may testify as to the sufficiency of an iron coupling pin to withstand certain strain. Louisville, N. A. & C. R. Co. *v.* Berkey, 136 Ind. 181, 35 N. E. 3.

Sufficiency of a Wire Cable Supporting an Elevator may be proved by the opinion of a witness familiar and experienced with wire cables and elevators, including the one in question. Stomne *v.* Hanford Produce Co., 108 Iowa 137, 78 N. W. 841.

Unusual and Unfamiliar Structure, Opinion as to Its Capacity. Where the article of structure, viz:

B. Opinion Evidence. — Where the subject matter is of such character that the facts may be clearly and explicitly described to the jury, and is such that, under these circumstances, the jury is capable and competent to form a correct conclusion as to capacity, opinions are inadmissible.[67]

C. Comparison. — Where the question is whether an instrument is inadequate in size and strength to do certain work or withstand certain strain placed upon it, an instrument similar to the one in question may be submitted to expert witness and he may give his opinion thereon as to its sufficiency.[68]

D. Exhibition. — In certain cases it has been held that the thing itself may be exhibited to the jury.[69]

hoisting crane, the capacity of which is in question, is unusual and peculiar both in size and kind and different from the ordinary, the opinion of experts having knowledge, experience and skill in the construction and the use of such peculiar structure is admissible.

67. So held with reference to the sufficiency of anchors to hold a coal bin; jury were competent to judge if facts had been placed before them. Gerbig *v.* New York L. E. & W. R. Co., 67 Hun 649, 22 N. Y. Supp. 21.

Sufficiency of a Fence to Turn Cattle is not the subject of opinion evidence. The fence being described, the jury are as competent to judge its sufficiency as the witness. Enright *v.* San Francisco & S. J. R. Co., 33 Cal. 230; Sowers *v.* Dukes, 8 Minn. 23; Green *v.* Hornellsville & C. R. Co., 24 App. Div. 434, 48 N. Y. Supp. 576. *Contra.* — Sufficiency of fence to hold stock may be proved by the opinion of an expert farmer. Louisville N. A. & C. R. W. Co. *v.* Spain, 61 Ind. 460. The ability of a certain gate in a bad condition to remain closed or withstand heavy wind may be proved by the opinion of an ordinary person who knows the facts. Chicago & A. R. R. Co. *v.* Truitt, 68 Ill. App. 76.

The Capacity of a Bridge to Sustain a Load cannot be proved by the opinion of a witness. Crane *v.* Town of Northfield, 33 Vt. 124.

Sufficiency of a Platform to Sustain the Weight of Men Working Upon It. — Opinion of witness is inadmissible where the quality and condition of an apron and the weight of the men upon it were in evidence and fully described to jury. Cogdell *v.* Wilmington & W. R. Co., 130 N. C. 313, 41 S. E. 541.

Bridge, Speculative Opinion.—The opinion of a witness that, had the timbers of the bridge been larger and sound, the bridge would have been sufficient for the uses of the railroad company except in extraordinary rainfalls, is inadmissible. Witness should not be allowed to indulge in argument or speculation. Galveston H. & S. A. R. Co. *v.* Daniels, 1 Tex. Civ. App. 695, 20 S. W. 955.

68. Indiana B. C. Co. *v.* Buffey, 28 Ind. App. 108, 62 N. E. 279.

Contra. — **Sufficiency of Cornice on Building to Bear Weight — Test With Another Similar Cornice.** Where the question is as to the strength of a cornice on a building to stand weight, evidence that another cornice on the same building similarly constructed actually held up an equal or greater weight is inadmissible. Mayer *v.* Thompson-Hutchison Bldg. Co., 116 Ala. 634, 22 So. 859.

Comparison With Other Article. No Sufficient Connection. — Expert evidence that derrick such as that involved in the case is not of sufficient strength to support a certain stone of a certain weight and dimensions, is inadmissible, such stone not being connected with the one in suit. Murphy *v.* McWilliam, 15 Misc. 122, 36 N. Y. Supp. 492.

69. Iron Hook, Production of Part of Hook in Court, Submission to Jury. — On a question as to the sufficiency of an iron hook to sustain a weight, plaintiff introduced in evidence a piece of the broken hook.

E. Component Materials. — Evidence of the *quality and condition* of the material of which thing is composed is admissible as proof of its sufficiency to withstand force.[70]

3. Capacity of Machine. — A. Competency of Witness — **Who May Testify.** — A witness familiar with and experienced in the construction and operation of the machine in question or other similar machines may testify as to its capacity to do work.[71] But if the question is one requiring special skill and knowledge the witness must be an expert.[72]

and after the testimony of experts based on the piece of iron in court had been given as to its weakness. the iron was shown to the jury. *Held* no error. King *v.* New York Cent. & H. R. R. Co., 72 N. Y. 607.

70. Opinions of experts as to the quality and condition of iron in a coupling-pin are admissible to prove its sufficiency to withstand certain strain. Louisville N. A. & C. R. Co. *v.* Berkey, 136 Ind. 181, 35 N. E. 3; King *v.* N. Y. Cent. & H. R. R. Co., 72 N. Y. 607.

71. Capacity of Machine to Do Work for Which Intended. — Practical machinists familiar with machine in question may testify directly as to whether machine will do the work or not. Greenleaf *v.* Stockton C. H. & A. W., 78 Cal. 606, 21 Pac. 369; Buckeye Mfg. Co. *v.* Woolley F. & Mach. W., 26 Ind. App. 7, 58 N. E. 1069.

Where question is whether machine in question would do as good work as another specified machine, a person familiar with the use of said machines and who had seen the two work, may testify that one did not do as good work as other. McCormick H. M. Co. *v.* Cochran, 64 Mich. 636, 31 N. W. 561.

So also as to whether a cotton gin "was equal in all respects to the best saw gin then in use." Scattergood *v.* Wood, 79 N. Y. 263, 35 Am. Rep. 515.

Amount of Pressure Boiler Will Stand. — Opinion of Expert. — An expert on boilers, familiar with one in question, may testify his opinion as to the amount of pressure a certain boiler will stand, and also as to whether explosion of same was caused by excessive pressure. Beunk *v.* Valley City Desk Co., 128 Mich. 562, 87 N. W. 793.

Capacity of Mill may be proven by opinions of expert millers and millwrights. Read *v.* Barker, 30 N. J. Law 378; Read *v.* Barker, 32 N. J. Law 477; Clifford *v.* Richardson, 18 Vt. 620.

Capacity of Flour Mill with Certain Power. — To prove how much flour a certain mill can grind with a certain quantity of water power, the opinion of an expert millwright is admissible, and for this purpose witness may consult standard published tables which are recognized by millwrights as authority. Garwood *v.* New York C. & H. R. R. Co., 45 Hun (N. Y.) 128.

Lumber Mill. — Burns *v.* Welch, 8 Yerg. (Tenn.) 117.

Capacity of Packing House. The amount of work that can be done in a certain pork packing house within a given time may be proven by the opinions of witnesses, based on observation and actual work done in the establishment. Paddock *v.* Bartlett, 68 Iowa 16, 25 N. W. 906.

72. The Capacity or Power That an Engine Can Develop, under proper management, is the subject of expert testimony. Schuwerth *v.* Thumma, (Tex. Civ. App.), 66 S. W. 691.

Capacity of Certain Locomotive to Draw a Certain Train. — The question as to whether a certain engine has the power to draw a certain train can be proved only by the testimony of an expert. In this case only facts in evidence were the appearance of engines and trains. Sis-

B. Comparison, Conflict of Authorities. — The authorities are conflicting on the question as to whether where the capacity of a certain machine is the issue, evidence showing the capacity of other machines of the same make and pattern and designed for the same purpose, is admissible. One line of cases holds that the capacity of a certain machine may be shown by the testimony of a witness familiar and experienced with other machines of the same make and pattern; that his testimony as to the capacity of such other machines is admissible to show the capacity of the machine in suit.[73] On the other hand, many cases hold that the testimony must be confined to the machine in suit; that evidence of the capacity of other similar machines is inadmissible.[74]

son *v.* Cleveland & T. R. Co., 14 Mich 488.

Opinion When Inadmissible. Where a *belt fastener and belt* have been fully described to the jury and it is in the power of party to show manner in which used, opinion evidence as to the sufficiency of the fastener to hold belt is inadmissible. Harley *v.* Buffalo Car Mfg. Co., 142 N. Y. 31, 36 N. E. 813, *overruling* Harley *v.* Buffalo Car Mfg. Co., 48 N. Y. St. 58, 20 N. Y. Supp. 354.

Agreed Test to Determine Capacity. — Expert Opinion Based on Patent Defects When Admissible. Where a contract requires a certain test to be made in order to determine the capacity of the machine and the evidence is conflicting as to whether the test was properly made, expert testimony that, because of patent defects, plainly to be seen, the machine could not do the work is admissible. Meiners *v.* Steinway, 12 Jones & S. (N. Y.) 369.

73. To prove the capacity of an evaporating machine of certain make and pattern, a witness experienced in using evaporators of same make and pattern, although he never saw machine in question, may state that it would do certain amount of work, basing his testimony on experience with other machines. Sprout *v.* Newton, 48 Hun (N. Y.) 209.

Capacity of Machine to Do Work for Which Intended. — Evidence that other machines of same make and pattern, handled by competent men, failed to do the work for which they were designed is admissible. Dempster Mill Mfg. Co. *v.* Fitzwater, 6 Kan. App. 24, 49 Pac. 624.

Breach of warranty that loom attachments would work successfully, evidence that they worked well on other similar looms held admissible. Weight of evidence is for jury. Brierly *v.* Mills, 128 Mass. 291.

Evidence that under similar circumstances engine of same make and rated at same power as one in question did certain amount was held admissible to prove capacity of machine in question, in that it proved "in an incidental and inferential way the possibilities of another engine of same make and pattern." National Bank & Loan Co. *v.* Dunn, 106 Ind. 110, 6 N. E. 131.

Evidence that machine was compared with good machine used by same parties and proved to be insufficient by the comparison is proper. Davis *v.* Sweeney, 80 Iowa 391, 45 N. W. 1040.

74. On the question as to the capacity of a machine to do good work, evidence that other machines of same make, pattern and materials, and designed for same purpose, did good work, is inadmissible. Fox *v.* Stockton C. H. & A. W., 83 Cal. 333, 23 Pac. 295; The Stockton C. H. & A. W. *v.* Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. 565.

"It does not tend to prove that the one sold plaintiff was not defective." Murray *v.* Brooks, 41 Iowa 45.

Breach of warranty that machine would "work well," evidence as to how it worked compared with other

C. Time to Which Evidence Confined. — Where the question is as to the capacity of a machine at a certain time, evidence of the capacity of such machine a short time previous or subsequent thereto is admissible.[75]

D. Exhibition of Model. — On the question of the capacity of a certain piece of machinery to withstand certain pressure a model may be taken, *ex parte,* and exhibited to jury at trial, without notice.[76]

E. Evidence of Test. — Where the question, in an accident case, is as to whether it was possible for a railroad train to have been stopped after the deceased might have been seen by engineer, and in time to have avoided the injury, evidence of tests made by the railroad company at the same place and under identical circumstances, and of the results of such tests, is admissible, although plaintiff was not present when tests were made.[77]

III. ABILITY OF ANIMALS.

The capacity or ability of animals may be proved by the testimony of a person familiar with them, and who has had opportunities for and has exercised continuous observation in the line of knowledge to which the inquiry relates. So held with reference to the ability

machines of same character is inadmissible. McCormick H. Mach. Co. *v.* Brower, 88 Iowa 607, 55 N. W. 537; McCormick H. Mach. Co. *v.* Gray, 100 Ind. 285.

Comparison with Similar Machine. When Admissible.—Exception.—Lyon *v.* Martin, 31 Kan. 411, 2 Pac. 790, seems to lay down the correct rule on this point. The question was as to whether certain machines complied with warranty that they "were capable of cutting, *if properly managed,* from ten to fifteen acres per day." It was held that testimony of certain qualified witnesses as to the capacity of other like machines was inadmissible to show capacity of one in suit, but "perhaps, for the purpose of tending to show it was properly handled, testimony was admissible that other like machines in the hands of parties familiar with farm machinery also failed to do the work warranted."

75. Where issue is as to capacity of mill at certain time, evidence as to capacity based on knowledge of mill acquired few years before is admissible. It is for adverse party to show change in mill. Burns *v.* Welch, 8 Yerg. (Tenn.) 117.

Evidence that at subsequent time and under control of another, the engine, being in same general condition, did good work is admissible. McKay *v.* Johnson, 108 Iowa 610, 79 N. W. 390.

Testimony showing total output of a mill for a period of 57 days after it had been enlarged was held competent to show capacity of enlarged mill in comparison with its former capacity, especially when agent of person who warranted the capacity was present. Edward P. Allis Co. *v.* Columbia Mill Co., 65 Fed. 52.

76. Morgan Bros. Co. *v.* Snoqualmie F. P. Co., (Wash.), 69 Pac. 759; Railroad Co. *v.* Dorsey, 68 Ga. 228.

77. Burg *v.* Chicago R. I & P. R. Co., 90 Iowa 106, 57 N. W. 680.

Held error to refuse evidence of such tests. Byers *v.* Nashville C. & St. L. R. Co., 94 Tenn. 345, 29 S. W. 128.

of fish to ascend stream;[78] reproductive capacity of sheep;[79] capacity of teams to do work.[80]

78. Fish, Ability to Ascend Stream. — The ability of a certain kind of fish to ascend a certain stream may be proven by the opinion of an experienced observer,—one who has for years observed the agility and powers of such fish in the ascent of streams. Cottrill *v.* Myrick, 12 Me. 222.

79. Sheep, Average Increase Per Year. — A person experienced in sheep raising may testify his opinion as to what is the average increase of lambs per year in a flock of a given number of sheep. Estate of More, 121 Cal. 609, 54 Pac. 97.

80. Teams, How Much Work They Can Do in Certain Time. The opinion of an expert in that line of work is admissible to prove whether or not a certain number of men and teams, known by him, can do a certain amount of work in a certain time. Salvo *v.* Duncan, 49 Wis. 151, 4 N. W. 1074; Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979.

CAPIAS.—See Execution; Writs.

CARDS.—See Gambling.

CARE.—See Negligence.

CARGO.—See Admiralty; Insurance.

CARLISLE TABLES.—See Books; Mortality Tables.

CARNAL KNOWLEDGE.—See Adultery; Incest; Rape; Seduction.

CARRIAGE.—See Carriers.

CARRIERS.

For matters of evidence as to skill and competency of a carrier's servants and employees, *see* article "MASTER AND SERVANT."

CROSS-REFERENCES.

Assent;
Bailments;
Cause; Capacity;
Declarations;
Experiments;
Negligence;
Parol Evidence;
Res Gestae.

I. CARRIERS OF PROPERTY.

1. Character of Carrier as Common Carrier. — A. BURDEN OF PROOF AND PRESUMPTION. — In an action to charge a person as a common carrier for breach of an alleged contract of carriage, the plaintiff has the burden of showing as an affirmative fact that the defendant is a common carrier.[1] But the relation of common carrier being once shown, it is presumed to continue, and the burden is upon the carrier in an action against it for the value of property lost in transit, to show that at the time of the loss its liability as such carrier had terminated.[2]

B. MODE OF PROOF. — That a person or corporation is a common carrier is shown by proof that it undertook to carry for persons generally and held itself out as ready to engage in the transportation of goods, for a reward, as a business and not as a casual occupation.[3]

1. Ringgold *v.* Haven, 1 Cal. 108.

2. Peoria & P. U. R. Co. *v.* U. S. R. S. Co., 136 Ill. 643, 27 N. E. 59.

3. Southern Exp. Co. *v.* Ashford, 126 Ala. 591, 28 So. 732.

Holding Out as Carrier. — In an action against a carrier to recover for the value of an animal lost in transportation based on the fact that the animal was of high breeding, the carrier cannot show that it and other carriers, by uniform custom and general practice, do not and never have held themselves out to the public as carriers except of common live stock. McCune *v.* Burlington C. R. & N. Co., 52 Iowa 600, 3 N. W. 615.

2. The Contract of Carriage. — A. Burden of Proof and Presumptions. — a. *In General.* — Of course, as in other actions growing out of a breach of contract, the plaintiff in an action against a carrier to recover damages for breach of contract of carriage has the burden of proving the contract, either expressed or implied.[4]

b. *Delivery of Property to Carrier.* — In an action against a carrier to charge it for property lost or injured while in its hands as a carrier, the plaintiff has the burden of proof to establish the fact of the delivery of the property to the carrier for carriage.[5]

c. *Authority of Agent to Contract.* — Where a contract of shipment is entered into between the shipper and a station agent, it is not necessary for the shipper to prove that the agent had authority to make the contract, since it will be presumed that he had such authority.[6]

d. *Through Contract of Carriage.* — The acceptance by a carrier for carriage of goods marked to a place beyond the terminus of his own line, and its giving a receipt therefor, raises a presumption of a contract to carry and deliver at the place so marked.[7]

e. *Consignee's Liability for Freight.* — It is presumed that a vendor of property delivering property to a carrier for carriage to the purchaser as consignee contracted on his own behalf, notwithstanding the carrier may know the name and address of the consignee, and that the consignee may have title to the property through such delivery to the carrier; although such presumption

4. This is a fundamental rule applicable in all such actions, finding direct support in Tarbox *v.* Eastern S. B. Co., 50 Me. 339. And see cases cited in succeeding sections and notes.

5. Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44; Southwestern R. Co. *v.* Webb, 48 Ala. 585; Stout *v.* Coffin, 28 Cal. 65; Tarbox *v.* Eastern S. B. Co., 50 Me. 339; Southern R. Co. *v.* Allison, 115 Ga. 635, 42 S. E. 15; Dispatch Line *v.* Glenn, 41 Ohio St. 166; Farnham *v.* Camden & A. R. Co., 55 Pa. St. 53.

The Receipt of Property by the Carrier lies at the very foundation of the contract of carriage, and must be proved by the shipper or owner of the property. St. Louis, I. M. & S. R. Co. *v.* Knight, 122 U. S. 79.

Contract Executed Before Receipt of Goods. — A shipper suing a carrier for breach of a contract of carriage makes a *prima facie* case by introducing the contract of carriage, acknowledging the receipt of goods by the carrier. But where it appears that the contract of carriage was executed and delivered before the goods were actually received into the custody and control of the carrier the shipper still has the burden to show delivery to the carrier. Cunard S. S. Co. *v.* Kelley, 115 Fed. 678.

6. Gulf C. & S. F. R. Co. *v.* Short, (Tex. Civ. App.), 51 S. W. 261.

7. Chicago & N. W. R. Co. *v.* Simon, 160 Ill. 648, 43 N. E. 596. See also Elgin J. & E. R. Co. *v.* Bates Mach. Co., 98 Ill. App. 311. *Compare* Dixon *v.* Columbus R. Co., 4 Biss. 137, 7 Fed. Cas. No. 3929; Orr *v.* Chicago & A. R. Co., 21 Mo. App. 333, in which it was held that before a receiving carrier can be held liable for loss occurring beyond the terminus of its line there must be proof both of a loss and of a contract by the defendant to carry the goods beyond such terminus, where it proves that it delivered the goods in good order to the connecting carrier.

may be overcome by proof of an agreement that the freight was to be paid by the consignee.[8]

f. *Special Contract Limiting Carrier's Liability.* — On an issue as to whether or not the shipment was made under a special contract limiting the carrier's liability, the burden of proof as to any limitation set up, rests with the carrier.[9]

g. *Shipper's Assent to Limited Contract.* — Although there is authority to the effect that where the contract of carriage limits the carrier's liability, the burden is on the carrier to show that such restrictions were assented to by the consignor, and that mere acceptance of the writing without express notice of the restrictions contained in it does not raise the presumption of assent,[10] the weight of authority is to the contrary,[11] especially where it appears that the consignor printed his own bills of lading embracing the contract of carriage, took them to the carrier for signature and received them back when so signed.[12]

8. Union F. R. Co. *v.* Winkley, 159 Mass. 133, 34 N. E. 91, 38 Am. St. Rep. 398.

9. Schaeffer *v.* Philadelphia & R. R. R., 168 Pa. St. 209, 31 Atl. 1088; Chicago, S. L. & N. O. R. Co. *v.* Abels, 60 Miss. 1017; Baltimore & O. R. Co. *v.* Brady, 32 Md. 333; St. Louis I. M. & S. R. Co. *v.* Lesser, 46 Ark. 236.

The burden of proof resting upon a carrier under its claim of exemption by reason of the contract of carriage limiting its liability is not sustained by mere proof of the terms of the bill of lading containing the stipulated exceptions; it must go further and produce affirmative evidence. Mitchell *v.* Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515.

10. Shipper's Assent to Limited Contract. — Chicago & N. W. R. Co. *v.* Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095; Chicago & N. W. R. Co. *v.* Simon, 160 Ill. 648, 43 N. E. 596, *affirming* 52 Ill. App. 502. See also American M. U. Exp. Co. *v.* Schier, 55 Ill. 140; Erie & W. Transp. Co. *v.* Dater, 91 Ill. 195, 33 Am. Rep. 51; Elgin J. & E. R. Co. *v.* Bates Mach. Co., 98 Ill. App. 311.

In Georgia, a stipulation in a bill of lading exempting a carrier from liability unless notice is given of the damage within a specified time is one of the matters forbidden by the Georgia Code, §2068, and is not effectual without proof of assent thereto by the shipper. Central R. & B. Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

11. Presumption of Assent.—*Alabama.* — Louisville & N. R. Co. *v.* Meyer, 78 Ala. 597.

Iowa. — Mulligan *v.* Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514.

Kentucky. — Louisville & N. R. Co. *v.* Brownlee, 14 Bush 590.

Massachusetts. — Grace *v.* Adams, 100 Mass. 505, 1 Am. Rep. 131; Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Cox *v.* Central V. R. Co., 170 Mass. 129, 49 N. E. 97.

New Hampshire. — Durgin *v.* Am. Exp. Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453.

North Carolina. — Whitehead *v.* Wilmington & W. R. Co., 87 N. C. 255.

South Carolina. — Johnstone *v.* Richmond & D. R. Co., 39 S. C. 55, 17 S. E. 512.

Tennessee. — Dillard *v.* Louisville & N. R. Co., 2 Lea 288; Merchants' Disp. Transp. Co. *v.* Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847.

Wisconsin. — Schaller *v.* Chicago & N. W. R. Co., 97 Wis. 31, 71 N. W. 1042.

12. Lawrence *v.* New York P. & B. R. Co., 36 Conn. 63.

See also Mouton *v.* Louisville & N. R. Co., 128 Ala. 537, 29 So. 602.

For a Full Discussion of This

h. *Consideration Supporting Limitation.* — Where a contract of carriage limiting a carrier's common law liability is challenged for want of consideration to support these special stipulations, the challenge will be of no avail unless the challenger gives affirmative evidence to support it.[13]

i. *Notice of Claim of Loss.* — Where the contract of carriage requires the presentation to the carrier of a claim for goods lost or damaged by the carrier in a certain form and within a certain time, the burden is upon the shipper to show that he has complied with the terms and conditions of the contract in that respect,[14] unless it is otherwise expressly provided by statute.[15]

j. *Reasonableness of Stipulation.* — But where the carrier relies on the failure of the shipper or consignee to comply with such a stipulation, the carrier has the burden to show that the stipulation is a just and reasonable one.[16]

k. *Freight Rate Based on Valuation.* — In a contract limiting the liability of a carrier to an agreed valuation of the goods carried, it will be presumed from the terms of the contract, and in the absence of any evidence to the contrary, that where the rate of freight as expressed therein is stated to be on the condition the carrier assumes liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation.[17]

l. *Contract to Rebate Freight.* — In an action to recover rebates or drawbacks on freight paid, based on an alleged contract that in consideration of the plaintiff doing certain things, the carrier would make a certain rebate to him on all shipments of freight, the plaintiff has the burden of proof to show the contract alleged.[18]

Question, see the article "ASSENT."

13. Consideration Supporting Limitation. — Schaller *v.* Chicago & N. W. R. Co., 97 Wis. 31, 71 N. W. 1042. See also McMillan *v.* Michigan S. & N. I. R. R. Co., 16 Mich. 79, 93 Am. Dec. 208.

14. Osterhoudt *v.* Southern Pac. Co., 47 App. Div. 146, 62 N. Y. Supp. 134.

15. *In Texas* a statute imposes upon a carrier the burden of proving non-compliance with a stipulation in the contract of carriage fixing the time within which a notice of a claim for damages shall be given. St. Louis S. W. R. Co. *v.* Hays, (Tex. Civ. App.), 35 S. W. 476. And it was stated in this case that apart from the statute referred to, the burden of proving such non compliance would still be on the carrier, *following* Ft. Worth & D. C. R. Co. *v.* Greathouse, 82 Tex. 105, 17 S. W. 834.

16. Cox *v.* Vermont R. Co., 170 Mass. 129, 49 N. E. 97.

17. Adams Exp. Co. *v.* Carnahan, (Ind. App.), 64 N. E. 647, *denying rehearing* 63 N. E. 245.

18. Michigan Cent. R. Co. *v.* Edwards, 33 Mich. 16.

In Iowa a statute enacted against discrimination in freight charges by railroad companies forbids charging and collecting for the transportation of property a greater sum than is charged and collected from any other person for a like service from the same place and upon like conditions, and in Paxon *v.* Ill. Central R. R. Co., 56 Iowa 427, 9 N. W. 334, an action to recover for rebates or drawbacks allowed to through shipper of like property, it was held that the plaintiff had the burden of proof to show not only that the charges were for a like service from the same place, but also that the shipments were upon like conditions.

B. Circumstantial Evidence.— a. *Delivery to Carrier.*— Proof of a delivery to the carrier of property to be carried may be made by circumstantial evidence,[19] as well as by direct testimony.[20]

b. *Reasonableness of Freight Rate.* — Upon an issue as to the reasonableness of a freight rate, the carrier cannot give evidence of the value of its line of road;[21] nor as to the rate of charges made by other carriers for similar services unless the circumstances to be considered in fixing the rate answer to or are substantially the same as those applying to the carrier in question.[22]

c. *Execution of Contract of Carriage.* — Again on an issue as to whether or not a written contract was executed, it is proper to show that the carrier gave the shipper but one rate of freight.[23] And on an issue as to whether or not a contract for through shipment was made, it is proper to show that it was the carrier's custom to contract to carry freight to any point beyond the terminus of its own line.[24] But for the purpose of showing that the contract of carriage was probably executed as alleged by the carrier, the latter cannot show that it was impracticable to carry the property in question in the manner asserted by the shipper.[25]

d. *Reasonableness of Conditions.* — The reasonableness of conditions imposed in a shipping receipt may be shown by evidence of negotiations between the initial carrier and the shipper leading up to his acceptance of the receipt.[26]

C. Documentary Evidence. — a. *In General.* — "The bill of

19. In an action against a common carrier to recover damages for the loss of goods, which the carrier defends on the ground that its liability is as warehousemen only, the carrier may show that the goods were not left for immediate shipment, but were to be held by it until the remainder of the goods were brought the next morning. Missouri Pac. R. Co. *v.* Riggs, 10 Kan. App. 578, 62 Pac. 712.

20. See *infra* this article "Oral Evidence—In General."

21. Hopper *v.* Chicago, M. & St. P. R. Co., 91 Iowa 639, 60 N. W. 487.

22. Hopper *v.* Chicago M. & St. P. R. Co., 91 Iowa 639, 60 N. W. 487,

23. Hendrick *v.* Boston & A. R. Co., 170 Mass. 44, 48 N. E. 835.

24. Gulf C. & S. F. R. Co. *v.* Leatherwood, (Tex. Civ. App.), 69 S. W. 119.

In Vicksburg S. & P. R. Co. *v.* Stocking (Miss.), 13 So. 469, an action to recover for damages to stock shipped from a point on another road, connecting with the defendant's road, to a point on the defendant's road, a witness was introduced by the defendant as an expert to testify as to the nature of the bill of lading and the liability of connecting carriers on receiving such bill of lading from other connecting carriers, and as to their duty to forward freight so received, and as to the regular freight rate charges from the place of shipment to the place of delivery, and as to the special rates given where common law liabilities were removed; and it was held that his testimony was competent to show in connection with other evidence that the carriage by the defendant was under the contract of shipment made at the place of shipment limiting the carrier's liability.

25. Ames *v.* St. Paul & P. R. Co., 12 Minn. 412.

26. Mears *v.* New York N. H. & H. R. Co., (Conn.), 52 Atl. 610.

lading[27] and the way bill[28] made by the authorized agent of a common carrier for freight are competent evidence tending to prove that the articles therein described were delivered to such carrier for shipment."[29]

The Mere Fact That a Package or Box is Improperly Labeled as to what it contains does not affect the admissibility of the bill of lading which properly describes the goods.[30]

Nor Does the Mere Omission of Freight Rate to Be Charged affect the admissibility of the contract as evidence.[31]

Letters Written and Memoranda Made on an Expense Bill by a carrier's agents while they were endeavoring to find property for whose loss a carrier is sought to be held liable, and having reference exclusively to the act in which they were then engaged, are competent evidence against the carrier on an issue as to whether or not it received the property in question from a connecting carrier.[32] So also where the delay in delivery resulted from the terminal carrier demanding the payment of freight at a rate higher than the rate agreed upon between the shipper and the initial car-

27. Where an action against a common carrier for freight lost or injured is founded upon a bill of lading, the bill of lading must be produced in evidence or its non-production accounted for and its substance proved as alleged. Texas & P. R. Co. *v.* Logan, 3 Willson Civ. App. (Tex.) §187.

In an action for damages to goods transported over connecting carriers brought under Georgia Code, §2084, against the last carrier, receiving the goods as "in good order," it is not necessary that the plaintiff shall introduce in evidence the bill of lading given by the initial carrier. Central R. & B. Co. *v.* Bayer, 91 Ga. 115, 16 S. E. 953.

28. *See infra* "DECLARATIONS."

29. Chicago M. & S. P. R. Co. *v.* Johnston, 58 Neb. 236, 78 N. W. 499; New York & T. S. S. Co. *v.* Weiss, (Tex. Civ. App.), 47 S. W. 674.

In an action against a connecting carrier for the loss of goods, a receipt given by the initial carrier as agent for the connecting carrier is competent evidence against the latter for the purpose of showing the goods delivered, their condition at the time of delivery, and the terms of shipment. Southern Exp. Co. *v.* Hess, 53 Ala. 19.

In an action to recover for freight under a promise by the shipper to pay the freight if the carrier would forward the goods, made subsequently to the issuance of a bill of lading by the carrier providing for the payment of the freight by the consignee, whereupon the carrier did forward the goods, marking the waybill "prepaid," the bill of lading is properly admitted as one step in a transaction. Montpelier & W. R. Co. *v.* Macchi, 74 Vt. 403, 52 Atl. 960.

Way Bills As Entire Document. Where the owner of goods suing a carrier for injuries to them in transportation introduces in evidence waybills of previous connecting carriers, it is error for the court to reject pencil entries on such waybills to the effect that the goods were not in proper condition for shipment when received by the defendant carrier, where there is nothing to the contrary but that such entries were written at the same time that the other parts of the waybills were written. Goodman *v.* Oregon R. & Nav. Co., 22 Or. 14, 28 Pac. 894.

30. Chicago, B. & Q. R. Co. *v.* Gustin, 35 Neb. 86, 52 N. W. 844.

31. Hutchison *v.* Chicago S. P. M. & O. R. Co., 37 Minn. 524, 35 N. W. 433.

32. Union Pac. R. Co. *v.* Hepner, 3 Colo. App. 313, 33 Pac. 72.

rier, a letter from the latter quoting the rate agreed upon, is admissible.[33]

b. *Proof of Execution.* — As in the case of other private writings, however, there must be due proof of the execution of the bill of lading before it can be received in evidence.[34]

D. Declarations and Admissions. — A contract to pay rebates on freight may be established by declarations made by the carrier's agent within the scope of his authority as such.[35]

The Receipt of Property by a Carrier for Carriage may be shown by

33. Gulf C. & S. F. R. Co. *v.* Leatherwood, (Tex. Civ. App.), 69 S. W. 119.

34. An endorsee of a bill of lading suing the carrier for loss or damage to the property carried cannot introduce in evidence the bill of lading in the absence of proof of the endorsement, where the bill of lading and its endorsement are not the foundation of the action as laid in the complaint, but arise only incidentally in the evidence, since a statute, dispensing with proof of the execution of instruments which are the foundation of the suit, unless such execution is denied by sworn plea, does not apply. Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44. See also Peck *v.* Dinsmore, 4 Port. (Ala.) 212.

In Millam *v.* Southern Ry. Co., 58 S. C. 247, 36 S. E. 571, an action to recover damages sustained by live stock received by the defendant for carriage, the plaintiff, while on the stand as a witness for himself, was shown a writing on the back of the bill of lading purporting to be an agreement for free transportation with the shipment, and asked if he had signed it; which he admitted, but claimed that he had not read the paper, but that he signed it when told to do so in order to get his pass, but that he knew nothing of a contract such as the bill of lading; that he never signed it, nor did he authorize anyone to sign the same for him. It was held that under this proof the bill of lading was not admissible in evidence; that the mere fact that the plaintiff admitted his signature to the writing on the back of the bill of lading did not entitle the bill of lading itself to be admitted.

In Mouton *v.* Louisville & N. R. Co., 128 Ala. 537, 29 So. 602, an action by a consignee for failure to transport goods delivered to the defendant for carriage, the defendant proved that the consignor had for its own convenience its own bills of lading in blank, and made out the one offered in evidence in triplicate, and sent them to the agent to be signed when the goods were delivered; that the agent signed the three, one being kept by the defendant and the other two by the shippers. The plaintiff objected to its introduction because it was not signed by the consignor, nor by the plaintiff, and because it was not shown that the plaintiff had authorized the consignor to accept such a bill of lading. But it was held that the consignor was necessarily the agent of the consignee for the shipment of the goods, and that the consignor's signature to the bill or a notice by him to the carrier that he had accepted it, was not necessary, and hence it was properly admitted.

35. In 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, an action to recover rebates or drawbacks on freights paid by the plaintiff to the defendant under a contract providing for the repayment of such rebates, it was held proper to permit proof of a conversation between the plaintiff and the agent of the defendant, in which the agent admitted the contract and the defendant's liability therefor when there was proof that the contract for the rebates was made with such agent, that his authority respecting contract for freight was of wide scope, that the claim in suit was presented to him as the rep-

the admissions of the president of the carrier at the time of a demand upon him for the delivery of the property to the owner.[36]

Representations Inducing Shipment. — And evidence of representations made by the carrier's agent to the shipper at the time of the contract of carriage, and for the purpose of inducing the shipment, is competent against the carrier.[37]

Abandonment of Written Contract. — On an issue as to whether or not a shipment was made under written contract of carriage set up by the carrier, or under a parol contract subsequently entered into by the parties, it is proper to receive evidence of conversations between the shipper and the carrier's agent showing an abandonment of the written contract of carriage.[38]

Way Bills made out by a railway company being declarations in its own favor are not admissible in its behalf.[39]

resentative of the defendant, and that communications concerning the claim were made to him, and that he conducted the general negotiations by correspondence with the carrier and by interviews with the plaintiff.

36. Hartnett *v.* Westcott, 18 N. Y. St. 962, 3 N. Y. Supp. 7.

37. Representations Inducing Shipment. — In an action against a carrier for the loss of freight during transportation, in which it is shown that the carrier sought to be charged is included in a system of railroads operating for the shipment of freight, soliciting it and carrying it as one through route, evidence of statements and representations made by the general agent of the system, and acting for it and authorized to solicit such shipments, and made for the purpose of inducing them, is properly admitted. Missouri K. & T. R. Co. *v.* Wells, 24 Tex. Civ. App. 304, 58 S. W. 842.

Where the time of the year and the character of the goods are such that delays are dangerous, evidence as to conversations between the shipper and the carrier's agents at the time when the contract of carriage was made, in regard to the length of time it would require for transportation, is competent. Blodgett *v.* Abbott, 72 Wis. 516, 40 N. W. 491, 7 Am. St. Rep. 873.

In Hinton *v.* Eastern R. Co., 72 Minn. 339, 75 N. W. 373, an action to recover damages for the loss of goods due to the alleged negligence of defendant carrier, which was the terminal carrier, the defendant gave evidence tending to show that its agent at the connecting point had no notice of the shipment until within 48 hours of the arrival there of the goods in question, and that it only had a limited time in which to prepare to receive, care for, and transport such an unusually large shipment at that season of the year; and it was held proper to permit the plaintiff in rebuttal to show that the defendant's agent at the point of destination had solicited the shipment of the goods, and that he had been advised when the shipment would commence and approximately of the quantity.

For Purpose of Showing Why No Valuation Was Stated in the Bill of Lading by the shipper, it is competent for him to show that the carrier had through its local agents solicited his patronage on the same terms which other companies had made—that is, that such goods as the shipper was known to be constantly shipping should be taken on non-valuation rates. Boscowitz *v.* Adams Exp. Co., 93 Ill. 523, 34 Am. Rep. 191.

38. Toledo S. L. & K. C. R. Co. *v.* Levy, 127 Ind. 168, 26 N. E. 773.

39. Southern R. Co. *v.* Allison, 115 Ga. 635, 42 S. E. 15.

In Hill *v.* Georgia C. & N. R. Co., 43 S. C. 461, 21 S. E. 337, it was held that a way bill is merely a memorandum, intended for the guidance of the agents and servants of the carriers, which the shipper is not supposed to know anything about, and hence is irrelevant, although it was

E. Best and Secondary Evidence. — The rule forbidding the resort to secondary evidence of the contents of a writing, unless its non-production is explained by proof of facts deemed by law a sufficient excuse for such non-production, applies to the contract of carriage.[40]

F. Oral Evidence. — a. *In General.* — **The Delivery of Property** to a common carrier for carriage may be proved by the direct testi-

held that such evidence could not be said to be incompetent, and hence its admission was not material error.

40. Peck *v.* Dinsmore, 4 Port. (Ala.) 212; Smith *v.* North C. R. Co., 68 N. C. 107; San Antonio & A. P. R. Co. *v.* Woodley, 20 Tex. Civ. App. 216, 49 S. W. 691; St. Louis S. W. R. Co. *v.* Cates, 15 Tex. Civ. App. 135, 38 S. W. 648.

Refusal to Attach to Deposition. Evidence that a non-resident agent of the initial carrier whose deposition is being taken was asked to attach the bill of lading to his deposition, which he declined to do because the rules of the company did not permit it, is sufficient showing on behalf of the terminal carrier of its inability to produce the original bill of lading so as to permit secondary evidence of its contents. Missouri K. & T. R. Co. *v.* Dilworth (Tex.), 67 S. W. 88, *affirming* 65 S. W. 502.

In Gulf C. & S. F. R. Co. *v.* Leatherwood, (Tex. Civ. App.), 69 S. W. 119, an action to recover for injuries sustained by live stock because of their detention by the carrier's agent at the point of destination until the shipper paid the freight at a rate higher than the rate agreed upon in the contract of carriage, the defendant attempted to show that the rate charged by the agent was the regular tariff, affixed with the approval of the interstate commerce commission, the contention being that such rate was binding regardless of any agreement for a lower rate. It was shown that the rate demanded by the agent was found in the printed tariff furnished him by the carrier. The chief clerk in the office of the defendant carrier's general freight agent testified that a similar printed tariff was on file in his office and offered to testify that such tariff had been established, published, and filed with the commission. It was held that his testimony was properly excluded, because his answers to the question showed that he did not know, of his own knowledge, the facts to which he proposed to testify; that he seemed to have assumed that because the printed tariff was on file in his office and was acted on by the company, it had been filed and legally established and published and filed with the commission.

Duplicates. — On proof that a contract of carriage was signed in duplicate and that the original in the possession of the carrier had been destroyed by a flood, and the shipper failing to produce the duplicate in his possession or in any manner accounting for it, it is proper for the carrier to introduce a copy of the contract in evidence. Cincinnati, N. O. & T. P. R. Co. *v.* Disbrow, 76 Ga. 253.

Where the Contract of Carriage Is Partly in Writing and partly verbal, the latter part of the contract may be proved by extrinsic evidence. Fischer *v.* Merchants' Disp. Transp. Co., 13 Mo. App. 133.

That Certain Classifications and Rates Charged Had Been Approved by the interstate commerce commission cannot be proved by oral evidence. If the rulings and orders of that commission are important to be shown, the rulings themselves are required. Mouton *v.* Louisville & N. R. Co., 128 Ala. 537, 29 So. 602.

Rebutting Secondary Evidence. Where a carrier, alleged to be in possession of the written contracts of shipment of freight, has been notified to produce the same, and the shipper has introduced secondary evidence of their contents because of its failure to so produce them, the carrier can not then introduce some of the contracts and move to strike out the shipper's testimony of their contents.

mony of the shipper.[41]

Special Contract Limiting Liability. — While it is true that it devolves upon the carrier to show affirmatively the terms of any contract which lessens his common law liability, yet that fact is to be proved, like any other, by any pertinent evidence; if in writing, the writing must be shown; but if by parol, there is no rule which requires different proof from that which would establish any other contract.[42]

b. *Contradiction of Bills of Lading, etc.* — **(1.) Generally.** — The terms of a bill of lading as written, to the extent that they constitute the contract of carriage, are not to be contradicted or varied by oral evidence.[43] But this rule forbidding parol evidence does not

Gulf C. & S. F. R. Co. *v.* Leatherwood, (Tex. Civ. App.), 69 S. W. 119.

41. Gwyn Harper Mfg. Co. *v.* Carolina Cent. R. Co., 128 N. C. 280, 38 S. E. 894.

Testimony of the consignee's agent as to his purchase of the goods for the consignee and as to the contract made by him with the vendors as to the way and manner of shipping the goods, is admissible in an action by the consignee against the carrier as part of the *res gestae* to show the plaintiff's interest in the goods, to identify them, and show that he authorized their delivery to the defendant for carriage to the consignee, but not to show the fact of the delivery to the carrier; and the admission of this testimony of the latter fact is not a harmless error merely because the carrier admitted in its answer that it received such a package as was delivered to it, which the plaintiff says was afterwards proved to contain the goods in question. New England Mfg. Co. *v.* Starin, 60 Conn. 369, 22 Atl. 953.

42. American Transp. Co. *v.* Moore, 5 Mich. 368.

Parol evidence is permissible to show a special contract between a shipper and a common carrier, notwithstanding the carrier's clerk had given a receipt specifying the terms on which the freight was received. Purcell *v.* Southern Exp. Co., 34 Ga. 315, where the court in so holding said: "If a common carrier may make an express contract, certainly it will be allowed to prove it; and, as it would not be allowed to limit its liability by an entry on a receipt given, so, of course, it will be permitted to prove it by *aliunde* testimony. Evidence, then, aside from the receipt, was most clearly admissible to prove an express contract."

43. *United States.* — O'Rourke *v.* Tons of Coal, 1 Fed. 619.

Alabama. — Louisville & N. R. Co. *v.* Fulgham, 91 Ala. 555, 8 So. 803; Wayland *v.* Moseley, 5 Ala. 430, 39 Am. Dec. 335.

Connecticut. — Jones *v.* Hoyt, 25 Conn. 374.

Georgia. — Richmond & D. R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220; McElveen *v.* Southern R. Co., 109 Ga. 249, 34 S. E. 281, 77 Am. St. Rep. 371.

Indiana. — Cincinnati U. & F. W. R. Co. *v.* Pearce, 28 Ind. 502.

Iowa. — Burgher *v.* Chicago, R. I. & P. R. Co., 105 Iowa 335, 75 N. W. 192.

Kansas. — Missouri, K. & T. R. Co. *v.* Simonson, 64 Kan. 802, 68 Pac. 653.

New York. — Long *v.* New York Cent. R. Co., 50 N. Y. 76; Van Etten *v.* Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630; Germania Ins. Co. *v.* Memphis & C. R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Parker *v.* North German Lloyd S. S. Co., 74 App. Div. 16, 76 N. Y. Supp 806; Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224.

North Carolina. — Morganton Mfg. Co. *v.* Ohio R. & C. R. Co., 121 N. C. 514, 28 S. E. 474, 61 Am. St. Rep. 679.

Pennsylvania. — Baltimore & P. S Co. *v.* Brown, 54 Pa. St. 77; Hostetter *v.* Baltimore & O. R. Co., (Pa. St.), 11 Atl. 609.

apply where its purpose is to show fraud[44] or mistake.[45]

(2.) Ambiguities. — The rules of evidence pertaining to oral evi-

Texas. — Arnold *v.* Jones, 26 Tex. 335, 82 Am. Dec. 617; St. Louis S. W. R. Co. *v.* Cates, 15 Tex. Civ. App. 135, 28 S. W. 648.

Evidence That Goods Were to Be Sent C. O. D. is not admissible for the shipper in an action by him against the carrier for loss in not so shipping the goods as against the bill of lading, which was retained by the shipper, which does not specify that the goods were to be so shipped. Smith *v.* Southern Exp. Co., 104 Ala. 387, 16 So. 62.

Different Place of Delivery. — In McTyer *v.* Steele, 26 Ala. 487, it was said that evidence cannot be received to show that the goods shipped were to be delivered at a different port or to other consignees than those specified in the bill of lading.

Route. — Where a shipper accepts a bill of lading before shipment, which upon its face designates no particular route by which the shipment is to be forwarded after reaching the terminus of the initial carrier's line, he cannot prove a prior parol agreement to forward by a particular line. Snow *v.* Indiana B. & W. R. Co., 109 Ind. 422, 9 N. E. 702.

Mode of Shipment. — Where a carrier stipulates in writing that it may forward the goods by any customary mode which is safe and prudent, it is a variation of the contract to permit proof of a prior or contemporaneous oral direction imposing upon it the duty of shipping in any other mode. Hinckley *v.* New York Cent. & H. R. Co., 56 N. Y. 429.

Time of Shipment. — Where a bill of lading is silent as to the time in which delivery is to be made at the place of destination, the presumption is that the delivery was to be made within a reasonable time; and hence it is not allowable to negative this presumption by evidence showing that a definite and specified time was agreed upon either expressly or by implication. Pennsylvania Co. *v.* Clark, 2 Ind. App. 146, 27 N. E. 586; Central R. & B. Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

Rate of Freight. — Where the amount of freight to be paid is not fixed by the contract of carriage, the law implies that the carrier shall have a reasonable reward, to be ascertained by what is commonly paid for other like services; and in such case the shipper cannot in an action by him against the carrier to recover for alleged excessive freight charges paid, show an oral contract made prior to the contract of carriage to carry at a specific rate, in the absence of any fraud, concealment or mistake. Louisville E. & St. L. R. Co. *v.* Wilson, 119 Ind. 352, 21 N. E. 341, 4 L. R. A. 244.

44. For Purpose of Showing That a Shipper Did Not Assent or Agree to Terms of Contract of Carriage limiting the carrier's liability, extrinsic evidence is admissible for him, not to contradict or vary its express terms, but to show whether it was fairly and honestly entered into in respect to this question. O'Malley *v.* Great N. Ry. Co., 86 Minn. 380, 90 N. W. 974; *citing* Black *v.* Railway Co., 111 Ill. 351, 53 Am. Rep. 628; Erie & Transportation Co. *v.* Dater, 91 Ill. 195, 33 Am. Rep. 51; Dispatch Co. *v.* Leysor, 89 Ill. 43; Field *v.* Railway Co., 71 Ill. 458; Boscowitz *v.* Adams Exp. Co., 93 Ill. 523, 34 Am. Rep. 191; Madan *v.* Sherard, 73 N. Y. 329, 29 Am. Rep. 153; King *v.* Woodbridge, 34 Vt. 565; Boorman *v.* American Exp. Co., 21 Wis. 154.

In Caldwell *v.* Felton, (Ky.), 51 S. W. 577, it was contended that the contract of carriage was obtained by the carrier through misrepresentation by its agent that it contained what had been previously verbally agreed upon between the shipper and the carrier's agent; and it was held error under such circumstances to refuse to permit the shipper to prove what the verbal contract was.

45. Louisville E. & St. L. R. Co. *v.* Wilson, 119 Ind. 352, 21 N. E. 344,

dence to explain ambiguities in a writing[46] apply to bills of lading.[47]

(3.) Usage and Custom. — Proof of a custom or usage is not admissible to vary or control a bill of lading[48] except in case of an

4 L. R. A. 244; Grace *v.* Adams, 100 Mass. 505, 1 Am. Rep. 131.

In Sonia Cotton Oil Co. *v.* Red River, 106 La. 42, 30 So. 303, it was held that if error was committed by including terms in the bill of lading, binding the carrier to deliver the goods at a particular place, it was competent for the carrier to show that the place at which it offered to land the goods was the usual place of landing.

On an issue as to whether or not a shipment was made under a written contract of carriage set up by the carrier, or under a parol contract asserted by the shipper, it is competent for the shipper to show by parol that a written contract was not the contract expressing the terms of the carriage. Mobile & M. R. Co. *v.* Jurey, 111 U. S. 584.

46. *See* the article "AMBIGUITY," Vol. I, p. 825.

47. Baltimore & P. S. Co. *v.* Brown, 54 Pa. St. 77.

Technical Terms. — The rule making it the duty of the court to define and construe the meaning of words in a writing does not apply to signs and technical words used in a bill of lading and which are not in general use; but they may be explained by parol evidence. Mouton *v.* Louisville & N. R. Co., 128 Ala. 537, 29 So. 602.

In Savannah, F. & W. R. Co. *v.* Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87, a clause "care R. R. Agt. Callahan" in a bill of lading, was held to be ambiguous and explainable by parol evidence under Georgia Code, § 2070.

Filling Blanks. — Where the rate of freight in a contract of carriage is left blank, the blank may be filled by showing the rate actually agreed upon or paid. Georgia R. & B. Co. *v.* Reid, 91 Ga. 377, 17 S. E. 934, so holding under the rule allowing the introduction of parol evidence to supplement or explain a writing which is incomplete, uncertain and ambiguous.

Where the shipper of goods is only impliedly bound from the face of the bill of lading to pay the freight, it is permissible for him to show that the carrier received the goods under an agreement with a third person to pay the freight, which the latter had done. Wayland *v.* Mosely, 5 Ala. 430, 39 Am. Dec. 335.

48. Tallahassee Falls Mfg. Co. *v.* Western R., 128 Ala. 167, 29 So. 203; Schroeder *v.* Schweizer Lloyd Transp., 66 Cal. 294, 5 Pac. 478.

Evidence of a custom amongst steamboat men to ascend the river so far as the water permitted and then to land their cargo and place it in warehouses is not admissible for the owners of a steamboat, sued as common carriers for failure to deliver goods at the place specified in the bill of lading. Cox *v.* Peterson, 30 Ala. 608, 68 Am. Dec. 145.

Evidence of a Custom to Carry Torch Lights at Night on board of steamboats can not be received to affect the liability of the steamboat owners for the loss by fire caused by negligent use of such torch lights. Hiler *v.* McCartney, 31 Ala. 501.

By Way of Showing a Usage in Shipping on a Certain River it is competent for the witness to testify as to what has been his habit and custom in shipping on all boats on such river, as well as on the boat on which the loss occurred, which is the subject matter of the controversy. Berry *v.* Cooper, 28 Ga. 543.

Selling Freight En Route. — In Sharpe *v.* Clarke, 13 Utah 510, 45 Pac. 566, the contract of carriage for live stock consisted of the written contract of carriage and the written contract for the transportation of the shipper's servant to care for the stock. The ticket read to the end of the carrier's terminal point, while the contract of carriage read to a point beyond; but before reaching such terminal point the carrier diverted the shipment and thus prevented the shipper from having an opportunity to dispose of the stock at such terminal point. It was held

ambiguity, and where there are circumstances to create doubt of the proper application of terms used in the writing.[49]

that although separate papers for the transportation of the stock did not name the particular route, yet the transportation ticket named the terminal point, and by necessary implication a notice to carry the stock through or to that place; and it was held competent for the shipper to show by oral testimony a usage on the part of the carrier to permit the shipper to take stock from the train and sell en route and to prove his conversation between plaintiff and the carrier's station agent at the place of shipment, and the plaintiff's express intention to sell when the stock reached the carrier's terminal point, since the law of carriers permits the shipper to withdraw his stock at any point on the route by payment of freight to the point designated in the contract, and since also the evidence was not repugnant or contrary to the written contract. It was held also competent under the contract to prove by parol an usage between the parties to pay and collect freight for the distance the stock is actually carried where such usage is not contrary to law and does not contradict or change the express terms of the contract of carriage.

In Pickering *v.* Weld, 159 Mass. 522, 34 N. E. 1081, an action to recover freight claimed to be due under a charter party, in which defendants seek to recoup the value of a portion of the cargo claimed to have been lost while the vessel was being discharged, it was held proper to receive evidence of a general custom at the port of discharge that "After a vessel arrives at the port and goes to the wharf designated by the consignee and due notice has been given to the consignee, and the cargo is taken off and distributed on the wharf according to the marks and numbers, the care of the goods devolves upon the consignee."

49. Parol evidence is admissible to show that the words "Dangers of the River," as used in a bill of lading by usage and custom, include dangers by fire. McClure *v.* Cox, 32 Ala. 617, 70 Am. Dec. 552; Sampson *v.* Gazzam, 6 Port. 123, 30 Am. Dec. 578; Hibler *v.* McCartney, 31 Ala. 501.

Where a bill of lading recites that cotton was shipped on a steamboat, parol evidence is admissible to show that it was customary for steamboats, when the river was low, to carry barges in tow and to store freight at their option on either boat or a barge. McClure *v.* Cox, 32 Ala. 617, 70 Am. Dec. 552. The court said: "Evidence of usage and custom, offered in the present case, does not labor under the objection of introducing anything repugnant to, or inconsistent with, the tenor of the written contract. . . . That evidence goes no further than to furnish "the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract." It tends to show that the words "on the steamer," used in the bill of lading, were used "in a new, peculiar, or technical sense" in the particular trade; and that, by this new, peculiar or technical sense, the barge towed by the steamboat in low stages of water, was included in the term steamer or steamboat, so far at least as to secure to the commander of the boat the privilege of stowing the cotton on either the boat or barge. If the explanation or addition thus derived from the evidence of the custom had been expressed in the bill of lading, it would not have rendered the bill of lading insensible or inconsistent. It is obvious that the bill of lading would not be rendered insensible or inconsistent by the expression therein of the privilege to the commander of the steamboat to stow the cotton on the boat, or on the barge towed by her, in accordance with the custom."

In East Tenn., V. & G. R. Co. *v.* Johnston, 75 Ala. 596, 51 Am. Rep. 489, the bill of lading was for the use of a car for the transportation of cattle, having reference to the cars in use on the defendant's road. There was no stipulation for any particular car; and the shipper retained control

(4.) As a Receipt.— As a receipt acknowledging the delivery of the property for carriage,[50] or the quantity[51] and condition of such property,[52] the bill of lading may be contradicted or varied by parol evidence.[53] And this rule applies to bills of lading for shipment of live stock.[54] And under this rule a connecting carrier may show by parol that the damage to the goods occurred before they came to its hands.[55] Again, a recital in a bill of lading that the

and charge of the cattle and assumed the risk and responsibility of loading; and it was held admissible for the carrier to introduce evidence that it was customary for persons shipping cattle over its road to bed cars furnished therefor. That the bedding of such cars had never been required of the carrier, and that the plaintiff had previously made freight shipments of cattle on the carrier's road, at which times he had furnished and bedded the cars himself; and the court holding that evidence of the usage and custom by which the shipper is to bed the cars, known to him and upon which he had acted in previous shipments, is admissible for the carrier for the purpose of interpreting and explaining the intention, meaning and understanding of the parties in making the special contract.

In an action to recover freight charges, evidence is competent for the shipper to show that when freight is to be prepaid, it was the carrier's custom to indicate that fact upon the bill of lading, the bill of lading in question containing no such indication; and the fact that the shipper had never shipped to a prepay station except in that one instance did not affect the competency of the evidence, but was merely a fact affecting its credit. Montpelier & W. R. R. Co. *v.* Macchi, 74 Vt. 403, 52 Atl. 960.

50. The Willie D. Sandhoval, 92 Fed. 286; Cunard S. S. Co. *v.* Kelley, 115 Fed. 678.

51. Brouty *v.* 5256 Bundles of Elm Staves, 21 Fed. 590; Bissel *v.* Price, 16 Ill. 408; Meyer *v.* Peck, 28 N. Y. 590; Abbe *v.* Eaton, 51 N. Y. 410; Graves *v.* Harwood, 9 Barb. (N. Y.) 477; Horsman *v.* Grand Trunk R. Co., 30 Q. B. (Can. L. C.) 130.

Weight. — Recitals in a bill of lading, although of specific weights, across which are endorsed "weight and quantity unknown," "weight unknown," etc., are open to explanation as to the exact quantity of goods delivered to the carrier, who has the burden to prove that it fully delivered all the goods actually received by it. Planters' F. Mfg. Co. *v.* Elder, 101 Fed. Cas. No. 110.

52. Illinois Cent. R. Co. *v.* Cowles, 32 Ill. 116; Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327; Meyer *v.* Peck, 28 N. Y. 590; Bissel *v.* Price, 16 Ill. 408; Hunt *v.* Mississippi Cent. R. Co., 29 La. Ann. 446; Porter *v*, Chicago & N. W. R. Co., 20 Iowa 73; Ellis *v.* Willard, 9 N. Y. 529.

In an action against a carrier for injuries to property in transit, the bill of lading and manifest showing that the property was received by the carrier in good order is *prima facie* evidence against the carrier, but it is not conclusive and may be rebutted. Burwell *v.* Raleigh & G. R. Co., 94 N. C. 451.

A "Clear" Receipt given to the carrier by an agent of the consignee is not conclusive upon the consignee, and it is admissible for him to show by other evidence that the goods were received by him in a damaged condition. Mears *v.* New York, N. H. & H. R. Co., (Conn.), 52 Atl. 610.

53. Wayland *v.* Mosely, 5 Ala. 430, 39 Am. Dec. 335; Steamboat Missouri *v.* Webb, 9 Mo. 193; Meyer *v.* Peck, 28 N. Y. 590; Missouri K. & T. R. Co. *v.* Simonson, 64 Kan. 802, 68 Pac. 653; Morganton Mfg. Co. *v.* Ohio R. & C. R. Co., 121 N. C. 514, 28 S. E. 474, 61 Am. St. Rep. 679; Purcell *v.* Southern Exp. Co., 34 Ga. 315.

54. Chapin *v.* Chicago M. & St. P. R. Co., 79 Iowa 582, 44 N. W. 820.

55. Great Western R. Co. *v.* McDonald, 18 Ill. 172.

goods were received in "apparent good order" may be explained or contradicted by the carrier and the true condition shown.[56] So also as to the recital "in good order and well conditioned."[57]

(5.) Burden of Proof. — A carrier seeking to contradict the recital in the bill of lading as to the condition of the goods shipped has the burden of proof.[58] So also where he seeks to show mistake in the quantity of goods stated therein;[59] or where he seeks to show that in fact he never received the property for carriage as stated.[60]

3. The Fact of the Loss or Injury. — A. Burden of Proof and Presumptions. — In an action to compel a common carrier to respond in damages for property lost or injured by it in transportation, the burden of proof in the first instance is upon the plaintiff to establish the fact of the loss or injury.[61]

56. The California, 2 Sawy. 12 St. Louis A. & T. R. Co. *v.* Neel, 56 Ark. 279, 19 S. W. 963; Illinois Cent. R. Co. *v.* Cobb, 72 Ill. 148; Mitchell *v.* U. S. Exp. Co., 46 Iowa 214; Seller *v.* Steamship Pacific, 1 Or. 409; Blade *v.* Chicago St. P. & F. du L. R. Co., 10 Wis. 4.

A shipping receipt describing the goods "as in apparent good order, except as noted (contents and condition of contents of package unknown)," does not raise the presumption that the goods were received at the point of shipment in good order, but has reference merely to the condition of the exterior of the box or package containing the goods. Mears *v.* New York N. H. & H. R. Co., (Conn.), 52 Atl. 610.

57. Gowdy *v.* Lyon, 9 B. Mon. (Ky.) 112; Keith *v.* Amende, 1 Bush (Ky.) 455.

58. Bissel *v.* Price, 16 Ill. 408; Illinois Cent. R. Co. *v.* Cowles, 32 Ill. 116.

59. Little Rock & F. S. R. Co. *v.* Hall, 32 Ark. 669.

60. A carrier sued for non-delivery of goods acknowledged by it in its bill of lading to have been received for shipment has the burden to show that they were not in fact so received where it seeks to escape liability on that ground; yet where there was no evidence whatever of the goods having been loaded beyond the shipping receipt and the bill of lading made therefrom, and there is other evidence tending to show that the goods were not in the possession of the carrier at its first stop, and it is also shown that goods loaded on the carrier's vessel were so loaded that they could not be lost or stolen without probable knowledge on the part of the carrier thereof; the carrier need not go further to show affirmatively the fact of the goods not having been actually loaded. The Willie D. Sandhoval, 92 Fed. 286.

61. Burden of Proving Fact of Loss or Injury. — Savannah F. & W. R. Co. *v.* Harris, 26 Fla. 148, 7 So. 544; Silverman *v.* St. Louis I. M. & S. R. Co., 51 La. Ann. 1785, 26 So. 447; Tarbox *v.* Eastern S. B. Co., 50 Me. 339; Dow *v.* Portland Steam P. Co., 84 Me. 490, 24 Atl. 945; Boehl *v.* Chicago M. & St. P. R. Co., 44 Minn. 191, 46 N. W. 333; Mitchell *v.* Carolina C. R. Co., 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515; Farnham *v.* Camden & A. R. Co., 55 Pa. St. 53; Johnstone *v.* Richmond & D. R. Co., 39 S. C. 55, 17 S. E. 512.

In an action against a carrier for non-delivery of goods, although the allegation is a negative one, it put in issue, the burden of proof is upon the plaintiff to give some evidence of non-delivery according to the obligation assumed by the carrier before the latter can be called upon to prove delivery. Roberts *v.* Chittenden, 88 N. Y. 33.

In an action against a carrier based on the theory that the carrier owns the whole line of railroads over which the property was to be transported, the burden is on the shipper to show that the loss or damage for which he seeks compensation occurred on the carrier's line. Cleve-

Slight Proof of Non-Delivery is Sufficient to put the burden of showing delivery on the carrier; but there must be some proof by the plaintiff of non-delivery.[62]

B. Declarations.—*The Fact of Loss or Injury of Property in Carrier's Custody* cannot be shown by declarations of the carrier's agent made long after the loss or injury, and after the property has left the carrier's custody and not made while the agent was engaged in any act which his declarations qualified or explained.[63]

C. Claim of Loss. — The claim of loss filed by the plaintiff as required by the contract, is competent to show such claim was made.[64]

4. The Cause of Loss or Injury. — A. Presumptions and Burden of Proof. — *a. Generally.* — It may be stated that in nearly, if indeed not in quite, all actions against carriers to recover damages for property lost or injured in transit, negligence or want of that care imposed by the law upon the carrier lies at the foundation of the action; and the rule is that negligence or want of due care as an affirmative fact is not to be presumed, but there must at least be such a showing made as will raise a *prima facie* presumption of negligence,[65] and that the loss or injury complained of was

land C. C. & St. L. R. Co. *v.* Heath, 22 Ind. App. 47, 53 N. E. 198, holding also that the carrier has the right to show that the loss in fact occurred on a connecting line.

62. Chicago, St. L. & N. O. R. R. Co. *v.* Provine, 61 Miss. 288.

63. Smith *v.* North C. R. Co., 68 N. C. 107.

64. Gwyn Harper Mfg. Co. *v.* Carolina Cent. R. Co., 128 N. C. 280, 38 S. E. 894.

65. Frederick *v.* Louisville & N. R. Co., 133 Ala. 486, 31 So. 968; Sejalon *v.* Woolverton, 31 Misc. 752, 64 N. Y. Supp. 48.

In an action against a common carrier to recover for damages for failure to transport the property to its place of destination within a reasonable time, the burden is on the plaintiffs to show failure by the carrier to exercise ordinary care and diligence in carrying the goods; but unusual and unreasonable delay and failure to deliver the goods according to the general course of business, raise a presumption of negligence, and are *prima facie* sufficient evidence of a want of ordinary care. And it is not incumbent on the plaintiff to prove that there was not some unavoidable accident or other unforeseen occurrence which would relieve the defendants of this presumption.

"To require the plaintiffs, in making a *prima facie* case, to assume the burden of negativing the occurrence of matters which, if they did occur, were out of the usual course of events, and particularly within the defendant's knowledge, would be an extraordinary perversion of the natural and ordinary rules of evidence." Mann *v.* Birchard, 40 Vt. 326, 94 Am. Dec. 398. See also Brintnall *v.* S. & W. R. Co., 32 Vt. 665.

In an action against a carrier for failure to give a dog received by it for carriage, the proper care and attention in the matter of food, water, and exercise, it is not incumbent on the plaintiff to show that the defendant failed to give the dog food, water and exercise, or any food, water and exercise, but he need only show the failure to give a proper or adequate supply of these things. Southern Exp. Co. *v.* Ashford, 126 Ala. 591, 28 So. 732.

A shipper of freight seeking to hold the carrier liable on the ground that the means of transportation were not safe and suitable, has the burden to show that fact when the contract of carriage recites that the shipper had examined the means of

due to the negligence alleged.[66] But, as has been before stated, the fact of the loss or injury must first be established, and it is usually held that proof of that fact,[67] or of the carrier's fail-

transportation, and found it in good order and condition. Western R. *v.* Harwell, 91 Ala. 340, 8 So. 649; *affirmed* 97 Ala. 341, 11 So. 781.

66. In an action against a carrier to recover for injuries to property grounded on the negligence of the carrier in permitting water to leak into the car, thereby causing the injuries complained of, the burden is upon the plaintiff to show that the injuries were occasioned by the negligence alleged. Weed *v.* International & G. N. R. Co., 21 Tex. Civ. App. 689, 53 S. W. 356.

In an action against a carrier for unreasonable delay in transportation resulting in the loss of a particular market, the plaintiff has not only the burden to prove the delay and also a damage, when it appears from his proofs that there was other delay not chargeable to the carrier, but some damage traced directly to the delay for which the carrier was in fault. Detroit & B. C. R. Co. *v.* McKenzie, 43 Mich. 609, 5 N. W. 1031.

In an action against a carrier to recover for injuries to cows resulting in the premature birth of calves, the burden of proof is upon the plaintiff to show that such premature births were the direct result of the cause set up as causing the injuries. New York L. E. & W. R. Co. *v.* Estill, 147 U. S. 591.

Where the contract of carriage limits the liability of the carrier to damages occurring on its own line, the plaintiff in an action against such carrier has the burden to show that the damages occurred before the property left the defendant's hands. Texas & P. R. Co. *v.* Llano L. S. Co., (Tex. Civ. App.), 33 S. W. 748.

On proof by dates of shipment that the property had time to arrive and be delivered to the consignee before the intervening cause producing the loss or injury occurred, the burden of showing what part of the property, if any, did not arrive within that time is upon the carrier; and then the burden is on the consignee to show the damage done to those which did arrive, and the amount thereof, in order to hold the carrier responsible on the ground of negligence in not notifying him of their arrival or in not delivering upon application. Richmond & D. R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802.

67. *Florida.* — Savannah F. & W. R. Co. *v.* Harris, 26 Fla. 148, 7 So. 544.

Maine. — Tarbox *v.* Eastern S. B. Co., 50 Me. 339.

Minnesota. — Boehl *v.* Chicago M. & St. P. R. Co., 44 Minn. 191, 46 N. W. 333.

New Hampshire.—Shelden *v.* Robinson, 7 N. H. 157, 26 Am. Dec. 726.

North Carolina.—Mitchell *v.* Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515.

Pennsylvania. — Adams Exp. Co. *v.* Holmes, (Pa.), 9 Atl. 166; Crogan *v.* Adams Exp. Co., (Pa.), 7 Atl. 134.

South Carolina. — Johnstone *v.* Richmond & D. R. Co., 39 S. C. 55, 17 S. E. 512.

Texas. — Ryan *v.* Missouri K. & T. R. Co., 65 Tex. 13, 57 Am. Rep. 589.

Wisconsin. — Black *v.* Goodrich Transp. Co., 55 Wis. 319, 13 N. W. 244.

When the contract of carriage contains no express stipulation relieving the carrier from liability for its own negligence, the non-delivery of the property to the consignee and circumstances of the loss thereof being unexplained, raises a presumption of negligence on the part of the carrier. Browning *v.* Goodrich Transp. Co., 78 Wis. 391, 47 N. W. 428, 23 Am. St. Rep. 414, 10 L. R. A. 415; *following* Black *v.* Goodrich Transp. Co., 55 Wis. 319, 13 N. W. 244.

When the contract for the carriage of the goods beyond the end of the initial carrier's line provides that the responsibility of the carrier as such ceases at the place of delivery to the connecting carrier, a plaintiff in an action against the carrier for loss or

ure,[68] or refusal to explain the non-delivery of the property,[69] makes a *prima facie* case for the plaintiff, although there is authority to the effect that while the mere fact of the loss or injury is not enough, the circumstances surrounding it may be sufficient to raise a presumption of negligence.[70]

damage suffered after the goods were delivered to the connecting carrier, based on a modification of the contract of carriage by agreement of the parties at the time of the shipment, has the burden to establish that fact by proof. Keller *v.* Baltimore & O. R. R. Co., 174 Pa. St. 62, 34 Atl. 455.

In Browning *v.* Goodrich Transp. Co., 78 Wis. 391, 47 N. W. 428, 23 Am. St. Rep. 414, 10 L. R. A. 415, the contract of carriage relieved the carrier from liability "for the dangers of navigation, fire, collision or delivery, except to land goods on dock or pier;" and it was held that assuming that mere non-delivery to the consignee did not give a right of action, but a failure by the carrier to land the goods on dock or pier was essential to such right, the burden was on the carrier to show that the property was so landed.

68. Pennsylvania Co. *v.* Liveright, 14 Ind. App. 518, 41 N. E. 350, 43 N. E. 162.

The failure of a carrier to deliver property or any portion thereof to the consignee on demand, at the place of destination, is *prima facie* evidence of negligence on the part of the carrier, which in the absence of any evidence excusing non-delivery presents a question of fact for the jury. Canfield *v.* Baltimore & O. R. Co., 93 N. Y. 532, 45 Am. Rep. 268.

69. Where a carrier, on inquiry by the shipper or owner as to the cause of a fire in which his goods were destroyed, and where it occurred, refuses to give any information in reference thereto, a presumption of negligence arises which the carrier must meet; and this presumption is not met by proof that the carrier exercised ordinary care. Pennsylvania R. Co. *v.* Miller, 87 Pa. St. 395. See also American Exp. Co. *v.* Sands, 55 Pa. St. 140; Kirst *v.* Milwaukee, L. S. & W. R. Co., 46 Wis. 489, 1 N. W. 89.

70. In an action against a carrier for the loss of live stock predicated on the negligence of the carrier, it is held that although a contractual relation existed between the parties, the burden of proof is upon the plaintiff to establish the negligent facts by a preponderance of the evidence. But that obligation is met when evidence is given sufficient to raise a presumption of negligence; and that presumption may arise from proof of a state of facts showing a situation which could not have arisen but from the existence and operation of some abnormal cause. Newman *v.* Pennsylvania R. Co., 33 App. Div. 171, 53 N. Y. Supp. 456.

And again in Morris *v.* Weir, 20 Misc. 586, 46 N. Y. Supp. 413, an action to recover for the value of a demijohn of whiskey packed in a champagne case, it was held that a *prima facie* case of negligence at most was made out by evidence for the plaintiff of the breaking of the demijohn; that the delivery of the goods by a carrier in a damaged condition raises the presumption that the damage was done by the carrier's act or default.

Rule Stated.—"Although the burden of proof of negligence (in an action against a common carrier for freight lost or injured) unquestionably rests upon the plaintiff, yet he is not always required to point out the precise act or omission in which the negligence consists. Negligence may be inferred from the circumstances of the case. Where the accident is one which in the ordinary course of events would not have happened but for the want of proper care on the part of the defendant, it is incumbent upon him to show that he had taken such precautions as prudence would dictate, and his failure to furnish the proof, where, if it existed, it would be within his power, may subject him to the inference that such precautions were omitted." Russell Mfg. Co. *v.* New Haven S.

Forwarders Are Not Insurers as Common Carriers.— They are liable as an ordinary bailee for hire, who need only prove his care and fidelity by the best evidence in his power, and that the loss did not arise from any default of himself or his servants.[71]

b. Exemption from Negligence by Contract. — Where a carrier exempts himself from liability under the contract for loss or damage, unless the same is proved to have occurred through his fraud or gross negligence, the plaintiff in an action against the carrier has the burden of proving such fraud or negligence. Negligence must not only be shown, but it must appear to have caused, or at least to have contributed to, the loss or injury complained of.[72]

c. Animate Property. — The rule that injury to freight may furnish ground for the presumption of negligence has been held

B. Co., 50 N. Y. 121. In this case the plaintiff's goods, while upon the defendant's wharf, were destroyed at night by fire originating upon the wharf. A large quantity of other freight was upon the wharf and was also destroyed. There was evidence also that no apparatus or means for extinguishing fires were kept there. A private watchman had been left in charge with some other men, but none of them were produced as a witness, nor did it appear that he was at his post, nor that any person was on the wharf when the fire broke out.

In Magnin *v.* Dinsmore, 56 N. Y. 168, proof was given of the non-delivery of the goods to the consignee, and that some months after shipment the box in which they had been shipped was found empty; but no explanation of the non-delivery was shown; and it was held that this was sufficient to raise a presumption of negligence.

Evidence that a horse firmly secured in a car in which it was being shipped was, by the sudden stopping of the train, thrown forward with such force as to break the guards and barriers by which it was secured, sustaining fatal injuries, is sufficient to raise a presumption of negligence against the carrier which it is the carrier's duty to rebut. Newman *v.* Pennsylvania R. Co., 33 App. Div. 171, 53 N. Y. Supp. 456.

Where goods have been shipped by three successive carriers and upon delivery to the consignee the box containing the goods is open and certain goods missing, although there is no external indication of the fact on the box itself, the presumption is that the box remained unopened until it came into the control of the last carrier, and that the loss occurred through its default. Laughlin *v.* Chicago & N. W. R. Co., 28 Wis. 204, 9 Am. Rep. 493.

71. American Exp. Co. *v.* Second Nat. Bank, 69 Pa. St. 394, 8 Am. Rep. 268.

72. Cochran *v.* Dinsmore, 49 N. Y. 249.

Slight Evidence, However, May Suffice to shift the burden to the carrier, or to state it more correctly, to discharge the burden and make it incumbent on the carrier to prove that the loss was not occasioned by the causes invoked. Proof of the nature of the accident may afford *prima facie* proof of negligence. Campe *v.* Weir, 28 Misc. 243, 58 N. Y. Supp. 1082. In this case the property shipped was a violin which had been strongly crated under the direction of the carrier. On arrival, one of the slats of the crate was missing and another was loosened, and although the violin case was intact, the violin itself was injured. It was demonstrated on the trial that the case was of sufficient strength, and that previous use had not impaired its efficacy. The plaintiff dealt a hard blow against the case with his fist and another person jumped on it and it was not affected by either test.

to apply to live stock with proper limitations;[73] although there is authority to the effect that the shipper or owner must also produce some evidence to prove loss or injury due to human agency causing, or contributing to cause, such loss or injury.[74]

d. Causes Exonerating Carrier. — The rule is invariably recognized that when the *prima facie* case referred to in the preceding section has been made out, it then devolves upon the carrier, if he pleads exemption from liability upon the ground that the loss or injury was primarily occasioned by some cause for which the common law imposes no liability upon him, or from which he is exempt by virtue of a special contract between himself and the shipper or owner, to show such facts as will bring him within

73. Live Stock. — Schaeffer *v.* Philadelphia & R. R. R., 168 Pa. St. 209, 31 Atl. 1088. It of course would have no application in the case of injuries which are such as animals voluntarily inflict upon each other, or which cannot be accounted for, or which can be satisfactorily explained on other ground than that of negligence in managing the train; nor in cases of death from natural causes, or from causes entirely unknown, as in Pennsylvania R. R. Co. *v.* Riordon, 119 Pa. St. 577, 13 Atl. 324, 4 Am. St. Rep. 670. In this case the court said: "Death from natural causes can hardly be called an accident; but, if it was otherwise, yet there is a very broad distinction between the case of its coming . . . by reason of circumstances and conditions that are personal or peculiar to him, and the case of its coming to a passenger, as such, by reason of accident to or on account of the means of transportation employed by the carrier, whether in motion or not. In the former class of cases, no presumption of negligence can arise, for the facts furnish no foundation for it; in the latter, there is a presumption, not conclusive, but *prima facie*, on which the plaintiff may rest, and which the carrier must overcome. Applying this distinction to the case we have in hand, and its disposition is easy. The testimony of the plaintiff showed the happening of no injurious accident to the train or car on which his horses were transported. It showed that he was personally in charge of them, at every stop examining the car, and that he saw nothing to attract his attention. It showed that the death of his horse on the journey was wholely unknown to him until he reached the city, and he does not attempt to assign a cause for it. This testimony left no ground for the legal presumption that arises from the happening of an injurious accident, and left the burden of proof where it rests in ordinary cases — on the plaintiff."

74. Hance *v.* Pacific Exp. Co., 66 Mo. App. 486; Cash *v.* Wabash R. Co., 81 Mo. App. 109.

In an action against a carrier for injuries to live stock resulting from the failure of the carrier to seasonably transport and safely deliver the live stock received by it for carriage, the plaintiff's case is fully made out when he has shown that the stock were received by the carrier and not seasonably and safely delivered; that is, not delivered at all or delivered in a damaged condition, and after an unreasonable delay. The burden is then on the carrier, and if it wishes to escape any part of its common law liability by showing a special contract, it must affirmatively prove such contract and bring the injury clearly within the terms of its exemption, and also show that there was on its part no negligence or want of due care. Hinkle *v.* Southern R. Co., 126 N. C. 932, 36 S. E. 348.

A carrier of live stock is not liable for injury to them unless it is shown that the injury was caused by its negligence, but when negligence on its part is shown, causing the injury, or the loss of the live stock, the extent of that injury or loss is a ques-

the exemption claimed.[75] And the burden so resting upon the

tion for the jury. Louisville & N. R. Co. *v.* Wathen, 23 Ky. L. Rep. 2128, 66 S. W. 714.

75. *United States.* — The Warren Adams, 74 Fed. 413; Rich *v.* Lambert, 12 How. 347; Hudson R. L. Co. *v.* Wheeler Cond. & Eng. Co., 93 Fed. 374.

Alabama. — Montgomery & W. P. R. Co. *v.* Moore, 51 Ala. 394; Southern & N. A. R. Co. *v.* Wood, 66 Ala. 167.

Arkansas. — St. Louis I. M. & S. R. Co. *v.* Lesser, 46 Ark. 236.

California. — Jackson *v.* Sacramento V. R. Co., 23 Cal. 268.

Florida. — Savannah F. & W. R. Co. *v.* Harris, 26 Fla. 148, 7 So. 544.

Georgia. — Cooper *v.* Raleigh & G. R. Co., 110 Ga. 659, 36 S. E. 240; Henry *v.* Central R. & B. Co., 89 Ga. 815, 15 S. E. 757.

Iowa. — McCoy *v.* Keokuk & D. M. R. Co., 44 Iowa 424.

Maine. — Little *v.* Boston & M. R. Co., 26 Me. 239; Dow *v.* Portland Steam P. Co., 84 Me. 490, 24 Atl. 945.

Maryland. — Baltimore & O. R. Co. *v.* Brady, 32 Md. 333.

Minnesota. — Lindsley *v.* Chicago M. & St. P. R. Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692; Southard *v.* Minneapolis S. & P. S. S. M. R. Co., 60 Minn. 382, 62 N. W. 442, 619.

Mississippi. — Chicago St. L. & N. O. R. Co. *v.* Abels, 60 Miss. 1017; Johnson *v.* Alabama & V. R. Co., 69 Miss. 191, 11 So. 104, 30 Am. St. Rep. 534.

New Hampshire. —Hall *v.* Cheney, 36 N. H. 26.

North Carolina. — Mitchell *v.* Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515; Hinkle *v.* Southern R. Co., 126 N. C. 932, 36 S. E. 348.

Ohio. — Pittsburgh C. & St. L. R. Co. *v.* Barrett, 36 Ohio St. 448; U. S. Exp. Co. *v.* Backman, 28 Ohio St. 144.

Tennessee. — Dillard *v.* Louisville N. R. Co., 2 Lea 288.

Texas. — St. Louis S. W. R. Co. *v.* Martin, (Tex. Civ. App.), 35 S. W. 28.

Where the evidence shows that when the car containing the property reached the place of destination there was a large breakage in the floor of the car, and it appears that such breakage might reasonably cause the injuries or damages complained of, the carrier has the burden to show that the injuries were not caused by such breakage. Ohio M. & R. Co. *v.* Tabor, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18, 34 L. R. A. 685.

Where a carrier receives goods for carriage in good order, and delivers them in a damaged condition, the presumption is against the carrier that the goods were damaged in its hands, whether the damage was open or concealed, and accordingly the burden is on the carrier to show otherwise. Savannah, F. & W. R. Co. *v.* Hoffmayer, 75 Ga. 410.

When a common carrier receives goods for carriage, and in case of their loss seeks to evade liability on the ground that the loss was caused by the public enemy, the burden is on the carrier to show by clear and satisfactory evidence that the goods were so destroyed whilst in its possession, inasmuch as the presumption of the law is against the carrier in the case of loss. Van Winkle *v.* South Carolina R. Co., 38 Ga. 32.

In Johnstone *v.* Richmond & D. R. Co., 39 S. C. 55, 17 S. E. 512, the contract for the carriage of live stock released the carrier from all damages incidental to railroad or water transportation which were not "established by positive evidence to have been caused by the negligence" of the carrier or its agent; and it was held that the plaintiff made a *prima facie* case by showing the loss or injury complained of, and that thereupon the carrier had the burden to show that such loss or injury resulted either from causes exempting it under the common law or from which it, the carrier, had exempted itself legally in the contract of carriage.

The Ability or Want of Ability of a Railroad Company to Furnish Cars and transportation when it is ordered by a shipper, without undue interference with its business, and without disregard of its obligation to treat

carrier must be sustained by evidence showing these facts with reasonable certainty; mere conjecture or possibility is not enough.[76]

c. Carrier's Negligence Contributing. — **(1.) Division of Authorities Stated.** — Upon the questions just discussed as to the burden

shippers impartially, and without the use of means of transportation already subject to orders or engagements, must be regarded as being peculiarly within the knowledge of the officers and agents of the company. To show that, with reasonable diligence, the company could not furnish the means of transportation when it was ordered, or at the time the company was notified to have it ready, without undue interference with its business or duty, must be easier for the company than to show the contrary would be for the shipper. Logically, the burden of proof upon this question should be upon the company. Pittsburgh C. C. & St. L. R. Co. *v.* Racer, 5 Ind. App. 209, 31 N. E. 853.

Where there has been unreasonable delay on the part of a carrier in the transportation and delivery of live stock, and where after such unreasonable delay the stock are found to be in an unsound condition, the burden is on the carrier to show that such condition did not result from the unreasonable delay in transportation. Richmond & D. R. Co. *v.* Trousdale, 99 Ala. 389, 13 So. 23, 42 Am. St. Rep. 69.

In Missouri a statute makes it the duty of a railroad company to furnish cars for the shipment of stock with trap doors in the roof, so that a person may enter the car therefrom, and that if it fails to do so the company is liable to all persons damaged thereby, for all injuries which they may sustain on that account. By another statute it is provided that in case of injuries to stock shipped in a car in which there are two or more different kinds of stock, the presumption is that the injury resulted from the mixed shipment, and in Paddock *v.* Missouri Pac. R. R. Co., 155 Mo. 524, 56 S. W. 453, it was held that the presumption referred to in the last statute cited is not rebutted or overcome by merely showing the non-compliance by a railroad company with the former statute as cited; that that statute does not declare the failure of the railroad company to furnish the cars required evidence of or that it raises a presumption that such failure caused the injury, and leaves the shipper to connect the failure and the injury by the preponderance of the evidence, as in any other case of common law or statutory negligence.

In Bankard *v.* Baltimore & O. R. Co., 34 Md. 197, 6 Am. Rep. 321, the contract for the carriage of animals provided that in consideration of reduced freight, the shipper released the carrier from all damages except such as might arise from gross negligence or default of the carrier, or its agents and servants; and it was held that the shipper, or owner, under such a contract had the burden of showing not merely that the animals were injured and damaged by accident and delay occurring in their transportation, as alleged, but also that these were caused by the gross negligence or default of the carrier's agents; and that the fact that some of the animals were injured by accidents during the carriage, that considerable delay occurred in their carriage, and that they were damaged and lessened in weight and value from this cause does not raise the presumption of negligence or default on the part of the carrier's agents within the meaning of the contract.

Where a carrier charged with the loss of goods entrusted to it for carriage admits the receipt of the goods, the carrier has the burden to show that their loss occurred through no negligence or fault upon its part. Blum *v.* Monahan, 36 Misc. 179, 73 N. Y. Supp. 162; *citing* Lichtenstein *v.* Jarvis, 31 App. Div. 33, 52 N. Y. Supp. 605; Rhind *v.* Stake, 28 Misc. 177, 59 N. Y. Supp. 42.

76. St. Louis I. M. & S. R. Co. *v.* Lesser, 46 Ark. 236.

of proof and presumptions the authorities are practically unanimous; but when this point in the case is reached, and the question is, this showing having been made by the carrier, upon whom then devolves the burden of showing the fact of the carrier's negligence, or his freedom from negligence, the authorities are divided.

(2.) Burden on Shipper or Owner. — On the one hand are cases holding that where a carrier relying on a cause for which at common law or under the special contract of carriage he is exempt, shows that the loss or injury occurred from such cause, the burden is then upon the shipper or owner to show that notwithstanding the existence of the cause the loss or injury would not have occurred but for the negligence of the carrier.[77]

(3.) Burden on Carrier — On the other hand, there are numerous authorities to the effect that the carrier has the additional burden of showing his freedom from negligence contributing to the cause of the loss or injury, where he relies for exemption from liability upon grounds for which either at common law or under special

77. *England.* — Muddle *v.* Stride, 9 Car. & P. 380.

United States. — Railroad Co. *v.* Reeves, 10 Wall. 176; Transportation Co. *v.* Downer, 11 Wall. 129; Clark *v.* Barnwell, 12 How. 272; Cunard S. S. Co. *v.* Kelley, 115 Fed. 678; The Warren Adams, 74 Fed. 413.

Arkansas. — Little Rock M. R. & T. R. Co. *v.* Corcoran, 40 Ark. 375; Little Rock M. R. & T. R. Co. *v.* Harper, 44 Ark. 208; Little Rock M. R. & T. R. Co. *v.* Talbot, 39 Ark. 523.

Indiana. — Indianapolis D. & W. R. Co. *v.* Forsythe, 4 Ind. App. 326, 29 N. E. 1138; Pennsylvania Co. *v.* Liveright, 14 Ind. App. 518, 41 N. E. 350, 43 N. E. 162.

Iowa. — Mitchell *v.* U. S. Exp. Co., 46 Iowa 214.

Kansas. — Kansas Pac. R. Co. *v.* Reynolds, 8 Kan. 623; Kallman *v.* U. S. Exp. Co., 3 Kan. 205.

Louisiana. — Kelham *v.* The Kensington, 24 La. Ann. 100; Kirk *v.* Folsom, 23 La. Ann. 584.

Maine. — Sager *v.* Portsmouth S. & P. & E. R. Co., 31 Me. 228, 50 Am. Dec. 659.

Missouri. — Anderson *v.* Atchison T. & S. F. R. Co., 93 Mo. App. 677; Witting *v.* St. L. & S. F. R. Co., 28 Mo. App. 103, 101 Mo. 631 14 S. W. 743; Wolf *v.* Express Co., 43 Mo. 422; Davis *v.* Wabash St. L. & P. R. Co., 89 Mo. 340, 1 S. W. 327; Read *v.* St. L., K. C. & N. R. Co., 60 Mo. 199. *Compare* Hill *v.* Sturgeon, 28 Mo. 323.

New York. — Lamb *v.* Camden & A. R. & T. Co., 46 N. Y. 271, 7 Am. Rep. 327; Whitworth *v.* Erie R. Co., 87 N. Y. 413; Germania F. Ins. Co. *v.* Memphis & C. R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Platt *v.* Richmond Y. R. & C. R. Co., 108 N. Y. 358, 15 N. E. 393.

Pennsylvania. — Farnham *v.* Camden & A. R. Co., 55 Pa. St. 53; Colton *v.* Cleveland & P. R. Co., 67 Pa. St. 211, 5 Am. Rep. 424; Goldey *v.* Pennsylvania R. Co., 30 Pa. St. 242, 72 Am. Dec. 703; American Exp. Co. *v.* Sands, 55 Pa. St. 140.

Rhode Island. — Hubbard *v.* Harnden Exp. Co., 10 R. I. 244.

Tennessee. — Louisville & N. R. Co. *v.* Manchester Mills, 88 Tenn. 653, 14 S. W. 314.

Wisconsin. — Schaller *v.* Chicago & N. W. R. Co., 97 Wis. 31, 71 N. W. 1042.

Where it appears that the primary cause of the damage to goods in carriage was inherent defects in the goods themselves, the owner or shipper has the burden to show that by due diligence on the part of the carrier the damage could have been avoided. Mitchell *v.* U. S. Exp. Co., 46 Iowa 214.

contract, he is not liable,[78] or, as it has been sometimes stated, the

The Pennsylvania Rule is that the effect of a special contract limiting the carrier's liability is to convert the common carrier into a special bailee for hire whose duties are to be governed by the contract, and against whom thereafter, if negligence is charged, it must be proved by the party injured. See American Express Co. *v.* Sands, 55 Pa. St. 140; Camden & A. R. Co. *v* Baldauf, 16 Pa. St. 78. But even under that rule it has been held that where goods are lost while in the custody of the carrier under a special contract, and he gives no account of how it occurred, a presumption of negligence will follow, of course.

78. Rule Stated. — In Chicago St. L. & N. O. R. R. Co. *v.* Moss, 60 Miss. 1003, 45 Am. Rep. 428, the court in sustaining the rule that a carrier of goods must not only exempt itself by showing that the cause of the loss or injury came within the exceptions recognized by law or stipulated by express agreement, and also that his negligence or default did not cause or contribute to the loss or injury, argued that if a shipper at a distance were required to establish the negligence of the carrier by proof of the circumstances attending the loss at a distant point, it would in a great many cases result in a verdict for the carrier, even though there was in fact negligence. "In a large majority of cases the facts rest exclusively in the knowledge of the employees, whose names and places of residence are unknown to the shipper. In many cases the witnesses are the employees whose negligence has caused the loss, and if known to the shipper it may be dangerous for him to rest his case upon their testimony, since the natural impulses of mankind would sway them in narrating the circumstances to palliate their fault by stating the occurrence in the most favorable light to themselves. All the authorities hold that it devolves upon the carrier to show the loss to have occurred by an excepted cause. In doing this it will add but little to his burden to show all the attending circumstances, and that the burden rests upon him to do so and disproves his own negligence we think arises from the terms of the contract, from the character of his occupation, and from that rule governing the production of evidence which requires the facts to be proved by that party in whose knowledge they peculiarly lie."

The shipper makes a *prima facie* case against the carrier when he shows that the goods were not delivered. This casts the burden on the carrier to show that the loss occurred from a cause excepted; and he must also prove a *prima facie* case of diligence on his part. Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729, quoting with approval from Steele *v.* Townsend, 37 Ala. 247, 79 Am. Dec. 49, in which the bill of lading exempted the carrier from breakage, and in which the court said "The injury is not within the exception until it is shown that it occurred, notwithstanding the exercise of such care and diligence (as would have prevented it.) It is not strictly accurate to say that the onus is on the carrier to show not only that the cause of loss was within the exception, but also that it exercised due care. The correct view is, that the loss is not brought within the exception unless it proves to have occurred without negligence on the part of the carrier; and as it is for the carrier to bring itself within the exception, it must make at least a *prima facie* showing that the injury was not caused by its neglect. See also Mobile & O. R. Co. *v.* Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Mobile & O. R. Co. *v.* Jarboe, 41 Ala. 644; Southern & N. R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 678.

In Louisville & N. R. Co. *v.* Cowherd, 120 Ala. 51, 23 So. 793, an action to recover damages for the loss of goods by a fire, the court said: "By the common law a common carrier becomes absolutely liable for the safety of goods intrusted to it for transportation, and responsible for any loss of or injury to the goods not caused by the act of God or of the public enemy, or by the fault of

loss or injury is not brought within the exemption unless the carrier proves that it occurred without negligence on his part.[79]

the party complaining; and, when loss or injury happens, a *prima facie* presumption of negligence arises, and the burden is on the carrier to exempt itself from liability. By special contract, however, this common law liability may be limited, but not to the extent of exempting the carrier from responsibility for loss or damage caused by its own negligence. In an action against the carrier, as such, to recover damages for the loss of goods, a *prima facie* case is made out by proof that the carrier received the goods for transportation, and failed to deliver them safely; and, if the carrier claims exemption from liability under a special contract, it must show, to the reasonable satisfaction of the jury, not only that the cause of loss was within the limitation of the contract, but also that the loss and the cause of loss were without negligence on its part." Steele *v.* Townsend, 37 Ala. 247, 79 Am. Dec. 49; South. & N. A. R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578; Louisville & N. R. R. Co. *v.* Oden, 80 Ala. 38.

79. *Alabama.* — East Tennessee V. & G. R. Co. *v.* Johnston, 75 Ala. 596, 51 Am. Rep. 489; Louisville & N. R. R. Co. *v.* Oden, 80 Ala. 38; Alabama G. S. R. Co. *v.* Little, 71 Ala. 611; Western R. Co. *v.* Harwell, 91 Ala. 340, 8 So. 649; Coosa R. S. B. Co. *v.* Barclay, 30 Ala. 120; Southern Exp. Co. *v.* Hess, 53 Ala. 19.

Connecticut. — Mears *v.* N. Y., N. H. & H. R. Co., (Conn.), 52 Atl. 610. *Compare* Camp *v.* Hartford & N. Y. S. B. Co., 43 Conn. 333.

Georgia. — Berry *v.* Cooper, 28 Ga. 543; So. Exp. Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783.

Minnesota. — Hull *v.* Chicago, St. P. M. & O. R. Co., 41 Minn. 510, 43 N. W. 391, 16 Am. St. Rep. 722, 5 L. R. A. 587; Boehl *v.* Chicago M. & St. P. R. Co., 44 Minn. 191, 46 N. W. 333; Shriver *v.* Sioux C. & St. P. R. Co., 24 Minn. 506, 31 Am. Rep. 353; Hinton *v.* Eastern R. Co., 72 Minn. 339, 75 N. W. 373; Shea *v.* Minneapolis St. P. & S. S. M. R. Co., 63 Minn. 228, 65 N. W. 458.

Mississippi. — Mobile & O. R. Co. *v.* Tupelo F. M. Co., 67 Miss. 35, 7 So. 279, 19 Am. St. Rep. 262; Chicago St. L. & N. O. R. Co. *v.* Moss, 60 Miss. 1003, 45 Am. Rep. 428; Chicago St. L. & N. O. R. Co. *v.* Abels, 60 Miss. 1017; Southern Exp. Co. *v.* Seide, 67 Miss. 609, 7 So. 547.

Ohio. — Gaines *v.* Union Transp. & Ins. Co., 28 Ohio St. 418; U. S. Exp. Co. *v.* Backman, 28 Ohio St. 144; Union Exp. Co. *v.* Graham, 26 Ohio St. 595; Graham *v.* Davis, 4 Ohio St. 362, 62 Am. Dec. 285.

South Carolina. — Swindler *v.* Hilliard, 2 Rich. Law 286; Baker *v.* Brinson, 9 Rich. Law 201; Slater *v.* South Carolina R. Co., 29 S. C. 96, 6 S. E. 936; Wallingford *v.* Columbia & G. R. Co., 26 S. C. 258, 2 S. E. 19.

Texas. — Houston & T. C. R. Co. *v.* Bath, 17 Tex. Civ. App. 697, 44 S. W. 595; Galveston H. & S. A. R. Co. *v.* Efron, (Tex. Civ. App.), 38 S. W 639; Missouri Pac. R. Co. *v.* China Mfg. Co., 79 Tex. 26, 14 S. W. 785; Ryan *v.* Missouri K. & T. R. Co., 65 Tex. 13, 57 Am. Rep. 589; Texas & P. R. Co. *v.* Payne, 15 Tex. Civ. App. 58, 38 S. W. 366.

West Virginia. — Brown *v.* Adams Exp. Co., 15 W. Va. 812.

In an action against a carrier for failure to carry goods delivered to it for carriage, after proof of the delivery of the goods to the carrier, and the fact of their not having been delivered, the carrier, when relying upon an exemption in the bill of lading from liability for the loss of the goods by fire, has the burden to show that the goods were destroyed by fire, and that the fire was not the result of its negligence. Mouton *v.* Louisville & N. R. Co., 128 Ala. 537, 29 So. 602. See also Louisville & N. R. R. Co. *v.* Touart, 97 Ala. 514, 11 So. 756; Alabama G. S. R. Co. *v.* Little, 71 Ala. 611.

In Southern & N. A. R. Co. *v.* Wilson, 78 Ala. 587, the bill of lading recited that the goods were shipped at "owner's risk," and it was held that the carrier must make at least a

The Reason of the Rule so announced is said to be within the principle that where a particular necessary to be proved rests peculiarly within the knowledge of a party, the burden of proof is upon such party.[80]

(4.) **Liability to Injury From Mere Handling.**— Where the property shipped is of such a character that it is liable to injury upon the mere handling of it, the presumption of injuries resting against a carrier from the fact of its shipment in good order and its delivery by the carrier in bad order, does not apply; but such facts are evidence merely to go to the jury along with all the other evidence of the case.[81]

(5.) **Delivery to Rightful Owner.** — In an action against a carrier for breach of contract to carry, consisting of a delivery to a person, other than the consignee named, claimed by the carrier to be the rightful owner of the property, the burden of showing that the person to whom it yielded possession was the rightful owner rests upon the carrier.[82]

(6.) **Property Received in Bad Order.** — Although a carrier is not bound to receive for carriage property which is improperly packed or in a bad condition, yet if he does receive it he is bound to use all due care for its safe carriage; and if while in his charge the property is injured the burden is on the carrier to show that the injury is attributable to the improper packing or bad condition when received and not to any fault or neglect on his part.[83]

f. *Connecting Carriers.* — The rule as to connecting carriers is

prima facie showing that the injury was not caused by its neglect.

In Western R. *v.* Harwell, 91 Ala. 340, 8 So. 649, *affirmed*, 97 Ala. 341, 11 So. 781, the court said: "The onus is primarily on the defendant to show that the injury did not result from negligence on its part, and that the cause thereof was in the terms of the exception. The rule, however, should not be rigidly applied. That injury was not caused by neglect on the part of the carrier, and that it was within the terms of the exception, are relative propositions. The rule, accurately and reasonably interpreted, does not mean that the carrier must establish both of these propositions, independently of each other. When the carrier makes a *prima facie* showing that the injury occurred without negligence on its part, this *prima facie* brings its cause within the exception."

In Georgia, the Code, § 3033, provides that in cases of injury to person or property, the presumption in all cases is against the carrier that the injury was the result of its negligence, and to relieve itself of this presumption it is incumbent on the carrier to show that it was in the exercise of all ordinary care and diligence, and this presumption is applicable as well to an action founded upon the carrier's general liability as to one founded upon a contract limiting the carrier's liability. Columbus & W. R. Co. *v.* Kennedy, 78 Ga. 646, 3 S. E. 267.

80. Mitchell *v.* Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515.

81. Buck *v.* Pennsylvania R. Co., 150 Pa. St. 170, 24 Atl. 678, 30 Am. St. Rep. 800.

82. Cleveland C. C. & St. L. Co. *v.* Moline Plow Co., 13 Ind. App. 225, 41 N. E. 480.

83. Union Exp. Co. *v.* Graham, 26 Ohio St. 595.

that the carrier in whose hands the property is found damaged is presumed to have caused the damage, and that the burden of proof is upon such carrier to rebut this presumption by showing that the property was not damaged while in its possession.[84] And this is true although the goods are of a perishable nature and

84. Connecting Carriers. — *Florida.* — Savannah F. & W. R. Co. *v.* Harris, 26 Fla. 148, 7 So. 544.

Georgia. — Evans *v.* Atlanta & W. P. R. Co., 56 Ga. 498; Central R. Co. *v.* Rogers, 66 Ga. 251; Forrester *v.* Georgia R. & B. Co., 92 Ga. 699, 19 S. E. 811; Georgia R. & B. Co. *v.* Forrester, 96 Ga. 428, 23 S. E. 416.

Indian Territory. —Gulf C. & S. F. R. Co. *v.* Jones, 1 Ind. Ter. 10, 37 S. W. 208.

Minnesota. — Shriver *v.* Sioux C. & St. P. R. Co., 24 Minn. 506, 31 Am. Rep. 353.

Missouri. —Flynn *v.* St. Louis & S. F. R. Co., 43 Mo. App. 424.

New York. — Smith *v.* New York C. R. Co., 43 Barb. 225.

North Carolina. — Dixon *v.* Richmond & D. R. Co., 74 N. C. 538; Morgantown Mfg. Co. *v.* Ohio R. & C. R. Co., 121 N. C. 514, 28 S. E. 474, 61 Am. St. Rep. 679.

Tennessee. — Louisville & N. R. Co. *v.* Tennessee Brew. Co., 96 Tenn. 677, 36 S. W. 392.

Texas. — Texas P. R. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; Houston & T. C. R. Co. *v.* Ney, (Tex. Civ. App.), 58 S. W. 43; St. Louis S. W. R. Co. *v.* Cohen, (Tex. Civ. App.), 55 S. W. 1123.

Wisconsin. — Laughlin *v.* Chicago & N. W. R. Co., 28 Wis. 204, 9 Am. Rep. 493.

Contra. — Marquette H. & O. R. Co. *v.* Kirkwood, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453; Millam *v.* Southern R. Co., 58 S. C. 247, 36 S. E. 571.

Rule Stated. — In Louisville & N. R. Co. *v.* Jones, 100 Ala. 263, 14 So. 114, the court said: "Where goods are delivered to a common carrier for transportation to a point beyond its own line, under a through bill of lading, which, however, contains a stipulation exempting the receiving carrier from liability for loss or damage occurring beyond its own terminal, and the goods are not delivered to the consignee at all, the presumption of law is that they were lost by the receiving carrier, and it will be liable, unless it can show that the consignment was safely delivered to the connecting carrier. The burden is on it, in such case, and plaintiff, having shown non-delivery by the discharging carrier, is entitled to recover without more. Georgia Pac. R. Co. *v.* Hughart, 90 Ala. 36, 8 So. 62, and cases cited. On the other hand, where, upon such shipment and bill of lading, the goods have been delivered by the connecting or final carrier to the consignee, or have been carried to the place of consignment for delivery, and are then in a damaged condition, the presumption of law is that they were delivered by the receiving to the connecting carrier in good condition, and that the damage occurred while they were in the possession of the delivering carrier; and therefore, in an action against the receiving carrier for damages occasioned, not by the loss, destruction or non-delivery of the property, but by the injuries inflicted upon it at some time before delivery to the consignee, the presumption of safe delivery by the first to the second carrier must be overcome by evidence that the damage occurred before the shipment passed out of the possession of the first carrier. The burden, in this latter case, is upon the plaintiff, and unless he discharges it he fails to make out his cause of action, and must be cast. The presumption of law being that the delivering carrier has damaged the property, in an action by the owner against it, the plaintiff need only prove the shipment in good condition, and the delivery in damaged condition."

Where the contract of carriage requires the initial carrier to safely transport the freight over its line to the end of its route, and there safely

would by mere lapse of time become worthless from natural inherent cause.[85] And this rule is not varied by the fact that the property was carried by the last carrier in the same car in which it received them.[86] And the rule has been held to apply to intermediate carriers.[87] The fact that the bill of lading exempts the carrier from loss or damage, unless it is proved to have occurred during the time of its transit over the particular carrier's line, does not change the presumptive effect which the law attaches to given facts or require direct proof where the law has made legal presumption sufficient.[88]

deliver it to the connecting carrier, it has the burden of proof to show that it has done so. Georgia Pac. R. Co. *v.* Hughart, 90 Ala. 36, 8 So. 62.

Where goods receipted for as in good order by the first of a connecting line of carriers are delivered in a damaged condition, the last carrier being sued therefor may show that the damage was not done to the goods on either of the lines of railroads over which the goods were carried, but that the damage occurred before the goods were received by either of the connecting carriers for shipment. Central R. & B. Co. *v.* Rogers, 57 Ga. 336.

The Fact of Loss by the Preceding Carrier, so as to rebut this presumption, is not shown by proof that the goods when received by such preceding carrier were put in a sealed car, where it is not also shown in what condition as to seal and contents the car was received by the last carrier. Faison *v.* Alabama & V. R. R. Co., 69 Miss. 569, 13 So. 37, 30 Am. St. Rep. 577.

Nor is proof that some of the damage was done by preceding carriers enough, but it must be shown how much; and the fact that it was established by the shipper's own testimony that some of the goods were damaged before coming into the hands of such carrier, does not affect the question of the burden of proof. Texas N. O. R. Co. *v.* Brown, (Tex. Civ. App.), 37 S. W. 785.

Where the contract of carriage for a shipment of through freight stipulates for a specified means of transportation, as, for example, that the shipment shall have passenger service, the burden of proof is on the contracting carrier in case of loss resulting from delay due to such means of transportation not having been accorded, to show that it performed its duty in notifying each successive connecting carrier as to the means of transportation stipulated, or if it did not so notify them, then that the delay in transportation was not attributable to its default in this regard. Colfax Mountain Fruit Co. *v.* Southern Pac. Co., 118 Cal. 648, 46 Pac. 668, 50 Pac. 775.

Where a last connecting carrier receives for the purpose of completing the transportation, cars of live stock so loaded that they can not be further shipped without loss or injury, the burden is on the carrier to show that the loss or injury was not the result of its own default or negligence. Paramore *v.* Western R. Co., 53 Ga. 383. The court in its argument in this case further said that this rule would apply whether the shipment was of merchandise or live stock.

85. Forrester *v.* Georgia R. & B. Co., 92 Ga. 699, 19 S. E. 811.

86. Leo *v.* St. P. M. & M. R. Co., 30 Minn. 438, 15 N. W. 872.

87. Savannah F. & W. R. Co. *v.* Harris, 26 Fla. 148, 7 So. 544. *Compare* Farmington Merc. Co. *v.* Chicago B. & Q. R. Co., 166 Mass. 154, 44 N. E. 131, wherein it was held that there is no presumption that goods which are delivered to the terminal carrier in bad order were injured while in the hands of the first carrier; but if the shipper seeks to hold such carrier liable on that basis, he has the burden of proof.

88. Proof is proof, whether by direct evidence or force of presumption. In other words, the fact that the goods were delivered to the ini-

The Reason of This Rule is founded upon the better means the connecting carriers have to ascertain where the loss or injury occurred.[89]

g. *Live Stock Accompanied by Shipper.* — Where a shipper of live stock accompanies the shipment under a special contract to care for them himself, the burden is on the shipper in case of their loss or injury to show by a preponderance of the evidence that the loss or injury in question was not occasioned by any act of negligence on his part.[90] And if the loss was occasioned

tial carrier in good condition, raising the presumption equivalent to positive proof, so long as it is not rebutted, that the goods were in like condition when received by the terminal carrier, coupled with the evidence of damage when the property was delivered to the owner, proves the injury during transit over the terminal carrier's line. Gulf C. & S. F. R. Co. *v.* Jones, 1 Ind. Ter. 10, 37 S. W. 208.

89. The Reason of the Rule of Evidence. — "In the nature of the business, the party employing the transportation is not expected to follow up his goods to see that each carrier makes proper delivery to the succeeding one; but his reliance is, and the duty of each carrier is, that the goods shall be delivered as received. If not delivered at the point of final destination, it is but reasonable that the last carrier should account for them, and bear the responsibility of loss, if not able to show it never received them. Public policy requires this under the system of transportation over several lines of road, for the protection of those who engage in such commerce, because there is less hardship upon the carrier to trace the loss, it being ordinarily impracticable for the owner to trace it without great trouble and expense, and sometimes to the consumption of the value of the property lost." Savannah F. & W. R. Co. *v.* Harris, 26 Fla. 148, 7 So. 544.

In Gulf C. & S. F. R. Co. *v.* Edloff, (Tex. Civ. App.), 34 S. W. 410, there was evidence of the damaged condition of the property and of the car in which they were shipped at the time of delivery to the connecting carrier, and the court argued that while the extent of the damage was not shown, this was peculiarly within the knowledge of the carriers, and the burden rested upon them to show the extent of it if they desired to settle the matter between them.

90. Louisville & N. R. Co. *v.* Harned, 23 Ky. L. Rep. 1651, 66 S. W. 25; Louisville & N. R. Co. *v.* Wathen, (Ky.), 49 S. W. 185; Chicago B. & Q. R. Co. *v.* Williams, 61 Neb. 608, 85 N. W. 832; Texas & P. R. Co. *v.* Arnold, 16 Tex. Civ. App. 74, 40 S. W. 829.

Compare Crawford *v.* Southern R. Co., 56 S. C. 136, 34 S. E. 80, an action against a carrier for damages resulting from the killing of or injury to live stock received by it for carriage under a special contract, where it was held that the carrier had the burden of proof to show that the injury complained of resulted, not from its own negligence, but from one of the causes mentioned in the special contract, notwithstanding that the contract required the shipper or his agent to ride on the train on which the stock were transported and look after the loading and unloading of the same in transit, in which case the carrier has the burden to show that the injuries resulted from the shipper's fault.

In Faust *v.* Chicago & N. W. R. Co., 104 Iowa 241, 73 N. W. 623, 65 Am. St. Rep. 454, an action for the value of horses burned, the plaintiff accompanied the shipment as provided in the contract of carriage, which required him to ride in a caboose attached to the train until the train reached a certain point, where the train left him through accident, and it was held that the plaintiff did not have the burden to show, by preponderance of the evidence, that his loss did not occur by

by his failure to do what he was required by the contract of carriage to do, then he must show that such failure resulted from an omission on the part of the carrier to perform duty devolving upon it.[91]

B. Direct Testimony. — *The Delivery of Goods by a Carrier to a Connecting Carrier in Good Condition* may be shown by the testimony of the carrier's agent to that effect, where he based his knowledge of that fact upon the custom existing between the roads, that if the agent of the connecting carrier, after examination, found anything wrong he would not receive them.[92]

Inability to Furnish Cars as Agreed because of the situation and employment of the cars at the time, cannot be shown by the testimony of the carrier's agents who have no knowledge of the general resources of the carrier in respect of its car equipment.[93]

C. Circumstantial Evidence. — a. *Generally.* — The fact that a carrier exercised that care imposed upon it by law in its carriage of property, or that it failed to do so, is seldom, if ever, susceptible of direct proof, but is a fact to be determined from all the circumstances surrounding the loss or injury complained of; and hence great latitude is permitted in the reception of evidence showing[94]

reason of his acknowledged failure to remain upon the train with his stock, and care for it, or to show that the loss did not occur by reason of any failure on his part to carry out his agreement to take care of the stock while in transit.

91. Grieve *v.* Ill. Central R. Co., 104 Iowa 659, 74 N. W. 192.

92. Knott *v.* Raleigh & G. R. Co., 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321.

93. Ayres *v.* Chicago & N. W. R. Co., 75 Wis. 215, 43 N. W. 1122.

94. Overloaded Engine. — On an issue as to whether delay in transportation of live stock was due to the carrier's negligence it is proper to receive evidence that the engine drawing the train which carried the stock in question was overloaded or that there were some one or more of the defects alleged existing in the engine and that the carrier had notice thereof or ought to have known it, as being proper circumstantial evidence to be considered by the jury. Cleveland C. C. & St. L. R. Co. *v.* Heath, 22 Ind. App. 47, 53 N. E. 198.

Care of Live Stock. — In an action against a carrier for live stock lost or injured due to the alleged negligent handling of the same in transportation, it is competent, upon an issue made by the carrier that the loss or injury was due to the natural viciousness of the stock, to admit evidence as to the want of feed and water at the time of the loss or injury occurring, there being also proof that when the cattle were fed and watered they at once quieted down. Gulf C. & S. F. R. Co. *v.* Porter (Tex. Civ. App.), 61 S. W. 343.

Carrier's Knowledge of Shorter Route. — In an action against an express company for the negligent delay in the shipment of a corpse, it is not error to permit a witness for the plaintiff to testify that he pointed out to the carrier's agent at the place of shipment a certain route as the most direct route, and that at an intermediate point objected to the body being sent by another route, and insisted on its shipment by the route pointed out, such evidence going to show that the carrier had knowledge of the shorter route. Wells, Fargo & Co. *v.* Fuller, 13 Tex. Civ. App. 610, 35 S. W. 824.

Employee Unfit for Work. — On an issue as to whether injury to property, suffered while cars were being coupled together, was due to the carrier's negligence, it is proper to show

or negativing the fact of negligence,[95] provided, of course, the

that one of the brakemen operating the train was unfit for service by reason of a wounded hand received in an accident on another train the night before, and the mere fact that another train in which the wounded brakeman was serving met with the accident is only incidental as showing the fact of his having been wounded and does not affect the admissibility of the evidence. Galveston H. & S. A. R. Co. *v.* Johnson, (Tex.), 19 S. W. 867.

Condition of Property. — In an action against a carrier for negligence in carrying hay whereby it was wet and damaged, it is a necessary part of the plaintiff's case to show the condition of the hay when it was delivered to the carrier; evidence of its condition at a distant place, from which it was shipped to the place of delivery to the carrier can only be resorted to in the absence of more direct proof. But where proof of such condition at such distant place is admitted as evidence of its condition at the place of delivery to the carrier, it is legitimate on cross-examination to inquire into the mode of its trans-shipment, the manner of its stowage, the weather, and the condition in which it arrived; such inquiry being matters which by the direct evidence is left to inference, and on which the plaintiff has the burden of proof. Marquette H. & O. R. Co. *v.* Langton, 32 Mich. 251.

Evidence of the condition of the property when seen by the witness in the carrier's warehouse at the place of destination a week or so after the goods were shipped is admissible. Curtis *v.* Chicago & N. W. R. Co., 18 Wis. 312.

In Holden *v.* N. Y. Cent. R. Co., 54 N. Y. 662, an action against a common carrier for injuries resulting from delay in transportation, the plaintiff was permitted to prove the condition of the freight upon its arrival at the place of delivery as tending to show its condition at an intermediate point where the defendant turned it over to a connecting carrier.

In an action against a carrier for the negligent loss of an animal in transportation, it is error to exclude evidence for the shipper that the carrier, through its authorized agent, had been given timely notice of the shipment and that the agent had agreed to give the shipper notice of the arrival and had the means of doing so by a telephone connecting the carrier's office with the shipper's residence, which the carrier had been in the habit of using for that purpose. Pacific Exp. Co. *v.* Lothrop, 20 Tex. Civ. App. 339, 49 S. W. 898.

95. In an action against a common carrier to recover damages to goods shipped by sea, or where the same matter is relied on as a defense against an action by him to recover freight, evidence that goods of the character of those in question usually arrive in a damaged and broken condition is admissible for the carrier as a circumstance tending to show that the breakage or damage in question was not the result of negligence on his part. Steel *v.* Townsend, 37 Ala. 247, 79 Am. Dec. 49.

Shipper Consenting to Unloading. In an action against a carrier for injuries to live stock sustained in transportation it is proper to admit evidence for the carrier as to whether or not the shipper had paid for loading, reloading, and feeding the stock at an intermediate station, as bearing upon the issue whether or not the shipper had consented to such unloading. Nashville C. & St. L. R. Co. *v.* Parker, 123 Ala., 638, 27 So. 323.

On an issue as to the alleged negligence of a carrier in the transportation of property which was injured by water, evidence is admissible for the carrier to show that no rain fell while the property was on the carrier's road, and that the car in which it was being carried was not allowed to be stopped near any water tank. Burwell *v.* Raleigh & G. R. Co., 94 N. C. 451.

Unusual Accumulation of Freight. On an issue as to the negligence of a carrier by river for the loss of goods burned in its warehouse while awaiting reshipment, evidence that because of the low stage of water in the river

evidence be not otherwise objectionable.[96] So also in the same manner may the fact of the loss or injury be thus established,[97] or

such a quantity of freight had accumulated in the warehouse that the carrier could not by ordinary care have removed with the facilities at its command is competent and material. Hornthal *v.* Roanoke N. & B. S. Co., 107 N. C. 76, 11 S. E. 1049. But where a carrier agrees to carry the property by the next train, evidence of an unexpected rush of freight is not admissible in defense of the delay. Deming *v.* Grand Trunk R. C., 48 N. H. 455.

96. On an issue as to whether or not the loss of goods by a carrier was caused by evaporation or by the fault of the carrier, evidence that other persons had like goods stolen at the same point is not admissible to show that the carrier or its agents stole the goods in question, although the other thefts took place during the same time as the shipment in question, and were by the carrier's employees. Central R. Co. *v.* Brunson, 63 Ga. 504.

In an action against a carrier to recover for damages to goods in transportation, evidence showing that like goods shipped in the same kind of cars from the same place to the same destination just previous and subsequent to the shipment in question had arrived in good condition is not admissible; such testimony being within the principle of *res inter alios acta alteri nocere non debet.* Ft. Worth & D. C. R. Co. *v.* Harlan, (Tex. Civ. App.), 62 S. W. 971.

In Blodgett *v.* Abbott, 72 Wis. 516, 40 N. W. 491, 7 Am. St. Rep. 873, an action against an initial carrier for damages for delay, the defendant carrier asked its agent at the connecting point whether he had any knowledge that any other train on the connecting line would pass through for the place of destination other than a regular train due to pass through more than thirty-six hours after the arrival of the goods at the connecting point. It was held error to allow this question to be answered, because such evidence could not affect the liability of the defendants for their delay in not forwarding such perishable goods to the extent of their ability to do so until their delivery or effort to deliver them to the other road, as the connecting carrier. They must acquit themselves of this duty, and they cannot shield themselves from it by delays on the connecting road. They are bound to know when they so contract whether the goods could be carried through without such delay as would destroy or impair such perishable freight.

On an issue as to the negligence of a common carrier in delaying the transportation of goods by water, evidence as to the time when navigation between the points of shipment and delivery ordinarily close is inadmissible; the evidence upon that question should be confined to the year in question. McCotter *v.* Hooker, 8 N. Y. 497.

97. Non-Receipt of Goods by Consignee. — In an action against a carrier for breach of a contract of carriage in failing to deliver to the plaintiffs the goods contracted to be carried, it is proper for the plaintiffs to show that they never received the goods. Alabama M. R. Co. *v.* Thompson, 134 Ala. 232, 32 So. 672. "If he had received them the evidence was reasonably relevant, and while if he had not received them it might not have been conclusive that they had not been delivered, it was proper evidence to be considered by the jury for what it was worth in connection with all the other evidence as tending to show that the freight had never been delivered at said station."

Inquiries by Consignee. — In an action by a consignee of goods against a carrier for failure to deliver them, the fact that the plaintiff, after the goods should have been delivered, made inquiries for them of the carrier is competent in proof of their having been lost. Ingledew *v.* Northern R., 7 Gray (Mass.) 86.

Shipper Not Paid for Goods. — In an action by a shipper against a carrier for damages for failure to transport and deliver goods turned over to it for that purpose, it is not error

negatived.[98]

b. *Precautions.* — So, on an issue as to whether or not the loss or injury was due to the carrier's negligence, it is proper to receive evidence of acts of precaution which the carrier took,[99] or which were brought to his attention and might have been taken, but which he failed or refused to take [1] in order to avoid the loss or injury.

to allow the plaintiff to testify that he had never been paid for the goods, either by the defendant or the consignee. Southern R. Co. *v.* Allison 115 Ga. 635, 42 S. E. 15.

In an action against a carrier for injuries to live stock in transportation, it is proper to receive evidence that a bill for feeding the stock at an intermediate station was presented to the shipper at the terminal station and refused to be paid, such evidence having a tendency to locate where the injury (which appeared to have resulted from reloading) occurred, especially in view of the testimony of the person in charge of the train who saw the stock in question unloaded, that the seal of the initial station on the car was unbroken. Nashville C. & St. L. R. Co. *v.* Parker, 123 Ala., 683, 27 So. 323.

98. On an issue as to whether or not a carrier delivered to the consignee all the goods received by it from the consignor, evidence tending to show that the car in which the goods were shipped was sealed at the loading point and remained under seal until delivery of the goods to to the consignee, is proper to be received on behalf of the carrier. Missouri K. & T. R. Co. *v.* Simonson, 64 Kan. 802, 68 Pac. 653.

In Mears *v.* New York N. H. & H. R. Co., (Conn.), 52 Atl. 610, an action for injury to goods received in transit, it was held that the carrier was properly allowed to show that the consignee's agent who received the goods from the carrier for delivery looked at the box containing the goods, though from a position where he could not see all its sides, when it was pointed out to him by the defendant's delivery clerk, and made no complaint. If the box was then in a damaged condition, said the court, "it would have been natural for one who was there to act for the plaintiff to remark upon it, and his silence was evidence that he observed nothing amiss in its condition, and that there was nothing amiss to be observed." While the opinion in this case does not clearly so state, the evident purpose of this evidence was to show that the injury to the goods occurred after they left the hands of the carrier.

Evidence of a larceny of a different parcel from a common carrier from a place where the parcel for whose loss the carrier is sued does not appear to have been deposited, is not competent for the carrier to show that the parcel in question was also stolen. Shelden *v.* Robinson, 7 N. H. 157, 26 Am. Dec. 726.

99. On an issue as to the negligence, *vel non,* of a carrier by water, in the transportation of freight, the fact that he communicated by telegraph with the point on the river above the place where his boat had stranded for the purpose of ascertaining the stage of water at that point is relevant evidence for the carrier. Johnson *v.* Lightsey, 34 Ala. 169, 73 Am. Dec. 450. Dunn *v.* Hannibal & St. J. R. Co., 68 Mo. 275.

1. Evidence of Remonstrances to Employees of a carrier in charge of the property that it was improperly stowed is competent to show that the attention of those in charge was called to the difficulty. Black *v.* Camden & A. R. & T. Co., 45 Barb. (N. Y.) 40.

Evidence that a carrier's agent in charge of an animal lost through the alleged negligence of the carrier was told what was proper and necessary to be done to relieve the animal and to restore him to his normal condition, which such agent refused to do, is admissible to show negligence on the part of the carrier. Pacific Exp.

D. Custom and Usage. — On an issue as to the negligence of a carrier in transportation of property, proof of the general custom of other carriers under similar circumstances is competent as tending to show that the defendant was not negligent under the circumstances,[2] but if the method of shipment used by the carrier was an unsafe one, the fact that it was the carrier's custom to so ship cannot exonerate it from its contract to transport safely, and hence its own usage would have no tendency to show that it had adopted a safe method.[3]

Evidence of a Custom for Shippers of Live Stock to Accompany the Shipment is irrelevant in an action against the carrier for damages due to unreasonable delay in transportation.[4]

E. Declarations. — a. *Generally.* — The condition of the prop-

Co. *v.* Lothrop, 20 Tex. Civ. App. 339, 49 S. W. 898.

In an action against a carrier to recover for damages to live stock injured by too long confinement in the cars, it is competent on an issue as to the plaintiff's due care for him to testify that he did not know a permit to unload the stock was necessary, it being the carrier's duty to consider the need of such permit. Hendricks *v.* Boston & A. R. Co., 170 Mass. 44, 48 N. E. 835.

2. Custom and Usage. — Hinton *v.* Eastern R. Co., 72 Minn. 339, 75 N. W. 373; Hendricks *v.* Boston & A. R. Co., 170 Mass. 44, 48 N. E. 835; Lane *v.* Boston & A. R. Co., 112 Mass. 455.

In an action against a carrier by water for injury to goods shipped, after proof that the carrier at the time of the injury complained of was descending the river with two flat boats lashed together, it is permissible for the carrier to show that that was the customary mode of navigating the river. Johnson *v.* Lightsey, 34 Ala. 169, 73 Am. Dec. 450.

Evidence of a usage of railroads by which receipts for cars which are received by one company from another in the afternoon or evening are not delivered until the next morning, after the receipt of the cars, should be received, when it is consistent with the testimony of the company's yard master that the cars in question were delivered the day before the receipts were given. Hewitt *v.* Chicago B. & Q. R. R. Co., 63 Iowa 611, 19 N. W. 790.

Evidence of the course of business of the railroad company, or its custom as to rates charged other persons, is not admissible in an action against the railroad company for any injuries to live stock shipped under a special contract, except as such evidence tends to show the shipper's knowledge as to the regular and special rates. Paddock *v.* Missouri Pac. R. R. Co., 155 Mo. 524, 56 S. W. 453.

In an action against a carrier to recover for goods burned while in the carrier's freight house at the terminal point, evidence as to the custom of other railroad companies to keep their oil and fill and light their lamps in the freight room of their depot buildings is not admissible. Texas & P. R. Co. *v.* Payne, 15 Tex. Civ. App. 58, 38 S. W. 366. *Following* Weatherford R. Co. *v.* Duncan, 10 Tex. Civ. App. 479, 31 S. W. 562.

As to whether or not the condition of property upon its arrival at the point of destination was due to the length of time taken by the carrier in its transportation, evidence that it was customary on other roads like that of the carrier in question to run trains carrying like property at a rate of speed greater than that shown to have been run by the train in question, is admissible. Southern Pac. Co. *v.* Arnett, 11 Fed. 849.

3. Leonard *v.* Fitchburg R. Co., 143 Mass. 307, 9 N. E. 667.

4. Richmond & D. R. Co. *v.* Trousdale, 99 Ala. 389, 13 So. 23, 42 Am. St. Rep. 69.

erty at the time of shipment can not be shown by declarations by the shipper's agent which, although made at the time of shipment, were not made under such circumstances that they can be regarded as an act which the agent was then performing on behalf of his principal.[5]

b. *Delivery to Terminal Carrier.* — The written endorsement of the agent of the terminal carrier on the bill of lading acknowledging receipt of the freight as in good order is not competent to prove the fact stated unless accompanied by proof that it was his business to so act on reference of the matter to him.[6]

c. *Carrier's Negligence.* — The carrier's negligence as being the cause of the loss or injury to freight cannot be established by evidence of declarations of its servants or agents unless they come within the *res gestae* rule.[7]

5. Southern Pac. Co. *v.* Arnett, 111 Fed. 849.

6. Evans *v.* Atlanta & W. P. R. Co., 56 Ga. 498.

Declarations of a carrier's agent as to what was not done in respect to shipment of property by the carrier at the time of the shipment are not admissible against the carrier where they were made long after the shipment. Pennsylvania Co. *v.* Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215.

Evidence of declarations by a carrier's agent as to the time of the arrival of a car is not admissible against the carrier when there is no proof that the person who made the statement had any authority to bind the carrier by them; they are mere hearsay. Hewitt *v.* Chicago, B. & Q. R. R. Co., 63 Iowa 611, 19 N. W. 790.

In an action against the owners of a river steamboat for the loss of goods destroyed by fire, a protest made by the officers and passengers of the steamboat are mere hearsay *ex parte* statements, and are not competent evidence against shippers. Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729.

7. Declarations of a carrier's agent in relation to property entrusted to him in the usual course of business as to the reasons of the delay in the transportation are competent evidence as part of the *res gestae* against the carrier. McCotter *v.* Hooker, 8 N. Y. 497.

Whenever it becomes material for any purpose in an action against a carrier for goods to recover for their loss or injury, to prove the time when the train carrying the goods was due at a point connecting with the carrier's, it is proper to receive the declarations of the conductor in charge. San Antonio & A. P. R. Co. *v.* Barnett, (Tex. Civ. App.), 66 S. W. 474.

Declarations of a conductor on a freight train as to the cause of the delay of the train made during the course of the entire delay are not objectionable as not being a part of the *res gestae.* Cunningham *v.* Wabash R. Co., 79 Mo. App. 524.

In an action against a carrier to recover damages sustained by reason of the killing of some and the injury of others of certain cattle received by the defendant from the plaintiff for carriage, a statement by the engineer in charge of the locomotive attached to the train to carry the stock made while loading was going on and at the place of loading, to the effect that he would kill the cattle before he reached the place named is competent as a declaration as to the manner in which he intended to run the engine. Crawford *v.* So. R. Co., 56 S. C. 136, 34 S. E. 80.

Testimony of a shipper's agent in charge of a shipment of live stock, for injuries to which, consequent upon alleged delay, the carrier is sought to be held liable, that the first delay by the initial carrier caused all the other delays on connecting lines is objectionable as

Responses by the Carrier's Agent to Inquiries by the Shipper or Owner, as to the fact of the loss or injury,[8] or its cause,[9] are competent against the carrier.

F. Opinions and Conclusions. — Whether or not the condition of property on its arrival at the point of destination was due to the fact that it had been very badly handled and perhaps ill-used in transit is a proper subject for expert testimony.[10] So also when it appears that animals in transit were suffering greatly, probably from causes which might be relieved, it is not objectionable to ask an expert witness what course the carrier might properly have pursued for their relief.[11] Testimony that everything was done

being the mere conclusions of the witness. San Antonio & A. P. R. Co. *v.* Woodley, 20 Tex. Civ. App. 216, 49 S. W. 691.

8. Declarations by a carrier's freight agent made in response to inquiries by the consignee, stating his belief as to what had become of the freight, are competent evidence against the carrier. Lane *v.* Boston & A. R. Co., 112 Mass. 455.

Evidence that the agent of the terminal carrier on the arrival of the property in a damaged condition said to the consignee that the carrier desired him to take the property and do the best with it that he could, and that they would aid him in getting compensation for the damages, is admissible against such carrier as a part of the *res gestae* appertaining to the transportation of the property. Columbus & W. R. Co. *v.* Kennedy, 78 Ga. 646, 3 S. E. 267.

9. Evidence of statements made by a carrier's station agent in reply to a demand made upon him by the shipper for the reason of the non-compliance by the carrier with the contract of carriage which he had made is admissible against the carrier. Central R. & B. Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017.

The Answer of a Train Dispatcher to a Shipper's Inquiry about a Missing Car of live stock is competent as bearing upon the question of the shipper's negligence. Hendricks *v.* Boston & A. R. Co., 170 Mass. 44, 48 N. E. 835.

10. Southern Pac. Co. *v.* Arnett, 111 Fed. 849. *Compare* East Tenn. V. & G. R. Co. *v.* Wright, 76 Ga. 532; International & G. R. Co. *v.* True, 23 Tex. Civ. App. 523, 57 S. W. 977.

On an issue as to whether or not property was at the time of shipment unfit for shipment, and that the injuries were due to that condition, testimony of experts duly qualified as such, and who were acquainted with the property at the time of shipment, that they were not in fit condition for shipment, and that by reason thereof injuries would result from their shipment to another climate is competent. Southern Pac. Co. *v.* Arnett, 111 Fed. 849.

On an issue as to the negligence of a carrier sued for goods destroyed in its depot, which was struck by lightning and set on fire, testimony of an expert as to his test of the lightning arrester some time before the fire is competent. Missouri Pac. R. Co. *v.* Riggs, 10 Kan. App. 578, 62 Pac. 712.

Persons who have been engaged all their lives in raising and handling cattle are competent witnesses to testify as experts as to the condition of cattle at their time of shipment from one climate to another, and whether by reason of that condition injuries would result from a change of climate, although it is not shown that the witnesses had had any actual experience on the subject or had personally observed the effect on cattle of a change of climate, or that they had ever accompanied a shipment of cattle by rail. Southern Pac. *v.* Arnett, 111 Fed. 849.

11. Lindsley *v.* Chicago M. & St. P. R. Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692.

In an action against an express company for the loss of an animal, due to the alleged negligence of the carrier in transportation, it is error

which should have been done to prevent the occurrence which caused the injury in question is inadmissible as a mere conclusion embodying no statement of the facts on which the conclusion was based.[12]

G. Documentary Evidence. — a. *Official Reports.* — In an action against a connecting carrier to recover for goods lost in transit, official records and reports of officers of the different companies directly relating to the subject matter of the action are admissible for the plaintiff,[13] but not generally against him.[14]

b. *Contract of Carriage.* — On the sole issue as to the negli-

to exclude testimony to the effect that the animal was hot and restless when the witness saw him and in his opinion would have been entirely relieved and restored to his normal condition if the car in which the animal was shipped had been open and the animal allowed to exercise himself, the witness also testifying that he was present when the animal was unloaded and knew what was proper to be done when such animals became overheated. Pacific Exp. Co. *v.* Lothrop, 20 Tex. Civ. App. 339, 49 S. W. 898.

On an issue as to whether or not injuries suffered by live stock in transportation were due to the improper treatment of the stock by the carrier and to rebut the claim that they were the ordinary results of transportation, it is proper to receive the testimony of a witness, shown to have shipped a great deal of live stock, to the effect that when stock were properly managed he did not have as many head killed between the points of shipment and delivery in question as were shown to have been killed in the shipment in question, the witness also stating that the stock were in reasonably fair condition to stand the transportation if properly handled. Mexican Nat. R. Co. *v.* Savage, (Tex. Civ. App.), 41 S. W. 663.

12. Southern Pac. R. Co. *v.* Arnett, 111 Fed. 849; Montgomery & W. P. R. Co. *v.* Edmonds, 41 Ala. 667.

13. Gwyn Harper Mfg. Co. *v.* Carolina C. R. Co., 126 N. C. 280, 38 S. E. 849.

In an action against a common carrier to recover for the value of property lost in transportation, a printed circular purporting to be issued from the office of the general superintendent of the carrier, offering a reward for the arrest and conviction of the thief and for the recovery of the property stolen, is competent evidence against the carrier, after proof that the person signing as superintendent was such in fact, and that the issuance of such circulars and other publication was within the scope of his business as such, as well as the use of all necessary means including the offering of such rewards. Bennett *v.* Northern Pac. Exp. Co., 12 Or. 49, 6 Pac. 160, so holding because of such a document being an admission of the carrier and not of one of its agents, an act from which could be inferred an acknowledgment upon the part of the company that it was liable for the loss of the property.

14. In an action against a carrier for injuries to property sustained in transit, it is not error to refuse to permit the introduction by defendant of records, made by the person in charge of the train, as to seals put upon the car containing the goods at the point of shipment and their condition when the goods were unloaded, where the records are not offered for the purpose of refreshing the memory of the witness making them, and the facts stated in the records are proved by the person himself from his own direct personal knowledge independent of the records. Nashville C. & St. L. R. Co. *v.* Parker 123 Ala., 683, 27 So. 323.

On an issue as to the condition of property at a connecting point, entries made on the transfer sheet of the connecting carrier, by its agent at that point, and in the presence of

gence of the carrier, it is not error to exclude the contract of carriage limiting the carrier's liability.[15]

5. Matters As to Damages. — A. Burden of Proof. — As in the case of other facts, constituting the plaintiff's case, which he has the burden of proving, a shipper or owner of property lost or injured by a carrier in transit, has the burden of proving the damages sustained by him, which the law recognizes as the proper measure of damages to which he is entitled.[16]

B. Scope of Inquiry. — a. *Generally.* — Where a carrier, sued for breach of contract of carriage, for having carried the freight past its destination, admits the breach, the shipper is entitled to show what his general damages were.[17]

b. *Actual Value of Property.* — Although the contract of carriage limits the amount of the value of the property carried to which the carrier is liable in case of loss, evidence of the real value of the property may be received when the loss is the result of the carrier's negligence.[18]

the shipper, as to the condition of the property at that time, is admissible for the carrier as part of the *res gestae*. Vicksburg, S. & P. R. Co. *v.* Stocking, (Miss.), 13 So. 469.

15. Louisville & N. R. Co. *v.* Plummer, 18 Ky. L. Rep. 228, 35 S. W. 1113.

16. Atlanta & W. P. R. Co. *v.* Texas Grate Co., 81 Ga. 602, 9 S. E. 600.

In an action by a consignee to recover for damages to goods caused by the delay in transportation, where it appears that he paid a draft, with the bill of lading attached, drawn by the consignor, the burden is upon the plaintiff to show that the proceeds of the sales of the goods were insufficient to pay the amount of the draft advanced. Haas *v.* Kansas City, Ft. S. & G. R. Co., 81 Ga. 792, 7 S. E. 629.

Where the damages accruing to a shipper for the loss or injury to goods equal or exceed the freight due to the carrier, the shipper does not have the burden of showing that he paid or tendered payment of the freight charges. Miami Powder Co. *v.* Port R. & W. C. R. Co., 47 S. C. 324, 25 S. E. 153, 58 Am. St. Rep. 880.

To Authorize a Recovery for the Loss or Profits, As Damages occasioned by suspension of the business, it is essential that there must be proof, not only that the suspension was caused or rather conditioned by the failure of the carrier to promptly forward the goods, but also that such facts had been communicated to the carrier as would have reasonably indicated that delay in the shipment of the goods would result as claimed. Pacific Exp. Co. *v.* Darnell, 62 Tex. 639.

17. Teague *v.* Southern R. Co., 45 S. C. 27, 22 S. E. 779.

18. Adams Exp. Co. *v.* Holmes, (Pa.), 9 Atl. 166; Grogan *v.* Adams Exp. Co., 114 Pa. St. 523, 7 Atl. 134. See also Marquis *v.* Wood, 29 Misc. 590, 61 N. Y. Supp. 251; Georgia R. & B. Co. *v.* Keener, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197; Missouri, K. & T. R. Co. *v.* Wells, Tex. Civ. App. 304, 58 S. W. 842; Missouri K. & T. R. Co. *v.* Chittin, (Tex. Civ. App.), 40 S. W. 23.

Where the contract of carriage limits the liability of the carrier for loss to a certain amount, evidence of the real value of the goods lost, whatever that may be, is admissible for the purpose of showing that such value is at least equal to the amount specified in the contract. Georgia R. & B. Co. *v.* Reid, 91 Ga. 377, 17 S. E. 934. *Compare* Johnstone *v.* Richmond & D. R. Co., 39 S. C. 55, 17 S. E. 512, the contract of carriage limiting the liability of the carrier

c. *Value at Places Other Than Place of Delivery.* — Upon an issue as to the value of the property at the place of delivery, it is usually held improper to receive evidence of value at other places;[19] unless it is shown that the values in both places are relatively the same, and that the market value at the place of delivery is in fact controlled by the market of the other place.[20]

Where There Is Evidence That the Property Had no Market Value at the Place of Delivery, proof may be resorted to of its value in the the nearest market.[21]

d. *Value at Other Times.* — Upon failure of a common carrier to deliver property at the time agreed upon, or, if no time be specified, within a reasonable time, the rule of damages is the difference between the value of the goods at the time and place of delivery, and their value at the same place at the time they should have been

for the loss of the goods to a certain valuation placed thereon; and it was held that evidence on the part of the shipper showing that the actual value of the property far exceeded the value stated in the contract was properly rejected. Following and quoting with approval from Hart *v.* Pennsylvania R. Co., 112 U. S. 331.

Cost of Property at Place of Shipment Immaterial. — Hendricks *v.* Boston & A. R. Co., 170 Mass. 44, 48 N. E. 835.

Where no market value of the property at the point of destination is established, proof of what the article cost may be received. Pacific Exp. Co. *v.* Lothrop, 20 Tex. Civ. App. 339, 49 S. W. 898.

Where it is shown that the goods for whose value a carrier is sued, had no market value at the point of destination, it is proper to allow evidence of the amount paid for the goods, there being also testimony to the effect that the prices paid were those charged by dealers in such goods, and that the goods were reasonably worth the same amount at the point of destination. New York & T. S. S. Co. *v.* Weiss, (Tex. Civ. App.), 47 S. W. 674.

19. Missouri Pac. R. Co. *v.* McGrath, 3 Kan. App. 220, 44 Pac. 39. See also Hendricks *v.* Boston & A. R. Co., 170 Mass. 44, 48 N. E. 835. *Compare* Echols *v.* Louisville & N. R. Co., 90 Ala. 366, 7 So. 655; South & N. A. R. R. Co. *v.* Wood, 72 Ala. 451; Ward *v.* Reynolds, 32 Ala. 384; Foster *v.* Rodgers, 27 Ala. 602; Louisville & N. R. Co. *v.* Mason, 11 Lea (Tenn.) 116.

In an action against a carrier to recover for damages to live stock in transportation, evidence of what the stock was worth at the point of shipment is not admissible. Gulf W. T. & P. R. Co. *v.* Staton, (Tex. Civ. App.), 49 S. W. 277.

20. Hudson *v.* Northern Pac. R. Co., 92 Iowa 231, 60 N. W. 608, 54 Am. St. Rep. 550.

21. Houston & T. C. R. Co. *v.* Williams, (Tex. Civ. App.), 31 S. W. 556; Pacific Exp. Co. *v.* Lothrop, 20 Tex. Civ. App. 339, 49 S. W. 898.

In Leonard *v.* Fitchburg R. Co., 143 Mass. 307, 9 N. E. 667, a witness was asked as to the value of an animal found dead amongst a shipment on its arrival at the destination, "Having regard to its market value, at the time, in the nearest place to the place (of delivery) that he knew of where there was a market for it, and the cost of getting it there, and the risk;" and was further asked "on the same basis," as to the injury to the herd if it had at its arrival been put up for sale, and was answered that "a hundred dollars a head would not have covered it." The witness was further asked as to what was his estimate of the injury sustained at the time, if such judicious and proper care were taken as a prudent man would take to make them fit for market, and what his own estimate would be of the actual

delivered;[22] and in such case it is error to allow evidence of values at other times.[23]

e. *Weight and Condition of Live Stock.* — Proof that cattle for whose loss a carrier is sought to be held were in good condition when they were shipped is competent.[24]

damage from the experience of that night, assuming that he could have an opportunity to cure it by a usual judicious and prudent course? It was held that the witness was properly allowed to answer the question because even if the destination of the shipment was not the proper market for such animals, they certainly must have a value there for the purpose of transportation to the place where they were continually bought and sold.

22. In Holden *v.* New York Cent. R. Co., 54 N. Y. 662, an action against a common carrier for injuries to freight due to delay in transportation, the plaintiff was permitted to prove the market value of the property at the place of delivery at the time when it should have been delivered, and its market value when it was in fact delivered.

23. Values at Other Times. Missouri Pac. R. Co. *v.* McGrath, 3 Kan. App. 220, 44 Pac. 39.

On an issue as to the damage suffered by property from delay in transportation, testimony as to the market value of the property at the point of destination a day earlier than the property would have reached their destination had there been no delay, is not admissible. Gulf C. & S. F. R. Co. *v.* Hughes, (Tex. Civ. App.), 31 S. W. 411.

On an issue as to the value of property injured by a carrier in transportation at the place of delivery at which there is no market value for such property, it is competent to show actual sales of similar property, and the value thereof at other times near the date of the sale of the property in question, especially where the price of such property is stable and not fluctuating. Pacific Exp. Co. *v.* Lothrop, 20 Tex. Civ. App. 339, 49 S. W. 898.

24. Weight and Condition of Property at Time of Shipment. Hendricks *v.* Boston & A. R. Co., 170 Mass. 44, 48 N. E. 835.

As a fact or circumstance tending to prove the value of property for injuries to which a carrier is sought to be charged, it is proper to receive evidence of its condition and weight when it was purchased by the shipper. St. Louis S. W. R. Co. *v.* Williams, (Tex. Civ. App.), 32 S. W. 225.

A witness testifying as an expert to the values of property lost or injured by a carrier in transportation, is competent to testify from the appearance of the property as to what caused this condition at the place of destination, provided he states the data upon which he bases his opinion. San Antonio & A. P. R. Co. *v.* Barnett, (Tex. Civ. App.), 66 S. W. 474.

In an action against a carrier for the negligent loss and unreasonable detention of goods intrusted to it for carriage in which it is shown that the loss exceeds the freight charges, it is proper to permit the plaintiff to show the condition of the goods at any time before trial. Miami Powder Co. *v.* Port Royal & W. C. R. Co., 47 S. C. 324, 25 S. E. 153, 58 Am. St. Rep. 880. The court said: "We think there was error also in refusing to allow evidence as to the condition of the powder some considerable length of time after its arrival in Greenville. The evidence was competent for whatever it was worth on the question of damages sustained at the time the powder was tendered by the carrier upon condition of payment of freight. Whether the jury could infer what was the condition of the powder at that time by its condition at a later time, would depend upon the facts and circumstances of the case. The sufficiency of the evidence was wholly for the jury. It is clear that it would be competent for the defendant to exhibit to the jury the powder at the

A Bill of Lading is competent evidence to show the quantity of goods shipped.[25]

II. CARRIERS OF PASSENGERS.

1. Relationship. — A. Presumptions and Burden of Proof. a. *In General.* — It is presumed that a person riding in a vehicle ordinarily used for the accommodation of passengers is there lawfully as a passenger.[26] This presumption is rebuttable.[27] But where it is an issue whether or not the relationship of passenger and carrier existed at the time of the injuries complained of, the burden of proving that fact is in the first instance upon the party asserting it.[28]

b. *Passenger Riding on Freight Train.* — But the presumption stated in the preceding paragraph does not apply to a person riding in a vehicle not ordinarily used to carry passengers,[29] unless it appears that it was the custom of the road to carry passengers in such vehicle.[30]

time of trial for the purpose of showing that it was not damaged then, from which the jury could infer that, necessarily, it was not damaged at the time of tender. For a like reason, the plaintiff may show the condition of the powder at any time before trial, as a means, however weak may be the force of the evidence, to show its condition at the time of tender. Besides, if there is evidence tending to show that the powder was damaged at the time of tender to an amount equal to or exceeding the freight, then it becomes relevant in an action for claim and delivery and for damages to show the condition of the powder at any time before judgment, because, if the damage at the time of tender exceeded the freight, the detention of the goods by the carrier was unlawful, and damage resulting from that unlawful detention becomes relevant."

25. Wolfe *v.* Myers, 3 Sandf. (N. Y.) 7.

26. Presumption That Person on Passenger Train Is There Rightfully. — *United States.* — Bryant *v.* Chicago, St. P., M. & O. R. Co., 53 Fed. 997, 4 C. C. A. 146.

California. — People *v.* Douglass, 87 Cal. 281, 25 Pac. 417.

Colorado. — Atchison, T. & S. F. R. Co. *v.* Headland, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822.

Indiana. — Louisville, N. A. & C. R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120.

Louisiana. — *Compare* Snyder *v.* Natchez R. R. & T. R. Co., 42 La. Ann. 302, 7 So. 582.

New York. — Buffit *v.* Troy & B. R. Co., 40 N. Y. 168, *affirming* 36 Barb. 420.

Pennsylvania. — Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339, 98 Am. Dec. 229; Creed *v.* Pennsylvania R. Co., 86 Pa. St. 139, 27 Am. Rep. 693.

South Carolina. — Daniels *v.* Florida Cent. & P. N. Co., 62 S. C. 1, 39 S. E. 762.

West Virginia. — Gillingham *v.* Ohio R. R. Co., 35 W. Va. 588, 14 S. E. 243, 29 Am. St. Rep. 827, 14 L. R. A. 798.

27. People *v.* Douglass, 87 Cal. 281, 25 Pac. 417.

28. Chicago & E. I. R. Co. *v.* Huston, 95 Ill. App. 350; San Antonio & A. P. R. Co. *v.* Lynch, (Tex. Civ. App.), 55 S. W. 517; Toledo, W. & W. R. Co. *v.* Brooks, 81 Ill. 245; Creed *v.* Pennsylvania R. Co., 86 Pa. St. 139, 27 Am. Rep. 693.

29. People *v.* Douglass, 87 Cal. 281, 25 Pac. 417.

This Is the Rule Where the Person Is Riding Upon a Freight Train. Atchison T. & S. F. R. Co. *v.* Headland, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822; Eaton *v.* Delaware, L. & W. R. Co., 57 N. Y. 382, 15 Am. Rep. 513.

30. Georgia Pac. R. Co. *v.* Love, 91 Ala. 432, 8 So. 714, 24 Am. St.

c. *Passenger Expelled From Vehicle.* — In an action to charge a carrier for the alleged wrongful expulsion of a passenger, the plaintiff has the burden to prove the relationship of carrier and passenger at the time of the expulsion.[31] And the carrier does not have the burden of showing the lawfulness of an expulsion of a person from its vehicle until there is proof that such person was rightfully there.[32]

d. *Delivery of Baggage to Carrier.* — The burden of showing delivery of the baggage of a passenger to the carrier is upon the passenger in an action by him to recover for its loss.[33] So also in an action to recover for the loss of baggage beyond the terminus of the initial carrier's route, the burden is on the plaintiff to show a contract by such carrier to carry beyond that terminus.[34]

e. *Conditions of Tickets.* — Where a carrier issues tickets with special conditions, the burden of proof is upon it to show those conditions, where they are relied upon to relieve the company from liability.[35]

B. Direct Evidence. — a. *Oral Evidence.* — **(1.) Generally.** The fact that a passenger bought a ticket entitling him to passage

Rep. 927; Woolery *v.* Louisville, N. A. & C. R. Co., 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114.

31. Central of Georgia R. Co. *v.* Cannon, 106 Ga. 828, 32 S. E. 874. *Compare* Alabama G. S. R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28.

32. Central of Georgia R. Co. *v.* Cannon, 106 Ga. 828, 32 S. E. 874.

In an action of trespass for the unlawful ejectment of the plaintiff from the defendant's train on which he was a passenger, in which the issue was whether or not the plaintiff voluntarily left the train, the plaintiff has the burden of proof. Wilsey *v.* Louisville & N. R. Co., 83 Ky. 511.

Ownership of Road. — In an action against a railroad company to recover damages in consequence of the plaintiff having been ejected from a train of cars alleged by him to have been owned and operated by the defendant, the burden of proof is on the plaintiff to show that the train in question was being used and was under the control of the defendant at the time, but not that the train belonged to the defendant. Sullivan *v.* Oregon R. & N. Co., 12 Or. 392, 7 Pac. 508, 53 Am. Rep. 364.

"But where it is admitted that a railroad company is the owner of a railroad then being operated, a presumption arises that the same is operated by the company owning it, and the burden of proof is upon such company to show that such is not the fact." Peabody *v.* Oregon R. & N. Co., 21 Or. 121, 26 Pac. 1053, 12 L. R. A. 823. See also Ferguson *v.* Wisconsin Cent. R. Co., 63 Wis. 145, 23 N. W. 123.

33. Matteson *v.* New York C. & H. R. Co., 76 N. Y. 381; Michigan S. & N. I. R. Co. *v.* Meyres, 21 Ill. 627; Ringwalt *v.* Wabash R. Co., 45 Neb. 760, 64 N. W. 219.

34. Marmorstein *v.* Pennsylvania R. Co., 13 Misc. 32, 34 N. Y. Supp. 97.

35. Daniels *v.* Florida Cent. & P. N. Co., 62 S. C. 1, 39 S. E. 762.

Where a person claims the right to travel on a train as a passenger holding a commutation ticket issued by the agent of defendant, on the alleged ground that he is one of the members of the firm named in the ticket as being entitled to ride, he has the burden of showing by a clear preponderance of the proof that there existed such a partnership at the time, and that he was one of its members. The case was for damages for wrongful expulsion from a train. Granier *v.* Louisiana W. R. Co., 42 La. Ann. 880, 8 So. 614.

between two points, and did so pass, may be shown by parol independent of the ticket.[36]

(2.) Contradiction of Tickets. — But it has been held that passenger tickets are to be regarded as tokens, rather than contracts, and are not within the rule excluding parol evidence to vary a written agreement.[37]

(3.) Contents. — The contents of such ticket cannot be proved by parol evidence in the absence of explanation of its non-production.[38]

b. *Documentary Evidence.* — A carrier's ticket is documentary evidence of a right to transportation between the points named therein.[39]

C. CIRCUMSTANTIAL EVIDENCE. — Where issue is expressly taken whether or not a person was rightfully in a carrier's vehicle as a passenger, as for example where he is traveling or attempting to travel upon a freight train,[40] or even on a vehicle used for the carriage of passengers, in such case resort may be had to circumstantial evidence to establish the relationship,[41] or to nega-

36. Central R. Co. *v.* Wolff, 74 Ga. 664. See also Henderson *v.* Central R. Co., 73 Ga. 718.

37. Quimby *v.* Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 467. See also Van Buskirk *v.* Roberts, 31 N. Y. 661.

Evidence of a General Announcement of Selling Agent to Purchasers Then Assembled in front of the ticket window to the effect that tickets were limited to a certain date going and returning, is not admissible to change or vary the time limit as expressed by being printed on the ticket. Rutherford *v.* St. Louis S. W. R. Co., (Tex. Civ. App.), 67 S. W. 161.

Where a Railroad Passage Ticket Has Become So Mutilated that the date of its limitation cannot be told from the face of the ticket itself, it is proper to permit the agent who sold the ticket, after testifying that it was in his handwriting, that he could not remember the particular sale, and could not testify to the actual date inserted, to state the limit he was at that time permitted to sell tickets on. Dooley *v.* Burlington C. R. & N. R. Co., 89 Iowa 450, 56 N. W. 543.

38. Memphis & C. R. Co. *v.* Benson, 85 Tenn. 627, 4 S. W. 5.

39. International & G. N. R. Co. *v.* Ing, (Tex. Civ. App.), 68 S. W. 722.

40. Custom and Usage. — The relationship of carrier and passenger may be proved by evidence of a railroad's custom and usage to carry passengers on freight trains. McGee *v.* Missouri Pac. R. Co., 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706. See also Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 15; Lucas *v.* Milwaukee & St. P. R. Co., 33 Wis. 41, 14 Am. Rep. 735; Brown *v.* Kansas City, Ft. S. & G. R. Co., 38 Kan. 634, 16 Pac. 942.

41. Chicago & E. I. R. Co. *v.* Huston, 95 Ill. App. 350.

Good Faith of Passenger. — In an action against a railroad company for the wrongful ejectment of a passenger, evidence that the plaintiff and others had previously traveled over the same road, sometimes with and sometimes without a ticket, and had never paid more than the plaintiff tendered to the conductor at the time, is competent to show that the passenger acted in good faith and had reason to suppose that the fare would be the same whether he bought a ticket or not. Louisville, N. & G. S. R. Co. *v.* Guinan, 11 Lea (Tenn.) 98, 47 Am. Rep. 279.

Evidence of an Ineffectual Attempt to Procure a Ticket before entering the train, although incompetent to show a right to remain on the cars without payment of fare, is proper, nevertheless, to show good faith in getting aboard without a ticket, and as part of the *res gestae*.

tive it.[42]

Perkins *v.* Missouri, K. & T. R. Co., 55 Mo. 201.

Statement of Agent. — On an issue as to whether a passenger in good faith boarded a freight train which was not permitted to carry passengers, evidence of statements by the defendant's station agent informing the passenger concerning the arrival of the next freight train, and that it would carry passengers, is competent, although the statements were not made in his office. Lake Erie & W. R. Co. *v.* Matthews, 13 Ind. App. 355, 41 N. E. 842.

Evidence That a Person Was by Original Contract a Passenger, and that he was not out of place at the time of the injury, is admissible, although, at the time of the trial he is in the carrier's employ. O'Donnell *v.* Allegheny R. Co., 50 Pa. St. 490.

Proof That a Street Car Conductor Saw and Responded to a Signal to Stop, that he expected to stop for the party signalling to get on board, and that the latter advanced upon the crosswalk for that purpose, is not sufficient to establish the relation of carrier and passenger. Donovan *v.* Hartford St. R. Co., 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297.

In Brennan *v.* Fair Haven & W. R. Co., 45 Conn. 284, 29 Am. Rep. 679, plaintiff for the purpose of showing that he was not a trespasser on the defendant's street car, but was there by the knowledge and permission of the defendants, and to show that the driver knew that he intended to get off at a particular place and was negligent and careless in the management of his team and car in not stopping for the plaintiff to get off, offered evidence that the driver requested him to take a package then on the front platform of the car and deliver it at the place where he was to get off, and that while plaintiff was getting off the car with the package, he was injured. It was held that the evidence was admissible. In this case it was also held on an issue as to whether or not plaintiff was rightfully on the defendant's car as a passenger; that the plaintiff might show that he was permitted to ride on the car by the driver and conductor, as against the objection that neither driver nor conductor had the power to give the plaintiff a free ride, and that the driver had nothing to do with persons on the car, and that neither of them was the defendant's agent for any such purposes.

42. On an issue as to whether or not a person was a passenger, after proof that money was paid by such person to the conductor for his passage in the presence of the witness, who saw the money paid and heard the arrangements for the passage, it is proper and legitimate to ask the conductor if the witness or the alleged passenger, or either of them, came to him and paid him money and obtained his permission to ride on the train. Crawleigh *v.* Galveston, H. & S. A. R. Co., (Tex. Civ. App.), 67 S. W. 140.

After Proof That an Alleged Passenger's Ticket Was Taken up by a Certain Conductor, evidence of the system of issuing and selling tickets numbered consecutively, and of the preservation of cancelled tickets turned in by conductors, and that the tickets returned as sold on the day in question were collected and turned in by another conductor, is competent for the carrier. Pfaffenback *v.* Lake Shore & M. S. R. Co., 142 Ind. 246, 41 N. E. 530.

Evidence That a Carrier's Servants Had No Authority to Allow Persons other than employees of the road to ride on engines or freight cars of which they were in charge, is not competent against a passenger having no notice of such a rule. Lake Shore & M. S. R. Co. *v.* Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510.

On an issue as to whether a passenger was notified at the time of purchasing a mileage ticket that it was not good and would not be received for fare between certain points, evidence that the company had sold the same kind of a ticket to another person about the time of the sale to the plaintiff, and that such ticket was used without restriction, is inadmissible. Oppenheimer *v.* Den-

2. Fact of Injury or Death. — In an action against a carrier to recover damages for the injury or death of a passenger, the plaintiff has the burden of proof to establish the fact of the injuries or death complained of.[43]

3. Cause of Injury. — A. Negligence of Carrier. — a. *Presumptions and Burden of Proof.* — **(1.) Generally.** — In an action against a carrier to recover damages for injuries suffered by a passenger during transportation, the burden of proving negligence is upon the plaintiff.[44]

(2.) Presumption of Negligence From Fact of Accident. — (A.) Rule Stated Broadly. — The broad rule is laid down by some courts that the burden of proof just referred to is satisfied by proof of the injury, and that thereby a *prima facie* case of negligence is made

ver & R. G. R. Co., 9 Colo. 320, 12 Pac. 217.

Identity. — On an issue as to whether or not it was the plaintiff who was ejected from the train at the time in question, or his son, it is error to strike out testimony of the plaintiff to the effect that he never made any complaint to the defendant or any of its officers about being thus ejected until the commencement of the action nearly two years afterwards, and that he never complained to the district attorney of being robbed at the time of the expulsion. Washburn *v.* Chicago, St. P., M. & O. R. Co., 84 Wis. 251, 54 N. W. 504.

Where the plaintiff, in an action against stage coach proprietors to recover for injuries sustained by the plaintiff as a passenger, has testified upon his examination in chief that he was received by the driver as a passenger, and that after the accident had happened one of the defendants stated that he had ordered his drivers to receive the plaintiff without paying fare until he got to his destination, it is proper to ask the plaintiff on cross-examination whether he had not been asked to pay his fare by the agent at an intermediate station, and before the accident, and that the agent had told him he must either pay his fare or get off the stage. Gilmer *v.* Higley, 110 U. S. 47.

Evidence that certain rules and regulations governing the use of certain kinds of tickets were printed and furnished to the public with such tickets is inadmissible; although evidence that such rules had been given to the purchaser of a ticket of the kind in question at the time of the purchase of the ticket would be proper. Chicago & N. W. R. Co. *v.* Chisholm, 79 Ill. 584.

43. The separate citation of authorities to support this rule is hardly necessary, inasmuch as it is so closely connected with the succeeding sections; and accordingly reference is made to cases therein cited.

44. Baltimore & O. R. Co. *v.* State, 63 Md. 135; Norfolk & W. R. Co. *v.* Ferguson, 79 Va. 241; Central R. Co. *v.* Freeman, 75 Ga. 331; Harbison *v.* Metropolitan R. Co., 9 App. D. C. 60; Griffen *v.* Manice, 47 App. Div. 70, 62 N. Y. Supp. 364; Cleveland City R. Co. *v.* Osborn, 66 Ohio St. 45, 63 N. E. 604; Palmer *v.* Winona R. & L. Co., 78 Minn. 138, 80 N. W. 869; Southerland *v.* Texas & P. R. Co., (Tex. Civ. App.), 40 S. W. 193.

Rule Stated. — "It is a perfectly well settled principle that, to entitle a plaintiff to recover in an action of this kind, he must show, not only that he has sustained an injury, but that the defendant has been guilty of some negligence which produced that injury. The negligence alleged, and the injury sued for, must bear the relation of cause and effect. The concurrence of both, and the nexus between them, must exist to constitute a cause of action." Benedick *v.* Potts, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478.

Defective Track.—Where a passenger alleges that injuries were suffered through a defective track by reason

out,[45] and the burden is cast upon the carrier of proving that the injuries did not result from his negligence.[46]

(B.) Rule Qualified. — But the facts of the cases as to the manner in which the injuries were sustained do not require nor justify so broad a rule.[47] The cases in which the presumption of negligence was involved were those in which the injury was shown to have been caused by some defect in the apparatus or machinery used by

of which the car in which he was riding was derailed, he has the burden of proof to show the defect as alleged. Union Pac. R. Co. *v.* Hand, 7 Kan. 380.

In a Libel in Rem for the recovery for damages for personal injuries received by the libelant on board a steamship, the libelant must show that the respondent failed in the exercise of that degree of care and diligence which the law requires of carriers of passengers, and that its negligence in this behalf was the cause of the libelant's injuries. The Nederland, 14 Fed. 63.

45. Allen *v.* Dry Dock, E. B. & B. R. Co., 19 N. Y. St. 114, 2 N. Y. Supp. 738; Anderson *v.* Scholey, 114 Ind. 553, 17 N. E. 125; Texas & P. R. Co. *v.* Gardner, 114 Fed. 186, 52 C. C. A. 142; Cooper *v.* Georgia C. & N. R. Co., 61 S. C. 345, 39 S. E. 543; Bosqui *v.* Sutro R. Co., 131 Cal. 390, 63 Pac. 682.

46. In Georgia, by express statute (Ga. Code, § 3033) proof that a passenger was hurt or injured by the running of the train raises a presumption of negligence against the carrier. Killian *v.* Georgia R. & B. Co., 97 Ga. 727, 25 S. E. 384; Augusta & S. R. Co. *v.* Randall, 79 Ga. 304, 4 S. E. 674; Central R. Co. *v.* Sanders, 73 Ga. 513.

But it must appear that the injury was caused either by the running of the locomotives or cars or other machinery of the carrier. Savannah, F. & W. R. Co. *v.* Flaherty, 110 Ga. 335, 35 S. E. 677.

The Rule in Nebraska is that under the provisions of compiled statutes (Article I, Ch. 72, § 3) it is sufficient in an action to recover for injuries received by a passenger on a railroad train to prove that the injuries resulted from the operation and management of the road. The law infers negligence from the fact of the injury, and imposes upon the carrier the burden of proving that the case is within one of the exceptions mentioned in the statute. St. Joseph & G. I. R. Co. *v.* Hedge, 44 Neb. 448, 62 N. W. 887. In this case the plaintiff was a passenger in the caboose of a freight train and was injured in a collision between the caboose and a freight car being switched which was not equipped with sufficient brakes to properly handle the car. See also Chicago, B. & Q. R. Co. *v.* Wolfe, 61 Neb. 502, 86 N. W. 441.

47. McDonald *v.* Montgomery S. & R. Co., 110 Ala. 161, 20 So. 317.

Rule Stated as Qualified.— "As an injury may occur from causes other than the negligence of the party sued, it is obvious that, before a liability on account of that injury can be fastened upon a particular individual, it must be shown, or there must be evidence legally tending to show, that he is responsible for it; that is, that he has been guilty of the negligence that produced or occasioned the injury. In no instance can the bare fact that an injury has happened — of itself, and divorced from all surrounding circumstances — justify the inference that the injury was caused by negligence. It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred. But this inference must, after all, be a legitimate inference, and not a mere speculation or conjecture. There must be a logical relation and connection between the circumstances proved and the conclusion sought to be adduced from them. . . . There are instances in which the circumstances surrounding an occurrence, and giving a character to it, are held, if unexplained, to indicate

the carrier,[48] or by a want of diligence or care in those em-

the antecedent or coincident existence of negligence as the efficient cause of an injury complained of. These are the instances where the doctrine *res ipsa loquitur* is applied. This phrase, which, literally translated, means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident; and the doctrine which it embodies, though correct enough in itself, may be said to be applicable to two classes of cases only, viz: 'First, when the relation of carrier and passenger exists, and the accident arises from some abnormal condition in the department of actual transportation; second, where the injury arises from some condition or event that is, in its very nature, so obviously destructive of the safety of the person or property, and is so tortious in its quality as, in the first instance, at least, to permit no inference save that of negligence on the part of the person in the control of the injurious agency.' Thomas Neg. 574. . . . The maxim does not go to the extent of implying that you may, from the mere fact of an injury, infer what physical act produced that injury; but it means that when the physical act has been shown, or is apparent, and is not explained by the defendant, the conclusion that negligence superinduced it may be drawn as a legitimate deduction of fact." Benedick *v.* Potts, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478. In this case the defendant owned and operated a mimic railway, a part of which ran through a tunnel; and the plaintiff was a passenger on one of its trips; was in his seat when the car entered the tunnel, but when the car emerged from the tunnel was missing. On search being made he was found inside the tunnel in an unconscious condition with a wound upon his head. There was no defect or abnormal condition affecting the means of actual transportation. The other occupants of the car passed safely through the tunnel. What caused the plaintiff to be thrown out of the car is a matter of pure conjecture; and it was held that the doctrine of *res ipsa loquitur* was not applicable.

There is no presumption of negligence from the fact of injuries to a passenger who stumbled over an ordinary gang plank on a vessel, lying on the deck close to the place where it is used, there being no other proof of negligence causing the accident. Seddon *v.* Bickley, 153 Pa. St. 271, 25 Atl. 1104.

48. *California.* — Bassett *v.* Los Angeles Traction Co., 133 Cal. XIX, 65 Pac. 470.

Colorado. — Denver & R. G. R. Co. *v.* Fotheringham, (Colo. App.), 68 Pac. 978.

Illinois. — Chicago City R. Co. *v.* Morse, 98 Ill. App. 662; Elwood *v.* Chicago City R. Co., 90 Ill. App. 397.

Indiana. — Terre Haute & I. R. Co. *v.* Sheeks, 155 Ind. 74, 56 N. E. 434.

Iowa. — Pershing *v.* Chicago, B. & Q. R. Co., 71 Iowa 561, 32 N. W. 488.

Kansas. — St. Louis & S. F. R. Co. *v.* Burrows, 62 Kan. 89, 61 Pac. 439.

New York. — Miller *v.* Ocean S. S. Co., 118 N. Y. 199, 23 N. E. 462.

Virginia. — Baltimore & O. R. Co. *v.* Wightman, 29 Gratt. 431, 26 Am. Rep. 384; Baltimore & O. R. Co. *v.* Noell, 32 Gratt. 394.

Rule Stated. — A *prima facie* case against a carrier is made out by proving that the relation of carrier and passenger existed between the parties; that an accident occurred resulting in injury to the passenger, and that it was occasioned by the failure of some portion of the machinery, appliances, or means provided for the transportation of the passengers. This proof being made, a presumption of negligence on the part of the carrier arises, and the plaintiff is not bound to go further and show the particular defect or cause of the accident until the presumption is rebutted. It devolves upon the carrier to rebut this presumption by evidence that it exercised the greatest degree of diligence practicable under the circumstances. Wall *v.* Livezay, 6 Colo. 465. See

ployed,[49] or by some other thing which the carrier can and ought to control as a part of its duty to safely carry the passengers.[50]

also Baltimore & Y. T. R. Co. *v.* Leonhardt, 66 Md. 70, 5 Atl. 346; Baltimore & P. R. Co. *v.* Swann, 81 Md. 400, 32 Atl. 175, 31 L. R. A. 313; Norfolk & W. R. Co. *v.* Ferguson, 79 Va. 241.

Gang Plank Falling. — Proof that a stage plank or connecting way, used for the purpose of taking on and discharging passengers on a boat, fell whilst a passenger, in the exercise of due care, was walking over it, is *prima facie* evidence of negligence on the part of the carrier, in the performance of his duty, and casts upon him the burden of proving that the falling of the plank was the result of an accident for which he was not responsible. Eagle Packet Co. *v.* Defries, 94 Ill. 598, 34 Am. Rep. 245.

Proof that a train stopped at the wood and water station and started again in an unusually short time, or with unusual speed, or without blowing the signal whistle at all, or sufficiently long before starting, to put persons on their guard, is sufficient to raise a presumption of negligence. Mitchell *v.* Western & A. R., 30 Ga. 22.

49. Whalen *v.* Consolidated Traction Co., 61 N. J. Law 606, 40 Atl. 645, 68 Am. St. Rep. 723, 41 L. R. A. 836 (where the injury to the passenger arose from the act of the conductor in seizing the passenger to save himself from falling from the car).

Memphis & O. R. P. Co. *v.* McCool, 83 Ind. 392, 43 Am. Rep. 71 (where the plaintiff was injured while standing near the foot of the stairway on the defendant's boat, used for receiving and discharging passengers and freight, being struck by a bale of cotton which the defendant's servants were loading).

50. Davis *v.* Paducah R. & L. Co., 24 Ky. L. Rep. 135, 68 S. W. 140.

In New York C. St. L. R. Co. *v.* Blumenthal, 160 Ill. 40, 43 N. E. 809, the plaintiff was a passenger on the defendant's freight train accompanying a shipment of live stock; and it appeared that whilst he was descending on a ladder of one of the stock cars, for the purpose of inspecting the stock, without any sign or warning, the engineer in charge of the train suddenly started the train, whereby the plaintiff was caught between two cars and injured, and it was held that within the rule allowing a presumption of negligence upon the part of the carrier where an injury is caused to the passenger by apparatus wholly under the control of the carrier, and furnished and applied by it, a *prima facie* case of negligence was made out sufficient to throw upon the carrier the burden of proving that the injury was not its fault.

In Baltimore & P. R. Co. *v.* Swann, 81 Md. 400, 32 Atl. 175, 31 L. R. A. 313, the evidence showed that the plaintiff was a passenger on the defendant's railroad, occupying a seat in the baggage car, which was the only car attached for passengers; that she was "shaken up and knocked about from side to side, and slammed against the side of the car several times," resulting in the injuries complained of, and it was held that the fact of the injuries shown as having thus occurred was *prima facie* evidence of negligence on the part of the carrier.

Where a person takes passage on a steamboat and is drowned on reaching the point at which he expected to leave the boat, in an attempt to transfer him to a skiff, the burden of proof rests on the carrier to show that such an occurrence did not result from the fault of its servants. Le Blanc *v.* Sweet, 107 La. 355, 31 So. 766.

A presumption of negligence on the part of the employees of a stage coach proprietor does not arise from the fact of injuries resulting to a passenger from jumping from the stage while in motion under the belief that his safety was jeopardized through the failure of the defendants to provide suitable horses and a suitable and competent driver for them. Kennon *v.* Gilmer, 4 Mont. 433, 2 Pac. 21.

In Connecticut it is held that al-

(C.) Rule Applied. — (a.) *Passenger Injured While Embarking.*— It is held that the mere fact that a passenger received the injuries complained of while proceeding to embark or board a car or train does not of itself raise a presumption of negligence against the carrier,[51] unless the circumstances surrounding the accident are such as to bring it within the rule stated in the preceding section.[52]

(b.) *Passenger Injured by Sudden Jerking of Vehicle, Etc.* — The fact of injury to a passenger resulting from sudden jerks or lurches of the car or vehicle while in transit has been held sufficient to raise a presumption of negligence,[53] although there is authority to the effect

though it is found that the passenger was guilty of no contributory negligence, proof of the accident is not *prima facie* evidence of negligence on the part of the carrier. Donovan *v.* Hartford St. R. Co., 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297. In this case it appeared that the plaintiff while standing on the line of switch at the street crossing, waiting for a street car, which she had signalled, as it approached on the main track, the car instead of continuing on the main track ran in on the switch and struck her while standing there.

51. Chicago & W. I. R. Co. *v.* Bingenheimer, 14 Ill. App. 125.

52. Chicago St. L. & N. O. R. Co. *v.* Trotter, 60 Miss. 442 (where the passenger fell while so doing); Hayman *v.* Pennsylvania R. Co., 118 Pa. St. 508, 11 Atl. 815, Baltimore & O. R. Co. *v.* State, 81 Md. 371, 32 Atl. 201, (where the plaintiff's intestate was killed while crossing a track at the direction of the defendant's station agent, and for the purpose of boarding her train).

In Fenig *v.* New Jersey St. R. Co., 64 N. J. Law 715, 46 Atl. 602, the car was started when the passenger had one foot on the ground, and the other on the car, and negligence was presumed. See also Camden & A. R. Co. *v.* Williams, 61 N. J. Law 646, 40 Atl. 634.

Electric Shock From Hand Bar of Car. — Proof that a person, while boarding a street car, received a severe electric shock from the hand bar above the step, of which he had taken hold, in consequence of which his grasp became fixed, and that while in this attitude the car started, and the passenger was dragged some distance over a rough street until his grasp gave way and he fell on the street and was injured, is sufficient to raise the presumption of negligence against the carrier. Dallas Con. Elec. St. R. Co. *v.* Broadhurst, (Tex. Civ. App.), 68 S. W. 315. In answer to the contention of the defendant that the mere fact that a passenger received an electric shock under the circumstances shown is not sufficient in itself to show negligence on the part of the defendant, and especially so where the hand hold of the car is charged with electricity and such fact was unknown to the defendant, and could not have been known by any amount of evidence, the court said: "The hand hold and steps of the car were designed to be used by the passengers as aids in their entrance to and exit from the cars; the cars in their equipment were under the control and management of the defendant; and the accident was such as in the ordinary course of things would not happen with the use of proper care by those who have their management." *Citing* Thiel *v.* Kennedy, 82 Minn. 142, 84 N. W. 657; Trenton Pass. R. Co. *v.* Cooper, 60 N. J. Law 219, 37 Atl. 730, 64 Am. St. Rep. 592, 38 L. R. A. 637; Howser *v.* Cumberland & P. R. Co., 80 Md. 146, 30 Atl. 906, 45 Am. St. Rep. 332, 27 L. R. A. 154; Gulf C. & S. F. R. Co. *v.* Wood, (Tex. Civ. App.), 63 S. W. 164.

Proof of Injury to Passenger Standing in Detached Car, standing at the station for the reception of passengers, and bumped into by another car, throwing the passenger violently upon the floor, raises a presumption of negligence. Root *v.* Catskill M. & R. Co., 33 Fed. 858.

53. Burr *v.* Pennsylvania R. Co., 64 N. J. Law 30, 44 Atl. 845; Lavis

that there must be proof that they were caused by the neglect or default of the carrier or its employees.[54]

(c.) *Passenger Injured by Breaking of Machinery, Etc.* — Again, the fact of a passenger having received an injury in an accident caused by the breaking of some of the machinery, running gear, etc., used by the carrier, is enough to raise a presumption of negligence.[55]

v. Wisconsin Cent. R. Co., 54 Ill. App. 636; Murphy *v.* St. Louis I. M. & S. R. Co., 43 Mo. App. 342; Dougherty *v.* Missouri R. Co., 81 Mo. 325, 51 Am. Rep. 239; Langley *v.* Metropolitan St. R. Co., 36 Misc. 804, 74 N. Y. Supp. 857; Coudy *v.* St. Louis, F. M. & S. R. Co., 85 Mo. 79; Murphy *v.* Coney Island & B. R. Co., 36 Hun (N. Y.) 199. *Compare* Saunders *v.* Chicago & N. W. R. Co., 6 S. D. 40, 60 N. W. 148.

In Consolidated Traction Co. *v.* Thalheimer, 59 N. J. Law 474, 37 Atl. 132, it appeared that the plaintiff was a passenger, and having been notified by the conductor that the car was approaching the point where she desired to alight, left her seat and walked to the door while the car was still in motion; and while going through the door-way she was thrown into the street by a sudden lurch of the car and thus injured. The court said: "At all events, the fact that such a lurch occurred, as would have been unlikely to occur if proper care had been exercised, brings the case within the maxim *res ipsa loquitur.*" The presumption of negligence arose, not from the fact of the injury to the passenger, but from the act that caused the injury. See also Scott *v.* Bergen Traction Co., 63 N. J. Law 407, 43 Atl. 1060, *affirmed* 64 N. J. Law 362, 48 Atl. 1118.

When an injury has been shown to be occasioned by the error of the carrier or his servant in operating the instrumentality employed in the business as carriers, a presumption of negligence arises against the carrier, which casts on him the burden of showing that the accident happened, notwithstanding the exercise on his part of the degree of care which the law imposes upon him. Madden *v.* Missouri P. R. Co., 50 Mo. App. 666, where it appeared that the plaintiff had risen and was moving toward the open car door for the purpose of alighting at her destination, when the car was suddenly stopped, causing the plaintiff to fall against the frame of the car door and the door to swing to with great violence and injure her hand.

Proof that a passenger stood up in the car when getting into station at the end of her journey with her back to the seat which she had been occupying, when another car bumped into her car, throwing her against the seat and injuring her spinal cord, raises a presumption of negligence. Railroad Co. *v.* Pollard, 22 Wall. (U. S.) 341.

54. Stager *v.* Ridge Ave. P. R. Co., 119 Pa. St. 70, 12 Atl. 821. See also Jones *v.* Long Island R. Co., 21 Misc. 306, 47 N. Y. Supp. 149. *Compare* Clow *v.* Pittsburgh Tr. Co., 158 Pa. St. 410, 27 Atl. 1004.

In Jacksonville St. R. Co. *v.* Chappell, 21 Fla. 175, the proof showed that the plaintiff entered one of the defendant's street cars and started to walk to the farther end, and just as he turned to seat himself, the car suddenly started forward, throwing him to one side so that his leg struck the seat and he fell to the floor; and the court in refusing to permit the presumption of negligence, said that there was "no proof of such acts or omissions upon the part of the driver as show a failure to observe such care, precaution and diligence as the circumstances demanded — in a word no affirmative proof of negligence."

55. Presumption of Negligence From Fact of Breakage of Running Gear. — *England.* — Dawson *v.* Manchester S. & L. R. Co., 7 Hurlst. & N. 1037.

Illinois. — Toledo N. & W. R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613.

Maryland. — Baltimore & O. R.

(d.) *Passenger Injured by Breaking of Bridge, Etc.* — Again, proof that a passenger was injured by the breaking or giving way of a trestle,[56] embankment,[57] or bridge,[58] is sufficient to raise a presumption of negligence.

(e.) *Passenger Injured by Vehicle Overturning.* — So, also, proof of an injury to a passenger resulting from the upsetting or overturning of the vehicle in which he was being carried is sufficient to raise a presumption of negligence.[59]

Co. *v.* Worthington, 21 Md. 275, 83 Am. Dec. 578.

Minnesota. — Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 3 N. W. 333, 37 Am. Rep. 410; Goodsell *v.* Taylor, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673 (applying the rule to a passenger elevator).

Missouri. — Lemon *v.* Chanslor, 68 Mo. 340, 30 Am. Rep. 799; Yerkes *v.* Keokuk N. L. P. Co., 7 Mo. App. 265 (where the paddle wheel of a steamboat broke); Sharp *v.* Kansas City C. R. Co., 114 Mo. 94, 20 S. W. 93.

New York. — Gilmore *v.* Brooklyn Hts. R. Co., 6 App Div. 117, 39 N. Y. Supp. 417 (where the brake handle flew around and struck a passenger who had just stepped on the platform;) Edgerton *v.* New York & H. R. Co., 39 N. Y. 227.

Pennsylvania. — Meier *v.* Pennsylvania R. Co., 64 Pa. St. 225, 3 Am. Rep. 581.

Presumption of Negligence From Wheel of Stage Coach Coming Off. Ware *v.* Gay, 11 Pick. (Mass.) 106.

The Breaking Down of a Car by reason of the breaking of an axle, raises a presumption of negligence. Hegeman *v.* Western R. Corp., 16 Barb. (N. Y.) 353. See also Meier *v.* Pennsylvania R. Co., 64 Pa. St. 225, 3 Am. Rep. 581.

Axletree of Stage Coach Breaking. In Christie *v.* Griggs, 2 Camp. 79, 11 Rev. Rep. 666, plaintiff, a passenger in a stage coach, proved that the axletree broke, and Mansfield, C. J., deeming such proof *prima facie* proof of negligence, called upon the defendant to show that the injury resulted from mere accident.

In Carter *v.* Kansas City C. R. Co., 42 Fed. 37, the plaintiff was injured by the cable car breaking loose on a steep incline and running backward to the foot of the incline with great velocity and there colliding with other cars, and it was held that negligence should be presumed.

56. Presumption of Negligence from Breaking of Trestle. — Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

57. Presumption of Negligence from Defective Embankment. — Philadelphia & R. R. Co. *v.* Anderson, 94 Pa. St. 351, 39 Am. Rep. 787.

58. Presumption of Negligence from Breaking Down of Bridge. Grote *v.* Chester & H. R., 2 Ex. 251, 5 Rail Cas. 649; Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442; Rice *v.* Illinois Cent. R. Co., 22 Ill. App. 643; Bedford, Sp. O. & B. R. Co. *v.* Rainbolt, 99 Ind. 551; Louisville N. A. & C. R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; Louisville N. A. & C. R. Co. *v.* Pedigo, 108 Ind. 481, 8 N. E. 627; Louisville N. A. & C. R. Co. *v.* Snider, 117 Ind. 432, 20 N. E. 284, 10 Am. St. Rep. 60, 3 L. R. A. 434; Sawyer *v.* Hannibal & St. J. R. Co., 37 Mo. 240, 90 Am. Dec. 382.

59. Vehicle Overturning. — Denver S. P. & P. R. Co. *v.* Woodward, 4 Colo. 1; Pittsburg, C. & St. L. R. Co. *v.* Thompson, 56 Ill. 138; Felton *v.* Holbrook, 21 Ky L. Rep. 1824, 56 S. W. 506.

Passenger Injured by Stage Coach Upsetting. — Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181, (leading case); McKinney *v.* Neil, 1 McLean 540, 16 Fed. Cas. No. 8865; Fairchild *v.* California Stage Co., 13 Cal. 599; Boyce *v.* California Stage Co., 25 Cal. 460; Lawrence *v.* Green, 70 Cal. 417, 11 Pac. 750, 59 Am. Rep. 428; Bush *v.* Barnett, 96 Cal. 202, 31 Pac. 2; Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544; Anderson *v.* Scholey, 114 Ind. 553, 17 N. E. 125; Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138; Ware

(f.) *Passenger Injured in Collision.* — So, also, this presumption of negligence arises on proof of injury suffered by a passenger in an accident caused by the collision of the car or train in which he is riding with other cars or trains;[60] or with live stock on the track;[61] although it has been held that the collision of the vehicle with objects not under the control of the carrier, is not enough to raise a presumption of the carrier's negligence.[62]

(g.) *Passenger Injured From Defective Tracks.* — Again, proof that the injury was due to a defect in the carrier's railway track, raises a presumption of negligence.[63]

v. Gay, 11 Pick. (Mass.) 106; Lemon *v.* Chanslor, 68 Mo. 340, 30 Am. Rep. 709; Farish *v.* Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666.

60. Presumption of Negligence From Collision of Trains or Cars. *England.* — Skinner *v.* L. B. & S. C. R., 5 Ex. 787, 15 Jur. 299.

United States. — Railroad Co. *v.* Pollard, 22 Wall. 341; Carter *v.* Kansas City C. R. Co., 42 Fed. 37; Goble *v.* Delaware L. & W. R. Co., 10 Fed. Cas. No. 5488a.

Alabama. — Georgia P. R. Co. *v.* Love, 91 Ala. 432, 8 So. 714, 24 Am. St. Rep. 927.

California.—Green *v.* Pacific Lumb. Co., 130 Cal. 435, 62 Pac. 747.

Georgia. — Central R. *v.* Freeman, 75 Ga. 331.

Illinois. — Chicago City R. Co. *v.* Engel, 35 Ill. App. 490; North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486, 29 N. E. 899.

Indiana. —Louisville N. A. & C. R. Co. *v.* Faylor, 126 Ind. 126, 25 N. E. 869.

Kentucky. — Central Pass. R. Co. *v.* Kuhn, 86 Ky. 578, 6 S. W. 441, 9 Am. St. Rep. 309; Louisville & N. R. Co. *v.* Ritter, 85 Ky. 368, 3 S. W. 591; Baltimore & O. S. R. Co. *v.* Hausman, 21 Ky. L. Rep. 1264, 54 S. W. 841.

Minnesota. — Graham *v.* Burlington C. R. & N. R. Co., 39 Minn. 81, 38 N. W. 812; Smith *v.* St. Paul C. R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550.

Mississippi. — New Orleans J. & G. R. R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98.

Missouri. — Clark *v.* Chicago & A. R. Co., 127 Mo. 197, 29 S. W. 1013; Wilkerson *v.* Corrigan Consol. St. R. Co., 26 Mo. App. 144.

Montana. — Hamilton *v.* Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860.

Nevada. — Wedgkind *v.* Southern P. Co., 20 Nev. 292, 26 Pac. 682.

New York. — Seybolt *v.* New York L. E. & W. R. Co., 95 N. Y. 562, 47 Am. Rep. 75.

Ohio. — Iron R. Co. *v.* Mowery, 36 Ohio St. 418, 38 Am. Rep. 597. *Compare* Falk *v.* Third Ave. R. Co., 38 App. Div. 49, 55 N. Y. Supp. 984.

Proof That a Train Became Uncoupled and the two portions subsequently collided raises a presumption of negligence. Tuttle *v.* Chicago R. I. & P. R. Co., 48 Iowa 236.

Presumption of Negligence, Collision of Vessel. — Sherlock *v.* Alling, 44 Ind. 184.

Presumption of Negligence From Injury Caused by Ferry Boat Striking Wharf With Such Violence As to Cause Rebound. — Bartlett *v.* New York & S. B. F. & S. Tr. Co., 25 Jones & S. (N. Y.) 348.

61. Presumption of Negligence From Collision With Animals on Track. — Louisville N. A. & C. R. Co. *v.* Hendricks, 128 Ind. 462, 28 N. E. 58; Louisville & N. R. Co. *v.* Ritter, 85 Ky. 368, 3 S. W. 591; Sullivan *v.* Philadelphia & R. R. Co., 30 Pa. St. 234, 72 Am. Dec. 698. See also Blair *v.* Milwaukee & P. D. C. R. Co., 20 Wis. 254.

62. Federal St. & P. V. R. Co. *v.* Gibson, 96 Pa. St. 83 (where the car collided with a wagon on the street). See also, Central Pass. R. Co. *v.* Kuhn, 86 Ky. 578, 6 S. W. 441, 9 Am. St. Rep. 309. *Compare* Shay *v.* Camden & S. R. Co., 66 N. J. Law 334, 49 Atl. 547.

63. Presumption of Negligence From Defective Tracks. — George *v.*

(h.) *Passenger Injured by Derailment of Vehicle.* — A presumption of negligence upon the part of the carrier arises on proof that the injury to the passenger resulted from the derailment of the car or train on which he was riding.[64] But where the passenger does

St. Louis I. M. & S. R. Co., 34 Ark. 613; Arkansas M. R. Co. *v.* Griffith, 63 Ark. 491, 39 S. W. 550; Pittsburg C. & St. L. R. Co. *v.* Williams, 74 Ind. 462; Cleveland C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312.

64. Derailment of Car or Train. *England.* Carpue *v.* L. B. & S. C. R. Co., 5 Q. B. 747, 13 L. J. Q. B. 138.

Alabama. — Louisville & N. R. Co. *v.* Jones, 83 Ala. 376, 3 So. 902; Alabama G. S. R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65; Montgomery & E. R. Co. *v.* Mallette, 92 Ala. 209, 9 So. 363.

Arkansas. — Eureka Springs R. *v.* Timmons, 51 Ark. 459, 11 S. W. 690; St. Louis & S. F. R. Co. *v.* Michell, 57 Ark. 418, 21 S. W. 883; George *v.* St. Louis I. M. & S. R. Co., 34 Ark. 613.

California. — Mitchell *v.* Southern Pac. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130.

Colorado. — Rio Grande W. R. Co. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76.

Georgia. — Florida Cent. & P. R. Co., *v.* Rudulph, 113 Ga. 143, 38 S. E. 328; Central R. Co. *v.* Sanders, 73 Ga. 513; Yonge *v.* Kinney, 28 Ga. 111.

Illinois. — Wabash W. R. Co. *v.* Friedman, 41 Ill. App. 270; Peoria, P. & J. R. Co. *v.* Reynolds, 88 Ill. 418; Pittsburgh, C. & St. L. R. Co. *v.* Thompson, 56 Ill. 138; Galena & C. U. R. Co. *v.* Yarwood, 17 Ill. 509, *affirming* 15 Ill. 468, 65 Am. Dec. 682.

Indiana. — Chicago & E. I. R. Co., *v.* Grimm, 25 Ind. App. 494, 57 N. E. 640; Cleveland C. C. & I. R. Co. *v.* Newell, 75 Ind. 542, 3 N. E. 836; Louisville N. A. & C. R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476; Ohio & M. R. Co. *v.* Voight, 122 Ind. 288, 23 N. E. 774.

Iowa. — Pershing *v.* Chicago B. & Q. R. Co., 71 Iowa 561, 32 N. W. 488.

Kansas — Southern Kansas R. Co. *v.* Walsh, 45 Kan. 653, 26 Pac. 45; Atchison T. & S. F. R. Co. *v.* Elder, 57 Kan. 312, 46 Pac. 310.

Kentucky. — Louisville & P. R. Co. *v.* Smith, 2 Duv. 556.

Maine. — Stevens *v.* European & N. A. R., 66 Me. 74.

Maryland.—Baltimore & O. R. R. Co. *v.* Worthington, 21 Md. 275, 83 Am. Dec. 578.

Massachusetts — Feital *v.* Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720.

Missouri. — Furnish *v.* Missouri Pac., 102 Mo. 438, 13 S. W. 1044, 15 S. W. 315, 669, 22 Am. St. Rep. 781.

Nebraska. — Chicago R. I. & P. R. Co. *v.* Zernecke, 59 Neb. 689, 82 N. W. 26; Spellman *v.* Lincoln Rapid Trans. Co., 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316.

New Jersey. — Bergen Co. T. Co. *v.* Demarest, 62 N. J. Law 755, 42 Atl. 729, 72 Am. St. Rep. 683.

New York. — Seybolt *v.* New York L. E. & N. R. Co., 95 N. Y. 562, 47 Am. Rep. 75; Webster *v.* Elmira C. & N. R. Co., 85 Hun 167, 32 N. Y. Supp. 590; Hegeman *v.* Western R. Corp., 16 Barb. 353. *Compare* Hastings *v.* Central C. R. Co., 7 App. Div. 312, 40 N. Y. Supp. 93.

Philadelphia. — Sullivan *v.* Philadelphia & R. R. Co., 30 Pa. St. 234, 72 Am. Dec. 698; Reading City P. R. Co. *v.* Eckert, (Pa.), 4 Atl. 530; Dampman *v.* Pennsylvania R. Co., 166 Pa. St. 520, 31 Atl. 244.

Tennessee. — Illinois Cent. R. Co. *v.* Kuhn, 107 Tenn. 106, 64 S. W. 202.

Texas. — Mexican C. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

Rule Discussed. — In San Antonio & A. P. R. Co. *v.* Robinson, 73 Tex. 277, 11 S. W. 327, the court charged the jury that "where a railroad car, containing passengers, is thrown from the track, and a passenger, who has paid his fare, is thereby injured, the presumption is that the accident resulted either from the fact that the track was out of order, or that the train was badly managed, or both combined, and the burden is on the defendant company to show by a pre-

ponderance of evidence that it was not neglect in any of these respects." The court said: "This was instructing the jury that proof of derailment of the train was equivalent to evidence either that the track was out of order or that the train was badly managed, and was proof of negligence sufficient to authorize a verdict for plaintiff, unless the defendant overcame it by a preponderance of evidence. The instruction that the facts presumed to exist from proof of the derailment cast upon the defendant the burden of proving want of negligence amounts to a charge that proof of an injury to a passenger, occasioned by a derailment of the train on which he is being conveyed, is evidence of the carrier's negligence. If this charge does not in so many words decide for the jury the question of negligence, it still does so in effect by charging that such proof devolved upon the defendant the necessity of disproving negligence arising out of that state of facts. If the proposition be correct that proof of an injury resulting to a passenger from such a cause, unexplained and uncontradicted, would be sufficient evidence for a jury to find against the carrier, it is still incorrect for the court to declare or charge as a proposition of law. It has been repeatedly decided by this court that the existence of negligence is, in such cases as this, a question for the jury, and not for the court. We do not think that the propositions stated in this charge are correct, either as presumptions of law or fact. It does not necessarily follow that a car's being thrown from the track is caused by the track being out of order, or the train being badly managed, or from both causes combined. The same thing may happen from other causes. It was the province of the jury to find from the evidence what caused the accident, and whether the defendant was negligent. In this case the evidence was conflicting both upon the point of the condition of the track and the speed of the train. The facts that plaintiff was a passenger, and that the car in which he was riding was thrown from the track, whereby he was injured, were undisputed. The charge of the court is that plaintiff's evidence upon the conflicting points is aided by a presumption that casts upon the defendant an additional burden of proof."

In Texas & P. R. Co. *v.* Buckelew, 3 Tex. Civ. App. 272, 22 S. W. 994, the injuries sued for resulted from the derailment of the car in which the passenger was being carried, and it was held error to charge the jury that the fact that the passenger is injured without fault of his raises a presumption of negligence against the carrier and places the burden upon the latter to show that the injury was not caused by its negligence; that the law raises no such presumption, nor does it impose the burden of proof upon the carrier; that while in many instances negligence may be presumed from the fact that the train was derailed and the passenger injured, the law does not presume that the carrier was guilty of negligence simply because of such derailment and injury.

In Curtis *v.* Rochester & S. R. Co., 18 N. Y. 534, 75 Am. Dec. 258, the accident consisted of the train running off the track at the switch; but the proof left it uncertain whether the switch was deranged or the accident resulted from the spreading and breaking of the rails; and it was held that it was immaterial which theory was correct, as in either case the presumption of negligence arose.

Presumption of Negligence From Street Car Rolling Down Embankment. — Louisville & P. R. Co. *v.* Smith, 2 Duv. (Ky.) 556.

Where not only the fact of the injury is admitted, but the derailment and overturning of the car are undisputed facts and there is evidence tending to show that at the time of the accident the train was running down a steep incline on a new and curved track at an unusual and dangerous rate of speed, the burden is upon the carrier to prove that the injury was not caused by any want of care on its part. Mitchell *v.* Southern Pac. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130.

In Zemp *v.* Wilmington & M. R. Co., 9 Rich. Law (S. C.) 84, 64 Am. Dec. 763, the plaintiff was injured while standing on the car plat-

not rest upon the fact of the derailment, but shows the manner in which the accident happened, he must show negligence upon the carrier's part.[65]

(i.) *Objects Falling Upon Passengers.* — Again, negligence upon the part of the carrier will be presumed where a passenger was injured by some object constituting a part of the carrier's apparatus or machinery falling upon the passenger,[66] as for example berth in a sleeping car,[67] or ship.[68] And the rule has been invoked even though the falling object did not constitute part of the carrier's apparatus, but was under the control of its servants.[69] But the rule is not applicable where the falling object was neither a part of the carrier's apparatus, nor was under the control of its servants.[70]

(j.) *Objects Striking Passenger.* — Again, where a passenger is struck by some object under the control of the carrier, the presumption of negligence arises.[71]

form where he had gone for the purpose of alighting and taking a stage coach at a point where the trains had been accustomed to stop, being, in fact, as far as the road was finished. In this instance, however, it appeared that the train was to go on to another point, and while the plaintiff was so standing on the platform the conductor signalled the train, immediately after which the train left the track and the plaintiff was caught in the wreck and injured. It was held that the presumption of negligence arose.

65. Buckland *v.* New York N. H. & H. R. Co., 181 Mass. 3, 62 N. E. 955.

66. White *v.* Boston & A. R. Co., 144 Mass. 404, 11 N. E. 552.

67. Railroad Co. *v.* Walrath, 38 Ohio St. 461, 43 Am. Rep. 433.

68. Smith *v.* British & N. A. R. M. S. P. Co., 14 Jones & S. (N. Y.) 86.

69. Memphis & O. R. P. Co. *v.* McCool, 83 Ind. 392, 43 Am. Rep. 71.

70. Morris *v.* New York Cent. & H. R. R. Co., 106 N. Y. 678, 13 N. E. 455 (where the passenger was injured by another passenger's luggage falling out of the rack). See also Spencer *v.* Chicago M. & St. P. R. Co., 105 Wis. 311, 81 N. W. 407.

In Pennsylvania R. Co. *v.* MacKinney, 124 Pa. St. 462, 17 Atl. 14, 10 Am. St. Rep. 601, 2 L. R. A. 820, a passenger was struck in the eye by some hard substance hurled from without, and the jury were charged that the mere happening of an injurious accident to a passenger while in the hands of a carrier raised *prima facie* a presumption of negligence and threw upon the carrier the burden of proving that it did not exist. The court in holding this charge to be erroneous said that the presumption of negligence arising from the fact of an injury could be invoked only when there was some evidence tending to connect the carrier or his servants or some of the appliances of transportation with the happening of the injury.

71. Presumption of Negligence From Injury Caused by Objects Under Control of Carrier Striking Passenger. — Breen *v.* New York Cent. & H. R. R. Co., 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450 (where passenger was struck by swinging door on another train); Walker *v.* Erie R. Co., 63 Barb. (N. Y.) 260 (where the passenger was struck by a bar of iron projecting from another train); Baltimore Y. T. Co. *v.* Leonhardt, 66 Md. 70, 5 Atl. 346, 59 Am. Rep. 156 (where passenger was struck by bridge); Holbrook *v.* Utica & S. R. Co., 12 N. Y. 236, 64 Am. Dec. 502 (where it appeared that the plaintiff was injured by being struck by some board or other hard substance projecting from cars standing on a sidetrack); Texas M. R. Co. *v.* Jumper, 24 Tex. Civ. App. 671, 60 S. W. 797 (where the passenger was in-

(k.) *Explosions.* — Within the rule under discussion, negligence of the carrier may be inferred when the injury was caused by explosion of the boiler on the boat,[72] or locomotive,[73] or of a lamp on an omnibus.[74]

(l.) *Train Running Past Station.* — Proof that a train ran past the station and the passenger was required to alight at an unsafe place raises a presumption of negligence.[75]

(m.) *Passenger Injured While Alighting.* — It is held that the mere fact that a passenger is injured while alighting from the car or train is not sufficient to raise a presumption of negligence against the carrier.[76] But proof of an injury to a passenger while in the

jured by a hot cinder from the engine).

The mere happening of an injurious accident raises *prima facie* a presumption of negligence and throws upon the carrier the burden of showing that negligence did not exist. Laing *v.* Colder, 8 Pa. St. 479, 49 Am. Dec. 533. In this case it appeared that the accident occurred whilst the car was passing over a bridge which was so narrow that the plaintiff's hand lying outside the car window was caught by the bridge and his arm broken.

72. Dunlap *v.* Steamboat Reliance, 2 Fed. 249. See also Fay *v.* Davidson, 13 Minn. 275, 491; Spear *v.* Philadelphia W. & B. R. Co., 119 Pa. St. 61, 12 Atl. 824.

Presumption of Negligence From Explosion of Boiler. — Caldwell *v.* New Jersey S. B. Co., 56 Barb. (N. Y.) 425, *affirmed* 47 N. Y. 282.

73. Yeomans *v.* Contra Costa St. Nav. Co., 44 Cal. 71; Robinson *v.* New York Cent. & H. R. Co., 20 Blatchf. (U. S.) 338.

74. Wilkie *v.* Bolster, 3 E. D. Smith (N. Y.) 327.

75. Memphis & C. R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699.

76. Mitchell *v.* Chicago & G. T. R. Co., 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566; Railroad *v.* Mitchell, 11 Heisk. (Tenn.) 400 (where the passenger was run over while alighting); Kelly *v.* New York & S. B. R. Co., 109 N. Y. 44, 15 N. E. 879 (where the passenger's clothes caught on a broken hook); Pennsylvania Co. *v.* Marion, 104 Ind. 239, 3 N. E. 874 (where the passenger stepped from a moving train on to a defective platform); Delaware L. & W. R. Co. *v.* Napheys, 90 Pa. St. 135 (where the passenger fractured her knee pan while alighting); Sommers *v.* Mississippi & T. R. Co., 7 Lea (Tenn.) 201.

Testimony that a passenger on a street car indicated a desire to leave the car, which was stopped to enable him to do so; that while he was in the act of leaving the car and before he could place himself safely upon the ground the car was started, in consequence of which he was thrown down and injured, makes a *prima facie* case of negligence against the railroad company. United R. & Elec. Co. *v.* Beidelman, 95 Md. 480, 52 Atl. 913, *citing* Pittsburg & C. R. Co. *v.* Andrews, 39 Md. 329, 17 Am. Rep. 568; Philadelphia W. & B. R. Co. *v.* Anderson, 72 Md. 519, 20 Atl. 2, 20 Am. St. Rep. 483, 8 L. R. A. 673.

In Fielders *v.* North Jersey St. R. Co., 67 N. J. Law 76, 50 Atl. 533, a passenger was injured by stepping into a hole in the street, which it was claimed the defendant should have repaired, and it was held that the presumption of negligence arose.

Rule Stated. — In Paynter *v.* Bridgeton & M. T. Co., 67 N. J. Law 619, 52 Atl. 367, the court said: "A fall while alighting from a street car is not such a fact, standing alone, as to authorize the application of the doctrine of *res ipsa loquitur*. The thing that happened in no way can be said to prove that the defendant was negligent. The only thing proved was the fall. Nothing was proved causing the fall or any circumstance which could be in any way said to show that the defendant was negligent. If it had been proved that a jerk or jolt of the car had produced

act of alighting from a car caused by a sudden jerk of the car imposes upon the carrier the duty to show that it was not responsible therefor.[77]

(n.) *Passenger Riding on Freight Train.* — A passenger riding on a freight train and rightfully there, is entitled to the same presumption of negligence within the rule under discussion, as a passenger riding on a regular passenger train.[78]

b. *Circumstantial Evidence.* — **(1.) Generally.** — Negligence of a carrier is often not susceptible of direct proof; and hence resort is had to circumstantial evidence,[79] and the charge of negligence may

the fall, that fact, unexplained, might be said to prove the defendant's negligence, though the defendant might furnish an explanation of it which would relieve from responsibility."

Passenger Stepping on Obstruction. — No presumption of negligence on the part of a carrier arises from the fact of injury to a passenger stepping upon an obstacle upon the station platform, there being no proof as to how it came there or how long it had been there. Bernhardt *v.* Western Pennsylvania R. Co., 159 Pa. St. 360, 28 Atl. 140.

77. Birmingham U. R. Co. *v.* Hale, 90 Ala. 8, 8 So. 142, 24 Am. St. Rep. 748; Martin *v.* Second Ave. R. Co., 3 App. Div. 448, 38 N. Y. Supp. 220.

78. Woolery *v.* Louisville N. A. & C. R. Co., 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114; Stoody *v.* Detroit G. R. & W. R. Co., 124 Mich. 420, 83 N. W. 26; Georgia Pac. R. Co. *v.* Love, 91 Ala. 432, 8 So. 714, 24 Am. St. Rep. 927; Norton *v.* St. Louis & H. R. Co., 40 Mo. App. 642; St. Joseph & G. I. R. Co. *v.* Hedge, 41 Neb. 448, 62 N. W. 887; Southern R. Co. *v.* Dawson, 98 Va. 577, 36 S. E. 996.

79. On an issue as to whether or not a car was so overloaded as to cause it to break down and cause a wreck wherein a passenger was injured, it is proper to receive evidence of the size of the articles loaded on the car. Kansas City M. & B. R. Co. *v.* Smith, 90 Ala. 25, 8 So. 43, 24 Am. St. Rep. 753.

On an issue as to whether or not a steamboat owner was negligent in allowing persons to sit in a small boat suspended from the main deck on one side of the boat, which fell and injured a passenger sitting on the main deck, it is proper to receive evidence that on the same trip persons were seen to sit in a like boat similarly suspended on the other side of the boat. Simmons *v.* New Bedford, V. & N. S. Co., 100 Mass. 34.

Speed of Train. — In Keating *v.* Detroit B. C. & A. R. Co., 104 Mich. 418, 62 N. W. 575, an action to recover for injuries to a passenger riding in a passenger coach attached to the rear end of a train loaded with logs, in which the charge of negligence was that the logs were so loaded as to permit them to become loose and roll off, thus causing the derailment, it was held proper to admit evidence as to the speed of the train and as to the absence of the bell cord. The court said that "What might have been proper loading for running the train in one manner might not be proper in case of a higher rate of speed, and the circuit judge, in his charge, limited the application of the testimony and instructed the jury that it could only be considered as bearing upon the question whether it was negligent to load the cars in the manner in which they were loaded, having reference to the rate of speed and the manner in which the train was run, and the failure to provide a bell cord."

Evidence of the Rate of Speed at Which a Car or Train Was Running Some Distance From the Place of the Accident is competent on an issue as to whether or not it was running at a dangerous rate of speed at the time of the accident, where there is also evidence that the speed had not been checked after the train left the last stop. Louisville N.

be rebutted by such evidence.[80] So, in an action against the owner of a stage coach to recover for injuries to a passenger, evidence

A. & C. R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476. See also Wilson *v.* Broadway & S. A. R. Co., 8 Misc. 450, 28 N. Y. Supp. 781, and in Saffer *v.* Dry Dock E. B. & B. R. Co., 53 Hun 629, 5 N. Y. Supp. 700, an action against a street car company for injuries received by a passenger while alighting from a car, the plaintiff testified that while he was standing on the car step expecting the car to stop, the car, in fact, increased its speed and threw him from the car. The conductor testified for the defendant that the car was passing over the curve at a corner of the streets and was diminishing its speed, and that the plaintiff thereupon stepped off while the car was in motion. The defendant had also given evidence to the effect that the cars never passed over a curve in the manner described by the plaintiff, and it was held proper for the plaintiff to introduce evidence as to the rate of speed at which the cars were run in passing around curves.

The General Reputation of a Horse Used by a Street Car Company, amongst the drivers and employees of the company for being an unsafe and unreliable horse for such purposes and her propensity to run if anything came against her heels, is not objectionable as being merely hearsay, but is admissible as tending to show negligence on the part of the street car company in providing an unsafe horse, and using it after they knew, or should have known, its unsafeness for the work. Wormsdorf *v.* Detroit C. R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453, *citing* Davis *v.* Detroit & M. R. Co., 20 Mich. 105, 4 Am. Rep. 364; Hilts *v.* Chicago & G. T. R. Co., 55 Mich. 437, 21 N. W. 878.

"Where the employee whose business it was to place a stool used for the purpose of assisting lady passengers to enter the train was not produced or accounted for, there was no error in rejecting evidence that it was the custom and habit of the company to have the stool in its proper place up to the time of the starting of the train, there being positive evidence in behalf of the plaintiff that it was out of place when he was injured, and only negative evidence to the contrary in behalf of the defendant." Atlantic W. P. R. Co. *v.* Holcombe, 88 Ga. 9, 13 S. E. 751. If the employee, said the court, "whose duty it was to look after this stool had been sworn as a witness and had testified that when the plaintiff fell the stool was where it should be, we think it would have been proper to allow him to strengthen his testimony by stating, if he could, that he knew the stool was in its proper place on this particular occasion because it was his invariable habit and custom to keep it where it belonged, and not to take it up until the train was about to start."

On an issue as to whether or not it was proper for a passenger conductor to remove a passenger from the train at the point where he did, it is proper to receive evidence that an extra train was following the train from which the passenger was expelled and was expected to reach, and did reach, the point at which the expulsion took place within twenty minutes thereafter. Illinois Cent. R. Co. *v.* Latimer, 128 Ill. 163, 21 N. E. 7, *affirming* 28 Ill. App. 552.

80. On an issue as to whether or not a carrier of passengers stopped its train at a station a sufficient length of time to permit passengers to alight, it is proper to receive evidence for the carrier showing how long the carrier usually stopped its train at that place. Fuller *v.* Naugatuck R. Co., 21 Conn. 557. And where the defendant has been allowed to introduce evidence that the train upon the day in question stopped as long or longer than usual, it is proper to permit plaintiff to show in rebuttal how long the defendant's trains had been in the habit of stopping at the station in question in order to enable the jury to determine the weight of the defendant's evidence upon that subject and perhaps also to measure the duration of the stoppage of the train upon the particular occasion.

as to the manner in which the stage was driven[81] before and after the accident is relevant.[82]

(2.) Cost of Rolling Stock. — Evidence of the cost of Pullman cars and other rolling stock of a railroad company is irrelevant upon an issue as to whether or not the company was negligent in running its train at a dangerous and high rate of speed.[83]

(3.) Condition of Instrumentalities, Appliances, Etc. — (A.) IN GENERAL. Evidence of the general bad condition of a portion of a railroad track and roadbed in and about the place of an accident caused by alleged defects therein, is admissible in an action against the company to recover damages for injuries suffered by a passenger in such accident.[84] But where the accident is charged to the alleged

Gulf C. & S. F. R. Co. *v.* Rowland, 82 Tex. 166, 18 S. W. 96.

A General Custom As to Number of Passengers Conveyed by a coach of the same size on other routes may be proved, but not the custom on the particular route to carry as great a number of passengers as were carried on the trip in controversy. Maury *v.* Talmadge, 2 McLean 157, 16 Fed. Cas. No. 9315.

In an action against a street railway company for injuries suffered by a passenger through the alleged negligence of the company in not maintaining brakes in proper repair, whereby the car was allowed to run down a steep hill, it is proper to refuse evidence for the company that its servants had stopped cars there before that day without accident. Joliet St. R. Co. *v.* Call, 42 Ill. App. 41.

81. It is not error to receive evidence tending to prove that the coach was upset by reason of the negligence and carelessness of the driver in not skillfully and prudently driving and controlling his team; and also for the purpose of showing negligence on the part of the driver in managing and controlling the team, to receive evidence tending to show that the coach was unreasonably overloaded, that the team was unsafe on account of the character of the horses, and that it was unsafe and imprudent to drive six horses. Faylor *v.* Day, 16 Vt. 566.

82. Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544. Such evidence, said the court, "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 time the accident occurred, or as connected with the accident." See also McKinney *v.* Neil, 1 McLean 540, 16 Fed. Cas. No. 8865, so holding of evidence that at one time the lines were not properly fastened on the horses, and that at another time the driver handled them unskillfully and came near upsetting the coach.

83. Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321.

84. Vicksburg & M. R. Co. *v.* Putnam, 118 U. S. 545, 30 L. ed. 257; Fitch *v.* Mason City & C. L. T. Co., 116 Iowa 716, 89 N. W. 33; Ohio Valley R. Co. *v.* Watson, 93 Ky. 654, 21 S. W. 244, 40 Am. St. Rep. 211, 19 L. R. A. 310; Nashville C. & St. L. R. Co. *v.* Johnson, 15 Lea (Tenn.) 677; Texas T. R. Co. *v.* Johnson, 86 Tex. 421, 25 S. W. 417. See also Union Pac. R. Co. *v.* Hand, 7 Kan. 380; Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541.

On an issue as to whether or not an accident was caused by the rapid running of a train over an imperfect track, it is competent to show the condition of the track over which the train had to pass before reaching the place of the accident. Jacksonville S. E. R. Co. *v.* Southworth, 135 Ill. 250, 25 N. E. 1093, *affirming* 32 Ill. App. 307.

In Missouri Pac. R. Co. *v.* John-

son, 72 Tex. 95, 10 S. W. 325, an action by a passenger for injuries sustained through the derailment of a train, plaintiff after proof tending to show gross negligence on the part of the defendant in failing for a long time to keep in repair its road, was permitted to prove that it was the general reputation in the community along the line of the road that the track was in bad order. The court said: "It is to be presumed that the evidence was admitted for the purpose of showing that the company had knowledge of the defective condition of the road. Evidence may have been admissible for this purpose, though it seems to us it was unnecessary. The condition of the track, as was shown by all the evidence, had not materially changed for several months prior to the accident; and if that condition was such as plaintiff claimed it to be, . . . want of repair was visible and manifest, and the company must be held to have known of it."

Where there is evidence tending to show that the immediate cause of the derailment of a train was the breaking of a rail as the train passed over it, and also that the rail gave way in consequence, in part, of the defective condition of the ties under it and in part of the rail itself being old and worn, it is proper to receive evidence showing that other rails and cross ties near that place were also old, worn, rotten, decayed, etc. Ala. G. S. R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65. The court said: "It may well have been that other defective rails and cross ties in the immediate vicinity contributed to the breaking of the particular rail by imparting irregular motion to the cars and causing them to bear down with greater weight and force at the point where the track gave way. Moreover, all this evidence was competent as affording a stronger inference that defendant's employees knew of the perilous condition of the track, including that portion constituted of the broken rail and the ties beneath it than would have been afforded by proof confined to the particular rail and ties."

In Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321, the injury was caused by a passenger car being thrown from the track and upset, the testimony showing that the accident was caused by the breaking of the defective axle, testimony was introduced bearing upon the condition of the cars and track and the speed of the train, etc. The court said that no "defects in the track could be relied on to show negligence contributing to the accident except those existing where the track was injured or displaced, and that testimony as to the condition of the road away from the scene of the injury was improper to make out a cause of action, and could only tend to raise false issues. The testimony should be confined to the time as well as the place of the accident."

Evidence of the presence of obstructions on the depot platform, near the place of the accident, an hour or so after the accident happened, is admissible against the railroad company, especially where it corroborates the testimony of a witness to the presence of these obstructions at the time of the accident. New York C. & St. L. R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871.

In Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17, an action to recover damages for an alleged injury received by the plaintiff while traveling as a passenger, through the derailment of the train, caused by the breaking of a rail, it was held error to permit the plaintiff to exhibit to the jury pieces of rail claimed by him to have been picked up at the place of the accident several months after the accident occurred, and permit the jury to draw a conclusion as to the soundness or unsoundness of the rails by an inspection of such pieces.

Where a railroad company claims that an accident was due to the displacement of a rail, wrongfully loosened from the track and thrown diagonally across the track by some evil-disposed person, and in support thereof introduces the rail in court, showing on the outside of its bottom flange a scar claimed to have been made by collision of the pony truck

negligence of the carrier's servants, while not engaged in the operation of the carrier's machinery, evidence of defects in such machinery is irrelevant.[85]

(B.) Condition at Another Time. — Upon an issue as to the condition of some of the carrier's instrumentalities used for the transportation of passengers, at the time of an injury suffered by a passenger through the alleged defective condition of such instrumentality, its condition at another time can be shown if the circumstances justify the presumption,[86] or if it is affirmatively proved,[87] that no change has taken place in the interval.

(C.) Condition at Another Place. — But, on an issue as to the condition of some of the carrier's instrumentalities at the place of the injury, evidence of its condition at other places is inadmissible,[88]

wheel, in front of the engine, with the flange of the rail as it laid across the track, it is proper to allow an experiment with a rail and wheel of practically the same size, dimension, measurement, and weight as those actually used, for the purpose of showing that the rail in question could not have been scarred as claimed. Leonard *v.* Southern Pac. Co., 21 Or. 555, 28 Pac. 887, 15 L. R. A. 221.

A Photograph of a Railroad Trestle and of a Wrecked Train of cars shown to have been taken about two hours after the accident in question and verified by the testimony of the photographer as being a correct representation of the locality and scene, is properly admitted in evidence. Kansas City M. & B. R. Co. *v.* Smith, 90 Ala. 25, 8 So. 43, 24 Am. St. Rep. 753.

Proof of the condition of a railroad track and roadbed may be made by reports made by the superintendent of the road to the officers, reporting on the condition of the road, including the place of the accident. Vicksburg & M. R. Co. *v.* Putnam, 118 U. S. 545, 30 L. ed. 257.

85. Memphis & O. R. P. Co. *v.* McCool, 83 Ind. 392, 43 Am. Rep. 71.

86. Slack *v.* Harris, 101 Ill. App. 527 (passenger elevator). See also Kingman *v.* Lynn & B. R. Co., 181 Mass. 387, 64 N. E. 79.

87. Jacksonville S. E. R. Co. *v.* Southworth, 135 Ill. 250, 25 N. E. 1093; Union Pac. R. Co. *v* Hand, 7 Kan. 380. *Compare* Newcomb *v.* New York Cent. & H. R. Co., 169 Mo. 409, 69 S. W. 348.

On an issue as to the condition of a railroad track at a certain point, it is not error to permit evidence showing the condition of the ties at the place of the accident several months later, when the road was being repaired at that point. Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17, the court said: "The mere fact that the road was repaired at that place six months after the accident would not in itself be competent evidence tending to show that it was out of repair when the accident happened; but if in making such repairs it was shown that the ties were in such a state of decay as fairly led to the conclusion that they were in a decayed state at the time that accident happened, or the condition of the road be such as would fairly tend to prove that it was not in a safe condition when the accident happened, such evidence would be clearly admissible."

88. *Iowa.* — Whittlesey *v.* Burlington C. R. & N. R. Co., (Iowa), 90 N. W. 516.

Kentucky. — Louisville & N. R. R. Co. *v.* Fox, 11 Bush 495.

Michigan. — Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321.

Missouri. — Hipsley *v.* Kansas City, St. J. & C. B. R. Co., 88 Mo. 348.

New Hampshire. — Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541.

New York. — Reed *v.* New York C. R. Co., 45 N. Y. 574.

North Carolina. — Grant *v.* Raleigh & G. R. Co., 108 N. C. 462, 13 S. E. 209.

unless such defective condition is shown to be the result of a cause operating presumptively at the place of the accident, or may have caused the defect which produced the injuries complained of.[89] But where a train is derailed and the condition of the track at the place of the accident cannot be ascertained, it is competent to show such condition near by on the theory that it may be presumed that the track was in bad condition in the immediate vicinity of the accident.[90]

Wisconsin. — Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17.

In an action against a railway company for injuries suffered by a passenger while alighting from a train, the plaintiff cannot show that the platform at the place of the accident was considerably higher than the platform at another station. Nichols *v.* Dubuque D. R. Co., 68 Iowa 732, 28 N. W. 44. The court said: "If the platform was higher than it should have been, and the height contributed to the difficulty of alighting safely, under the circumstances shown, it may be that the plaintiff would have been entitled to show such fact as bearing upon the question of her freedom from contributory negligence, but we are unable to see how the mere fact that the platform was higher than the one at Allison was material."

Evidence of the condition of the railroad for a short distance on either side of the place where the accident in question occurred is competent. Nashville C. & St. L. R. Co. *v.* Johnson, 15 Lea (Tenn.) 677. See also Texas P. R. Co. *v.* DeMilley, 60 Tex. 194; Missouri Pac. R. Co. & I. G. R. Co. *v.* Collier, 62 Tex. 318.

On an issue as to whether the conduct of a railroad company was what it should have been at the time of an accident, in view of the increased danger resulting from the irregularity in the arrival of trains, and unusual number of persons on the platform, and that by reason thereof passengers should have been discharged elsewhere, or have been notified to remain in their car until the other train was in, or that the other train should not have been brought in as it was, when the platform was thus crowded, or that someone should have been stationed there to protect or warn the passengers standing on the platform, it is not error to refuse to permit the railroad company to show that at several other points the arrangement of tracks and the method of drawing up trains for the discharge of passengers were, and had been for years, substantially the same as at the place of the accident. Ranney *v.* Johnsbury & L. C. R. Co., 67 Vt. 594, 32 Atl. 810.

89. Pattee *v.* Chicago M. & St. P. R. Co., 5 Dak. 267, 38 N. W. 435. See also Morse *v.* Minneapolis & St. L. R. Co., Minn. 465, 16 N. W. 358; Leonard *v.* Southern Pac. Co., 21 Or. 555, 28 Pac. 887, 15 L. R. A. 221, where this rule was applied so as to admit proof of the defective condition of a portion of a bridge standing after the accident in such close proximity to the wrecked portion as to have contributed to the falling of the bridge.

90. Murphy *v.* New York C. R. Co., 66 Barb. (N. Y.) 125. In this case the court said: "If the ties were proved to be rotten, an adequate cause for the accident would be established; and as their condition at the point of divergence could not be ascertained, it was competent to show their condition near it, thus laying the foundation for the inference that if the ties were damaged to such a degree in the immediate vicinity of the accident, they may have been so at the place where the cars passed from the track. If such evidence is not competent it would be impossible to charge a railroad company with negligence in the construction or care of a track of its road. The duty of a company, after an accident by which its track is injured, is to put it in a proper state of repair immediately. This is required as well by its own interests as by the duty it owes to those traveling over

(4.) Precautions, Repairs, Etc. — (A.) In General. — Upon an issue as to whether or not injuries suffered by a passenger were caused by the carrier's negligence, evidence that precautions available to the carrier were omitted by him is admissible,[91] and likewise it is proper to receive evidence for the carrier of thoroughness and carefulness

its road. In repairing, defective ties and rails will be removed, and thus the persons injured will be deprived of all means of proving that the company was negligent. I do not desire to be understood as holding that the existence of defective ties or rails at one place on a road is conclusive evidence that they are defective at another. All I intend to say is, that it is evidence competent to be submitted to the jury, and from which, in connection with other proof, they may infer the presence of the same defects at the place where the injury occurred or the cause of the accident commenced to operate. I think the evidence was competent, and was properly admitted."

91. Chicago & A. R. Co. *v.* Fisher, 31 Ill. App. 36; Parker *v.* Boston & H. S. B. Co., 109 Mass. 449; Lustig *v.* New York, L. E. & W. R. Co., 65 Hun 547, 20 N. Y. Supp. 477; Jones *v.* Baltimore & O. R. Co., 21 D. C. 346; McGearty *v.* Manhattan R. Co., 15 App. Div. 2, 43 N. Y. Supp. 1086.

On an issue as to whether or not a railroad company was negligent in not providing a safety beam for the car which had broken down because of a defect in the axle, it is proper to admit evidence showing that that improvement had been extensively known and used prior to the time when the accident happened, and also to show its utility as a safeguard against accidents. Hegeman *v.* Western R. Corp., 16 Barb. (N. Y.) 353.

Stage Coach Lamp Not Lighted. In an action against a stage coach proprietor to recover for injuries sustained by a passenger from the upsetting of the stage coach, it is proper to permit evidence that one of the lamps on the stage, the one on the side which collided with the rock, causing the accident, was not lighted at the time of the accident. Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544.

Unprotected Street Car Platform. On an issue as to whether or not it was negligence on the part of a street car company to leave the front door of the car open, when the car was so full of passengers and the passage way blocked, making it difficult for the passenger to get to the rear platform to alight, and impossible for the conductor to see him, the fact that the front platform was not enclosed with a fender is proper to be shown in an action by one of the passengers who was injured while attempting to alight from the car at the front platform. Philadelphia City P. R. Co. *v.* Hassard, 75 Pa. St. 367.

Insufficient Accommodations for Excursion. — On an issue as to the negligence *vel non* of a railroad company in permitting a passenger train to be so overcrowded as to force passengers to ride on the platform, one of whom was thrown therefrom and injured, it is proper to receive evidence showing that upon the special occasion the company had advertised the excursion; the object of such testimony being to establish the fact that the company should, in the nature of things, have expected and did expect, large crowds. Williams *v.* International & G. N. R. Co., (Tex. Civ. App.), 67 S. W. 1085. *Compare* Chicago & A. R. Co. *v.* Fisher, 31 Ill. App. 36, wherein it was held that, on an issue as to whether a railroad company failed to provide sufficient accommodations for the passengers of an excursion train from which a passenger claims to have been crowded, the extent to which the excursion had been advertised, and the general understanding of the number of excursionists expected, cannot be shown, unless it is also shown that such advertising and general understanding were known to the company.

In Southern Kansas R. Co. *v.* Pavey, 48 Kan. 452, 29 Pac. 593, a passenger

in all respects directed to be used in the construction of the appliances which cause the injury.[92]

having heard his station called, and the train having stopped, proceeded to alight, and whilst in such act was thrown to the ground by the train suddenly jerking forward, and injured. It appeared that the passenger had never been at the station before, that the place where he alighted was not the station, nor was there any platform upon which to alight, nor any lights, and that the train men saw him passing out of the car but said nothing, and it was held that under the circumstances shown, it was proper to receive in evidence a rule of the company requiring conductors to prevent passengers from endangering themselves by imprudent exposure.

On an issue as to the negligence of a carrier by its servants in carelessly and improperly managing its engine and in not providing proper and suitable platforms and railings for the safety of passengers at the crossing or point where a passenger was injured while attempting to board a train, a rule of the company prohibiting trains or engines passing between the station and a standing train receiving or discharging passengers is admissible. Lake Shore & M. S. R. Co. *v.* Ward, 135 Ill. 511, 26 N. E. 520. "Such a rule," said the court, "is in the nature of an admission by (the company) that due care in the running and management of its engines and trains at stations and street crossings where passenger trains were receiving and discharging passengers required the course of conduct prescribed by the rule." See also Baltimore & Ohio R. Co. *v.* State, 81 Md. 371, 32 Atl. 201.

In San Antonio & A. P. R. Co. *v.* Robinson, 73 Tex. 277, 11 S. W. 327, the charge of negligence against the carrier was that the road was newly constructed and in bad condition, requiring great care in running trains over it; that the train in question consisted mainly of freight cars, and did not have the necessary brakes and that the defendant's servants in charge of the train, by gross negligence and carelessness, ran it at a high rate of speed down a heavy grade approaching a bridge, both track and bridge being in bad condition, whereby the train was wrecked. It was held that evidence to the effect that the engineer had, at the last stop, been warned about his reckless running over an unsurfaced, unsafe and hastily constructed road, was irrelevant.

Evidence that a few months after the accident in question some one of the skilled mechanics or engineers connected with the road devised a patent or plan by which it was supposed that such an accident as the one in question could not again occur, or could be prevented, is not competent as against the carrier in the absence of the proof that such new device was known to the carrier prior to the accident in question, or that its discovery could have been made by the exercise of diligence on its part. Carter *v.* Kansas City Cable R. Co., 42 Fed. 37.

Where it appears that a passenger was injured not by reason of any defect in the manner of constructing the car in which he was traveling, or any defect in the material of which it was constructed, but by reason of the fact that the car had become weak and unfit for use on account of long service, evidence as to the manner of construction and of the material used is immaterial, especially where it relates to the making and inspection of cars generally, and is not confined to the car under investigation. Ohio & M. R. Co. *v.* Voight, 122 Ind. 288, 23 N. E. 774.

92. On an issue as to whether or not a bolt by which a small boat which fell and injured a passenger was suspended from the main deck of the vessel was of sufficient strength, it is proper to permit the owner of the vessel to show instructions given to the builder as to the construction of the small boat, pertaining particularly to the small bolt in question. Simmons *v.* New Bedford V. & N. S. Co., 100 Mass. 34. The court said: "Upon the ques-

(B.) Precautions Subsequent to Accident. — Upon an issue as to whether injuries to a passenger were caused by the carrier's negligence, evidence of precautions taken by the carrier subsequent to the accident in question is not competent,[93] although the reception of such evidence has been held to be harmless error where the carrier's negligence is otherwise conclusively shown.[94]

(5.) Other Accidents. — (A.) In General. — Upon an issue as to whether or not injuries to a passenger were caused by the carrier's negligence, evidence of other accidents at the same place, or about the same time, causing injuries to passengers, may be received.[95]

tion whether the corporation had been negligent in allowing a bolt to be put in the small boat of insufficient strength, it could be shown that directions were given to have the particular bolt of the best kind and of sufficient size, or that general orders were given to have the materials all of the safest kind. The fact that thoroughness and carefulness in all respects had been directed to be used in the construction of the small larboard boat was competent evidence to rebut charge of negligence."

93. Aldrich *v.* Concord & M. R. Co., 67 N. H. 250, 29 Atl. 408 (where it was held error to admit evidence that the switch which had caused the accident was subsequently removed); Reed *v.* New York C. R. Co., 45 N. Y. 574; Hipsley *v.* Kansas City, St. J. & C. B. R. Co., 88 Mo. 348; Galveston, H. & S. A. R. Co. *v.* Walker, (Tex. Civ. App.), 48 S. W. 767; Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541; Brady *v.* Manhattan R. Co., 127 N. Y. 46, 27 N. E. 368; Auld *v.* Manhattan L. Ins. Co., 165 N. Y. 610, 58 N. E. 1085. See also Exton *v.* Central R. Co., 62 N. J. Law 7, 42 Atl. 486. *Compare* Baltimore & Y. T. R. *v.* Leonhardt, 66 Md. 70, 5 Atl. 346.

Evidence that immediately after the accident an elevator chain which broke was replaced by a larger and stronger one is inadmissible. Delaney *v.* Hilton, 50 N. Y. Super. Ct. 341.

The fact that a wooden bridge which was alleged to have been too narrow to allow the safe passage of trains, and which was alleged to have been allowed to get out of repair, so as to injure a passenger sitting by an open window with his elbow on the window sill, was replaced by a new iron bridge which was not defective in the particulars alleged, cannot be shown and taken into consideration in determining whether the company was negligent in allowing the old bridge to remain. Dale *v.* Delaware, L. & W. R. Co., 73 N. Y. 468.

94. Prescott & N. R. Co. *v.* Smith, 70 Ark. 179, 67 S. W. 865.

95. *Alabama.* — Mobile & M. R. Co. *v.* Ashcraft, 49 Ala. 305, 48 Ala. 15.

California. — Fogel *v.* San Francisco & S. M. R. Co., (Cal.), 42 Pac. 565.

Kansas. — Union Pac. R. Co. *v.* Hand, 7 Kan. 380; Missouri Pac. R. Co. *v.* Neiswanger, 41 Kan. 621, 21 Pac. 582, 13 Am. St. Rep. 304.

New Hampshire. —Bullard *v.* Boston & M. R. Co., 64 N. H. 62, 5 Atl. 837.

New York. —Rogers *v.* Trustees of N. Y. & B. Bridge, 11 App. Div. 141, 42 N. Y. Supp. 1046.

Evidence That Other Derailments had taken place at a particular switch, both before and after the time in question, is proper to be received where there is other evidence showing that when such accidents occurred the switch was in substantially the same condition. Clapp *v.* Minneapolis, St. L. R. Co., 33 Minn. 22, 21 N. W. 844, 24 N. W. 340; Morse *v.* Minneapolis, St. L. R. Co., 30 Minn. 465, 16 N. W. 358.

In Chase *v.* Jamestown St. R. Co., 60 Hun 582, 15 N. Y. Supp. 35, where the plaintiff while attempting to alight from a street car caught the skirt of her dress on the corner of sheet iron projecting from under a seat, throwing her forward onto the ground, it was held proper to receive

And it has been held that it is proper for the carrier to show by a witness competent to speak thereof, that he had never heard of a like accident.[96]

Trolley Wire Breaking. — Evidence that a trolley wire, which had been the occasion of an accident in which a passenger was injured, had, about the time of the accident in question, broken frequently is admissible.[97]

(B.) Accidents at Other Places. — But evidence of similar acci-

evidence of previous accidents from the same cause as illustrating the character of the defect.

In the Dallas Con. Elec. St. R. Co. *v.* Broadhurst, (Tex. Civ. App.), 68 S. W. 315, an action against a street railway company to recover damages for injuries sustained by a passenger from an electric shock, while attempting to board a car, testimony of a witness that he had undertaken the day before the accident to the plaintiff, to board the same car at the same place, and while so doing received an electric shock in the same manner as the plaintiff, is admissible as tending to show that the car and its equipment were not in proper condition and repair, and the company knew, or it ought to have known, of the fact by the use of proper diligence; and such testimony is not objectionable as being immaterial, and because it refers to an electric shock received by another person at a different time, at a different place and by a different current.

In an action against a stage coach proprietor to recover for injuries suffered by a passenger by the upsetting of the stage coach, it is proper to receive evidence that some distance further on the road, the same night of the accident in question, the driver got outside the road and into a gully made by the recent washout and that the passengers had to get out and assist in extricating the stage coach and team and getting them back on to the road, as being 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. Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544.

In Higley *v.* Gilmer, 3 Mont. 90, 35 Am. Rep. 450, an action to recover damages for injuries received by the upsetting of the defendant's stage coach, it was held proper to bring out on cross-examination of the driver the fact that he had had coaches driven by him before upset with him, and all the circumstances connected with such accidents. The court said that "Anything that would show that he was not (a good and skillful driver) was proper on cross-examination. The turning over of coaches even in this mountainous country where the roads are poor and dangerous is not frequent when the driver is good and competent, and appreciates the responsibilities of his position, and has a just pride in his useful and often dangerous and most arduous avocation."

Proof of Such Other Accidents May Be Made by a record of all accidents of all kinds occurring, kept by the carrier's servants, under the direction of the proper officer, and made in accordance with reports from servants cognizant of the accident, and signed by him. Rogers *v.* Trustees of N. Y. & B. Bridge, 11 App. Div. 141, 42 N. Y. Supp. 1046.

96. Holt *v.* Southwestern M. Elec. R. Co., 84 Mo. App. 443.

97. Richmond R. & Elec. Co. *v.* Bowles, 92 Va. 738, 24 S. E. 388. The court said: "Electricity is an agent no less powerful and dangerous than steam, and imposes equal obligations upon those who use it. The trolley wire is a contrivance essential to the use of electricity in the mode adopted by the defendant company, and the frequently recurring accidents which happened to the particular wire, which is the subject of investigation in this controversy, were quite sufficient to warn the defendant of its unsafe condition."

dents, at other places, to be so admissible, must be accompanied by proof that the conditions were similar.[98]

(C.) Accidents at Other Times. — So, also, evidence of accidents at other times, to be admissible within this rule, must be accompanied by proof that there had in the interval been no change in the conditions.[99]

c. *Res Gestae.*— (1.) Generally. — The *res gestae* rule has been so applied, in actions against carriers to recover damages for injuries suffered by passengers, as to admit evidence of the circumstances surrounding the accident or occurrence in which the passenger was injured.[1] And this rule applies with equal force in an action to

98. Brady *v.* Manhattan R. Co., 127 N. Y. 46, 27 N. E. 368; Hipsley *v.* Kansas City, St. J. & C. B. R. Co., 88 Mo. 348.

In Grant *v.* Raleigh G. R. Co., 108 N. C. 462, 13 S. E. 209, an action to recover for injuries suffered by a passenger through the defendant's train leaving the track at a switch, the exclusion of a question to the conductor as to whether or not a similar accident had not taken place near the same place a little before or after the accident in question, by a train under the management of the same engineer and conductor, was held error; although it was held further that the error was rendered harmless, because the engineer was allowed to answer a similar question.

99. Schmidt *v.* Coney Island & B. R. Co., 26 App. Div. 391, 49 N. Y. Supp. 777; Wilder *v.* Metropolitan St. R. Co., 161 N. Y. 665, 57 N. E. 1128. See also Hayes *v.* St. Louis R. Co., 15 Mo. App. 583; Gulf C. & S. F. R. Co. *v.* Rowland, 82 Tex. 166, 18 S. W. 96; Louisville & N. R. Co. *v.* Carothers, 23 Ky. L. Rep. 1673, 65 S. W. 833, 66 S. W. 385.

Other Jerks of Train. — On an issue as to whether a passenger was injured by the sudden jerking of the train, evidence of other jerks at other stations is inadmissible. Clark *v.* Smith, 72 Vt. 138, 47 Atl. 391.

In an action against a street car company for injuries received by a passenger, a witness having been asked if the car on which the plaintiff was riding was striving with another car as to which should pass a crossing first, it was held proper to reject a further question as to whether or not he had ever seen races of that kind. "What took place on other occasions was immaterial to the issue in this case." Whitbeck *v.* Atlantic Ave. R. Co., 4 N. Y. Supp. 100.

1. Southern R. Co. *v.* Crowder, 130 Ala. 256, 30 So. 592; Denver & R. G. R. Co. *v.* Roller, 100 Fed. 738; Werner *v.* Chicago & N. W. R. Co., 105 Wis. 300, 81 N. W. 416.

On an issue as to whether or not it was unsafe and dangerous to run a train on a bridge because of its insecure and defective condition, and because of the unskillful repairs made, any evidence relating to the condition of the bridge at the time it fell, the manner in which it was supported during the process of repairment then going on, the weight of the train, and the speed at which the train was being run, is competent as part of the *res gestae*, and accordingly it is competent to show the speed at which the train was running when it went on the bridge. Louisville N. A. & C. R. Co. *v.* Pedigo, 108 Ind. 481, 8 N. E. 627.

In an action against a street car company for injuries received by a passenger, it is proper to show that there was no conductor on the car, and that there were steps on the front of the car; such evidence being merely descriptive of the situation under which the car was run. Allen *v.* Drydock E. B. & B. R. Co., 19 N. Y. St. 114, 2 N. Y. Supp. 738.

In an action against a railway company for injuries suffered by a passenger while attempting to alight from its train, it is competent to show that no conductors or train men were at the platform to assist passengers in alighting, where the plaintiff dis-

recover damages for the wrongful expulsion of a passenger from a car.[2]

claims any right to recover for that reason, but offers the testimony merely to show the surroundings. Sherwood *v.* Chicago W. M. R. Co., 88 Mich. 108, 50 N. W. 101.

In an action against a railroad company to recover damages for injuries sustained in being compelled to ride in a cold and unsuitable and unfit car, and in permitting profane and indecent language to be used by other passengers therein in the hearing of the plaintiff, evidence of profane language used by a fellow passenger is admissible. Texas & P. R. Co. *v.* Kingston, (Tex. Civ. App.), 68 S. W. 518.

In an action against a street car company for breach of its duty to carry the plaintiff as a passenger, consisting of abusive and insulting treatment and conduct by the driver and conductor of the car toward the plaintiff, it is competent for the plaintiff to show that after the driver and conductor were relieved by another driver and conductor, the former remained in the car and continued to abuse and insult the plaintiff to the end of the trip. "Whatever occurred between the defendant's agents and the plaintiff at any time during the voyage was competent proof to go to the jury. There was no evidence that the first driver had been discharged by the defendant, when he yielded the reins to the second driver, and, although not in active work, he was still there continuing the same insults to the plaintiff, and the defendant in fact refused to dismiss him, but retained him in its employment. The temporary rest from his work did not relieve the company from their responsibility for his insults to passengers. Malecek *v.* Tower Grove & L. R. Co., 57 Mo. 17.

2. McGhee *v.* Cashin, 130 Ala. 561, 30 So. 367.

On an issue as to whether or not an assault on a passenger by a brakeman, at the time of his ejection from the car, was justified, or, in view of the claim of vindictive damages, palliated by the conduct of the passenger himself, all that occurred and was said between the passenger on the one hand and the trainmen on the other, the manner and language and the conduct of the parties, as being violent and threatening or pacific and submissive in and during the conversation just before and leading up to the assault, is pertinent and competent as *res gestae* of the main fact, giving character thereto, and furnishing data by which to determine the issue properly. Alabama G. S. R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28.

In Morris *v.* Atlantic Ave. R. Co., 116 N. Y. 552, 22 N. E. 1097, the alleged reason for putting off the passenger was that he had packages so large as to require the payment of additional fare, pursuant to a rule requiring such payment for packages "too large to be carried on the lap of the passenger without incommoding others," and it was held proper to receive evidence of the number of passengers in the car when the plaintiff entered, not as bearing upon the question of the right of the plaintiff to ride without paying additional fare but as descriptive of the situation.

In an action against a railroad company to recover for unlawful expulsion of the plaintiff from a passenger train of the defendant, it is competent for a witness to testify to what he heard said by others at the time of the expulsion, leaving it to others to identify the persons who had made the statements. Indianapolis P. & C. R. Co. *v.* Anthony, 43 Ind. 183.

Continuance of Assault. — In an action against a railroad company to recover damages for assault upon, and the unlawful ejection of, a passenger from a car by the conductor, it is proper to admit evidence that the assault was continued after an attempt by the plaintiff to get on the car again. Denver Tramway Co. *v.* Reid, 4 Colo. App. 500, 36 Pac. 557. The court said: "The ejection and fight were really part and parcel of one and the same transaction, and the concluding struggle was really

(2.) Declarations of Carrier's Servants. — And this rule extends to declarations of the carrier's servants made at the time of the accident.[3]

the result of the attempt by Reid to get on the car, and the conductor to still prevent him from riding. It was certainly competent to prove those facts, both to show what injury the passenger sustained from the continuance of the assault on the ground, and to throw light on the character of the transaction, the amount of the force used, and the spirit and method adopted by the conductor in his attempt to execute what he believed to be his duty. The admission of the evidence can be justified on many grounds, and there is no evident reason why any part of the proof respecting it should have been excluded."

Evidence to show the temper of the conductor upon re-entering the coach after ejecting a passenger is admissible in an action by the passenger to recover damages for such expulsion. St. Louis & S. F. R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225.

3. Skill of Employee. — In Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181, the declarations of the driver after the upsetting of the stage coach that he had upset fifty stages, etc., was admitted by the circuit court as evidence, and the judgment of that court was generally affirmed by the supreme court. Had these declarations been considered as having been made by a witness merely, they would clearly have been inadmissible. But coming as they did from the agent of the defendant, and for whose conduct he was answerable, they conduced to prove a want of skill in the driver, and were therefore received as evidence. But the declarations of a stage coach driver who was not present at the time of the upsetting of the stage in question, was not the driver thereof, and whose conduct was not in any way implicated, to the effect that the stage was top heavy and overloaded, is not competent evidence as against the stage proprietors. Mauray *v.* Talmadge, 2 McLean, 157, 16 Fed. Cas. No. 9315.

Statement in Response to Complaints. — In an action against a street car company for breach of its duties to carry the plaintiff as its passenger, consisting of abusive and insulting conduct by the driver towards the plaintiff, evidence of statements by the defendant's superintendent to the plaintiff in response to his complaints, recognizing the assault of the driver and justifying it upon the ground of the non-payment of fare by the plaintiff, is competent evidence against the defendant. Malecek *v.* Tower Grove & L. R. Co., 57 Mo. 17.

Response to Inquiry About Accident. — In Wormsdorf *v.* Detroit C. R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453, an action against a street car company to recover damages for injuries to the plaintiff in a collision between one of its cars and the train of a railroad company over whose track the car was passing, the proof showed that within a few minutes after the collision the defendant's superintendent arrived at the place, and the court permitted a witness to testify that the superintendent asked the driver as to the cause of the accident, and the driver's reply thereto. It was held that this part of the testimony was properly admissible as part of the *res gestae;* but that it was error to permit further testimony to a conversation overheard between the superintendent and the driver to the effect that the driver had reported the car as in bad condition; that he had reported the car before, but that the witness did not hear the superintendent say anything as to the cause of the accident; the latter part of the testimony being the mere narration of the driver as to a past transaction.

Declarations by the Conductor in Charge of a Train, made to a passenger a moment before the accident in which the passenger was injured, about the bad condition of the road, and his having run off the track five consecutive times before the trip in question, are not admissible against a railroad company either as

(3.) Declarations of Fellow Passengers. — So, also, evidence of declarations of fellow passengers who remained in the car and were uninjured, giving their reasons for the remaining, are competent as part of the *res gestae*.[4] Otherwise of a card published by the passengers immediately after the accident, to the effect that in their opinion the trainmen did all in their power to prevent the accident.[5]

(4.) Declarations of Passenger Injured. —The question of the admissibility of evidence of exclamations and ejaculations by persons injured through the negligence of another, as applied to a passenger injured through the negligence of the carrier, is treated elsewhere in this work.[6]

d. *Opinions and Conclusions.* — The general rules as to proving due care, or the want of it, as elsewhere fully treated in this work,[7] are applicable in action against carrier to recover damages for personal injuries suffered through the carrier's negligence, upon the issue as to the carrier's negligence.[8] Thus upon matters of com-

part of the *res gestae* or as an admission of the agent binding on his principal. Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 15.

Evidence of the Statement of a Street Car Conductor Made Immediately After an Accident in which a passenger was injured, to the effect that he forgot the passenger and that he was entirely at fault, and made in response to the statement by the passenger that she had signaled him to let her off, is not admissible as part of the *res gestae,* but is merely narrative of a past occurrence and cannot be received as proof of the character of that occurrence. Blackman *v.* West Jersey & S. R. Co., (N. J.), 52 Atl. 370.

Declarations of Engineer. — In an action against a railroad company to recover for injuries sustained by a passenger, declarations of the engineer as to the rate of speed at which the train was running, made from ten to thirty minutes after the accident, are not admissible against the company. Vicksburg & M. R. Co. *v.* O'Brien, 119 U. S. 99.

Evidence of Statements Made by a Conductor in the Depot After a Passenger Was Injured and brought into the depot, expressing his opinion to the company, tending to show that stools used by passengers in alighting were unsafe implements, is not competent evidence as part of the *res gestae* against the company. Gulf C. & S. F. R. Co. *v.* Southwick, (Tex. Civ. App.), 30 S. W. 592.

Willful Misconduct. —Upon an issue as to whether a train was willfully run past a passenger's place of destination, it may be shown that the passenger asked the conductor to stop in front of his residence, not a station, to which the conductor replied that he would not stop "for you there, or anywhere else." Vicksburg & M. R. R. Co. *v.* Scanlan, 63 Miss. 413.

4. Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 15. See also Galena & C. U. R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323.

5. Macon W. R. Co. *v.* Johnson, 38 Ga. 409.

6. *See* article "Res Gestae."

7. *See* article "Negligence."

8. In an action against a railroad company to recover damages for refusal of the conductor to honor ticket held by the plaintiff, witnesses may be asked as to the manner of the conductor at the time, whether it was polite and courteous or otherwise, and as to the language used by him. Rutherford *v.* St. Louis S. W. R. Co., (Tex. Civ. App.), 67 S. W. 161. The court said: "Words spoken may in themselves be inoffensive, yet if uttered in a rude and insulting manner may be very objectionable. The manner and expression of one cannot well be described without the expression of an opinion, that being the

mon knowledge, the testimony of an expert should not be received,[9] but where the question is one not within the common knowledge of men, expert testimony is proper.[10] Nor should a witness be asked whether or not everything was done to obviate or prevent an accident.[11]

B. Contributory Negligence of Passenger.—a. *Presumptions and Burden of Proof.* — (1.) **Generally.** — Some of the courts hold that in an action against a carrier to recover damages for personal injuries suffered by a passenger, the plaintiff has the burden of showing absence of contributory negligence.[12] The authorities,

best evidence of which it is susceptible. The evidence was pertinent, as it tended to prove the allegations of plaintiff's petition regarding the offensive and insulting conduct of the conductor, which, if proved, warranted a recovery."

9. Baltimore & Y. T. R. *v.* Leonhardt, 66 Md. 70, 5 Atl. 346.

Whether or not if the driver of a wagon had not whipped up his horses, starting them as he did, when the street car was within a certain distance, there would have been plenty of time for the team to cross the track in safety is not a case or situation calling for the testimony of an expert. Myer *v.* Brooklyn City R. Co., 10 Misc. 11, 30 N. Y. Supp. 534.

The speed of trains is not a matter for scientific testimony, but it cannot be shown from the opinions of passengers, observing only from the inside, unless their experience and observation are such as to make their judgment reliable. Their testimony should not be merely relative without some standard of rapidity, but should at least approximately show the real rate, and show it was unsafe. Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321.

For a full treatment of matters of evidence as to proving the speed of a railroad train, street cars, etc., *see* article "Expert and Opinion Evidence."

10. Sufficiency of Structure. Whether or not the structure of a railroad is such as to warrant the running of trains at a high rate of speed is not usually a question for non-expert witnesses. Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321.

Safety Contrivance.—The question as to what contrivance would have rendered a double deck street car safe in passing over a bridge is a matter involving technical skill and knowledge, and upon which it is proper to receive expert testimony. Baltimore & Y. T. R. *v.* Leonhardt, 66 Md. 70, 5 Atl. 346, 59 Am. Rep. 156.

Cars Jumping Track. — The question as to how the fact that cars jumping the track at a curve will do so on the inside, instead of the outside, of the curve can be accounted for, may be explained by any person acquainted with the elementary principals of mechanism, and claiming to be an expert in all things relating to mechanics; and it is not true that railroad engineers or constructors only are competent to answer that question. Murphy *v.* New York C. R. Co., 66 Barb. (N. Y.) 125.

Engine Opening Switch. — The question whether or not the flanges of the wheels of a locomotive engine might not open a switch if the switch had become worn, is one to be answered by an expert witness only, and even then it is improper to be asked when there is no proof that the switch in question was worn. Grant *v.* Rawley & G. R. Co., 108 N. C. 462, 13 S. E. 209.

One who for many years has been a railroad superintendent, is competent to give his testimony as an expert, as to whether or not a collision could occur where both trains are off schedule time, without fault on the part of the railroad company. Macon W. R. Co. *v.* Johnson, 38 Ga. 409.

11. Fogel *v.* San Francisco & S. M. R. Co., (Cal.), 42 Pac. 565.

12. Raymond *v.* Burlington C. R.

however, are in conflict;[13] but the weight of authority is that such contributory negligence is a matter of defense which the carrier has the burden of establishing;[14] unless the plaintiff's own evidence

& N. R. Co., 65 Iowa 152, 21 N. W. 495; Bonce *v.* Dubuque St. R. Co., 53 Iowa 278, 5 N. W. 177, 36 Am. Rep. 221; Deyo *v.* New York C. R. Co., 34 N. Y. 9, 88 Am. Dec. 418; Norfolk & W. R. Co. *v.* Ferguson, 79 Va. 241; Galena & C. U. R. R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323; Brown *v.* New York, N. H. & H. R. Co., 181 Mass. 365, 63 N. E. 941. *Compare* Merrill *v.* Eastern R. Co., 139 Mass. 252, 29 N. E. 666.

13. For an exhaustive treatment of the question as to the burden of proving contributory negligence upon the part of the plaintiff in an action to recover for injuries suffered through the negligence of the defendant, or freedom from such negligence, *see* article "NEGLIGENCE."

14. *United States.* — Hough *v.* Railway Co., 100 U. S. 213; Holmes *v.* Oregon & Cal. R. Co., 5 Fed. 523; Texas & P. R. Co. *v.* Gardner, 114 Fed. 186, 52 C. C. A. 142.

Alabama. — North Birmingham St. R. Co. *v.* Calderwood, 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105.

California. — May *v.* Hanson, 5 Cal. 360, 63 Am. Dec. 135; MacDougall *v.* Central R. Co., 63 Cal. 431.

Colorado. — Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544.

Maryland. — Baltimore & O. R. Co. *v.* State, 60 Md. 449.

Texas. — Missouri Pac. R. Co. *v.* Foreman, (Tex. Civ. App.), 46 S. W. 834; Gulf C. & S. F. R. Co. *v.* Williams, 70 Tex. 159, 7 S. W. 88, 8 S. W. 78; Pares *v.* St. Louis S. W. R. Co., (Tex. Civ. App.), 57 S. W. 301; Dallas & W. R. Co. *v.* Spicker, 61 Tex. 427, 48 Am. Rep. 297.

Washington. — Northern Pac. R. Co. *v.* Hess, 2 Wash. 383, 26 Pac. 866.

West Virginia. — Fowler *v.* Baltimore & O. R. R. Co., 18 W. Va. 579.

Rule Stated. — Contributory negligence being a matter purely defensive, it must follow that there are no presumptions against a passenger of want of due care and diligence on his part, and that there is no burden on him to prove affirmatively that he was in the exercise of due care and diligence at the time of the injuries sustained. The burden of contributory negligence rests on the carrier, and consequently when the proof shows injury caused by the culpable negligence of the carrier and is wholly silent as to contributory negligence, the passenger is entitled to recover for his injuries. McDonald *v.* Montgomery S. R. Co., 110 Ala. 161, 20 So. 317.

In Central R. Co. *v.* Smith, 74 Md. 212, 21 Atl. 706, an action to recover damages for personal injuries alleged to have been sustained by the plaintiff while a passenger on the defendant's road, on account of negligence of the defendant's employees, the jury were instructed that "the burden of proof is on the defendant to show contributory negligence on the part of the plaintiff; but the plaintiff is entitled to the benefit of the presumption that persons ordinarily take care of themselves, and the defendant is entitled to the benefit of the principle that in exceptional cases persons are heedless; and it is for the jury to find from all the circumstances in evidence upon the principle laid down, whether either of them, and which of them, was responsible for the accident;" and this instruction was sustained, although the court said that the portion referring to the presumption that persons ordinarily take care of themselves, etc., might have been omitted, but that under the circumstances it was error, if at all, without injury.

In North Carolina a statute places the burden of proving contributory negligence upon the defendant in an action to recover damages from a railroad company for personal injuries suffered on account of the defendant's alleged negligence; and in Wallace *v.* Western N. C. R. Co., 104 N. C. 442, 10 S. E. 552, it was held that this statute affected only the remedy and did not impair any vested right, and hence was not unconstitutional.

discloses it, in which case it is incumbent on the plaintiff to show that the injuries would have resulted, notwithstanding such contributory negligence.[15]

(2.) Knowledge of Posted Notice. — A notice conspicuously posted in a vehicle is presumed *prima facie* to have been noted by passengers carried therein.[16]

(3.) Passenger Expelled. — A person who was wrongfully upon the carrier's vehicle and refused to leave when requested, has the burden to show that injuries suffered by him upon his expulsion were in no way contributed to by his own illegal conduct.[17] A passenger wrongfully expelled from a car and placed on the track has the burden to show that he left the track at the earliest practicable opportunity.[18]

b. *Circumstantial Evidence.* — **(1.) Generally.** — Circumstantial evidence is admissible both to establish contributory negligence,[19]

15. St. Louis & S. F. R. Co. *v.* Whittle, 74 Fed. 296. See also North Birmingham St. R. Co. *v.* Calderwood, 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105; St. Louis S. W. R. Co. *v.* Martin, (Tex. Civ. App.), 63 S. W. 1089.

In Browne *v.* Raleigh & G. R. Co., 108 N. C. 34, 12 S. E. 958, it was held that a passenger was *prima facie* negligent in getting upon a moving train, and in order to relieve himself of the onus placed upon him, must show either that he went in obedience to an unequivocal invitation or demand to get upon a train in motion, and in obeying the order or in accepting the invitation that he did not expose himself to manifest danger, or that the train did not stop at the station a sufficient length of time to permit passengers to get on and off.

In Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135, 93 Am. Dec. 495, it was held that *prima facie* negligence on the part of a passenger was established by proof that he was riding on the platform of a car in a place of danger, and that the onus was on him to rebut the presumption; but that in that particular case the presumption was rebutted by proof that the car and platform were full of passengers with no room for more, and that the conductor called for and received the fare from the passenger at the place where he was riding.

In Texas P. R. Co. *v.* Davidson, 68 Tex. 370, 4 S. W. 636, the proof showed that the passenger went close to the train so as to be ready to board it; when notified by a brakeman to get on, started to do so when she received the injuries complained of; and it was held that the plaintiff's evidence did not expose herself to suspicion of contributory negligence so as to cast the burden upon her to clear up the suspicion.

16. Macon W. R. Co. *v.* Johnson, 38 Ga. 409.

17. Coleman *v.* New York & N. H. R. Co., 106 Mass. 160.

18. Ham *v.* Delaware & H. C. Co., 155 Pa. St. 548, 26 Atl. 757, 20 L. R. A. 682.

19. On an issue as to whether or not a passenger was guilty of negligence in contributing to the injuries complained of, which were sustained through being thrown from the car while in the act of alighting, the car being suddenly started forward at a point which it appeared was not the stopping place, evidence of the usage of the road that one train should not enter a station while another train was engaged in delivering passengers, is competent where there is proof that the passenger had knowledge of such usage. Floytrup *v.* Boston & M. R. Co., 163 Mass. 152, 39 N. E. 797.

On an issue as to whether or not it was negligence for the passenger to permit his hand to rest on the outside of the car window, it is proper to permit evidence for the carrier showing that during the journey warning had been given by the

and to rebut it.[20]

carrier's agent to another passenger of the danger of putting his arms out of the window, and that such passenger was sitting so near the plaintiff that the warning must have been heard by him. Laing *v.* Colder, 8 Pa. St. 479, 49 Am. Dec. 533.

It may be shown that a passenger when starting to alight from a slowly moving car hesitated and failed to hold onto the railings. Root *v.* Des Moines C. R. Co., 113 Iowa 675, 83 N. W. 904.

In McDonald *v.* Montgomery St. R. Co., 110 Ala. 161, 20 So. 317, an action against a street railway company to recover damages for injuries alleged to have been suffered by the plaintiff in being thrown from the car at a crossing where it had stopped to allow the plaintiff to alight and had suddenly started while he was so alighting, it was held competent in connection with the plaintiff's testimony that his place of business was in the middle of the block beyond the crossing, where he claimed to have been hurt, to show that it was the plaintiff's habit to ride further down street in front of his place of business, before alighting, and had formerly requested the motorman to allow him to do so.

In Lake Erie & W. R. Co. *v.* Morain, 140 Ill. 117, 29 N. E. 869, *affirming* 36 Ill. App. 632, an action against the defendant for injuries received by the plaintiff while alighting from a train, the plaintiff on cross-examination testified that he was not out of the train between the place where he boarded it and the place where he was injured, and was not on the platform at the station immediately preceding the place where he was injured; and it was held proper to reject evidence for the carrier showing that the plaintiff got off the train at such immediately preceding station, remaining off until it started, and boarding the train while in motion, because such evidence was inadmissible as primary evidence since it tended to raise a collateral and immaterial issue, and it was not competent as rebutting testimony for the reason that the matter sought to be contradicted was immaterial and was drawn out by the defendant on cross-examination.

In Mitchell *v.* Southern Pac. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130, an action for injuries sustained by the passenger in jumping from a moving train in order to escape an expected accident, the train conductor testified that he had left the car in which the plaintiff was two or three minutes before the accident occurred, and that the plaintiff went out with him; that the train was not going as fast then as it had on former occasions at the same place and while plaintiff was on board; that he gave the brakeman orders to let off the brakes, walked back into the car and took his seat, while the plaintiff remained standing on the platform; and it was held error to refuse to permit the defendant to show by one of the passengers in the car at the time of the accident that the conductor returned into the car after he and the plaintiff left it and before the accident occurred. The court said: "The question whether plaintiff went upon the platform under the circumstances narrated by him was a most important one; in fact, the main question in the case is, whether he acted as a prudent man would under the circumstances. In determining that question, the length of time he remained upon the platform, and the conduct of others on the train, including the officers of the train, is material, competent, and important. The testimony of the conductor, if true, would tend, not only to impeach the testimony of the plaintiff as to the length of time he stood on the platform, but directly to prove that there was no apparent reason for alarm at the time the accident occurred. To enable the jury to decide whether the conductor's account of the circumstances, or that of the plaintiff, was correct, the testimony of Smith, a disinterested witness, might have been important. It certainly was material and competent, and should have been admitted."

20. Crowded Condition of Car. In an action against a street railway to recover for injuries sustained by a passenger while alighting, the car

suddenly starting forward, evidence as to the crowded condition of the car is relevant as a circumstance to be considered in determining whether the plaintiff was negligent in attempting to leave the car, as well as whether the conductor should on that account have closely observed the passengers desiring to get off and given them more than ordinary time for that purpose. Metropolitan R. Co. *v.* Jones, 1 App. D. C. 200.

The Fact That the Doors of Cars Standing at a Station Were Locked Until Just Before the Train Started is relevant on an issue as to whether or not a passenger, who was injured while entering one of the cars after the signal was given to start, was not negligent in not getting upon the train sooner, and also upon the question of the carrier's due diligence. "The locked doors may have prevented him from getting on board the train earlier." Dawson *v.* Boston & M. R. Co., 156 Mass. 127, 30 N. E. 466.

On an issue as to whether or not a passenger was guilty of contributory negligence, evidence that the brakeman who was assisting the passenger to alight, the train still being in motion, told the passenger "to come on, hurry up," is competent as being a part of the *res gestae*. Waller *v.* Hannibal & St. J. R. Co., 83 Mo. 608. See also Louisville, H. & St. L. R. Co. *v.* Bowlds, 23 Ky. L. Rep. 1202, 64 S. W. 957.

Testimony that it was a railroad company's custom not to allow passengers to go forward from one car to another in alighting at stations; that passengers taking a train at a certain point for stations beyond were usually directed by the conductor to take the rear car, and that the witness, himself, had jumped off the train several times at the place where the plaintiff did and suffered injuries therefrom, is competent upon the question whether it was negligence in the plaintiff to leave the car where she did. Bullard *v.* Boston & M. R. Co., 64 N. H. 62, 5 Atl. 837.

It is proper for a passenger, who had been directed by one of the trainmen to leave a moving train, to show that the train was not stopped, nor offered to be stopped, and that he was not warned not to leave the train. Gulf C. & S. F. R. Co. *v.* Shelton, (Tex. Civ. App.), 69 S. W. 653.

Evidence that the name of the station was announced when the train reached the station and before it stopped is competent upon the question whether the passenger's conduct was careful in alighting when the train did stop, and upon the question whether the defendant's servants used due care to prevent the passengers from alighting at the time when it was not stopped to deliver passengers, and whether the announcement was made by a trainman or not. Floytrup *v.* Boston & M. R. Co., 16 Mass. 152, 39 N. E. 797.

In Farrell *v.* Houston & W. St. & P. F. R. Co., 51 Hun 640, 4 N. Y. Supp. 597, the proof showed that the passenger injured had boarded a horse car, and while standing at the front door inquiring of the driver as to the destination of the car he was thrown from the car because of its taking the wrong track at a switch; and it was held competent for the passenger to show that there was no conductor on the car of whom the inquiry might have been made.

In Herdt *v.* Rochester C. & B. R. Co., 65 Hun 625, 20 N. Y. Supp. 346, it appeared that the inner rails of the two street car tracks were nearer to each other at the point where the plaintiff was injured than was safe for the passage of the cars, by reason of which the plaintiff, who was standing on the side step of a crowded car, was pushed off by a car going in the opposite direction, and the plaintiff was allowed to answer the question as to whether he was aware that there was any danger in riding on the steps to the effect that he was not; that he had observed other people riding in that position at various other times. It was objected that the testimony left the case with the jury, not strictly upon their opinion of the propriety of the defendant's conduct in the face of real and apparent danger, but rather that the plaintiff should be exonerated from blame if he did not see or appreciate the dangerous situation; but the court said that it was manifest that the witness intended to and did actually speak in this regard of the

(2.) Conduct of Passenger. — Where it is a question whether or not a passenger at the time of the accident jumped from the car while it was in motion, the carrier may show that such was the habit of that passenger.[21] But such evidence is not admissible where the manner of getting on or off is not disputed, but only whether or not the so getting on or off contributed to the injury.[22]

Stating Reasons for Conduct. — A passenger who claims to have jumped from a moving train, by reason of the conductor's conduct, should be allowed to state his reasons for so jumping.[23]

(3.) Inexperienced Traveler. — The fact that a passenger who was killed while alighting from a street car had never before ridden upon a street car, is competent for the purpose of illustrating the cause of his failure to alight from the car in safety.[24]

particular danger of which he had no knowledge or information until after the collision, namely, the closeness and operation of the two inside rails of the double tracks; that undoubtedly he assumed in riding as he did, the ordinary hazards pertaining to such a position, but not the risk caused by the gross negligence of the defendant in permitting its tracks to be so laid as to cause a car going in one direction to collide with passengers riding on another car going in the opposite direction on the other track.

21. Craven *v.* Cent. Pac. R. Co., 72 Cal. 345, 13 Pac. 878, the court said: "A sensible man, called upon out of court to determine whether or not a certain person had on a certain occasion carelessly jumped off a moving train of cars, and finding the direct testimony as to the matter conflicting, would naturally and properly give some weight to the fact that the person was in the habit of alighting from cars in that manner; and the consideration of such a fact in cases resembling the one at bar has frequently been sanctioned in court. The evidence, at least, had some legal tendency to show that plaintiff's conduct at the time of the injury was such as defendant ascribed to her."

22. Eppendorf *v.* Brooklyn C. & N. R. Co., 69 N. Y. 195, 25 Am. Rep. 171. "The mere fact," said the court, "that he was in the habit of jumping on the moving cars could have no bearing in this case. The sole question to be determined here so far as relates to plaintiff's contributory negligence was the character of the plaintiff's act under the circumstances existing at the time; and what he may have done at some other time under other circumstances could have no bearing upon that question."

23. Spohn *v.* Missouri Pac. R. Co., 101 Mo. 417, 14 S. W. 880.

Testimony of a passenger who was injured by jumping from a train to avoid an anticipated rear end collision, to the effect that he thought it was prudent to get off the train, and that he left it for the purpose of avoiding danger, and of another that a fellow passenger said, "Here comes another train running into us, and we had better get out of here," is admissible for the purpose of showing in some degree how the situation appeared to him and his fellow passengers at the time he leaped from the train and was hurt, and that in so doing he acted as one of ordinary prudence would have done under the same circumstances. St. Louis & S. F. R. Co. *v.* Murray, 55 Ark. 248, 18 S. W. 50, 29 Am. St. Rep. 32, 16 L. R. A. 787.

On an issue as to whether a passenger was guilty of contributory negligence in jumping from a derailed car which was still moving, it is proper for him to show that the train men and other passengers jumped also; to show declarations by the passengers and train men stating their reasons for so jumping. Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 15.

24. Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406. The court said: "The jury, in looking at the

(4.) Conduct of Other Passengers. — So, also, on an issue as to whether a passenger was guilty of contributory negligence at the time of the accident, it is competent to show the conduct of his fellow passengers,[25] and whether any of them were injured.[26]

(5.) Safety of Place of Injury. — Upon an issue as to whether a passenger was guilty of contributory negligence in attempting to board a car at an unusual and dangerous place, it may be shown that the same place was used by passengers in boarding and alighting from another car.[27] And, on an issue as to whether a passenger was guilty of contributory negligence in riding in an exposed and dangerous place on the train, evidence of a usage of the road to carry its passengers in such place is competent.[28]

facts and circumstances of the homicide, would naturally desire to classify the particular passenger, not alone by his age, but also by his experience, or the want of it, in handling himself as a passenger on electric cars. Familiarity with this mode of transportation would qualify him to see and appreciate danger which he would not be likely to observe if he was wholly without experience. With experience he might be chargeable with fault; without it, with none. And hence in the one case his failure to come off safely might be attributable to his own negligence, in part or in whole, whereas, in the other case, he might be treated as free from any negligence whatever. It may be that the evidence might have other bearings, but it has this, at least."

25. Twomley *v.* Central Park N. & E. R. Co., 69 N. Y. 158, 25 Am. Rep. 162.

26. Mitchell *v.* Southern Pac. R. Co., 87 Cal. 62, 25 Pac. 245; West Chicago St. R. Co. *v.* Kennelly, 170 Ill. 508, 48 N. E. 996, *affirming* 66 Ill. App. 244.

On an issue as to whether or not a passenger was in fact injured by a train jumping the track, it is proper to receive evidence showing that the conductor, sitting near the passenger in question, at the time of the accident, was not hurt. Levy *v.* Campbell, (Tex.), 20 S. W. 196, *reversing* 19 S. W. 436. "The mere fact," said the court, "that another person who was present with the plaintiff, was not hurt in the same accident, does not necessarily prove that plaintiff was uninjured. But where the evidence shows that they were seated in the same car near each other, and both fell across the car in the same way when it turned over, these are circumstances the jury have a right to consider."

27. McDonald *v.* Chicago & N. W. R. Co., 29 Iowa 170. See also Pennsylvania Co. *v.* McCaffrey, 173 Ill. 169, 50 N. E. 713.

28. Tibby *v.* Missouri Pac. R. Co., 82 Mo. 292. The passenger in this case was a stock driver and was riding on the top of a box car after the caboose had been disconnected from the train, and while the train was being carried from that place to the station; and in holding, as stated above, the court said that "presumably this was no place for a passenger to be. But that he was in a proper place if this was the only place provided by the company for his accommodation. Moreover if this was the place in which the defendant was in the habit of transporting its stock passengers, the deceased was properly there along with the other stock passengers without any express direction of the defendant to go there. The usage operated as a standing license to be there in the absence of an expressed order or direction to the contrary." See also San Antonio & A. P. R. Co. *v.* Lynch, (Tex. Civ. App.), 55 S. W. 517.

Testimony as to a custom in vogue amongst persons having charge of live stock on freight trains to pass over the tops of trains on running boards provided for that purpose when the necessities of the trip required it to reach their stock and at-

c. *Opinions and Conclusions.* — The rules stated *supra* in respect of proving a carrier's negligence by opinion evidence apply with equal force to proving contributory negligence of a passenger by the same kind of evidence.[29]

4. Rightfulness of Expulsion of Passenger. — Where a carrier asserts that the conductor as merely exercising the authority vested in him to expel disorderly passengers, and that plaintiff suffered no damage, which the latter denies, it has the burden of proof.[30] So, also, where it is shown that the passenger had delivered up his ticket, the burden is on the carrier to justify the expulsion.[31]

5. Loss of, or Damage to, Baggage. — A. Presumptions and Burden of Proof. — a. *Generally.* — In an action to charge a carrier for the loss of a passenger's baggage, the plaintiff has the burden of proof to make a *prima facie* case of loss.[32] But evidence of

tend to it or to reach the caboose, is competent upon an issue as to whether or not a stockman so passing over a freight train was guilty of contributory negligence. Chicago, M. & St. P. R. Co. *v.* Carpenter, 56 Fed. 451; Nelson *v.* Southern Pac. Co., 18 Utah 244, 55 Pac. 364.

29. It is not proper for a street car company to ask witnesses to state whether or not a particular place was a safe place for a person to board a car in motion; as to the manner in which a person should act if he wanted to board a car at that place, to get on the front platform, and whether at the time a passenger jumped to board the car at that place, it was a safe and careful thing for him to do, where the gist of the action against the company is not an alleged injury caused by the fault of the passenger while attempting to board a moving car, but that while he was attempting to do so, the motorman, knowing of his attempt, suddenly forced the car at a high rate of speed, and thereby caused the passenger to fall. Woo Dan *v.* Seattle Elec. R. & P. Co., 5 Wash. 466, 32 Pac. 103.

In Madden *v.* Missouri P. R. Co., 50 Mo. App. 666, a question put to the brakeman, "Did your train stop long enough for her, if she had exercised diligence, to get from the place at which she was sitting to the platform, and get off, before it started?" was objectionable, as involving a statement to the witness of the question, whether the plaintiff had in fact exercised diligence in rising and moving toward the door of the car to get off the train.

30. Chicago, R. I. & P. R. Co. *v.* Barrett, 16 Ill. App. 17.

31. Georgia R. Co. *v.* Homer, 73 Ga. 251.

In an action against a railroad company to recover damages for the unlawful refusal of the conductor to honor the ticket offered by the plaintiff, in which the defendant admits that the ticket in question entitled the plaintiff to carriage; that the conductor made a mistake in not accepting it, and that the plaintiff was entitled to recover actual damages, stating what it claimed to be the amount of them, the defendant has the burden of proof, under the Kentucky statute. Louisville & N. R. Co. *v.* Champion, 24 Ky. L. Rep. 87, 68 S. W. 143.

32. McCormick *v.* Pennsylvania Cent. R. Co., 99 N. Y. 65, 52 Am. Rep. 6.

To charge a carrier for the loss of personal ornaments packed in a trunk with the baggage of the owner, it must be shown that the trunk was not rifled after it was so packed, and before it was delivered to the carrier. McQuesten *v.* Sanford, 40 Me. 117. See also Ringwalt *v.* Wabash R. Co., 45 Neb. 760, 64 N. W. 219.

In the absence of negligence, a passenger, in order to charge a carrier for the loss of property, not his personal baggage, which he delivered to

delivery of the baggage to the carrier, and its unexplained non-delivery at the end of the journey, has been held to make a *prima facie* case against the carrier,[33] imposing upon the carrier the duty of showing that the loss or injury occurred from some cause for which it is exempt from liability. And proof of demand and refusal is not necessary when the loss is otherwise fully established.[34]

B. Delivery in Damaged Condition. — Proof of delivery of baggage to a carrier, and its delivery by the carrier in a damaged condition, makes out a *prima facie* case of negligence against the carrier.[35]

C. Connecting Carriers. — In the case of connecting carriers, an initial, or intermediate carrier, sued for the loss of baggage of a passenger holding a through ticket and check, has the burden of showing that it safely carried the same to the end of its line and there promptly delivered it to the connecting carrier.[36] And where

the carrier as baggage without the payment of other consideration than the price paid for his passage ticket, has the burden of proving that the carrier had notice of the nature of the property. Haines *v.* Chicago & St. P. M. R. Co., 29 Minn. 160, 12 N. W. 447, 43 Am. Rep. 199.

Warehouseman. — To charge a carrier for the loss of baggage after its liability as a carrier had ceased, the burden is on the passenger to show want of ordinary care. Kahn *v.* Atlantic & N. C. R. Co., 115 N. C. 638, 20 S. E. 169. But the carrier has the burden of showing the storage of the baggage in a safe and secure warehouse. Bartholomew *v.* St. Louis, J. & C. R. Co., 53 Ill. 227, 5 Am. Rep. 38. *See* the article "Bailments."

33. *United States.* — The Priscilla, 106 Fed. 739.

Indiana. — Toledo, St. L. & K. C. R. Co. *v.* Tapp, 6 Ind. App. 304, 33 N. E. 462.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Brewer, 20 Kan. 669.

New York. — Matteson *v.* New York C. & H. R. Co., 76 N. Y. 381; Steers *v.* Liverpool, N. Y. & P. S. S. Co., 57 N. Y. 1, 15 Am. Rep. 453; Burnell *v.* New York C. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Wheeler *v.* Oceanic Steam Nav. Co., 125 N. Y. 155, 26 N. E. 248, 21 Am. St. Rep. 729; Garvey *v.* Camden & A. R. Co., 1 Hilt. 280.

Pennsylvania. — Camden & A. R. Co. *v.* Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481; Verner *v.* Sweitzer, 32 Pa. St. 208.

Proof of delivery of baggage to the carrier, and that the baggage car fell through a bridge on the carrier's line of road and into a river, and that the baggage was injured by being wet, is sufficient to raise a presumption of negligence. Rice *v.* Illinois Cent. R. Co., 22 Ill. App. 643. But not where it appears that the disaster in which the train was destroyed was the result of an extraordinary flood. Long *v.* Pennsylvania R. Co., 147 Pa. St. 343, 23 Atl. 459, 30 Am. St. Rep. 732, 14 L. R. A. 741.

Where baggage is sent gratuitously, and is not accompanied by the passenger, it is not incumbent on the passenger, in order to charge the carrier with the loss of the baggage, to show actual negligence or misconduct on the part of the carrier; but the presumption of negligence arises from the fact of the loss as in the case of other shipment of goods as freight. The Elvira Harbeck, 2 Blatchf. 336, 8 Fed. Cas. No. 4424, *reversing* 4 Fed. Cas. No. 2005.

34. Garvey *v.* Camden & A. R. Co., 1 Hilt. (N. Y.) 280.

35. Montgomery & E. R. Co. *v.* Culver, 75 Ala. 587.

36. Baltimore S. P. Co. *v.* Smith, 23 Md. 402, 87 Am. Dec. 575; Philadelphia W. & B. R. Co. *v.* Harper, 29 Md. 330. See also Montgomery & E. R. Co. *v.* Culver, 75 Ala. 587.

a terminal carrier delivers baggage in a damaged condition, it has the burden of proof to show the condition of the baggage when received by it.[37]

In Order to Charge an Initial Carrier for the non-delivery of a passenger's baggage to a connecting carrier, the passenger has the burden of showing non-delivery at the connecting point.[38]

6. Matters As to Damages. — A. ELEMENTS. — a. *Mental Suffering.* — Where a passenger is not shown to have been personally injured by being carried past her destination, evidence showing that she suffered mentally is inadmissible.[39]

b. *Effects of Landing at Improper Place.* — A passenger, proved to have been landed not at her place of destination, but at a place where she was compelled to walk a long distance, should be permitted to prove the character of the road over which, and the length of time, she walked; that her clothing and feet got wet in crossing a stream; that she was frightened by dogs chasing her, and otherwise, and that by reason of the character of the weather she was ill for some time.[40]

c. *Malice.* — In an action against a carrier to recover compensatory damages for injuries to a passenger, evidence to prove malice on the part of the carrier is not admissible.[41]

d. *Remarks by Fellow Passengers.* — In an action to recover damages for an alleged assault and threatened expulsion of the plaintiff from a passenger train of the defendant, while it is proper to show that the expulsion was in the presence and hearing of other passengers on the train, evidence of remarks subsequently made by passengers on the subject should not be received as a ground for the assessment of damages.[42]

So, also, evidence that a passenger while alighting from a train, in trying to keep himself from falling, was laughed at by other passengers, is not competent in an action by the passenger against the carrier for injuries sustained by a fall while so alighting.[43]

B. MITIGATION. — a. *Provocation of Assault.* — Damages may be mitigated by evidence that the passenger provoked the assault complained of.[44]

37. Montgomery & E. R. Co. *v.* Culver, 75 Ala. 587; Fox *v.* Wabash R. Co., 16 Misc. 370, 38 N. Y. Supp. 88. See also Myerson *v.* Woolverton, 9 Misc. 186, 29 N. Y. Supp. 737; Springer *v.* Westcott, 2 App. Div. 295, 37 N. Y. Supp. 909.

38. Midland R. Co. *v.* Bromley, 17 C. B. 372, 25 L. J. C. P. 94.

39. Smith *v.* Wilmington & W. R. Co., 130 N. C. 304, 41 S. E. 481.

40. Cincinnati, H. & I. R. Co. *v.* Eaton, 94 Ind. 474, 48 Am. Rep. 179.

41. Grisim *v.* Milwaukee C. R. Co., 84 Wis. 19, 54 N. W. 104.

42. Hoffman *v.* Northern Pac. R. Co., 45 Minn. 53, 47 N. W. 312.

In an action to charge a carrier for the wrongful expulsion of a passenger from the carrier's vehicle, evidence that sometime after the occurrence the passenger was "guyed about having been put off the train" is inadmissible. Gulf C. & S. F. R. Co. *v.* Copeland, 17 Tex. Civ. App. 55, 42 S. W. 239.

43. Campbell *v.* Alston, (Tex. Civ. App.), 23 S. W. 33.

44. Galveston, H. & S. A. R. Co.

b. *Belief of Conductor As to Duty to Expel.* — In an action against a railroad company for unlawfully ejecting a passenger from its cars, in which, as the case is made by the plaintiff, punitive damages may be allowed, evidence on the part of the conductor that, at the time he ejected the plaintiff, he believed that the plaintiff had not surrendered a ticket entitling him to be carried, and that he believed it to be his duty to put plaintiff off if he did not pay his fare, is competent in mitigation of damages.[45]

v. La Prelle, (Tex. Civ. App.), 65 S. W. 488.

In Chicago, B. & Q. R. Co. *v.* Boger, 1 Ill. App. 472, an action to recover damages for the alleged unlawful expulsion of the plaintiff from a passenger train of the defendant, in which the plaintiff claimed exemplary damages for the willful misconduct of the defendant's brakeman in using a billet in expelling the plaintiff, it is proper in mitigation of such damages to receive evidence for the defendant as to the reasons why the brakeman was armed with such a weapon.

45. Yates *v.* New York Cent. & H. R. R. Co., 67 N. Y. 100.

CASE LAID BEFORE COUNSEL.—See Privilege.

CATTLE.—See Animals.

CAUSE.

By Matthew A. Palen.

I. SCOPE OF SUBJECT.

This article deals only with the modes of proving what is the immediate physical cause of a given fact.

II. QUESTION OF LAW OR FACT.

When the facts are not in dispute,[1] or when the proofs are so convincing that by them all reasonable men, in the fair exercise of their judgment, would be brought to adopt the same conclusion,[2] or where the facts are found or agreed to,[3] it is a question for the court. But where the testimony of a witness and the opinion of an expert witness are in conflict,[4] or the facts complicated and debatable,[5] it is a question for the jury to determine the cause of an event in question.

1. Bunting *v.* Hogsett, 139 Pa. St. 363, 21 Atl. 31, 23 Am. St. Rep. 192, 12 L. R. A. 268.

2. Whether an accident or a disease caused the death of a party, whose life was insured against death by accident, should be submitted to and determined by a jury, unless, with reference to that proposition, the proofs are so convincing that by them all reasonable men, in the fair exercise of their judgment, would be brought to adopt the same conclusion. Modern Woodmen Acc. Assn. *v.* Shryock, 54 Neb. 250, 74 N. W. 607, 39 L. R. A. 826.

3. Coy *v.* Indianapolis Gas Co., 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535.

4. Where the witnesses are in conflict as to the cause of death, the question is for the jury. The court said: "It is urged that this question was for the court, and that the court was bound to declare that the cutting was the proximate efficient cause of the death in this case, because the evidence was uncontradicted that the cutting was later in time than the shot wound, and was sufficient to cause the death. This position might be maintained if the cutting was not itself produced by the shot wound, and if the evidence was uncontradicted that the death would not have occurred as soon from the tetanus in the absence of the cutting. But the argument begs the primary question in the case, whether the cutting was a cause of death at all. If it neither caused nor hastened the death of the insured, then it was in no sense a cause of it. And however new or sufficient it may have been to have caused it, it could not relieve the insurance company from a death whose sole cause was accidental injury. This question was peculiarly one of fact. The insurance company had agreed to pay the promised indemnity for any death that resulted from the accidental shot wound alone. The question was, what did in fact cause death — the shot wound, the cutting, or both? Nor would this case be withdrawn from the effect of this rule if the evidence upon this question was undisputed, for the question is always for the jury where a given state of facts is such that reasonable men may fairly differ upon it. It is only when all reasonable men, fairly exercising their judgments, must draw the same conclusion from an admitted state of facts, that it becomes the duty of the court to withdraw a question of fact from the jury. But the evidence in this case was not undisputed. One witness testified that he thought the cutting was the cause of the death; another that tetanus was; and a third that it was both. It was at least doubtful what answer ought to be given to the question upon the evidence. It was by no means clear that no reasonable man could fairly draw the conclusion that the shot wound and not the cutting was the cause of death, and the request to withdraw the case from the jury was properly denied." Travelers' Ins. Co. *v.* Melick, 65 Fed. 178, 27 L. R. A. 629; Jackson *v.* Wisconsin Tel. Co., 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101.

5. Moakler *v.* Portland & W. V. R. Co., 18 Or. 189, 22 Pac. 948, 17 Am. St. Rep. 717, 6 L. R. A. 656.

III. PRESUMPTIONS.

1. As to Cause of Death. — There is no presumption that death was caused by injuries self-inflicted.[6] Where a person is found dead under such circumstances that death may have been due to suicide or accident, the presumptions are against suicide and in favor of accident.[7] But this does not apply in case of the death of an insane person.[8] But the circumstances of the case may overcome such presumptions.[9]

2. As to Accidents and Injuries. — Where a cause is shown which might produce an accident and an accident does happen, the presumption is that the accident was due to such cause,[10] and when the evidence showed the train was running at a high rate of speed,

6. Accident Ins. Co. *v.* Bennett, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685; Jones *v.* U. S. Mut. Acc. Assn., 92 Iowa 652, 61 N. W. 485; Cronkhite *v.* Travelers' Ins. Co., 75 Wis. 116, 43 N. W. 731, 17 Am. St. Rep. 184; Mallory *v.* Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410; Travelers' Ins. Co. *v.* McConkey, 127 U. S. 661; Freeman *v.* Travelers' Ins. Co., 144 Mass. 572, 12 N. E. 372.

7. *United States.* —Travelers' Ins. Co. *v.* McConkey, 127 U. S. 661; Connecticut Mut. L. Ins. Co. *v.* Aiken, 150 U. S. 468; Ingersoll *v.* Knights Golden Rule, 47 Fed. 272.

Georgia. — Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

Kentucky. — Couadeau *v.* American Acc. Co., 95 Ky. 280, 25 S. W. 6.

Missouri. — Meadows *v.* Pac. Mut. L. Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427.

New York. — Mallory *v.* Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410; Peck *v.* Equitable Acc. Assn., 52 Hun 255, 5 N. Y. Supp. 215; Whitlatch *v.* Fidelity & C. Co., 71 Hun 146, 24 N. Y. Supp. 537; Washburn *v.* National Acc. Soc., 57 Hun 585, 10 N. Y. Supp. 366; Wehle *v.* U. S. Mut. Acc. Ins. Assn., 11 Misc. 35, 31 N. Y. Supp. 865.

Vermont. — Walcott *v.* Metropolitan L. Ins. Co., 64 Vt. 221, 24 Atl. 992, 33 Am. St. Rep. 923.

Wisconsin. — Cronkhite *v.* Travelers' Ins. Co., 75 Wis. 116, 43 N. W. 731, 17 Am. St. Rep. 184; Sorenson *v.* Menasha Paper & Pulp Co., 56 Wis. 338, 14 N. W. 446.

Presumptions As to Cause of Death. When it is doubtful from the facts of a case, whether death was caused by accidental injuries or by the suicidal act of the deceased, a presumption of law arises that the accident and not the suicidal act was the cause. Travelers' Ins. Co. *v.* Melick, 65 Fed. 178, 27 L. R. A. 629.

Presumption Against Suicide. Where one is found dead in a hole filled with water, suicide cannot be presumed without any fact or circumstance on which it can be logically predicated. Sorenson *v.* Menasha Paper & Pulp Co., 56 Wis. 338, 14 N. W. 446.

8. Merrett *v.* Preferred M. Mut. Assn., 98 Mich. 338, 57 N. W. 169.

9. Germain *v.* Brooklyn L. Ins. Co., 26 Hun (N. Y.) 604.

10. Brownfield *v.* Chicago R. I. & P. R. Co., 107 Iowa 254, 77 N. W. 1038.

Presumption As to Cause of Fire. If fire is discovered along the track shortly after an engine has passed, it may be presumed that it was started by sparks from the engine. Smith *v.* Longdon & S. W. R. Co., L. R. 6 C. P. 14; Karsen *v.* Milwaukee & St. P. R. Co., 29 Minn. 12, 11 N. W. 122, 7 Am. & Eng. R. Cas. 501; Brusberg *v.* Milwaukee L. S. & W. R. Co., 55 Wis. 106, 12 N. W. 416. But see Reading & C. R. Co. *v.* Latshaw, 93 Pa. St. 449, 2 Am. & Eng. R. Cas. 267; Philadelphia & R. R. Co. *v.* Schultz, 93 Pa. St. 341, 2 Am. & Eng. R. Cas. 271; Brown *v.* Atlanta C. A. L. R. Co., 19 S. C. 39, 13 Am. & Eng. R. Cas. 479.

and deceased was not negligent, the presumption is that the motion caused deceased to fall from the train;[11] and where a hand hold on a car is bent the presumption is that such bent hand hold caused deceased to fall;[12] and where a cow is found injured on a track near a steep bank over which she might have fallen, there is no presumption that she was struck by a train.[13]

IV. MODES OF PROOF.

1. Verdict and Reports. — The verdict of a coroner's jury is competent *prima facie*[14] evidence of the cause of death, but it is not

11. In Martin *v.* Chicago R. I. & P. R. Co., (Iowa), 91 N. W. 1024, 59 L. R. A. 698, evidence that train was running at high rate of speed, and that deceased was not negligent, justified the presumption that deceased's fall was caused by the motion of the train.

12. Settle *v.* St. Louis & S. F. R. Co., 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633.

13. When a cow is found fatally injured on a track at the foot of a steep, high bank, over which the evidence shows she might have fallen, there is no presumption that such injury was caused by a train rather than by the fall, there being no indication of her having been struck by the train. Southern R. Co. *v.* McMillan, 101 Ga. 116, 28 S. E. 599.

14. In an Illinois case, in an action on an insurance policy, the defendants relied upon the coroner's inquest to prove the cause of death of the insured, but the court excluded the coroner's verdict as evidence. The appellate court in determining whether the verdict could be used as evidence, after considering the statutes relating to the inquest of a coroner, said: "It will be observed that the evidence of all witnesses examined before the coroner is required to remain in his office, while the inquest must be sealed up and returned to the clerk of the circuit court of the county, when it shall be filed. Thus the inquest becomes, by force of the statute, a record of the circuit court, a public record of the county where the inquest was held. It is a record containing the results of a public inquiry, made by a public officer under authority of law, relating to matters in which the public have an interest. Shall it be held that a public record of this character shall not be evidence in a judicial proceeding tending to prove the facts found to be true on the face of such record? We are not prepared to adopt a rule of that kind. Moreover, we believe the weight of authority to be in favor of the admission of such evidence. . . . We are satisfied, both upon principle and authority, that the coroner's inquisition was admissible in evidence. The inquisition was made by a public officer, acting under the sanction of an official oath, in discharge of a public duty enjoined upon him by the law, and when it is returned into court and is filed, we see no reason why it should not be competent evidence tending to prove any matter properly before the coroner which appears upon the face of the inquisition. We do not hold that such evidence is conclusive, but only that it is competent evidence to be considered." U. S. L. Ins. Co. *v.* Kielgast, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65. But see Memphis & C. R. Co. *v.* Womack, 84 Ala. 149, 4 So. 618; Central R. R. *v.* Moore, 61 Ga. 151; Chicago M. & St. P. R. Co. *v.* Staff, 46 Ill. App. 499; Lake Shore & M. S. R. Co. *v.* Taylor, 46 Ill. App. 506; Mutual Life Ins. Co. *v.* Schmidt, 6 Ohio Dec. 901.

In an action upon an insurance policy, the plaintiff gave in evidence the record of the proceedings of a coroner's jury, for the sole purpose of showing a compliance with the requirements of the policy as to preliminary proofs of death. That jury,

conclusive.[15] Records of a board of health are not admissible for that purpose.[16] Reports of official inspectors are not admissible in evidence to prove cause of accidents.[17]

by its verdict, had found that the deceased committed suicide. *Held,* that this was *prima facie* evidence of the manner and the cause of the death of the insured, and that the effect of the proceedings was not limited to the purpose for which they were given in evidence. Walther *v.* Mutual L. Ins. Co., 65 Cal. 417, 4 Pac. 413.

Coroner's Verdict Admissible As to Cause of Death. — Wallace *v.* Cook, 5 Esp. 117; Mutual Ben. L. Ins. Co. *v.* Newton, 22 Wall. 32; National Union *v.* Thomas, 10 App. D. C. 277; State *v.* Parker, 7 La. Ann. 83; State *v.* Johnson, 10 La. Ann. 456.

Preliminary Proofs of Death. — In Mutual Ben. L. Ins. Co. *v.* Newton, 22 Wall. (U. S.) 32, an action on an insurance policy, the defendant in error, as required by the policy, gave notice of death of deceased, which consisted of affidavits and the record of the finding of the jury upon the coroner's inquest, which disclosed the manner and cause of death of insured. The insurance company refused to pay the policy, as the manner and cause of death, as disclosed by the affidavits, was one of the excepted causes provided for in the policy. Defendant in error, contended that this was not an admission of the cause of death, and that he was not estopped from proving cause of death. The court held that if the preliminary proofs presented were sufficient as to the death of the insured, and they disclosed the manner of death, the whole admission must be taken together, if sufficient to establish the death of the insured, it was also sufficient to show the manner of death. The preliminary proofs presented to an insurance company are admissible as *prima facie* evidence of the facts stated therein against the insured and on behalf of the company.

Report of Coroner Without a Jury. The report of the coroner acting as such and as health officer is not admissible in evidence in such a case when not based upon the verdict of a jury regularly impaneled. National Union *v.* Thomas, 10 App. D. C. 277.

The verdict of a coroner's jury is *prima facie* evidence of the cause of death. Pyle *v.* Pyle, 158 Ill. 289, 41 N. E. 999.

15. Charter Oak Ins. Co. *v.* Rodel, 95 U. S. 232.

16. **Records of Board of Health.** In the absence of a statute to that effect the records of books of a board of health are not evidence as to the cause of a death, in an action on a life insurance policy. Buffalo L. T. & S. D. Co. *v.* Knights Templars & M. Mut. Aid Assn., 56 Hun 303, 9 N. Y. Supp. 346.

The records of a city board of health established by statute requiring the board to register the deaths and their causes, are not evidence, in a suit between private parties, as an action on an insurance policy, as to the facts recorded, as such records are required under police regulations for local and specific purposes. Buffalo L. T. & S. D. Co. *v.* Knights Templars & M. Mut. Aid Assn., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839, *affirming* 56 Hun 303, 9 N. Y. Supp. 346.

In an action by a laborer against a manufacturer for injuries from inhaling vapors from the vats in which arsenic and sulphate of copper were dissolved in the process of manufacturing Paris green, plaintiff cannot introduce in evidence the certificate of the superintendent of the poor, admitting him to the poorhouse as a city charge, or an indorsement thereon by the city physician to the effect that he was ill with arsenical poisoning, the certificate being irrelevant, and the indorsement not being required by the statute. And the testimony of the physician in charge that he based his diagnosis of plaintiff's case on the indorsement of the city physician on plaintiff's certificate of admission is also inadmissible. Fox *v.* Peninsular W. L. & C. Works, 92 Mich. 243, 52 N. W. 623.

17. The report as to the cause of

2. Experiments. — A. Out of Court. — When one alleges that a certain fact is caused by certain conditions shown to have existed, he may introduce evidence of experiments made under like conditions with similar results;[18] and to prove that the fact was not so caused it may be shown that experiments under different conditions produced the same results.[19]

a boiler explosion, made by an official inspector, and filed with the commissioner of the District four days after an accident, the making of which report is not required by any law or regulation of the commissioners, and which contains *ex parte* statements of witnesses, is not admissible. Birmingham *v.* Pettit, 21 D. C. 209.

18. Experiments to Prove That Given Conditions Are the Cause of Given Results. — In Brooke *v.* Chicago R. I. & P. R. Co., 81 Iowa 504, 47 N. W. 74, an action for damages, the theory of the plaintiff as to the cause of the injuries of his intestate were that he had caught his foot between the rails of a split switch, maintained by the defendant; evidence of experiments made by one of the plaintiff's attorneys by placing his foot between the rails, with testimony as to how and in what manner his foot was held, held to be competent.

Similar Results From Similar Conditions. — In an action for an injury to the plaintiff's house, the question in controversy, and upon which the parties had introduced expert testimony, was whether the injuries were caused by fumes and gases from the defendant's copperas works, or by emanations from a sewer near the premises. The plaintiff's experts were allowed to give the grounds and reasons of their opinions, including the details of experiments made by them elsewhere than the premises in question, under conditions and circumstances which, as they testified, were as nearly as possible like those surrounding the plaintiff's house, in the absence of the sewer; and it was held the defendant had no ground of exception. Eidt *v.* Cutter, 127 Mass. 522.

19. Experiments in Rebuttal. In the case of Leonard *v.* Southern Pac. Co., 21 Or. 555, 28 Pac. 887, 15 L. R. A. 221, the defendant claimed that the wrecking of the train was due to an obstruction on the road. It was claimed that a rail was removed and thrown diagonally across the track. A rail was introduced on which was a scar which the defendants alleged was made by the flange on the wheel of the pony truck. Plaintiff then introduced in rebuttal a section of a rail and a wheel made to run on rails, and requested a witness to show the jury the manner in which the wheel would come in contact with the rail under the circumstances stated by the defendant. The section of rail upon which the wheel was run was then placed in a horizontal position, and the wheel brought into court for the purpose of the experiment, placed upon it and moved along it until forced in contact with another section of rail laid diagonally across the rail upon which the wheel moved, the result being to demonstrate that a wheel thus approaching and striking across a rail could strike it only on the ball or upper part and not on the flange or bottom part, where the scar on the defendant's rail appeared.

Similar Results From Different Conditions. — In Lincoln *v.* Taunton Copper Mfg. Co., 9 Allen (Mass.) 181, which was an action for damages to the plaintiff's land from the operation of a neighboring copper mill, which it was alleged produced noxious gases and from which the poisonous substances were discharged, so that the gases and liquids discharged from the mill injured the land, the plaintiff was allowed to prove, by an expert witness, that copper had been obtained from grasses taken from the premises. The defendant, over the plaintiff's objection, was permitted to introduce counter expert testimony to the effect that copper frequently exists in vegetation generally, and in support of such opinion evidence was admitted of

B. In Court. — Cause may be proved by experiments made in court.[20] For rules governing evidence of experiments and by experiments, see article "Experiments."

3. Opinions. — A. Of Non-Experts. — a. *Generally.* — Generally the opinions or conclusions of non-experts as to the cause of the fact are not competent.[21] See articles "Conclusions" and "Expert and Opinion Evidence."

b. *Exceptions.* — But to this there are well recognized exceptions concerning which reference should be made to the articles "Conclusions" and "Expert and Opinion Evidence." See also the cases cited below.[22]

two experiments similar to those made by the plaintiff's witness upon grasses procured elsewhere, with the result that copper was obtained in both instances.

Different Results From Similar Conditions. — Leonard *v.* Southern Pac. Co., 21 Or. 555, 28 Pac. 887, 15 L. R. A. 221; Chicago, etc., R. Co. *v.* Champion, 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 23 L. R. A. 861.

20. In Brooke *v.* Chicago R. I. & P. R. Co., 81 Iowa 504, 47 N. W. 74, the shoe worn by the person injured at the time of the injury was before the jury, and as the court observed, "the witness who made the experiment was there, and the relative size of the shoes worn by each could be shown." It was very material to be ascertained whether as the rails were situated the shoe could or would be likely to be caught. And, continued the court, "we can hardly imagine testimony that would better show the fact than such experiments."

May Refuse Experiments Before the Jury. — In Homan *v.* Franklin Co., 98 Iowa 692, 68 N. W. 559, an action for personal injuries, an expert witness stated that the dilated condition of the plaintiff's eyes was due to the abnormal condition of the heart, caused by the injuries complained of, and was permitted to make certain experiments in the presence of the jury. The defendant requested similar experiments on some other person to show the same results, though the subject of the experiment was in a normal condition, and it was held that such refusal was not error, as being in the discretion of the court.

In Stockwell *v.* C. C. & D. R. Co., 43 Iowa 470, which was an action to recover for the alleged burning of plaintiff's lumber yard by sparks from defendant's engine, defendant claimed that the train which was alleged to have caused the fire ran by the yard on a down grade and without the use of steam, and that it therefore could not have emitted sparks. The jury inspected the premises, and while there defendant's servant ran a train down the grade past where the yard was located for the purpose of showing that it could be done without using steam. The trial court set aside the verdict because of the experiment, but the Supreme Court reversed the decision, holding that the experiment was not so erroneous as to call for such action.

21. Shaw *v.* Susquehanna Boom Co., 125 Pa. St. 324, 17 Atl. 426; Dushane *v.* Benedict, 120 U. S. 630, 7 Sup. Ct. 696; International & G. N. R. Co. *v.* Kuehn, 11 Tex. Civ. App. 21, 31 S. W. 322; Haynie *v.* Baylor, 18 Tex. 498; Harris *v.* Panama R. Co., 3 Bosw. (N. Y.) 7; American Acc. Co. *v.* Fidler, 18 Ky. L. Rep. 161, 35 S. W. 905; Ohio & M Ry. Co. *v.* Neutzel, 143 Ill. 46, 32 N. E. 529, *reversing* 43 Ill. App. 108; Duntley *v.* Inman, P. & Co., (Or.), 70 Pac. 529, 59 L. R. A. 785; Luning *v.* State, 2 Pinn. (Wis.) 215, 1 Chand. 178, 52 Am. Dec. 153; Bennett *v.* Meehan, 83 Ind. 566, 43 Am. Rep. 78.

22. *United States.* — St. Louis & S. F. R. Co. *v.* Bradley, 54 Fed. 630;

B. Of Experts. — a. *Generally.* — Under the general rules governing expert and opinion evidence, (see article "Expert and Opinion Evidence") evidence is admitted,[23] or rejected in proving cause.[24]

b. *Instances.* — Thus opinions on the causes of facts have been received from civil engineers,[25] steamfitters,[26] machinists,[27] miners,[28] brakemen.[29]

Physicians and surgeons have frequently been permitted to testify as to cause of abortion,[30] or miscarriage;[31] as to cause of death in

New York L. E. & W. R. Co. *v.* Estill, 147 U. S. 591, 37 L. ed. 292.

Connecticut. — Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249.

Iowa. — Yahn *v.* City of Ottumwa, 60 Iowa 429, 15 N. W. 252.

Nevada. — McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124.

Texas. — Galveston H. & S. A. Co. *v.* Daniels, 9 Tex. Civ. App. 253, 28 S. W. 548, 711; Gulf C. & S. F. R. Co. *v.* Haskell, 4 Tex. Civ. App. 550, 23 S. W. 546; International & G. N. R. Co. *v.* Klaus, 64 Tex. 293; Gulf C. & S. F. R. Co. *v.* Locker, 78 Tex. 279, 14 S. W. 611; Ethridge *v.* San Antonio & A. P. R. Co., (Tex. Civ. App.), 39 S. W. 204; Pullman P. C. Co. *v.* Smith, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215; St. Louis T. & A. R. Co. *v.* Burns, 71 Tex. 479, 9 S. W. 467; Gulf C. & S. F. R. Co. *v.* John, 9 Tex. Civ. App. 342, 29 S. W. 558.

23. American Acc. Co. *v.* Fidler, 18 Ky. L. Rep. 161, 35 S. W. 905; Ohio & M. R. Co. *v.* Neutzel, 143 Ill. 46, 32 N. E. 529, *reversing* 43 Ill. App. 108; Donohoe *v.* New York & N. E. R. Co., 159 Mass. 125, 34 N. E. 87; Piollet *v.* Simmers, 106 Pa. St. 95, 51 Am. Rep. 496; Branson *v.* Turner, 77 Mo. 489; Laird *v.* Snyder, 50 Mich. 404, 20 N. W. 654; State *v.* Clark, 12 Ired. Law (N. C.) 151; Ft. Worth & D. C. R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742; Lotz *v.* Scott, 103 Ind. 155, 2 N. E. 560.

24. Toledo P. W. R. Co. *v.* Conroy, 68 Ill. 560; Hughes *v.* Muscatine Co., 44 Iowa 672; National Gaslight & Fuel Co. *v.* Meithke, 35 Ill. App. 629; Ohio & M. R. Co. *v.* Webb, 142 Ill. 404, 32 N. E. 527; Ohio & M. R. Co. *v.* Neutzel, 143 Ill. 46, 32 N. E. 529; Ohio & M. R. Co. *v.* Long, 52 Ill. App. 670.

25. Covert *v.* Brooklyn, 6 App. Div. 73, 39 N. Y. Supp. 744; Ohio & M. R. Co. *v.* Schmidt, 47 Ill. App. 383; Ohio & M. R. Co. *v.* Webb, 142 Ill. 404, 32 N. E. 527; Folkes *v.* Chadd, 3 Doug. 157, 26 Eng. C. L. 63; St. Louis I. M. & S. R. Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170; Boffum *v.* Harris, 5 R. I. 243; Moyer *v.* New York C. & H. R. R. Co., 98 N. Y. 645; Grigsby *v.* Clear Lake Water Wks. Co., 40 Cal. 396; Ball *v.* Hardesty, 38 Kan. 540, 16 Pac. 808.

26. Webster Mfg. Co. *v.* Mulvanny, 168 Ill. 311, 48 N. E. 168.

27. Camp Point Mfg. Co. *v.* Ballou, 71 Ill. 417; Seaver *v.* Boston & M. R. Co., 14 Gray (Mass.) 466; Murphy *v.* New York C. R. Co., 66 Barb. (N. Y.) 125.

28. Clark *v.* Willett, 35 Cal. 534.

29. Brownfield *v.* Chicago R. I. & P. R. Co., 107 Iowa 254, 77 N. W. 1038; Ft. Worth & D. C. R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742.

30. Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111; People *v.* Sessions, 58 Mich. 594, 26 N. W. 291; Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; State *v.* Wood, 53 N. H. 484; Bathrick *v.* Detroit P. & T. Co., 50 Mich. 629, 16 N. W. 172; State *v.* Stagle, 83 N. C. 630.

31. Howland *v.* Oakland C. St. R. Co., 110 Cal. 513, 42 Pac. 983; McKeon *v.* Chicago M. & St. P. R. Co., 94 Wis. 477, 69 N. W. 175; Gibbons *v.* Phoenix, 61 Hun 619, 15 N. Y. Supp. 410; De Forest *v.* Utica (city), 69 N. Y. 614; State *v.* Ginger, 80 Iowa 574, 46 N. W. 657; Benjamin *v.* Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95; Bloomington *v.* Shrock, 110 Ill. 219, 51 Am. Rep. 678; Hauk

civil and criminal cases,[32] disease,[33] wounds[34] and other hurts, and as to cause of hemorrhage.[35]

v. State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

32. *United States.* — Manufacturers' Acc. I. Co. *v.* Dorgan, 58 Fed. 945; Travelers' Ins. Co. *v.* Melick, 65 Fed. 178, 27 L. R. A. 629.

Alabama. — Mitchell *v.* State, 58 Ala. 417; Bostic *v.* State, 94 Ala. 45, 10 So. 602; Simon *v.* State, 108 Ala. 27, 18 So. 731; Mobile Life Ins. Co. *v.* Walker, 58 Ala. 290.

Arkansas. — Ebos *v.* State, 34 Ark. 520; Polk *v.* State, 36 Ark. 117.

Florida. — Newton *v.* State, 21 Fla. 53.

Louisiana. — State *v.* Baptiste, 26 La. Ann. 134.

Maine. — State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578; State *v.* Pike, 65 Me. 111.

Michigan. — People *v.* Foley, 64 Mich. 148, 31 N. W. 94; People *v.* Hare, 57 Mich. 505, 24 N. W. 843.

Mississippi. — Pitts *v.* State, 43 Miss. 472.

New York. — Eggler *v.* People, 56 N. Y. 642; People *v.* Rogers, 13 Abb. Pr. (N. S.) 370.

North Carolina. — State *v.* Bowman, 78 N. C. 509.

Pennsylvania. — Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40.

South Carolina. — State *v.* Bradley, 34 S. C. 136, 13 S. E. 315.

Texas. — Shelton *v.* State, 34 Tex. 662; Powell *v.* State, 13 Tex. App. 244; Hunter *v.* State, 30 Tex. App. 314, 17 S. W. 414.

Virginia. — Livingston *v.* Com., 14 Gratt. 592.

Washington. — Ilawaco R. Co. *v.* Hedrick, 1 Wash. 446, 25 Pac. 335.

33. *Alabama.* — Eufaula (city) *v.* Simmons, 86 Ala. 515, 6 So. 47.

Illinois. — Louisville N. A. & C. R. Co. *v.* Shires, 108 Ill. 617; Illinois C. R. Co. *v.* Latimer, 128 Ill. 163, 21 N. E. 7.

Massachusetts. — Hardiman *v.* Brown, 162 Mass. 585, 39 N. E. 192.

New York. — Jones *v.* Utica & B. R. R. Co., 40 Hun 349; Matteson *v.* New York C. R. Co., 35 N. Y. 487, 91 Am. Dec. 67.

West Virginia. — State *v.* Perry, 41 W. Va. 641, 24 S. E. 634.

Wisconsin. — Kliegel *v.* Aitken, 94 Wis. 432, 69 N. W. 67.

34. *Canada.* — Napier *v.* Furguson, 2 P. & B. (N. B.) 415.

Alabama. — Patterson *v.* South. & N. A. R. Co., 89 Ala. 318, 7 So. 437.

Connecticut. — State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 27 L. R. A. 498.

Illinois. — Chatsworth *v.* Rowe, 166 Ill. 114, 46 N. E. 76; Jacksonville & S. R. Co. *v.* Southworth, 32 Ill. App. 307.

Indiana. — Louisville N. A. & C. R. Co. *v.* Holsapple, 12 Ind. App. 301, 38 N. E. 1107; Louisville N. A. & C. R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Pennsylvania Co. *v.* Frund, 4 Ind. App. 469, 30 N. E. 1116.

Iowa. — Armstrong *v.* Town of Ackley, 71 Iowa 76, 32 N. W. 180; State *v.* Cross, 68 Iowa 180, 26 N. W. 62; State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153; State *v.* Seymour, 94 Iowa 699, 63 N. W. 661.

Maine. — State *v.* Pike, 65 Me. 111.

Maryland. — Williams *v.* State, 64 Md. 384, 1 Atl. 887.

Massachusetts. — Flaherty *v.* Powers, 167 Mass. 61, 44 N. E. 1074.

Michigan. — People *v.* Hare, 57 Mich. 505, 24 N. W. 843; Jones *v.* Portland, 88 Mich. 598, 50 N. W. 731; Olson *v.* Manistique, 110 Mich. 656, 68 N. W. 986; Fuller *v.* Jackson, 92 Mich. 197, 52 N. W. 1075; Lucas *v.* Detroit C. R. Co., 92 Mich. 412, 52 N. W. 745.

Minnesota. — Donnelly *v.* St. Paul C. R. Co., 70 Minn. 278, 73 N. W. 157.

Nebraska. — Omaha & R. V. R. Co. *v.* Brady, 39 Neb. 27, 57 N. W. 767; Chicago R. I. & P. R. Co. *v.* Archer, 46 Neb. 907, 65 N. W. 1043.

New York. — Hurley *v.* New York & B. B. Co., 13 App. Div. 167, 43 N. Y. Supp. 259; Haviland *v.* Manhattan R. Co., 40 N. Y. St. 773, 15 N. Y. Supp. 893; Filer *v.* New York C. R. Co., 49 N. Y. 42; Wendell *v.* Troy, 39 Barb. 329; Friess *v.* New York C. & H. R. R. Co., 67 Hun 205, 22 N. Y. Supp. 104; Cole *v.* Fallbrook Coal Co., 87 Hun 584, 34 N. Y.

4. Declarations. — Statements admissible under the *res gestae* rule[36] are received to establish cause.[37] As to dying declarations, see article under that title.

5. Circumstantial Evidence. — A. GENERALLY. — Circumstantial evidence is continually received to establish cause.[38]

Supp. 572; Hunter *v.* Third Ave. R. Co., 20 Misc. 432, 45 N. Y. Supp. 1044; McDonald *v.* N. Y. C. & St. L. R. Co., 13 Misc. 651, 34 N. Y. Supp. 921; Quinn *v.* O'Keeffe, 9 App. Div. 68, 41 N. Y. Supp. 116; Griffith *v.* Utica & M. R. Co., 43 N. Y. St. 835, 17 N. Y. Supp. 692; Montgomery *v.* Long Island R. Co., 55 Hun 611, 8 N. Y. Supp. 811; McClain *v.* Brooklyn C. R. Co., 116 N. Y. 459, 22 N. E. 1062; Buel *v.* New York C. R. Co., 31 N. Y. 314; Curtiss *v.* Rochester & S. R. R. Co., 20 Barb. 282; Matteson *v.* New York C. R. Co., 62 Barb. 364.

Texas. — Texas C. R. Co. *v.* Burnett, 80 Tex. 536, 16 S. W. 320; White *v.* State, 13 Tex. App. 269.

Washington. — Robinson *v.* Marino, 3 Wash. 434, 28 Am. St. Rep. 50.

Wisconsin. — Smalley *v.* City of Appleton, 75 Wis. 18, 43 N. W. 826; Vosburg *v.* Putney, 86 Wis. 278, 56 N. W. 480; Tebo *v.* Augusta, 90 Wis. 405, 63 N. W. 1045; Block *v.* Milwaukee St. R. Co., 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849; Vosburg *v.* Putney, 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226; Corthans *v.* State, 78 Wis. 560, 47 N. W. 629.

35. Brant *v.* City of Lyons, 60 Iowa 172, 14 N. W. 227.

36. *See* article "RES GESTAE."

37. *England.* — Rex *v.* Foster, 6 Car. & P. 325.

United States. — Travelers' Ins. Co. *v.* Mosley, 8 Wall. 397.

Alabama. — Louisville & N. R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176; Richmond & D. R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577.

Arkansas. — Little Rock M. R. & T. R. Co. *v.* Leverett, 48 Ark. 333, 3 S. W. 50.

Georgia. — Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838.

Illinois. — Illinois C. R. Co. *v.* Sutton, 42 Ill. 438.

Indiana. — Toledo & W. R. Co. *v.* Goddard, 25 Ind. 185; Louisville N. A. & C. R. Co. *v.* Buck, 116 Ind. 566, 19 N. E. 453; Toledo & W. R. Co. *v.* Goddard, 25 Ind. 185; Ohio & M. R. Co. *v.* Stein, 133 Ind. 243, 31 N. E. 180, 19 L. R. A. 733.

Iowa. — Gray *v.* McLaughlin, 26 Iowa 279; Perigo *v.* Chicago R. I. & P. R. Co., 55 Iowa 326, 7 N. W. 627.

Massachusetts. — Com. *v.* Pike, 3 Cush. 181.

Mississippi. — Mayes *v.* State, 64 Miss. 329, 1 So. 733.

Missouri. — Entwhistle *v.* Feighner, 60 Mo. 214; Brownell *v.* Pacific R. R. Co., 47 Mo. 240; Harriman *v.* Stowe, 57 Mo. 93; Leahy *v.* Cass Ave. & T. G. R. Co., 97 Mo. 165, 10 S. W. 58.

New York. — Waldele *v.* New York C. & H. R. R. Co., 95 N. Y. 275.

Ohio. — Cleveland C. & C. R. Co. *v.* Mara, 26 Ohio St. 185.

Pennsylvania. — Elkins B. & Co. *v.* McKeon, 79 Pa. St. 493; Pennsylvania R. Co. *v.* Lyons, 129 Pa. St. 113, 18 Atl. 759.

Texas. — Galveston *v.* Barbour, 62 Tex. 172, 8 Am. & Eng. R. Cas. 577, Missouri Pac. R. Co. *v.* Bond, 2 Tex. Civ. App. 104, 20 S. W. 930; Texas & N. O. R. Co. *v.* Crowder, 70 Tex. 222, 7 S. W. 709.

Wisconsin. — Bass *v.* Chicago & N. W. R. Co., 42 Wis. 654; International & Great Northern R. Co. *v.* Smith, (Tex.), 14 S. W. 642, 44 Am. & Eng. R. Cas. 324.

38. *United States.* — Pocket Co. *v.* Clough, 20 Wall. 324.

California. — Gerke *v.* Cal. Steam Nav. Co., 9 Cal. 251.

Georgia. — East Tennessee V. & G. R. Co. *v.* Maloy, 77 Ga. 237, 2 S. E. 941, 31 Am. & Eng. R. Cas. 352.

Illinois. — Ohio & M. R. Co. *v.* Porter, 92 Ill. 437; Michigan C. R. Co. *v.* Gougar, 55 Ill. 503; Michigan Cent. R. Co. *v.* Carrow, 73 Ill. 348; Chicago & N. W. R. Co. *v.* Fillmore, 57 Ill. 265.

Kansas. — Dodge *v.* Childs, 38 Kan. 526, 16 Pac. 815.

B. Similar Occurrences. — Thus, it may be shown that the same result has at other times been produced by a certain cause,[39] under similar conditions.[40]

Maryland. — Dietrich *v.* Baltimore & H. S. R. Co., 58 Md. 347, 11 Am. & Eng. R. Cas. 115.

Massachusetts. — McKinnon *v.* Norcross, 148 Mass. 533, 20 N. E. 183; Williamson *v.* Cambridge R. Co., 144 Mass. 148, 10 N. E. 790.

Michigan. — Patterson *v.* Wabash St. L. & P. R. Co., 54 Mich. 91, 19 N. W. 163, 18 Am. & Eng. R. Cas. 130; Sisson *v.* Cleveland & T. R. Co., 14 Mich. 489.

Mississippi. — Moore *v.* Chicago St. L. & N. O. R. Co., 59 Miss. 243, 9 Am. & Eng. R. Cas. 401.

Missouri. — Adams *v.* Hannibal & St. J. R. Co., 74 Mo. 353, 7 Am. & Eng. R. Cas. 414.

New York. — Whitaker *v.* Eighth Ave. R. Co., 51 N. Y. 295; Luby *v.* Hudson River R. Co., 17 N. Y. 131; Anderson *v.* Rome W. & O. R. Co., 54 N. Y. 334; Whalen *v.* Standard Gas Light Co., 32 N. Y. St. Rep. 48, 10 N. Y. Supp. 105.

Pennsylvania. — Baker *v.* Allegheny Valley R. Co., 95 Pa. St. 211; Hanover R. Co. *v.* Coyle, 55 Pa. St. 396.

Texas. — Missouri Pac. R. Co. *v.* Ivey, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500.

39. *Colorado.* — Railroad Co. *v.* DeBusk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350; Crissey & Fowler Lumb. Co. *v.* Denver & R. G. R. Co., (Colo.), 68 Pac. 670, 25 Am. & Eng. R. Cas. (N. S.) 412; Denver T. & G. R. Co. *v.* De Graff, 2 Colo. App. 42, 29 Pac. 664.

Connecticut. — Martin *v.* New York & N. E. R. Co., 62 Conn. 331, 25 Atl. 239, 56 Am. & Eng. R. Cas. 79.

Georgia. — Southern R. Co. *v.* Williams, 113 Ga. 335, 38 S. E. 744, 22 Am. & Eng. R. Cas. (N. S.) 415; Gainesville J. & S. R. Co. *v.* Edmondson, 101 Ga. 747, 29 S. E. 213, 10 Am. & Eng. R. Cas. (N. S.) 154.

New York. — Crist *v.* Erie R. Co., 58 N. Y. 638.

South Carolina. — Whitney Mfg. Co. *v.* Richmond & D. R. Co., 38 S. C. 365, 17 S. E. 147, 55 Am. & Eng. R. Cas. 612.

South Dakota. — Kelsey *v.* Chicago & N. W. R. Co., 1 S. D. 80, 45 N. W. 204, 43 Am. & Eng. R. Cas. 43; White *v.* Chicago M. & St. P. R. Co., 1 S. D. 326, 47 N. W. 146, 45 Am. & Eng. R. Cas. 565.

Texas. — San Antonio & A. P. R. Co. *v.* Adams, 11 Tex. Civ. App. 198, 32 S. W. 918, 24 Am. & Eng. R. Cas. (N. S.) 878.

Wisconsin. — Donovan *v.* Chicago & N. W. R. Co., 93 Wis. 373, 67 N. W. 721, 5 Am. & Eng. R. Cas. (N. S.) 318; Finkelston *v.* Chicago M. & St. P. R. Co., 94 Wis. 270, 68 N. W. 1005, 6 Am. & Eng. R. Cas. (N. S.) 193; Beggs *v.* Chicago W. & M. R. Co., 75 Wis. 444, 44 N. W. 633.

40. *England.* — Pigott *v.* Eastern Counties R. Co., 10 Jur. 571, 54 Eng. C. L. 229; Aldrich *v.* Great Western R. Co., 3 Man. & G. 515, 42 Eng. C. L. 272.

United States. — Osborne *v.* City of Detroit, 32 Fed. 36; Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454; Chicago St. P. M. & O. R. Co. *v.* Gilbert, 52 Fed. 711.

California. — Remy *v.* Olds, (Cal.), 34 Pac. 216, 21 L. R. A. 645; Butcher *v.* Vaca Valley & C. L. R. Co., 67 Cal. 518, 8 Pac. 174; Henry *v.* Southern Pac. R. Co., 50 Cal. 176.

Colorado. — Union Pac. R. Co. *v.* DeBusk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep., 3 L. R. A. 350.

Illinois. — Chicago & N. W. R. R. Co. *v.* Williams, 44 Ill. 176.

Indiana. — Gagg *v.* Vetter, 41 Ind. 228.

Iowa. — Babcock *v.* Chicago & N. W. R. Co., 62 Iowa 593, 13 N. W. 740, 11 Am. & Eng. R. Cas. 63; Slossen *v.* Burlington C. R. & N. R. Co., 60 Iowa 214, 14 N. W. 244, 7 Am. & Eng. R. Cas. 509.

Maryland. — Baltimore & S. R. Co. *v.* Woodruff, 4 Md. 242; Green Ridge R. Co. *v.* Brinkman, 64 Md. 52, 20 Atl. 1024; Annapolis & E. R. Co. *v.* Gantt, 39 Md. 115.

C. Sufficiency of Such Evidence.—When the evidence offered supports a hypothesis or probability as to the cause of an injury, it is sufficient to prove such cause,[41] as when a witness testifies that a fire sprang up after a train passed and there is no other efficient cause, it is sufficient to warrant an inference that the train caused the fire,[42] or when there is evidence of a possible cause and no

Massachusetts. — Ross *v.* Boston & W. R. Co., 6 Allen 87.

Minnesota. — Phelps *v.* Mankato (city), 23 Minn. 276; Morse *v.* Minnesota & St. L. R. Co., 30 Minn. 465, 16 N. W. 358, 11 Am. & Eng. R. Cas. 168.

Missouri. — Campbell *v.* Missouri P. R. Co., 121 Mo. 340, 25 S. W. 936, 23 L. R. A. 175; Coale *v.* Hannibal & St. J. R. Co., 60 Mo. 227; Kenney *v.* Hannibal & St. J. R. Co., 70 Mo. 243.

Nevada. — Longabaugh *v.* Virginia City & T. R. Co., 9 Nev. 271.

New York. — Holbrook & Utica S. R. Co., 12 N. Y. 236; Babcock *v.* Fitchburg R. Co., 140 N. Y. 308, 35 N. E. 596; Hinds *v.* Barton, 25 N. Y. 544; Rood *v.* New York & E. R. Co., 18 Barb. 80; Flinn *v.* New York C. & H. R. R. Co., 67 Hun 631, 22 N. Y. Supp. 473; Field *v.* New York C. R. Co., 32 N. Y. 339; Webb *v.* Rome W. & O. R. Co., 49 N. Y. 420, 10 Am. Rep. 389; Westfall *v.* Erie R. Co., 5 Hun 75; Home Ins. Co. *v.* Pennsylvania R. Co., 11 Hun 182; Sheldon *v.* Hudson R. R. Co., 14 N. Y. 218, 67 Am. Dec. 155; O'Neill *v.* New York O. & W. R. Co., 115 N. Y. 519, 22 N. E. 217; Quinlan *v.* Utica (city), 11 Hun 217, 74 N. Y. 603.

Pennsylvania. — Pennsylvania R. Co. *v.* Stranahan, 79 Pa. St. 405; Van Steuben *v.* Central R. Co., 178 Pa. St. 367, 35 Atl. 992; Railroad Co. *v.* Yeiser, 8 Pa. St. 366; Phila. & Reading R. Co. *v.* Schultz, 93 Pa. St. 341, 2 Am. & Eng. R. Cas. 275.

Rhode Island. — Smith *v.* Old Colony & N. R. Co., 10 R. I. 22.

South Dakota. — White *v.* Chicago M. & St. P. R. Co., 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 824.

Tennessee. — Burke *v.* Louisville & N. R. Co., 7 Heisk. (Tenn.) 451.

Vermont. — Cleavelands *v.* Grand Trunk R. Co., 42 Vt. 449.

Wisconsin. — Gibbons *v.* Wis. Valley R. Co., 58 Wis. 335, 17 N. W. 132; Brusberg *v.* Milwaukee L. S. & W. R. Co., 55 Wis. 106, 12 N. W. 416.

41. *Connecticut.* — House *v.* Metcalf, 27 Conn. 631.

Georgia. — Augusta *v.* Hafers, 61 Ga. 48.

Idaho. — Minty *v.* Union Pac. R. Co., 2 Idaho 437, 21 Pac. 660, 4 L. R. A. 409.

Illinois. — Chicago *v.* Powers, 42 Ill. 169.

Indiana. — Pittsburgh Ft. W. & C. R. Co. *v.* Ruby, 38 Ind. 294; Delphi (city) *v.* Lowery, 74 Ind. 520.

Iowa. — Moore *v.* Burlington (city), 49 Iowa 136; Calkins *v.* Hartford, 33 Iowa 57.

Kentucky. — L. & N. R. Co. *v.* Fox, 11 Bush. 495.

Maine. — Hill *v.* Portland & R. R. Co., 55 Me. 438.

Massachusetts.—Standish *v.* Washburn, 38 Mass. 237.

Michigan. — Dundas *v.* Lansing (city), 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143; Jones *v.* Portland, 88 Mich. 598, 50 N. W. 731; Grand Rapids & Ind. R. Co. *v.* Huntley, 38 Mich 537.

Minnesota. — Morse *v.* Minn. & St. L. R. Co., 30 Minn. 465, 16 N. W. 358, 11 Am. & Eng. R. Cas. 168.

New Hampshire.—Willey *v.* Portsmouth, 35 N. H. 303.

New York — Dougan *v* Champlain T. Co., 56 N. Y. 1; Reed *v.* New York C. R. Co., 45 N. Y. 574; Quinlan *v.* Utica (city), 11 Hun 217, 74 N. Y. 603.

Vermont. — Kent *v.* Town of Lincoln, 32 Vt. 591.

Wisconsin. — Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1092, 44 Am. & Eng. R. Cas. 313.

42. Shevlin *v.* American Mut. Acc. Assoc., 94 Wis. 180, 68 N. W. 1009, 36 L. R. A. 52, the court held that evidence that plaintiff, with a companion, was stealing a ride on a

evidence of any other cause it is sufficient to sustain the possible cause,[43] or cause may be proven by coincidences.[44] When the evidence is circumstantial, conflicting and equally credible, the weight is with the most probable.[45]

freight train and had agreed to jump off at that place, and was found by the track unconscious by his companion immediately after the latter jumped off, justified the conclusion that deceased jumped from the moving train and was thus killed.

In Philadelphia & R. R. Co. *v.* Huber, 128 Pa. St. 63, 18 Atl. 334, 5 L. R. A. 439, on the question whether a brakeman fell from a car in consequence of a defective brake, proof that he was seen at a brake a moment before with one arm about the brake lever pulling on the brake is sufficient to sustain a verdict finding that the fall was due to such defect.

Evidence that at various times during the same summer, before the fire occurred, some of the defendant's locomotives scattered fire when going by the mill is admissible. Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. ed. 356.

See Knowlton *v.* New York & N. E. R. Co., 147 Mass. 606, 18 N. E. 580, 1 L. R. A. 625; St. Louis I. M. & S. R. Co. *v.* Yonly, 53 Ark. 503, 14 S. W. 800, 9 L. R. A. 604

Fire Started After Train Passed. Testimony of witnesses to the springing up of a fire immediately after the passing of a train and that there was no fire before, and no other efficient cause for it, is sufficient to warrant the inference that it was caused by the train. Union P. R. Co. *v.* De Busk, 12 Colo. 294, 20 Pac. 752, 3 L. R. A. 350.

Evidence that before a train passed there was no fire, but that sparks were flying from the smoke stack when it passed and soon afterward a fire broke out and a tiny piece of coal about an inch long and three quarters of an inch thick was found near by, is sufficient evidence that a fire which broke out about that time was caused by the train. White *v.* Chicago M. & St. P. R. Co., 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 824; Kenney *v.* Hannibal & St. J. R. Co., 70 Mo. 243, 80 Mo. 573.

43. In Woodman *v.* Metropolitan R. Co., 149 Mass. 335, 21 N. E. 963, 4 L. R. A. 213, the court said that the fact that a person falls in a street at a point where the rails project beyond a temporary barrier guarding an excavation warrants a finding that he tripped over the end of the rail in the absence of evidence of any other possible cause of the fall.

44. The coincidence of the decay and death of vegetation with the existence of a leakage of a large amount of gas after the laying of a new main and until its recalking, and the fact of the healthy growth after the recalking, will sustain a conclusion by the jury that the escape of the gas was the cause of the injury. Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 30 L. R. A. 651; Perkins *v.* St. Louis I. M. & S. R. Co., 103 Mo. 52, 15 S. W. 320.

45. In Donald *v.* Chicago B. & Q. R. Co., 93 Iowa 284, 61 N. W. 971, 33 L. R. A. 492, which was an action to recover damages for the death of a brakeman alleged to have been caused by striking his head on an overhead bridge, evidence was introduced to show that he might have just reached the overhead bridge, and that his body was found just beyond the bridge under which the train passed in rounding a curve at high speed, and that there was some dandruff on his hat, but the court held that such evidence was not sufficient to sustain a verdict that his death was caused by striking the bridge.

CAVEAT.—See Patents.

CEMETERIES.—See Dedication; Eminent Domain; Highways; Nuisances.

CENSUS.—See Judicial Notice.

CERTIFICATES.

I. CERTIFICATES BY PRIVATE INDIVIDUALS.

1. General Rule. — The general rule is that a mere unsworn non-official certificate by a third person is hearsay evidence and therefore inadmissible.[1]

2. Contract Stipulating for Certificate as Evidence. — But where a contract contains a stipulation that the certificate of a third person

1. Beale *v.* Pettit, 1 Wash. C. C. 241, 2 Fed. Cas. No. 1158; Langford *v.* Sanger, 35 Mo. 133; Paull *v.* Mackey, 3 Watts (Pa.) 110; Mathis *v.* Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Certificate Awarding Medal. — In D'Homergue *v.* Morgan, 3 Whart. (Pa.) 26, it was held that on an issue as to the plaintiff's capacity as a manufacturer of silk, a certificate of the Franklin Institute setting forth that they had awarded to the plaintiff a silver medal as a testimonial of the satisfaction experienced by them from the silks exhibited by the plaintiff, was mere hearsay evidence.

In Sutherland *v.* Kittridge, 19 Me. 424, the defendant and another person employed a third person to drive logs at a stipulated rate to be paid by each party in proportion to their interest, and agreed that such third person might employ the plaintiff on their account, and that his services should be deducted from the stipulated price; and it was held that a certificate of such third person directed to the defendant as to the amount of work done by the plaintiff was not competent evidence

as to certain matters relative to the contract shall be conclusive evidence, it is so between the parties.[2]

II. CERTIFICATES BY PUBLIC OFFICERS.

1. Admissibility. — A. — Rule as to Certificates Required or Authorized by Law. — a. *In General.* — As a general rule when some enactment or rule of law requires or authorizes a public officer to make a certificate or statement in writing as to some matter or fact pertaining to and as a part of his official duty, such writing is competent evidence of the matter or fact stated or certified.[3]

against the defendant, but that such third person should have been called as a witness; and that the objection to the certificate in this respect was not overcome by the fact of the silence of the defendant when apprised by the other owner that he had settled with the plaintiff according to that certificate.

Certificate of Payment of Subscription. — In Sypher *v.* Savery, 39 Iowa 258, an action by a subscriber to a fund raised and to be loaned to a certain individual for certain purposes, the trustees of the fund issued to the subscribers certificates of the payment of their subscriptions, and it was held that such a certificate was not competent evidence for the plaintiff, a subscriber, as against the defendant, the borrower of the fund, because he was no party to it, and it was not shown that the certificate was issued with his knowledge or consent.

2. Malone *v.* Mayfield, 13 Tex. Civ. App. 548, 36 S. W. 148, so holding of the certificates of an architect as to the cost of a building stipulated for in the building contract. *See* article "Conclusive Evidence."

3. Certificates by Public Officers Required or Authorized by Law. *United States.* — Craig *v.* Radford, 3 Wheat. 594, 4 L. ed. 467; *In re* Breen, 73 Fed. 458.

Alabama. — Walling *v.* Morgan County, 126 Ala. 326, 28 So. 433; McCollum *v.* Hubbert, 13 Ala. 282, 48 Am. Dec. 56; First National Bank *v.* Lippman, 129 Ala. 608, 30 So. 19.

Connecticut. — Hennessy *v.* Metropolitan L. Ins. Co., 74 Conn. 699, 52 Atl. 490.

Illinois. — Roper *v.* Clabaugh, 4 Ill. 166.

Iowa. — Clark *v.* Polk County, 19 Iowa 248; York *v.* Sheldon, 18 Iowa 569.

Kansas. — State *v.* Board of Comrs., 59 Kan. 512, 53 Pac. 526.

Louisiana. — Hanna *v.* His Creditors, 12 Mart. (O. S.) 32.

Maryland. — Harwood *v.* Marshall, 9 Md. 83.

Massachusetts. — Com. *v.* Hollis, 170 Mass. 433, 49 N. E. 632.

Minnesota. — Mosness *v.* Lacy, 73 Minn. 283, 76 N. W. 34.

Mississippi. —McNutt *v.* Lancaster, 9 Smed. & M. 570.

Missouri. — Gurno *v.* Janis, 6 Mo. 330.

New York. —Williams *v.* Merle, 11 Wend. 80, 25 Am. Dec. 604.

Pennsylvania. — Vastbinder *v.* Wager, 6 Pa. St. 339.

Texas. — Weinert *v.* Simmang, (Tex. Civ. App.), 68 S. W. 1011.

Vermont. — McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438.

Wisconsin. — Peters *v.* Reichenbach, 114 Wis. 209, 90 N. W. 184.

The Certificate of the Governor Under Seal of the State is the best evidence of the official character of a person holding office under appointment from such governor, and before other evidence can be received thereof, the absence of such higher and better evidence must be accounted for. Buford *v.* Johnson, 10 Rob. (La.) 456.

In Stuart *v.* Broome, 59 Tex. 466, an action to foreclose a mechanic's lien in accordance with an itemized account of the materials furnished by the material man, it was held that the

b. *Admissible for Officer Certifying.* — The certificate of a public officer when by law competent evidence for others is likewise competent evidence for the officer himself, provided he was competent at the time of making it to act officially in the matter to which it relates.[4]

c. *Endorsements on Certificates.* — An offer and reception in evidence of a certificate does not include and carry with it as evidence a non-official endorsement thereon, unless the offer is broad enough to include the endorsement.[5]

B. Rules as to Extra-Official Certificates. — a. *In General.* On the other hand, the certificate of a public officer as to matters or facts which he is not by any enactment or rule of law required or authorized to make, is extra official and entitled to no greater

certificate of the clerk, who recorded the account, certifying that it was filed for record in his office on a certain date, and that it was recorded on a certain other date, was *prima facie* evidence that the facts stated in it were true.

Certificate of Deputy. — In State *v.* Clark, 46 La. Ann. 1409, 16 So. 374, a statute authorized the assistant secretary of state to perform all or any of the duties or official acts required by law of the secretary of state; and it was held that a certificate of the assistant secretary showing the date of the publication of a certain act was competent evidence of such fact, since the certificate of the secretary himself would have been so competent. See also Godbold *v.* Planters' & Merchants' Bank, 4 Ala. 516, holding to the same effect as to a certificate of a deputy clerk of a duty or official act required of the clerk.

The Certificate of the Controller of the Currency of the Organization of a National Bank is one which the law requires a controller to make, and hence is competent evidence tending to show the incorporation of such a bank. National Bank *v.* Galland, 14 Wash. 502, 45 Pac. 35.

When the Time of Recording a Paper in a Recording Officer's Office is rendered material by statute, such officer's certificate showing the time when it was in fact recorded is competent evidence of that fact. Town of Pawlet *v.* Town of Sandgate, 17 Vt. 619.

Certificate as Semi-Official Document. — In Perkins *v.* Augusta Ins. & B. Co., 10 Gray (Mass.) 312, 71 Am. Dec. 654, it was held that a certificate of the marine inspector and surveyor as to the condition of a vessel in respect of its seaworthiness at the time of the inspection was competent evidence. The court said "it was not a mere private memorandum made for the purpose of enabling a witness to refresh his memory. . . . But it was a certificate made by a person of skill and experience engaged in the regular and constant performance of a particular duty or service well known and recognized among merchants and ship owners, and sanctioned by the usage and customs of business. Nor was it the record of a past transaction merely or of existing facts casually noticed to which no importance was attached at the time. On the contrary, it was a statement of facts contemporaneous with the written memorandum made for the purpose of giving information to parties interested in the subject matter to which it related, and which was acted on by them. It was therefore in its nature a semi-official document and although not made in pursuance of any positive enactment or rule of law, it was, nevertheless, like the entries made by bank clerks, messengers and other similar agents, competent evidence of the fact therein stated." See also Shove *v.* Wiley, 18 Pick. (Mass.) 558.

4. McKnight *v.* Lewis, 5 Barb. (N. Y.) 681.

5. Johnson *v.* English, 53 Neb. 530, 74 N. W. 47.

weight as evidence than the unsworn certificate of any other person.[6]

b. *Matters Collateral to Records.* — Accordingly a certificate of a public officer is not generally competent evidence to prove facts collateral to the records in his office;[7] such as that no document

6. *United States.* — Wagner *v.* County Comrs., 91 Fed. 969; The Alice, 12 Fed. 923.

Arkansas. — Obermier *v.* Core, 25 Ark. 562.

Illinois. — People *v.* Hayes, 63 Ill. App. 427.

Maine. — Randall *v.* Bradbury, 30 Me. 256.

Massachusetts. — Com. *v.* Richardson, 142 Mass. 71, 7 N. E. 26.

Michigan. — Smith *v.* Rich, 37 Mich. 549.

Minnesota. — Fleckten *v.* Spicer, 63 Minn. 454, 65 N. W. 926.

Mississippi. — Newman *v.* Harris, 4 How. 522.

Missouri. — Langford *v.* Sanger, 35 Mo. 133; Evans *v.* Labaddie, 10 Mo. 425.

New York. — Bissell *v.* Pearce, 28 N. Y. 252; Parr *v.* Village of Greenbush, 72 N. Y. 463; Pugsley *v.* Anderson, 3 Wend. 468; Staring *v.* Bowen, 6 Barb. 109.

South Dakota. — Billingsley *v.* Hiles, 6 S. D. 445, 61 N. W. 687.

Texas. — Reynolds *v.* Dechaumes, 22 Tex. 116.

Wisconsin. — Reed *v.* Chicago M. & St. P. R. Co., 71 Wis. 399, 37 N. W. 225.

7. Governor *v.* McAffee, 2 Dev. Law (N. C.) 15; Governor *v.* Bell, 3 Murph. Law (N. C.) 331; Jackson *v.* Miller, 6 Cow. (N. Y.) 752; Daggett *v.* Bonewitz, 107 Ind. 276, 7 N. E. 900; Billingsley *v.* Hiles, 6 S. D. 445, 61 N. W. 687; Coit *v.* Wells, 2 Vt. 318.

Statement of Rule. — In Armstrong *v.* Boylan, 4 N. J. Law 76, the court in holding inadmissible a certificate of the surrogate stating that in the settlement of an account of certain administrators, certain sums had been allowed for commission, said: "For though it should be admitted that the surrogate, who has the custody of the seal, might lawfully certify copies of any of the records or proceedings of the said court, of which he is the clerk, and that such certificate should be a sufficient authentication of such copies to make them evidence in other courts, yet it can never be admitted that he can, by fixing his official seal, give authenticity to a paper like this, which does not even pretend to be a copy of any record, proceeding, or paper filed in his office, but a mere certificate of a fact remaining in his own memory, or, at most, brought to his memory by looking into the account filed. However accurate the surrogate may be in his statement (and it is believed no one who knows him, will doubt his accuracy) and however well satisfied the justice and others concerned may have been of the truth of the fact certified, yet all this does not make the certificate lawful evidence. To make the most of the surrogate's power in this respect, he can only certify copies, not facts existing in his own knowledge, whether that knowledge depends upon his recollection alone, or upon the inspection of his office records."

The Certificate of a Mere Matter of Fact by a Public Officer is not admissible. If he was bound to record the fact, a copy of the record duly authenticated is the proper evidence. As to matters which he was not bound to record his certificate is merely the statement of a private person, and hence is inadmissible. Hughey *v.* Barrow, 4 La. Ann. 248, where the certificate in question was that of the auditor of public accounts to the effect that upon examining the tax roll of a parish for a certain year there appeared to be assessed thereon in the name and as the property of a certain person, a tract of land; and it was held that as the certificate disclosed the existence of a copy of the tax roll in the possession of the auditor, the certificate itself was not admissible.

Assessment and Payment of Tax. A town clerk has no authority or power to certify to the contents of his records or to their substance or effect. As a certifying officer he may make only exact copies from his rec-

ords and certify to their correctness as copies. Hence, a certificate by the clerk of a town in which a tax is claimed to have been paid, to the effect that it appeared by the records of such town that the tax was ordered to be assessed, and that subsequently a tax was assessed against certain property, is not competent to prove the making of such assessment. Hopkins *v.* Millard, 9 R. I. 37. A certificate of a town clerk as to the payment of a road tax is not competent evidence that such tax was ever assessed. Fleckten *v.* Spicer, 63 Minn. 454, 65 N. W. 926.

Performance of Contract. — On an issue as to whether or not certain street work had been fully performed under the contract, and the work and materials furnished were such as were called for, a certificate of the street superintendent to that effect is not competent evidence where it does not appear that he was authorized by any enactment or rule of law to make such certificate. Parr *v.* Village of Greenbush, 72 N. Y. 463. "Such a certificate," said the court, "could not be made evidence against the defendants unless some statute or the defendants, by ordinance, or in some other way, authorized it to be made. It was no part of his duty to make it, and it was no part of any *res gestae*. It was mere hearsay, and its reception was a plain violation of a rule of evidence too important to be disregarded."

In Reed *v.* Inhabitants of Scituate, 7 Allen (Mass.) 141, an action to recover for work done by the plaintiff in building a highway, it was held that a certificate, by the chairman of the county commissioners, addressed to the selectmen of the defendant town, and stating that the road had been graded and worked to the acceptance of the commissioners, was not competent for the purpose of showing good faith on the part of the plaintiff inasmuch as it was a mere declaration *in pais* and stood on the same ground as ordinary hearsay evidence.

The Fact That a Certain Person Is Public Administrator cannot be proved by the certificate of the probate judge. Littleton *v.* Christy, 11 Mo. 390.

The Certificate of a Probate Judge Naming the Heirs of a certain person deceased is not competent in proof thereof. Greenwood *v.* Spiller, 3 Ill. 502. See also Billingsley *v.* Hiles, 6 S. D. 445, 61 N. W. 687.

The Events of a Trial cannot be proved by the certificate of the clerk of the court before which the trial took place. Wilcox *v.* Ray, 1 Hayw. (N. C.) 410.

The Certificate of a Justice of the Peace That a Certain Demand was Claimed before him on the trial by the defendant as a set-off is extra official, and hence inadmissible to prove the facts stated. Wolfe *v.* Washburn, 6 Cow. (N. Y.) 261.

A Certificate of a Jailer of the Date of the Death of a Prisoner is not competent evidence of that fact. Gill *v.* Phillips, 6 Mart. (N. S.) (La.) 298. The court said: "Admitting it was the duty of this officer to keep a record of the deaths of the persons committed to his custody, and that a copy from this record could be evidence, the certificate offered did not purport to be such. It is merely a statement by the jailer that a prisoner in his custody had died. This was not the best evidence of which the case was susceptible. The oath of the person certifying would be higher and better proof, and consequently the inferior evidence could not be received."

Copy of Paper on File. — In Bissell *v.* Pearce, 28 N. Y. 252, it was held that the certificate of a town clerk in whose office chattel mortgages were required to be filed, stating that a certain paper is a copy of an original mortgage on file in his office, was no proof of the existence of the mortgage; nor was it any evidence that the paper in question was a copy of the mortgage.

Clerks of Religious and Other Corporations and Other Recording Officers may make and verify copies of their records, and in doing so act under the obligation of their oath of office. Of the verity of such copies their certificates was evidence. But it is no part of their duty to certify facts. Oakes *v.* Hill, 14 Pick. (Mass.) 442, where the clerk of a religious society certified merely that a certain person had at his own request ceased to be a member of the society; and it was held that the cer-

of a particular kind exists or is on file in his office,[8] but the officer himself should be called as a witness,[9] or his deposition taken in case of his inaccessibility.[10]

c. *Stating Conclusions of Officer.* — So also the certificate of a public officer which merely states his conclusions as to the legal effect of his records is mere hearsay and is not competent evidence of the facts stated;[11] although it is held that such a certificate is not to be entirely excluded merely because a portion of it is but the mere statement of the officer's opinion, but the portions which are pertinent and unobjectionable may be received in evidence, and the remainder rejected as surplusage.[12]

d. *Certificate Issued After Expiration of Office.* — It has been held that the certificate of one who had been a public officer made long after the transaction stated and after his term of office has expired is not competent evidence.[13]

tificate was not competent evidence of that fact.

8. Bemis *v.* Becker, 1 Kan. 226; Greer *v.* Ferguson, 104 Ga. 552, 30 S. E. 943.

Paper Not Filed. — The certificate of the secretary of state that the duplicate of the certificate of organization of a certain corporation had not been filed in his office is not competent evidence to prove that fact. Cross *v.* Pinckneyville Mill Co., 17 Ill. 54. See also Ayres *v.* Stewart, 1 Overt. (Tenn.) 220, so holding of the certificate of the secretary of state that a grant named had not been filed in his office.

9. Bullock *v.* Wallingford, 55 N. H. 619.

10. Stoner *v.* Ellis, 6 Ind. 152.

11. *Alabama.* — Bonner *v.* Phillips, 77 Ala. 427.

Maine. — McGuire *v.* Sayward, 22 Me. 230.

Massachusetts. —Wayland *v.* Ware, 109 Mass. 248; Hanson *v.* Inhabitants of South Scituate, 115 Mass. 336.

North Carolina. —Drake *v.* Merrill, 2 Jones Law 368.

Pennsylvania. — Cox *v.* Cox, 26 Pa. St. 375, 67 Am. Dec. 432.

Texas. — Fisher *v.* Ullman, 3 Tex. Civ. App. 322, 22 S. W. 523.

Issuance of Official Document. A certificate of the United States commissioner of patents that diligent search had been made, and that it does not appear that a certain patent has been issued, is not competent evidence of that fact. "It was the conclusion drawn by the certifying officer from the examination of the records in his office, and possibly he may have been mistaken." Bullock *v.* Wallingford, 55 N. H. 619; Stoner *v.* Ellis, 6 Ind. 152.

12. Petrucio *v.* Cross, (Tex. Civ. App.), 47 S. W. 43.

In Johnson *v.* Hocker, 1 Dall. (U. S.) 406, an action of debt on a bond to which the defendant pleaded payment, the defendant in order to prove payment to the state treasury under the Tender Law of Pennsylvania, offered a certificate of the state treasurer acknowledging receipt from the defendant of a sum of money specified, due to the plaintiff, which the latter "refused to receive when legally tendered to him in presence of" certain witnesses, which was objected to as containing facts stated extra officially, to which the treasurer, like any other witness, ought to have been produced and sworn; but it was held that the certificate was properly admitted to prove that payment was made to the treasurer, the remainder of the receipt being struck out as surplusage.

13. Certificate After Expiration of Office. — In Turner *v.* Thomas, 77 Miss. 864, 28 So. 803, it was held that a certificate of the tax collector to the list of lands sold to the state under tax sale made long after the sale, and more than 40 days after the expiration of his term of office, was not an instrument authorized by law, and was properly excluded as evidence. *Compare* Maynard *v.* Thompson, 8 Wend. (N. Y.) 393,

C. Rules Applied to Particular Certificates. — a. *Foreign Officers.* — Sometimes certificates by foreign officers have been received in evidence where the certificates related to or were part of some official act.[14]

b. *Land Officers.* — Within the general rules just stated the certificate of a land officer, the giving of which is a part of his official duty, or which he is authorized or required by some statute or rule of law to give, is competent evidence;[15] otherwise it is extra-official and hence inadmissible.[16]

wherein a statute provided that the official certificate of a justice of the peace certifying the proceeding, judgment and execution issued thereon in every case by him rendered with a certificate by the county clerk in the form specified therein, was legal evidence in any court of justice of that state to prove the facts contained therein; and it was held that such a certificate was admissible in favor of the justice in an action against him for the wrongful sale of property of the plaintiff under an execution issued under such judgment, notwithstanding that the certificate in question had been given by the justice after his office had expired. "It is doing no violence to the language of the act," said the court, "to consider a certificate given by a justice after his office had expired, in relation to an act performed by him when in office, *an official certificate;* and if such be the construction of the act, there can be no question that the justice would be liable for a false certificate given after his office had expired, in the same manner and to the same extent as though he had still been in office, with the single exception of removal from office." It was further held in this case that a certificate of the county clerk authenticating the certificate of the justice, must be given by the clerk of the county where the justice resided at the time of the rendition of the judgment.

14. U. S. *v.* Acosta, 1 How. (U. S.) 24, where it was held that the certificate of the secretary of the Spanish governor of Florida was competent *prima facie* evidence of the existence of a land grant, especially as there was proof that no original could be found in the proper office where it should have been on file.

15. In Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374, it was held that the certificate of the register of the United States land office that a certain person had located with a Choctaw certificate upon certain lands, was competent evidence upon an issue as to the title to such lands. *Compare* Mays *v.* Johnson, 4 Ark. 613.

In Illinois a statute makes the official certificate of the register or receiver of any land office evidence of an entry of any tract of land in his district. Neiderer *v.* Bell, 174 Ill. 325, 51 N. E. 855. See also Ross *v.* Reddick, 2 Ill. 73.

Land Certificates Issued by Proper Officers are *prima facie* valid, and the burden of proof to show their invalidity is upon the party asserting that fact. Quinlan *v.* Houston & T. C. R. Co., 89 Tex. 356, 34 S. W. 738.

16. Mays *v.* Johnson, 4 Ark. 613; Cunningham *v.* Ashley, 12 Ark. 296; Hastings *v.* Devlin, 40 Cal. 358; Murphy *v.* Sumner, 74 Cal. 316, 16 Pac. 3; Stephenson *v.* Reeves, 92 Ala. 582, 8 So. 695; Woods *v.* Nabors, 1 Stew. (Ala.) 172; Lesassier *v.* Dashiell, 14 La. (O. S.) 467; Gaither *v.* Hanrick, 69 Tex. 92, 6 So. 619.

The Certificate of the Commissioner of the General Land Office That a Certain Paper Is on File in his office, or that a land certificate had been transferred from one person to another, is not competent evidence to prove those facts; such a certificate not being such as the law required or authorized him to make. Smithwick *v.* Andrews, 24 Tex. 488. The court said: "That was not a fact which the commissioner of the land office could certify, in the manner exhibited by the certificate offered in evidence in this cause. Whenever the commissioner of the land office certifies that a writing is a true copy of an original in his office,

c. *Certificates of Return.* — **(1.) Certificate by Officer.** — A certificate of return when authorized by statute is competent evidence only of the facts which the officer is authorized to state in his return.[17] And a certificate of return wholly unauthorized has no effect as evidence and is treated the same as any unsworn statement, declaration, or confession.[18]

(2.) Mode of Introduction. — A certificate of return in most jurisdictions becomes a part of the record and may be introduced in evidence whenever and wherever the record itself is admissible.[19]

then such writing is admissible in evidence in the courts of the state, because of the commissioner's certificate, and because it is a part of his official duties to give such copies of instruments. But it is no part of the official duties of the commissioner of the land office to certify that there is in his office a deed from one person to another. Nor can the fact that a land certificate has been transferred by one person to another, or that land has been conveyed by one person to another, be proved by the mere certificate of any person or officer."

A Texas Statute provides that certain officers, including the commissioner of the general land office, shall give certificates properly attested certifying to any fact contained in the records of their offices, but does not provide that such certificate shall be received in evidence; and hence such a certificate is not admissible in evidence. Lott *v.* King, 79 Tex. 292, 15 S. W. 231.

17. Williams *v.* Cheesebrough, 4 Conn. 356; Lindley *v.* Kelley, 42 Ind. 294; Bruce *v.* Dyall, 5 T. B. Mon. (Ky.) 125; Denton *v.* Livingston, 9 Johns. (N. Y.) 96, 6 Am. Dec. 264; Browning *v.* Hanford, 5 Denio (N. Y.) 586.

Statement of Rule. — "The return of an officer on mesne or final process can be evidence of the facts stated therein only when the facts recited are official acts done in the ordinary and usual course of proceedings. Matters of opinion or excuse for failure to perform a duty cannot be made evidence by stating them in the return, but must be proved on the trial." Splahn *v.* Gillespie, 48 Ind. 397.

18. Arnold *v.* Tourtellot, 13 Pick. (Mass.) 172; Davis *v.* Clements, 2 N. H. 390; Governor *v.* Bell, 3 Murph. Law (N. C.) 331; Barney *v.* Weeks, 4 Vt. 146.

In Hathaway *v.* Goodrich, 5 Vt. 65, the court in commenting upon the inadmissibility of the unauthorized certificate of a tax collector, said: "The return of the surveyor in this case is no better evidence for him than his own confession and declarations would be, and was clearly incompetent evidence to be offered by him to the jury. There is a plain distinction between the return of a sheriff made on a returnable process where the law requires him to certify his doings under his official signature and the return of a surveyor of highways made on his warrant to collect highway taxes which is not a returnable process, and by law the surveyor is not required to endorse and certify his doings thereof; the return of the sheriff is an official act done under the oath of his office and is deserving of credit, but the return of the surveyor is not an official act and was not done under the oath of his office and therefore his return is not to be credited like the sheriff's."

Place of Delivering Writ. — An officer's return on a writ of attachment, that he gave the defendant a copy of the writ at a place out of his precinct is extra official, and hence not competent evidence of notice to the defendant. Arnold *v.* Tourtellot, 13 Pick. (Mass.) 172.

19. Sheriff's Return. — In Creagh *v.* Savage, 14 Ala. 454, an action to try the right to certain property, the coroner, who claimed the property under certain executions, offered in evidence the executions and returns made thereon to show that there was no fraud in connection with his ownership. The court in holding ad-

d. *Certificates of Election.* — **(1.) In General.** — When the law requires certain officers to examine the returns of an election and issue a certificate of election to the successful candidate, such certificate is *prima facie* evidence of the facts therein stated[20] in direct proceedings to contest the validity of the election or the right to the seat or office in question.

(2.) Surplusage. — When authorized by statute a certificate of election otherwise unobjectionable is not to be entirely rejected because it contains the certification of facts outside of those which the officer had a right to certify; but such objectionable portion may be rejected as mere surplusage.[21]

D. AUTHENTICATION. — a. *In General.* — Where the law requires a public officer, as part of his official duty, to issue certificates, such certificates duly issued are instruments that prove themselves, and require no authentication,[22] although it has been held that there must be proof of the signature of the officer.[23]

missible the sheriff's return said: "In Hardy *v.* Gascoignes, 6 Port. (Ala.) 447, the court says, 'if the execution be admissible, we cannot conceive why the sheriff's return should be excluded; for when made *in pursuance of law* it becomes a matter of record, and as such is clearly evidence.' The return is his response to the execution. The law requires the officer to make it and holds him and his sureties liable if he fail to make it conform to the truth of the case. When the execution is returned by the sheriff it becomes a part of the record of the court, and is admissible in all cases where the record itself could be used. . . . And we see no reason why the return of the officer should not be evidence in this case as showing the levy and sale of the property in suit and consequent satisfaction of the execution."

20. *Arkansas.* — Patton *v.* Coates, 41 Ark. 111.

California. — Wicks *v.* Jones, 20 Cal. 50.

Illinois. — People *v.* Head, 25 Ill. 325; People *v.* Callaghan, 83 Ill. 128.

Indiana. — Reynolds *v.* State, 61 Ind. 392.

Maine. — Abbot *v.* Inhabitants of Hermon, 7 Me. 96.

Michigan. — People *v.* Van Cleve, 1 Mich. 362, 53 Am. Dec. 69.

Minnesota. — Crowell *v.* Lambert, 10 Minn. 295; State *v.* Sherwood, 15 Minn. 221, 2 Am. Rep. 116.

Missouri. — State *v.* Sutton, 3 Mo. App. 388.

Montana. — State *v.* Kenney, 9 Mont. 223, 23 Pac. 733.

New York. — Rust *v.* Gott, 9 Cow. 169, 18 Am. Dec. 497; People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451, *affirming* 14 Barb. 259; People *v.* McGuire, 2 Hun 269; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; Hartt *v.* Harvey, 32 Barb. 55.

Tennessee. — Marshall *v.* Kerns, 2 Swan 68.

Texas. — Henderson *v.* Albright, 12 Tex. Civ. App. 368, 34 S. W. 992.

West Virginia. — Swinburn *v.* Smith, 15 W. Va. 483.

Wisconsin. — Carpenter *v.* Ely, 4 Wis. 420; State *v.* Avery, 14 Wis. 122.

21. Broadhead *v.* Berg, 76 Mo. 136.

22. Cox *v.* Jones, 1 Stew. (Ala.) 379.

In Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374, it was held that a certificate of the register of the United States land office as to the location of certain lands was an instrument of evidence that proved itself and did not require authentication.

A Deputy County Treasurer Is Prima Facie Authorized to Sign the Name of His Principal to certificates of redemption from tax sale, and hence such a certificate is admissible in evidence on proof that the person signing was a deputy, although not accompanied by proof of his authority to sign. Byington *v.* Allen, 11 Iowa 3.

23. Proof of Signature. — In

b. *Certificates of Return of Service.* — The certificate of service made by an officer in the performance of his official duty needs no authentication when offered as evidence in the same jurisdiction, since it is presumed to have been regularly made;[24] but the official certificate of an officer of one jurisdiction is not competent evidence in another jurisdiction without due authentication.[25]

c. *Certificates of Election.* — **(1.) Generally.** — A certificate of election regular upon its face needs no authentication, the presumption being that it was properly issued.[26]

(2.) Compliance With Statute. — But such a certificate, in order to be properly received in evidence, must have been issued in compliance with the statute governing such certificates; as, for example, the fact that a certificate is not signed by the proper officers as required,[27] or that the ballots have not been sealed in an envelope,[28] or that the certificate does not state that the vote had been compared,[29] is enough to justify rejection of the certificate.

Jackson *v.* McMurray, 4 Colo. 76, an action of ejectment to recover the possession of premises, the certificate of the register of the United States land office that the premises had been entered was held inadmissible because there was no proof of the signature of the register.

24. Time. — In an action on a contract to recover money, commenced under Code of Virginia, 1887, § 3211, as amended by Acts of 1895-96, p. 140, by serving fifteen days' notice which must be returned five days after the service of the same; the statute did not prescribe the mode of return. Although the date of the return did not appear, the court held that it would be presumed that the notice was regularly returned. The court said: "The presumption of law until the contrary is proved is that the officer has performed his duty, . . . and it is therefore to be presumed in the absence of evidence to the contrary that the return on the execution in this cause being without date was made while the sheriff had the right to make it, and in due time." New River M. Co. *v.* Roanoke C. & C. Co., 110 Fed. 343.

Signature. — In McDonald *v.* Carson, 94 N. C. 497, the court in holding that no authentication or proof of signature to the sheriff's certificate of return was necessary, said: "The sheriff makes this return to the notice to be used in the court of which he is an officer, and his official acts and returns are recognized without proof of his signature."

25. Thurston *v.* King, 1 Abb. Pr. (N. Y.) 126, where the court said: "The certificate of a sheriff in our own state is proof because he is acting under his official oath. But a sheriff in a county in Ohio when he serves process or notices from our state does it not by virtue of his oath of office, but as a private individual; his oath relates only to what he does under the laws of his own state. He should, therefore, make his affidavit of service." See also Morrell *v.* Kimball, 4 Abb. Pr. (N. Y.) 352; McCarthy *v.* Sherman, 3 Johns. (N. Y.) 429; Webster *v.* Hunter, 50 Iowa 215; Den *v.* Evaul, 1 N. J. Law 283.

26. Bailey *v.* Hurst, 24 Ky. L. Rep. 504, 68 S. W. 867; Dent *v.* Board of Com'rs., 45 W. Va. 750, 32 S. E. 250. See also Com. *v.* O'Hara, 17 Ky. L. Rep. 1030, 33 S. W. 412, where the court said: "It seems to us that the introduction of the official certificate on the poll books returned from the precinct where defendants acted as officers, purporting to be signed by them, was at least *prima facie* evidence that the same had been signed by the defendants."

27. State *v.* Conness, 106 Wis. 425, 82 N. W. 288. See also Perry *v.* Whitaker, 71 N. C. 475.

28. Dooley *v.* Van Hohenstein, 170 Ill. 630, 49 N. E. 193.

29. Perry *v.* Whitaker, 71 N. C. 475.

E. Best and Secondary Evidence. — a. *Certificates as Secondary Evidence.* — **(1.) Generally.** — Although a certificate by a public officer may not of itself be admissible as primary evidence, it may be received, under some circumstances, as secondary evidence.[30]

(2.) Returns of Election. — By express statute, it is sometimes provided that, when the ballots which are usually the primary and ultimate evidence relied upon and necessary to establish the result of an election[31] have been tampered with, upon such showing being made the returns of the officers presiding at the polls may become better evidence than the ballots.[32]

b. *Contents of Certificates.* — When proper to be received as evidence the certificate itself must be produced, unless it has been lost or destroyed or is inaccessible, when upon the proper showing being made the contents of the certificate may be proved by secondary evidence as in the case of other documents.[33]

A Return Made in a Foreign Jurisdiction may be proved by a certified copy.[34]

2. Conclusiveness of Certificates As Evidence. — A. In General. On the question as to whether or not a certificate by a public officer is conclusive evidence of the matters certified, no rule applicable to all cases seems capable of being stated. On the one hand are a number of cases in which it is held that such a certificate is only

30. In Day *v.* Huggins, 29 Ga. 78, an action of ejectment, the defendant proved that he had had an original grant from the state; that such grant had been lost or destroyed, and that he had been unable to procure a copy from the secretary of state; and it was held that a certificate from the secretary of the executive department to the effect that it appeared from his books that such grant had been issued to the defendant was properly admitted as secondary evidence.

Where an amended transcript in a justice court had been lost from the files in the district court, it was held that a certificate by the clerk that such a transcript had been filed on record; that it was the one which formed the basis of the action in the district court, and that it could not be found, and a certificate by the judge of the district court who tried the cause that the transcript had been on file; that it had formed the basis of his decisions as being the true and proper transcript of the justice were sufficient secondary evidence to prove the items in the transcript. Coffeen *v.* Hammond, 3 Greene (Iowa) 241.

31. Hudson *v.* Solomon, 19 Kan. 177. *See* article "Elections."

32. Bailey *v.* Hurst, 24 Ky. L. Rep. 504, 68 S. W. 867.

33. Freeland *v.* M'Caleb, 2 How. (Miss.) 756; Groover *v.* Coffee, 19 Fla. 61; De Loach *v.* Sarratt, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441; People *v.* Clingan, 5 Cal. 389.

34. In Carr *v.* Youse, 39 Mo. 346, 90 Am. Dec. 470, reaffirmed in 43 Mo. 20, an action of ejectment, the plaintiff to show title by sheriff's deed under an execution issued upon a transcript of judgment from another township, offered in evidence the deed and the certified transcript of the justice; and to prove the execution he offered a certificate by the justice that execution had been issued and returned *nulla bona* and giving the words of the return as signed by the constable. The court in sustaining the rejection of such certificate, said: "His certificate in writing is no better evidence than his testimony as a witness would be, nor so good, for a

prima facie evidence and may be contradicted.[35] On the other hand, however, there are a number of cases in which it is held that such a certificate is conclusive evidence of the facts stated and cannot be attacked by parol.[36]

Date of Certificate. — The rule which permits the contradiction of the date of a document, by other proof of the time of its execution, has been applied in the case of official certificates as to the time when the official act is certified to have been done, and evidence has been admitted as to the time when it was in fact done.[37]

witness on the stand could be cross-examined. Here the justice is not even called as a witness, but his certificate in writing is offered as evidence to prove these facts. Better evidence might have been procured, namely, a certified transcript of the execution and return."

35. Succession of Steers, 47 La. Ann. 1551, 18 So. 503 (certificate of foreign curate); Parker *v.* Staniels, 38 N. H. 251, wherein it was held that a certificate by the magistrate of the administration of the oath for the relief of poor debtors when made in conformity to the statute is *prima facie* evidence of the facts therein stated, but that it has not the character of a judgment so as to render it conclusive. See also Banks *v.* Johnson, 12 N. H. 445; Woods *v.* Blodgett, 15 N. H. 569.

The certificate of a recording officer that an instrument has been duly recorded is only *prima facie* evidence of the fact and may be contradicted by the production of the records showing that the instrument has not in fact been so recorded. Hastings *v.* Blue Hill T. Corp., 9 Pick. (26 Mass.) 80. See also Morton *v.* Webster, 2 Allen (Mass.) 352.

36. McCormick *v.* Hayes, 159 U. S. 332 (certificates of federal and state officers authorized to certify as to condition of swamp lands); People *v.* Board of Aldermen, 18 Misc. 533, 42 N. Y. Supp. 545 (civil service certificate).

In Bronson *v.* Mann, 13 Johns. (N. Y.) 460, it was held that the certificate of a jury, finding the fact of an encroachment upon a highway, was conclusive evidence of that fact in an action brought to recover the penalty for not removing the encroachment.

Parol evidence is not admissible to contradict the certificate of a justice of the peace as to the proceedings had in a cause before him. McLean *v.* Hugarin, 13 Johns. (N. Y.) 184.

In Mussel *v.* Tama Co., 73 Iowa 101, 34 N. W. 762, it was held that the certificate of township trustees certifying to the correctness of a claim for the care and support of the poor, as provided by an Iowa statute, partook of a judicial character and could not be impeached by oral evidence except in case of fraud.

In Dole *v.* Allen, 4 Me. 527, it was held that a certificate of membership granted by the overseers of a society of Friends and Quakers pursuant to a Maine statute, was conclusive evidence of the facts it contained.

The Certificate of the Officers Selecting Grand Juries under the Alabama statute of 1836, was held in State *v.* Clarkson, 3 Ala. 378, not to be open to impeachment by evidence that it was not signed by the clerk whose name appears to it, or by showing that he was not present when the duties were performed.

37. Wilmot *v.* Lathrop, 67 Vt. 671, 32 Atl. 861. See also Lacy *v.* Cox, 15 N. J. Law 469.

The Certificate of the Justice of the Peace of the Time When the Execution and Return of Levy Was Recorded in his office is but *prima facie* evidence of that fact, and parol evidence is admissible to show the true time when such record was made. Morton *v.* Edwin, 19 Vt. 77, holding also that the justice who made the record and certificate might be called as a witness to prove when the record was in fact made.

The Certificate of a Town Clerk on a Deed As to When it Was Received in His Office may be contradicted by parol evidence showing

B. Certificates of Return. — a. *In General.* — As a general rule, a certificate of service of return, made by a sworn officer in the performance of his duty, and in relation to facts which he is authorized to certify, is held to be conclusive evidence of the fact certified, as against the parties to the suit and their privies, and, hence, parol evidence is inadmissible in the same suit, or in a collateral proceeding, to vary or contradict the certificate;[38] such an attack must be

when in fact the deed was recorded. Bartlett *v.* Boyd, 34 Vt. 256. The same has been held true of the certificates of town clerks of the record of the proceedings of land tax collectors. Chandler *v.* Spear, 22 Vt. 388; Carpenter *v.* Sawyer, 17 Vt. 121.

38. Certificate of Return As Conclusive Evidence. — *United States.* Miller *v.* U. S., 11 Wall. 268; Brown *v.* Kennedy, 15 Wall. 591.

Alabama. — Kirksey *v.* Bates, 1 Ala. 303; Dunklin *v.* Wilson, 64 Ala. 162.

Arkansas.—Newton *v.* State Bank, 14 Ark. 9, 58 Am. Dec. 363.

California. — Egery *v.* Buchanan, 5 Cal. 53.

Colorado. — Bishop *v.* Poundstone, 11 Colo. App. 73, 52 Pac. 222.

Illinois. — Rivard *v.* Gardner, 39 Ill. 125; Hunter *v.* Stoneburner, 92 Ill. 75.

Indiana. — Rowell *v.* Klein, 44 Ind 290, 15 Am. Rep. 235; Cully *v.* Shirk, 131 Ind. 76, 30 N. E. 882, 3 Am. St. Rep. 414.

Kentucky. — Doty *v.* Deposit B. & L. Assn., 20 Ky. L. Rep. 625, 46 S. W. 219, 47 S. W. 433, 43 L. R. A. 551; Thomas *v.* Ireland, 88 Ky. 581, 11 S. W. 653, 21 Am. St. Rep. 356.

Maine. — Bamford *v.* Melvin. 7 Me. 14; Huntress *v.* Tiney, 39 Me. 237.

Maryland. — Taylor *v.* Welslager, 90 Md. 409, 45 Atl. 476.

Massachusetts.—Sykes *v.* Keating, 118 Mass. 517; Bates *v.* Willard, 10 Metc. 62; Whitaker *v.* Sumner, 7 Pick. 551, 19 Am. Dec. 298. *Compare* Trager *v.* Webster, 174 Mass. 580, 55 N. E. 318.

Michigan. — Green *v.* Kindy, 43 Mich. 279, 5 N. W. 297.

Minnesota. — Tullis *v.* Brawley, 3 Minn. 191.

New Hampshire. — Bolles *v.* Bowen, 45 N. H. 124; Messer *v.* Bailey, 31 N. H. 9.

New Jersey. — Castner *v.* Styer, 23 N. J. Law 236.

North Carolina. — Walters *v.* Moore, 90 N. C. 41.

Pennsylvania. — Paxson's Appeal, 49 Pa. St. 195; McMicken *v.* Com., 58 Pa. St. 213.

Rhode Island. — Barrows *v.* National Rubber Co., 13 R. I. 48.

Texas. — Schneider *v.* Ferguson, 77 Tex. 572, 14 S. W. 154; Gatlin *v.* Dibrell, 74 Tex. 36, 11 S. W. 908; Flaniken *v.* Neal, 67 Tex. 629, 4 S. W. 212; Holt *v.* Hunt, 18 Tex. Civ. App. 363, 44 S. W. 889.

Vermont. — Wood *v.* Doane, 20 Vt. 612; Swift *v.* Cobb, 10 Vt. 282.

Virginia. — Ramsburg *v.* Kline, 96 Va. 465, 31 S. E. 608; Preston *v.* Kendrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777.

West Virginia. — Stewart *v.* Stewart, 27 W. Va. 167; McClung *v.* McWhorter, 47 W. Va. 150, 34 S. E. 740, 81 Am. St. Rep. 785.

Wisconsin. — Carr *v.* Commercial Bank, 16 Wis. 52.

In Hallowell *v.* Page, 24 Mo. 590, the court in commenting upon the effect of a sheriff's return as evidence said that the defendant had no right to controvert the truth of the sheriff's return; that it was regular on its face, and its truth could only be impeached in an action against the officer for its falsity. To permit the parties to an action to controvert the truth of the return of the officer deputed by law to serve the process would produce great delay and embarrassment in the administration of justice. Hence it is the general rule that, as between the parties to the process, or their privies, the return is usually conclusive, and is not liable to collateral impeachment. This rule, it is said, is one necessary to secure the rights of the parties and give validity and effect to the acts of ministerial officers, leaving the

made in a direct proceeding against the officer for a false return.[39] There are cases, however, in which it is held that such a certificate amounts to no more than *prima facie* evidence, and in such case parol evidence is admissible to impeach it.[40] Sometimes such a certificate, though not conclusive evidence, is said to be strong evidence.[41]

An Exception to This Rule has been recognized so as to permit the contradiction of the certificate of return when the question of jurisdiction of the party arises, and in such case it may be shown that jurisdiction was never in fact obtained, notwithstanding recitals to that effect in the record.[42]

b. *Certificate by Private Individual.* — A return, made and certified by a private individual, where the statute allows service in that manner, is not conclusive evidence of the facts which such person is authorized to certify.[43]

c. *As Against Officer.* — The officer making the return cannot, ordinarily, be permitted to impeach his own certificate.[44]

persons injured to their redress in an action for a false return.

See article "CONCLUSIVE EVIDENCE."

39. Tillman *v.* Davis, 28 Ga. 494, 73 Am. Dec. 786; Goddard *v.* Harbour, 56 Kan. 744, 44 Pac. 1055, 54 Am. St. Rep. 608 (disapproving Jones *v.* Marshall, 3 Kan. App. 529, 43 Pac. 840); Stinson *v.* Snow, 10 Me. 263, 25 Am. Dec. 238; Stewart *v.* Stringer, 41 Mo. 400, 70 Am. Dec. 278; Angell *v.* Bowler, 3 R. I. 77.

40. Gregory *v.* Sherman, 44 Conn. 466; Fox *v.* Hoyt, 12 Conn. 491, 31 Am. Dec. 760; in Watson *v.* Watson, 6 Conn. 334, Hosmer J., speaking of the peculiar rule as applied in that state, says: "The return of the sheriff on mesne process is held, by the courts of this state, to be *prima facie* evidence only. This, so far as my knowledge extends, has been the *ancient* and invariable doctrine of our courts, and conclusively settles the law of *Connecticut* on this subject. For this departure from the *English* common law I am unable to assign the precise reason. I presume it must have been believed that the *prima facie* evidence only allowed to a return is a sufficient security to the rights of the people and necessary to prevent the perpetration of irreparable wrong. These principles derive support from the infrequent questions arising on the falsity of returns, and the peculiar condition of the state. The service of process, both *mesne* and *final*, is committed to constables, as well as to sheriffs; and of the former it is well known that some of them are irresponsible men, and that all of them exercise their official duties without the collateral security of sureties. These thoughts I have suggested, as comprising the reasons that probably induced the adoption by our courts of the above mentioned rule, but whether they are correct or not is of little importance. The rule has been settled by long, frequent and familiar practice, and is not now to be questioned." The learned judge also states that the same rule applies to return on final process in that state.

41. Driver *v.* Cobb, 1 Tenn. Ch. 490; Ketchum *v.* White, 72 Iowa 193, 33 N. W. 627; Galvin *v.* Dailey, 109 Iowa 332, 80 N. W. 420.

Rule Stated. — "Upon grounds of public policy the return of the officer, even though not regarded as conclusive, should be deemed strong evidence of the facts as to which the law requires him to certify, and should ordinarily be upheld, unless opposed by clear and satisfactory proof." Wyland *v.* Frost, 75 Iowa 209, 39 N. W. 241.

42. Toepfer *v.* Lampert, 102 Wis. 465, 78 N. W. 779, and cases cited.

43. Peck *v.* Chambers, 44 W. Va. 270, 28 S. E. 706.

44. Gardner *v.* Hosmer, 6 Mass.

d. *As Against Strangers.* — As against strangers to the record a certificate of return is but *prima facie* evidence and hence may be contradicted by parol.[45]

e. *Certificate Contradicted by Record.* — When the fact of service is contradicted by another portion of the record, the certificate of return is not conclusive evidence.[46]

f. *Burden of Proof.* — The burden of proof of establishing the illegality or irregularity of a certificate of return is on the party seeking to impeach it on those grounds.[47] And in all cases where the certificate is sought to be impeached, clear and satisfactory evidence is required.[48] One witness is not enough.[49]

C. CERTIFICATES OF ELECTION. — a. *In General.* — A certificate of election, although *prima facie* evidence of the right to office and although presumed to be regularly issued, may be varied or contradicted by parol evidence;[50] although it has been held that the return

325; Purrington *v.* Loring, 7 Mass. 388; Ayres *v.* Duprey, 27 Tex. 593.

45. Rigney *v.* De Draw, 100 Fed. 213; Whitaker *v.* Sumner, 7 Pick. (Mass.) 551, 19 Am. Dec. 298; Angier *v.* Ash, 26 N. H. 99; Hill *v.* Kling, 4 Ohio 135; Barrett *v.* Copeland, 18 Vt. 67, 44 Am. Dec. 362; Witherell *v.* Goss, 26 Vt. 748.

46. Hunter *v.* Stoneburner, 92 Ill. 75; Warren *v.* Wilner, 61 Kan. 719, 60 Pac. 745; Pollard *v.* Wegener, 13 Wis. 569.

"**The Return of an Officer That He Has Executed Process** is of no higher grade of evidence than the other papers of the case which come before us as parts thereof; and if other parts of the justice's record either contradicted the return of the constable or rendered it doubtful whether the return is true, we are not bound to concede to it absolute verity." Wilson *v.* Moss, 7 Heisk. (Tenn.) 417.

47. Dunklin *v.* Wilson, 64 Ala. 162; Abell *v.* Simon, 49 Md. 318; Foster *v.* Berry, 14 R. I. 601; Driver *v.* Cobb, 1 Tenn. Ch. 490.

Rule Stated. — "The return of the sheriff imports verity, and the burden of proving it to be false rests on the party assailing it and must be discharged by evidence sufficient to overcome the presumption arising from the fact that it was made in the line of his duty by a sworn officer." Paul *v.* Malone, 87 Ala. 544, 6 So. 351.

48. *Alabama.* — Dunklin *v.* Wilson, 64 Ala. 162.

Illinois. — Callender *v.* Gates, 45 Ill. App. 374.

Iowa. — Ketchum *v.* White, 72 Iowa 193, 33 N. W. 627; Galvin *v.* Dailey, 109 Iowa 332, 80 N. W. 420.

Kentucky. — Jones *v.* Churchill, 4 J. J. Marsh. 44.

Maryland. — Anderson *v.* Graff, 41 Md. 601; Abell *v.* Simon, 49 Md. 318.

Minnesota. — Jensen *v.* Crevier, 33 Minn. 372, 23 N. W. 541; Osman *v.* Wisted, 78 Minn. 295, 80 N. W. 1127.

Mississippi. — Duncan *v.* Gerdine, 59 Miss. 550.

Nebraska. — Johnson *v.* Jones, 2 Neb. 126.

Washington. — Johnson *v.* Gregory, 4 Wash. 109, 29 Pac. 831, 31 Am. St. Rep. 907.

49. Driver *v.* Cobb, 1 Tenn. Ch. 490. *Compare* Trager *v.* Webster, 174 Mass. 580, 55 N. E. 318, where the court said that "the weight of evidence in these days is measured by more delicate tests than a simple count of witnesses, and such quantitive estimates are not likely to be enforced in this commonwealth, except when established by authority."

50. *Arkansas.* — Patton *v.* Coates, 41 Ark. 111.

California. — Wicks *v.* Jones, 20 Cal. 50.

Illinois. — People *v.* Callaghan, 83 Ill. 128.

Kansas. — Hale *v.* Evans, 12 Kan. 562.

Minnesota. — People *v.* Van Cleve, 1 Mich. 362, 53 Am. Dec. 69; People *v.* Miller, 16 Mich. 56.

of an election clerk cannot be contradicted by the parol testimony of voters.[51]

Mistake. — It has been held that a certificate of election can be impeached for mistake.[52]

b. *Collateral Proceedings.* — Certificates of elections are conclusive evidence of the facts certified when their validity is sought to be impeached in a collateral proceeding.[53]

c. *Proceedings by Strangers.* — So, also, if the validity of such certificates is sought to be impeached by parties other than those immediately concerned with the right to the seat or office in question,

Minnesota. — Crowell *v.* Lambert, 10 Minn. 295.

Missouri. — State *v.* Sutton, 3 Mo. App. 388.

Montana. — State *v.* Kenney, 9 Mont. 223, 23 Pac. 733.

New York. — People *v.* Thacher, 7 Lans. 274; Rust *v.* Gott, 9 Cow. 169, 18 Am. Dec. 497; People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451, *affirming* 14 Barb. 259; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People *v.* McGuire, 2 Hun 269; Hartt *v.* Harvey, 32 Barb. 55; matter of Dudley, 33 App. Div. 465, 53 N. Y. Supp. 742.

Tennessee. — Marshall *v.* Kerns, 2 Swan 68.

Texas. — Henderson *v.* Albright, 12 Tex. Civ. App. 368, 34 S. W. 992.

West Virginia. — Swinburn *v.* Smith, 15 W. Va. 483; Dent *v.* Board of Com'rs., 45 W. Va. 750, 32 S. E. 250.

Wisconsin. — Carpenter *v.* Ely, 14 Wis. 420; State *v.* Avery, 14 Wis. 122.

"**As the Certificate of the Election Officers Conferred Only a Prima Facie Right to the Office,** the appellee was entitled to overthrow it by showing that it had been given . . . upon an unsubstantial basis and that appellee, and not the relator, had received the highest number of votes." State *v.* Shay, 10 Ind. 36.

In State *v.* Sutton, 3 Mo. App. 388, the court said: "The rule, as recognized in the instances shown, which forbids an officer's impeaching his own certificate, had doubtless a common origin with that which formerly would not allow a witness to cast a shadow on his own attestation of a will. The exigencies of 'public policy' were once perpetually clamoring against the supposed horrors of self-stultification, but the common-sense tendencies of later jurisprudence have long since ignored those phantoms. By the doctrine now prevailing no man can be so steeped in fraud as not to be a competent witness to prove it. His turpitude, which formerly might have driven him from the witness stand, now only affects his credibility. The triers of fact are properly intrusted with authority to believe or disbelieve him, according to the impression created by all the circumstances and surroundings of his testimony. The reasons are very few which may be advanced against a like treatment of official witnesses brought to testify about their official acts."

51. Com. *v.* Barry, 98 Ky. 394, 33 S. W. 400. See also Com. *v.* Featherston, 17 Ky. L. Rep. 1020, 33 S. W. 401.

52. People *v.* Vail, 20 Wend. (N. Y.) 12, where the inspectors in making their official statement, after stating the whole number of votes, omitted by mistake to add how many were given to each of the persons voted for by the electors, and in a *quo warranto* proceeding the relator was allowed to introduce evidence of such mistake, although the defendant had been given a certificate of election by the county canvassers.

53. Warner *v.* Myers, 4 Or. 72, *affirming* 3 Or. 218; Com. *v.* Baxter, 35 Pa. St. 263; Kerr *v.* Trego, 47 Pa. St. 292; Ewing *v.* Thompson, 43 Pa. St. 372; Hadley *v.* Mayor, 33 N. Y. 603, 88 Am. Dec. 412; Morgan *v.* Quackenbush, 22 Barb. 72; Crowell *v.* Lambert, 10 Minn, 295

the certificate is conclusive evidence of the facts therein stated.[54]

d. *Issue Compelled by Mandamus.* — The fact that the issue of a certificate of election was compelled by a mandamus proceeding will not give the certificates any greater weight as evidence. They remain *prima facie* evidence, in case they would have been only such, if regularly issued.[55]

e. *Whether Rightfully or Wrongfully Issued.* — A certificate of election whether rightfully or wrongfully issued, if regular upon its face is *prima facie* evidence of the facts certified until overthrown in a legal proceeding instituted for that purpose.[56]

f. *Non-Election Apparent Upon Certificate.* — Certificates of election are not *prima facie* evidence where the non-election of the parties relying upon them is shown upon the face of the certificate.[57]

g. *Burden of Proof.* — The burden of proof is upon the party disputing the legality or regularity of the issuance of a certificate of election.[58]

III. CERTIFICATES OF PROTEST.

1. Admissibility. — A. Presentment, Demand and Dishonor. a. *Foreign Bills of Exchange.* — It is an established rule of law that the notarial certificate of protest is of itself competent evidence of presentment, demand and dishonor of foreign bills of exchange without any auxiliary evidence.[59]

54. See People *v.* Cook, 8 N. Y. 67; Morgan *v.* Quackenbush, 22 Barb. (N. Y.) 72.

55. State *v.* Gibbs, 13 Fla. 55, 7 Am. Rep. 233.

56. People *v.* Miller, 16 Mich. 56.

57. Hartt *v.* Harvey, 32 Barb. (N. Y.) 55.

58. Dent *v.* Board of Com'rs., 45 W. Va. 750, 32 S. E. 250; Whipley *v.* McKune, 12 Cal. 352; People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451, *affirming* 14 Barb. 259; Bashford *v.* Barstow, 4 Wis. 567; Moulton *v.* Reid, 54 Ala. 320.

"The canvassing board, therefore, we think, acted correctly in canvassing said returns, and their certificate is *prima facie* evidence of the facts therein stated and certified to. But that certificate is only *prima facie* evidence, and the district court in which this action was brought can go behind it and inquire as a matter of fact whether the canvass was fairly conducted, and whether the result of the election is truly set forth in the certificate. But the burden of proof is on the contestant (plaintiff) to show that there were irregularities, *and that they affected the result.*" Taylor *v.* Taylor, 10 Minn. 107.

59. Certificate of Protest of Foreign Bill of Exchange. — *United States.* —Dickins *v.* Beal, 10 Pet. 572, 9 L. ed. 538; Lonsdale *v.* Brown, 4 Wash. C. C. 148, 15 Fed. Cas. No. 8493; Pierce *v.* Indseth, 106 U. S. 546, 27 L. ed. 254; Townsley *v.* Sumrall, 2 Pet. 170.

Alabama. — Bradley *v.* Northern Bank, 60 Ala. 252.

Arkansas. — Johnson *v.* Cocks, 12 Ark. 672.

Florida. — Spann *v.* Baltzell, 1 Fla. 338, 46 Am. Dec. 346.

Kentucky. — Lail *v.* Kelly, 3 B. Mon. 10; Tyler *v.* Bank of Kentucky, 7 T. B. Mon. 555.

Maine. — Ticonic Bank *v.* Stackpole, 41 Me. 302, 66 Am. Dec. 246; Clark *v.* Bigelow, 16 Me. 246; Freeman's Bank *v.* Perkins, 18 Me. 292.

Maryland. — Chase *v.* Taylor, 4 Har. & J. 54; Whiteford *v.* Burckmyer, 1 Gill 127, 39 Am. Dec. 640; Bryden *v.* Taylor, 2 Har. & J. 396, 3 Am. Dec. 554.

Massachusetts. — Ocean Nat. Bank *v.* Williams, 102 Mass. 141; Johnson

b. *Inland Bills and Promissory Notes.* — (1.) **Rule at Common Law.** The rule at common law was, and still is,[60] that a notarial certificate was not admissible to prove presentment, demand or dishonor of an inland bill or promissory note.[61]

The Tendency of the Law, however, has been irrespective of the statutory changes, to extend the use of notarial certificates as evi-

v. Brown, 154 Mass. 105, 27 N. E. 994.

Missouri. — Commercial Bank *v.* Barksdale, 36 Mo. 563.

New Hampshire. — Grafton Bank *v.* Moore, 14 N. H. 142; Carter *v.* Burley, 9 N. H. 558.

New Jersey. — Burk *v.* Shreve, 39 N. J. Law 214 (*dictum*).

New York. — Halliday *v.* McDougall, 20 Wend. 81.

Tennessee — Spence *v.* Crockett, 5 Baxt. 576.

Virginia. — Nelson *v.* Fotterall, 7 Leigh 179.

Wisconsin. — Carruth *v.* Walker, 8 Wis. 252, 76 Am. Dec. 235.

Rule Stated. — In Townsley *v.* Sumrall, 2 Pet. (U. S.) 170, the court said: "It is admitted that in respect to foreign bills of exchange the notarial certificate of protest is of itself sufficient proof of the dishonor of a bill without any auxiliary evidence. It has been long adopted into the jurisprudence of the common law, upon the ground that such protests are required by the custom of merchants, and being founded in public convenience they ought everywhere to be allowed as evidence of the facts which they purport to state. The negotiability of such bills and the facility as well as certainty of the proof of dishonor, would be materially affected by a different course; a foreign merchant might otherwise be compelled to rely on mere parol proof of presentment and dishonor, and be subjected to many chances of delay, and sometimes to absolute loss, from the want of sufficient means to obtain the necessary and satisfactory proofs. The rule, therefore, being founded in public convenience, has been ratified by courts of law as a binding usage."

60. In some of the states from which cases are cited in the succeeding note, statutes have been enacted changing the common law rule, as will be noted by comparing the cases cited in note 64 *infra.*

61. Inland Bills and Promissory Notes — Certificate of Protest Inadmissible. — *United States.* — Union Bank *v.* Hyde, 6 Wheat. (U. S.) 572, 5 L. ed. 333.

Arkansas. — Real Estate Bank *v.* Bizzell, 4 Ark 189.

Illinois. — Bond *v.* Bragg, 17 Ill. 69; McAllister *v.* Smith, 17 Ill. 328, 65 Am. Dec. 651; Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15.

Kentucky. — Bank of U. S. *v.* Leathers, 10 B. Mon. 64.

Louisiana. — Crane *v.* Benit, 20 La. Ann. 228; Waldron *v.* Turpin, 15 La. 552, 35 Am. Dec. 210. *Compare* Fougard *v.* Tourregaud, 3 Mart. (N. S.) 464.

Missouri. — Williams *v.* Smith, 21 Mo. 419.

Maryland. — Whittington *v.* Farmers' Bank, 5 Har. & J. 489, 6 Har. & J. 548; Moses *v.* Franklin Bank, 34 Md. 574 (*dictum*).

Mississippi. — Smith *v.* Gibbs, 2 Smed. & M. 479.

New Hampshire. — Carter *v.* Burley, 9 N. H. 558.

New Jersey. — Burk *v.* Shreve, 39 N. J. Law 214 (*dictum*).

New York. — Miller *v.* Hackley, 5 Jonns. 375, 4 Am. Dec. 372.

Ohio. — Case *v.* Heffner, 10 Ohio 180.

South Carolina. — Payne *v.* Winn, 2 Bay 374.

Wisconsin. — Sumner *v.* Bowen, 2 Wis. 524.

Where the Parties Resided in the Same Kingdom or Country there is not the same necessity for giving entire verity and credit to the certificate of protest. The parties may produce the witnesses upon the stand and compel them to give their depositions. And accordingly even in case of foreign bills, drawn upon and protested in another country, if the protest was made in the country or state where the suit is brought the certificate itself is not competent evi-

dence of the presentment, demand and dishonor of bills and notes.[62] And in one state, at least, it has been held that even in the absence of any statute, the distinction between inland bills and promissory notes and foreign bills has never been adopted.[63]

(2.) Rule Under Statutes. — (A.) GENERALLY. — By express statute in many states the certificate of a notary public is made *prima facie* evidence of the facts of presentment, demand and dishonor of inland bills and promissory notes.[64]

dence, but the notary himself should be produced as a witness. Townsley *v.* Sumrall, 2 Pet. (U. S.) 170. See also Chesmer *v.* Noyes, 4 Camp. 122.

In Massachusetts the certificate of a notary public protesting a bill or note prior to the passage of the statute in 1880 was not considered as an official act, although if he died before the trial his written memoranda were admissible as secondary evidence. See Legg *v.* Vinal, 165 Mass. 555, 43 N. E. 518, *citing* Porter *v.* Judson, 1 Gray (Mass.) 175.

62. McFarland *v.* Pico, 8 Cal. 626; Browne *v.* Philadelphia Bank, 6 Serg. & R. (Pa.) 484, 9 Am. Dec. 463.

In Dumont *v.* Pope, 7 Blackf. (Ind.) 367, it was doubted whether the protest of an inland bill was evidence for any purpose. But in Turner *v.* Rogers, 8 Ind. 139, it was held on the authority of Shanklin *v.* Cooper, 8 Blackf. (Ind.) 81, that a certificate of protest of a promissory note in Ohio was competent evidence to prove presentment, demand, and dishonor. The court, although they were disinclined to hold as stated, said that "the universal practice of doing so (that is, of admitting the certificate of protest,) which the commercial community has adopted and which is well known to the profession indicates the propriety of this course; and as a contrary rule would require us to overrule a decision of this court we are disposed, instead of doing so, to follow it."

Where the Indorser of a Note Lives in One State and the Maker in Another, the operation of the endorsement is so far similar to the drawing of the bill of exchange that in an action against the indorser the fact of dishonor of the note may be established by the notarial certificate of protest. Williams *v.* Putnam, 14 N. H. 540, 40 Am. Dec. 204. In this case the court after quoting from Smith *v.* Little, 10 N. H. 526, to the effect that "an indorsed note, though it may have a similitude to and an operation like a bill of exchange, is not one, technically speaking, and it is not necessary to prove its dishonor by a protest, even where the maker and indorser reside in different governments," said: "But it by no means follows that it *may* not be proved in that way, although it is not *necessary* so to prove it. . . . Each indorsement of a bill is, in effect, a new bill, drawn by the indorser upon the acceptor; and the similarity between the indorsement of notes and the drawing and indorsement of bills of exchange is so great that there can be no sound reason given for establishing or preserving a distinction between them and requiring a different character of evidence to prove the same facts with regard to two instruments, which, though different in some respects as to their formal phraseology, are so essentially similar in their nature and operation."

63. The Uniform Practice in Louisiana has been to receive the protests of the notaries as evidence of presentment, demand, and dishonor of foreign bills, inland bills, and promissory notes alike. Allain *v.* Whitaker, 5 Mart. (N. S.) (La.) 511. *Compare* Louisiana cases cited *supra* in note 61.

64. Certificate of Protest Prima Facie Evidence Under Statute. *Alabama.* — Bradley *v.* Northern Bank, 60 Ala. 252; Brennan *v.* Vogt, 97 Ala. 647, 11 So. 893; Bank of Ala. *v.* Whitlow, 6 Ala. 135.

California. — Connolly *v.* Goodwin, 5 Cal. 220; McFarland *v.* Pico, 8 Cal. 626.

(B.) Certificates of Foreign Notaries. — Some of the statutes referred to in the preceding section are held to apply only to certificates by notaries residing within the state, and not to certificates by notaries residing in other states.[65] In other states, however, the statutes making certificates by notaries public, competent evidence of the facts therein stated apply to certificates, whether made by a

Connecticut. — Union Bank *v.* Middlebrook, 33 Conn. 95.

Georgia. — Walker *v.* Bank of Augusta, 3 Ga. 486.

Kansas — State *v.* McCormick, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341.

Kentucky — Mattingly *v.* Bank of Commerce, 21 Ky. L. Rep. 1029, 53 S. W. 1043.

Maine. — Pattee *v.* McCrillis, 53 Me. 410; Loud *v.* Merrill, 45 Me. 516.

Maryland. — Reier *v.* Strauss, 54 Md. 278, 39 Am. Rep. 390; Citizens' Bank *v.* Howell, 8 Md. 530, 63 Am. Dec. 714.

Massachusetts. — Johnson *v.* Brown, 154 Mass. 105, 27 N. E. 994; Legg *v.* Vinal, 165 Mass. 555, 43 N. E. 518.

Michigan. — Martin *v.* Smith, 108 Mich. 278, 66 N. W. 61.

Minnesota. — Kern *v.* Von Puhl, 7 Minn. 426, 82 Am. Dec. 105; Bettis *v.* Schreiber, 31 Minn. 339, 17 N. W. 863.

New Hampshire. — Rushworth *v.* Moore, 36 N. H. 188.

North Dakota. — Ashe *v.* Beasley, 6 N. D. 191, 69 N. W. 188.

Pennsylvania. — Union Safe Deposit Bank *v.* Strauch, 20 Pa. Super. Ct. 196.

West Virginia. — Peabody Ins. Co. *v.* Wilson, 29 W. Va. 548, 2 S. E. 888.

Check. — Under the Maryland statute a check is an inland bill of exchange protestable as such, and hence the certificate of protest is evidence of demand and dishonor. Moses *v.* Franklin Bank, 34 Md. 574.

Protestable Security. — Under a statute making a certificate of protest competent evidence of presentment, demand, and dishonor of protestable securities, a certificate of protest of a paper not protestable is not competent evidence of the facts stated. Dunn *v.* Adams, 1 Ala. 527, 35 Am. Dec. 42, so holding of a certificate of protest by a notary in Georgia of a promissory note on the ground that it would be presumed in the absence of evidence to the contrary that the laws of Georgia were the same as the common law rule that promissory notes were not required to be protested.

Under the Missouri Statute where the notary's certificate is verified by affidavit and has been filed in the case more than 15 days before the trial, it is *prima facie* evidence of presentment, demand, dishonor, and notice. Greffet *v.* Dowdall, 17 Mo. App. 280. See also First National Bank *v.* Hatch, 78 Mo. 13. But want of verification cannot be taken advantage of under this statute under a general objection of incompetency. People's Bank *v.* Scalzo, 127 Mo. 164, 29 S. W. 1032. Nor is the fact that the certificate was not filed as required available under such an objection. Koontz *v.* Tempel, 48 Mo. 71.

65. Skelton *v.* Dustin, 92 Ill. 49; White *v.* Englehard, 2 Smed. & M. (Miss.) 38. See also Corbin *v.* Planters' Nat. Bank, 87 Va. 661, 13 S. E. 98.

A Vermont Statute (§2310) provides that a negotiable note, inland bill of exchange, draft, or check may be officially protested for non-payment by a notary public and a notice thereof to the parties to the instrument may be given by such notary, as in case of a foreign bill of exchange, and that the certificate of protest under the hand and official seal of the notary is made evidence of such protest, non-payment and notice as in case of a foreign bill of exchange. In First National Bank *v.* Briggs, 70 Vt. 599, 41 Atl. 586, it was held that this statute applied only to protests made within the state and that it did not authorize the giving of notice by a notary in protests made without the state, nor make his certificate evidence that he

notary resident in that state or elsewhere,[66] even although the statute does not so state in express terms.[67]

(C.) Competent, Although Not Necessary. — And it is held that under these statutes the certificate is *prima facie* evidence of the facts stated in it in relation to the dishonor of inland bills and notes, although the statute does not in express terms render the protest of an inland bill or note necessary.[68]

(D.) Criminal Prosecutions. — A certificate of a notary public as to the protest of a bill or note is not competent evidence against the defendant in a criminal prosecution, since he is entitled to be confronted with the witnesses against him.[69]

B. Notice of Protest. — a. *Rule at Common Law.* — Since it is no part of a notary's official duty in protesting a bill to give notice thereof, his certificate is not, in the absence of statutory enactment to the contrary, competent evidence to prove the fact of notice of protest.[70]

b. *Rule Under Statutes.* — By express statute in many, if not in

gave notice and that hence the common law rule that certificates of protest were not competent evidence of notice applied to a foreign certificate of protest in that state, offered for the purpose of proving notice of dishonor.

66. Johnson *v.* Cocks, 12 Ark. 672; Bank of Alabama *v.* Middlebrook, 33 Conn. 95; Mattingly *v.* Bank of Commerce, 21 Ky. L. Rep. 1029, 53 S. W. 1043; Lee *v.* Buford, 4 Met. (Ky.) 7; Harmon *v.* Wilson, 1 Duv. (Ky.) 322; Johnson *v.* Brown, 154 Mass. 105, 27 N. E. 994; Rushworth *v.* Moore, 36 N. H. 188; Simpson *v.* White, 40 N. H. 540.

The Pennsylvania Statute (P. L. 1855, p. 724) provides that the official protest of a notary public under his hand and seal of office of all the bills and promissory notes and of notice to the parties thereto may be received and read in evidence as proof of the facts therein stated in all suits now pending or hereafter to be brought, provided that any party might be permitted to contradict by other evidence such certificate. And in Persons *v.* Kruger, 45 App. Div. 187, 60 N. Y. Supp. 1071, an action on a draft payable in Pennsylvania, it was held that a certificate of protest by a notary public pursuant to the statute of Pennsylvania was proper evidence of protest for non-payment and of notice in that state.

67. See Ashe *v.* Beasley, 6 N. D. 191, 69 N. W. 188, where the North Dakota statute declares that full faith and credit shall be given to all the protestations of all notaries public.

68. So Holding Under the Minnesota Statute in Bryant *v.* Lord, 19 Minn. 396.

69. State *v.* Reidel, 26 Iowa 430. *Compare* State *v.* McCormick, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341.

70. Certificate of Protest Not Evidence of Notice of Protest. *Alabama.* — Rives *v.* Parmley, 18 Ala. 256.

Arkansas. — Real Estate Bank *v.* Bizzell, 4 Ark. 189; Sullivan *v.* Deadman, 19 Ark. 484.

Kansas. — Couch *v.* Sherrill, 17 Kan. 622.

Louisiana — Union Bank *v.* Cushman, 12 Rob. 237; Jones *v.* Mansker, 15 La. (O. S.) 51; Gale *v.* Kemper, 10 La. (O. S.) 205.

New Hampshire. — Williams *v.* Putnam, 14 N. H. 540, 40 Am. Dec. 204.

New York. — Bank of Rochester *v.* Gray, 2 Hill 227.

North Dakota. — Ashe *v.* Beasley, 6 N. D. 191, 69 N. W. 188 (*dictum*).

Virginia. — Walker *v.* Turner, 2 Gratt. (Va.) 536.

most states, a certificate of protest is made competent *prima facie* evidence of the fact of notice of dishonor.[71]

It has been held that a statute permitting proof of notice of dishonor by the notarial certificate of protest does not apply to foreign certificates of protest.[72]

C. Matters Collateral to Protest and Notice. — A certificate of protest is not legal evidence of other collateral or independent facts than those required by the common law or statute to be stated therein, especially when such facts are not necessarily within the knowledge of the notary, and are of such character that they could

71. Statutes Making Certificate Evidence of Notice of Protest. *Alabama.* — Brennen *v.* Vogt, 97 Ala. 647, 11 So. 893; Curry *v.* Bank of Mobile, 8 Port. 360; Rives *v.* Parmley, 18 Ala. 256.

California. — Fiske *v.* Miller, 63 Cal. 367.

Georgia. — Walker *v.* Bank of Augusta, 3 Ga. 486.

Iowa. — Bradshaw *v.* Hedge, 10 Iowa 402; Walmsley *v.* Rivers, 34 Iowa 463; Thorp *v.* Craig, 10 Iowa 461.

Maine. — Pattee *v.* McCrillis, 53 Me. 410.

Maryland. — See Reier *v.* Strauss, 54 Md. 278, 39 Am. Rep. 390.

Michigan. — Martin *v.* Smith, 108 Mich. 278, 66 N. W. 61.

Minnesota. — Bettis *v.* Schreiber, 31 Minn. 339, 17 N. W. 863.

New Hampshire. — Simpson *v.* White, 40 N. H. 540.

Virginia. — Walker *v.* Turner, 2 Gratt. (Va.) 536.

West Virginia. — Peabody Ins. Co. *v.* Wilson, 29 W. Va. 522, 2 S. E. 888.

Wisconsin. — Sumner *v.* Bowen, 2 Wis. 524.

In Missouri when the certificate also recites notice of dishonor, it is competent evidence of that fact, when verified by the affidavit of the notary; but not when not so verified. First National Bank *v.* Hatch, 78 Mo. 13.

Under the New York Statute the certificate of protest stating service of notice in the manner specified in the statute is presumptive evidence, unless the party against whom it is offered accompanies his plea with an affidavit denying notice. But a denial by the indorser of a promissory note in his verified answer of the demand, dishonor, and notice is not an affidavit within the meaning and terms of this statute so as to exclude the notarial certificate. Young *v.* Catlett, 6 Duer (N. Y.) 437.

Under the New Jersey Statute where the certificate is defective in substance in not stating sufficient facts as to notice, the indorser may object to its competency as evidence, although he has not given notice with his plea that he intends to testify to the facts of presentment and notice. Burk *v.* Shreve, 39 N. J. Law 214.

The Mississippi Code (§ 1802) makes the record of the officer protesting any promissory note or bill of exchange, when verified by the officer's oath, evidence of the facts therein stated touching the dishonor and the giving or mailing of the notice thereof, and that the statement therein that notice was given or mailed, and any place mentioned therein as the postoffice address of any such parties is *prima facie* evidence of those facts. See Stiles *v.* Inman, 55 Miss. 469.

A Massachusetts Statute (Pub. St., Ch. 77, § 22) provides that the protest of a bill of exchange, note or order, duly certified by a notary under his hand and official seal, is *prima facie* evidence of the facts stated and of the notice given to the drawer or indorser; and in Legg *v.* Vinal, 165 Mass. 555, 43 N. E. 518, it was held that a certificate of protest was *prima facie* evidence of notice of non-payment to a party who signed on the back of the note in blank before delivery.

72. Bank of Rochester *v.* Gray, 2 Hill (N. Y.) 227.

not be proved by his testimony if he were produced as a witness.[73]

D. Variance From Paper Protested. — The mere fact that a certificate of protest differs in some respects from the paper protested is not enough to justify the exclusion of the certificate; but it should be received in evidence in order to permit proof connecting the paper sued on with the certificate, by other evidence, and thus identify it as the same paper that was protested.[74]

2. Requisites of Certificate. — A. Matters of Authentication. a. *Seal.* — **(1.) Necessity for Affixing.** — A certificate of protest is to be authenticated according to the law of the place of the presentment and demand at the time of making the same, and if such law requires the certificate to be sealed with the official seal of the notary in order to be so properly authenticated, the want of the seal is a fatal defect;[75] otherwise a seal is not necessary.[76]

Protest by Officer Without Seal. — Nor is a seal essential to the validity of a certificate where the protest appears to have been made under a local law by an officer who had no seal.[77]

(2.) Time for Affixing. — A notarial seal of a certificate of protest need not be affixed at the time the protest is made, but may be affixed when the certificate is offered in evidence.[78]

(3.) Mode of Affixing. — A certificate of protest is sufficiently sealed by a seal stamped directly upon paper of sufficient tenacity to retain the impression.[79] But under a statute permitting seals to be so

73. Reier *v.* Strauss, 54 Md. 278, 39 Am. Rep. 390.

Not Competent to Prove Statement That Drawer Expressed Willingness to Pay in Certain Bank Bills. Maccoun *v.* Atchafalaya Bank, 13 La. (O. S.) 342.

A Statement That the Reason Given for Non-Acceptance was that the acceptor had no effects or funds of the drawer in his hands is not competent evidence of the want of such effects or funds. Dumont *v.* Pope, 7 Blackf. (Ind.) 367; Dakin *v.* Graves, 48 N. H. 45.

Death of Acceptor. — In Weems *v.* Farmers' Bank, 15 Md. 231, it was held that a statement in the certificate that the party on whom presentment and demand was made was "one of the administrators" of the acceptor, did not establish the facts of the death of the acceptor and of the granting of letters of administration on his estate to such party.

"Diligent Search and Inquiry." A statement in a notarial certificate that the notary made "diligent search and inquiry in trying to ascertain the whereabouts" of the indorser is not competent evidence to prove that such a search was made. Reier *v.* Strauss, 54 Md. 278, 39 Am. Rep. 390. See also Furniss *v.* Holland, Edm. Sel. Cas. (N. Y.) 470; Bennett *v.* Young, 18 Pa. St. 261; Cockrill *v.* Lowenstein, 9 Heisk. (Tenn.) 206.

74. Johnson *v.* Cocks, 12 Ark. 672.

75. Bank of Rochester *v.* Gray, 2 Hill (N. Y.) 227; Rindskoff *v.* Malone, 9 Iowa 540, 47 Am. Dec. 367; Ross *v.* Bedell, 5 Duer (N. Y.) 462; Morris *v.* Forman, 1 Dall. (Pa.) 193, 1 Am. Dec. 235.

76. Bank of Kentucky *v.* Pursley, 3 T. B. Mon (Ky.) 238; Lambeth *v.* Caldwell, 1 Rob. (La.) 61; Second Nat. Bank *v.* Chancellor, 9 W. Va. 69.

77. See Bank of Rochester *v.* Gray, 2 Hill (N. Y.) 227.

78. Rindskoff *v.* Malone, 9 Iowa 540, 47 Am. Dec. 367; Billingsley *v.* State Bank, 3 Ind. 375.

79. Ross *v.* Bedell, 5 Duer (N. Y.) 462; Connolly *v.* Goodwin, 5 Cal. 220; Carter *v.* Burley, 9 N. H. 558; Bradley *v.* Northern Bank of Ala., 60 Ala. 252; Bank of Rochester *v.* Gray, 2 Hill (N. Y.) 227.

affixed, a seal printed in ink is not sufficient to justify the certificate as evidence.[80] It matters not whereabouts on the certificate the seal is placed.[81]

(4.) Reference to Seal. — It is not necessary that the certificate of protest should refer in express terms to the notarial seal.[82]

b. *Signature of Notary.* — **(1.) Proving.** — The general rule is that where the certificate of protest is under the official hand and seal of the notary, proof of his signature is not necessary.[83]

(2.) Signature Affixed by Notary's Direction. — The signature of a notary need not be in the notary's own handwriting, but it is sufficient that it was affixed by his authority or direction.[84]

(3.) Signature Printed. — The mere fact that the signature of the notary is printed instead of written in his own handwriting is not fatal to the certificate.[85]

c. *Certificate in Notary's Handwriting.* — The certificate need not be entirely in the notary's handwriting.[86]

d. *Verification by Notary.* — Some of the courts have held that the certificate of protest must be verified by the oath of the notary that he believes it contains a true statement of the facts.[87]

80. Richard *v.* Boller, 51 How. Pr. (N. Y.) 371.

81. Olcott *v.* Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298, *affirming* 40 Barb. 179. In this case the court said: "If the certificate be under his hand and seal of office, it is sufficient, and it cannot be of any importance where the seal is affixed. It may be at the beginning, at the end, or anywhere upon the margin, or it might be appended by a ribbon, after the manner of the sealing of ancient charters. The officer is not required to certify to the sealing, but it is sufficient if the seal be, in fact, affixed, and the name signed. Unquestionably, therefore, if the seal had been placed where it is, and the signature only at the bottom of the last part of the certificate, the whole would have been sufficiently verified. I do not think it is any the less so by reason of the words '*in testimonium veritatis*,' with the signature opposite the seal, between the two parts of the certificate. The whole may with propriety be regarded as one certificate, once sealed and twice signed."

82. Jones *v.* Berryhill, 25 Iowa 289, where the certificate stated "*in testimonium veritatis*," followed with the name of the officer in his official character, with his seal of office.

83. Johnson *v.* Brown, 154 Mass. 105, 27 N. E. 994; Sims *v.* Hundley, 6 How. (U. S.) 1, 12 L. ed. 319; Caume *v.* Sagory, 4 Mart. (O. S.) (La.) 81; Crowley *v.* Barry, 4 Gill (Md.) 194; Ross *v.* Bedell, 5 Duer (N. Y.) 462. *Compare* Waldron *v.* Turpin, 15 La. (O. S.) 552, 53 Am. Dec. 210; Phillips *v.* Flint, 2 La. 146.

In Southern B. *v.* Mechanics' Sav. Bank, 27 Ga. 252, it was held that where two sets of notarial protests upon the same bill are filed under the Georgia Act of 1836, both are entitled to be received in evidence without further proof by the notary.

84. Monroe *v.* Woodruff, 17 Md. 159.

The mere fact that a witness testifies to his acquaintance with the notary's handwriting, and that he does not believe the signature to the protest was written by the notary, is not sufficient to exclude a certificate which is otherwise unobjectionable. Bank of Alabama *v.* Whitlow, 6 Ala. 135.

85. Fulton *v.* MacCracken, 18 Md. 528, 81 Am. Dec. 620.

86. Barnard *v.* Planters' Bank, 4 How. (Miss.) 98.

87. Spann *v.* Baltzell, 1 Fla. 338, 46 Am. Dec. 346; Allen *v.* Georgia Nat. Bank, 60 Ga. 347.

Statutes. — And sometimes there are statutes requiring such verification.[88]

e. *Attesting Witnesses.* — Sometimes it is a statutory requisite that the protest and the record of the certificate of the notary must be attested by witnesses.[89]

f. *Official Character of Notary.* — **(1.) Necessity of Proof.** — A certificate of protest by a notary public under his official hand and seal is competent evidence without further proof as to the official character of the notary.[90] But if not made by a notary, and under seal, there must be proof of official character of the officer and of the laws of the state or county showing that it was duly made.[91]

(2.) Presentment and Demand by Deputy or Clerk. — Where the law of the place of presentment authorizes notaries to appoint deputies or clerks, a certificate of protest by such deputy, duly appointed, is competent.[92] But in the absence of such a law a notarial certificate of protest stating that the notary caused presentation and demand to be made, is fatally defective;[93] although the certificate should not be excluded in the first instance on this ground, unless the fact appears from the face of the certificate itself.[94]

g. *Time for Making Certificate.* — The certificate need not be made at precisely the same time, and as part of the demand and

88. Thus in Mississippi. — Dorsey *v.* Merritt, 6 How. (Miss.) 390. **Under the Missouri Statute** a certificate of protest, to be evidence of dishonor, must be verified by the notary's affidavit. Faulkner *v.* Faulkner, 73 Mo. 327.

89. Bank of Louisiana *v.* Watson, 15 La. (O. S.) 38; Allain *v.* Whitaker, 5 Mart. (N. S.) (La.) 511; Gaslight & Banking Co. *v.* Nuttall, 19 La. (O. S.) 447; Delamare *v.* Kennedy, 5 La. Ann. 749. *Compare* Bradford *v.* Cooper, 1 La. Ann. 325; Lallande *v.* Hope, 18 La. Ann. 188.

90. Sims *v.* Hundley, 6 How (U. S.) 1, 12 L. ed. 319; Crowley *v.* Barry, 4 Gill (Md.) 194; Ross *v.* Bedell, 5 Duer (12 N. Y. Super. Ct.) 462; Dunn *v.* Adams, 1 Ala. 527, 35 Am. Dec. 42; Curry *v.* Bank of Mobile, 8 Port. (Ala.) 360; Roberts *v.* State Bank, 9 Port. (Ala.) 312; Johnson *v.* Brown, 154 Mass. 105, 27 N. E. 994.

91. Carter *v.* Burley, 9 N. H. 558. See also Bank of Rochester *v.* Gray, 2 Hill (N. Y.) 227.

92. Carter *v.* Union Bank, 7 Humph. (Tenn.) 548, 46 Am. Dec. 89; Lee *v.* Buford, 4 Met. (Ky.) 7; Bank of Kentucky *v.* Garey, 6 B. Mon. (Ky.) 626.

93. Onandoga County Bank *v.* Bates, 3 Hill (N. Y.) 53; Hunt *v.* Maybee, 7 N. Y. 266; Gawtry *v.* Doane, 51 N. Y. 84; Ocean Nat. Bank *v.* Williams, 102 Mass. 141. See also Adams *v.* Wright, 14 Wis. 408. *Compare* Stewart *v.* Allison, 6 Serg. & R. (Pa.) 324, 9 Am. Dec. 433.

Statement of Rule. — In Commercial Bank *v.* Barksdale, 36 Mo. 563, the court said: "The protest is to be evidence of the facts stated in it of which the notary is supposed to have personal knowledge, and credit is given to his official statements by the commercial world on the faith of his public and official character. In court the instrument speaks as a witness. Such statements made merely upon the information of another person would amount to hearsay only if the notary were himself upon the stand as a witness. The notarial protest must state facts known to the person who makes it, and he cannot delegate his official character or his functions to another."

94. McAndrews *v.* Radway, 34 N. Y. 511.

protest. It is enough that the facts are noted by him at the time, and the certificate may be made at any time subsequently;[95] although it has been held that the certificate should be made within a few days, and in the ordinary course of business.[96] And there is authority to the effect that the certificate must be made at the same time, and as part of the protest.[97]

h. *Competency of Notary.* — **(1.) Territorial Limits.**— A certificate of protest outside of the jurisdiction limits of the notary is not legal evidence of demand and dishonor;[98] and those limits must include the place where the paper is payable.[99] It cannot be objected, however, that the government under which he held office was merely *de facto*.[1]

(2.) Relationship of Notary to Holder of Paper. — The fact that the notary is a relative of the holder of the paper protested is not fatal to the certificate of protest.[2]

(3.) Notary As Officer or Stockholder. — The fact that the notary making the certificate of protest was an officer[3] and stockholder[4] of the bank holding the paper protested is not fatal to the certificate.

B. Matters of Substance. — a. *Presentment, Demand and Dishonor.* — **(1.) Generally.** — The certificate must contain sufficient

95. Bailey *v.* Dozier, 6 How. (U. S.) 23, 12 L. ed. 328; Chatham Bank *v.* Allison, 15 Iowa 357; Mattingly *v.* Bank of Commerce, 21 Ky. L. Rep. 1029, 53 S. W. 1043; Union Nat. Bank *v.* Williams Milling Co., 117 Mich. 535, 76 N. W. 1; Grimball *v.* Marshall, 3 Smed. & M. (Miss.) 359; Cayuga Co. Bank *v.* Hunt, 2 Hill (N. Y.) 635; Union Bank *v.* Holcomb, 5 Humph. (Tenn.) 583. *Compare* Winchester *v.* Winchester, 4 Humph. (Tenn.) 51.

96. Rutland & B. R. Co. *v.* Cole, 24 Vt. 33.

97. Spann *v.* Baltzell, 1 Fla. 338, 46 Am. Dec. 346; Commercial Bank *v.* Barksdale, 36 Mo. 563. See also Aiken *v.* Cathcart, 2 Spear (S. C.) 642.

Rule Stated.—In Boggs *v.* Branch Bank of Mobile, 10 Ala. 970, the court said: "The power conferred on the notary by the act of the legislature (Clay's Dig. 380, § 9) to certify the fact that he had given notice to the parties on the bill of its dishonor, is a power which did not exist at common law, and must therefore be exercised in the mode pointed out by the statute. The power conferred is to certify the fact of notice, as a part of the protest, and when the protest is made and completed, his power is at an end. The attempt here to prove the existence of a fact, four and a half years after it transpired, by his certificate, instead of taking his deposition, is entirely unauthorized by the act in question. It is an act entirely independent of the protest, and is therefore not legal evidence of the fact it purports to establish. This point was expressly determined in Whitman & Hubbard *v.* Farmers' Bank of Chattahoochie, 8 Porter 258."

98. Gordon *v.* Dreux, 6 Rob. (La.) 399; Duchess Co. Bank *v.* Ibbotson, 5 Denio (N. Y.) 110.

99. Neeley *v.* Morris, 2 Head (Tenn.) 595, 75 Am. Dec. 753.

1. Tyree *v.* Rives, 57 Ala. 173.

2. Waters *v.* Petrovic, 19 La. (O. S.) 584.

3. Nelson *v.* First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425. See also Dykman *v.* Southridge, 153 N. Y. 662, 48 N. E. 1104 (where the notary was also the principal maker of the note).

4. Moreland *v.* Citizens' Sav. Bank, 16 Ky. L. Rep. 860, 30 S. W. 19. *Compare* Herkimer Bank *v.* Cox, 21 Wend. (N. Y.) 119, 34 Am. Dec. 220; Bank *v.* Porter, 2 Watts (Pa.) 141.

averments to show that everything was done on the part of the holder or his agent to authorize the demand on the endorser.[5]

Mere Inaccurate or Ungrammatical Language in the certificate of the notary will not vitiate it where the meaning is plain.[6]

(2.) Identifying Holder of Paper Protested. — It is not necessary that the certificate state that the persons at whose instance the protest was made were the owners or holders of the paper protested or were authorized agents of the holders.[7]

(3.) Identifying Paper Protested. — The certificate of protest should identify the paper to which it refers.[8]

(4.) Time of Making Presentment and Demand. —Although, of course, the certificate should state presentment and demand of the paper for payment on the proper day,[9] it need not state the hour of presentment and demand.[10]

5. People's Bank *v.* Brooke, 31 Md. 7, 1 Am. Rep. 11; Crowley *v.* Barry, 4 Gill (Md.) 194; Burke *v.* Shreve, 39 N. J. Law 214; Nailor *v.* Bowie, 3 Md. 251; Otsego Co. Bank *v.* Warren, 18 Barb. (N. Y.) 290.

A statement in the certificate that the notary went to the bank where the note was payable and was informed by the teller that there were no funds in the bank with which to pay the note, wherefore he protested the same, is not legal evidence of a presentment and demand of the note. Warren *v.* Briscoe, 12 La. (O. S.) 472.

Under the West Virginia Statute the certificate of protest should set forth the time and place of presentment, the fact and manner of presentment, the demand of payment, the name of the person by whom and the name of the person to whom presentment was made, and the fact of dishonor. Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

6. New Orleans Gas L. & B. Co. *v.* Hudson, 5 Rob. (La.) 486.

An error in the certificate as to the middle initial of the payee's name is immaterial. Reid *v.* Reid, 11 Tex. 585.

7. Mt. Pleasant Branch Bank *v.* McLeran, 26 Iowa 306; Gillespie *v.* Neville, 14 Cal. 408.

In Whittington *v.* Farmers' Bank, 5 Har. & J. (Md.) 489, 6 Har. & J. 548, it was held to be no objection to a certificate of protest that it was stated to have been made at the request of the Farmers' Bank instead of the president, etc., the corporation named.

8. This is usually done by putting on it the copy of the note, but if the original note be annexed and referred to in the body of the protest that is sufficient. Fulton *v.* MacCracken, 18 Md. 528, 81 Am. Dec. 620; Lionberger *v.* Mayer, 12 Mo. App. 575; Colms *v.* Bank of Tennessee, 4 Baxt. (Tenn.) 422.

Where the Certificate Appears Without Either the Note or a Copy, it is enough to admit the protest in evidence that there is indorsed on it a memorandum of the maker, indorser, amount, and date of protest corresponding with the note in suit. Fulton *v.* MacCracken, 18 Md. 528, 81 Am. Dec. 620.

9. Burk *v.* Shreve, 39 N. J. Law 214.

In Mt. Pleasant Branch Bank *v.* McLeran, 26 Iowa 306, it was held that a certificate of protest by a notary public in New York showing presentment to have been made on the last day of grace was not to be excluded on the ground that by the laws of New York a bill of exchange payable at a bank was not entitled to grace, where the bill of exchange does not appear on its face to have been drawn on a bank, banking association or individual bank.

10. Cayuga Co. Bank *v.* Hunt, 2 Hill (N. Y.) 635.

A certificate of protest stating presentment of the bill is presumptive evidence of presentment during the proper hours of business (De

(5.) Manner of Making Presentment and Demand. — It must appear from the certificate of protest that the notary had the paper in his possession at the time of the presentment and demand by him.[11] But where the certificate states that the notary went to the proper place to make presentment and demand and found the place closed and no one present, it is not necessary that the certificate also state that the notary had the paper in his possession.[12] Nor is it necessary for the certificate to state that the paper was exhibited to the cashier of the bank holding the same, who handed it to the notary for protest.[13] Where the certificate states presentment to the cashier of the bank where the paper was payable it will not be presumed that the paper was at the bank.[14]

(6.) Place of Presentment and Demand. — (A.) GENERALLY. — It must also appear from the certificate itself that the notary made presentment and demand at the proper place.[15]

(B.) MAKER OR ACCEPTOR HAVING NO PLACE OF BUSINESS. — Where the

Wolf *v.* Murray, 2 Sandf. [N. Y.] 166); and the mere fact that the certificate states that the "time limit for payment had expired" does not import that the presentment was made after the close of business hours so as to exclude the certificate. Skelton *v.* Dustin, 92 Ill. 49.

11. Dupre *v.* Richards, 11 Rob. (La.) 495, 43 Am. Dec. 214; Musson *v.* Lake, 4 How. (U. S.) 262, 11 L. Ed. 967.

A Statement That the Notary Went With the Draft and Demanded Payment is equivalent to stating that he had it with him ready to surrender on payment. Bank of Vergennes *v.* Cameron, 7 Barb. (N. Y.) 143.

12. Ross *v.* Bedill, 5 Duer (N. Y.) 462, where the court said: "When payment is, in fact, demanded, the protest must, undoubtedly, state that the bill was exhibited when the demand was made, but when it appears from the protest that the acceptor was absent from the place where the demand was properly to be made, and had left no person there of whom the demand could be made, it is sufficient to state that the notary went there for the purpose of demanding payment; and, in these cases, such, we understand, is the usual form of the protest. The law will intend that he meant to make the demand in the proper form, by the exhibition of the bill, and, consequently, that the bill was then in his hands for that purpose."

"The Occasion Did Not Arise for the Notary to Say Anything about having the bill present with him, or exhibiting it to the drawer; that would only become appropriate if he had found some one of whom payment could be demanded. Then, and not till then, could the question of the sufficiency of the statement of those facts in the protest come legitimately under discussion. The law does not require vain things to be done or stated." Union Bank *v.* Fowlkes, 2 Sneed (Tenn.) 555.

13. Thomas *v.* Marsh, 2 La. Ann. 353.

14. Magoun *v.* Walker, 49 Me. 419.

15. Dupre *v.* Richard, 11 Rob. (La.) 495, 43 Am. Dec. 214; Union Nat. Bank *v.* Williams Milling Co., 117 Mich. 535, 76 N. W. 1.

A statement in a certificate of protest that the notary presented the note for payment at the courthouse, postoffice, and exchange, in the city where the maker resided, and that he could find no one who could inform him where the maker resided or did business, is sufficient to admit the certificate as evidence to prove the demand. Tate *v.* Sullivan, 30 Md. 464, 96 Am. Dec. 597.

A statement in the certificate of protest of presentment and demand at the office of the drawees, and they not being there, upon a person named by the notary whom he found in the office, is sufficient. Bradley

maker or acceptor has no place of business or residence, or has removed, the certificate should set forth the nature of the inquiries made to ascertain his whereabouts in order to show due diligence to make presentment and demand.[16]

(C.) Paper Designating Place of Payment. — Where the paper protested designates in express terms the place at which it is payable, the certificate of protest of such paper is fatally defective where it does not state that presentment and demand were made at the place designated.[17]

(D.) Stating Absence of Maker or Acceptor. — A certificate which is otherwise sufficient is not defective for not stating that the makers

v. Northern Bank, 60 Ala. 252. See also Branch Bank *v.* Hodges, 17 Ala. 42.

Where the certificate states that the notary went during business hours to the place of business of the maker of the note in order to demand payment thereof, and found the same closed and no one there to answer demand, it is not necessary that the certificate should also state the place at which presentment was made. Baumgardner *v.* Reeves, 35 Pa. St. 250, holding also that the certificate so stating was admissible under a declaration of an actual presentment and demand.

16. Baumgardner *v.* Reeves, 35 Pa. St. 250.

A Statement of a Notary That He Went to a Building Adjoining the One in Which the Draft Was Payable, and there presented it for payment and inquired of the person there for the treasurer of the corporation, at whose office it was payable, who told him that the corporation's office was closed and removed to parts unknown to him, and that he made other diligent but ineffectual search and inquiry for such office and officer, is not sufficient. Gage *v.* Dubuque & P. R. Co., 11 Iowa 310, 77 Am. Dec. 145.

17. Otsego County Bank *v.* Warren, 18 Barb. (N. Y.) 290; Gage *v.* Dubuque & P. R. Co., 11 Iowa 310, 77 Am. Dec. 145; Langley *v.* Palmer, 30 Me. 467, 50 Am. Dec. 634; People's Bank *v.* Brooke, 31 Md. 7, 1 Am. Rep. 11.

Where a Bill Is Addressed to the Drawee at a Particular Place in the City Where He Resides, and there accepted by him, a certificate of protest of the bill stating merely the fact of presentment and demand "at the place of business" of the acceptor, without specifying the place, is fatally defective, especially where it appears that the acceptor has two places of business. Brooks *v.* Higby, 11 Hun (N. Y.) 235.

In Warren *v.* Allnutt, 12 La. (O. S.) 454, the note in question was payable at the Planters' Bank of Mississippi at Port Gibson; and it was held that a certificate of protest by a notary in Natchez stating demand of payment at "Planters' Bank, State of Mississippi," was not legal evidence of the demand.

A certificate of protest stating demand of payment at the proper place, on the cashier of the bank, is sufficient, although it does not expressly state that demand was made in the banking house. Coleman *v.* Flint, 16 La. (O. S.) 250.

In Barbaroux *v.* Waters, 3 Met. (Ky.) 304, it was held that a statement in the certificate of protest that the bill was presented to the secretary of the "Ohio Ins. Co. at New Albany," where the bill was payable, payment of which by him was refused, was equivalent to stating that the presentment was made at the office of such company.

Where a note is payable at "the bank in" a town named, a certificate of protest showing presentment of the note at the "bank of," the town named is sufficient, unless accompanied by proof that the bank at which the note was payable, and the bank named in the certificate were the same. Stix *v.* Matthews, 75 Mo. 96.

In Onondaga Co. Bank *v.* Bates, 3

or acceptors were absent at the time of the presentment and demand.[18]

(7.) Party on Whom Presentment and Demand Made. — (A.) GENERALLY. It must also appear from the certificate itself that presentment and demand were made upon the proper party.[19]

(B.) STATING NAME OF OFFICER OF BANK WHERE PAYABLE. — A certificate of protest of paper payable in bank is not fatally defective for not stating the name of the person or officer of the bank to whom presentment was made.[20]

(C.) PRESENTMENT AND DEMAND ON FIRM. — A certificate of pro-

Hill (N. Y.) 53, a copy of the note protested, payable at a certain bank in Albany, was annexed to the certificate which stated a presentment of the note at the bank named, but not stating the name of the town, was held sufficient inasmuch as the copy of the note was set out as a part of the protest.

In Boit *v.* Corr, 54 Ala. 112, the note in question was payable at any bank in Savannah, Georgia. The certificate of protest stated presentment at a certain bank named, but did not state that the bank was located in Savannah. But the protest showed that it was made in the City of Savannah; and it was held that the evidence proved presentment at a bank located in the city where the note was payable.

18. Young *v.* Catlett, 6 Duer (N. Y.) 437. See also Gardner *v.* Bank of Tennessee, 1 Swan (Tenn.) 420, where the court said: "We do not think that the statement of this fact in the body of the protest is essential to its validity. In the absence of the drawees, it was proper to make the demand of their clerk or agent, at their place of business; and because it was so done, it is to be presumed in favor of the protest, it being the act of a public officer, that there was sufficient reason for so doing; that is, that the drawees were absent. This fact is merely a reason why the demand was properly made of the clerk, and if stated, would only have a tendency to show that proper diligence had been used in making the demand."

19. Union Nat. Bank *v.* Williams Milling Co., 117 Mich. 535, 76 N. W. 1; Dupre *v.* Richard, 11 Rob. (La.) 495, 43 Am. Dec. 214; Nave *v.* Richardson, 36 Mo. 130. *Compare* Curry *v.* Bank of Mobile, 8 Port. (Ala.) 360.

Demand on Clerk. — A statement of demand of the drawee's clerk at his place of business is *prima facie* evidence that the person named was such clerk, duly authorized to refuse acceptance or payment. Whaley *v.* Houston, 12 La. Ann. 858; Stainback *v.* Bank of Virginia, 11 Gratt. (Va.) 260.

Demand on Bookkeeper. — A statement of demand made of the drawee's bookkeeper at his place of business is *prima facie* evidence that the person named was the drawee's bookkeeper. Phillips *v.* Poindexter, 18 Ala. 579; Dickerson *v.* Turner, 12 Ind. 223; Austin *v.* Latham, 19 La. (O. S.) 88.

In Castles *v.* McMath, 1 Ala. 326, it was held that under the Alabama statute of 1828 declaring the effect of notarial certificates of protest, a statement in the protest that the bill was presented to certain persons named as agents of the drawees is not evidence of such agency. See also O'Connell *v.* Walker, 1 Port. (Ala.) 263.

20. Hildeburn *v.* Turner, 5 How. (U. S.) 69. See also Ashe *v.* Beasley, 6 N. D. 191, 69 N. W. 188, where the court said: "The statement that payment was there demanded and refused is clearly a statement that the demand was made of some one connected with the bank. The contention of counsel that it is entirely consistent with the language to assume that the notary went to the front door of the bank, and made a demand of a passer-by, is too hypercritical to merit serious consideration. When a note is payable at a bank, it is sufficient for the notary to state in his certificate that he pre-

test of bill drawn on a firm, stating presentment to a member of the firm, is sufficient.[21]

(D.) Stating Answer to Demand. — The certificate should state the answer of the party on whom demand was made.[22]

b. *Notice of Protest.* — **(1.) Time of Service.** — A notarial certificate of protest in order to be evidence of notice must state the date on which the notice was given to the endorser.[23] But it is not necessary that it should state the date of the letter containing the notice.[24] Nor is it necessary for a certificate showing personal service of the notice to state the hour of the day when the notice was served.[25]

(2.) Manner of Service. — (A.) Generally. — Again, when a certificate of protest of commercial paper is relied upon to fix the liability of the parties affected by the protest, the certificate should set forth the manner of notification;[26] and where the statute specifies the manner in which the parties are to be notified of the fact of dishonor the certificate must conform to those requirements.[27]

(B.) Stating "Due Service of Notice," Etc. — On the question as to whether or not a statement in the certificate of protest that "due service" of notice, that the parties were "duly notified," or the use of words of equivalent meaning, is sufficient, is one upon which the authorities are not in harmony. On the one hand there

sented the paper at the place of payment, and made a demand, without specifying the person upon whom the demand was made." *Compare* Stix *v.* Mathews, 75 Mo. 96.

21. Mt. Pleasant Branch Bank *v.* McLeran, 26 Iowa 306; Elliott *v.* White, 6 Jones Law (N. C.) 98. *Compare* Otsego Co. Bank *v.* Warren, 18 Barb. (N. Y.) 290, wherein it was held that where a bill of exchange was drawn on a firm in another state, and directed to them by the firm named, a certificate of protest of the bill stating presentment to one of the firm is defective where it does not also state who composed the firm nor the name of the person on whom presentment and demand was made.

22. Dupre *v.* Richards, 11 Rob. (La.) 495, 43 Am. Dec. 214. *Compare* Curry *v.* Bank of Mobile, 8 Port. (Ala.) 360.

23. Burk *v.* Shreve, 39 N. J. Law 214; Palmer *v.* Lee, 7 Rob. (La.) 537. *Compare* Golladay *v.* Bank of Union, 2 Head (Tenn.) 97.

A notarial certificate of protest in order to be evidence of notice must state on what date the notice was deposited in the postoffice. Knox *v.* Buhler, 6 La. Ann. 104, 39 Am. Dec. 553.

Where the certificate of a notary offered to prove notice written at the foot of a notice of protest dated June 26, 1841, the date of the maturity of the note, states that a copy of the notice was "on the 26th inst." put in the postoffice and directed to the indorsers, it is not enough. The omission to state in the certificate the year and month cannot be cured by any inference from the date of the notice. Menard *v.* Winthrop, 2 La. Ann. 333.

24. Palmer *v.* Lee, 7 Rob. (La.) 537.

25. Adams *v.* Wright, 14 Wis. 428, 2 S. E. 888.

26. Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

27. Burk *v.* Shreve, 39 N. J. Law 214; Faulkner *v.* Faulkner, 73 Mo. 327; Townsend *v.* Auld, 10 Misc. 343, 31 N. Y. Supp. 29.

is authority to the effect that such statement is insufficient;[28] but the weight of authority is to the effect that such a statement is sufficient.[29]

(C.) Personal Service. — Where the service of notice upon the endorser is personal the certificate must state the place of service.[30] A certificate stating that the notary left the notice of protest at the domicile of the endorser is sufficient; and it is not necessary to state whether he delivered the notice to one in the house or

28. Burk *v.* Shreve, 39 N. J. Law 214.

29. *California.* — McFarland *v.* Pico, 8 Cal. 626.

Connecticut. — Union Bank *v.* Middlebrook, 33 Conn. 95.

Maine. — Orono Bank *v.* Wood, 49 Me. 26; Pattee *v.* McCrillis, 53 Me. 410; Page *v.* Gilbert, 60 Me. 485; Lewiston Falls Bank *v.* Leonard, 43 Me. 144, 69 Am. Dec. 49. See also Ticonic Bank *v.* Stackpole, 41 Me. 321, 66 Am. Dec. 246.

Maryland. — Tate *v.* Sullivan, 30 Md. 464, 96 Am. Dec. 597.

Minnesota. — Kern *v.* Von Puhl, 7 Minn. 426, 82 Am. Dec. 105; Bettis *v.* Schreiber, 31 Minn. 339, 17 N. W. 863.

New Hampshire. — Simpson *v.* White, 40 N. H. 540; Rushworth *v.* Moore, 36 N. H. 188.

Tennessee. — Golladay *v.* Bank of Union, 2 Head (Tenn.) 57.

Rule Stated. — "Neither does the insertion of the word '*duly*' vitiate the notary's certificate, nor is it on that account to be regarded as stating a conclusion of law instead of a matter of fact. 'Duly' may well be interpreted 'properly,' and the certificate be understood as a simple averment by the notary that he had properly, in the usual and ordinary mode of giving personal notice, notified the indorsers. All that need have been stated was that notice had been given to the indorsers; all else is surplusage, and might well be rejected as such. The fact that notice was given is none the less stated because it is averred to have been given properly, in the usual and customary mode; which we must regard as equivalent to saying, under the circumstances of the case, that it had been done by delivering to or leaving at the place of business or residence of each indorser a written or printed notice of the protest. The statute making the protest itself *prima facie* evidence of the notice, as well as of the other facts stated in it, we can discover nothing in the form of the present protest to exclude it from the operation of the statute rule." Rushworth *v.* Moore, 36 N. H. 188.

30. Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

A certificate of a notary protesting a note stating that notice was given to the indorser, who resided in the same place where the protest was made by "a letter delivered to his barkeeper, he not being in," is objectionable for not stating the place at which the delivery to the barkeeper was made — whether at the residence or place of business of the indorser. Saul *v.* Brand, 1 La. Ann. 95.

A certificate of protest stating that service of notice was made by leaving written notice at the indorser's desk "in the custom-house with a person in charge, he being absent," is *prima facie* evidence of notice in the absence of specific objections that the place named was not shown to be his place of business, and of proof that better service could have been made. Bank of Com. *v.* Mudgett, 44 N. Y. 514, *affirming* 45 Barb. 663.

A statement in a certificate of protest that notice of dishonor was "left at the offices of the indorsers" is not proper evidence of the fact of notice. Coster *v.* Thomason, 19 Ala. 717.

A certificate which states that "the indorsers have had due notice of the demand and non-payment and protest of said note by a notice in writing directed by me as follows: To the indorsers," and left at their offices, is not open to the objection that the place where the notice was left is

simply left it there.[31] Nor is the certificate defective for not

not described, and that the notary decided that the place was the office of the indorser. Curry *v.* Bank of Mobile, 8 Port. (Ala.) 360.

A certificate of protest stating that the notary notified the parties to a note of the fact of dishonor by a letter written and addressed to each, dated on the day of the protest, and served on them by delivering the said letter "at their place of business to a person of discretion having charge thereof," is a sufficient compliance with the California statute. Kellogg *v.* Pacific Box Factory, 57 Cal. 327.

In McFarland *v.* Pico, 8 Cal. 626, the court in holding a statement that notice of protest was served by letter addressed to the indorser's residence and delivered to a person there in charge of proper age and capacity, the indorser being absent at the time, sufficient, said: "A formal protest is only necessary with foreign bills of exchange, but in practice, which is sanctioned by the statute, it is customary for notaries to formally protest notes upon a demand of the maker and his refusal of payment; and the idea conveyed by the word 'protest,' both in the mercantile community and among gentlemen of the legal profession, is not merely that a formal instrument has been drawn up by a notary public, but that the paper in question has been dishonored upon due presentation and demand. The merchant who states that he has received notice of protest of certain paper, and the lawyer who offers to prove that notice of protest has been given to the indorser of the paper in suit, both mean the same thing, that the necessary steps have been taken to fix the liability of the indorser — namely, presentment, refusal of payment, and notice given."

Where a bank relies on a constructive notice and notarial certificate to prove it, in a case in which the banking house was the elected domicile, it must appear from the certificate that the notice was left at the banking house and addressed to the indorser at that place. A certificate that the notice was served by leaving it with the cashier of the bank is not enough, for the reason that for all that appears from the certificate the notice may have been given to him at some place not within the banking house, nor does it show how it was addressed. Union Bank of Louisiana *v.* Smith, 9 Rob. (La.) 75.

In Fuller *v.* Dingman, 41 Iowa 506, it was held that a statement in the certificate of protest that the notary "notified the maker and indorsers," was sufficient; and that it was not necessary for the certificate also to state that the residences of the several parties were at the places where the notices were addressed to them.

A certificate of protest stating that notice "was left at the boarding-house of A or the office of B" is not competent evidence that it was left in the manner required. Rives *v.* Parmley, 18 Ala. 256.

A certificate of protest which states that the notary "made notices to all the indorsers" which he "caused to be left at their dwelling-houses" is not sufficient. Union Bank *v.* Humphries, 48 Me. 172.

31. Manadue *v.* Kitchen, 3 Rob. (La.) 261, 38 Am. Dec. 237; Adams *v.* Wright, 14 Wis. 408; Louisiana State Bank *v.* Dunartrait, 4 La. Ann. 483.

A certificate of service of notice upon the mate of a vessel, the master of which is the indorser to be charged, need not designate the mate by name. Austin *v.* Latham, 19 La. (O. S.) 88.

A statement in a foreign notarial certificate of service of protest on the acceptor in his own name and as agent of the indorser is not competent evidence of the fact of the agency in an action against the drawer. Coleman *v.* Smith, 26 Pa. St. 255.

A certificate that "notice to the indorser was left at the residence of his attorney in fact with a female white servant; the said attorney in fact not being in," is not *prima facie* evidence that the person named was such attorney in fact to receive notice. Drumm *v.* Bradfute, 18 La. Ann. 680.

stating that the endorser was absent when the notary left the notice at his house.[32]

(D.) Service by Mail. — Where the service of the notice by the notary was made by mail, the certificate should state in what postoffice the notary deposited the notice.[33] It should also show where the notices were directed.[34]

Where the certificate merely states that notice was addressed to the endorser at a certain place, but does not state that such place was the postoffice or residence of the endorser, there is no presumption that such was the fact, hence the certificate is not competent to prove notice.[35]

Statutes. — Sometimes the statutes require the certificate to specify

32. Adams *v.* Wright, 14 Wis. 408.

33. Pritchard *v.* Hamilton, 6 Mart. (N. S.) (La.) 457. See also Allain *v.* Whitaker, 5 Mart. (N. S.) (La.) 511.

34. Brennan *v.* Vogt, 97 Ala. 647; 11 So. 893; Allen *v.* Georgia Nat. Bank, 60 Ga. 347. *Compare* Golladay *v.* Bank of Union, 2 Head (Tenn.) 97.

In Union Bank *v.* Campbell, 2 La. Ann. 759, the certificate of the notary by whom the note was protested stated that the parties were duly notified of the protest by letters to them, written and addressed and served upon them by means of written notices addressed to the indorsers "all of the parish of S.," which notices were deposited in the postoffice. It was held that it could not be inferred from the mere statement that the indorsers were all of the parish named that the notices were addressed to "parish of S," since in the absence of any further direction the letter enclosing "notices" so addressed would not have been delivered, and hence the certificate was held inadmissible.

35. *United States.* — Bank of U. S. *v.* Smith, 11 Wheat. 171.

Alabama. — Sprague *v.* Tyson, 44 Ala. 338.

Arkansas. — Sullivan *v.* Deadman, 19 Ark. 484; Real Estate Bank *v.* Bizzell, 4 Ark. 189.

Indiana. — Turner *v.* Rogers, 8 Ind. 139.

Massachusetts. — *Compare* Legg *v.* Vinal, 165 Mass. 555, 43 N. E. 518.

Mississippi. — Styles *v.* Inman, 55 Miss. 472.

Missouri. — Pier *v.* Heinrichshofer, 67 Mo. 163, 29 Am. Rep. 501.

New Hampshire. — Simpson *v.* White, 40 N. H. 540; Rushworth *v.* Moore, 36 N. H. 188.

Virginia. — Linkous *v.* Hale, 27 Gratt. (Va.) 688.

A notarial certificate is competent evidence in the absence of proof that notice was not duly forwarded in time, although the indorser states that he did not receive the notice until a month after the maturity of the note. Union Bank *v.* Gregory, 46 Barb. (N. Y.) 98.

In Bradshaw *v.* Hedge, 10 Iowa 402, the court said: "Section 2414 of the Code provides 'that the usual protest by a notary public, without proof of his signature or notarial seal, is evidence of the dishonor and notice of a bill of exchange or promissory note.' The 'usual protest' referred to in the section of the Code above quoted is the protest recognized by the law merchant, and the design of this provision of the statute is to permit such protest to be received in evidence without requiring the party producing the same to prove the seal and signature of such officer. This evidence is *ex parte* in character, and its admissibility is an innovation upon the common law rule of evidence, giving to the opposite party the right of cross-examination, but the change is justified by its advantage to the commercial interests of the country. While the law allows such evidence to be admitted, it can only be considered as evidence of those facts which by the well-settled rules of commercial usage can be proved by such protest,

the reputed place of business of the party to whom notice was given and the postoffice nearest thereto.[36]

(E.) Stating Number of Places to Which Notice Sent. — A certificate of protest otherwise unobjectionable as evidence is not insufficient for not also stating the number of places to which notices were addressed.[37]

(F.) Stating by Whom Mailed. — The certificate of protest need not state by whom the notices of protest were mailed.[38]

(G.) Prepayment of Postage. — Where a certificate states that notices of protest properly addressed were deposited in the postoffice, it will be presumed that postage was prepaid.[39]

(3.) Stating Presentment, Demand and Dishonor. — The certificate protest must inform the endorser that payment had been demanded and refused.[40]

(4.) Stating Contents of Notice. — It is not necessary that the cer-

namely, the demand at maturity of the maker, and notice to the indorser of non-payment. The protest in this case does not show that Dubuque was the place of residence of Hervey, or his postoffice address, nor was there any evidence introduced to establish this fact, except the protest." *Compare* Fuller *v.* Dingman, 41 Iowa 506; Walmsley *v.* Rivers, 34 Iowa 463.

36. By N. Y. Code Civ. Proc., § 923, a notarial certificate of protest of a promissory note or bill of exchange and of service of notice, specifying the mode of giving notice, the reputed place of residence of the party to whom given and the postoffice nearest thereto are presumptive evidence, and a certificate stating service of notice must specify the postoffice nearest the reputed residence of the party to whom notice was given; it is not enough to state merely that notice was put in the postoffice at the place of presentment directed to the party at a particular place, the reputed place of his residence. Rogers *v.* Jackson, 19 Wend. (N. Y.) 383. *Compare* this statute with Ketchum *v.* Barber, 4 Hill (N. Y.) 224; Treadwell *v.* Hoffmann, 5 Daly (N. Y.) 207, holding that certificate need not specify the reputed place of residence or the postoffice nearest thereto.

A statement in the certificate of notice directed to a place reputed to be the place of residence of the indorser is presumptive evidence that such place is his reputed place of residence. Bell *v.* Lent, 24 Wend. (N. Y.) 230.

Where the certificate states the name of the postoffice to which notice to the indorser was sent, it is not necessary that it also state that such postoffice was the nearest to the indorser's residence. Gas Bank *v.* Desha, 19 La. (O. S.) 459.

37. Walker *v.* Bank of Augusta, 3 Ga. 486.

38. Ketchum *v.* Barber, 4 Hill (N. Y.) 224, *affirmed,* Barber *v.* Ketchum, 7 Hill 444.

39. Brooks *v.* Day, 11 Iowa 46.

40. Bank of Alexandria *v.* Wilson, 2 Cranch C. C. 5, 2 Fed. Cas. No. 856.

A certificate of protest of a note payable generally which, after stating demand and refusal to pay, states that written notices were addressed to the indorsers "informing them that it had not been paid by the drawer thereof, and that they would be held responsible for its payment," is not legal evidence of a notice to the indorsers of a demand and refusal. Nailor *v.* Bowie, 3 Md. 251.

A statement in a certificate of protest that the notary "addressed written notices to the indorsers of the note informing them that they were severally held liable for the payment thereof" is no evidence of the protest having been sent to the indorsers. Graham *v.* Sangston, 1 Md. 59. The court said: "The result of the authorities on this head is, that

tificate of protest should have annexed to it, or set out therein, the notices referred to.[41]

3. Conclusiveness. — A. In General. — A notarial certificate of protest is *prima facie* evidence only of the facts recited therein both at common law and under the statutes, and hence may be contradicted by any competent evidence.[42]

B. Notice of Protest. — So also, although the certificate may

although no precise form of words is necessary to be used in giving the notice, yet it is indispensable that it should either expressly or by just and natural implication, contain, in substance, the following requisites: First, a true description of the note, so as to ascertain its identity; second, an assertion that it has been duly presented to the maker at its maturity and dishonored."

41. Jones *v.* Berryhill, 25 Iowa 289; Barstow *v.* Hiriarts, 6 La. Ann. 98; Seneca Co. Bank *v.* Neass, 3 N. Y. 442.

In Wisconsin it was formerly held that a certificate which did not state the contents of the notice was not competent evidence to prove the fact of notice. Smith *v.* Hill, 6 Wis. 154; Duckert *v.* Von Lilienthal, 11 Wis. 56. But in 1860 a statute was passed which overruled these cases and expressly declared that such a certificate was *prima facie* evidence of the contents of the notices therein stated as having been served. Central Bank *v.* St. John, 17 Wis. 157.

42. Certificate of Presentment, Demand, and Dishonor, Not Conclusive Evidence of Those Facts. *United States.* — Sims *v.* Hundley, 6 How. 1, 12 L. ed. 319; Townsley *v.* Sumrall, 2 Pet. 170.

Alabama. — Bank of Ala. *v.* Whitlow, 6 Ala. 135; Martin *v.* Brown, 75 Ala. 442.

Arkansas. — Johnson *v.* Cocks, 12 Ark. 672.

California. — Applegrath *v.* Abbott, 64 Cal. 459, 2 Pac. 43.

Indiana. — Turner *v.* Rogers, 8 Ind. 139.

Iowa. — Walmsley *v.* Rivers, 34 Iowa 463.

Kentucky. — Tyler *v.* Bank of Kentucky, 7 T. B. Mon. 555. *Compare* Bank of Kentucky *v.* Pursley, 3 T. B. Mon. 238.

Louisiana. — Harrison *v.* Bowen, 16 La. (O. S.) 282; Peyroux *v.* Dubertrand, 11 La. (O. S.) 32.

Maine. — Bradley *v.* Davis, 26 Me. 45; Orono Bank *v.* Wood, 49 Me. 26; Pattee *v.* McCrillis, 53 Me. 410; Loud *v.* Merrill, 45 Me. 516.

Maryland. — Howard Bank *v.* Carson, 50 Md. 18; Whiteford *v.* Bruckmyer, 1 Gill 127, 39 Am. Dec. 640; Citizens' Bank *v.* Howell, 8 Md. 530, 30 Am. Dec. 714; Ricketts *v.* Pendleton, 14 Md. 320.

Minnesota. — Bettis *v.* Schreiber, 31 Minn. 339, 17 N. W. 863.

Mississippi. — Wood *v.* American L. I. & T. Co., 7 How. 609.

Missouri. — Moore *v.* Missouri Bank, 6 Mo. 379; Draper *v.* Clemens, 4 Mo. 52.

New Hampshire. — Simpson *v.* White, 40 N. H. 540.

New York. — Onondaga Co. Bank *v.* Bates, 3 Hill 53; Meise *v.* Newman, 76 Hun 341, 27 N. Y. Supp. 708; McAndrew *v.* Radway, 34 N. Y. 511; Brooks *v.* Higby, 11 Hun 235.

North Carolina. — Gordon *v.* Price, 10 Ired. Law 385.

Ohio. — Daniel *v.* Downing, 26 Ohio St. 578.

Pennsylvania. — Brown *v.* Philadelphia Bank, 6 Serg. & R. 484, 9 Am. Dec. 463; Brittain *v.* Doylestown Bank, 5 Watts & S. 87, 39 Am. Dec. 110; Baumgardner *v.* Reeves, 35 Pa. St. 250; Stewart *v.* Allison, 6 Serg. & R. 324, 9 Am. Dec. 433.

South Carolina. — Dobson *v.* Laval, 4 McCord 57.

Tennessee. — Gardner *v.* Bank of Tenn., 1 Swan 420; Union Bank *v.* Fowlkes, 2 Sneed 555; Rosson *v.* Carrol, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727; Smith *v.* McManus, 7 Yerg. 477, 27 Am. Dec. 519; Caruthers *v.* Harbert, 5 Cold. 362, 98 Am. Dec. 421; Spence *v.* Crockett, 5 Baxt. 576.

Texas. — Munzesheimer *v.* Allen, 3 Willson Civ. Ct. App. Cas. § 55.

be competent evidence of the notice of protest, it is not conclusi evidence of such fact, and hence it may be contradicted by parol.

4. Omissions. — Where a certificate of protest, regular in oth respects, does not show upon its face all the facts necessary prove presentment, demand, and dishonor[44] and notice of dishonc such omission may be supplied by other proper evidence.[45]

Virginia. — Nelson *v.* Fotterall, 7 Leigh 179.

Wisconsin. — Adams *v.* Wright, 14 Wis. 408; Central Bank *v.* St. John, 17 Wis. 157.

43. Certificate of Protest As to Notice Not Conclusive Evidence. Bradley *v.* Davis, 26 Me. 45; Howard Bank *v.* Carson, 50 Md. 18; Seltzer *v.* Fuller, 6 Smed. & M. (Miss.) 185; Caruthers *v.* Harbert, 5 Cold. (Tenn.) 362, 98 Am. Dec. 421.

Where the notary left the notice at the wrong place that fact may be shown, notwithstanding he may have certified that it was properly left. Curry *v.* Bank of Mobile, 8 Port. (Ala.) 360.

A certificate of protest is not conclusive evidence, and it is competent for an indorser to show that he could not have received a personal notice as stated in the certificate, because he was elsewhere and had no agent and no place of business at which a notice could have been left, or any other fact which negatives the recital in the protest. Bank of Mobile *v.* Marston, 7 Ala. 108.

A notarial certificate is only presumptive evidence of the fact it certifies, and where it certifies to the due mailing and direction of a notice of dishonor, evidence that the party never received the notice is competent to show that it was not so mailed and directed. Townsend *v.* Auld, 10 Misc. 343, 31 N. Y. Supp. 29.

The certificate of a notary that he had given notice to the indorser of the dishonor of the note by depositing a letter containing the notice in the postoffice and directed to him is only *prima facie* evidence of the fact of notice and may be contradicted by other evidence. Booker *v.* Lowry, 1 Ala. 399.

Where a certificate of protest, after stating presentment, demand, and protest, states that at the proper time "due notice of such pr sentment, demand, and dishon was put in the postoffice" and d rected, postage prepaid, to plac named, "each of the above plac being the reputed place of residen of the person to whom the noti was directed," it is error to recei evidence for the purpose of contr dicting such certified evidence of t non-receipt of the notice unaccon panied by any testimony tending show that the notice was not in fa deposited in the postoffice. Wilson Richards, 28 Minn. 337, 9 N. W. 87 See also Roberts *v.* Wold, 61 Min 291, 63 N. W. 739.

44. Boit *v.* Corr, 54 Ala. 1 (identification of bank); Magoun Walker, 49 Me. 419 (evidence of d mand at bank where note payable) Seneca Co. Bank *v.* Neass, 3 N. Y 442, *affirming* 5 Denio 329; Stair back *v.* Bank of Virginia, 11 Grat (Va.) 260 (authority of clerk to r fuse acceptance); Morris *v.* Forma 1 Dall. (Pa.) 198 (fact of nor acceptance); Walker *v.* Turner, Gratt. (Va.) 536 (time, place, an manner of presentment).

Where a certificate of protest fail to state to whom presentment wa made, but does state that present ment was made at the usual place o business of the acceptor, it is prope to permit the notary to testify t whom presentment was in fact made Cook *v.* Merchants' Nat. Bank, 7 Miss. 982, 18 So. 481. See also Wit kowski *v.* Maxwell, 69 Miss. 56, 1 So. 453.

45. Wetherall *v.* Claggett, 28 Md 465; Sasscer *v.* Farmers' Bank, Md. 409; Douglass *v.* Bank of Com merce, 97 Tenn. 133, 36 S. W. 874 Fletcher *v.* Arkansas Nat. Bank, 6 Ark. 265, 35 S. W. 228, 54 Am. St Rep. 294; Nailor *v.* Bowie, 3 Md 251; Ashe *v.* Beasley, 6 N. D. 191 69 N. W. 188.

The fact that a certificate of pro

5. Best and Secondary Evidence. — A. CERTIFICATES AS SECONDARY EVIDENCE. — Even although a certificate of protest may not be competent evidence under any rule of law of the fact of presentment and demand of the particular paper[46] or of the fact of notice,[47] there are cases in which, under the rules of law pertaining to secondary evidence, the certificate has been received

test omits to specify the reputed place of residence of the party to whom the notice was given and the postoffice nearest thereto is not ground for excluding the certificate entirely, but such omission may be supplied by other evidence. Townsend *v.* Auld, 10 Misc. 343, 31 N. Y. Supp. 29.

46. **A Michigan Statute** (Compl. Laws, § 2635) provides that in all courts of that state the certificate of a notary under his hand and official seal of official acts done by him shall be received as presumptive evidence of the facts stated therein, but is not evidence of notice of non-payment in any case in which defendant annexes to his plea an affidavit denying the fact of having received such notice. And in Sexton *v.* Perrigo, 126 Mich. 542, 85 N. W. 1096, it was held that the effect of this statute was not only to exclude the certificate as primary evidence when such an affidavit was filed, but also to exclude the certificate as secondary evidence after the death of the notary.

47. **In New York** a statute (Code Civ. Proc., § 924) adopted subsequent to a prior statute identical in language with a Michigan statute provides that in the case of the death or insanity of a notary public of that state, or of his absence or removal, so that his attendance or testimony cannot be procured, his original certificate of protest under his hand and official seal, the genuineness being first duly proved, is presumptive evidence of a demand of acceptance or of payment therein stated and that a note or memorandum personally made or signed by him at the foot of the protest is presumptive evidence that a notice of non-acceptance or non-payment was sent or delivered at the time and in the manner stated in the note or memorandum. And in Sexton *v.* Perrigo, 126 Mich. 542, 85 N. W. 1096, the court in construing the Michigan statute with reference to the New York statute said that it was a reasonable inference that the legislature of New York did not consider that the first New York statute, which, as stated, was identical with the Michigan statute, would permit the introduction in evidence of the certificate as secondary evidence in case of the death of the notary. They also quote from Seneca Co. Bank *v.* Neass, 3 N. Y. 442, to the effect that "the act of 1833 (which is the first New York statute referred to before) provides that where notice has not been received, the indorser against whom suit is brought may accompany his plea with an affidavit that no notice has been received, and in that case the certificate ceases to be any evidence whatever."

In Barnard *v.* Planters' Bank, 4 How. (Miss.) 98, the statute of Mississippi provided that when a notary public protested any bill or note he should make a certificate on oath of a full and true record of his acts in relation thereto. The certificate in that case was not made on oath; the notary had died and the question arose whether the record was evidence under the common law. The record was held admissible, notwithstanding it was not under oath, the court saying: "The record of a notary is thus admissible where his personal attendance cannot be procured or when the parties in the suit think proper to dispense with it. It is only conclusive evidence in the absence of the officer. The difference of the rule thus created by the statute from that of the common law is that the record is conclusive evidence in the lifetime of the notary under the statute, whereas it is only evidence after his death by the common law."

as such evidence.[48]

48. Nicholls *v.* Webb, 8 Wheat. (U. S.) 326; Bank of Wilmington *v.* Cooper, 1 Harr. (Del.) 10; Holmes *v.* Smith, 16 Me. 181; Bell *v.* Perkins, Peck. (Tenn.) 261. See also Bodley *v.* Scarborough, 5 How. (Miss.) 729. *Compare* Williamson *v.* Patterson, 2 McCord (S. C.) 132.

CERTIFICATES OF DEPOSIT.—See Bills and Notes.

CERTIFIED CHECKS.—See Bills and Notes.

CESTUI QUE TRUST.—See Trusts and Trustees.

CESTUI QUE VIE.—See Presumption.

CHALLENGE.—See Bias; Jurors.

CHAMPERTY & MAINTENANCE.—See Contracts.

CHANGE OF VENUE.—See Venue.


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